[2017] UKUT 476 (TCC)

Appeal number: UT/2016/0038

EXCISE DUTY – persons with no actual or constructive knowledge of unpaid duty – meaning of "making the delivery of" and "holding" goods in Article 33(3) EU Council Directive 2008/118/EC and reg 13(2) Excise Goods (Holding, Movement and Duty Point) Regulations 2010 – liability for penalty under paragraph 4 Schedule 41 Finance Act 2008

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HM REVENUE AND CUSTOMS **Appellants**

- and -

MARTYN GLEN PERFECT

Respondent

TRIBUNAL: MRS JUSTICE WHIPPLE
JUDGE ASHLEY GREENBANK

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on Thursday 16 November 2017

Ms Jessica Simor QC instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Mr David Bedenham, instructed by Rainer Hughes LLP, solicitors, for the Respondent

DECISION

Introduction

1. This appeal is brought by the Commissioners of HM Revenue and Customs ("HMRC") against the decision of the First Tier Tribunal (Judge Timothy Herrington sitting with Michael Bell ACA CTA) ("FTT") delivered on 7 December 2015 (the "Decision"). The FTT (Judge Herrington) granted permission to appeal on 8 February 2016.

2. The Respondent is Martyn Glen Perfect. Mr Perfect is a self-employed lorry driver. He was stopped by the UK Border Force at Dover Docks on 6 September 2013 while driving a heavy goods vehicle into the UK. He was found to be carrying 26 pallets of beer (the "goods") on which excise duty was due but had not been paid. HMRC assessed him to excise duty under regulation 13(1) and (2) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (SI 593/2010) (the "2010 Regulations") in the amount of £22,790 and imposed a penalty under Schedule 41 to the Finance Act 2008 ("Schedule 41") in the amount of £4,897.48.

3. HMRC upheld the assessment and penalty on review (although the amount of the penalty was adjusted slightly). Mr Perfect appealed to the FTT. The FTT allowed his appeal against assessment and penalty (the "Decision"). It did so on the basis that Mr Perfect was an "innocent agent" who lacked actual or constructive knowledge of the fact that the goods that he was carrying were liable to excise duty which had not been paid.

4. HMRC now appeals to this tribunal against the Decision, with permission granted by the FTT.

5. In this appeal, HMRC were represented by Ms Jessica Simor QC and Mr Perfect was represented by Mr David Bedenham. Neither appeared below. We are grateful to both of them for their helpful written and oral submissions.

Background

6. When Mr Perfect was stopped at Dover Docks on 6 September 2013, he produced the paperwork in his possession, namely an international consignment note ("CMR") which stated that the goods were covered by an Administrative Electronic Document with a stated unique administrative reference code (known as an "ARC"). The consignor was stated to be a German bonded warehouse and the goods were said to be destined for a UK bonded warehouse. The transporter was said to be D Khells from County Fermanagh in Northern Ireland, with the postcode given. When questioned, Mr Perfect said he was working for D Kells which was based in Basildon, Essex. HMRC were unable to locate any haulier or transport company in that name based in Basildon, and the postcode on the CMR was found to be associated with SK Kells Ltd, a company which operates a chain of department stores in Northern Ireland. It was further established that the CMR in fact related to a different consignment of beer which had already been delivered to a UK bonded warehouse.

7. In summary, it is established that the paperwork accompanying these goods was invalid. The goods were not covered by a valid ARC and were not within the duty suspended regime under the regulations at all. Excise duty was due on the goods. HMRC seized the goods and seizure notices were sent to the named consignor (the bonded warehouse

in Germany) and to Mr Perfect. Neither challenged the notices and the goods were condemned as forfeit.

8. On 20 February 2014, HMRC notified Mr Perfect of the assessment. On 12 March 2014, HMRC notified Mr Perfect of the penalty. By his solicitors, Mr Perfect requested a review. On 13 August 2014, HMRC concluded its review and upheld the assessment and penalty, although the amount of the penalty was increased.

9. On 4 September 2014 Mr Perfect appealed against the assessment and the penalty on grounds that he was not liable to pay the duty because he was merely driving the vehicle in which the goods were found, and was not "holding" the goods or "making delivery of" them within the meaning of the 2010 Regulations. He also argued that the penalty should be quashed or reduced in light of the circumstances of the case. By its Decision, the FTT allowed both limbs of the appeal and quashed the assessment and the penalty.

10. On 8 February 2016 the FTT granted permission to appeal. HMRC submitted formal grounds of appeal by an appellant's notice dated 8 March 2016. HMRC's grounds were amended on 24 April 2017 to deal with the case of *McKeown and Others v HMRC* [2016] UKUT 0479 (TCC) pursuant to the Upper Tribunal's direction of 29 March 2017 (Rose J). Mr Perfect submitted an amended response on 15 May 2017.

Issues before the FTT

11. It was HMRC's primary case before the FTT, as indeed it has been argued before us, that the 2010 Regulations impose strict liability which extends to anyone who is "holding" or "making delivery of" the goods in question (those words appearing in the relevant part of the 2010 Regulations). Those are ordinary words which should be accorded their ordinary meaning, which would include Mr Perfect's possession of the goods while he was carrying them in his HGV. Mr Perfect's case, then as now, was that the 2010 Regulations do not impose liability on those who are innocently in possession of the goods, for example, those whose only role is to transport the goods and who have no knowledge, actual or constructive, of any attempt to evade duty. Mr Perfect was such a person. He lacked any knowledge that the goods were subject to unpaid excise duty. He was an "innocent agent".

12. HMRC advanced an alternative argument on the facts at the FTT, to the effect that Mr Perfect should have known that he was involved in smuggling, and that because he had constructive knowledge of the criminal enterprise he was not, in fact, an "innocent agent" at all. This argument requires a little explanation. HMRC had accepted from an early stage that Mr Perfect was not "actively" involved in smuggling – that being the language used in the review letter dated 13 August 2014. In consequence, the FTT noted that it had been *"accepted at all times by HMRC, that Mr Perfect was not a knowing participant in what was clearly a smuggling attempt"* (see [39] and to same effect [52]). The FTT noted that 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 (see, again, [39]). In other words, HMRC suggested that Mr Perfect had constructive knowledge of the criminal enterprise. The FTT rejected HMRC's alternative case of constructive knowledge, on the facts: see [56], [57], [62], [63]. The FTT concluded that "*these circumstances* [ie the circumstances in which Mr Perfect came to be carrying the

goods] *should not in themselves without stronger evidence have put Mr Perfect on enquiry as to whether he was going to be involved in the smuggling of alcohol*" ([63]).

13. The FTT went on to conclude that Mr Perfect was to be regarded as an "innocent agent" ([64]) and on that basis allowed the appeal against the assessment.

14. In reaching those conclusions, the FTT was clearly influenced not only by the paucity of the evidence (as they saw it) against Mr Perfect; but also by the fact (as the FTT found) that HMRC had only conducted a "very limited investigation" into the smuggling attempt (see [52]): HMRC had not attempted to investigate the existence of the trailer park in Basildon, nor conducted any check to see who was the registered keeper of the HGV being driven by Mr Perfect when he was stopped (see [53]), nor had they asked Mr Perfect for the phone number of the individual called "Des" who had asked him to take that consignment from the warehouse in Germany to Basildon (see [51]). HMRC's answer was that any such enquiries would have been fruitless in terms of identifying who was behind the smuggling attempt ([53]). But the FTT was not persuaded by that answer. As the FTT noted, the only action taken was to make an assessment against Mr Perfect and impose a penalty on him ([54]), despite HMRC's acceptance that he was not a knowing participant (see [39]).

15. So far as the penalty was concerned, the FTT concluded that it followed from the discharge of the assessment that the penalty also should be discharged (see [65]). It was not therefore necessary to consider the question of whether the penalty should have been mitigated.

Issues in the appeal

16. There is no appeal against the FTT's findings of fact. Nor could there be. The consequence is that this appeal proceeds on the basis that Mr Perfect had neither actual nor constructive knowledge of the smuggling attempt.

17. So far as the assessment is concerned, HMRC renews its primary case that the 2010 Regulations impose strict liability on those who deliver or hold the goods in question; this would include Mr Perfect who was carrying the goods in his HGV when he was stopped at Dover, even though he did not know (actually or constructively) that excise duty was due and unpaid on those goods. HMRC argue that it is sufficient that he knew he was carrying pallets of beer, which are goods of a kind which is liable to excise duty.

18. In answer, Mr Perfect argues that the 2010 Regulations do not impose strict liability at all; specifically, they do not impose liability on those who are involved merely as innocent agents; that the term "innocent agent" extends to those who lack actual or constructive knowledge of the criminal enterprise in which they have become unwittingly involved; and that such an exclusion from liability is consistent with the scheme and purpose of EU Council Directive 2008/118/EC (the "2008 Directive"), which the 2010 Regulations seek to implement, and the language of the 2010 Regulations themselves, and is established by authority. Mr Perfect suggests a reference to the CJEU if this Tribunal is in doubt about what the 2008 Directive requires.

19. In reply, HMRC suggest that the cases relied on by Mr Perfect can be distinguished on their facts, and that this Tribunal is required to interpret the 2010 Regulations in an EU-

compliant way, which can only be achieved by adopting HMRC's strict liability approach.

20. So far as the penalty is concerned, HMRC argues that even if Mr Perfect is not liable for excise duty under the 2010 Regulations, he is still liable to the penalty under Schedule 41 on its plain wording. Mr Perfect submits, applying a similar argument to that which he adopts in response to the assessment, that the penalty regime must be subject to an "innocent agent" exception. Alternatively, he argues that on the facts as found by the FTT, he has a reasonable excuse for being found in possession of the goods and so the penalty should be reduced to nil.

Ground 1: The Assessment

The 2008 Directive

21. The 2008 Directive sets out the general arrangements for excise duty. Recital 8 records that it is necessary to make clear, amongst other things, who is liable to pay excise duty. The operative part of the 2008 Directive provides that excise duty becomes chargeable at the point that goods are released for consumption in a Member State (Art 7). Release for consumption includes any departure, including irregular departure, from a duty suspension arrangement; the person liable to pay the excise duty that has become chargeable is the person who holds the goods; where several persons are liable, they are jointly and severally liable (Art 8). Where excise goods have already been released for consumption in one Member State and are held for commercial purposes in another Member State in order to be delivered or used there, they are subject to excise duty and excise duty is payable in that other Member State (Art 33.1).

22. Art 33.3 is in point in this appeal. It provides as follows:

> "The person liable to pay the excise duty which has become chargeable shall be, depending on the cases referred to in paragraph 1, the person making the delivery or holding the goods intended for delivery, or to whom the goods are delivered in the other Member State."

23. The 2008 Directive repealed EC Council Directive 92/12/EEC (the "1992 Directive"). But Articles 32 to 34 of the 2008 Directive do not substantially amend the earlier provisions contained in Articles 7 to 9 of the 1992 Directive, and it is established that case law interpreting the 1992 Directive is applicable also to the interpretation of the 2008 Directive (see Case C-315/12 *Metro Cash & Carry Danmark ApS v Skatteministeriet* at [42]).

24. The CJEU confirmed that the aim of the 1992 Directive (and, it is to be inferred, the 2008 Directive) is to harmonise the levying of excise duty throughout the EU and to ensure that similar rules are applied in all Member States (see Case C-165/13 *Stanislav Gross v Hauptzolamt Braunschweig* at [17]).

Domestic Legislation

25. Section 1 of the Finance (No. 2) Act 1992 provides that regulations may be made to implement the 1992 Directive and its successor, the 2008 Directive (see *CCE v B&M Retail Ltd* [2016] UKUT 0429 (TCC) at [29]). Section 1(4) provides as follows:

> "(a) specifying the person or persons on whom the liability to pay duty is to fall at the excise duty point (being the person or persons having the prescribed connection with the goods at that point or at such other time, falling no earlier than when the goods become chargeable with the duty, as may be prescribed)."

26. The Court considered the meaning of "prescribed connection", as it appears in s 1(4) of Finance (No. 2) Act 1992, in *R v Taylor and Wood* [2013] EWCA Crim 1151, a case which we will consider in greater detail below. The issue raised in that case was whether a past connection with the goods was sufficient for the purposes of s 1(4). Kenneth Parker J said this, giving the judgment of the Court:

> "[20] … It may be that some past connections (such as being the inventor, designer or advertiser of the goods) would be regarded as simply too remote, and so challengeable as being connections outside the scope of what the legislature could have contemplated as a fair and reasonable justification for imposing the relevant liability. However, the invalidity for that reason of a particular past link with the goods is very different from invalidating any link that relates to an act in the past."

27. We are satisfied that the "fair and reasonable justification" identified by Kenneth Parker J as a necessary condition under the statute exists just as much now as it did then. After all, the scheme and purpose of the directive has not changed (see *Metro Cash & Carry*), and the enabling provisions contained in the primary statute (Finance (No. 2) Act 1992) remain the same.

28. The original regulations were the Excise Goods Regulations 1992 (the "1992 Regulations"). But those regulations have been amended and replaced over time. The relevant provisions at the time of *Taylor and Wood* were contained in the Tobacco Products Regulations 2001 (the "2001 Regulations"), regulation 13 of which provided as follows:

> "13. – Person liable to pay the duty
>
> (1)The Person liable to pay the duty is the person holding the tobacco products at the excise duty point.
>
> (2)…"

29. The relevant provisions are currently contained in the 2010 Regulations, regulation 13 of which 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."

Case Law

30. There is no CJEU authority which assists the resolution of this case. In *Gross*, the CJEU confirmed that a person receiving smuggled cigarettes could be liable for the excise duty. The CJEU rejected a more restrictive interpretation which would have limited liability to the first holder of the goods (see [25] and [28] in particular). However, the judgment records that Mr Gross had been sentenced to imprisonment for his part in the taking receipt of smuggled goods (see [10]). He was not, it appears, an innocent. The case does not therefore assist us in determining whether someone who is innocent of the criminal enterprise should be liable for the tax which has been evaded.

31. In Case C-140/04 *United Antwerp Maritime Agencies NV v Belgische Staat* the CJEU emphasised that the decisive criterion for determining the person responsible for customs duty (by reference to different legislation) is the person who 'holds' those goods, who is the person with physical possession at that time. But the CJEU did not examine the issue which arises in this appeal relating to a person without knowledge of the unpaid tax.

32. That issue has been examined by the domestic courts, in two cases of particular relevance, both being decisions of the Court of Appeal Criminal Division. In both, the ultimate issue was the validity of a confiscation order under the Proceedings of Crime Act 2002 ("POCA"), but the resolution of that issue depended on whether the individuals who had been subject to the confiscation orders were, as a matter of law, liable for excise duty which had gone unpaid on smuggled goods. If they were, it could be said that those individuals had "obtained a pecuniary advantage" for the purposes of POCA and so a confiscation order could be made and would be upheld on appeal. If they were not, then they could not be said to have obtained such an advantage and the confiscation orders in each case would have to be quashed.

33. The first case is *Taylor and Wood,* mentioned already. Kenneth Parker J was sitting with Lord Justice Leveson (as was) and Sir David Clarke. The question was whether the appellants, Taylor and Wood, who had used their businesses to arrange transportation of smuggled cigarettes to the UK, were liable for the unpaid excise duty under the 2001 Regulations, then in force. On the facts, neither had ever taken physical control of the cigarettes. Instead, they had arranged for a firm of hauliers, Yeardley, to bring the cigarettes from Belgium to the UK. Yeardley had sub-contracted the job to a Dutch firm, Heijboer. The documentation which accompanied the goods described the goods as textiles and when the shipment was inspected by HMRC officers, it was found that the top four boxes in each pallet contained textiles, but beneath these were further boxes containing cartons of cigarettes, which had not had excise duty paid on them. The Court records at [7] that:

> "No one at Yeardley knew the true nature of the goods that Yeardley would be collecting, transporting and delivering to the United Kingdom, and there is nothing to suggest that Yeardley, or anyone working at Yeardley, would have agreed to transport the relevant load if it had known or suspected that it involved a cache of counterfeit cigarettes."

34. The Court appears to have reached a similar conclusion in relation to Hiejboer's state of knowledge, namely that no one at Heijboer had any idea that the shipment contained counterfeit cigarettes.

35. At [27], the Court listed the issues which arose on the appeal, three of which are relevant to this appeal also:

> "i) Was the appellant a person "liable to pay the duty" under Regulation 13 of the [2001] Regulations? If the answer were no, the appeal must succeed, because the appellant would not have evaded liability to pay duty and would have obtained no pecuniary advantage under POCA .
>
> ii) If the answer to (i) were yes, was the putative basis of liability to pay duty under Regulation 13 compatible with any of the bases of liability set out in Article 7(3) of the [1992] Directive? If the answer were also yes, that would be the end of the appeal because the EU challenge would fall away.
>
> iii) If the answer to (ii) were no, may the United Kingdom nonetheless impose liability to pay excise duty, in the circumstances of this case, on a basis that does not correspond with any basis of liability in Article 7(3)? If the answer were no, the appeal must again be allowed because the EU challenge would have succeeded."

36. Issue i) concerned the meaning of the domestic legislation. On that issue, the Court held as follows:

> "[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."

37. Ms Simor argues that this passage does not assist in the present appeal because the Court's conclusions about Yeardley and Heijboer are *obiter dicta* and therefore not binding on us; but in any event, she says that the case can be distinguished because neither Yeardley nor Heijboer knew that they were carrying cigarettes at all, they thought they were carrying textiles, by contrast with this case where Mr Perfect knew that he was carrying beer. Ms Simor submitted that if Yeardley and/or Heijboer had in fact known that the goods they were carrying were cigarettes, then that would have affected the Court's analysis and each of them would have been found to be liable for the excise duty which was due on the cigarettes.

38. Issue ii) concerned the scheme and purpose of the 1992 Directive, and whether any liability established under the domestic regulations was compatible with the 1992 Directive. In determining the second issue, the Court held:

> "[39] For the same reasons that have already been elaborated in interpreting Regulation 13(1) of the [2001] Regulations, both the language and purpose of Article 7(3) [the predecessor to Art 33 of the 2008 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. 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.

> 40 The same considerations apply to the further basis of liability, namely, "delivery" of the goods. It was Heijboer, as agent of Yeardley, who actually carried the goods. However, Wood, through Events, and Taylor, through TG, made all the arrangements necessary for delivery and controlled the delivery throughout the carriage. Neither Heijboer nor Yeardley knew the true nature of what was being delivered, and were no more than innocent agents. It was the appellants exploiting such innocent agents who in reality effected delivery within the meaning of Article 7(3) of the Directive. The basis of liability under domestic law (causing the goods to reach the excise duty point) rests ultimately on the real and substantial responsibility of the appellants for delivery of the goods to the excise duty point, and that basis corresponds entirely with the alternative basis of liability under EU law."

39. In light of the answers on the first and second issues, issue iii) did not arise (see [41]): the Court having found that the domestic legislation was compatible with the scheme and purpose of the 1992 Directive (in answer to the second issue), it was not necessary to consider the regulations outside that scheme.

40. The Court dismissed the appeal on the basis that Taylor and Wood were both liable for the unpaid excise duty and had therefore obtained a pecuniary advantage, such as to justify the making of a confiscation order against them.

41. The second case is *R v Philip Tatham* [2014] EWCA Crim 226. The judgment of the Court was given by the President of the Queen's Bench Division, Sir Brian Leveson (as he by then was), sitting with Thirlwall J (as was) and Phillips J. The issue again centred on smuggled tobacco on which excise duty had been avoided. The appellant had pleaded guilty to smuggling offences and a confiscation order was made against him, reflecting the Crown Court judge's finding that the appellant was liable for not less than £500,000 of the £2.5 million lost to the Revenue by this criminal enterprise. The confiscation order had been imposed on the basis that the 1992 Regulations applied; in fact, as the appellant subsequently realised, the 2001 Regulations applied at the time of these offences. The appellant argued that the later regulations were different and that they did not impose liability to excise duty on him because his role in the criminal enterprise was limited to being the person who "meets and greets" incoming loads of goods and distributing them; he was not in control of the overall operation.

42. The Court considered whether the 2001 Regulations would have applied to the appellant to render him liable for the unpaid excise duty. The President stated that the 2001 Regulations fell to be construed in light of the 1992 Directive which was at that time in effect (see [21]), and noted that the proper construction of the Directive and its effect on the 2001 Regulations had been considered in a number of cases in the Court of Appeal (see [22]). The principles emerging from those cases could be summarised (see [23]) so far as is relevant for this appeal:

> "a. Mere couriers or incidental custodians, who are rewarded by way of fixed fee and have no beneficial interest in the tobacco, are likely to be excluded from the definition of 'obtaining property' for the purposes of confiscation orders: *May* [48].
>
> …

> d. By way of contrast, 'holding' for the purposes of Regulation 13(1) can be a question of law, and does not require physical possession of the goods, and the test is satisfied by constructive possession. The test for 'holding' is that the person is capable of exercising *de jure* and/or *de facto* control over the goods, whether temporarily or permanently, either directly or by acting through an agent (see *Taylor & Wood*, [28-40]).
>
> e. There is no need for the person to have any beneficial ownership in the goods in order to be a 'holder' (or indeed to have 'caused' their importation). A courier or person in physical possession who lacks both actual and constructive knowledge of the goods, or the duty which is payable upon them, cannot be the 'holder' within Regulation 13(1) - *Taylor & Wood*, [30-31], [35]."

43. The Court concluded that the appellant was liable for excise duty under the 2001 Regulations, and dismissed the appeal. He was 'holding' the goods at the excise point, because he was the consignee of deliveries to the UK which gave him legal possession (see [37]). The Court also concluded that the appellant had constructive possession of the goods at the time of excise duty evasion (see [40]).

44. We note that these two cases are themselves the product of a long line of domestic authority relating to confiscation orders where tax has been evaded. Other cases in this line are *R v May* [2008] UKHL 28, [2009] 1 AC 1028; *R v Mitchell* [2009] EWCA Crim 214; *R v White* [2010] EWCA Crim 978; and *R v Bajwa* [2012] 1 WLR 601. The concept of an innocent agent appears to derive from the first of those cases, *R v May*, where Lord Bingham, in a single speech on behalf of the Judicial Committee, provided guidance on confiscation orders under POCA in an End Note at [48], the concluding sentences of which stated (with emphasis added):

> "… (5) In determining, under the 2002 Act, whether D has obtained property or a pecuniary advantage and, if so, the value of any property or advantage so obtained, the court should (subject to any relevant statutory definition) apply ordinary common law principles to the facts as found. The exercise of this jurisdiction involves no departure from familiar rules governing entitlement and ownership. … (6) 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**. It may be otherwise with money launderers."

45. We were also shown two cases where the issue of liability has been considered outside the context of confiscation orders.

46. The first is *Greenalls Management Ltd v Customs and Excise Commissioners* [2005] UKHL 34, [2005] 1 WLR 1754. In that case, the authorised warehouse keeper was liable for excise duty even though the goods had fraudulently become available for

consumption after he had released them from the warehouse: the fact that his connection with the goods lay in the past did not mean that it could not be prescribed as a ground for liability (see [30]). The Court (per Lord Hoffman) concluded (at [34]) that:

> "In my opinion, however, the words are clear enough. Once one rids oneself of *a priori* assumptions about what they should mean and illusory questions of *vires*, there is no problem about allowing them to mean exactly what they say."

47. The second is *McKeown*. In that case, the Upper Tribunal (Tax and Chancery Chamber, Judges Bishopp and Sinfield) ("UT") considered the position of lorry drivers found to be carrying excise goods on which duty had not been paid. It was a joined hearing of three appeals by self-employed lorry drivers based in Northern Ireland who had been stopped by the UK Border Force at Dover, each found to be carrying substantial amounts of alcoholic beverages in their lorries on which duty had not been paid. In all three appeals, the FTT had found that the drivers had not been innocent parties to the importation of alcoholic products without payment of excise duty. The UT concluded:

> "[66] A person who has de jure and de facto control of goods but who lacks both actual and constructive knowledge of them and the fact that duty is payable on them, cannot be said to be 'holding' the goods for the purposes of reg 13. In these cases, however, it was not disputed that the Appellants knew the nature of the goods they were carrying and that they were subject to excise duty. In Mr McKeown's case the FTT made an express finding that he knew that the duty had not been paid. There is no equivalent finding in the other decisions but it can readily be inferred that the tribunals had reached the same conclusion from the finding in Mr Duggan's appeal that he was not an innocent party to the transportation of the goods and, in Mr McPolin's case, that he had not behaved as an innocent driver would have done. Moreover, Mr McNamee accepts that the tribunals made findings of fact that the Appellants were knowingly concerned in the fraudulent evasion of duty. There is no challenge to those findings …"

48. Two points arise in *McKeown* which require clarification. The first relates to the UT's suggestion (also at [66]) that there might be a conflict between *Tatham* and *Taylor and Wood,* because in *Tatham* the Court did not distinguish between an innocent agent, on the one hand, and a person who has guilty knowledge on the other. The UT recognised that this might have been because there was no dispute that Mr Tatham was knowingly concerned in fraudulent evasion of duty – and therefore possessed guilty knowledge - but suggested that alternatively it may be because the Court of Appeal in *Tatham,* unlike the Court of Appeal in *Taylor and Wood*, did not consider that guilty knowledge is relevant in determining whether a person is 'holding' excise goods for the purposes of reg 13; the UT did not resolve the issue because it was not necessary for the disposal of the appeals before it to do so: see [66]. We are satisfied that there is no conflict between *Tatham* and *Taylor and Wood;* indeed, neither party submitted to us that there was, and we note that the President of the Queen's Bench Division was a member of the constitution of both courts meaning that unexplained inconsistency would be an unlikely conclusion. We are sure that the first of the UT's explanations is correct: there was no question of Mr Tatham being an innocent agent, because he had pleaded guilty, and that

is why the court did not examine the term "innocent agent" in his case. The Court clearly recognised that a person who is innocent will not be liable for the tax: see paragraph 23e. set out above.

49. The second point to clarify is at [58] of *McKeown* where the UT records the concession by Ms Simor, appearing for HMRC in that appeal too, that

> "… persons who, despite having physical possession of the goods, are not aware (and should not have been aware) that they are in possession of such goods are not 'holding' the goods for the purposes of reg 13".

Ms Simor told us that her concession in that case had only gone as far as her concession in this case, namely that persons unaware of the *nature* of the goods (ie that they were excise goods) are not 'holding' the goods for the purposes of regulation 13. Lest it be thought otherwise, we were assured that HMRC's case before the UT in *McKeown* was identical to HMRC's case before us.

Meaning of Innocent Agent

50. The words 'delivery' and 'holding' as they appear in regulation 13 are words which appear in the 2008 Directive (and in the 1992 Directive which came before). They represent independent concepts of EU law which must be accorded an EU-complaint meaning.

51. The Court of Appeal has considered what those words mean on several occasions. The Court of Appeal recognises that a person can 'hold' the goods for the purposes of the regulations even though he or she has no beneficial interest in them, and even though he or she may not be in physical possession of them, so long as he or she is capable of exercising de jure and/or de facto control over them, whether temporarily or permanently, either directly or through an agent. This is to construe the word 'holding' (and by necessary extension, the word 'delivery') broadly. However, the Court of Appeal has confirmed that a person who lacks actual and constructive knowledge will not 'hold' the goods for the purposes of the regulations. This is to recognise that the broad words are subject to an exception for those who are "innocent agents".

52. Ms Simor accepts that there is an exception, in line with the domestic authorities. That is, in one sense, to accept that the words of the 2008 Directive do not impose strict liability at all.

53. The appeal turns on what innocence means in this context. Ms Simor argues that, properly understood, the innocent agent exception only extends to those cases where the agent has no knowledge (actual or constructive) of the *nature* of the goods as excise goods; so, she says, if the agent knows the nature of the goods, and specifically that he or she is carrying goods of a kind which is subject to excise duty, then the agent "knows the risks" and will be fixed with liability, if it turns out that the duty on those goods has gone unpaid. The logical consequence of Ms Simor's argument is that a driver who knows that he or she is carrying excise goods can never be immune from liability for any excise duty which goes unpaid on those goods, albeit jointly and severally liable alongside others who may also be within the scope of the regulations. Thus, she says, *Taylor and Wood* can be explained: Yeardley and Heijboer did not know they were carrying cigarettes at all and thought they were carrying textiles; that is why they were

"innocent agents". Had they known that they were carrying tobacco products, they would have been liable for the unpaid tax.

54. Mr Bedenham challenges that submission. He says that the concept of the innocent agent extends to anyone who lacks actual or constructive knowledge of the *criminal enterprise* in relation to the goods (i.e. the attempt to evade tax on the goods), regardless of whether that person knows that the goods he or she is carrying are of a kind which is subject to excise duty in the first place.

55. We accept Mr Bedenham's submissions and reject Ms Simor's interpretation of "innocent agent". That is for a number of reasons. First, the domestic case law does not support her submission. Most obviously, paragraph 23 e. of *Tatham* (see above) states in terms that a person who lacks both actual and constructive knowledge of the goods *or the duty which is payable on them* cannot be the 'holder' for the purposes of the legislation even if that person is in physical possession. Contrary to Ms Simor's submissions, we consider this passage to be clear in its meaning. Certainly, it extends to a person who is carrying the goods without knowing their nature (like Yeardley and Heijboer in *Taylor and Wood*). But it goes further. It extends to a person who does not know – either actually or as a matter of constructive knowledge – that there is duty due on the goods he or she is carrying which has gone unpaid.

56. We reject the submission that *Taylor and Wood* would have been decided differently if either of Yeardley or Heijboer had known that they were carrying cigarettes, not textiles. The answer would have been the same, assuming on the altered facts that they knew they were carrying cigarettes but did not know or have reason to know that the duty was unpaid. As Kenneth Parker J emphasised, the regulations are aimed at imposing liability on those who are responsible for the goods (see [31] and [34]), which on the facts of that case included Mr Taylor and Mr Wood; neither Yeardley nor Heijboer was 'responsible' for the goods in the sense intended by the Court, they were simply bailees who had actual possession at the excise point, as innocent agents (see [31]). The Court's reasoning would have been no different on the altered facts: Yeardley and Heijboer would still have been "entirely innocent agents" being exploited by Taylor and Wood who bore the "real and substantial responsibility" for the goods and their delivery (see [39] – [40]).

57. Secondly, such an interpretation is consistent with the scheme and purpose of the 2008 Directive. We accept, of course, that the 2008 Directive must be interpreted in a manner which complies with EU law principles, including the principles of fairness and proportionality. That is a point echoed by s 1(4) of the Finance (No. 2) Act 1992, which permits regulations which specify the person to be liable where the "prescribed connection" is established, in relation to which this Tribunal is required to have regard to the scope of what the legislature contemplated as a "fair and reasonable justification" for imposing the liability (see *Taylor and Wood* at [20]). We do not accept that it is fair, proportionate or reasonable to impose liability for evaded excise duty on HGV drivers who are found in possession of the goods at the point that the evasion is discovered, but who lack any involvement in or knowledge of the criminal enterprise; they are not aware that tax has been evaded on the goods they are carrying, and nor can it be said that they should have been aware. To impose liability on those drivers simply because they are in possession of the goods at the time that the fraud is discovered, but without knowledge of what has occurred or is intended, is neither fair nor proportionate. The

suggestion by Ms Simor that any unfairness or lack of proportionality in the application of the regime could be mitigated by HMRC, as the taxing authority, exercising discretion in individual cases, does not meet the point: the exercise of discretion in individual cases is not to be confused with the need for the system to be fair and proportionate in its application to all. In any event, HMRC do not intend to exercise discretion in Mr Perfect's favour, so the fact that HMRC has discretion in individual cases does not avail him.

58. Thirdly, and in any event, we consider ourselves bound by Court of Appeal authority as to the meaning of the 2008 Directive. In *Taylor and Wood,* the Court concluded that to impose liability on entirely innocent agents would run contrary to the objectives of the directive and the domestic legislation (see [39]). We agree, for reasons given above. We therefore decline Ms Simor's invitation to depart from the Court of Appeal's conclusions in that case. With respect, we consider the Court of Appeal has got its EU law analysis right.

Burden of Proof

59. There is a potential issue about who should bear the burden of proof in a case where an appellant argues that he or she is an innocent agent. Ordinarily the burden of proof in the FTT lies on the appellant, to the civil standard. There are obvious difficulties in requiring appellants to prove a negative proposition, namely that they had no knowledge, actual or constructive, of the criminality in which they had become involved.

60. Ms Simor asks us to address and determine this issue. Mr Bedenham invites us not to, because it does not arise in this case where the FTT made clear findings of fact that Mr Perfect lacked both actual and constructive knowledge of the tax evasion, without finding it necessary to analyse where the burden of proof lay.

61. We agree with Mr Bedenham. In order to dispose of this appeal, it is not necessary to determine where the burden of proof lies. We note that the same can be said for a number of other FTT cases which we have been shown, where similar issues have been litigated and factual findings made without the FTT suggesting that the burden of proof has caused them any difficulty (indeed, the first instance decisions appealed in the *McKeown* cases would stand as illustrations). We leave the issue for resolution, if necessary, in another case, where it is material.

Conclusion, Ground 1

62. In summary, we conclude that HMRC's interpretation of the 2008 Directive is not supported by authority or legal principle. The exception from liability, established by the case law, for those who are "innocent agents", extends to those who lack any knowledge (actual or constructive) of the fact that the goods are or will be duty unpaid. Such persons are not 'making the delivery' or 'holding' the goods for the purposes of the 2010 Regulations.

63. We do not consider that there is any need to refer a question to the European Court under Art 67 of the Treaty. We note that no previous court considering similar questions has considered it necessary to make a reference, and that HMRC does not

invite a reference if we are against them. For the reasons given, we consider the matter to be clear as a matter of EU law.

64. In terms of the consequences of this decision, we wish to return to the FTT's approach to the facts of this case. The FTT plainly considered that there were other questions which HMRC could have asked of Mr Perfect, and other lines of inquiry HMRC could have pursued. If HMRC had made greater efforts to find those who were really and substantially responsible (in the sense used by Kenneth Parker J in *Taylor and Wood*) for the evasion of the tax, then the outcome of this case might have been different, either because HMRC would have been able to track down and pursue those individuals; or because, if Mr Perfect had refused to cooperate or had disclosed greater knowledge about what had occurred, the FTT may not have been persuaded that he was, after all, entirely innocent. This is not in any way to cast a shadow over the FTT's findings of fact or over Mr Perfect's innocence; it is just to note that HMRC are not powerless to prevent tax evasion of the type which occurred here.

65. The appeal in relation to the assessment is dismissed.

Ground 2: the Penalty

66. 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 P acquires possession of the goods or is so concerned, a payment of duty on the goods is outstanding and has not been deferred."

67. Liability does not arise if the act or failure giving rise to the penalty is not deliberate and the person satisfies HMRC (or the tribunal on an appeal) that there is a reasonable excuse for the act or failure, see paragraph 20 which provides as follows:

> "(1) Liability to a penalty under any of paragraphs 1, 2, 3(1) and 4 does not arise in relation to an act or failure which is not deliberate if P satisfies HMRC or (on appeal) the First-tier Tribunal that there is a reasonable excuse for the act or failure.
>
> (2) For the purposes of sub-paragraph (1)—
>
> (a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,
>
> (b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the relevant act or failure, and
>
> (c) where P had a reasonable excuse for the relevant act or failure but the excuse has ceased, P is to be treated as having continued to

> have the excuse if the relevant act or failure is remedied without unreasonable delay after the excuse ceased."

68. The FTT appears to have assumed that the discharge of the assessment necessarily led to the discharge of the penalty (Decision, [65]). But that did not reflect the position of either party before the FTT. The parties had in fact agreed that the penalty regime in Schedule 41 operated independently of the excise duty liability regime, and that in consequence Mr Perfect *could* be subject to a penalty even if he was not liable for the unpaid excise duty. We were surprised to be told that a person who bears no liability for the unpaid excise duty, because he or she was an innocent agent, could nonetheless be subject to a penalty for carrying the goods. But for reasons set out below, we did not consider it necessary or appropriate to investigate the proposition further: we simply accepted it.

69. On the facts, Mr Bedenham submitted that the FTT was correct to discharge the penalty but acknowledged that it had done so on a basis which was not correct in law. He invited us to remake the decision ourselves to reach the same end point of allowing the appeal against the penalty, on one of two possible bases. First, he argued that the FTT's finding that Mr Perfect was an innocent agent was a sufficient basis on which to conclude that Mr Perfect had not acquired possession of the goods or otherwise dealt in the goods, in the manner required by paragraph 4(1)(a). He accepted that this argument, in effect, amounted to a submission that paragraph 4(1)(a) was to be read as being subject to the same 'innocent agent' exception as applies in the context of the 2010 Regulations. His second, alternative argument was that the FTT's finding that Mr Perfect was an innocent agent provided an ample basis on which to allow the appeal against the assessment, on the different route of reasonable excuse within paragraph 20. Ms Simor does not suggest that it was not open to the FTT to consider reasonable excuse or that it was not open to the FTT to discharge the penalty on that basis.

70. We are persuaded that there is merit in Mr Bedenham's alternative submission which relies on paragraph 20. On the facts of this case, noting the FTT's findings of fact, we conclude that Mr Perfect did have a reasonable excuse for having acquired possession of the goods or otherwise dealing in them.

71. In the circumstances, we do not need to determine Mr Bedenham's first submission. We would simply note that the proposition which underpins it, that a person who has been found to be an innocent agent for the purposes of the 2010 Regulations should be excluded as a matter of law from the class of persons to whom paragraph 4(1)(a) applies, involves issues relating to the scope and purpose of Schedule 41 which would require careful analysis. It is appropriate to leave that point for argument in another case, if needs be.

72. We accept, as is common ground, that the FTT was in error in allowing the penalty appeal for the reasons it gave.

73. Section 12 of the Tribunals, Courts and Enforcement Act 2007 sets out this Tribunal's powers to remedy an error of law by the FTT. We consider it appropriate in the circumstances to set aside the FTT's Decision in so far as the FTT purported to discharge the penalty on a ground which was wrong in law (s 12(2)(a)) and to re-make the decision (s 12(2)(b) and s 12(4)(a)). It is not necessary to make any further findings of fact (s 12(4)) because the FTT's findings are sufficient.

74. We conclude that the appellant has demonstrated a reasonable excuse for his act (namely the act of carrying the goods or keeping or otherwise dealing with them). It was that act which triggered the penalty under paragraph 4, Schedule 41. His reasonable excuse was that he was innocent of any wrongdoing and lacked any knowledge, actual or constructive, of the criminal enterprise to smuggle excise goods.

Conclusion

75. This appeal is allowed to the limited extent of setting aside the FTT's Decision to discharge the penalty. However, we remake the decision to same effect and discharge the penalty. We dismiss the appeal in all other respects.

Mrs Justice Whipple **Ashley Greenbank**
Upper Tribunal Judge

RELEASE DATE: 8 December 2017