TC04394

Appeal number: TC/2014/00733

EXCISE DUTY *– goods seized and forfeited - duty assessed – penalty issued – whether driver liable as the person "holding" the goods – no.*

FIRST-TIER TRIBUNAL
TAX CHAMBER

GARY IGNATIUS McALEER **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE CHRISTOPHER HACKING
JOHN ADRAIN FCA

Sitting in Belfast on 28 January 2015

Danny McNamee of McNamee McDonnell Duffy, Solicitors appeared on behalf of the Appellant

Richard Chapman, counsel, instructed by the Office of the Solicitor and General Counsel to HMRC appeared for the Respondents

DECISION

Background to the appeal

1. This was an appeal against decisions of the Commissioners:

(i) to issue an assessment for excise duty in the sum of £28,435; and

(ii) to issue a penalty of £5,687

The facts as stated by the Respondents

3. The facts concerning the seizure of the dutiable goods on 14 March 2013 can be stated quite briefly and are not substantially disputed although the proper inferences to be drawn from those facts and from other assertions by the Respondents relating to the Appellant's involvement in other incidents are in contention.

4. The Respondents' Statement of Case provides a useful summary of the facts as follows.

5. On 14 March 2013 the Appellant was intercepted by UK Border Force Officers at Dover Eastern Docks as he travelled into the UK in a vehicle registration number K212OVL and trailer AJ7701.

6. When interviewed the Appellant confirmed he loaded the vehicle at the trailer swap at the trailer park in Calais and that he checked the load of 25,180.8 litres of mixed beer and put a seal on it. The detection officer noted that the trailer's number plate was made of plastic and had been written on using a stencil and black marker pen. Mr McAleer has stated that the trailer was bearing this plate when he collected the load.

7. The goods were being transported under the Administrative Code Reference ("ARC") 13BEHE8RK10100MJVXV7. The Respondents say that whilst this should have been uniquely referable to the movement of this load on the day of the seizure, a document bearing the same number had been sighted by UK Border Officers on 13 March 2013 when it was used to transport goods by another vehicle and trailer.

8. On both occasions the haulier is said to have been shown as Kelco Ltd with the same trailer number and quantity of beer in the load but with a different driver. The first load was allowed to pass into the UK.

9. At interview, following the interception, the Appellant confirmed he worked for Kelco Ltd and produced a copy of an Operator's Licence relating to a Maurice Kelly of Tyrone.

10. Following the receipt by Mr Maurice Kelly of a seizure letter issued to him by the Respondents on 30 March 2013, Mr Kelly wrote to HMRC expressing concern as he stated that he was unaware how the matter related to his company. The Respondents accepted that he was not the haulier of the goods involved in the dispute. Further investigations by the Respondents are said to have revealed that there was no valid Operator's licence for the vehicle K212OVL at the time.

11. On 18 October 2013 the Respondents issued an Assessment and Penalty Explanation letter to the Appellant advising him that following the seizure of the mixed beer on 14 March 2013 the Respondents intended to charge an Assessment and Penalty and full details of the calculations were enclosed. The Appellant was also provided with factsheets on 'Compliance Checks – Human Rights Act' and 'Compliance Checks – Penalties for Excise and VAT Wrongdoing'. The Appellant was advised to provide HMRC with any relevant information that may affect its view by 1 November 2013.

12. The Respondents contend that Mr McAleer was involved in two other incidents in relation to the seizure of goods in 2011 and is consequently known to HMRC. As there was no reply to the Assessment and Penalty Explanation letters issued on 18 October 2013 letter the Assessment and Penalty notices were issued on 5 November 2013 in the sums indicated above.

The Appellant's account

15. The Appellant's evidence can be summarised thus:

16. At the time when he was stopped by the Border Force officers, Mr McAleer says that he was driving for Maurice Kelly of Omagh, Co. Tyrone, Northern Ireland. He agrees that he was driving vehicle registration number K212OVL which he says was registered in Mr Kelly's name.

17. The Road Freight Licence in the cab was, he says, placed there by Mr Michael Kelly. Whilst Mr McAleer understood that he was undertaking this driving job for Mr Maurice Kelly, as a practical matter the arrangements were made with Maurice's brother Michael with whom he had contact, mainly by telephone but on occasion at a local pub. It was Michael Kelly who picked Mr McAleer up following the seizure of the vehicle and trailer at Dover.

18. In his statement of 5 September 2014 Mr McAleer states:

> "In the normal course of things Mr Michael Kelly is the person who pays me for the runs I do for himself and his brother"

19. In relation to suggestions advanced by the Respondents that Mr McAleer had been previously involved in similar seizure situations on 8 October 2011 and 12 October 2011 Mr McAleer states:

> "On 8 October 2011 I was simply a passenger in a vehicle, having left my own lorry on the continent due to there being no load to take back. In relation to the alleged seizure

> on 12 October 2011 this simply did not happen. I was stopped coming back with my load later in October 2011 but neither vehicle, trailer nor goods were seized"

20. Mr McAleer's statement concludes thus:

> "Again I would state that the lorry I was driving belonged to Maurice Kelly and was being operated by his brother Michael Kelly, who was responsible for supervising me during my work. I had no control whatsoever in relation to the disposition of the goods which I was carrying and was operating completely under the instruction of Mr Kelly"

The evidence

21. The Respondents' evidence included formal evidence relating to the load carried, the ARC and the assessments to duty and penalty. Written statements were provided by Officer Martin Joseph McConnell who dealt with the interception of the vehicle and trailer on 14 March 2013 and the interview with Mr McAleer as well as by HMRC Officer Karen Ausher who was part of the team carrying out post detection audits. Her evidence dealt with checks made after the issue of the assessments the subject of this appeal and with matters associated with Mr McAleer's employment status.

22. The only oral evidence heard by the tribunal was that of the Appellant, Mr McAleer. He largely repeated what had been stated in his written statement but expanded upon this in one or two instances. For example he told the tribunal that he had previously undertaken some 5 or 6 such trips for Mr Kelly over a period of 2 or 3 months. He was not a professional driver. His main job had been that of a mechanic working for a firm called PTW but he took driving jobs when work was slack. He was to have been paid £350 for the job in question but when he asked Michael about this after the seizure he was told that he would not be paid as he had not completed the job.

23. As to the two previous incidents in which he was said to have been involved, Mr McAleer said that he had only been a passenger in the vehicle which had been stopped on 8 October 2011. He had simply hitched a lift in it.

24. Concerning the incident said to have occurred on 12 October 2011 Mr McAleer agreed that he did bring a lorry back to Thurrock where he had spoken with an officer. He was however unaware that the vehicle had been seized although he said that this could have happened after he had departed.

25. In relation to the seizure with which this appeal is concerned Mr McAleer said that on the day in question (14 March 2013) he had what he believed to be all of the documents which he was properly required to carry and he did not see how he could be liable for the considerable sum which the assessments called for.

26. Mr McNamee on behalf of Mr McAleer waived his right to question the witnesses for the Respondents who had attended the hearing. Their evidence as to factual matters was substantially accepted.

27. Mr Chapman for the Respondents cross examined Mr McAleer.

28. Referring to the evidence of Officer Ausher, Mr McAleer agreed that he had failed to properly notify HMRC of his self-employment following his having left his employment by PTY. This was, said Mr McAleer, something which he had now "sorted out".

29. Mr McAleer said that he had first met Michael Kelly in a pub in Omagh at the end of 2012 or early January 2013. All of his contacts relating to driving jobs had been with Michael. The arrangements made were informal and were not documented in any way. Payment was always by way of cash-in-hand. It was clear that Mr McAleer was entirely unaware of the Kelly's company arrangements beyond an understanding that both Maurice and Michael were involved in the business.

30. It was put to Mr McAleer by Mr Chapman that this was all rather "risky"…..dealing with people in this casual manner. Mr McAleer said that he had simply been told that he would be engaged on "Groupage" work. He had not undertaken any enquiries as to the company he was working for as he saw no reason to do so. He did not agree that this was "risky".

31. Mr McAleer said that Michael would call him to ask if he could undertake a particular job. He would offer a fixed price per trip. He was not aware of what profit element might be involved so far as the goods were concerned. He had been told by Michael that the vehicle was his brother's (Maurice's).

The law

32. The Respondents rely on the provisions of Regulations 13(1) and 13(2) of the Excise Goods (Holding Movement & Duty Point) Regulations 2010 ("the Regulations") as follows:

> 13(1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are so held.
>
> 13(2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person
>
> (a) making the delivery of the goods;
> (b) holding the goods intended for delivery; or
> (c) to whom the goods are delivered

33. The Respondents' case is that Mr McAleer was "holding" the excise goods concerned when he was stopped at the docks on 14 March 2013 and has thereby rendered himself liable to be assessed and penalised.

34. Mr McNamee contends that as a driver with no other interest in the goods concerned his client cannot properly be considered to be "holding" the excise goods as the regulations require.

35. The tribunal was taken to a number of authorities as to the meaning of "holding". These included the Upper Tribunal decision in *HMRC and Nicholas Race*

[2014] UKUT 0331 (TCC); *R v Taylor and Wood* [2013]EWCA Crim 1151*; R v May* [2008] UKHL 28; *R v White and Ors*
[2010] EWCA Crim 978 and the First-tier decision in *Gerald Carlin and The Commissioners for Her Majesty's Revenue and Customs* (no published reference given but a copy supplied).

36. Of the above little help is provided by the *Nicholas Race* case as this essentially concerned the question whether the tribunal had jurisdiction to challenge the legitimacy of the seizure. The effect of the "deeming" provisions of the Customs and Excise Management Act 1979 ("CEMA") is accepted by the tribunal as appears as set out in paragraphs 40 and 41 following.

37. The case of *May* is not directly on point addressing as it does the question of liability in the context of a confiscation order in a criminal case following a guilty plea to a charge involving dishonesty.

38. The question of a driver's liability to excise duty was not settled in *White & Ors* either as it was said to be "both complex and does not arise in this case". However the court in its conclusion did go onto state:

> "We say only this. It tentatively seems to us that a lorry driver who knowingly transports smuggled tobacco will, for the purposes of the Regulations, have caused the tobacco to reach an excise duty point and will have the necessary connection with the goods at the excise duty point".

The court continued:

> "Mere couriers or custodians or other very minor contributors to an offence, rewarded by a specific fee and having no interest in the property or the proceeds of sale, are unlikely to be found to have obtained that property"

39. The *Taylor and Wood* and *Carlin* cases are of more immediate significance and we shall return to these in our consideration of the appeal.

The tribunal's consideration of the appeal

40. The tribunal is bound to accept as valid the seizure and subsequent forfeiture of the goods and the vehicles concerned. There was no challenge to these by those entitled to appeal to the Magistrates Court had they wished to so do. This would include the owners of the beer and/or the vehicle owner. The reason that this matter cannot be further explored is that the "deeming" provisions of paragraph 5 of Schedule 3 of CEMA provide that, absent a challenge to the forfeitures in the Magistrates Court, the goods/vehicles are deemed condemned as forfeit and this issue cannot subsequently be addressed by the Tribunal.

41. If there had been any doubt about this matter it was effectively put to rest in the *Nicholas Race* decision referred to above. This does however give rise to at least two problems in this appeal. The first concerns the fact that Mr McAleer could not possibly challenge the lawfulness of the seizure in the Magistrate's Court in any event as he had no standing as an owner of either the goods or the vehicle to do so. The

seizure itself was predicated upon the assertion that the CMR produced by Mr McAleer had been used previously although no direct evidence of this fact was presented to either Mr McAleer or indeed the tribunal. The evidence was, at best, indirect and hearsay in this particular respect .

42. The second problem relates to the very severe financial consequences of the proceedings following seizure Mr McNamee raised an issue concerning his client's Human Rights. He argues that it cannot be right that a person in Mr McAleer's position cannot challenge the legitimacy of the seizure where there may be proper grounds for so doing thereby exposing himself, if the Respondents' arguments concerning "holding" are correct, to liability to excise duty and penalties. We think that Mr McNamee was right to make this point and had it become necessary for the tribunal to explore this further we would not have hesitated to do so. For the reasons which will become apparent this is not necessary.

43. It has not been helpful to the Respondents' case that they felt it necessary to include reference to other alleged incidents in 2011 involving Mr McAleer. The only purpose in doing so can have been to suggest that Mr McAleer was someone with what might be described as a "track record" so far as the evasion of excise duty was concerned. Indeed in the Respondents Amended Statement of Case the following appears:

> "The Appellant is known by H M Revenue and Customs from previous alcohol seizures in October 2011 as detailed below."

44. Describing the 8 October 2011 event, whilst acknowledging that Mr McAleer was only a passenger in the vehicle concerned, the Respondents apparently felt it to be appropriate to continue to recite the examination of the paperwork, the discovery of discrepancies and the fact of seizure of the lorry, trailer and goods. What is not mentioned however is the very brief exchange between the officer and the driver of the vehicle concerning Mr McAleer in the following terms:

> Officer Dyer addressing the driver: "When did you pick up Mr McAleer"
> Driver: "This evening at the truck stop. His vehicle broke down and needed a lift home"

That is exactly what Mr McAleer told the tribunal. There is no evidence that Mr McAleer had anything to do with this incident.

45. The incident on 12 October 2011 was different in that Mr McAleer was the driver on that occasion. He was carrying a load of beer for a Mr Mone who instructed him by telephone as to the pick-up and drop off. The officer who stopped Mr McAleer asked him a number of questions about what he was doing. Mr McAleer cooperated and gave him as much information as he could including the fact that this was the first job he had done for Mr Mone. The officer's notes make it quite clear that the interview ended after what could only have been 5 minutes or so. At 15.25 the officer's interview notes were read back to Mr McAleer who, according to his evidence to the tribunal, left the interview site. It was not until 15.45 that the lorry and trailer were seized although on what basis is not entirely clear. Mr McAleer says that he knows nothing about this. He was acting then, as in relation to the circumstances of

the present appeal, purely as a contracted driver. There was no question on that occasion of any assessment or penalty being raised against Mr McAleer.

46. In relation to the arrangements between Mr McAleer and Michael Kelly Mr McAleer has consistently maintained (including his evidence on oath) that these were as he has explained. It does not come as a surprise to the tribunal that such transactions are frequently characterised by informality – arrangements made over a beer in a pub or by telephone. Clearly Mr McAleer trusted Mr Kelly. Whether in all the circumstances that trust was fully justified is open to question but from Mr McAleer's standpoint there was nothing remarkable about what he was being asked to do, He had done between 5 and 6 similar trips over the 2 or 3 months before March 2013 without anything unusual occurring. Why he might have been alerted to some risk element in relation to the task he undertook on 14 March 2013 we cannot understand nor have the Respondents explained.

47. The Respondents place considerable reliance on the letters sent to and received from Mr Maurice Kelly dated respectively 30 March 2013 and 9 April 2013. It is these letters which, say the Respondents, show that what Mr McAleer says about his instructions coming from Maurice Kelly via Michael Kelly simply cannot be true.

48. The Respondents appear, apparently without further enquiry, to have accepted Mr Maurice Kelly's apparent bemusement concerning their letter written to him as dispositive of the issue and, apparently, without further enquiry. The tribunal does not accept that letter as settling the matter in the way the Respondents suggest.

49. Mr McNamee submitted that Maurice Kelly's reply was in fact quite carefully drafted. For example "I have never owned this vehicle" does not mean that his company or for that matter his brother may not have owned it. He asserts that he does not know Mr McAleer. That does not conflict with what Mr McAleer told the tribunal. All of his dealings were with Michael Kelly. Again "Neither I nor my vehicles have been in the UK mainland, I operate solely in Ireland as owner driver" may well be true but does not necessarily tell the whole tale.

50. Mr McNamee quite properly referred to the tenor of the letter to Maurice Kelly, a letter written in uncompromising terms with threats of action and demands which would, it is suggested, very naturally cause considerable concern. The response to the letter, says Mr McNamee, is, in these circumstances, quite circumspect and hardly surprising.

51. Why the Respondents did not simply search the vehicle registration details for K 212 OVL as a much more reliable way of establishing the true position we are at a loss to understand. There was however no such evidence before the tribunal.

52. Mr McNamee's principal submission to the tribunal was that the Respondents attempt to impose on a driver of a vehicle which is found to be importing goods on which duty has not been paid, liability for the duty would, as a prerequisite, require the Respondent to prove some form of ownership or beneficial interest of the driver in the goods or some legal power of disposition over the goods. In support of this submission Mt McAleer refers to the cases of *R-v-Taylor and Wood* and to *R-v-May*.

53. *Taylor and Wood* was a case in which the facts were somewhat complicated. It was however of the essence of that case, so far as the matters at issue in this appeal are concerned, that parties engaged to transport textile products in which a large quantity of cigarettes were concealed and who were wholly unaware of the concealment were held not to have been liable to the duty as they were not "holding" the goods for the purposes of regulation 13(1) of the Regulations.

54. Mr Justice Kenneth Parker said (at paragraph 31):

> "To seek to impose liability to pay duty on either Heijboer or Yeardley *(the innocent hauliers)*, who, as bailees, had actual possession of the cigarettes at the excise duty point but who were no more than innocent agents, would raise serious questions of compatibility with the objectives of the legislation"

55. A similar result is recorded in the First-tier decision of *Carlin.* Although this is only a First-tier decision it has persuasive authority particularly given the similarity of circumstances with those in this appeal.

56. Mr McAleer was a bailee of the goods he carried. Those goods had been correctly described in the CMR. There is no evidence that Mr McAleer knew that an apparently identical CMR had previously been used. The Respondents have not even suggested that this was known or should in some way have been known to Mr McAleer. The Respondents case for imposing an assessment and penalties rests on suggestions that Mr McAleer was, in some way which the Respondents have not explained and certainly not proved, a party to the wrongdoing said to have occurred. In the absence of such an awareness and in the absence of any proven interest in the goods the tribunal concluded that the Appellant could not be considered to have the necessary connection with the goods so as to be "holding" the goods for the purposes of regulation 13(1) of the Regulations. There is accordingly no proper basis for the assessment or the penalties and both must be discharged.

57. We accordingly allow this appeal.

58. This document contains full findings of fact and reasons for the decision set out above. Any party dissatisfied with the decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

CHRISTOPHER HACKING
TRIBUNAL JUDGE

RELEASE DATE: 08 MAY 2015