TC06445

Appeal number: TC/2015/00068

EXCISE DUTY – cigarettes smuggled into UK – liability of non-complicit haulier – whether constructive knowledge – yes – duty assessment upheld and penalty assessment largely upheld

FIRST-TIER TRIBUNAL
TAX CHAMBER

AGNIESZKA HARTLEB **Appellant**
T/A
HARTLEB TRANSPORT

- and -

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

TRIBUNAL: JUDGE Barbara Mosedale

Sitting in public at Taylor House, Rosebery Avenue, London on 16 February 2018

The appellant did not appear and was not represented.

Mr D Northall, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Background

1. The appellant ran a small haulage business based in Poland. She employed Mr Piotr Myslinski as one of her drivers. One of her lorries, driven by Mr Myslinski, was stopped at Dover on 30 August 2013 and was found to contain (amongst other non-dutiable items) three pallets of cigarettes, for which there was no evidence that excise duty had ever been paid.

2. The cigarettes and lorry were seized. The legality of the seizure was not challenged, and cigarettes and lorry were duly condemned. Ms Hartleb requested restoration of the vehicle, and was offered restoration for a fee. This was paid and the vehicle restored.

3. HMRC carried out an investigation into the matter which resulted in an assessment on Ms Hartleb for the excise duty on the cigarettes (£130,913) and in the imposition of a fine for £68,351 (assessed on the basis of alleged deliberate behaviour). Ms Hartleb requested a review. The review decision upheld the assessment but reduced the penalty to £26,689 on the basis that the reviewing officer was satisfied that the behaviour was non-deliberate.

4. The appellant appealed to this Tribunal. The appeal was stayed firstly behind some criminal proceedings in Poland and then behind the *McKeown* case (see §87 below) in the UK. That largely explains why it has taken so long for this matter to come on for hearing.

Absence of the appellant

5. On 14 February 2018, two days before the hearing, the appellant emailed to the Tribunal a document which appeared to be a medical certificate in Polish dated 10 February 2018. The attached translation referred to the appellant and stated 'No possibility of appearing in the UK Court due to poor health'.

6. The Tribunal emailed the appellant on 15 February to ask her if she intended to apply for postponement, and if so, to give more details with regards to the medical problems, so that the Judge could form a view on the nature of the condition and in particular whether a postponement would make it likely that she would be able to attend a hearing at a later date. She was also asked about whether she had made travel arrangements.

7. On 16 January (the morning of the hearing) the appellant replied. She may have intended to apply for postponement although this was not made clear. She explained that she had been ill for some time and had then been diagnosed with Lyme's disease.

8. She did not explain (a) when she was diagnosed (b) when she knew she would be unable to travel to the hearing (c) whether she had made plans to travel to the hearing and (d) when she was likely to be well enough to attend a hearing.

9. In all these circumstances, even if the letter of 16 February ought to be taken as an application for postponement, I decided I would not grant one. I was given no indication of when, if ever, she would feel well enough to travel for a hearing so a postponement might achieve nothing; moreover, it did not appear that this illness was a recent matter, yet she had not applied for a postponement until the last moment, putting HMRC to the expense of preparing for and attending the hearing, costs which would be wasted if the hearing was postponed but which could have been avoided by a timely postponement application. Moreover, I was not convinced she had ever intended to attend the hearing: she had not explained what her travel plans had been even though this information had been requested. It was also of some relevance that this matter had been outstanding for a long time (the assessments in issue dated to mid-2014).

10. The hearing could go ahead in her absence if I was satisfied she had been notified of the hearing and it was in the interests of justice to do so. I was satisfied she had been notified of the hearing: she was clearly aware of it. It was in the interests of justice to proceed with the hearing in her absence for the same reasons it was right to refuse the application for postponement as given in the previous paragraph. Lastly, in any event, she had the right to apply for a set aside of the decision, which might be granted if she was able to give a more satisfactory explanation of why she did not attend and it was clear she could and would attend a hearing in the future.

11. So the hearing proceeded in the absence of the appellant.

The evidence

HMRC's officers

12. I had in the bundle the various documents relied on by both parties; I also had witness statements by Officer Barr and Officer Bushell, both of whom attended the hearing and were available to answer questions on their evidence, although in the event none were asked. Officer Bushell was the officer who intercepted the lorry, questioned Mr Myslinski and then seized the goods and lorry. Officer Barr was the officer who conducted the HMRC investigation and issued the assessments under appeal.

13. Their evidence was unchallenged. It was also largely uncontroversial: from the papers before me it was clear Ms Hartleb disagreed with their conclusions rather than their evidence. For these reasons, I accepted their evidence (but not their opinions).

Mr Piotr Marek Myslinski

14. HMRC's evidence included a few letters written by Mr Piotr Marek Myslinski, the driver of the vehicle. He was not called as a witness and therefore I was not able to be satisfied on a number of points about his evidence. Ms Hartleb did not accept as correct all that her driver said and there were points on which their evidence was inconsistent.

15. I also find that he was shown to have been untruthful to his employer (Ms Hartleb). This comes about as follows. HMRC's investigations into this matter revealed that Mr Myslinski had been stopped once before (in 2012) for smuggling goods into the UK while driving the same lorry. He had been required to pay about £860 in duty for the vehicle to be restored on the spot.

16. Ms Hartleb's side of the story is that he had been working for her at the time, but all she knew of the 2012 incident was that Mr Myslinski had told her he needed her to pay £860 to keep the lorry on the road, telling her that it was an on-the-spot fine for dangerous tyres. She paid the money.

17. Mr Myslinski, as I have said, did not give evidence and was not asked to comment on this in the letters he wrote back in early 2014. So I don't have his side of the story; HMRC were unable to call him as a witness as later letters they wrote to him were returned undelivered.

18. Nevertheless, it seems that there are only two possibilities here as to what happened: either Ms Hartleb was complicit in the smuggling in 2012 or Mr Myslinski must have lied to Ms Hartleb over the reason why the £860 was required. This follows because clearly she would not have paid the £860 and retained Mr Myslinski as an employee if she had discovered, when the £860 was demanded, that he was smuggling on his own account using her lorry. HMRC do not allege she was complicit: so the only remaining explanation is that Mr Myslinski did, as she says, lie to her over why the £860 was required to be paid and so I find that he did.

19. That means I have to be wary about accepting what else Mr Myslinski said, as he was clearly capable of telling self-serving untruths. Nevertheless, I do not entirely reject his evidence as some of what he said was consistent with Ms Hartleb's evidence and in some other instances consistent with the documents. I explain below precisely which of his evidence is accepted and what rejected. I do not accept his opinions.

20. As a footnote to this I mention that HMRC pointed out that back in 2012 they sent Ms Hartleb the receipt for the £860 which shows clearly that the payment was for 'VAT or duty'. As she is not an English speaker, she would have needed to have this translated in order to understand it. But as HMRC don't allege she was complicit with her driver's smuggling, the only conclusion is that she did not have it translated and she did not understand the information on the receipt. The only relevance of this footnote is that it adds to the picture I paint below of Ms Hartleb as someone who wasn't particularly careful in business matters and who was inclined to take people, including her driver, on trust.

Ms Agnieszka Hartleb

21. The appellant had written numerous long letters about what happened and had submitted a witness statement. But, as I have said, she was not present in the hearing to answer any questions. This meant that I was cautious about accepting what she said where it was not corroborated. It was also clear that in places her evidence was not entirely consistent: while she explained why she changed her mind about her driver (see §37), she did not explain why she was initially adamant the goods were not air con filters, but then later referred to them as such (§43) nor why she at one point said the cigarettes were manufactured by a Mr Ryszard Drozdz at the premises in Lodz, but elsewhere said they were imported into Poland. These were, however, fairly minor discrepancies.

22. There was (on paper) a significant dispute between Mr Myslinski and Ms Hartleb. She produced papers he had signed saying he was aware of and had been trained on the risk of smuggling. He denied this: in respect of some of the papers he said his signature was forged, and in respect of others he said that he was asked to sign them after the seizure and that they had then been backdated. Ms Hartleb denied all of this.

23. Without oral evidence from either of the two witnesses, it is difficult to know where the truth lies. I note that (after the event) Ms Hartleb has been very critical of her driver's behaviour and considers he ought to have known better than to accept unlabelled cargo or a CMR with errors, but I also consider she herself could have done more to check the legitimacy of the transport and that she did not react to suspicious indicators. HMRC do not allege she knew of the smuggling so the conclusion must be that her checks were not rigorous because she did not see the need for it, and that suggests the training of her drivers would not have been rigorous either. In any event, I am not satisfied that Ms Hartleb did train her drivers. However, at the same time, I have also not been satisfied that Ms Hartleb did backdate documents or forge signatures.

24. In conclusion, to a large extent I accept Ms Hartleb's evidence of fact: I explain below why I reject elements of it. I do not accept her opinions.

Findings of Fact

25. With the above reservations on both what Ms Hartleb and Mr Myslinski said, I make the following findings of fact.

What happened?

26. Mr Myslinski drove Ms Hartleb's lorry to the place of loading at Lodz, and loaded three pallets as agreed between Ms Hartleb's agent and Mr Drozdz, the owner of the goods. The pallets were wrapped up and Mr Myslinski did not check their contents. He drove the lorry to the UK where he was stopped at Dover Freight Terminal on 30 August 2013.

27. The pallets were found to contain cigarettes. There was some dispute in the letters exchanged between the parties as to where the cigarettes originated. At one point, Ms Hartleb suggested they must have been manufactured outside Poland and been brought into Poland for no purpose other than being smuggled into the UK.

28. As I explain below, whether the cigarettes were manufactured in Poland, or merely brought into Poland from elsewhere, makes no difference to the validity of the assessment. Nevertheless, for the sake of completeness I find that it was more likely than not that the cigarettes were actually manufactured in Poland at the site in Lodz. I say this because Ms Hartleb's undisputed evidence was that her complaint to the police in Poland (referred to at §51 below) led to a police raid at the Lodz premises and the discovery of illicit cigarette manufacturing equipment.

Due Diligence

29. The parties were agreed that the cigarettes were owned by FH Frutes, a business or company operated by Mr Drozdz. It was Ms Hartleb's evidence, which HMRC did not challenge, that the appellant had shipped pallets of goods for Mr Drozdz on 4 prior occasions. On the appellant's own evidence, her due diligence for FH Frutes comprised checking what appeared to be the Polish equivalent of Companies House to ensure that the company was solvent and trading, and taking a recommendation from another business (Trans Mar) with whom she shared a working relationship (in particular, she worked as bookkeeper for Trans Mar). I also find, relying on her own evidence, the only written instructions ever given to her agent by Mr Drozdz was on the first occasion. On all later occasions, her agent took and acted on instructions from FH Frutes given over the phone by Mr Drozdz.

Previous deliveries for Mr Drozdz

30. As I have said, the only written instructions produced by the appellant related to the first transaction with Mr Drozdz. She accepts there were no written instructions for later shipments, including the one at issue in this appeal.

31. The written instructions contain little detail, other than to specify the nature of the goods (filters), their weight and the fact they were packed on three pallets. The charge (€350 plus VAT) was clearly stated, but the identity of the sender and the recipient was not given. The delivery address was extremely vague being 'London (near M25)' although it stated that the precise delivery address would be given later. It seems, though, the address was only given later by phone.

32. Mr Myslinski explained in his letter that he had been the driver on all bar one of the earlier transports Ms Hartleb had undertaken for Mr Drozdz. On each occasion, he had been given precise instructions on where to meet by mobile phone shortly before arrival. On arrival, rather than the goods being unloaded into a warehouse or other business premises, he had been met by a 'man with a van' who had immediately driven away with the goods.

33. While I have expressed reservations about Mr Myslinksi's evidence, this evidence does not appear to be self-serving and is consistent with the factual matrix. Firstly, the written delivery instructions were very vague and therefore the exact address for delivery must have been given later and Ms Hartleb's own evidence indicates phone contact between Mr Myslinski and Mr Drozdz during the transport at issue in this appeal and such phone contact is consistent with Mr Myslinski's story; secondly, as the intercepted load was contraband, and Mr Drozdz was in the business of producing contraband (§51), it seems more likely than not that all the earlier loads were contraband. Being contraband, it is more than likely that the goods were delivered precisely as Mr Myslinski described as the smugglers would not want anyone to know their true address. For these reasons, I accept Mr Myslinski's evidence on this.

The CMR

34. The only CMR produced was for the delivery at issue in this appeal. It did not show FH Frutes or Mr Drozdz as the sender: it did not mention them. On the contrary, the sender was shown to be an address in Germany. It correctly showed Lodz (in Poland) as the place of loading.

35. It did include a recipient. HMRC's case is that the company named as recipient (Eurostorage) did not exist and the address to which the appellant was meant to be delivering did not include warehouse facilities. The appellant did not accept that was true, saying that the recipient company had a website and she had checked a map to ensure that the address was genuine. I consider this further at §102.

The driver's knowledge of the smuggling?

36. Both the driver and Ms Hartleb agreed that his employment contract ceased shortly after the seizure on a mutual basis due to the lack of work, as the lorry was impounded. He was not dismissed. I accept that evidence: it is consistent with the largely positive view of him Ms Hartleb initially expressed in correspondence with HMRC.

37. But as the correspondence progressed, Ms Hartleb's view of Mr Myslinski became negative to the extent that she now expressed the view that her driver must have known about the illicit nature of the cargo being shipped for FH Frutes. She explained her change of view was initiated by the prosecutor (see §51) who thought the evidence might indicate collusion between Mr Myslinski and Mr Drozdz.

38. In brief, the reasons she put forward for seeing her business as a victim of an illegal act by its employee were as follows:

(1) Mr Myslinski had smuggled a small amount of contraband in 2012 and then lied to her about it (discussed above).

(2) he accepted the CMR which showed the goods as picked up in Germany when he knew he had loaded them in Poland

(3) he spoke to FH Frutes by mobile phone during the journey (she knows this from the mobile phone bill for his company SIM card, which she had to pay) and

(4) three pallets of cigarettes must have smelt of tobacco so he must have known what he was carrying;

(5) he accepted unlabelled pallets;

(6) he referred to the goods as 'air con filters' when they were supposed to have been 'plastic containers'.

39. I don't put any store on point (2). Even Ms Hartleb accepts that the CMR shows that the goods were picked up in Lodz (Poland); as she took instructions orally, she cannot demonstrate that Mr Myslinski ought to have known that the sender was not a German company. Even the written instructions for the original transportation did not specify the sender.

40. With respect to (3), HMRC appear to accept Ms Hartleb's case that the driver's mobile phone records show he spoke to Mr Drozdz during the journey. In any event, as I have said, this is consistent with Mr Myslinski's story too. However, I don't agree with Ms Hartleb that it indicates collusion between Mr Myslinski and Mr Drozdz. On the contrary, Ms Hartleb has been shown to be prepared to accept vague delivery instructions which would necessitate her driver being given precise delivery instructions by phone. While it is true that for the transport at issue in this appeal, the CMR did contain a precise delivery address, I consider it more likely than not that yet again Mr Myslinski was to be met by a 'man with a van' and he would have needed to be in contact with Mr Drozdz in order to deliver the goods as Ms Hartleb employed him to do. I do not accept Ms Hartleb's suggestion that Mr Myslinski was not acting in the course of his employment in having these calls with Mr Drozdz: on the contrary, by accepting vague delivery instructions Ms Hartleb must have realised phone contact would be necessary to enable Mr Myslinski to deliver the goods.

41. With respect to (4), I have no evidence to support this. It is accepted by all parties that the pallets were wrapped up. It is possible the smell would have been supressed: in any event, Ms Hartleb has not satisfied me that the driver must have known from the smell.

42. In respect of (5), it was accepted by all parties that the pallets were unlabelled. Ms Hartleb insists they should have been labelled and her driver was in the wrong in accepting them unlabelled. I agree that the pallets should have been labelled: this is common sense. Her lorries were undertaking multiple deliveries each journey and the driver would need to deliver the right goods to the right destination. However, as I have said, she has not satisfied me as to the training given to Mr Myslinski so she has not satisfied me that Mr Myslinski would have been told by her not to accept unlabelled goods.

43. In respect of (6), I read nothing into the confusion over what the goods were meant to be: Ms Hartleb herself is confused about this, originally insisting they were meant to be 'plastic containers' and then later referring to them as 'air con filters'.

Certainly, the first goods shipped by FH Frutes and the only ones for which there was documentation, were described as 'filters'. In any event, the last batch were clearly cigarettes and it is more likely than not that all the earlier batches were smuggled goods too, and on no occasion comprised filters or plastic containers.

44. There are two aspects of Ms Hartleb's allegations against Mr Myslinski: firstly that he knew he was transporting contraband, and secondly, he was in collusion with Mr Drozdz, and in both scenarios she was the innocent victim.

45. I agree with Ms Hartleb that Mr Myslinski ought to have known that he was being used to smuggle goods. He ought to have understood that the odd delivery arrangements on all previous occasions meant that the person taking delivery wished to remain untraceable. And whatever the pallets smelt of, it was accepted that they were not labelled. He should have found that odd too. The CMR was odd: it referred to a place in Germany rather than Mr Drozdz or FH Frutes as being the sender.

46. Does that mean that because he should have known, he did know that he was being used to smuggle goods? HMRC consider he did not have actual knowledge of this: they accept the contents of his letters to them, and consider them more consistent than Ms Hartleb's story. However, I put no weight on HMRC's opinion and make up my own mind on this matter.

47. I take into account Mr Myslinski was involved in an earlier smuggling attempt and then lied about it in order to get his employer to foot the bill. However, I don't consider the two incidents were connected: the 2012 incident was for a much smaller amount and was long before there was any involvement by Mr Drozdz. I consider that Mr Myslinski's involvement in the former incident does not necessarily indicate involvement in the later incident.

48. And there seems no reason for Mr Myslinski to be knowingly concerned with the 2013 smuggling incident: as Ms Hartleb accepts, it had been her decision to accept the recommendation of Trans-Mer to trade with Mr Drozdz. and it was her agent (Mr Fabiaski) who agreed all the transports with Mr Drozdz. This was not a case where Mr Myslinski had either engineered the connection with Mr Drozdz nor the particular contract concerned. Indeed, on one occasion Ms Hartleb used a Trans-Mer driver to deliver Mr Drozdz' goods to the UK: so it is clear Mr Myslinski's involvement in the transport was unnecessary to Mr Drozdz. So there is no reason to suppose Mr Myslinski had any knowing involvement. The fact that he chose to cooperate with HMRC, replying to two letters (later letters from HMRC were returned undelivered) support the analysis that he was not a knowing participant.

49. Taking all this into account, I do not find that Ms Hartleb has made out her case of bad faith on the part of her ex-driver: I find he was not knowingly involved in the smuggling nor in collusion with Mr Drozdz. I find that with this load, just as with the earlier three loads, he was acting in the course of his employment by Ms Hartleb when he transported it to the UK.

What should Ms Hartleb have known?

50. Ms Hartleb is not accused of knowing about the smuggling attempt. Although Mr Barr's original opinion was that she was involved and that was the reason why he imposed a penalty for 'deliberate' behaviour, the penalty had been reduced to £26,689 on review, and HMRC no longer maintained the allegation of actual knowledge of the smuggling against Ms Hartleb.

51. The main reason, I understand, why HMRC no longer allege that Ms Hartleb had any knowledge of what was going on was because she reported the matter to the Polish police, and her complaint led to a successful prosecution of FH Frutes/Mr Drozdz (although it is not clear that Mr Drozdz was ever located). Her complaint had also led to the discovery of illicit cigarette manufacturing equipment at the location in Lodz.

52. HMRC's case is that Ms Hartleb ought to have known of the smuggling attempt. They point to the following:

(1) her due diligence was (in their view) cursory;

(2) her driver's knowledge should (in their view) be treated as her knowledge, because he was acting in the course of his employment in transporting the loads. He knew about the odd delivery arrangements, he knew the pallets were unmarked, he ought to have known the CMR was incorrect.

(3) she accepted instructions for this delivery and earlier ones without any documentation whatsoever, so she had nothing in writing about where the goods were coming from, where they were to be delivered, what they were nor to whom they belonged.

Due diligence

53. Dealing with point (1), I find her due diligence was cursory. The recommendation from Trans-Mer was on the face of it based on only 3 months trading with Mr Drozdz. She also made little investigation into the identity of the sender and recipient.

54. However, HMRC do not suggest she would have discovered anything had her due diligence been more thorough. So, as actual knowledge is not alleged, no constructive knowledge can be conferred by her cursory due diligence.

She must be treated as knowing what Mr Myslinski knew?

55. To what extent should an employer have attributed to her the knowledge of her employee? This was discussed in the Upper Tribunal case of *Greener Solutions Ltd* [2012] UKUT 18 (TCC). The normal rule is that a person is deemed to have the knowledge of its employee or agent to the extent that that employee or agent is acting in the course of his duties. There is an exception to that and that is where the employee or agent acted fraudulently or dishonestly but *only* if the employer was a victim of the fraud or dishonesty rather than being intended to benefit from it.

56. Even if Mr Myslinski had known that the goods he was transporting were contraband, all the evidence would point to the fact that the transport was in the course of his employment: it was Ms Hartleb who was to be paid for the transport. She was paid for the earlier journeys although it appears that the due contractual price was not paid on the journey at issue. Moreover, Ms Hartleb's transport for Mr Drozdz would take place irrespective of who was the driver. Whatever his state of knowledge, therefore, I find that Mr Myslinski undertook the transportation in the course of his employment by Ms Hartleb. Ms Hartleb is therefore fixed with the knowledge he acquired in the course of his employment: she must be taken to know about (1) the previous irregular deliveries to a man in a van, (2) the fact the goods were not labelled and (3) and the irregularity in the CMR on this journey.

57. Her own evidence is that her drivers were trained to be aware of the risk of being used to smuggle goods. It was her case that they were trained to spot warning signs. While I have not accepted that Mr Myslinski was trained, it does indicate an acceptance by Ms Hartleb that she herself had a good general awareness of the risk of smuggling and would know enough to spot warning signs.

Accepted suspicious instructions?

58. Ms Hartleb was happy to trade without a paper trail. She took what she was told on trust. She points out that there is no law against accepting transport orders by phone and that is true. Nevertheless, the question is not whether operating without a paper trail is lawful, but whether if she had been more careful she would have been alerted to the illicit nature of the cargo.

59. The original instructions were in writing. She should have found them suspicious because they had vague delivery instructions, which she ought to have known meant that she would have nothing in writing to identify the destination of the goods. She is treated as knowing that on earlier occasions when transporting for Mr Drozdz her driver was being met with a 'man with a van' and the goods were not being offloaded into business premises. That should have confirmed her suspicions.

60. She chose not to ask for the CMR in advance of her driver loading the goods. She waited until her driver returned with it. But she could and should have asked for sight of it in advance and in any event must be treated as having seen it as her driver had possession of it. From the CMR she ought to have realised it was suspicious because it did not include the name of FH Frutes or Mr Drozdz, the persons who were contracting for her services, but an address in Germany of which she had no knowledge.

61. She ought to have realised from the original vague delivery instructions and the fact that her lorry was being met in the UK by a man with a van rather than offloaded into commercial premises that the recipient wished to remain untraceable; she should have realised that because the CMR did not identify FH Frutes or Mr Drozdz as the sender and because she had nothing else in writing from them that they also wished to remain invisible; even the lack of labelling suggested something odd about the transport. The most likely reason for all these irregularities is that the shipment was

contraband and I consider Ms Hartleb should have realised that the cargo was contraband.

The law

62. The assessment was raised under Regulation 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ('HMDP Regulations'). That provides as follows:

> (1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the UK in order to be delivered or used in the UK, 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.
>
> (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 for for P's own use and were acquired in, and transported to the UK from, another Member State by P.

63. It can be seen from this that there are a number of conditions which must be fulfilled before Ms Hartleb could be liable to excise duty on the cigarettes at issue in this case. Those conditions were:

> (a) The cigarettes were released for consumption in a member state other than the UK;
>
> (b) The cigarettes were held for a commercial purpose in the UK;
>
> (c) The cigarettes were to be delivered or used in the UK;
>
> (d) Ms Hartleb was the person making the delivery, or holding the goods for delivery, or to whom the goods were delivered.

I will deal with each condition in turn.

Released for consumption in another Member State?

64. There is no definition in Regulation 13 of 'released for consumption' but there is in Regulation 6 of the same Regulations, which provides:

> (1) Excise goods are released for consumption in the UK at the time when the goods -

> (a) leave a duty suspension arrangement;
>
> (b) are held outside a duty suspension arrangement and UK excise duty on those goods has not been paid, relieved, remitted or deferred under a duty deferment arrangement;
>
> (c) are produced outside a duty suspension arrangement; or
>
> (d) are charged with duty at importation unless they are placed, immediately upon importation, under a duty suspension arrangement.

65. This definition obviously applies to excise goods within the UK; it is HMRC's position that nevertheless it must follow that Parliament intended the exact same meaning to be given to 'released for consumption' where that phrase is used elsewhere in the same regulations to refer to an event in another Member State. I agree with them: it is a normal rule of statutory construction that the same phrase has the same meaning throughout the same piece of legislation. So 'released for consumption' in Reg 13 should be taken to have the meaning given in Reg 6(1) save that references to the UK should be taken to refer to Member States other than the UK.

66. So were the cigarettes at issue in this appeal released for consumption elsewhere in the EU, and in particular, in Poland? There are two aspects to 'released for consumption': one is physical in the sense that the goods are produced, imported or held, the other is tax in the sense that the goods must be outside a duty suspension arrangement.

67. On the 'physical' side, my finding at §28 is that they were manufactured in Poland and so would fall within (c); even if they had been manufactured elsewhere and merely transported to Lodz, they would fall into (b). On the 'tax' side, what evidence there is, is that the cigarette manufacturing activity at Lodz was unlawful under Polish law. Moreover, it seems clear that the cigarettes were intended to be smuggled into the UK to evade UK excise duty law: again that suggests it is extremely unlikely the owners of them would have complied with Polish excise duty law. And there is absolutely no evidence that the cigarettes were in a duty suspension arrangement. It is more likely than not that the cigarettes were not in a duty suspension arrangement in Poland and therefore I find they were not in such an arrangement

68. Therefore, I find that the condition in Reg 13(1) that the cigarettes were released for consumption in Poland was met.

69. Ms Hartleb disputes this. She points out that the cigarettes were (she assumes) not offered for sale in Poland. It is her case it would have been illegal to offer them for sale in Poland as they did not have the correct Polish excise duty marks on them. But even if I accept that the cigarettes were not and could not have been offered for sale in Poland, it makes no difference. The meaning of 'released for consumption' is not, as I have explained, a question of whether or not the cigarettes were offered for sale, but whether (in summary) they were manufactured or held outside a duty suspension arrangement in Poland. And I find it proved that they were.

Held for a commercial purpose in the UK?

70. The next question is whether the cigarettes were held for a commercial purpose in the UK. Of course, the facts are that they were seized very shortly after arrival in the UK. But the meaning of 'held for a commercial purpose' is given in Regulation 13(3) and it is very wide. In summary it means that *all* excise goods are held for a commercial purpose unless they are (1) held by a private person, (2) acquired by that person in another member state and transported into the UK from that member state by that person and (3) intended for that person's own consumption.

71. Putting aside the meaning of 'held', the person who transported the goods into the UK was Mr Myslinski, but he had not 'acquired' the goods (he had no title to them) and they were not for his own use. They were to be delivered to someone else.

72. So the conclusion must be that the goods were held for a commercial purpose in the UK. In any event, the seizure of the cigarettes was not challenged by anyone and so under §5 of Sch 3 Customs and Excise Management Act 1979 the goods were forfeited as 'duly' condemned. That means that this Tribunal is bound to find that the goods were held for a commercial purpose in the UK else they should not have been condemned.

Goods to be delivered or used in UK?

73. It was Ms Hartleb's case that her business was employed to deliver the goods to an address in the UK. The goods were, therefore, to be delivered in the UK and this condition is fulfilled.

74. The goods were therefore liable to duty under Reg 13(1), but under Reg 13(2) who was liable to pay the duty?

Is Ms Hartleb liable for the duty?

75. It is clear that Ms Hartleb did not own the goods nor have any kind of beneficial interest in them. She was contracted to do no more than deliver the goods from Lodz to the place specified in the UK. But under Reg 13(2) liability falls on the person

> (a) making the delivery of the goods;
>
> (b) holding the goods intended for delivery; or
>
> (c) to whom the goods are delivered.

76. The preceding words are 'Depending on the cases referred to in paragraph (1)' and paragraph (1) makes it clear that the excise duty point is the time when the goods are first held for a commercial purpose in the UK. I have already explained this these goods were held for a commercial purpose the whole time they were in the UK and therefore the moment the excise duty liability arose was at the moment of importation.

77. That being the case, Reg 13(2)(c) must be inapplicable as no delivery took place; but potentially Ms Hartleb could be liable under (a) as the person making delivery or (b) as holding the goods intended for delivery.

78. With respect to both (a) and (b) there is a question whether Ms Hartleb could be said to be doing anything in respect of the goods when they were in a lorry driven by Mr Myslinski. There is a second question and that is whether there is a particular state of knowledge required for liability under (a) or (b). There is a lot of authority on the meaning of 'holding' for Reg 13(2)(b) and so I will address that before considering possible alternative liability under Reg 13(2)(a).

79. I also note that Ms Hartleb's first ground of defence in her notice of appeal was that a mere carrier or transporter of goods could not be liable for the excise duty on them: only an owner could be so liable. But as the above extract of the law shows, she is mistaken in her understanding of the law on this point. UK law in my view reflects EU law on this point and it is clear that liability is not restricted to owners and can fall on a haulier.

Can a person hold goods without physical possession?

80. There has been a number of recent authoritative decisions on this. The Court of Appeal decision in *Taylor and Wood* [2013] EWCA Crim 1151 was about whether criminals could be liable for the duty when they had arranged for two innocent hauliers to bring duty unpaid excise goods into the country. Who held the goods: those who arranged the transport or the hauliers who did not know the cigarettes were hidden in their cargo? The Court said:

> [39] ...both the language and purpose of the [relevant legislation] 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 ....rather than upon the [criminals] would no more promote the objectives of the Directive than those of the Regulations.

81. The criminals were found to be liable to the duty even though they had no physical possession of the goods at the time of seizure.

82. The next year the Court of Appeal ruled in the case of *R v Tatham* [2014] EWCA Crim 226 that:

> ....'holding' ...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)....*
>
> There is no need for the person to have any beneficial ownership in the goods in order to be a 'holder'....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'.....

83. In conclusion, Ms Hartleb could be, subject to the question of knowledge, 'holding' the goods if she had legal or factual control over the goods. And it seems to me that she does in this instance. The goods were factually in the possession of her employee Mr Myslinski. He was transporting the goods in accordance with her instructions and therefore doing so in the course of his employment. I have entirely rejected her case that he was committing some kind of fraud on her (see §§36-49). The goods were therefore in her control as they were factually in the control and possession of her employee, Mr Myslinski, acting in the course of his employment.

84. However, the cases make clear that there are two elements to 'holding': control *and* knowledge. I have found Ms Hartleb had the necessary control. But did she have the necessary knowledge?

What element of knowledge is required?

85. The cases cited above, *Taylor and Wood* and *Tatham* make it clear innocent parties were not 'holding' the goods. This was repeated by the Upper Tribunal in *McKeown, Duggan and McPolin* [2016] UKUT 479 (TCC), a case concerning assessments to duty on three HGV drivers who were each stopped on arrival in the UK and found to be knowingly carrying non-excise duty paid goods which did not belong to them. They were found liable to the duty.

86. In the case of *Perfect* [2017] UKUT 476 (TCC), a self-employed driver, using the lorry provided to him by the person who contracted for his services, brought beer into UK with invalid paperwork (which stated that the goods were in duty suspension when they were not). The First-tier Tribunal ruled that Mr Perfect had no knowledge, actual or constructive, of the smuggling. HMRC appealed to the Upper Tribunal contending that the legislation imposed strict liability on anyone who knew that they were carrying alcohol. The Upper Tribunal did not agree, and consistently with the above cases ruled at [54-55] that there is no liability on anyone who has no actual or constructive knowledge that they are carrying excise dutiable goods, or who knows this, but has no actual or constructive knowledge that the duty is unpaid.

87. From these cases it is clear that Ms Hartleb is not liable for the excise duty unless she had actual or constructive knowledge that the goods she imported into the UK were duty unpaid excise goods.

88. It is not alleged she had actual knowledge of this so I find that she did not. But did she have constructive knowledge? 'Constructive' knowledge is where a person does not know something, but is deemed by the law to know it because they should have known it. Ms Hartleb did not know her lorry was being used to smuggle cigarettes into the UK, but should she have known it?

89. This Tribunal is not bound by the findings of fact in any other Tribunal, nevertheless it is interesting to consider the findings in *Perfect* at first instance ([2015] UKFTT 639 (TC)), which findings were not challenged in the Upper Tribunal. The first instance Tribunal ('FTT') ruled that Mr Perfect did not have constructive knowledge that the alcohol was duty unpaid even though

(a) The FTT at [39] clearly thought Mr Perfect was choosing not to reveal information he had;

(b) He was paid in cash, knew no one's surname and was only contacted by phone;

(c) The business which contracted his services did not appear to exist and certainly not at the location in Essex from which he collected the lorry;

(d) The CMR showed his contractor to be a company based in Northern Ireland whereas he dealt with a business which appeared to be based in Essex;

(e) He didn't know who owned the lorry he drove.

90. The FTT did not think that amounted to constructive knowledge of the fact he was being used to smuggle goods. As I have said, these findings were not challenged and the Upper Tribunal implied no fault could be seen with them.

91. I have found as a fact that Ms Hartleb ought to have known that her lorry was being used for smuggling for the reasons given at §§55-61. I am aware that that might seem to be at odds with the FTT's decision in *Perfect,* where the appellant in that case was not expected to have checked that his contracting party was a genuine business nor noticed discrepancies in the CMR. There is no requirement for the decisions to be consistent but much more relevantly all cases are decided on their own facts and the facts here are not identical to those in *Perfect*.

92. In particular, however informally Ms Hartleb chose to run her business, she knew she was transporting loads which neither she nor her driver would be able to verify. The loads would be sealed and she would not be able to check their contents. It must be obvious to anyone in those circumstances that their lorry might be used for smuggling of contraband or even illegal goods. A haulier in those circumstances ought to take reasonable steps to verify that the load they were taking across national boundaries was something they were entitled to import, yet Ms Hartleb was prepared to accept vague delivery instructions, and did not ask to check the paperwork in advance, and she was prepared to continue to deal with Mr Drozdz even after it ought to have been clear to her that the goods were being delivered to a 'man in a van' and the true recipient was untraceable and unidentified.

93. My conclusion is that she did have constructive knowledge that the load on her lorry included smuggled goods. While she was not in a position to know they were cigarettes rather than some other kind of contraband or illegal goods, I do not think that matters. It is sufficient 'guilty' knowledge if she has constructive knowledge of smuggling. She is a person within Reg 13(2)(b) and the assessment is therefore valid.

Footnote: Is Ms Hartleb within Reg 13(2)(a)?

94. That conclusion makes it unnecessary to consider whether in addition she was liable to assessment under Reg 13(2)(a) as a person 'making the delivery of the goods'. There is little authority on this provision so far as I am aware. I wondered whether it has the same knowledge requirements as Reg 13(2)(b). Would Ms Hartleb

be liable to the assessment under Reg 13(2)(a) even if I had concluded she did not have the requisite constructive knowledge to be 'holding' the goods under Reg 13(2)(b)?

95. It seems to me that Reg 13(2)(a) must be interpreted to have the same requirement of actual or constructive knowledge in order to be consistent with 'holding' in Reg 13(2)(b). The Upper Tribunal in *Perfect* said of 'holding' that:

> [57] ....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.....

And it seems to me that the same must be true of Reg 13(2)(a) as of (b). In other words, Ms Hartleb could only be liable to the duty if she had the requisite knowledge. As I have held that she did have the requisite constructive knowledge, she would be liable under Reg 13(2)(a) as well as Reg 13(2)(b). The excise duty assessment is therefore valid.

Footnote: burden of proof

96. The Upper Tribunal in *Perfect* at [56] indicated that it was not yet clear who had the burden of proof in these types of cases: in other words, did HMRC have to prove Ms Hartleb had constructive knowledge, or did Ms Hartleb have to prove that she did not?

97. HMRC's position was that S 154(1)(d) Customs and Excise Management Act 1970 applied to put the burden of proof on the appellant but I cannot agree. While s 154(1) does create a rebuttable presumption for a number of matters, and s 154(2) does give the appellant the burden of proving a number of other matters, neither sub-section applies to the question of proof of liability of a particular person to excise duty (and in particular proof that that person was 'holding' the goods because they had constructive knowledge of the unpaid duty on, and excisable status of, the goods concerned).

98. HMRC also referred me to *Euro Wines (C&C) Ltd* [2018] EWCA Civ 46 which ruled that s 154 did not breach the European Convention on Human Rights by reversing the burden of proof even in a case of an excise penalty. That does not seem relevant here: s 154 simply does not apply on its face to the question of constructive knowledge.

99. HMRC, as I have said, indicated that they relied specifically on s 154(1)(d) but I find that reliance strange as that sub-section creates a rebuttable presumption that HMRC have or have not been satisfied of something: but there is no requirement here for the Tribunal to consider whether or not HMRC have been satisfied of any matter: the Tribunal is not exercising supervisory jurisdiction but deciding whether the appellant was a person 'holding' the goods. Therefore, s 154(1)(d) does not apply.

100. Like the Upper Tribunal in *Perfect,* I do not consider the question of burden of proof straightforward. While the appellant normally has the burden of proving an assessment is wrong, it seems questionable whether an appellant would have to prove that they did not have constructive knowledge as that would require an appellant having to prove that s/he wouldn't have discovered anything relevant if proper due diligence had been undertaken. It seems likely that the true position is that while the appellant must prove the checks that were undertaken, it is for HMRC to show that those checks were insufficient and to show what sufficient checks would have revealed.

101. However, I do not have to resolve this issue as, like the cases referred to by the Upper Tribunal at [56] in *Perfect*, this is another appeal where nothing significant turns on the burden of proof. My findings of fact are based on the evidence and not a failure to prove or disprove a matter.

102. There was one issue where I did lack evidence and that was in respect of the identity of the recipient named on the CMR referred to at §35 above. HMRC maintained the trader did not exist but produced no evidence to that effect; Ms Hartleb maintained that the trader had a website and therefore did exist but also produced no evidence to that effect.

103. Nothing turns on this because I consider the irregular delivery arrangements on earlier transports to a 'man with a van' should have put Ms Hartleb on notice that the given name and address of the recipient might well not be the name and address of the true recipient, who wished to remain untraceable. She was on notice of the smuggling even if she was right to say that the named recipient had a website. It is in any event a relatively minor point and for the other reasons set out at §§55-61 I find Ms Hartleb had constructive knowledge of the contraband nature of the goods irrespective of the point about whether or not the named recipient actually existed.

104. If I had to decide the matter, I would rule that Ms Hartleb had to prove that the named recipient existed and appeared to be a genuine trader with genuine trading address. She has failed to do this. It would be yet one more reason why I consider she had constructive knowledge that the goods were contraband.

Footnote: The relevance of the Convention on the contract for the international carriage of goods

105. Ms Hartleb drew the Tribunal's attention to the Convention on the contract for the International Carriage of goods which has a provision that the carrier is not obliged to check whether the CMR and other documents are accurate, and the sender is liable for the carrier for any deficiencies in the CMR and other documents.

106. However, that is not relevant to the question of tax liability. As is clear from the title of the Convention, it regulates the contractual position between sender and carrier. It does not regulate the position between tax authorities and importers. The Convention may give Ms Hartleb a right of action against Mr Frutes, but this Tribunal is concerned only with Ms Hartleb's liability or otherwise for the amounts assessed on her.

Footnote: goods confiscated

107. Ms Hartleb's position is that she cannot be made liable for either the unpaid duty or penalty on the goods because they were seized and forfeited by UKBA and so were never sold in the UK.

108. She is mistaken. The duty arises when the goods are brought into the UK, and not when they are sold in the UK. It is therefore irrelevant that they were destroyed before they could be sold.

109. She points out that she did not ask for the return of the goods: she suggests that there can be no liability for duty on goods where the goods effectively (through seizure and forfeiture) pass into the ownership of the state. She suggests that would be double payment. She is wrong. It is well-established that the state is liable to the duty because a duty point has passed; it is *also* entitled to forfeit the goods because the duty was not paid when it was due.

Footnote: Mr Drozdz liable?

110. Ms Hartleb's case is that HMRC should have pursued Mr Drozdz rather than herself for the excise duty. He is the one who has been convicted for an offence in connection with this matter.

111. My understanding of the law as referred to above, and in particular *Taylor & Wood,* is that Mr Drozdz would be liable for the duty if I had found Ms Hartleb to be entirely innocent in the smuggling (in other words, if I found she had neither actual nor constructive knowledge). However, it is not clear whether Mr Drozdz has some kind of joint and several liability for the duty as a person 'holding' the goods in the circumstances where the carrier has constructive knowledge. I do not need to consider this: the assessment on Ms Hartleb is valid irrespective of whether Mr Drozdz could also have been assessed.

112. I do understand Ms Hartleb's dismay with the assessment. She is accused of nothing worse than carelessness yet is left liable to pay a very substantial assessment,

while the person (Mr Drozdz) who does appear to have committed criminal offences in Poland and the UK has not been pursued for the duty. But my understanding is that the law was written with the intention of imposing duty on carriers (other than those without actual or constructive knowledge) in order to encourage hauliers to take reasonable care to ensure that they do not smuggle contraband into the UK. If this were not the case, hauliers would have no incentive to ensure they were not used to carry contraband, and smuggling would be much more prevalent than it already is.

The penalty

113. Schedule 41 of the Finance Act 2008 provided as follows:

> *Handling goods subject to unpaid excise duty*
>
> 4 –
>
> (1) 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.

114. As was made clear by the Upper Tribunal in *Perfect*, there is no necessary correlation between liability for the duty and liability to a penalty. It is possible to be liable for the penalty even where there is no liability for the duty, and to be liable for the duty but not for a penalty.

115. Is Ms Hartleb liable for the penalty? Putting aside the question of whether Ms Hartleb was in possession of the goods because her employee Mr Myslinski was in possession of them at the time they entered the UK and became liable to UK excise duty, Ms Hartleb was clearly a person 'concerned in carrying' the goods, as she agreed to transport them to the UK and they were being transported to the UK on her lorry and on her instructions by her employee.

116. It is accepted that the goods were duty unpaid at the point of entry into the UK. So the conditions of paragraph 4 were fulfilled.

117. Ms Hartleb is therefore liable to a penalty unless the provisions of paragraph 20 of Schedule 41 apply. That paragraph provides:

> (1) Liability to a penalty under ... paragraphs ...4...does not arise in relation to an act or failure which is not deliberate if P satisfies HMRC or (on appeal) the FTT that there is a reasonable excuse for the act or failure.
>
> (2) For the purposes of sub-paragraph (1) –
>
> (a) [not relevant]

> (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) [not relevant]

118. 'Reasonable excuse' is a phrase which appears frequently in penalty legislation. It is established that it requires the appellant's actions to be judged objectively by comparing them to the reasonable actions of a hypothetical person who is conscious of, and intends to comply with, his obligations. That hypothetical taxpayer is put into the same scenario as the appellant, and is endowed with the appellant's actual physical and mental health but otherwise the test is objective.

119. A reasonable person would not import a cargo into the UK if they had good cause to suspect that it was unlawful to do so. I have already found Ms Hartleb had constructive knowledge that her business was being used to smuggle contraband into the UK: I found that she knew, and in some instances, was deemed to know, of matters, which if considered together should have made her realise her lorry was being used for smuggling. For the same reason, I find she did not have a reasonable excuse.

120. While it was her case that she relied on her agent to check that the papers were in order, sub-paragraph (2)(b) provides that that is not a reasonable excuse unless she took reasonable care to avoid the relevant failure. I find that she did not: on the contrary it was clear from the earlier transportations for Mr Drozdz that she was prepared to operate in circumstances that should have put her on notice of the smuggling.

Special circumstances

121. The relevant part of Sch 41 reads as follows:

> **Special reduction**
>
> 14(1) if HMRC think it right because of special circumstances, they may reduce a penalty under ... paragraph ....4.
>
> (2) In sub-paragraph (1) 'special circumstances' does not include –
>
> (a) ability to pay, or
>
> (b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.
>
> (3) In subparagraph (1) the reference to reducing a penalty includes a reference to
>
> (a) staying a penalty, and
>
> (b) agreeing a compromise in relation to proceedings for a penalty.

122. Then §19(3) of Sch 41 provides that the Tribunal has jurisdiction to consider a special reduction but only in circumstances where HMRC's decision in respect of

special circumstances was 'flawed', in the sense that HMRC took into account irrelevant factors, failed to take into account relevant factors, or reached an unreasonable decision; a decision by HMRC is also 'flawed' in this sense if HMRC simply failed to think about the matter at all.

123. There is no test of what 'special circumstances' are set out in the legislation but various Tribunals have attempted to give a definition. They have relied on what the Court of Appeal (in a different context) said in *Clarks of Hove Ltd v Bakers Union* [1978] 1 WLR 1207 at page 1215 H that:

> "…to be special the event must be something out of the ordinary, something uncommon; …"

124. In *Warren* [2012] UKFTT 57 (TC) the Tribunal said of "special circumstances":

> "[53.] We were not referred to (and could not find) any authority on the meaning of "special circumstances". Plainly it must mean something different from, and wider than, reasonable excuse, for (i) if its meaning were confined within that of reasonable excuse, paragraph 9 would be otiose, and (ii) because paragraph 9 envisages a reduction in a penalty rather than absolution, it must be capable of encompassing circumstances in which there is some culpability for the default: where it is right that some part of the penalty should be borne by the taxpayer.
>
> [54.] The adjective "special" requires simply that the circumstances be peculiar or distinctive. But that does not necessarily mean that the circumstances which affect all or most taxpayers could not be special: an ultra vires assertion by HMRC that for a period penalties would be halved might well be special circumstances; but generally special circumstances will be those confined to particular taxpayers or possibly classes of taxpayers. They must encompass the situation in which it would be significantly unfair to the taxpayer to bear the whole penalty."

What was said in *Warren* seems right, if very general.

125. In summary, it seems to me that the alleged special circumstances must be an unusual event or situation which does not amount to a reasonable excuse but which renders the penalty in whole or part significantly unfair and contrary to what Parliament must have intended when enacting the provisions.

126. In this case, HMRC's review officer considered that there were no special circumstances. He did not explain why. It seems to me that I can only consider whether this was flawed if I consider whether there were special circumstances.

127. There is nothing in the above findings of fact which in my view could amount to special circumstances. The HMRC's officer's conclusion that there was none does not therefore appear to be flawed and I have no jurisdiction to allow a reduction.

Mitigation

128. The permitted mitigation is much greater for behaviour which is not deliberate or concealed. HMRC accepted that Ms Hartleg's behaviour was not deliberate or concealed which under paragraph 6B of Sch 41 resulted in a maximum possible penalty of only 30%.

129. Further mitigation is permitted for disclosure, with greater mitigation where the disclosure is unprompted than prompted. Paragraph 12 sets out the definition of 'disclosure':

> **12 Reductions for disclosure**
>
> (1) Paragraph 13 provides for reductions in penalties under paragraphs 1-4 where P discloses a relevant act or failure
>
> (2) P discloses a relevant act or failure by-
>
> (a) Telling HMRC about it,
>
> (b) Giving HMRC reasonable help in quantifying the tax unpaid by reason of it, and
>
> (c) Allowing HMRC access to records for the purpose of checking how much tax is so unpaid.
>
> (3) Disclosure of a relevant act or failure –
>
> (a) Is 'unprompted' if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the relevant act or failure, and
>
> (b) Otherwise, is 'prompted'
>
> (4) In relation to disclosure 'quality' includes timing nature and extent.

130. HMRC classified the disclosure given by the appellant as 'prompted' because it was not 'unprompted'. While HMRC considered that the quality of disclosure was high (95%), any cooperation given by the appellant was necessarily after HMRC had discovered that contraband was contained on the lorry. I consider HMRC were therefore right to classify the disclosure as 'prompted' as it did not fall into the definition of 'unprompted'.

131. I agree with HMRC that that meant that the appropriate range of the penalty under paragraph 13 was 20-30%. As I have said HMRC gave 95% of the 10% to reflect the quality of disclosure resulting in a penalty of 20.5% of the potential lost revenue (being the excise duty that would otherwise have been evaded). That was £26,689.

132. It was not entirely clear to me why the mitigation permitted was 95% rather than 100% as Ms Hartleb appears to have entirely cooperated with the investigation. I would therefore increase the mitigation to 100% which reduces the penalty to £26,182.60.

Penalty lacks proportionality?

133. It is possible for penalties in law to be disproportionate. But the test for disproportionality is a high one: the penalty must be 'not merely harsh, but plainly unfair' (*International Roth Transport* [2003] QB 728 per Lord Justice Simon Brown).

134. It is not normally considered disproportionate to measure the penalty by reference to the offence rather than to the offender's means. Here the penalty is 20% of the evaded duty. I do not consider it 'plainly unfair' when measured against the duty.

135. Ms Hartleb's point is that the penalty is harsh when she was not knowingly involved: but the penalty is much lower than it would have been had HMRC considered her knowingly involved. And she has not been found entirely innocent: I have agreed with HMRC she was careless: she ought to have known her transport business was being used to transport contraband. Parliament has chosen to penalise persons with constructive knowledge: it is not 'plainly unfair' to do so. While the penalty is harsh, it is lawful.

136. The appeal is dismissed save that the penalty is reduced to £26,182.60.

137. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 12 APRIL 2018