



TC04436

Appeal number: TC/2013/05601

Excise Duty - Excise Goods (Holding, Movement and Duty Point) Regulations 2010, Regulations 13 and 88, Finance Act 1994, Section 12(1A) and Customs & Excise Management Act 1979, sections 139 and 170B and Schedule 3 - assessment and penalty in respect of seized goods - whether electronic administrative document (e-AD) had been unlawfully used more than once and in consequence duty evaded - whether the Appellant as driver of the vehicle and goods seized was the 'holder' of the goods and therefore the person liable for the assessment - yes - appeal dismissed

FIRST-TIER TRIBUNAL

TAX CHAMBER

THOMAS McPOLIN

Appellant

- and -

DIRECTOR OF BORDER REVENUE

Respondent

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER CELINE CORRIGAN**

Sitting in public at Belfast Tribunals Unit, Bedford House, Bedford Street, Belfast on 27 November 2014

**Mr Danny McNamee of McNamee McDonnell Duffy Solicitors for the Appellant
Mr Simon Charles instructed by the General Counsel and Solicitor to UK Border Agency for the Respondent**

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DECISION

Appeal

1. This is an appeal by Mr Thomas McPolin (“the Appellant”) against the decision of the Respondent (“UKBA”) dated 14 May 2013, to assess the Appellant for alcohol products excise duty in the sum of £28,677 for holding goods for a commercial purpose in the UK without payment of duty.

2. The Appellant does not dispute the seizure and deemed forfeiture of a vehicle and goods in respect of which the assessment arose, but disputes that he was the “holder” of the goods within the meaning of Regulation 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010.

Evidence

3. The hearing bundle included a witness statement by Pamela Wilson of the UKBA’s CITEX (Customs International Trade and Excise Enquiries) Post Detection Audit office, who issued the assessment, two witness statements from Sandra Bentley an officer of the UKBA Revenue Fraud Detection Team, together with relevant exhibits, which included the Border Agency’s notes of the initial interception, interview of the driver, a photograph of the Vehicle’s cab and correspondence between the Appellant’s representatives and the Border Agency. Also included was a witness statement from Janet Thornton also of the Revenue Fraud Detection team, who undertook extensive enquiries into the ownership of the vehicle seized. Her evidence is set out in detail in paragraph 23 below. The bundle also included the Appellant’s witness statement. The Appellant and the witnesses all gave oral evidence and were cross-examined under oath.

Background and findings of fact

4. On 17 May 2012, the Appellant, in a vehicle registration number 00MN3622 with a trailer, registration number 2014 (hereinafter “the Vehicle”), arrived from Calais France, and was intercepted by UKBA officers at Dover and found to be carrying 24,531.28 litres of mixed beer (hereinafter “the Goods”). The interception was timed at 18:41.

5. A Cross Movement Record (“CMR”) was found with the Vehicle’s paperwork dated 15 May 2012 and showed that on 15 May at 14:20, a trailer numbered 2014 carrying a mixed load of beer came into the UK with vehicle 02MN38725. As the Administrative Reference Code (“ARC”) number 12FRG007400003304909 of the electronic administrative document (“e-AD”) was over two days old, it was suspected that it had could have been used on more than one occasion. An ARC reference number can be described as a unique number which is only valid for one particular load. The ARC can therefore only be used once. Usually ARCs are issued shortly before a vehicle destined for the UK commences its journey and hence for a vehicle travelling from northern France it would have been expected to arrive within twelve hours or less.

5 6. Investigations showed that on 16 May 2012 at 00.40, a vehicle registration number 00MN3622 driven by the Appellant arrived in the UK carrying a load manifested as 'foodstuffs'. The trailer bore the same registration number as the trailer which had entered the UK on 15 May 2012. This could have also been an earlier use of the same ARC.

7. Accordingly, when the Appellant was stopped on 17 May 2012 at 18:41 this may have been the third use of the ARC/e-AD.

10 8. UKBA officer Bentley formed the view that the import on 15 May 2012 was the first movement making use of the ARC/e-AD given that both the trailer number and the load appeared consistent with its e-AD and that its arrival time into the UK was also consistent with when a load of mixed beer, which was documented to have been 'dispatched' from northern France at 00:35 on 15 May 2012 would have arrived in the UK.

15 9. The Vehicle and the Goods were seized pursuant to s 139, 141 and s 170B(2) of the Customs and Excise Management Act 1979 ("CEMA") and Regulation 88 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010, as being in contravention of Regulation 53 and/or 68 and 69 and Regulation 87.

20 10. The paperwork with the load indicated that it came from the account of Beverex in the bonded warehouse MT Manutention in France and was destined for the account of MKG Convenience at Seabrook Warehousing in the UK.

25 11. The haulier's name on the documents which accompanied the intercepted load was "Fingal International Logistics, Dublin, Ireland". However the Appellant said he was employed by Paul Sheridan Transport, (incorrectly initially recorded in the case file as Paul Sheridan Transport). The front of the cab unit bore the sign-written name "AP Haulage".

12. The trailer number on the trailer appeared to have been stencilled on. A search of the Vehicle revealed a letter stencil kit, five CMR's which were blank with the exception of the 'sender' box which had the details of 'Les Vins du Tunnel' stamped on them and trailer plate numbers 2014 and 7269 loose in a box.

30 13. The Appellant was asked to stay for an interview but declined. He said that as UKBA were going to seize his vehicle anyway, there was no point.

14. A Seizure Information Notice (BOR156) was issued together with a Notice of Seizure which was sent to all parties in the movement being:

MT Manutention – the consignor in France

35 Beverex Hungary - the owner of the Goods at MT Manutention

Paul Sheridan, Sheridan Transport - stated by the Appellant to be his employer

Seabrook Warehousing - the consignee

MKG Convenience Ltd - the Goods were for this account in Seabrooks.

15. The Goods were tallied against the delivery note/e-AD and the Electronic Movement Control System (“EMCS”) and it was found that all of the products were as recorded, with the exception of the Budweiser beer which when tallied showed an ABV of 5% when the e-AD and the EMCS system both showed an ABV of 4.8%.

16. On 29 May 2012, the Border Force National Post Seizure Unit (“NPSU”), received ten pages of correspondence, purportedly from Mr Joseph O’Donnell, A&P Plant Hire, Donegal, requesting restoration of the Vehicle (unit 00MN3622 and trailer 2014). However, as the legality of the seizure of the Vehicle was not challenged by the Appellant or any other party within the requisite time period at the Magistrates’ Court, the Vehicle and the Goods seized were, in due course, condemned as lawfully seized and liable to forfeiture under paragraph 5 of Schedule 3 to CEMA.

17. On 14 May 2013, UKBA assessed the Appellant for the excise duty on the seized goods in the sum of £28,677, holding the Appellant liable to pay the duty by virtue of Part 2 Regulation 13(2) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010.

18. On 3 June 2013 the UKBA received a letter from Messrs McNamee McDonnell Duffy, Solicitors LLP on behalf of the Appellant, requesting a review by an officer not previously involved in the decision to issue the duty assessment.

19. A formal independent review was carried out by officer Allan Donnachie. Having considered all the information presented to him, by way of letter dated 16 July 2013 he informed the Appellant of his conclusions and that he upheld the decision of 14 May 2013, advising the Appellant that he could appeal to the Tribunal.

20. By Notice of Appeal dated 15 August 2013, the Appellant appealed to the Tribunal. The Appellant’s grounds of appeal, as stated by his representatives, were:

“i. The Appellant is not liable for the duty

ii. The legal basis upon which the Revenue have fixed our client with liability is incorrect in law.”

21. On 14 October 2013 the UKBA consented to the appeal being heard without payment of the duty.

22. On 10 July 2014 the Appellant filed a ‘Statement’ which read as follows:

“I state that I have no liability in relation to any tax owing on the goods which were being transported by me into Dover on 17 May 2012. Neither the lorry, trailer nor the goods were owned by me. My function as regards these goods and vehicles was simply to drive the lorry in compliance with the directions of the carrier of the goods.

I have no standing as regards any proceedings pursuant to Schedule 3 of the Customs and Excise Management Act 1979 being neither the owner of the goods nor the vehicles involved herein.

I have given HMRC details of my employer and explained my role as simply the driver in this matter. I state that I am not the person liable for the tax on these goods having no power of disposition over same and no control over same. I was simply the agent for the carrier.”

5 **Witness evidence**

The evidence of Officer Janet Thornton

23. In evidence given under oath, Officer Thornton amplified statements made in her witness statement and detailed the extensive enquiries she undertook in endeavouring to locate Paul Sheridan Transport. Her evidence, which we accept, can be summarised as follows:

(1) The request for restoration from Mr Joseph O’Donnell, A&P Plant Hire, Donegal, (see paragraph 16 above) included:

- i. An Irish Registration document for vehicle 00MN3622, showing it was registered from 30 March 2012 to Mr Joseph O’Donnell, “A & P Plant Hire”, 17 Knocknamona Crescent, Letterkenny, Co Donegal, Ireland.
- ii. An Equipment Rental Agreement between the Lessor “A & P Plant Hire Ltd” with a head office address of Knocknamona Crescent, Letterkenny, Co Donegal and the Lessee SJS Transport with a head office address of Altnagrieve, Ballyconnel (sic), Co Cavan for the rental of vehicle 00MN3622 and trailer chassis number SDCC545B3ABA52169, hired for the rate of 400 Euros per week from 16 April 2012. The agreement has been signed for the Lessor “Joseph O’Donnell, Director” and for the Lessee “Seamus Jones”.
- iii. An invoice dated 12 November 2011 from Brendan Woods Transport Ltd, Kilcrouney, Louth, Co Louth to “A & P Plant Hire”, 17 Knocknamona Crescent, Letterkenny, Co Donegal, for the purchase of a trailer chassis number SDCC545B3ABA52169.
- iv. A copy of the BOR156 handed to the driver Thomas McPolin at the time of the seizure, which had been annotated: “F.A.O. Mr Dillon. Any further queries telephone 00353 87 3532241”.

(2) Internet searches were made for Paul Sheridan Transport and Sheridan Transport, but revealed no trace of either. Company House checks were made for a Director by the name of Paul Sheridan linked to haulage or transport without success.

5 (3) Travel checks showed that the Appellant had manifested the haulier as “J & K” on his inward trip on 17 May 2012. On previous inward trips driving vehicle 00MN3622, he had manifested the haulier as: 16 May 2012: “GMK”, 10 May 2012: “SKT”, 9 May 2012: “JMK”, 4 May 2012: “KST Tpt”, 15 May 2012: “GMK”, 25 April 2012: “JMK” and 17 April 2012 as “KTSP”. These details did not assist in identifying the entity Sheridan/Sheridan Transport.

(4) Internet checks on “AP Haulage”, without success.

10 (5) Checks were made with the Irish Revenue with regard to the vehicle registration number 00MN3622, Joseph O’Donnell, A & P Plant Hire Ltd, Seamus Jones, SJS Transport and Fingal Logistics.

(6) The reply stated that:

- 15 i. “Vehicle registration number 00MN3622 is registered to Joseph O’Donnell, A&P Plant Hire, since 30 March 2012.
- ii. There is no record of a Joseph O’Donnell registered with the Revenue Commissioners at Knocknamona Crescent, Letterkenny, Co Donegal.
- 20 iii. There is no record of an entity in the name of A & P Plant Hire Ltd being registered with the Revenue Commissioners or with the Irish Register of Companies.
- iv. There is no record of the entities Joseph O’Donnell and A & P Plant Hire Ltd being issued a Road Haulage Licence by the Department of Transport. The entities are completely unknown to our service.
- 25 v. There is no record of a Seamus Jones, Altnagieve, Ballyconnell, Co Cavan being registered with the Revenue Commissioners.
- vi. There is no record of an entity in the name of SJS Transport being registered with the Revenue Commissioners or with the Irish Register of Companies.
- 30 vii. There is no record of Seamus Jones or SJS Transport being issued a Road Haulage Licence by the Department of Transport. The entity is completely unknown.
- 35 viii. There is no record of a Fingal International Logistics being registered with the Revenue Commissioners or with the Irish Register of Companies. There is no record of a Fingal International Logistics being issued a Road Haulage Licence by the Department of Transport. The entity is completely unknown to our service.”

(7) Departmental records show that the NPSU wrote to “A & P Plant Hire Ltd” on 2 July 2012 requesting confirmation of their legal status as investigations had indicated that they were not a limited company and NPSU wished to confirm the legitimacy of the vehicle rental agreement.

5 (8) On 16 August 2012, the NPSU received twenty pages of
correspondence by fax from a sending fax number and sending name
“Anthony Gorman”, a name that had not appeared in the case. The fax
included copies of a birth certificate and driving licence for Joseph
10 O’Donnell of 17 Knocknamona Crescent and “Memorandum of Articles of
Association” under the “Companies Act, 1963-2009” for a “Company
Limited by Shares”. This eighteen page document referred to the
incorporation of a company “A & P Plant Hire Ltd” on 9 June 2011, under
company number “499632”. It stated the objects for which the company
was established and also showed the names of the shareholders. It did not
15 show the names of the Director/s. The name “Joseph O’Donnell” did not
appear anywhere in the document.

(9) On 20 August 2012, the NPSU made checks with the Irish Revenue
with regards to the Irish company number 499632, the Irish company A &
P Plant Hire Ltd and to determine whether Joseph O’Donnell was a
20 Director of A & P Plant Hire Ltd.

(10) On 11 September 2012, the NPSU received a reply from Irish
Revenue dated 29 August 2012 stating that:

- 25 i. Company number 499632 related to an entity named “Carlow
Silk Limited” in Carlow, incorporated on 3rd June 2011; there
was no record of a Joseph O’Donnell as Director of this
company at any stage.
- ii. There was no record of A & P Plant Hire being registered with
the Irish Register of Companies.
- 30 iii. There was no record of a Joseph O’Donnell with date of birth 9
February 1970 being registered as a Director with the Irish
Register of Companies, or being registered with the Revenue
Commissioners.

(11) On receipt of the NPSU file containing hard copies of the above
correspondence, Officer Thornton became aware that the last page of the
35 ten page letter received by the NPSU on 29 May 2012, showing telephone
number “00353 87 3532241”, had not previously been forwarded to
RFDT. As no checks had been previously completed on the telephone
number she undertook internet checks and identified an advert dated 30
40 March 2011 from a “Manus Kelly” quoting the same telephone number.
This name had not appeared in the case.

The evidence of the Appellant

24. In evidence Mr McPolin, the Appellant, agreed that he had not provided any documentation to support his assertion that he was employed by or subcontracted to Paul Sheridan Transport. No evidence had been offered to show that Paul Sheridan
5 Transport existed. He said that there should have been some documentation in the lorry cab, but none was found.

25. The Appellant said that he normally operated as a sub-contractor on a self-employed basis and that he had done “several jobs” for Paul Sheridan in the days prior to being stopped. He had driven the same vehicle carrying beer. He said that he
10 was paid in cash by Mr Sheridan who calls at his house to pay him. They communicated by telephone but he did not know Mr Sheridan’s telephone number. He acknowledged that he was unable to produce any documentation in the nature of invoices issued to Mr Sheridan, wages paid, fuel or other expenses which may have verified Mr Sheridan’s existence. He said that he had only met Mr Sheridan once, the
15 weekend before he was stopped.

26. The Appellant in evidence initially said that he could not recollect whether the goods he had collected on 15 and 16 May had been from a bonded warehouse, but later said that on both dates he had collected the goods by way of trailer change in Calais, as he had with the collection on 17 May. He also said that he had told the
20 shipping company that he was carrying “foodstuffs”, even though he was aware he was carrying alcohol, because in his view, alcohol was foodstuffs. He said he was not aware that alcohol is separately categorised.

27. The Appellant could also not explain why the goods were recorded as having been despatched at 0.35 am on 15 May 2012 but did not arrive in the UK until two and a
25 half days later or why there were discrepancies between the load and its description on the CMR (bottles of Budweiser manifested as containing 4.8% alcohol content were in fact 5%).

28. The Appellant could not satisfactorily explain the reason why he had numerous blank CMR’s in his cab. CMR’s are normally produced and computer generated by
30 the bonded warehouse. He explained that he buys blank CMR’s for the sender to fill in, in case that is ever necessary.

29. He was unable to say where Paul Sheridan traded from. The Appellant did not issue invoices for work undertaken; he simply handed over a delivery note and was paid in cash. He did not know his financial year-end. His wife does his books and tax
35 returns. His only bank account was one held jointly with his wife.

Legislation and relevant case law

30. The Excise Goods (Holding, Movement & Duty Point) Regulations 2010 provide:

Goods already released for consumption in another Member State-excise duty point and persons liable to pay

13 (1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.

5 (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.

10 (3) For the purposes of paragraph (1) excise goods are held for a commercial purpose if they are held -

- (a) by a person other than a private individual; or
- (b) by a private individual (“P”), except in a case where the excise goods are for P’s own use and were acquired in, and transported to the United Kingdom from, another Member State by P.

Electronic administrative document for imports of excise goods under duty suspension arrangements

20 53 (1) A movement to which this Part applies must take place under cover of an electronic administrative document or a fall back accompanying document.

(2) A printed version of the electronic administrative document, the fall back accompanying document or any other commercial document on which the unique administrative reference code is clearly stated, must accompany the goods.

25 (3) Whilst the goods remain in the custody or under the control of the person accompanying the goods, that person must, upon request, produce or cause to be produced to the Commissioners one of the documents referred to in paragraph (2).

31. Regulation 87 of the 2010 Regulations provide:

Obligations of owners and transporters

30 87. (1) Every owner and every transporter of excise goods to which these Regulations apply must ensure that the EU requirements are complied with at all times.

35 (2) Every transporter of excise goods to which these Regulations apply must, while the goods remain in that transporter’s custody or under that transporter’s control, produce or cause to be produced to an officer any documents that are required by these Regulations to accompany the goods when required to do so.

(3) This regulation also applies to

(a) any person who undertakes the carriage of excise goods who is not the transporter; and

40 (b) the driver of any vehicle in which the goods are being carried, as it applies to the transporter.

Forfeiture of excise goods on which the duty has not been paid

88. If in relation to any excise goods that are liable to duty that has not been paid there is -

- (a) a contravention of any provision of these Regulations, or
- (b) a contravention of any condition or restriction imposed by or under these Regulations,

those goods shall be liable to forfeiture.

5 32. The Customs and Excise Management Act 1979 (“CEMA”) provides at:

Section 139(1):

“Anything liable to forfeiture under the Customs and Excise Acts may be seized or detained by any officer...”

Paragraph 5 Schedule 3:

10 “If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of any thing no such notice has been given to the Commissioners or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with the thing in question shall be deemed to have been duly condemned as forfeited.”

15 33. Section 154(2) CEMA provides:

“in any proceedings relating to customs or excise, where any question arises as to the place from which any goods have been brought or as to whether or not – (a) any duty has been paid or secured in respect of any goods ... then, where those proceedings are brought by or against the Commissioners ... The burden of proof shall lie upon the other party to the proceedings.”

34. The Finance Act 1994 provides:

12 *Assessments to excise duty.*

(1A) Subject to subsection (4) below, where it appears to the Commissioners -

25 (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 due 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.

30 35. It was held in *HMRC v Jones & Jones* [2011] EWCA Civ 824 that:

71... For the future guidance of tribunals and their users I will summarise the conclusions that I have reached in this case in the light of the provisions of the 1979 Act, the relevant authorities, the articles of the Convention and the detailed points made by HMRC.

35 (4) The stipulated statutory effect of the owners’ withdrawal of their notice of claim under paragraph 3 of Schedule 3 was that the goods were deemed by the express language of paragraph 5 to have been condemned and to have been “duly” condemned as forfeited as illegally imported goods. The tribunal must

give effect to the clear deeming provisions in the 1979 Act: it is impossible to read them in any other way than as requiring the goods to be taken as “duly condemned” if the owner does not challenge the legality of the seizure in the allocated court by invoking and pursuing the appropriate procedure.

5 (5) The deeming process limited the scope of the issues that the owners were entitled to ventilate in the FTT on their restoration appeal. The FTT had to take it that the goods had been “duly” condemned as illegal imports. It was not open to it to conclude that the goods were legal imports illegally seized by HMRC by finding as a fact that they were being imported for own use. The role of the
10 tribunal, as defined in the 1979 Act, does not extend to deciding as a fact that the goods were, as the owners argued in the tribunal, being imported legally for personal use. That issue could only be decided by the court. The FTT’s jurisdiction is limited to hearing an appeal against a discretionary decision by HMRC not to restore the seized goods to the owners. In brief, the deemed effect of the owners’ failure to contest condemnation of the goods by the court was that
15 the goods were being illegally imported by the owners for commercial use.

36. The issue as to whether the Tribunal has jurisdiction to decide whether or not an individual has been wrongly assessed to pay excise duty and/or had a penalty imposed following seizure of dutiable goods received judicial scrutiny by the Upper-tier
20 Tribunal in the case of *HMRC v Nicholas Race* [2014] UKUT 0331. In the First-tier Tribunal it was held at para 35:

“35 (1) It is arguable that Jones & Jones does not limit the jurisdiction of the Tribunal in relation to an appeal against an assessment to excise duty.

25 (2) If the Appellant satisfies the Tribunal that he was frustrated in a genuine attempt to challenge the legality of the seizure then the Tribunal arguably must give him a remedy in order to vindicate his rights under Article 5(1) which include the right to a procedurally fair hearing.”

37. However on appeal to the Upper-tier Tribunal, Mr Justice Warren stated the following at paragraphs 33 to 35 of his judgment:

30 “33. Taking these factors in turn, I do not consider it to be arguable that Jones does not demonstrate the limits of the jurisdiction. It is clearly not open to the tribunal to go behind the deeming effect of paragraph 5 of Schedule 3 for the reasons explained in Jones and applied in EBT. The fact that the appeal is against an assessment to excise duty rather than an appeal against non-restoration makes no difference because the substantive issue raised
35 by Mr Race is no different from that raised by Mr and Mrs Jones.

34. The Judge supported his contrary conclusion by referring to the period between the expiry on the one month time limit for challenging seizure and the point at which the assessment to excise duty was issued. The Judge commented that the owner of seized goods should not be forced to seek condemnation to proceedings simply to guard against
40 the possibility of a future tax or penalty assessment [see paragraph 131 of the Decision]. But that is precisely what he must do if he wishes to assert, if he were to be assessed, that goods were not subject to forfeiture. The effect of the deeming provisions is that the goods are legally forfeit. Notice 12A is clear that, unless the seizure is challenged it is not possible subsequently to argue that the goods were not liable to forfeiture because they
45 were in fact held for personal use. I agree with Mr Puzey that it is not surprising or a cause for complaint that HMRC are entitled to assess for unpaid duty in respect of such goods.

In any event, it remains open to a person subject to such an assessment to argue that it is wrongly calculated, is out of time, is raised against the wrong person or is otherwise deficient so that the factual issues in relation to an assessment and penalty assessment are likely to be different.

5 35. As to the second of the Judge's reasons, concerning procedural unfairness, it is clear
that paragraphs 5 and 6 of Schedule 3 are Convention compliant. That is not to say that
HMRC could escape the consequences of any unfairness on their part in relation to the
application of those statutory provisions. The remedy for that sort of unfairness, however,
10 is judicial review, which itself gives a Convention compliant remedy to a taxpayer alleging
the sort of unfairness about which the Judge was concerned. The First-tier Tribunal has no
inherent power to review decisions of HMRC, although it does have certain statutory
powers in relation to certain decisions, it has no power to review, or to provide any
remedy, in relation to procedural unfairness of the sort which concerned the Judge. It is
15 not, in any case, immediately obvious that there is anything in the point concerning
procedural unfairness in the light of the fact that Mr Race was provided with Notice 12A
which set out clearly what he needed to do."

The decision in *Gerald Carlin v HMRC* TC2013/03410 ("Carlin")

20 38. Mr McNamee for the Appellant relies heavily on his submission that the facts of
this case, particularly in the context of whether the Appellant was 'holding' the seized
Goods, are similar to those in *Carlin* where the Tribunal found in favour of the
Appellant. It is therefore necessary to set out the relevant facts of that case and the
reasons the Tribunal came to its decision.

25 (i) Mr Carlin was a lorry driver who was stopped by the UKBA at Dover on 10
May 2012. A trailer was attached to his lorry which was found to contain
25,255.68 litres of mixed beers. He provided UKBA with a delivery note from a
French warehouse stating that the place of delivery was Seabrook Warehousing
Ltd in Essex. He also produced a CMR International Consignment Note which
stated that the Goods were under the cover of an e-AD and that the carrier of the
goods was European Transport Services.

30 (ii) Mr Carlin and the lorry had travelled from France to the UK the previous day,
on 9 May, the Goods shipped being manifested as 'foodstuffs'. Mr Carlin said he
did not know what this load consisted of as he did not really check his loads but he
had been instructed to take it to a yard in West Thurrock, Essex. He did not know
to whom he was delivering the load but said that he was working for Kevin Woods
35 of Woods Transport, Dungannon, Northern Ireland.

(iii) On 9 May 2012 Mr Carlin sat in his cab while the trailer was being loaded. He
always checked his trailers for illegal goods or illegal immigrants. However he did
not always know what the load was as it was not always obvious. He did not
usually check the documentation as "this is somebody else's responsibility".
40 Neither could he remember where his instructions had come from.

(iv) UKBA concluded that the e-AD had been used to cover a duplicate load on 9
May 2012 and that the Goods were liable for payment of UK duty. As a result the
lorry and the Goods were seized as liable to forfeiture.

- (v) UKBA said they were unable to locate or identify Mr Woods or Woods Transport and accordingly addressed the seizure notice to Mr Woods care of Mr. Carlin. Mr Carlin was issued with an assessment in respect of unpaid duty of £28,227.00 and a penalty of £9,879.45.
- 5 (vi) Mr Carlin said he employed his accountant to prepare all the invoices. Most trips were for a fixed price. Mr Woods owned the lorry and at the start of a trip gave Mr Carlin £500.00 to cover the cost of fuel.
- (vii) The officer who issued the assessment gave evidence and conceded that he had not checked for the registered owner of the lorry, had not checked for the owner of the road freight licence, had not tried to trace Mr Woods through HMRC records or telephoned Mr Woods using the mobile number provided by Mr Carlin during the interview on 10 May 2012. He maintained it was for others in HMRC to make these checks. It is not mentioned in the decision but it appears that no checks were made of the accountant who ‘prepared all the invoices’.
- 10
- 15 39. Mr McNamee in *Carlin*, maintained that HMRC was not entitled to draw the conclusion, simply because Mr Carlin transported a load of foodstuffs from France to the UK on 9 May 2012, that this load was covered by the same e-AD as the Goods on 10 May 2012. It was accepted by both parties that the e-AD used by Mr Carlin on 10 May was a valid document. The question was simply whether it had already been used by Mr Carlin on 9 May.
- 20
40. Mr McNamee further argued that Mr Carlin could not be deemed to be ‘holding’ the Goods at any point for the purposes of s 13(2)(a) or (b) of the 2010 Regulations and referred the Tribunal to the case of *Ian Leslie White and others v The Crown* [2010] EWCA Crim 978, where Lord Justice Hooper at paragraph 190 cites the case of *R v May* [2008 UKHL 28] where it was said that:
- 25
- “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.”
41. The decision in *Carlin* records [at paragraphs 20 and 21], that Mr Chapman for HMRC was unable to produce any evidence that the e-AD related to the Goods which had been imported on 9 May 2012, rather than the Goods imported on 10 May. The decision further records that during cross-examination of Mr Carlin, Mr Chapman repeatedly asked him whether he transported similar Goods on both 9 May and 10 May. Mr Carlin said he could not remember, but eventually admitted that on the balance of probabilities the Goods probably consisted of beer. Mr Chapman, although conceding that Mr Carlin did not appear to have been the owner of the Goods or the lorry, argued that he was nonetheless the ‘holder’ of the Goods within the meaning of paragraph 13(2)(b) of the 2010 Regulations being the person ‘holding the goods intended for delivery’.
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- 35
- 40 42. Although there is no definition of ‘holding’ the Tribunal was referred in *Carlin* to the case of *R v Taylor and Wood* [2013] EWCA Crim 1151 where Kenneth Parker J stated:

“[Holding] can broadly be described as control, directly or through another, of the asset, with the intention of asserting such control against others, whether temporary or permanently.”

5 Parker J went on to state that if the person who had physical possession of the goods at the excise duty point had known, or perhaps even ought to have known, that he had physical possession of the goods, possession might have been sufficient to constitute a holding.

10 43. Mr Chapman in *Carlin* argued that as Mr Carlin had physical possession of the Goods, and knew that on 10 May 2012 they consisted of beer, he was holding the Goods for the purposes of the 2010 Regulations.

15 44. The Tribunal did not agree with Mr Chapman and concluded that Mr Carlin was not ‘holding’ the Goods for the purposes of the legislation. Following the decision of Lord Justice Hooper in *R v May*, the Tribunal considered Mr Woods as owner of the lorry and goods, to be the ‘holder’ and that Mr Carlin was merely the courier. The Tribunal was clearly unhappy with the assessing officer’s response in evidence that
20 checking for the existence of Mr Woods or Woods Transport was not his responsibility. The Tribunal said that a simple search should have been able to identify the owner of the lorry. HMRC had “failed to carry out the most basic checks. They were supplied by Mr Carlin with a mobile telephone number for Mr Woods which they did not ring. They could easily have checked the lorry’s registration number to ascertain the name and address of the registered owner.”

25 45. Further HMRC had failed to produce any evidence to convince the Tribunal that the e-AD used by Mr Carlin in connection with the transportation undertaken on 10 May had already been used in connection with the transportation undertaken on the previous day.

The Appellant’s Case

30 46. Mr McNamee says that Schedule 3 of the Customs and Excise Management Act 1979 has no application in this appeal. The Appellant fully accepts the law as set out in the cases of inter-alia, *Jones* and *Race*, but he says that reliance by the UKBA upon those cases is entirely misplaced in the present appeal. UKBA’s reliance upon the non-challenge of the Goods to establish the liability of the Appellant to the duty assessed is misconceived, because where the Appellant is not relying upon the duty paid status or otherwise of the Goods, the provisions of Schedule 3 of the Customs and Excise Management Act 1979 are irrelevant.

35 47. He says that the UKBA has not set out the basis in law upon which the Appellant is or could be liable for the assessed duty. Mr McNamee submits that the UKBA submissions are an attempt to avoid dealing properly with the legal issues in the appeal which also arose in the case of *Carlin*. In that case the appeal was determined in favour of the Appellant.

40 48. He referred to the judgment in *R v Taylor and Wood* and specifically to paragraphs 29 – 30 (see below), wherein the Court of Appeal dealt definitively with

the meaning of ‘holding’ within the relevant Regulations, for the purpose of establishing who is liable for assessed duty.

5 49. *Taylor and Wood* concerned the fraudulent importation of counterfeit cigarettes and proceedings under the Proceeds of Crime Act 2002. The Appellants appealed a
confiscation order in respect of excise duty evaded. Their argument turned on the
10 meaning of ‘holding’ in Regulation 13 of the Tobacco Products Regulations 2001
which provides:

Reg 13. Persons liable to pay the duty

10 The person liable to pay the duty is the person holding the tobacco products at the excise
duty point.

50. The Appellants in *Taylor and Wood* had been instrumental (with others) in the
importation of the counterfeit cigarettes. They had used innocent road hauliers in the
transportation chain and Wood’s otherwise legitimate business as a freight forwarder
to “give a veneer of legitimacy to the importation.”

15 51. Mr Justice Parker considered and analysed in some detail the meaning of
‘holding’. Mr Justice Parker said at paragraphs 29-31, 35, 39-40:

20 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.... But it can broadly
be described as control, directly or through another, of the asset, with the intention of
asserting such control against others, whether temporarily or permanently:In a case
of bailment, the bailee has actual, or physical, possession and the bailor constructive
possession. In other words, if the bailee holds possession not for any interest of his own
25 but exclusively as bailee at will, legal possession will be shared by bailor and bailee.

30 [30] In this case Heijboer [innocent road hauliers] 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 [another innocent haulier in the transportation train].
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. 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
35 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 the consignee of the goods that were being transported..

40 [31] There is nothing, furthermore, in this interpretation and application of reg 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

5 [35] Both Appellants rely upon the fact that Ali was the principal conspirator and was the
mastermind of the illegal importation. The cigarettes were always the “property” of Ali,
meaning that he owned them. The Appellant Taylor had no interest, financial, beneficial
or otherwise, in the cigarettes themselves..... However, none of this avails the
10 Appellants. In a case of this kind it is necessary to examine the precise and individual
conduct of each person to see whether that conduct brings him within the terms of reg
13.

[39] For the same reasons that have already been elaborated in interpreting reg 13(1) of
the Regulations... a person who has de facto and legal control of the goods at the excise
15 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.

20 [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
25 more than innocent agents. It was the Appellants exploiting such innocent agents who in
reality effected delivery within the meaning of art 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....

30 52. The Appellants appeals in *Taylor and Wood* were dismissed, but Mr McNamee
argues that, based on the principles, and “definition” of holding, as set out in *Taylor
and Wood*, on any analysis of the facts in the present case the Appellant is simply a
lorry driver with no power of disposition over the Goods and that therefore no liability
can arise under Regulation 13 of the 2010 Regulations. He argues that the legal
35 finding of the Tribunal in *Carlin* was that the driver could not be deemed to have been
‘holding’ goods liable to seizure for the purpose of the Regulations. The UKBA have
fallen into error in equating simple possession of goods with ‘holding’ of goods, as set
out in the Regulations.

The UKBA’s Case

40 53. UKBA says that its submissions can be divided into the following categories:

- i. The effect of paragraph 5 of Schedule 3 of CEMA;
- ii. The basis upon which the Appellant is liable; and

iii. Consideration of the decision in *Carlin*.

The effect of paragraph 5 of Schedule 3 of CEMA

54. The fact that the seizure was not challenged means that the Goods “shall be deemed to have been duly condemned as forfeited”. This point was put beyond doubt
5 by the Court of Appeal’s judgment in *Jones and Race*

55. The Appellant may not relying upon the duty paid status or otherwise of the Goods, but the provisions of Schedule 3 of CEMA are relevant for the purpose of establishing that the assessment was correctly raised. It is not open to the person assessed to avoid liability for duty pursuant to Regulation 13(1) by asserting that the
10 goods seized were not being held for a commercial purpose. Given that the Appellant’s case is that he was an employed commercial driver, any assertion that the goods were not held for a commercial purpose must fail.

The basis upon which the Appellant is liable

56. UKBA assert that the Appellant was “making the delivery of the goods” when he
15 was stopped at Dover and that he was also “holding goods intended for delivery”.

57. Because of the above, pursuant to Regulation 13(2)(a) and/or (b) of the 2010 Regulations, the Appellant is/was liable to pay any duty arising pursuant to Regulation 13(1) of the 2010 Regulations. Although the Appellant asserts that he cannot be liable for the assessed duty because:

- 20 i. he did not own the Goods; and/or,
ii. he was an employee of Sheridan Transport.
iii. he was not the holder or deliverer of the goods within the meaning of regulation
13

- neither Regulation 13(2)(a) nor (b) impose liability by reference to either ownership
25 and/or employment status and that on the facts the Appellant was both the holder and deliverer of the goods.

Consideration of the decision in *Carlin*

58. The major criticism which the Tribunal had of HMRC’s conduct in *Carlin* was
30 that it did not properly investigate Mr Carlin’s assertion that he was an employee of ‘Woods Transport’. Such a criticism cannot be levelled in the present case given that, as is set out in the evidence of Officer Thornton, extensive investigations were undertaken to establish the accuracy of the Appellant’s claim that he is an employee of Paul Sheridan Transport. Indeed the information which
35 the Appellant gave about his employer was significantly less precise than that given by Mr Carlin as, for example, the Appellant did not provide a telephone number or any other information which may have allowed his alleged employer to be contacted.

59. In *Carlin* the Tribunal appears to have fallen into the following legal errors:

- i. It wrongly required HMRC to prove that the e-AD had been used before. Given that the case arose out of the seizure of the relevant goods the Tribunal failed to have regard to Regulation 13 of the 2010 Regulations; and,
- 5 ii. It wrongly failed to have regard to/or properly apply paragraph 5 of Schedule 3 of CEMA.
- 10 iii. It wrongfully failed to recognise that there was no need for the UKBA to give notice of the seizure to Woods Transport or Mr Woods given that Mr Carlin's case was that he was the servant/agent of Woods Transport/Mr Woods. Regulation 1(2)(b) makes it clear that in such a circumstance Notice of the seizure need not be given.

Conclusion

15 60. The seizure of the Goods was not challenged by the Appellant or by any other party. Therefore by due process the Goods were condemned as forfeit to the Crown because they were deemed to have been imported for a commercial purpose. As a consequence, by law the Goods were liable to forfeiture. Both parties are agreed on that.

20 61. Where the duty paid status of goods is not in issue, as in this case, the deeming provisions are nonetheless relevant for the purposes of establishing that an assessment to duty, to best judgement, pursuant to Regulation 13(1) of the 2010 Regulations and s 12 Finance Act 1994 has been validly raised.

25 62. Mr McNamee's argument is quite simply that the Appellant is a lorry driver and that he had no power of disposition over the goods and, following upon the definition of 'holding' in *Taylor and Wood*, no liability can arise under Regulation 13 of the 2010 Regulations. He argues that the findings of the Tribunal in *Carlin*, that the driver could not be deemed to have been 'holding' goods liable to seizure, are equally applicable in this case.

30 63. We are not of course bound by *Carlin*. In any event whilst there are some similarities in the circumstances leading up to the seizures, the facts of this case are very different.

35 64. In *Carlin* the Appellant provided details of the haulier who employed him to collect the Goods. In this case the Appellant refused to provide any information either by way of interview at the time he was stopped or subsequently. Furthermore despite exhaustive efforts, the UKBA have been unable to trace either a Paul Sheridan or Paul Sheridan Transport. Our conclusion has to be that neither the individual nor the company exists. In any event, because the Goods were deemed lawfully seized and forfeit under s 131(2)(b) Notice of Seizure did not have to be served on the haulier.

65. Although Mr McNamee submits that the Court's interpretation of 'holding' in *Taylor and Wood* supports his arguments, we take the opposite view. The Appellant

had direct possession and control of the Goods. He was in a position to assert such control against others, whether temporarily or permanently. He knew that he was in physical possession of the alcohol at the excise duty point, and in such circumstances as recognised in *Taylor and Wood* possession is sufficient to constitute a “holding” of the alcohol at that point. He was exercising ‘de facto and legal control’ over the alcohol and responsibility for the Goods carries responsibility and liability for payment of the duty.

66. We did not find the Appellant to be a credible witness. He declined to be interviewed by the UKBA. In our view an innocent driver, unaware that he was carrying illicit or smuggled goods and keen to protect his good name by disassociating himself from the wrongdoers, would have readily agreed to interview. His evidence regarding Mr Sheridan was very vague. He said in evidence that he had only met Sheridan once, but this contradicted his earlier statement that Sheridan “calls at his house to pay him in cash” indicating that visits from Sheridan had occurred more than once.

67. He initially said that he collected the goods from a bonded warehouse but later said that in fact he had collected them at a trailer swop in Calais. He could not, and in fact made no attempt, to explain why the Goods purportedly took two and a half days to travel from France to the UK, when a typical channel crossing takes a matter of two or three hours. We also found his evidence regarding the stencil set and blank CMR’s to be inherently improbable.

68. Regulation 87 of the 2010 Regulations requires the driver of any vehicle in which excise goods are being carried whilst in his custody or under his control to produce to an officer any documents that are required by the Regulations to accompany the goods when required to do so. These include the e-AD. Officer Bentley in our view reasonably came to the conclusion that the e-AD produced by the Appellant did not relate to the load of mixed beer which had been despatched from France in the early hours of 15 May 2012.

69. Under s 154(2) CEMA, where any question arises as to whether or not - any duty has been paid or secured in respect of any goods....then, the burden of proof lies upon the Appellant. In our view the Appellant has not discharged that burden.

70. The assessment for the duty has therefore been correctly issued against the Appellant as he was holding the goods when they were brought into the United Kingdom.

71. The appeal is accordingly dismissed and the assessment for alcohol products excise duty in the sum of £28,677 is confirmed.

72. 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.

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**MICHAEL CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 20 May 2015

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