[2015] UKFTT 639 (TC)

TC04772

Appeal number: TC/2014/04915

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 "making the delivery of" or "holding" the goods and therefore liable for the assessment -
No - appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MARTIN GLEN PERFECT **Appellant**

- and -

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

TRIBUNAL: JUDGE TIMOTHY HERRINGTON
MICHAEL BELL ACA CTA

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 19 October 2015

Christopher Snell, Counsel, instructed by Rainer Hughes, Solicitors, for the Appellant

Ruth Hughes, 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 ("the 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 £22,779.00; and

(2) a penalty ("the Penalty") imposed under Schedule 41 to the Finance Act 2008 ("Schedule 41") in the amount of £4,897.48.

Background Facts

2. The following is a summary of the facts that are undisputed.

3. The appellant ("Mr Perfect") is a self-employed lorry driver. On 6 September 2013 UK Border Force officials intercepted him at Dover Eastern Docks whilst he was driving a heavy goods vehicle registration number YX53 KKL ("the Vehicle") into the UK. The Vehicle was carrying 26 pallets of mixed beer totalling 25,221.12 litres ("the Goods ").

4. Mr Perfect produced a CMR freight contract which stated that the goods were covered by an Administrative Electronic Document with a stated ARC reference number. The CRM stated that the consignor was Major Weine KG which is a German a bonded warehouse, that Seabrook Warehousing Ltd, a UK bonded warehouse was the consignee and that the transporter was D.Khells, County Fermanagh BT74 4RL.

5. When questioned Mr Perfect stated that he was employed by D Kells based in Basildon, Essex. The respondents ("HMRC") have not been able to locate a haulier or transport company with the name of D Kells based in Basildon and the postcode details on the CMR relate to S.D. Kells Limited which operates a chain of department stores in Northern Ireland.

6. The ARC on the CMR is one that related to a previous consignment to Seabrook of 25,221.12 litres of beer which demonstrated that the ARC had been used previously. Thus the Goods were outside the duty-suspended regime without duty having been paid on them.

7. The Vehicle and the Goods were seized as liable to forfeiture and seizure notices were sent to Major Weine AG and Mr Perfect. The seizure has not been challenged by anyone and by virtue of paragraph 5 of Schedule 3 to the Customs, Excise and Management Act 1979 the Goods were duly condemned as forfeit.

8. HMRC have made no attempt to establish who the legal owner of the Vehicle is. In particular, no search of DVLA records has been undertaken.

9. By a letter dated 20 February 2014 HMRC notified Mr Perfect of the Assessment. The stated ground for the Assessment was that Mr Perfect's actions had created an excise duty point and accordingly he was liable for excise duty on the Goods. On 12 March 2014 the Penalty was issued in the sum of £4,555.00.Mr Perfect's solicitors requested a review of the Assessment and Penalty. Following the review the Assessment was upheld and the Penalty was varied to £4,897.00. On 22 August 2014 HMRC issued an amended penalty assessment reflecting the outcome of the review.

10. On 4 September 2014 Mr Perfect gave notice of appeal against the Assessment and the Penalty to this Tribunal. In essence Mr Perfect's grounds of appeal are that he was not liable to pay the duty pursuant to Regulation 13(2) of the 2010 Regulations because as the person who was merely driving the vehicle in which the Goods were being transported he was not the person making the delivery of the Goods or holding the Goods intended for delivery.

11. Mr Perfect does not dispute that the seizure was legal, that the goods were duty unpaid, and that the ARC was improperly used. Consequently, the only issue to be determined in relation to the Assessment was whether Mr Perfect was at the material time "making delivery of the goods" or "holding" the goods for the purposes of Regulation 13 of the 2010 Regulations. The Penalty will only be in issue if the assessment is upheld. In those circumstances Mr Perfect contends that it was wrong for the Penalty to have been increased by HMRC on review.

Relevant 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.
>
> (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."

13. The 2010 Regulations implement in the United Kingdom the provisions of Council Directive 2008/118/EC concerning the general arrangements for excise duty ("the Directive"). Regulation 13 (2) of the 2010 Regulations contains wording which is identical to the corresponding wording in Article 33 of the Directive. This reflects Recital (8) of the directive which states that it remains necessary for the proper functioning of the internal market that the conditions for chargeability of excise duty are the same in all Member States.

14. Section 12 (1A) of the Finance Act 1994 provides:

> "Subject to subsection (4) below, where it appears to the Commissioners-
>
> (a) that any person is a person from whom any amount has become due in respect of any duty of excise; and
>
> (b) that the amount can be ascertained by the Commissioners,
>
> the Commissioners may assess the amount of duty due from that person and notify that amount to that person or his representative."

15. Paragraph 4(1) of Schedule 41 to the Finance Act 2008 provides:

> "A penalty is payable by a person (P) where –
>
> (a) after the excise duty point for any goods which are chargeable with a duty of excise, P acquires possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods, and
>
> (b) at the time when he acquires possession of the goods or is so concerned, a payment of duty on the goods is outstanding and has not been deferred."

16. Paragraph 6(1) of Schedule 41 provides that the penalty payable under paragraph 4 of the Schedule is-

> "(a) for a deliberate and concealed act or failure, 100% of the potential loss of revenue,
>
> (b) for a deliberate but not concealed act or failure, 70% of the potential lost revenue, and
>
> (c) for any other case, 30% of the potential lost revenue."

For the purposes of this provision the potential lost revenue is the amount of the duty which may be assessed as due.

17. Paragraph 12 of Schedule 41 provides:

> "(1) Paragraph 13 provides for reductions in penalties under paragraphs 1 to 4 where P discloses any relevant act or failure.
>
> (2) P discloses a relevant act or failure by -
>
> (a) telling HMRC about it,
>
> (b) giving HMRC reasonable help in quantifying the tax underpaid by reason of it, and

(c) allowing HMRC access to records for the purpose of checking how much tax is so unpaid.

(3) Disclosure of a relevant act or failure -

(a) is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the relevant act or failure, and

(b) otherwise, is "prompted".

(4) In relation to disclosure "quality" includes timing, nature and extent."

18. Paragraph 13(6) of Schedule 41 in so far as relevant provides:

"(6) Where a person who would otherwise be liable to a 30% penalty has made a prompted disclosure, HMRC shall reduce the 30% -

…

(b) in any other case, to a percentage not below 20%,

which reflects the quality of the disclosure."

The authorities and the correct legal test

19. As far as we are aware, there is no direct authority on the question as to the circumstances in which a lorry driver is liable to be assessed for excise duty where it is found that excise duty has not been paid on the goods that are being transported in the vehicle which he is driving. We were referred to three cases of relevance to the point as follows.

20. In *R v May* [2008] UKHL 28 the House of Lords was considering the confiscation powers contained in the Proceeds of Crime Act 2002. In particular, their Lordships considered the circumstances in which it could be said that a defendant had "obtained property or a pecuniary advantage" and thus benefited from his criminal conduct so that the power to make a confiscation order arose. In setting out the broad principles to be followed by those called upon to exercise the power to make confiscation orders the opinion of the Appellate Committee records at [48]:

> "D ordinarily obtains property if in law he owns it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of property to someone else. He ordinarily obtains a pecuniary advantage if (among other things) he evades a liability to which he is personally subject. 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...."

We observe that the focus of this test is on whether the person alleged to have obtained the property has done so by obtaining ownership of the property in question rather than some lesser interest.

21. *R v White and others* [2010] EWCA Crim 978 concerned an appeal against confiscation orders made in the context of an operation to smuggle tobacco into the United Kingdom. In particular, the Court of Appeal considered whether the appellants had obtained a pecuniary advantage as a result of or in connection with the offence of being knowingly concerned in dealing with goods which were chargeable with duty which had not been paid with intent to defraud the Crown of the duty chargeable on the goods and therefore could be the subject of a confiscation order. Hooper LJ observed at [4] that the evasion by a smuggler of duty or VAT constitutes, for the purposes of confiscation proceedings, the obtaining of a pecuniary advantage only if he personally owes that duty or VAT and at [5] quoted the passage in *May* set out at [20] above as authority for that proposition. The Court therefore had to consider whether the appellants were liable to be charged with the excise duty under the applicable regulations as in force at the relevant time. The primary question to be determined in that case was whether the appellants were liable by virtue of having caused the goods to reach an excise duty point. None were in the position of a lorry driver as we described at [19] above.

22. Nevertheless, the position of a driver was debated during the hearing of the case and although it did not arise in that particular case reference was made to the issue at the end of the judgment at [188] to [190] in the following terms:

> "188. As we said in paragraph 26, at the conclusion of the hearing we asked for written submissions about a driver's liability for excise duty, where a driver is no more than a courier paid to transport the load into this country. We have received those submissions.
>
> 189. We have decided that we shall not resolve the issue given that it is both complex and does not arise in this case. 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. We are concerned as to whether the driver falls within Article 7(3), assuming that is it is necessary for him to do so.
>
> 190. If he does so, it would remain a matter of domestic law whether he has obtained a benefit for the purposes of confiscation proceedings. We note, in this respect, that in paragraph 48 of *May* it was said that a defendant "ordinarily obtains a pecuniary advantage if (among other things) he evades a liability to which he is personally subject" (underlining added) and that: "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.""

The reference at [189] of this judgment to Article 7 (3) is a reference to that provision of EC Directive 92/12/EC, the predecessor to the Directive. This wording is in all material respects equivalent to the wording now to be found in Article 33 of the Directive and reflected in Regulation 13 of the 2010 Regulations.

23. It is therefore clear that in *White* that the Court of Appeal tentatively expressed the view that whether a lorry driver could be said to be "holding" goods subject to

excise duty was dependent on his state of knowledge as to what was being transported. We note at this point that the Court referred in this context not just to "tobacco" but to "smuggled tobacco" which we take to mean tobacco in respect of which duty has not been paid.

24. Clearly the passages in *White* referred to above were *obiter* and no reasoning is developed as to how the concept of knowledge as to the nature of the goods being transported is to be regarded as being implicit in the wording of the Directive.

25. *Taylor and Wood v R* [2013] EWCA Crim 1151 was another case considering whether an individual participating in a smuggling scheme had benefited from criminal conduct as a result of obtaining a pecuniary advantage, namely the evasion of excise duty through his involvement in the scheme. The relevant facts were as follows. Mr Wood through the freight forwarding firm that he controlled effected the secret transportation of counterfeit cigarettes, the load concerned being described as textiles. Mr Wood instructed a road haulier firm, Yeardley, to pick up the goods in Belgium and bring them to the UK. Yeardley had no idea what they were delivering and was described in the judgment as no more than an "innocent agent" in the importation of cigarettes. Yeardley employed a subcontractor, Heijboer, who were likewise described as being innocent.

26. The Court of Appeal at [16] referred to *May* and said at [17] :

> "Whatever else might be in dispute, it cannot seriously been suggested that the appellants in this case were "mere couriers or custodians or other very minor contributors" to be a legal importation. As the facts show, they were principal conspirators who played a pivotal role in arranging the delivery of the counterfeit cigarettes from Belgium to the UK. The ultimate issue in the appeals, therefore, is whether either or both evaded a liability to which he was personally subject."

The relevant regulation pursuant to which liability may arise was Regulation 13 of the Tobacco Products Regulations 2001 which, inter alia, provided that a person "holding" the tobacco products at the excise duty point would be liable and that any other person who cause the tobacco products to reach an excise duty point would be jointly and severally liable with that person.

27. The Court had this to say about the concept of "holding" at [29] to [31] of the judgment:

> "29. "Holding" 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 (a good example being *Re Atlantic Computer Systems plc* [1990] BCC 899, CA). 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: see, for example, *Goode on Commercial Law, Fourth Edition, p 46*. 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.

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."

As with *White*, these passages must be regarded as *obiter* in so far as they relate to the position of the haulier firm and its subcontractor and, *a fortiori,* in relation to the drivers engaged to drive the vehicles in question. The *ratio* of the decision is the conclusions regarding Mr Wood and Mr Taylor at [30] of the judgment, namely that those individuals were exercising control over the cigarettes at the excise duty point, in particular in Mr Wood's case, giving instructions to the carrier.

28. We observe that the Court of Appeal in this case, as in *White*, regarded the question of knowledge as being potentially significant. In common with *White,* the Court expressed its views tentatively, regarding the question of constructive knowledge of the possession of cigarettes as "perhaps" being sufficient to constitute "holding" and that actual or constructive knowledge "might" be sufficient to constitute "holding". Again there was no reasoning to support this tentative conclusion and in particular, to extend the potential liability to situations where a person ought to have known the nature of the goods were being carried as opposed to actually knowing, the position referred to in *White*.

29. Nor can it be said that the Court was saying that actual or constructive knowledge of the fact that what was being carried was a load of cigarettes was sufficient as opposed to knowledge that they were cigarettes in respect of which duty had not been paid.

30. The Court in *Taylor and Wood* referred to the fact that there appeared to be no interpretation of the concept of "holding" in the jurisprudence of the European Court of Justice. In the absence of this, the Court of Appeal concluded that both the language and purpose of Article 7(3) of the 1992 directive strongly support the conclusion that a person who has de facto and legal control of the goods at the excise duty point should be liable to pay the duty. The court went on to say at[39] :

> "That conclusion is all the more compelling where the person in actual physical possession does not know, and has no reason to know, the (hidden) nature of the goods being transported as part of a fraudulent enterprise to which he is not a party. To seek to impose liability on entirely innocent agents such as Heijboer or Yeardley, rather than upon the appellants, would no more promote the objectives of the Directive than those of the Regulations. "

We observe again that "nature of the goods" could refer to goods in respect of which duty had not been paid rather than simply goods of a particular type.

31. Neither Counsel appearing before us was able to refer us to any such jurisprudence or any cases in any other Member State. Regulation 13 of the 2010 Regulations must of course be construed so far as possible so as to be compatible with the Directive.

32. We observed at the hearing that there were a number of recent decisions in this tribunal which have considered the concept of "holding" as used in Regulation 13 in relation to the position of a lorry driver which neither Counsel referred us to. Mr Snell referred only to one case which supported his view and which Miss Hughes submitted was wrongly decided. Miss Hughes, in a footnote to her skeleton argument, referred to the fact that the issue was to be dealt with by the Upper Tribunal in another case without referring to it specifically. It transpired at the hearing that HMRC were under the erroneous impression that the case in question, and another one in respect of which permission to appeal to the Upper Tribunal had recently been given, had been made the subject of a privacy direction and that was the reason that they had not been referred to.

33. We have subsequently discovered that there are a considerable number of other cases on the point which had been decided before the hearing and which appear on the tribunal's public website of decisions. Some of these cases have been decided in favour of HMRC and others in favour of the lorry driver. Each of these cases, in varying levels of detail, refer to the three cases cited above but do not contain any significant analysis of the legal principles to be derived which are applicable to the position of a lorry driver. Permission to appeal to the Upper Tribunal has been granted in a number of these cases.

34. In these circumstances, we find it surprising that HMRC did not seek a stay of these proceedings pending the Upper Tribunal's decision on the point, which would of course have been binding on this tribunal in a way that the decisions referred to at [33] above are not.

35. Nevertheless, as the parties were before us and prepared for the hearing we proceeded with it and the issue of this decision. As except in one instance the other cases heard in this tribunal on the point were not cited to us, from our own examination of them they largely turn on their own facts and the point in any event will be considered in the Upper Tribunal we have decided not to refer to or rely on any of those cases in this decision. We have therefore reached our decision solely in the light of the submissions made to us.

36. We have also considered the question as to whether it would be appropriate to make a reference to the European Court of Justice. It appears to us that the concept of "holding" should be determined as a matter of European Community law rather than in accordance with any particular national law so as to be applied universally across the various legal systems of the European Union. The domestic cases that have been cited to us considered purely English law concepts of possession, legal control and bailment in construing the concept and, as we have observed above, we were not referred to any European jurisprudence on the point.

37. As we are aware that the issue is to be considered by the Upper Tribunal, in the circumstances it would be more appropriate for that tribunal to consider the question of a reference rather than ourselves.

38. We derive the following principles from our review of the cases cited to us:

(1) A person owning or having legal control of smuggled goods with the intention of asserting control against others, whether temporarily or permanently, is to be regarded as "holding" those goods for the purpose of Regulation 13 of the 2010 Regulations;

(2) Depending on the circumstances, a person having physical possession of smuggled goods, and sharing legal possession of those goods with the person mentioned in (1) above may be regarded as holding them for the purposes of Regulation 13;

(3) An innocent agent of a person mentioned in (1) or (2) above having physical possession of smuggled goods is not to be regarded as holding those goods for the purposes of Regulation 13; and

(4) Actual or constructive knowledge of his physical possession of smuggled goods might be sufficient to constitute "holding" for the purposes of Regulation 13 and take such a person outside the status of "innocent agent".

We shall determine this appeal by considering, in the light of the submissions of the parties, whether Mr Perfect could be regarded as "holding" the goods which were the

subject of the assessment made on him at the time of their seizure by applying the principles set out above to our findings of fact, as set out below.

Evidence

39. We had a witness statement from Mr Perfect on which he was cross-examined. In assessing Mr Perfect's evidence, our starting position is, as has been accepted at all times by HMRC, that Mr Perfect was not a knowing participant in what was clearly a smuggling attempt. Accordingly, the focus of Miss Hughes's cross-examination was on the extent to which Mr Perfect should have been put on enquiry because of the circumstances in which he was asked to transport the Goods to the United Kingdom. We have no doubt that Mr Perfect has all times since he was stopped by UK Border Force, including in his evidence to the tribunal, adopted a policy of not volunteering any more information than is necessary to answer the questions put to him. In our view it is likely that he has adopted that approach so as not to disclose, as far as is possible, any information that might assist in identifying those who were behind the smuggling attempt. That view is fortified by Mr Perfect's disclosure at the hearing that those who employed him to transport the Goods had arranged for him to have legal advice on the matter, presumably on the basis that he dealt with nothing other than his own role in the matter. In the light of that background, we have accepted Mr Perfect's evidence.

40. We also had a witness statement from Karen Ausher, the HMRC officer who investigated the matter after the seizure of the Vehicle and the Goods and issued the Assessment and Penalty to Mr Perfect following the completion of that investigation. We found Officer Ausher to be an honest and reliable witness and had no reason to doubt any of her evidence.

41. In addition we had a bundle of documents which included copies of the notebooks of the UK Border Force officers involved in the seizure of the Vehicle and the Goods, a copy of the CMR which was in Mr Perfect's possession when the Vehicle was seized, a copy of HMRC's electronic records relating to the ARC noted on the CMR, and copies of relevant correspondence between the parties.

Findings of fact

42. From the evidence that we heard and the documents we were shown we make following findings of fact.

43. Mr Perfect is an experienced a lorry driver. HMRC records show that he was employed by a haulage company, MJD Services Ltd, from November 2009 to August 2013. Since 2013 he has regarded himself as a self-employed. Mr Perfect did not register formally with HMRC as self-employed until 2015. He explained that on the basis that he had financial difficulties with many debts to pay and finally became registered on the advice of a firm of accountants. We accept that since he regarded himself as self-employed he was paid in cash without deductions. We make no finding as to whether in fact as a matter of law he could be regarded as being self-employed as opposed to being an employee of the businesses for whom he worked.

44. Sometime in August 2014 Mr Perfect began to work for a firm which he described as “Kells Transport”. We were told that the opportunity arose through an introduction made by a former colleague of Mr Perfect at MJD. Following that introduction, Mr Perfect received a phone call from an individual he described as “Des” who offered him work. Mr Perfect says that he was not told this individual's surname and he did not think to ask. He agreed to work for Kells, represented by “Des”, for £250 per week on the basis of two or three days work. If he worked longer than that in a week he might be paid between £350 and £360. He was paid in cash at the end of the week, either in person or, if he was unable to attend the lorry park on the Friday, the money being left concealed at the lorry park for him to collect when returning with the lorry to the lorry park. He had no written contract. In his witness statement Mr Perfect stated that he was "employed" by Kells but we are satisfied that this was loose language and he was not intending to indicate that he regarded himself as an employee. As far as he was aware, the firm was based at a lorry park in Basildon where he would go to pick up the vehicle that he was asked to drive. The vehicle would always be filled with fuel and he never had occasion to fill it up himself.

45. “Des” was the only person from Kells with whom Mr Perfect had contact. If there was a job to do "Des" would telephone Mr Perfect who would ask him to go to Basildon to pick up an empty trailer which would be taken to Calais and swapped for a loaded trailer of goods to be brought into the UK. He would travel to a secure trailer park in Calais, having been told by "Des" the number of the trailer that he was looking for. He would find the relevant documentation for the load in a tube on the side of the trailer, sometimes in a plastic wallet. He would look at the documentation, which consisted of a CMR and a Delivery Note to ascertain the nature of the goods he was carrying and their destination. Therefore in relation to the journey which is the subject of this appeal he knew that the consignment consisted of beer and the ultimate destination was Seabrook Warehousing in Barking.

46. On 6 September 2013 Mr Perfect was returning from Calais with the Vehicle when he was stopped by UK and Border Force Officials. As stated at [4] above the CMR that Mr Perfect produced had an ARC reference number which would have been produced as a result of the following process. Authorised warehousekeepers and registered consignors moving duty-suspended goods must register and enrol for EMCS, an EU–wide electronic system for recording and validating movements of duty suspended excise goods within the EU. The consignor of the duty-suspended excise goods must complete and submit a message known as an electronic administrative document (“eAD”) using EMCS before a movement of excise goods can take place. Once the detail entered on the eAD has been validated, EMCS will generate a unique Administrative Reference Code (“ARC”) for that particular movement. The ARC is required to travel with goods and must be available for presentation and requested. Thus the consignment must provide the person accompanying goods during the course of the movement with a hard copy version of the validated eAD or a commercial document on which the ARC is clearly stated. In this case Mr Perfect presented a CMR which clearly stated an ARC numbered 13DE 26000000006082433.

47. UK Border Force officials were able to interrogate the EMCS system and establish that this ARC number related to an earlier consignment of beer to Seabrook which had already been delivered to them with the result that the ERC had previously been used. Consequently the Goods were subject to unpaid excise duty because they were not accompanied by the valid documentation which was necessary in relation to a duty suspended movement.

48. It was accepted by Officer Ausher that Mr Perfect would have no means of checking the ARC and whether it had been previously used or not because the system can only be accessed by the UK Border Force or HMRC. On the face of it, Mr Perfect therefore had the documentation that he would expect to have when transporting duty suspended alcohol to a bonded warehouse in the UK. His evidence, which we accept, was that he looked at the documentation which had been left on the Vehicle as described above to satisfy himself as to the nature of the goods that he was carrying and made no further enquiries, such as seeking confirmation as to whether the ARC had been used before. We therefore accept that he had no information that could have led him to conclude that he knew he was carrying goods in respect of which excise duty had not been paid.

49. Mr Perfect confirmed that he saw the name of the transporter, with the description set out at [4] above, but it did not register with him that the address given was in Northern Ireland whereas he only knew the firm operated from a lorry park in Basildon. We draw no adverse inference from this. We would not expect a lorry driver in the position of Mr Perfect to have subjected the documentation to detailed scrutiny so it is likely he would not pick up discrepancies of this kind, and in particular the different spelling of “Kells”.

50. When the seizure of the Vehicle took place, Mr Perfect had already made two journeys to Calais and back that week, so that he was then making his third return journey. When interviewed at the time of the seizure he initially said that he had only previously made two outward trips (on Tuesday and Thursday) to Calais and one return journey (on Wednesday) from Calais that week but he omitted to tell the Border Force officer of the fact that he had entered the UK with the Vehicle and a load of alcohol a second time, on Thursday, 5 September 2013. Mr Perfect accepted immediately that trip had taken place when it was put to him and he expressed some confusion with the days of the week which had led him to make a mistake. Looking at the tenor of the exchange as recorded in the officer's notebook and having heard Mr Perfect’s evidence we can find no clear evidence of an intent to mislead and we therefore accept that Mr Perfect was initially confused in his answer to the officer.

51. Mr Perfect spoke to "Des "to inform him of the seizure and was picked up at Dover by a friend so that he could go and retrieve his car from Basildon. He was paid his money for the week and had no further contact with "Des”. He was angry about what had happened and ceased working for "Des” immediately. He said he did not give HMRC Des's phone number when they subsequently contacted him regarding the Assessment because HMRC never asked for it. He said he could not produce the CMR that related to the previous loads delivered during the week of the seizure as they were dropped off when the loads were delivered. We accept that evidence.

52. It is clear that HMRC's investigation into the smuggling attempt was very limited. They have at all times accepted that although the evidence pointed overwhelmingly to the events being an attempt to deliver excise goods to the United Kingdom without the payment of UK excise duty, the evidence does not show that Mr Perfect was actively involved in this attempt and that he did not himself deliberately attempt to evade excise duty. This is apparent from the letter HMRC wrote on 13 August 2014 to Mr Perfect setting out the outcome of their review of their decision to make the Assessment and impose the penalty.

53. Officer Ausher established that no company called D Kells operated in Basildon. She established the existence of the company in Northern Ireland referred to at [5] above. She made no attempt to investigate the existence of a trailer park in Basildon from which the Vehicle travelled and did not check with DVLA as to who was the registered keeper of the Vehicle. There has been no suggestion that Mr Perfect was the owner or registered keeper of it. Her view was that any such enquiries would have been fruitless in terms of identifying who was behind the smuggling attempt. No person has claimed ownership of the Goods or the Vehicle.

54. Consequently, the only action taken in response to the smuggling attempt aside from the seizure of the Goods and Vehicle was to make an assessment against Mr Perfect and impose a penalty on him in respect of the unpaid excise duty as described at [9] above.

Discussion

55. Miss Hughes submitted that Mr Perfect had full control over the Goods in the Vehicle which he was driving and in those circumstances it was clear that he was "making delivery of the goods" within the meaning of Regulation 13 (2)(a) of the 2010 Regulations. Furthermore, he was also "holding the goods intended for delivery" within the meaning of Regulation 13 (2) (b). He had de facto and legal control of the Goods and knew that he was transporting beer. In her submission, he could only escape liability if he was able to satisfy the tribunal that somebody else was in full control of the Goods and that control was not shared. If there was any element of shared control then Mr Perfect fell within the scope of the regulations. She submitted that any lorry driver knowing that he was carrying beer was at risk of an assessment if it transpires that duty has not been paid on it. Miss Hughes accepted that this was a strict test with harsh consequences but was justified in support of HMRC's policy to deter smuggling.

56. Alternatively, Miss Hughes submitted, if the test was not as strict as that outlined above, then liability to assessment would follow if Mr Perfect should have been put on enquiry by the manner in which he was employed and collected the Goods.

57. We reject all of these submissions. Applying the principles we set out at [38] above our analysis of the position is as follows.

58. In our view Mr Perfect's position cannot be equated to that of Mr Wood in *Taylor and Wood* as described at [25] above. As has been accepted by HMRC Mr Perfect was not a conspirator in relation to the smuggling attempt. It is quite clear from the facts that Mr Perfect was subject to control by whoever it was who was arranging for the goods to be smuggled, manifested through the instructions given to him by "Des" and it is those persons who had the de facto and legal right of control over the Goods at the time that they were seized. Mr Perfect had no interest of his own in the Goods, his only interest was to follow instructions in collecting and delivering them and be paid modestly for his services in doing so. Neither was he the owner of the Vehicle. The fact that the identity of those behind the smuggling attempt and knowingly participating in it cannot be ascertained is irrelevant as the facts clearly demonstrate that persons unknown other than Mr Perfect have been involved in controlling the Goods. HMRC of course have made no serious attempt to find out who they might be. We observe that the policy of deterrence might be better served if such serious attempts were made. Therefore in our view Mr Perfect is not liable to be assessed for excise duty as a result of the application of the first of the three principles we identified in paragraph 38 above.

59. Neither in our view is he liable to be assessed by application of the remaining principles. We accept that Mr Perfect had physical possession of the Goods as a bailee and therefore shared legal possession with those who controlled his actions and the movement of the Goods. We therefore need to consider whether he can be regarded as an "innocent agent" as that term was used in *Taylor and Wood.*

60. In that regard we do not accept that just because Mr Perfect knew that he was carrying goods potentially subject to excise duty that he was in a different position to the hauliers in *Taylor and Wood* who had no idea that they were transporting cigarettes, let alone counterfeit cigarettes.

61. In our view in so far as the question of knowledge is concerned, assuming it is relevant to the question of "holding", the relevant knowledge is not only as to the physical nature of the goods are being carried but also as to whether or not a liability to excise duty had arisen in respect of them. As we have found at [29] this is consistent with the limited reasoning on this point in *Taylor and Wood.* The only information that Mr Perfect had was to be found in the documentation he collected when he picked up the Goods and on the face of it this documentation was consistent with the movement of goods subject to a valid duty suspended arrangement. As we have found, he had no means of checking whether the ARC stated on the CMR had been used or not.

62. As far as the question of constructive knowledge is concerned, again assuming that it is relevant to the question of "holding", as we have indicated above there was nothing on the face of the documents to put him on enquiry. It is also difficult to know what enquiries someone in his position could have made. He could not have access to the EMCS system and it does not appear to us to be reasonable to expect a lorry driver to make enquiries of HMRC himself as to the genuineness of the CMR and the ARC stated in it. HMRC made no submissions as to whether such a facility was available in practice. Even if he asked "Des" to confirm the genuineness of the documentation

he would have to have accepted what he was told at face value as would be no reasonable steps that he could have taken himself to verify the position.

63. This leaves the question as to whether he should have been put on enquiry by virtue of what a HMRC represented were the unusual circumstances in which he came to be engaged by "Des". In the world in which Mr Perfect operated these informal arrangements were not to be regarded as unusual with lorry drivers from time to time, as he did for the reasons he explained in his evidence, treating themselves as self-employed (whether the circumstances justified that conclusion or not), being paid in cash without any documentation to back up the arrangements, being disinterested in the identity of those engaging them and remaining off the radar as far as HMRC was concerned. These sort of arrangements proliferate regardless as to whether they involve the smuggling of alcohol. Consequently in our view these circumstances should not in themselves without any stronger evidence have put Mr Perfect on enquiry as to whether he was going to be involved in the smuggling of alcohol.

64. We therefore conclude that Mr Perfect should be regarded as an innocent agent in the same way that the hauliers were so characterised in *Taylor and Wood.* That being so, our analysis is equally applicable to the question as to whether Mr Perfect was "making delivery of the goods" within the meaning of Regulation 13 (2) (a). As the Court of Appeal observed at [31] of *Taylor and Wood* to impose liability on Mr Perfect in the circumstances that we have found would raise serious questions of compatibility with the objectives of the legislation.

Conclusion

65. For the reasons that we have given the Assessment must be discharged. It follows that the Penalty must also be discharged. It is therefore not necessary for us to consider the submissions Mr Snell made on the question as to whether there should have been further mitigation of the Penalty, assuming the Assessment was found to be valid.

Disposition

66. The appeal is allowed.

67. 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.

TIMOTHY HERRINGTON

TRIBUNAL JUDGE
RELEASE DATE: 07 DECEMBER 2015