[2016] UKFTT 153 (TC)

TC04939

Appeal number: TC/2014/01842

EXCISE DUTY - Excise Goods (Holding, Movement and Duty Point) Regulations 2010 Regulation 13 - Assessment in relation to seized goods - Whether the appellant driver of the vehicle was liable for the assessment - No - Appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR NOEL CHRISTOPHER MURRAY **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL
MR ANTHONY HENNESSEY FCA

Sitting in public at Tribunal Hearing Centre, Royal Courts of Justice, Chichester Street, Belfast BT1 3JF on 19 August 2015

Mr Danny McNamee, of McNamee McDonnell Duffy Solicitors LLP, for the Appellant

Ms Joanna Vicary, of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal against an assessment for excise duty issued on 19 November 2013 pursuant to section 12(1A) of the Finance Act 1994 and Regulation 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ('the 2010 Regulations') in the sum of £22,794.

2. A statutory review was requested. A review was carried out, and by letter dated 6 March 2013 (but obviously intended to refer to 2014) the decision was upheld by Officer Kinnaird.

Background

3. Mr Murray is a self-employed lorry driver.

4. On 2 May 2013 he was stopped by UK Border Force ('UKBF') at Dover Eastern Docks upon arrival from Calais. He was driving a lorry registration MV54 CJE with a trailer marked SRK111. The cab was liveried 'Beattie Transport'. The trailer was found to contain approximately 22,000 litres of beer and 1,920 litres of cider (together, 'the Goods').

5. The appellant had a number of documents with him. One was a Delivery Note numbered DEL000026 dated 30 April 2013 referring to a load of 26 pallets, being 24 pallets of beer and two pallets of Strongbow cider. That was issued by 'Ess Key' in Liege, and the destination address was Medway Bond in Medway, to the account of 'Ingini'. That appears at page 90 of the bundle.

6. The second document was a Cross Movement Record (CMR) numbered EDD 26 appearing at page 84 of the bundle. It was issued on 30 April 2013 in Liege. It related to 1858 cases of beer and 160 cases of wine (that is, it made no mention of cider). The destination was said to be Medway Bond and Storage Co Ltd, on account of 'Ingini'. The transporter was said to be Sanore Logistics of Dublin. The trailer was SRK111. The Administrative Reference Code (ARC) number, which is a unique number generated by a European-wide system, ended 'GI1'.

7. The Electronic Administrative Document (e-AD) at pages 85 to 89 inclusive of the bundle referred to the same ARC number: ending 'GI1'. The e-AD did not include any wine, but did include some Strongbow cider.

8. The Appellant was interviewed. He stated that he had driven out that morning through the tunnel. He had not seen the Goods loaded, but he knew that the load was beer. He had swapped trailers in Calais. He did not know whether the trailer was sealed. He had not looked. He was asked if he worked for 'Beatties', to which he said yes. He had £35 in his pockets.

9. After the officer conferred with the Revenue Fraud Detection Team, the appellant confirmed that he had travelled the same route on the previous day, 1 May

2013. He was asked if that had been with beer, and he said yes. He had taken it to the Titon Truck Stop in Purfleet. He could not remember the trailer number, other than it was 'LF something'. He did not have any paperwork for that load. He said that he had given it to the driver who took the trailer off him. The appellant was co-operative and signed the Officer's note book. The Officer made a note that it was 'suspected' that the ARC 'has been re-used'.

10. The Goods, trailer and cab were seized. The Goods were eventually duly condemned as forfeit to the Crown.

11. The decision letter stated that UKBF officers '*believed your paperwork was a duplicate and had been used on at least one occasion, you could not provide any evidence to dispute this*'.

The parties' cases

12. The Grounds of Appeal dated 3 April 2014 were very short. They were, in full, put thus:

> "The Appellant was simply the driver of this vehicle and as such had no interest in or control over the vehicle or its goods.
>
> He was at all times of the view that this load was legitimate and has never been involved in the evasion of duty".

13. Notwithstanding the brief and relatively uninformative way in which the Grounds of Appeal were put, the Appellant's case was developed further. It was said that there was no factual or evidential basis (as opposed to speculation) upon which UKBF could have formed the opinion that the documentation which the appellant had with him had been used on his previous journey. It was asserted that there was no evidence that the ARC was not properly issued, nor was there any evidence of it having been previously used or issued in relation to any other goods.

14. In any event, the appellant denied, as a matter of fact, that the paperwork had been used in relation to the load which he had carried on the previous day. He argued that there was nothing suspicious in his not having retained paperwork for the previous day's load, on the basis that it was common practice in the industry for the paperwork to remain with the load, and not with the driver.

15. He denied that he was a person who was 'holding' the Goods for the purposes of the 2010 Regulations. He denied that he was personally liable for the Goods.

16. HMRC's case is that the decision should be upheld and the appeal dismissed. In broad terms, HMRC seeks to rely on the decision on the Court of Appeal in *HMRC v Jones [2011] EWCA Civ 824*, and *HMRC v Nicholas Race [2014] UKUT 0331*, with the effect that the Goods were 'duly condemned as forfeit' pursuant to Paragraph 5 Schedule 3 of the Customs and Excise Management Act 1979 (CEMA) with that forfeiture being a conclusive determination on the question of liability to forfeiture. HMRC contended that the Goods had been brought from France into the UK, and, as such, were released for consumption in another Member State and held for a

commercial purpose. HMRC argued that, pursuant to Regulation 13(1) of the 2010 Regulations, a duty point had thereby arisen.

17. It was said that the Appellant did not resile from the fact that he was delivering the Goods; and accordingly, since he was found in physical possession of them at the point when the duty point arose, he was liable to pay the duty pursuant to Regulation 13(2) of the 2010 Regulations as he was making delivery and/or holding the same.

18. Further or alternatively, it was contended that the Appellant either knew, or should have known, that the contents of his load were not duty paid.

The evidence

Mr Murray

19. Mr Murray made a witness statement dated 13 April 2015. In essence, he stated that he was at all times acting in good faith as a casual driver in relation to the goods, and had no proprietorial or other beneficial interest in the Goods. He stated that he was not holding the Goods for the purposes of the legislation.

20. Mr Murray gave evidence on oath. Although his representative Mr McNamee had assisted him in drafting his witness statement, he understood it and agreed that its contents were true. He was a casual self-employed driver, who would get work and take it. He had been a driver for more than 20 years. He had never had a written contract, even when he had been driving as an employee.

21. He had driven a load from Calais to Dover on 1 May 2013 and had not been stopped.

22. He made the same journey on 2 May 2013, using the same vehicle. He understood that the Respondent was querying whether he had used the same paperwork on two trips, but he said 'that was definitely not the case'. He had not produced any paperwork in relation to the first trip because the paperwork had gone with the goods from that trip. He had tried to get hold of the paperwork from that load, but could not get in contact. He tried to get into contact with 'a guy called Fergal' who was the man who had phoned him up to collect the load. He did not have a clue what his surname was. He had originally had his phone number, but he had not got it any more, having lost two phones since then, and, with them, the numbers on them. He had not contacted his mobile phone provider to try to get his phone bills so as to get the mobile number. He said that he had tried to get the paperwork of the other load but not be able to get it. As he put it, he felt that his inability to produce that paperwork meant *'he had lost before he had even started'*.

23. He knew that the load contained alcoholic drinks. He accepted that when he had been stopped and asked what he was carrying he had said 'beer'. He would check his load and paperwork every now and again. He was asked whether he would check that the paperwork matched the load, and said that he sometimes would check but sometimes wouldn't check.

24. He had said that he was working for 'Beattie Transport', which was the livery on the vehicle, but he did not know that Beattie Transport Ltd had gone into liquidation on 14 December 2012.

25. He had not heard of 'Ingini'.

26. He had received the letters from HMRC, but, given that the Goods had been seized, he just ignored the letters, thinking - wrongly - that the matter would disappear, since it had nothing to do with him. It was put to him that the review was very much to do with him since he was a person being asked to pay nearly £23,000. His answer to that was that he had not really realised the gravity of the situation until he had talked to other people and was told to seek legal advice.

Officer Barr

27. Officer Barr issued the assessment on 19 November 2013.

28. On 23 October 2013, he had carried out a post detection audit. As he put it, the Goods were seized due to the fact that the appellant and the lorry had travelled previously into the UK, manifested as alcohol, within the lifetime of the ARC (which began on 30 April 2013). As he put it in his witness statement, this '*meant that the ARC had potentially been used twice. I have not seen any paperwork for the previous trip which would prove otherwise'*. We have added the emphasis-

29. Whilst Officer Barr was aware of the explanation which the appellant had given when interviewed, he *'came to the conclusion that it is not likely that a professional lorry driver would not have any paperwork which clearly shows the genuine nature of the movement of excise goods which he was involved in only the day before'*.

30. Officer Barr made two further criticisms of the appellant: (i) that he had not seen the trailer being loaded, and (ii) that he did not know whether the trailer was sealed because he had not looked. Officer Barr remarked: "*I took this answer into consideration during my investigation and I found it particularly unusual that a professional lorry driver who is about to import high risk excise goods into the UK does not make this kind of basic observation*."

31. Officer Barr sent Notices of Seizure to ESS Key, Medway Bond, Sanore Logistics, and Beattie Transport Ltd, but there were no responses on record. That in turn - in effect, by a process of elimination - led him to believe that the person responsible for the delivery into the UK could only be the appellant and/or Beattie Transport. At this point, we note that the Notice of Seizure sent to Beattie Transport Ltd was sent to an address in Lisburn, and was not sent to the company's address care of its liquidator in Belfast, which was a matter of public record. Hence, there is no reason to suppose that the Notice of Seizure ever reached Beattie Transport Ltd.

32. Officer Barr stated that the importer 'was a company by the name of Ingini Ltd', but he had not been able to establish the existence of any such company.

33. Officer Barr conducted a search for Beattie Transport Ltd. and discovered that the company had entered liquidation on 14 December 2012 '*and therefore could not have been employing Mr Murray*'.

34. The cab was discovered to have been registered off road in 2012.

35. On 24 October 2013, Officer Barr wrote to the appellant explaining that, at that point in his enquiries, he believed that the appellant could be liable as he was a person holding the goods. No response was received from the appellant, which to the Officer's mind *'added more weight (on the balance of probabilities) to the argument that if Mr Murray is unable to tell me who he was working for then it is indeed Mr Murray who was making the delivery of the goods at the time of the importation'.*

36. This all led to the following conclusion, set out at Paragraphs 17 and 18 of the Officer's witness statement:

> "As Beattie Transport could not have employed Mr Murray and they did not own the vehicle then they could not be involved. As there had been no response to the seizure letters issued to the parties named on the commercial documents and the fact that no one came forward to claim the goods or the vehicle, then I concluded that there was no evidence which shows me who Mr Murray was working for. Evidence did tell me however that Mr Murray had already transported alcohol using the same ARC so I concluded that he knew he was transporting alcohol and he knew that it was not moving under a suitable duty suspense arrangement and therefore this knowledge makes him liable as a person holding the goods and making the delivery of the goods. This led me to the conclusion that Mr Murray was the person holding the goods and the person making the delivery of the goods into the UK as per Part 2 Regulations 13(1) and 13(2) of the [2010] Regulations"

37. The part underlined is to supply emphasis. We note that Officer Barr shifted position, even in the course of his witness statement, from a suspicion ('potentially') that the ARC had been used twice to the bare assertion that 'Evidence did tell me that Mr Murray had transported alcohol using the same ARC'.

38. Most significantly, we have not seen, nor had presented to us, the 'evidence', referred to by Officer Barr, that the ARC had been used twice.

39. Officer Barr gave oral evidence and was cross-examined. He explained that the re-use of ARCs was a common technique for smuggling if an ARC was not checked when a load came into the UK. He considered that the fact that the appellant had already entered the UK once in the lifetime of the ARC (that is, on 1 May 2013) suggested just that scenario.

40. He agreed that the ARC had been issued on 30 April 2013, but there was nothing to show the period of duty suspension - that is, the period within which the goods could be moved under that ARC. He placed heavy reliance on the fact that there was no wine in the load, contrary to the Delivery Note. He was critical that the

appellant had not made any checks on the load, 'which could have been absolutely anything'.

41. He had not personally made any checks with the bond to ascertain whether they did issue any duty suspension document under that ARC number.

42. He had not checked with the purchasers identified on the e-AD to see if they had indeed purchased, and he did not know whether UKBF had checked. He did not know whether any checks had been made to establish whether the e-AD was legitimate.

43. He referred to the redactions which had been made on the documents showing Mr Murray's journeys on 1 May 2013 and 2 May 2013. He said that those showed who had paid for the shipping of the goods - that is, who had paid for the appellant and lorry to go onto the ferry. But he did not identify those persons. His answer was that this was 'a third party'. He did not say whether Notices of Seizure had been sent to that 'third party'. Nor did he outline the process whereby it was deemed appropriate to exclude that third party from inquiries.

44. In his view, he had felt that the best way was to focus on the appellant who, in his view, for the reasons already set out, had been holding the Goods.

The Law

45. We respect and apply the decisions of the Court of Appeal in Jones, and of the Upper Tribunal in Race. But, in this case, there was no challenge by the appellant to the fact that the Goods had been lawfully seized, nor to the fact that the Goods were for commercial and not personal use. The Appellant is not relying on the duty paid status of the Goods.

46. We agree with Counsel for the Respondent that we do not have jurisdiction 'to go behind the decision on commerciality and consequential forfeiture'. But this appeal does not concern commerciality or forfeiture. It concerns whether the appellant was holding the Goods or not.

47. As to 'holding', on our reading of the authorities cited to us, we derive the following principles:

(1) A person owning or having control, whether directly or through another, of smuggled goods with the intention of asserting such 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 (see Taylor and Wood [2013] EWCA Crim 1151 at [29]);

(2) A person having physical control of smuggled goods, and sharing possession of those goods with the person mentioned in (1) above may (depending on the circumstances) 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 (Taylor v Wood, loc. cit, at Para [31]);

(4) Actual or constructive knowledge of physical possession of smuggled goods might be sufficient to constitute 'holding' for the purposes of Regulation 13 so as to deprive such a person of status as an 'innocent agent' (for example, if there were actual knowledge that the goods were goods in respect of which duty had not been paid).

Discussion

48. Mr Murray struck us as an honest, if somewhat hesitant, witness. We did not find him to be evasive. He answered the questions which he was asked.

49. We accept his evidence that he had not moved two successive loads - 1 May 2013 and 2 May 2013 - under the same ARC. He was clear in his denial that he was involved in smuggling this load. We likewise accept his evidence as to his having handed over the previous load, together with the paperwork for it, at Titon to the driver with whom he made a swap on 1 May 2013. We find it credible that the papers would accompany the load.

50. We do not consider, applying the above tests, that Mr Murray was anything other than an innocent agent. There was no evidence that he had any interest of his own in the Goods other than to collect and deliver them. He was not the owner of the vehicle. We do not accept that just because Mr Murray knew that he was carrying alcohol potentially subject to excise duty deprives him of that status.

51. The same analysis applies to whether he was making delivery of the goods within the meaning of Regulation 13(2)(a).

52. We are troubled by the Respondent's case, which, stripped down to its basics, is that more than one load of goods had been moved under the same ARC. This is a matter upon which the Respondent bears the burden. We do not consider that we are barred from considering this feature by virtue of the deeming provisions relied upon by the Respondent.

53. For the reasons which we set out below, we consider the Respondent's analysis to have been fundamentally flawed. It led, via a process of reasoning which is not now entirely easy to unravel, to the conclusion that Mr Murray was not an innocent agent, when in fact he was.

54. We note that Officer Barr himself had initially expressed what can only be regarded as a degree of doubt in this regard. When conducting his post-detection audit he could not go further than saying that the ARC *'had potentially been used twice'*. Officer Barr was driven in the course of cross-examination to agree (as it seems to us, in fairness, he had to) that was a theory, which had originally come from UKBF. He had adopted that theory and his decision to impose a penalty was based on it.

55. The key feature which Officer Barr took into account in concluding that the ARC had been used twice was that it was *'not likely that a professional lorry driver would not have any paperwork which clearly shows a genuine nature of the movement of excise goods which he was involved in only the day before'*. We respectfully disagree, for the reasons which we have set out above.

56. The heart of the matter is that there was simply no evidence that the ARC had been used previously. In the absence of any evidential basis expressed for the conclusion, then it does not amount (with respect to Officer Barr, or to the UKBF officers who had come before him) to anything more than opinion. It may well be entirely correct that smuggling is facilitated by repeated use of the same ARC, or indeed by the use of duplicate ARCs.

57. However, there was no evidence in this case (whether of a documentary or a real character) that this ARC had been used twice. We were not addressed on whether any steps had been taken to explore this point. In short, it was no more than a theory (flowing from a general theory about the mechanics of smuggling) that this ARC had been used twice. There were no hard facts against which that theory could be tested in this case.

58. Therefore, in our view, there was no evidence that the ARC had been used twice within its lifetime so as to justify the conclusion which had been arrived at.

59. We also note that the decision letter asserted that *'UKBF officers believed your paperwork was a duplicate and had been used on at least one occasion you could not provide any evidence to dispute this'*. This, in substance, appears to be a different allegation: that is, not an allegation that the same paperwork had been used twice, but an allegation that the paperwork had been duplicated, with (presumably) two identical ARCs in existence at one time, with (presumably) one set going off with one load (which need not have been the load of 1 May 2013 at all) and the other set being in the hands of the appellant on 2 May. In our view, this exposes an imprecision going right to the heart of the Respondent's case, namely the use to which this ARC had been put, and whether the use to which it was being put on 2 May 2013 was unlawful.

60. Whilst there was apparently an inconsistency between the Delivery Note and the CMR, insofar as the CMR referred to wine when the Delivery Note did not, we are not sure where this takes the respondent given that the bulk of the load - 24 or 26 pallets - was beer. There was no evidence as to the manner in which the pallets were loaded, packed, or wrapped. There was no evidence that the Appellant should have known that the load contained some wine.

61. Officer Barr wrongly treated Ingini as Ingini *Ltd*. However, there was nothing to indicate on the Delivery Note that Ingini was a legal person (such as a limited company) as opposed to a trading name, a partnership, or a natural person or sole trader. Officer Barr accepted in cross-examination that some checks (which he did not expand upon) had been done on the name 'Ingini' but he was not '100% sure' how the belief that it was a limited company 'came to be a permanent fixture'. There was no evidence that Medway Bond had been asked to identify the account holder.

62. The conclusions as to the existence and role of Beattie Transport Ltd were not sound. The company had indeed gone into liquidation on 14 December 2012, but had not been removed from the roll. The Respondent did not apparently contact the liquidators to ask what, if anything, was known about the liveried cab or whether there were still any trading activity. The appellant had said that he was working for 'Beattie Transport'. He did not mention Beattie Transport Ltd. The Respondent had come to the conclusion that the company could not be responsible for the load because it was in liquidation. But we do not know whether any other person or entity was continuing as Beattie Transport (as opposed to Beattie Transport *Ltd*).

63. We reject the respondent's contention that the appellant *'appeared willing to accept work without any consideration of the integrity of the source of that work, the source of that work being, on the face of it, a non-existent company and employer.'* We are not satisfied that the appellant, as a self-employed driver, should have satisfied himself as to Beattie Transport / Beattie Transport Ltd's corporate standing, solvency or status.

64. Whilst the cab was registered as off-road with effect from 24 August 2010, there is no evidence that the appellant knew or ought reasonably to have known that fact. There was no suggestion that the appellant, as a self-employed lorry driver, should have been carrying with him the registration documents of the lorry, or should have satisfied himself that the cab was road-legal in the sense that it had an up to date MOT certificate or had not been declared as notified off-road.

65. We do not understand the purpose of the redactions on the notes of Mr Murray's journeys on 1 May 2013 or 2 May 2013, or the process whereby the person (or persons) who had actually paid for the two journeys on 1 May 2013 and 2 May 2013 came to be excluded from inquiry. On the face of it, those were a person (or persons) who, as a fact, had actually parted with money in order to move loads on both dates.

66. Absent such evidence, all being matters of which inquiry could have been made by the respondent, the process of elimination which was engaged in by the Respondent, leaving Mr Murray as the only potentially answerable person - was simply not sound.

Conclusion

67. For the reasons that we have given the Assessment must be discharged.

68. A wrongdoing penalty under Schedule 41 of the Finance Act 2008 amounting to £4,900 was imposed on 6 January 2014. That has not been made the subject of this present Appeal, but we anticipate that HMRC will wish to consider the comments which we have made in this Decision.

Disposition

69. The Appeal is allowed.

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

DR CHRISTOPHER McNALL
TRIBUNAL JUDGE

RELEASE DATE: 3 MARCH 2016