TC04540

Appeal number: TC/2014/01056

Excise Duty - Excise Goods (Holding, Movement and Duty Point) Regulations 2010, reg 13 - Finance Act 2008, Sch 41 - assessment and penalty in respect of seized goods - whether the Appellant driver of the vehicle was "holding" the goods and therefore liable for the assessment - yes - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

PATRICK JOSEPH McPEAKE **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MR TONY HENNESSEY FCA

Sitting in public at Belfast on 1 April 2015

Ciaran Roddy BL, instructed by MacDermott, McGurk & Partners, for the Appellant

Richard Chapman, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The Appellant appeals against:

   (1) an assessment issued under regulation 13(1) and (2) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (the "2010 Regulations") in the amount of £31,748; and

   (2) a penalty imposed under Schedule 41 to the Finance Act 2008 ("Schedule 41") in the amount of £6,349.

Background facts

2. The following facts are undisputed.

3. The Appellant is a lorry driver. On 18 June 2012, UK Border Force officials intercepted him at the Port of Dover driving a heavy goods vehicle carrying 22,530 litres of beer and 3,240 litres of cider.

4. The Appellant provided the Border Force officials with two CMR international consignment notes stating that each consignor was VIP, that each consignee was Seabrook Warehousing Ltd ("Seabrook"), and that the hauliers were McArdle Transport ("McArdle") and Rutex BV ("Rutex"). The CMRs stated that the goods were under the cover of an Administrative Electronic Document ("e-AD") with a stated ARC reference.

5. The e-AD showed a time and date of dispatch of 14:30 on 13 June 2012. It is HMRC's case that this e-AD had in fact been used at 14:30 on 13 June 2012, at 22:35 on 14 June 2013 and at 17:15 on 16 June 2013.

6. The vehicle and goods were seized as liable to forfeiture and seizure notices were sent to the Appellant, McArdle and Rutex. The seizure of the vehicle and goods has not been challenged by anyone.

7. By a letter dated 24 May 2013, HMRC Officer Howat notified the Appellant of the assessment against which he now appeals.

8. The Appellant requested a review of this decision, and in a review decision dated 16 October 2013, HMRC upheld the assessment.

9. By a further decision dated 22 October 2013, the Appellant was issued with the penalty against which he now also appeals.

10. On 20 February 2014, the Appellant commenced the present Tribunal appeal. The grounds of appeal in his notice of appeal are that he "was an employee at the time", that the vehicle and cargo did not belong to him, that he was "given papers by [his] employer", and that he thought the cargo was legitimate and legal.

11. The Appellant does not dispute that the seizure was legal, that the goods were duty unpaid, and that the e-AD was improperly used. The parties agree that as far as the appeal against the assessment is concerned, the only real issue is whether the Appellant was at the material time "holding" the goods for purposes of regulation 13 of the 2010 Regulations.

Applicable legislation

12. Regulation 13 of the 2010 Regulations provides:

> (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 first so held.
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> (2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person -
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> (a) making the delivery of the goods;
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> (b) holding the goods intended for delivery; or
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> (c) to whom the goods are delivered.

The evidence

The evidence of the Appellant

13. The Appellant's witness statement states as follows. On 17 June 2013 he got an offer of a job to travel to Calais to do a "trailer change". This involves taking one trailer to the destination, dropping it off and returning with another trailer. He was instructed to pick up a trailer at the Transmarck truckstop in Calais. He met the person with the trailer and was given the paperwork and trailer. After looking at the paperwork, he inspected the load to see if it matched the load listed in the paperwork. He was satisfied that it did and that "there was nothing suspicious about the trailer i.e. illegal immigrants, drugs, etc". When he arrived in Dover the Appellant intended to deliver the load "to the address on the bond". In Dover he was pulled over and the lorry was seized. At no stage was he aware that he was bringing in a load that was not legitimate. The paperwork looked legitimate and the Appellant had done his best to inspect the load which seemed to match what was on the paperwork and did not seem suspicious.

14. In examination in chief the Appellant said as follows. He is a lorry driver by trade. On 17 June 2012 he was in Tilbury, near Purfleet or Thurrock services. He received a telephone call from a driver called John who asked him "Will you go for a load for me" and offered him £100 for the job. The Appellant agreed to do so. He picked up a trailer from a truck stop near Thurrock. Someone gave him a lift to get there. He then got in the vehicle and drove to Calais where he met a person for a trailer change. He did not know that person. That person gave him the paperwork for the new load. The Appellant checked the load for illegal immigrants and checked to

ensure that the load was secure and to check what the load consisted of. The goods were going "to one of the bonds" but he does not remember where. When he arrived at Dover, he was stopped and the load was seized.

15. In cross-examination the Appellant said as follows.

16. At the time, he was self-employed. His notice of appeal was prepared by his representative on his behalf, and his representative must have been mistaken when stating in the grounds of appeal that the Appellant was given papers by his "employer".

17. On the day in question, another driver who the Appellant knows by the nickname "Johnny" asked him if he wanted to do a job and said that there was "a McVeigh lorry" there.

18. When asked if he checked whether the lorry was insured and not stolen, the Appellant at first answered that there may have been some documents there. He then said that he did not remember whether he had checked, and later said perhaps he did not check. When it was put to him that it was very dangerous to take a lorry without checking who was the owner, he said that it was "only a few hours out and in", and that when Johnny asked him if he wanted to do a job he just took it at face value and said yes, and "thought that it should be OK".

19. When asked who he was carrying the load for, the Appellant said that as far as he was concerned, it was "for McVeigh". He said that "Michael McVeigh" rang him, and that the Appellant thought that the lorry must have belonged to him, unless he was the "transport man" for whoever owned the lorry. The lorry had no livery. Mr McVeigh told him to go to Calais to do a trailer change, and told him nothing about what the goods were or who owned them. Mr McVeigh did not give him any documents and the Appellant never met him.

20. When it was put to him that he had said on the day of the seizure that he had "no contact details", the Appellant said that Mr McVeigh gave him the contact of the lorry he was going to meet, but that he did not remember whether Mr McVeigh had given him his own telephone number. The Appellant then accepted that the record of interview on the day of the seizure suggested that Mr McVeigh had not done so. It was put to the Appellant that it was dangerous to go without Mr McVeigh's contact details, and he was asked what he would have done if there had been a problem. The Appellant said that he would have called Johnny. When asked whether he had Johnny's contact details, the Appellant said that he did on the day in question.

21. When it was put to the Appellant that the hauliers named on the CMR were McArdle and Rutex, the Appellant responded that he thought he was working for McVeigh. When it was put to him that McVeigh was not named on the CMR, the Appellant responded that he only checked the details of the load on the CMR. He then said that it might have been a McArdle trailer that he was exchanging with.

22. The Appellant said that he knew that the trailer he collected contained beer and cider.

23. When asked about the person in Calais who handed over the trailer, the Appellant said that he "would not know him from Adam", and did not know his name. The Appellant said that he had the registration number of the trailer he was to collect, and the other person had the registration number of the trailer that the Appellant was dropping off. No papers were signed during the drop off to acknowledge mutual receipt of the trailers they were exchanging. When asked what he would have done if McVeigh later said that there was no sign of the lorry that the Appellant was meant to deliver, the Appellant said that he just expected that everything would be OK.

24. The Appellant said that he expected to be paid by either Johnny or Mr McVeigh, but was ultimately paid nothing as the lorry was seized. The Appellant said that he had had no communication with either Johnny or Mr McVeigh after he was served with the assessment. When asked why he did not contact Mr McVeigh to say that the assessment was all Mr McVeigh's fault, the Appellant at first was silent, and then said that "It looks like they are all putting it on to me". When asked if that was not all the more reason for the Appellant to contact Johnny or Mr McVeigh, the Appellant said that he could not get hold of them and that they did not want to know him. The Appellant then said that he had spoken after the event to someone whose number he had obtained from Johnny. When asked if he did not ask his legal representative to investigate the matter, the Appellant said that he had tried to sort it out himself.

25. The Tribunal asked the Appellant to comment on paragraph 6 of the witness statement of HMRC Officer Smith, who said that when pulled over in Dover, the Appellant had said that "it was the second time that week that he had been 'pulled' by Customs". The Appellant confirmed that he had said that, and said that the other occasion related to a different load but had also occurred in Dover. When asked for details, the Appellant said that he could not remember the time of the other occasion, or whether the lorry on that occasion was seized, or where the lorry on the other occasion was being brought from.

26. In re-examination the Appellant said as follows. It is common for him to receive work from a friend of a friend. It could often happen that he did not know exactly who he was working for. It could happen in his job that he thought that he was working for one company and it turned out to be another.

The evidence of HMRC Officer Howat

27. HMRC Officer Howat is the officer who issued the assessment and penalty against which the Appellant now appeals.

28. In her first witness statement she stated as follows. When reviewing the case before issuing the assessment, she carried out internet checks of McArdle Transport. There was no website for that company, but there was a listing for that company at the address to which HMRC had sent a notice of seizure. No restoration requests had been received for the lorry or trailer. As the haulier named by the Appellant had not

claimed the vehicle and the Appellant had no contact details for the claimed haulier, HMRC Officer Howat determined that the Appellant was "holding" the goods.

29. In her second witness statement she stated as follows. She confirmed that neither of the Seabrooks sites was expecting a delivery for the account of VIP Hampshire. She checked the registered keeper of the vehicle, but there was no trace. She completed a PNC check on the vehicle, but there was no trace. She checked departmental systems but could not link the vehicle to either named haulier. From internet checks, Rutex appears to be a large international haulage company in the Netherlands. A notice of seizure was sent to this address but no response was received, and the company did not come forward to claim the vehicle. An internet check of McArdle Transport returned an address in Armagh, but a Google Maps search showed this address to be a field. There was also a "McArdle" hit for a large haulage company in the Republic of Ireland, which showed all vehicles liveried as McArdle. The vehicle in this case was not liveried as McArdle. In a Companies House check, there was no McArdle Transport listed. A departmental check on McArdle Transport at the Armagh address returned a James McArdle trading at that address under "Freight Transport". A seizure notice was sent to this address but there was no response and the company did not come forward to claim the vehicle. HMRC Officer Howat's checks could not verify the CMR, neither haulier had claimed the vehicle, the Appellant had advised that he did not have contact details of who he was working for, and the goods were not expected at the delivery address and so the Appellant could not have been delivering to the address on the paperwork. HMRC Officer Howat concluded that the Appellant was the person holding the goods.

30. In cross-examination she stated as follows. She was aware from the paperwork that McArdle was involved and McArdle's address was stated in the paperwork. She did not attempt to contact McArdle as UKBA had sent them a seizure notice to which they did not respond. She had been informed that UKBA had confirmed from their database that the ARC had been used before. There was no evidence that the Appellant had a proprietary interest in any of the goods seized.

The evidence of HMRC Officer Smith

31. There was also before the Tribunal a witness statement of HMRC Officer Lisa Smith, who did not attend the hearing to give oral evidence. She stated as follows. On 18 June 2012 she was on duty at Dover and stopped the vehicle driven by the Appellant loaded with beer and cider. During questioning the Appellant had said that he had swapped trailers the same day at Transmarck near Calais, having driven outbound the previous day. He said that he could not remember the registration number of the trailer that he had dropped in Calais. Officer Smith made enquiries which led to a request that the vehicle be seized as the ARC had previously been used to import a legitimate load. The Appellant subsequently stated that this had been a last minute trip as the regular driver was unable to travel. This was his first trip for the company and his first trip in this vehicle. He had no contact details for the company. It was the second time that week that he had been "pulled" by Customs.

The documentary evidence

32. In addition to the witness evidence, the Tribunal has considered the documentary evidence contained in the hearing bundle.

The parties' submissions

33. The submissions on behalf of the Appellant were as follows.

34. The Appellant was merely a courier and there is no evidence to suggest that he had any proprietary interest in the goods seized (reliance was placed on *Carlin v Revenue & Customs* [2014] UKFTT 782 (TC) ("*Carlin*")). The Appellant had no means of establishing that the paperwork that he later received was a duplicate of an earlier, legitimate load (reliance was placed on *R (Blackside Ltd) v Secretary of State for the Home Department* [2013] EWHC 2087 (Admin) ("*Blackside*")). HMRC has not taken any great effort to establish the position of others in relation to the seized goods. In the industry in which the Appellant works it is not uncommon for instructions to be passed to a driver from a third party. The Appellant was an innocent pawn used by others. The Appellant in this case may not have taken all possible precautions, but he did inspect the load and the documents. Whilst the Appellant had knowledge that he was carrying beer and cider, that of itself was insufficient to infer that the Appellant was "holding" the goods for purposes of regulation 13 of the 2010 Regulations. His knowledge was a by-product of his diligence in checking the load for irregularities. Such an act is not sufficient to amount to "holding" the goods, and the fact that he checked the load should not be held against him. The Appellant might in fact have been doing a job for McArdle.

35. If the Appellant is not liable to pay the outstanding duty, he will not be liable to pay the penalty. In any event, he has a reasonable excuse under paragraph 20 of Schedule 41. HMRC accept that his behaviour was non-deliberate. Furthermore, no criminal prosecution was brought and he has co-operated fully. It is a reasonable excuse that the Appellant received documentation indicating that excise duty had been paid on the goods and that the Appellant had no means of determining that the documentation provided had already been used in respect of another load, or that the load otherwise contained illegitimate items. The Appellant accepts that he would be "holding" the goods if he had known that the ARC had been used before, but a mere suspicion is not enough. The Appellant had an opportunity to make a day's pay and was not in a position to take all the precautions suggested by HMRC.

36. The submissions of HMRC are as follows.

37. There is no definition of "holding" in the 2010 Regulations. To be a "holder" it is sufficient to have legal control or physical possession of the goods, together with knowledge of what the goods are. It is unnecessary to have actual or constructive knowledge of the fact that the goods were duty unpaid. Reliance was placed on *Taylor & Anor v R* [2013] EWCA Crim 1151 ("*Taylor*"); *Carlin*; and *Duggan v Revenue & Customs* [2015] UKFTT 125 (TC).

38. On the facts of this case, the Appellant was holding the goods. He had physical possession of the goods. He knew that he was carrying beer.

39. Even if the Appellant was used as a pawn by others, he allowed himself to be put in that position. Despite obvious grounds for suspicion, the Appellant took virtually no precautions. The Appellant is a professional driver acting in a business relationship, and as such should be expected to take precautions such as to know who he is working for and have their contact details, and to satisfy himself as to his entitlement to drive the vehicle. However, he was unable to give contact details for his employer and had not explained how he was contracted to work or who he was working for. His witness statement refers to "my lorry".

40. The absence of information suggests that he is not an innocent party. Investigations by HMRC Officer Howat have not yielded further information. It has therefore not been possible to link the goods or the vehicle to a haulier. The Appellant has not provided any leads that were not adequately followed up.

41. The Appellant has received the maximum reductions of the penalty for disclosure and assistance. The Appellant has not argued for any special circumstances or reasonable excuse. The penalty should therefore be upheld.

The Tribunal's findings

42. In relation to the assessment, the parties agree that the only substantive issue is whether the Appellant was at the material time "holding" the goods for purposes of regulation 13(2)(b) of the 2010 Regulations.

43. As to the definition of "holding", both parties rely on the decision of the Court of Appeal in *Taylor*.

44. In that case, two appellants, Mr Taylor and Mr Wood, had both had pleaded guilty to being knowingly concerned in the fraudulent evasion of duty payable on the import of cigarettes. Confiscation orders had then been made against them under the Proceeds of Crime Act 2002. They were appealing against the confiscation orders. The facts were found to be as follows. A company (TG) controlled by Mr Taylor had instructed a company (Events) controlled by Mr Wood to transport the goods from Belgium to the UK. The latter company then instructed a UK road haulier (Yeardley) to pick up the goods in Belgium and bring them back to the UK, and Yeardley had in turn instructed a Dutch firm of road hauliers (Heijboer) to collect the goods in Belgium and bring them to the UK. It was found that the two appellants and certain other persons were all instrumental in bringing in the cigarettes from Belgium, and that each of them knew what was hidden in the load, but that both Yeardley and Heijboer were "innocent agents of the criminal conspirators" (at [7]).

45. The court said at [40] that "Neither Heijboer nor Yeardley knew the true nature of what was being delivered, and were no more than innocent agents". The court noted at [5] that throughout the transportation documents the load was described as textiles, and at [11] that the top boxes of each pallet contained textiles, underneath

which were boxes of cigarettes. At [4], [12] and [39], the court refers to the cigarettes as being "hidden" in the load. It appears that Yeardley could not have known that the load contained cigarettes as Yeardley never physically handled the load, and that Heijboer which did handle the load could not have known because the cigarettes were hidden in the load described as textiles.

46. One of the issues in that appeal was whether the appellants were "holding" the cigarettes at the excise duty point. The Court of Appeal found that the appellants were holding the goods. It also found that Yeardley and Heijboer, as innocent agents, were *not* holding the goods. The Court of Appeal said:

> 29. "Holding" [within the meaning of reg 13 of the 2010 Regulations] is not defined in the Finance Act or in the Regulations, and there appears to be no authority on its meaning. It is plain that it denotes some concept of possession of the goods. Possession is incapable of precise definition; its meaning varies according to the nature of the issue in which the question of possession is raised ... But it can broadly be described as control, directly or through another, of the asset, with the intention of asserting such control against others, whether temporarily or permanently... In a case of bailment, the bailee has actual, or physical, possession and the bailor constructive possession. In other words, if the bailee holds possession not for any interest of his own but exclusively as bailee at will, legal possession will be shared by bailor and bailee.
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> 30. In this case Heijboer had physical possession of the cigarettes at the excise duty point, but Heijboer was acting as no more than the agent of the primary carrier, Yeardley. Yeardley was, therefore, in law the bailee of the cigarettes at the excise duty point and, not apparently having any interest of its own in the goods, shared legal possession with the person having the right to exercise control over the goods, as explained above. If Yeardley had known, or perhaps even ought to have known, that it had physical possession of the cigarettes at the excise duty point, its possession might have been sufficient to constitute a "holding" of the cigarettes at that point. However, Yeardley had no such knowledge, actual or constructive, and was entirely an innocent agent. That important fact then turns the focus on the person or persons who were exercising control over the cigarettes at the excise duty point. There is no doubt that Wood (through Events) was such a person. Wood, as a matter of fact, under the contract with Yeardley gave instructions throughout the transportation to the carrier. Wood was correctly shown on Yeardley's invoice to be Yeardley's client and the consignee of the goods that were being transported. Under the Convention, as a matter of law, Wood (through Events) had the legal right of control over the goods. It is also known that Taylor (through TG) was acting together with Wood in exercising control over the cigarettes throughout the transportation. TG was shown on the CMR to be the consignee, a designation which represented accurately, if incompletely, the true state of affairs. There is no good reason to distinguish the position, in this context, of the two appellants.

> 31. There is nothing, furthermore, in this interpretation and application of Regulation 13(1) to the facts of this case that would be inimical to the purposes of the Finance Act. To seek to impose liability to pay duty on either Heijboer or Yeardley, 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. Imposing liability on the appellants raises no such questions, because they were the persons who, at the excise duty point, were exercising de facto and legal control over the cigarettes. In short, responsibility for the goods carries responsibility for paying the duty.
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> 32. … The Court … has no hesitation in concluding that both appellants "held" the cigarettes at the duty excise point within the meaning of Regulation 13(1). …

47. The Appellant relies on *Taylor*, contending that he was an "innocent agent" like Heijboer and Yeardley. HMRC for its part relies on the statement in *Taylor* at [30] that "If Yeardley had known, or perhaps even ought to have known, that it had physical possession of the cigarettes at the excise duty point, its possession might have been sufficient to constitute a 'holding' of the cigarettes at that point". HMRC contend that in the present case, the Appellant knew that the vehicle was loaded with beer and cider, and that this was sufficient. HMRC argue that *Taylor* is distinguishable on the basis that in that case, Heijboer and Yeardley did not know that the load contained cigarettes.

48. At the outset, the Tribunal notes that *Taylor* indicates that it is possible for more than one person to be "holding" goods for purposes of regulation 13 of the 2010 Regulations at any given time. In *Taylor*, the Tribunal found that both Mr Taylor and Mr Wood were holding the goods. Furthermore, the court said that if the facts had been different, Heijboer or Yeardley might have been "holding" the goods. There is no suggestion that if Heijboer or Yeardley had been holding the goods, this would necessarily have meant that Mr Taylor and Mr Wood were no longer holding the goods. Indeed, *Taylor* at [29] appears to contemplate that both a bailor and a bailee of goods can be "holding" the goods at the same time.

49. This conclusion means that there may be more than one person liable to be assessed for the excise duty. That is consistent with the wording of regulation 13(2), which states that the persons so liable are the person making the delivery of the goods, the person holding the goods intended for delivery, or the person to whom the goods are delivered. These could be three different people, all of whom are so liable.

50. The Tribunal considers that it is therefore not required to consider whether there might have been persons other than the Appellant who were holding the goods at the material time. The Tribunal is required only to determine whether the Appellant was holding the goods, irrespective of whether or not there might also have been others who were also holding the same goods at the same time. Thus, even if it were the case that there are further investigations that HMRC could have undertaken into others who played a role in the matter (and the Tribunal is not persuaded that that is the case), that would not be material to the present appeal. The question in this appeal

is simply whether it has been established, on a balance of probability, that the Appellant was holding the goods at the material time.

51. The Tribunal notes that in *Carlin* at [30] it was concluded that "Mr Woods or Woods Transport was the holder of the goods and Mr Carlin [the lorry driver] was merely the courier". The Tribunal does not read this sentence as suggesting that the driver of a lorry cannot be holding goods if another person can be identified as holder. If this sentence was intended to suggest that, this Tribunal disagrees with that suggestion. It is also noted that *Carlin* relied at [18] and [30] on the judgment of Hooper LJ in *White & Ors v The Crown* [2010] EWCA Crim 978 at [190]. In that judgment at [188]-[190], the Court of Appeal expressly declined to decide the question of "a driver's liability for excise duty, where a driver is no more than a courier paid to transport the load into this country".

52. In *Taylor* at [30], the court found that Heijboer was not the bailee of the goods because it was merely acting as agent for Yeardley, such that Yeardley was in law the bailee. The Tribunal is not satisfied on the evidence in this case that the Appellant was acting as a mere agent for anyone else. As a self-employed driver (which he claims he was), the Appellant may have been contracted by someone else to do a job for them. However, that does not make the Appellant in law an agent of that person, as opposed for instance to an independent contractor.

53. In the present case, the Appellant does not dispute that he knew that the vehicle was loaded with beer and cider. HMRC contend that this is sufficient to conclude that he was holding the goods, relying on the sentence in *Taylor* at [31] referred to at paragraph 47 above. However, the Appellant argues that he can be an "innocent agent" of the kind referred to in *Taylor* even if he knew that the load consisted of beer and wine.

54. In support of this argument, the Appellant relies on *Blackside*. In that case, similarly to the present case, the Border Force had stopped and seized a lorry and its load of beer on arrival at Dover. The issues in that case were different, but the Appellant relies on a specific passage in that judgment, in which the court rejected a contention by the Secretary of State for the Home Department (who was responsible for the Border Force) that the driver of the vehicle had committed an offence. The court said:

> 58. In my view there is no evidence that Mr. Ray [the driver] was a person whose offence or suspected offence occasioned the seizure of the load. He told the UKBA officer that the trailer was fully loaded when he collected it. The documentation that he was given was valid on its face.
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> 59. It is, perhaps, worth pointing out that the procedure for the movement of duty suspended loads envisaged by Article 21 of the Council Directive requires the consignor to submit a draft electronic administrative document to the competent authorities using the computerised system. The computer then carries out an electronic verification of the data submitted and, if it appears valid, issues the unique administrative reference code and transmits it to the consignor.

> 60. I can see no reason why Mr. Ray, assuming that he studied the documents in some detail, should have been concerned to note that the Delivery Note was dated 18 September 2012. He, unlike the UKBA, would have had no means of knowing when the ARC was issued because the date and time of its issue is not shown on the documents: that is information that only the UKBA can retrieve from the computer.
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> 61. It is now known that checks carried out by Border Force have shown that Mr. Ray has been involved in three previous seizures, each case being one in which duplicate consignments have been carried using the same ARC. However, I know nothing about those incidents and it seems to me to be quite possible that Mr. Ray has simply been an innocent puppet exploited by others. Recent information shows also that European Transport Services is an entity used by a well-known smuggler. However, that in itself does not implicate Mr. Ray.
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> 62. If the Defendant wishes to rely on the fact that Mr. Ray was guilty of an offence when he brought the trailer into the UK on 20 September 2012, it must prove it. The evidence before the court on this application falls well short of any such proof. I therefore reject this argument.

55. The Tribunal finds that this passage is not directly relevant to the present case because it is concerned with the issue of whether the driver had committed an offence, rather than with the issue of whether the driver was "holding" the goods. The offence that the court had in mind was apparently one under s 170B of the Customs and Excise Management Act 1979, namely the offence of being knowingly concerned in the taking of any steps with a view to the fraudulent evasion, whether by himself or another, of any duty of excise on any goods (see *Blackside* at [18]). A person holding excise goods on which excise duty has not been paid is not for that reason alone necessarily committing such an offence, and such an offence can be committed by a person who is not holding the goods. The circumstances in which a person becomes liable to pay excise, and the circumstances in which a person commits a criminal offence, are two very different things.

56. The Tribunal has considered the evidence before it. As to the Appellant's evidence, the Tribunal found the Appellant to be an unimpressive witness. His answers to various questions were hesitant or evasive, and on occasion he has contradicted his own earlier evidence. For instance, the Tribunal does not find it plausible that he could not remember any details of the previous occasion that he had been "pulled" by Customs (paragraph 25 above). The first time that he mentioned a Mr Michael McVeigh was in cross-examination. The Appellant at first said that he had had no contact with Mr McVeigh or Johnny since the seizure. At first he could give no explanation as to why he would not have contacted them, then he subsequently said that he had been unable to contact them, and then he suggested that he might have spoken to Mr McVeigh after the event.

57. Nevertheless, the Tribunal has considered what the situation would be, even if the essential elements of the Appellant's evidence were to be accepted by the Tribunal.

58. At the material time in this case, the Appellant clearly had actual physical possession and control of the goods. He knew that the goods consisted of beer and cider. On his own evidence, he had been given the job orally on the telephone by Mr McVeigh, and he merely assumed that either the vehicle belonged to Mr McVeigh or to another person for whom Mr McVeigh was acting as "transport man". Thus, he did not in fact know to whom the vehicle belonged, nor what role Mr McVeigh played in the matter. He said that he looked at the CMR to check what the load consisted of, but did not look at other details such as the details of who was the haulier. Thus, he did not know who was the haulier, either on the paperwork or in reality. He did not know the identity of the person from whom he took possession of the trailer in France. It is apparent from the Appellant's evidence that at the time of the Appellant's arrival at Dover, the Appellant had no way of contacting Mr McVeigh. The Appellant said that if there had been any problem, he would have called Johnny. However, the Appellant's evidence suggests that Johnny played no role in the matter other than as a messenger, and that if the Appellant had contacted Johnny with a problem Johnny could have done nothing other than attempt to relay a message.

59. On the Appellant's own evidence, the Tribunal finds that during the period that the Appellant was transporting the goods, he was not subject to the supervision or control of anyone else. He had been given a telephone instruction to collect a trailer at a particular location in France and to take it to a particular location in the UK, but during the period that he was carrying out that instruction he was effectively out on his own with independent and unsupervised control of the vehicle and goods, and with responsibility for the goods. The Tribunal finds that in that period, he was "exercising control" in the kind of way referred to in *Taylor* at [30], and had "responsibility" of a kind referred to in *Taylor* at [31].

60. The Tribunal is satisfied that in the circumstances, he was holding the goods for purposes of regulation 13(2)(b) of the 2010 Regulations.

61. The Appellant's own evidence is sufficient to reach this conclusion. However, the conclusion is fortified by the HMRC evidence that no trace could be found of the claimed haulier, or of a registered keeper of the vehicle. HMRC accept that the Appellant had no proprietary interest in the goods or the vehicle, which means that there was another or others who owned the goods and vehicle. However, those others do not appear to be the persons named in the CMR, and the HMRC evidence thus strengthens the suggestion that the Appellant did not know who were the real owners of the vehicle and goods, and who was really behind the transport operation.

62. From the HMRC evidence, it seems that the destination to which the Appellant was taking the goods may not in fact have been Seabrook, since Seabrook were not expecting a delivery. If that is so, presumably the Appellant was given an oral telephone instruction to take the goods to a place other than the destination stated in the CMR. Considering the way that the Appellant had no idea of the identity of the person from whom he collected the trailer, it is quite possible that he had also no idea of the real identity of the person to whom he was to deliver the trailer. If so, that would further fortify the conclusion in paragraph 59 above.

63. In the circumstances, it is unnecessary to decide whether HMRC is correct in arguing that it was sufficient that the Appellant was in physical control of the load and knew that the load consisted beer and cider. If that HMRC argument is correct, there could be no question but that the Appellant was holding the goods at the material time.

64. The Tribunal accordingly dismisses the argument that the Appellant was not liable to be assessed to excise duty as the person holding the goods under regulation 13(2)(b). It has not been suggested by the Appellant that there is any error in the way that the amount of the assessment has been calculated.

65. As to the penalty, which has been imposed under Schedule 41, the Appellant contends that he has a reasonable excuse under paragraph 20 of Schedule 41. The Appellant contends that the circumstances amounting to a reasonable excuse are that he received documentation indicating that excise duty had been paid on the goods, and that he had no means of determining that the documentation provided had already been used or that the load otherwise contained illegitimate items.

66. The Tribunal is not satisfied on the Appellant's own evidence that the existence of circumstances amounting to a reasonable excuse have been established. On his own evidence, he did not know who owned the lorry that he was driving, and he had not even taken steps to satisfy himself that it was insured. He was given a telephone instruction to undertake the job by Mr McVeigh, but did not know exactly what role Mr McVeigh played in the matter. He did not know from whom he was collecting the trailer in France. On his own evidence, he checked the load to see that it contained beer and cider as described in the documentation, but did not otherwise check the documentation. The Tribunal finds that he did not do all that he could reasonably have been expected to do to satisfy himself that the load was legitimate.

67. For similar reasons, the Tribunal finds that the claimed circumstances do not amount to special circumstances justifying a special reduction under paragraph 14 of Schedule 41. Even if the Tribunal were to conclude that it was entitled to use its power under paragraph 19(3)(b) of Schedule 41, it could see no reason for relying on paragraph 14 to any different extent to the penalty decision.

68. Having dismissed that argument, the Tribunal finds that the Appellant has established no other basis for challenging the imposition of a penalty, or the amount of the penalty. The penalty explanation indicates that the penalty was calculated on the basis that the wrong-doing was non-deliberate, as it was considered that there was insufficient evidence to establish that it was deliberate. That finding was to the Appellant's advantage. The penalty explanation also indicates that the penalty was calculated on the basis that disclosure of the wrongdoing was prompted, given that the Appellant did not disclose the wrongdoing until he had reason to believe that HMRC had discovered it or were about to discover it. The Tribunal has no doubt at all that this was a prompted disclosure. The Appellant has not disputed the conclusion in the penalty explanation that the penalty for non-deliberate wrong-doing with prompted disclosure is in the range of 20% to 30% of the potential lost revenue. The Appellant has been given maximum reduction for the quality of his disclosure and a penalty of

only 20% has been applied. The Tribunal finds that the penalty is in accordance with Schedule 41 (see especially paragraphs 6(1)(c) and 13(6) thereof).

Conclusion

69. For the reasons above, this appeal is dismissed.

70. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 15 JULY 2015