



Neutral Citation: [2023] UKFTT 905 (TC)

Case Number: TC08973

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Taylor House, London

Appeal reference: TC/2020/03497

EXCISE DUTIES – pre- “Brexit” events - duty and penalties for hand rolling tobacco – appellant driving van intercepted at Coquelles Freight – appellant believed that he was delivering car parts – appellant claims he is a victim of fraud - was appellant holding or transporting excise goods at time of interception – was appellant's conduct deliberate and concealed – appeal dismissed – Excise Goods (Holding, Movement and Duty Point) Regulations 2010 and Schedule 41, Finance Act 1994

Heard on: 27 September 2023
Judgment date: 23 October 2023

Before

**TRIBUNAL JUDGE ALEKSANDER
DR CAROLINE SMALL**

Between

ANDRZEJ OSMOLSKI

Appellant

and

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS
Respondents**

Representation:

The Appellant in person

For the Respondents: Charlotte Brown, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. Mr Osmolski appeals against HMRC's decisions, upheld on review, to issue an excise duty assessment in the sum of £168,948 and an associated excise wrongdoing penalty in the sum of £97,145. The events giving rise to the duty and penalties all occurred prior to "Brexit".
2. At the hearing, Mr Osmolski appeared in person, and HMRC were represented by Ms Brown. We heard evidence on oath or affirmation from Border Force Officer Jason Poole (by video link), from HMRC Officer Alexander Collingwood, and from Mr Osmolski. The witness statements of the witnesses were taken as read as their evidence in chief.
3. Because Mr Osmolski is not a native English speaker, an interpreter was provided by the Tribunal without charge.
4. An electronic bundle of documents, comprising 773 pages (including the witness statements) was submitted in evidence.
5. Mr Osmolski produced at the hearing a slim bundle of documents. A quick review of the bundle showed that the documents were in Polish and were without translations. We asked Mr Osmolski about these documents, and he told us that they related to his ability to pay the assessment and penalty. As they did not relate to the factual circumstances giving rise to the assessments and penalties, we declined to consider the documents in this bundle and handed it back to Mr Osmolski.
6. A witness statement was filed by Border Force Officer Valerie Knott, but as she was unable to attend the hearing for reasons explained at the hearing, we did not rely on her witness statement.

BACKGROUND FACTS

7. In 2018, Mr Osmolski had been running a haulage company, Osmolski Transport Company, for two years. The company is based in Poland. The company had two vans, one driven by Mr Osmolski, and the other driven by a colleague. Mr Osmolski told us that the business no longer existed.
8. Mr Osmolski's evidence was that he travelled regularly to the UK in his Renault Master van transporting goods (car parts in particular). In 2018 his company was only two years' old, and whilst some of his clients already knew him, he also relied on his company's website to attract new business. A potential client would usually telephone him giving him details of the goods to be delivered and the address for collection. With a new customer, Mr Osmolski said that he would undertake some research into the customer, such as looking at its website. He would always arrange to meet the customer at a location where there was CCTV, so that there would be a recording of the meeting which could be accessed by the police if needed.
9. On 31 October 2018 at around 20:30, Mr Osmolski was intercepted at Coquelles Freight while driving his van to the UK. He was carrying two consignments:
 - (a) A legitimate load that does not form part of this appeal; and
 - (b) Three pallets of boxes that are the subject of this appeal.
10. The CMR for the three pallets had the box for the sender completed using a rubber stamp which read:

Leen Bakker
Route de la Basse Sambre
B-6061 Charleroi
+32 496 05 66 82
gmg.import@yahoo.com

This rubber stamp was also used to complete the box giving the place of collection of the goods, and the box at the foot of the form for the signature and stamp of the sender.

The Consignee was given as:

Old Ashford Road
Charing Ashford
TN27 0EE

The place of delivery of the goods was given as:

Go – TN27 0EE

The description of the goods was:

3 palette

11. The transport order was headed:

LEEN BAKKER BELGIE NV
LEEN BAKKER
IMPORT-EXPORT
2170 MERKSEM Antwerpen, Belgia
Terlindenhofstraat 36
NIP:BE04274485
Tel. +44 780 195 85 83

The box "Loading" was filled in as follows:

31/10/2018

LUXEMBOURG RUE DES SCILLAS ACCORDING CMR

The box "Unloading" was filled in as follows:

31/10/2018

UNITED KINGDOM
ASFORD ROAD ACCORDING CMR

The box "Cargo description" was filled in as follows:

Cargo description: CAR PARTS

Quantity: 3 pallet

Weight: 705kg

The box "Fracht" was filled in as follows:

500,00 Euro

The box "Payment Method" was filled in as follows:

Cash at the place of unloading

12. Officer Poole searched Mr Osmolski's van. His unchallenged evidence was that when he opened a box marked "Skandor laminate", he found a second box inside. Inside the second box was Turner hand rolling tobacco. Officer Poole found three pallets of boxes containing altogether approximately 720kg of Turner hand rolling tobacco. The tobacco had Luxembourg tax stamps. Included in the documents bundle were photographs of the pallets. Many of the boxes were labelled "Spülen-Unterschrank" – at the bottom of the label it stated in English "This kitchen furniture must always be installed by an authorised kitchen specialist according to the fitting instructions of the manufacturer commercially available – Made in Germany".

13. Mr Osmolski was interviewed by Border Force Officer Hooker. Officer Hooker interviewed Mr Osmolski with the help of an interpreter on the phone ("Language Line"). The interview took the form of a series of standard questions set out on a Border Force form, with the translations to Mr Osmolski's answers set out against the questions on the form.

14. The relevant questions and answers as set out on the sheet are as follows:

If you purchased the revenue goods, what was the name and address of the outlet where you obtained the goods?	I am not the owner of the goods
Who hired you for the cargo?	The owner of the company of goods delivering
What is the name of the company?	There is a stamp on the CMR Leen Bakker
How did they contact you?	I was in the place where the lorries are parking and I was approached by them, and said they were urgently need transporting van
Have you got a telephone number for them?	On CMR +32 xxxxxxxx and +44 xxxxxxxx (English Man)
Where did you collect the cargo?	Luxembourg. I don't know exact address, but it's on my GPS. Driver showed me his GPS. (Rue des Scillas, Luxembourg)
What type of premises was this?	Company for Leen Bakker
Did you see or assist with the loading of the goods?	I see loading but I did not see inside, he said its car parts.
What checks did you make to ensure that the vehicle was not carrying Excise goods?	I usually do, I believed what they were telling me, they had an office, they gave a seal. I did not expect this to be illegal. They gave me a CMR. There was no mention of customs duty.
Did you make any internal checks of the trailer?	I only counted the number of pallets. We can't touch or open goods, if we break seal we have to pay with our money.
What were your delivery instructions?	The address on the CMR
Who gave you the instructions?	The second number I gave you
Have you got a contact number and name for this consignment/ email address?	On CMR
Has anyone contacted you regarding this consignment since your journey began?	No
Have you taken goods to this delivery address before?	No
What sort of premises are they?	I only have details from map
Has anything happened at any time which has caused you to suspect something is wrong?	I always try to verify the clients. My verification everything seemed to be OK
If so, what have you done about it?	---
Have you got any other information that may assist Customs in dealing with this matter?	If this will help I can describe the people that are working there
What is your mobile phone number?	+42 xxxxx

15. Following this interview, the hand rolling tobacco was seized. No challenge was made to the seizure, and no application has been made for the tobacco to be restored.

16. On 5 December 2018, Mr Collingwood wrote to Mr Osmolski requesting information. Following a number of requests for additional time to reply, Mr Osmolski's then representatives, a firm of solicitors in London, wrote to HMRC on 8 March 2019 explaining

that on 31 October 2018, Mr Osmolski was in the course of transporting car parts from Italy to the UK when he received a call on his mobile phone from Mr Leen Bakker. He agreed to meet Mr Bakker at a Shell service station in Luxembourg. When Mr Osmolski arrived at the service station, he telephoned Mr Bakker. Mr Bakker subsequently arrived at the service station and got into the cab of Mr Osmolski's van, and they travelled together to Mr Bakker's warehouse some 3-4km from the service station. There were a number of other companies at the location, and Mr Osmolski could see companies such as DPD. A number of men loaded the pallets onto Mr Osmolski's van. Mr Osmolski watched the van being loaded, and then accompanied Mr Bakker to his office on site. Mr Osmolski asked about the company, and Mr Bakker produced his photographic ID to confirm his identity, and showed Mr Osmolski his company's website which gave information about the company's business. Mr Osmolski satisfied himself that Mr Bakker was the person he said he was, and that the company was reputable. It was agreed that Mr Osmolski would deliver Mr Bakker's consignment first, and then continue with the other delivery. A CMR was provided for the consignment. Mr Bakker stated that an order confirmation would not be provided now, but would be provided on delivery. Because of this, Mr Osmolski completed a transport order form using the template that he had on his laptop. A fee of €500 was agreed for the consignment, which would be paid on delivery. Mr Osmolski's normal practice is to provide an invoice after he has completed the delivery. As the goods were seized and not delivered, Mr Osmolski did not issue an invoice and he was not paid.

17. The letter went on to state that Mr Osmolski normally would receive a phone call from a client with information about an order. He would receive the relevant paperwork either in advance or when he arrived at the pick-up location to collect the load. He always thoroughly checks the paperwork. Prior to the provision of services, Mr Osmolski always carries out person and company checks. When he meets a new client at an unknown location, he will always endeavour to meet somewhere where there is CCTV.

18. Enclosed with the letter were a copy of the transport order form, a screenshot of Mr Bakker's details from Mr Osmolski's phone, and a printout from Mr Osmolski's GPS of the route he took from Italy to the UK. On 5 March 2019, Mr Osmolski received a message requesting transport services from the same number that Mr Bakker had used on 31 October 2018. Mr Osmolski forwarded a screenshot of the message to HMRC.

19. Following correspondence, Mr Collingwood assessed Mr Osmolski to excise duty of £168,948. In addition, a wrongdoing penalty of £97,145 was assessed. This was determined on the basis that the importation of the tobacco was undertaken deliberately by Mr Osmolski and that the importation was concealed. His disclosure of the importation was prompted following the search of his van. Under Schedule 41, Finance Act 2008, the penalty range for such behaviour was 50% to 100% of the potential lost revenue (range of 50%). Mitigation of 85% in total was given for "telling" (15%), "helping" (40%), and "giving" (30%), so the penalty percentage was 57.5% ((100 - (85 x 50))%).

20. The assessments were issued on 23 July 2019, and were upheld on a review (the review conclusion letter was dated 21 August 2020).

21. The Notice of Appeal was filed on 20 October 2020. But as this was within the 3-month extension period granted during the COVID pandemic, the appeal was admitted notwithstanding that it was late.

EVIDENCE

22. Border Force Officer Poole's account of the search of Mr Osmolski's van at Coquelles Freight and the seizure of the tobacco was not disputed, and his evidence was unchallenged.

23. HMRC Officer Collingwood was questioned by Mr Osmolski about the priority of liability for excise goods. Mr Osmolski submitted that the sender of the goods was primarily liable for duty on them, the recipient of the goods was next in priority, and the carrier was the last. Mr Osmolski asked Mr Collingwood why he did not take steps to trace either the sender or recipient of the tobacco and assess them. Mr Collingwood's response was that the paperwork showed the sender of the goods as a furniture retailer in Belgium. They were clearly not the real sender, and there was no point assessing them. Mr Collingwood could not identify the likely sender at the Rue de Scillas address in Luxembourg. As regards the recipient, the only address he had was a street in Ashford, and as it was not a full address, he could not trace the recipient. In any event, in his experience the recipient address on the CMR was probably not the intended delivery address, and that when Mr Osmolski arrived there, he would be diverted to another address elsewhere. Mr Osmolski asked Mr Collingwood why he did not contact the sender using the telephone numbers that he had been given. Mr Collingwood said that there was clearly no point writing to any of the addresses given on the CMR, and he thought that telephoning any of the numbers he had been given was unlikely to yield useful information.

24. Mr Osmolski's account given at the hearing was different from the account set out in the letter of 8 March 2019. Mr Osmolski said that he received a call from Mr Bakker on 31 October 2018. He stopped his van when speaking to Mr Bakker, and this was shown on the GPS route as a "P" slightly to the east of Lyon. Mr Osmolski agreed to meet Mr Bakker at a service station in Luxembourg, as he (and many other lorry drivers) regularly refuelled in Luxembourg as fuel in Luxembourg was considerably cheaper than in France (saving €100 on a tank of fuel). The saving considerably outweighed the additional distance and time involved in driving to Coquelles via Luxembourg. Another "P" appeared on the GPS printout to the northeast of Lyon. Mr Osmolski said that he stopped here and undertook some "due diligence" searches on his phone on the name "Leen Bakker". He discovered several companies with this name, including a furniture retailer in Belgium and a transport company. He then drove on to Luxembourg where he met Mr Bakker at the service station. Mr Bakker did not join Mr Osmolski in the cab of his van, but rather they travelled independently to the warehouse – Mr Bakker in his car and Mr Osmolski in his van. Mr Osmolski noticed that a number of well-known and reputable businesses appeared to be established around the location of the warehouse (such as DPD), which gave him confidence about the legitimacy of Mr Bakker's business. At the warehouse, Mr Osmolski watched as the three pallets of boxes were loaded onto his van. Once they were loaded the pallets were sealed. Mr Osmolski stated that he did not open any of the pallets as he was told that the boxes contained expensive car parts, and that if he opened them the parts could break – and he would be liable for the cost of the breakages. I asked him why he didn't ask Mr Bakker to open a box – to which his reply was if one of the boxes was opened it would take time to repack it, and as it was late, he did not want to be further delayed on his journey to Calais. Mr Osmolski then joined Mr Bakker in his office. Mr Osmolski was with Mr Bakker in the office for about 30 minutes, and the van was left open during this time - Mr Osmolski noted that it was possible that the pallets could have been swapped for other items whilst left his van unattended. Mr Bakker produced UK identification – Mr Osmolski did not take a photograph of this document, as he considers that individuals do not like their ID being photographed, and he never takes photographs of an individual's ID. Mr Bakker also showed Mr Osmolski his businesses website (Mr Osmolski's evidence was that when he tried to access this website himself some time after the seizure, he was unable to find it). Mr Osmolski provided a blank CMR form which he completed, and which Mr Bakker stamped. Mr Bakker told Mr Osmolski that he would only produce a formal order form when the goods were received in Ashford. Mr Osmolski therefore prepared a transport order form using a template that he kept on his laptop.

25. Ms Brown challenged Mr Osmolski's evidence in the course of cross-examination. She noted that Mr Osmolski had given three inconsistent accounts of how he came to be hired for the transport of the consignment – and suggested that none of these accounts were true. Mr Osmolski disagreed, and said that the account given orally at the Tribunal was correct. Mr Osmolski said that he must have been misunderstood or mistranslated when he was being interviewed by Officer Hooker at Coquelles about how he had been hired, and that he had not been shown this record of his interview at the time. As regards the letter sent to HMRC in March 2019, the main difference from the account given at the hearing was whether Mr Bakker travelled with Mr Osmolski, or whether Mr Bakker travelled separately in his own van. Mr Osmolski said that the letter was written by his representative, and not himself, and that she must have made a mistake in this one detail. Mr Osmolski explained that his then representatives advertised as being Polish speaking lawyers based in London, and he had engaged them primarily because they were able to translate the correspondence he had received from HMRC.

26. Mr Osmolski was asked why he took a detour to Luxembourg, when the more direct route would have been to drive through France on the autoroute from the Italian border. Mr Osmolski replied that fuel in Luxembourg was considerably cheaper than in Italy and France, and the cost saving in fuel was worth the 50km detour to the Luxembourg border. He said that many other lorry drivers fuelled up in Luxembourg as the saving was €50 to €100.

27. Mr Osmolski was asked about the checks he undertook, and whether he would have usually undertaken more thorough checks than he did in this case. Mr Osmolski said that he would normally look at the packaging, and how the goods were packed. In this case he was not allowed to inspect the goods as he was told that they were fragile car parts, and could be damaged if the packaging was opened. So, in such cases he relied on the description given on the CMR as to the contents of the boxes. Mr Osmolski stressed that he regarded the CMR as a safety net on which he could rely, if the goods turned out to be not as described. The CMR would show what he believed to be the content of the consignment. As he was not given any excise documents by Mr Bakker, he believed that the goods were not subject to excise duties.

28. Mr Osmolski's evidence was in the case of the consignment under appeal he had undertaken all the checks that he could do on his phone. Mr Osmolski was challenged about these checks as they would have shown that Leen Bakker was a furniture retailer in the Netherlands. Mr Osmolski's response was that when he searched on his phone when he stopped to the north-east of Lyon, he found various Leen Bakker companies, including the furniture retailer and a transport company. When he was in the office of Mr Bakker in Luxembourg, he was shown a different website for the business. But when he tried to find that website again (about a week after the seizure) it had disappeared.

29. Mr Osmolski was then asked about the completion of the CMR and the transport order form. He was asked about the delivery addresses on the CMR and transport order – which only gave the name of a road, but not the number of the building nor the name of the consignee (either a company or an individual). Mr Osmolski said that sometimes he was only given a postcode for UK delivery addresses, and that could be enough. Sometimes customers did not always give an exact address – and sometimes he was only given a telephone number and the customer would come out to meet him. This was particularly the case with large industrial estates, where the address of the industrial estate would not identify the delivery location, and he would need to drive around in his van to find the delivery location.

30. Mr Osmolski was asked about the address on the stamp used for the completion of the “sender”, collection location, and signature boxes – and that these gave an address in Charleroi, Belgium, and the address at the top of the transport order which gave an address in Antwerp,

Belgium. Mr Osmolski said that perhaps this address was the head office of the company in Belgium, and that their warehouse was in Luxembourg. Mr Osmolski said that there were many companies which have their head office in one place, but warehouses elsewhere – for example Airbus. The fact that the business had multiple addresses was evidence that it was a legitimate business. Mr Osmolski said that when he was shown the website on Mr Bakker’s computer, the website gave a Belgian address.

31. Mr Osmolski was asked what checks he had made in respect of the various addresses given in the documents, and said that he had not done any beyond looking at the website shown to him by Mr Bakker.

32. Mr Osmolski was questioned about the description of the consignment on the CMR – particularly as he stressed that he relied on the CMR as a safety net to show what he believed was in the consignment. The CMR just stated “3 palette”. Mr Osmolski acknowledged this, which is why he had created a transport order on his laptop which described the consignment as car parts.

33. During the course of his evidence, Mr Osmolski repeated on a number of occasions that he regarded the CMR as a safety net, as it showed what he genuinely believed to be the content of the consignment. He also stressed that he was the innocent victim of a fraud, and that HMRC and the Border Force should be pursuing the perpetrators of the fraud, and not him.

THE LAW

34. The relevant legislation is set out in an Appendix to this decision. We set out below a summary of how the legislation applies in this case.

35. Excise duty is payable on tobacco products held for a commercial purpose in the United Kingdom. The United Kingdom excise duty legislation applies to the Control Zone at Coquelles, France as if it were part of the United Kingdom.

36. In the case of excise goods which have been released (duty paid) for consumption in another EU member state, an “excise duty point” occurs when those goods 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 (regulation 13(1), Excise Goods (Holding, Movement and Duty Point) Regulations 2010) (references in this decision to a “Regulation” are to these regulations). The person liable to pay the duty (Regulation 13(2)) 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.

37. A penalty is payable by a person who is concerned in carrying, keeping, or otherwise dealing with goods in respect of which excise duty is due and has not been paid. The amount of the penalty is governed by Schedule 41, Finance Act 2008 (“Schedule 41”). The penalty is 100% of the potential lost duty, in other words, the unpaid excise duty in this case, for a deliberate and concealed failure. Where there has been disclosure of the failure, the penalty is reduced. The amount of the reduction depends on the level of the penalty and whether the disclosure is prompted or unprompted. In the case of a prompted disclosure of a deliberate and concealed failure, the maximum reduction for disclosure is 50% - reducing the penalty from 100% to 50%. HMRC may also reduce the penalty if they consider that there are special circumstances. The legislation states that “special circumstances” does not include the fact that someone is not able to pay the penalty. Where an act or failure is not deliberate, a person is not liable to a penalty if there is a reasonable excuse for the act or failure. The legislation states

that a lack of funds is not a reasonable excuse, unless attributable to events outside the person's control.

38. The meaning of "deliberate" in the context of direct tax returns was considered by the Supreme Court in its decision in *Tooth v. HMRC* [2021] UKSC 17. The court drew a distinction between (i) a deliberate statement which is (in fact) inaccurate or (ii) a statement which, when made, was deliberately inaccurate. At [43] the court stated that the second of those interpretations is to be preferred:

43. We have no hesitation in concluding that the second of those interpretations is to be preferred, for the following reasons. First, it is the natural meaning of the phrase "deliberate inaccuracy". Deliberate is an adjective which attaches a requirement of intentionality to the whole of that which it describes, namely "inaccuracy". An inaccuracy in a document is a statement which is inaccurate. Thus the required intentionality is attached both to the making of the statement and to its being inaccurate.

At [45] the court considered that the meaning of "deliberate" in relation to "discovery assessments" had the same meaning as used in relation with penalties:

45. Thirdly, the penalty scheme in Schedule 24 to the Finance Act 2007 had, shortly before the relevant amendments were made to section 29 (including section 118(7)), used the same concept of deliberate inaccuracy for the purpose of triggering penalties more serious than those arising from carelessness, at altogether higher levels of blameworthy conduct (even though subdivided by reference to the presence or absence of concealment). It seems inconceivable that Parliament would have chosen the same language to serve as the gateway to the longest available period of exposure to a discovery assessment, if the phrase was to be interpreted as meaning only that the statement was intentionally made.

The court summarised its conclusions at [47]:

47. It may be convenient to encapsulate this conclusion by stating that, for there to be a deliberate inaccuracy in a document within the meaning of section 118(7) there will have to be demonstrated an intention to mislead the Revenue on the part of the taxpayer as to the truth of the relevant statement or, perhaps, (although it need not be decided on this appeal) recklessness as to whether it would do so.

39. Although not cited to us, I would also refer to *Chohan Management Limited v HMRC* [2021] UKFTT 196 (TC) at [112] to [113]:

112. [...] It is dishonest for a person deliberately to shut their eyes to facts which they would prefer not to know. If he or she does so, they are taken to have actual knowledge of the facts to which they shut their eyes. Such knowledge has been described as "Nelsonian" or "blind-eye" knowledge. Although not cited to me, Lord Scott in *Manifest Shipping Company Limited v. Uni-Polaris Shipping Company Limited and Others* [2001] UKHL 1 at [112] said the following about blind-eye knowledge:

"Blind-eye" knowledge approximates to knowledge. Nelson at the battle of Copenhagen made a deliberate decision to place the telescope to his blind eye in order to avoid seeing what he knew he would see if he placed it to his good eye. It is, I think, common ground - and if it is not, it should be - that an imputation of blind-eye knowledge requires an amalgam of suspicion that certain facts may exist and a decision to refrain from taking

any step to confirm their existence. Lord Blackburn in (1877) 2 App Cas 616, 629 distinguished a person who was "honestly blundering and careless" from a person who "refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind - I suspect there is something wrong, and if I ask questions and make farther inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover". Lord Blackburn added "I think that is dishonesty".

113. I find that the principles articulated by Lord Scott relating to blind-eye knowledge are applicable to the subjective assessment of knowledge for the purposes of Schedule 24, and are binding upon me. The fact that the relevant individual in *Clynes* had a professional accounting qualification was not relevant to the decision of the Tribunal, rather it was the fact that the individual consciously and intentionally chose not to find out the correct position.

THE SUBMISSIONS OF THE PARTIES

HMRC

40. Ms Brown submitted that it was not disputed that Mr Osmolski was either making delivery of excise goods, or was holding excise goods at the excise duty point at Coquelles Freight for the purposes of Regulation 13(2). Mr Osmolski was therefore liable for the duty on the tobacco. The fact that he may have been the victim of a fraud (which HMRC disputes) is irrelevant. Ms Brown referred us to the decision of the Court of Justice of the EU in *HMRC v WR* [2021] EUECJ C-279/19 ("*Martin Perfect*"), in which it held that:

[...] a person who transports, on behalf of others, excise goods to another Member State, and who is in physical possession of those goods at the moment when they have become chargeable to the corresponding excise duty, is liable for that excise duty, under that provision, even if that person has no right to or interest in those goods and is not aware that they are subject to excise duty or, if so aware, is not aware that they have become chargeable to the corresponding excise duty.

41. The fact that Mr Osmolski may not have the means to meet this liability is also irrelevant – there is a strict liability falling on Mr Osmolski for the duty.

42. Ms Brown referred us to the decision of the Upper Tribunal in *HMRC v B&M Retail* [2016] UKUT 429 (TCC) which confirmed that there can only be one excise duty point, and that was the duty point which was the time when the goods were first held to be delivered or used in the UK for a commercial purpose. In the circumstances of this case the tobacco was first held to be delivered or used in the UK when Mr Osmolski drove his van into the control zone at Coquelles Freight. At that point, Mr Osmolski was the person liable for the excise duty as he was the person holding or transporting the tobacco.

43. She submitted that it was irrelevant whether HMRC could have done more to identify the persons who engaged Mr Osmolski, since Mr Osmolski's description of there being a hierarchy of liability for excise duty was incorrect. Ms Brown noted that Regulation 13(2) used "or" between the different persons with liability for duty – so the liability would attach to the first person to be holding, transporting, or receiving the goods in the UK. There was no excise duty point at the time when the goods were loaded onto Mr Osmolski's van outside the UK. And no liability can attach to the person to whom the tobacco was to be delivered as (a) that person was unknown, and (b) the delivery would occur after the time when Mr Osmolski was holding or transporting the goods into the UK.

44. As regards penalties, Ms Brown submitted that there was no dispute that Mr Osmolski was holding or carrying excise goods for the purposes of paragraph 4 of Schedule 41. The only

issue was whether Mr Osmolski's behaviour was deliberate or careless – and if deliberate, whether his wrongdoing was concealed, and the disclosure prompted. Ms Brown noted that (in the light of *Tooth*) some degree of knowledge or intentionality was required for deliberate behaviour (and “blind-eye” knowledge was equivalent to knowledge). Ms Brown submitted that Mr Osmolski's account could not be believed for the following reasons:

- (1) He gave three different and inconsistent versions of events:
 - (a) He met Mr Bakke at the truck stop in Luxembourg;
 - (b) He was telephoned by Mr Bakker whilst he was en route, and they met at a petrol station in Luxembourg, and Mr Osmolski drove Mr Bakker to the collection location in his van; and
 - (c) He was telephoned by Mr Bakker whilst he was en route, and they met at a petrol station in Luxembourg, and Mr Osmolski and Mr Bakker drove in their own vehicles to the collection location.

The fact that Mr Osmolski gave different and inconsistent versions of the events indicates that he is not telling the truth.

(2) Mr Osmolski claims that the record of his interview with Officer Hooker at Coquelles, and the 8 March 2019 letter from his representative, either contained mistranslations, or was misunderstood. Ms Brown disputes both accounts. In the case of the interview with Officer Hooker, Ms Brown submits that the version of events is so very different from that given by Mr Osmolski either at the hearing or in the 8 March 2019 letter, that the difference is unlikely to be either a mistranslation or a misunderstanding. In relation to the account given in the 8 March 2019 letter, the letter was written by his then representatives on his instructions, and the representatives were Polish speakers. Again, it is unlikely that there was either a misunderstanding or a mistranslation.

(3) There was no plausible reason for Mr Osmolski to deviate off the direct route between Italy and Coquelles, and take a detour to Luxembourg. The GPS printout showed his route – but until he gave oral evidence at the hearing, he had not explained that his stops around Lyon were because he was called by Mr Bakker, and in order to make checks about Leen Bakker on his phone.

(4) The absence of checks made by Mr Osmolski into Mr Bakker. The letter of 8 March 2019 described the checks Mr Osmolski normally undertook into new customers and consignments. In this case there was no evidence that Mr Osmolski undertook any checks. He did not photograph Mr Bakker's ID, and did not take a screenshot of the alleged website that he was shown at the office (and which has since gone). Mr Osmolski had been in business for two years at the time of these events, and by that point would have been aware of the importance of making checks into his customers and their consignments.

(5) The paperwork (CMR and transport order) was inconsistent. There were three addresses given in the documents for Leen Bakker. Mr Osmolski's explanation that the different addresses could be explained by there being a head office and multiple warehouses was inherently implausible, and should have set alarm bells ringing. Mr Osmolski should have checked further and deeper. Mr Osmolski accepted in cross-examination that he did not check the addresses.

(6) Mr Osmolski's explanation for the absence of a specific address for the delivery was also implausible. It was not plausible that Mr Osmolski was going to pick up the

goods and then drive along a street in Ashford, not knowing the precise address (or name of the business) for the delivery.

(7) The description of the goods on the CMR was “3 pallets”, and on the transport order as “car parts”. Mr Osmolski described the CMR as his safety net – especially the description of the goods. In this case the CMR had no description. If Mr Osmolski really believed that the CMR was a safety net, he would have included a description of the goods when he completed the CMR.

(8) The real reason Mr Osmolski made no checks (or did not record the checks he made) was because he knew that the goods he was carrying were illegal. Being telephoned by a stranger whilst he was transporting another load, and being asked to pick-up goods about which he was given few details would have set alarm bells ringing. If Mr Osmolski did not actually know that the goods were illegal, it was because he turned a blind-eye to the circumstances.

45. In relation to the assessment to penalties, Ms Brown submitted that the illegal nature of the consignment had been concealed and the disclosure prompted following the search of his van. The transport order describes the consignment as “car parts”, and the CMR includes no description. Mr Osmolski filled in both documents, and they are vague and contain misleading information.

46. As regards the mitigation of penalties, 15% was given for “telling”, which was due to the inconsistencies in the information that he provided to HMRC. Maximum mitigation had been given for “helping” and “giving”. Ms Brown submitted that these amounts were fair and reasonable, and no further reduction was appropriate.

47. Because Mr Osmolski’s behaviour was deliberate, the “reasonable excuse” exemption did not apply. There were no special circumstances that needed to be considered.

Mr Osmolski

48. Mr Osmolski’s primary submission was that he was the victim of a fraud perpetrated by Mr Bakker. He was tricked into transporting a consignment of tobacco, which he genuinely believed were car parts, relying on the description given to him by Mr Bakker and entered onto the transport order. He was not allowed to inspect the boxes, and these were sealed by Mr Bakker. He was shown fake ID and a fake website by Mr Bakker, which he believed were genuine.

49. Law enforcement authorities should have investigated this fraud. Under the Polish penal code, the use of fake ID is a crime with the penalty of up to 5 years imprisonment, and the theft of identity to perpetrate a crime is liable to up to 8 years imprisonment. Mr Osmolski reported it to the Polish authorities, who said that as the fraud took place in Luxembourg, he should take it up with the Luxembourg police. They told him that the crime related to the import of goods to the UK and responsibility for the investigation was with the UK Border Force and HMRC. Mr Osmolski submitted that the Border Force and HMRC should have investigated this fraud, of which he was a victim. Mr Bakker submitted that there was a hierarchy of responsibility for the liability for duty on excise goods. He submitted that liability was primarily the liability of the sender of the goods, secondarily it was the liability of the receiver of the goods, and only finally was it the liability of the transporter (in this case him). He submitted that HMRC had not taken sufficient steps to identify and assess either the sender or the receiver of the goods. The Border Force and HMRC should be pursuing the sender of the tobacco for the duty and penalties, and not him, as he was in reality the victim of a fraud. In the circumstances of this case, HMRC had not done everything that they were supposed to do.

50. Mr Osmolski submits that the fact that he had been released by the Border Force at Coquelles and that his vehicle had not been seized showed that he was an innocent victim. He had not been tried by a court and convicted of any offence, and must therefore be regarded as innocent.

51. When he was stopped at Coquelles Freight and first asked about what he was transporting, he told the Border Force officer that one of the consignments was for a new customer, and he couldn't be certain about the content – this is not what someone who knew that the content was illegal would have said and that is why he believed that the Border Force made their checks. If he had known that the boxes contained tobacco, he would not have said anything to the Border Force officers about transporting for a new customer and being uncertain about the content.

52. Mr Osmolski said that at the time his company was only two years old. It was a new company, and he did not have much experience. Mr Osmolski said that he had always relied on the contents of a CMR when transporting goods, and had never had an experience like this one before. The CMR and transport order demonstrated that he had a genuine reason to believe that he was transporting car parts. There nothing on the labels on the boxes to suggest that they contained tobacco.

53. Mr Osmolski stressed that he was an innocent victim of a fraud, and that he did not know that there was tobacco in the boxes.

DISCUSSION

54. Mr Poole was not cross-examined by Mr Osmolski and his evidence was not challenged. We find that his evidence is reliable.

55. Mr Collingwood was cross-examined by Mr Osmolski, but Mr Osmolski did not challenge Mr Collingwood's factual evidence. Mr Osmolski's cross-examination related to the hierarchy of liability for excise duties and why HMRC and the Border Force had not pursued the consignor and consignee of the tobacco. The former is an issue of law which we address below, and the latter is not relevant to the issues which we have to decide. We find that Mr Collingwood's evidence is reliable.

56. As regards Mr Osmolski, we did not find his evidence to be reliable for the reasons we give below.

57. We agree with Ms Brown that Mr Osmolski gave three different and inconsistent versions of events. We do not believe Mr Osmolski when he says that these inconsistencies are due to mistranslations or misunderstandings. The account given to Officer Hooker when he was interviewed at Coquelles is so very different to his other two accounts that the difference is unlikely to be either a mistranslation or a misunderstanding. The account given in the 8 August 2019 letter was written on his behalf by a firm who he engaged because of their Polish language proficiency. They are a firm of solicitors, and are therefore unlikely to misunderstand the account given to them. We find that there was no misunderstanding or mistranslation.

58. We consider that the account given by Mr Osmolski to Officer Hooker is plausible. It is the first account given by Mr Osmolski. We consider that it is likely to be correct. We find that Mr Osmolski took a route from Italy to Coquelles via Luxembourg to take advantage of the lower fuel prices in Luxembourg. We find that Mr Osmolski was approached while he was stopped in Luxembourg, and asked whether he had room to take 3 pallets to Kent. We consider that it is inherently implausible, and do not believe, that Mr Osmolski's small Polish transport business would be telephoned out of the blue by a stranger and asked to pick up a consignment in Luxembourg and take it to Kent.

59. The letter of 8 March 2019 described the checks Mr Osmolski normally undertook into new customers and consignments. There is no evidence that Mr Osmolski made any checks into either Mr Bakker or the consignment in this case. Mr Osmolski said that no one liked to have their ID photographed, which is why he never photographed ID. But the reality is that we have to provide copies of our ID in all kinds of circumstances, and readily accept that a copy of the ID has to be retained by the counterparty. Mr Osmolski's evidence that he undertook some basic web searches into Leen Bakker when he stopped to the northeast of Lyon, and noted that Leen Bakker was either a furniture retailer or a transport company. We do not believe him – not least because we have found that he was only approached by Mr Bakker much later, when he was at the truck stop in Luxembourg. But even if he had undertaken some web checks, the fact that his evidence is that his own web searches showed that Leen Bakker was a Dutch furniture retailer or a transport company was inconsistent with it being a car part distributor, and that fact would have rung warning bells. We do not believe Mr Osmolski when he said that he was shown a different web site when he was at the Luxembourg warehouse – there is no evidence that any such website ever existed.

60. The paperwork (CMR and transport order) was inconsistent. There were three addresses given in the documents for Leen Bakker (Luxembourg, Charleroi, and Antwerp). Mr Osmolski's explanation that the company had a head office and multiple warehouses is inherently implausible – it was obvious that he was not being asked to transport goods for a substantial multinational company such as Airbus. Mr Osmolski should have checked further and deeper into these addresses. Mr Osmolski accepted in cross-examination that he did not make any checks into the addresses. In our view, at the very least, Mr Osmolski turned a blind eye to the use of three addresses by Mr Bakker.

61. Mr Osmolski's evidence was that he did not check the contents of the boxes for fear of damaging the content. I asked him why he did not ask Mr Bakker to open one of the boxes so he could inspect it – but Mr Osmolski replied that it was getting late, and he wanted to get back onto the road. Mr Osmolski's evidence was that there was nothing on the labels on the boxes that would suggest that the boxes contained excise goods. But, Officer Poole's unchallenged evidence was that at least one of the boxes was labelled "Skandor-laminate". The photographs of labels included in the bundle showed the content as being kitchen units. Although these labels do not indicate that the boxes contained excise goods, they are obviously inconsistent with the content being car parts. In our view, either Mr Osmolski did not examine the labels on the boxes, or if he did, he turned a blind eye to the inconsistency between the description of the contents on the labels and the description in the transport order.

62. The fact that Mr Osmolski was not given a specific address for delivery is also strange – and again should have raised alarm bells. We do not believe Mr Osmolski would have been prepared to accept a consignment without a specific delivery address, and instead be content to have to drive along a street in Ashford, not knowing the precise address (or name of the business) for the delivery. We think it seems likely that Mr Osmolski must have been given oral instructions to telephone someone on his arrival in the UK, when he would be given a precise address for delivery.

63. Mr Osmolski stressed on many occasions in the course of his evidence that the CMR was his safety net, – especially the description of the goods – as this evidenced his belief as to the contents of the consignment. We do not believe that he really believed that the CMR was a "safety net". In this case Mr Osmolski completed the CMR himself without including any description. If Mr Osmolski genuinely believed that the CMR was his "safety net", he would have included a description of the goods on the CMR and not just left the description to the transport order.

64. We agree with Ms Brown, and find, that the real reason Mr Osmolski made no checks (or did not record the checks he made), was because he knew that the goods he was carrying were illegal. He might not have known that the goods were tobacco – but he knew they were not legitimate. Being approached at a truck stop by a stranger and asked to take a load to an imprecise destination in Kent for €500 cash would have set alarm bells ringing. We find that the reason why the CMR and transport order prepared by Mr Osmolski were vague and misleading was because he knew the consignment was dodgy. We find that he knew that Leen Bakker was not the real name of the business and that the individual he was dealing with was not really named “Mr Bakker”. And if Mr Osmolski did not actually know that the goods were illegal and Leen Bakker was not the real name of the business, we find that it was because he had turned a blind-eye to the circumstances.

65. We agree with Ms Brown that the liability for the excise duty is strict. Mr Osmolski does not dispute that he was holding and transporting the tobacco when he was stopped at Coquelles Freight. He is therefore liable for the duty. The quantum of the duty is not disputed.

66. We find that Mr Osmolski’s submissions on there being a hierarchy of liability – and that the sender and recipient are liable in preference to the transporter - are incorrect. The liability arises at when the goods are first held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom. This occurred when Mr Osmolski arrived at the control zone at Coquelles Freight, and the liability falls on Mr Osmolski as he was the person holding or transporting the goods. Although a liability could also fall on the person receiving the goods, that person is unknown as he was not identified on the CMR or on the transport order. There was no point in HMRC trying to pursue the senders of the goods, as they could not be identified from the information provided by Mr Osmolski, and in any event, they were not the persons with liability for the duty.

67. As regards penalties - given our findings that Mr Osmolski either knew (or had blind-eye knowledge) that the consignment was illegal, we have no hesitation in finding that Mr Osmolski’s conduct was deliberate and concealed, and that the disclosure was prompted.

68. We find that the mitigation given by HMRC is generous. Mr Osmolski’s disclosures about the circumstances of the consignment were inconsistent and inherently implausible. However, taking all circumstances into account, we do not propose to disturb it.

69. We do not agree with Mr Osmolski that he was the victim of a fraud. On the contrary, we find that he was a knowing participant in it (or had blind-eye knowledge of the fraud).

70. The fact that Mr Osmolski was not charged with a criminal offence, or found guilty in a criminal court is not relevant. He has been penalised under the UK’s tax laws. He has exercised his right to appeal to us, an independent and impartial tribunal, and we have upheld that penalty. Mr Osmolski’s rights under Article 6 of the European Convention of Human Rights have all been respected.

CONCLUSION

71. We find that Mr Osmolski held or transported the tobacco when it was first held for a commercial purpose in the UK in order to be delivered or used in the UK. He is liable for the excise duty on the tobacco as the person holding or transporting the tobacco at the excise duty point. We uphold the assessment for the excise duty.

72. We find that Mr Osmolski’s behaviour in transporting the tobacco into the UK was deliberate, the existence of the tobacco was concealed, and the disclosure of the illegal importation was prompted. We find that the 85% mitigation of the penalty range was reasonable and fair. We therefore uphold the assessment for penalties.

73. The appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

74. 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.

NICHOLAS ALEKSANDER TRIBUNAL JUDGE

Release date: 23rd OCTOBER 2023

Cases included in the Authorities Bundle but not referred to in the decision:

Perrin v HMRC [2018] UKUT 156 (TCC)
Edwards v HMRC [2019] UKUT 131 (TCC)
Turton and Adams v HMRC [2021] UKFTT 441 (TC)
Hare Wines v HMRC [2023] UKFTT 25 (TC)

APPENDIX

Relevant Legislation

Liability to excise duty

Section 2 of the Tobacco Products Duty Act 1979 provides that excise duty is payable on tobacco products when they are imported into the United Kingdom

Article 5(2)(a) of the Channel Tunnel (Customs and Excise) Order 1990 provides that goods intended to be brought into the United Kingdom through the Channel Tunnel on a shuttle train are treated as being imported into the UK when they are taken into the control zone in France within the tunnel system.

Article 2 of the Channel Tunnel (Alcoholic Liquor and Tobacco Products) Order 2010 provides that:

The Excise Goods (Holding, Movement and Duty Point) Regulations 2010 apply in a control zone with the modifications indicated in the Schedule.

Regulation 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 provides:

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.

(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.

Section 12(1A) of the Finance Act 1994 provides that HMRC may assess an amount of excise duty which it appears to them is due from a person. Section 16(1) provides that a person can appeal against a decision on review.

Liability to penalty

Article 3 of the Channel Tunnel (Alcoholic Liquor and Tobacco Products) Order 2010 states that:

Paragraph 4 of Schedule 41 to the Finance Act 2008 (civil penalty for handling goods subject to unpaid excise duty) applies to goods in a control zone with the modifications indicated in the Schedule.

Paragraph 4(1) of Schedule 41 to the Finance Act 2008 states:

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

The amount of the penalty payable under paragraph 4 is specified by paragraph 6(2) of Schedule 41:

- (2) If the failure is in category 1¹, the penalty is—
 - (a) for a deliberate and concealed failure, 100% of the potential lost revenue,
 - (b) for a deliberate but not concealed failure, 70% of the potential lost revenue, and
 - (c) for any other case, 30% of the potential lost revenue.

The degrees of culpability are defined in paragraph 5 of Schedule 41. The relevant provision is paragraph 5(4):

- (4) P's acquiring possession of, or being concerned in dealing with, goods on which a payment of duty is outstanding and has not been deferred or (as the case may be) chargeable soft drinks in respect of which a payment of soft drinks industry levy is due and payable and has not been paid is—
 - (a) “deliberate and concealed” if it is done deliberately and P makes arrangements to conceal it, and
 - (b) “deliberate but not concealed” if it is done deliberately but P does not make arrangements to conceal it.

Paragraphs 12 and 13 of Schedule 41 provide for reductions in penalties where there has been disclosure. Paragraph 12(2), (3) and (4) are as follows:

¹ “Category 1” includes matters where the tax at stake is neither income tax nor capital gains tax.

- (2) P discloses the 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.

Paragraph 13 specifies the percentage reduction to be applied to a penalty of a specified percentage (“the standard percentage”). Paragraph 13(2) provides that in the case of a standard percentage of 100%, the penalty may not be reduced below 50% for a prompted disclosure.

Paragraph 14 provides for special reductions if there are “special circumstances”. Special circumstances include neither the ability to pay, nor the fact that the potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

Paragraph 17 provides that a person may appeal against the imposition of a penalty (paragraph 17(1)) or its amount (paragraph 17(2)). Paragraph 19(1) provides that in the case of an appeal against the imposition of a penalty, the Tribunal may either affirm or cancel the penalty. In the case of an appeal against the amount of a penalty, the Tribunal may either affirm the penalty or substitute for HMRC’s decision another decision that HMRC had power to make. However, in the case of special reductions, the Tribunal can only depart from HMRC’s application of the provision if it finds that HMRC’s decision was “flawed” on judicial review principles.

Where the person has a “reasonable excuse” for the act or failure, and the act or failure is not deliberate, then paragraph 20 provides that no liability to a penalty arises. A reasonable excuse does not include an insufficiency of funds, nor reliance on another (unless the person took reasonable care to avoid the act or failure).