



Neutral Citation: [2024] UKFTT 00307 (TC)

Case Number: TC09136

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

Hearing Room 3, Royal Courts of Justice,  
Belfast

Appeal reference: TC/2021/16812

*Excise Duty and Wrongdoing Penalty – 2,311,400 cigarettes hidden behind in boxes behind wooden planks – truck and trailer seized at Coquelles – legality of seizure not challenged – driver employed by Appellant – physical possession with person under Appellant’s control and direction -Appellant had de facto control of cigarettes – appeal dismissed.*

**Heard on:** 13 and 14 March 2024

**Judgment date:** 8 April 2024

**Before**

**TRIBUNAL JUDGE ALASTAIR J RANKIN MBE  
MS PATRICIA GORDON**

**Between**

**ANTELOPE TRANSPORT LIMITED**

**Appellant**

**and**

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

**Respondents**

**Representation:**

For the Appellant: Mr Danny McNamee of McNamee McDonnell Solicitors

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

## DECISION

### INTRODUCTION

1. The Appellant is appealing against an excise duty assessment for £680,221.00 issued under regulation 13 of the Holding Movement and Duty Point Regulations 2010 (the “HMDP Regulations”) and a wrongdoing penalty for £408,132.60 issued under Schedule 41 of the Finance Act 2008. The assessment and penalty were upheld following a departmental review which concluded by way of letter dated 21 October 2021.
2. The Notice of Appeal was filed with the Tribunal on 10 December 2021. The Respondents consented to the appeal being heard without payment of the duty on 4 July 2022.

### BACKGROUND

3. At 21:45 hours on 19 December 2018, one of the Appellant’s vehicles (registration number MX53 MXV, trailer number LLT5) was intercepted by Officers from the UK Border Force (“UKBF”) at Coquelles freight terminal in France. The vehicle was carrying goods documented as timber.
4. Following inspection of the vehicle and trailer, UKBF Officers discovered 2,311,400 cigarettes concealed within pallets of timber on which duty had not been paid (the “Goods”)
5. Mr Paul Burgesss, the driver of the vehicle, produced a Consignment Movement Record (“CMR”) for the load which listed Hooymeijer Stevedoring B.V. as the consignor (as agents for Burger Logistics Services). The load was described as comprising eight bundles of Massaranduba timber and was due to be collected from Vlaardingen in the Netherlands.
6. Mr Burgesss was interviewed under caution on 20 December 2018. He stated that he was contacted by a friend who asked if he wanted some work transporting goods on behalf of Tinnelly European Transport. The delivery address was sent to him by Aaron Tinnelly (the owner of Tinnelly European Transport) and he collected the trailer on 18 December 2018 before travelling to the Netherlands. He was instructed to complete a trailer swap with another driver, Brett, on his return to the UK who would then transport the load to Ireland. Mr Burgesss stated that he was transporting the load on behalf of Aaron Tinnelly and denied any knowledge of the Goods.
7. UKBF Officers reviewed Mr Burgesss’ mobile phone data which corroborated the account he gave at interview and he was subsequently released without charge.
8. The Goods were seized because they were outside the European system of duty suspension and duty had not been paid on them. The vehicle and trailer were also seized pursuant to sections 139 and 141(1)(a) of the Customs and Excise Management Act 1979 (“CEMA”) because they were used for the carriage of goods liable to forfeiture.
9. Mr Burgesss was issued with forms BOR156 (seizure information notice), BOR162 (warning letter about seized goods) and Notice 12A (what you can do if things are seized).
10. The UKBF also sent details of the seizure to the Appellant who was advised that any challenge to the legality of the seizure in the Magistrates Court should be made within one month of the date of the seizure. No challenge was made to the legality of the seizure and hence the Goods were deemed to have been duly condemned as forfeited to the Crown by the operation of paragraph 5 of Schedule 3 to CEMA.
11. On 9 January 2019, the UKBF referred details of the seizure to the Respondents to consider taking further action following which the Respondents made enquiries of the other parties named on the paperwork accompanying the Goods as follows:

11.1 Hooymeijer Stevedoring BV (the consignor) advised that it was instructed by its client, Burger Logistics Services, to pick up a container of timber, unload it and reload it onto an open trailer. It merely acted as the stevedoring company and had no knowledge of Mr Burgesss or Tinnelly European Transport Ltd.

11.2 Burger Logistics advised that its involvement was limited to receiving, clearing and unloading the shipment of timber in Rotterdam on behalf of its customer, LB Consulting GMBH.

11.3 LB Consulting GMBH could not be traced at the address supplied.

11.4 TF Fionnradharc Ltd could not be traced at the addresses given in the paperwork.

12. The Respondents did receive a response from a company called Allied Damp Solutions which operated from one of the addresses given for TF Fionnradharc Ltd. Allied Damp Solutions denied any involvement or any knowledge of the Goods, Mr Burgesss or Tinnelly European Transport Ltd.

13. By letter dated 1 November 2019, the Appellant's then solicitors advised that the Appellant operated the vehicle and trailer which were involved in the seizure. This was confirmed by a Police National Computer (PNC) check. The solicitors also confirmed that the Appellant employed Mr Burgesss and his employment had commenced on 30 November 2018.

14. The Appellant requested restoration of the vehicle and trailer, but this was refused by the UKBF due to the Appellant's involvement in a further seizure in February 2019.

15. By letter dated 8 January 2020, the Appellant was issued with a Notice of Assessment. The letter stated that the Respondents were raising an excise duty assessment in the sum of £680,221.00 and the Appellant was deemed liable to pay this duty by virtue of Regulation 13(2) of the HMDP Regulations. The Appellant was asked to provide any information it had in relation to the circumstances of the seizure by no later than 9 February 2020.

16. The Appellant replied to the Respondents' letter via its then solicitors on 16 July 2020 questioned Mr Burgesss' credibility and stated that the request to transport the load came from a reputable company and there was no cause for concern. By letter dated 7 August 2020, the Respondents confirmed that they were considering charging the Appellant with a wrongdoing penalty because the Appellant had handled excise goods beyond the duty point on which excise duty had not been paid. The letter was accompanied by a factsheet which explained how penalties are calculated.

17. The Appellant was sent a Notice of Penalty Assessment on 23 September 2020. The penalty was calculated on the basis that the Appellant's behaviour was deliberate and concealed and the disclosure was prompted.

18. By letter dated 26 May 2021, the Appellant requested that the Respondents agree to conduct an out of time review of the decision to issue the assessment and penalty. In a letter dated 21 October 2021, HMRC's Review Officer upheld the assessment and penalty.

#### **APPELLANT'S GROUND OF APPEAL**

19. The Appellant's grounds of appeal submitted by the previous solicitors are as follows:

19.1 The decision-maker and reviewer have misinterpreted and misapplied the relevant legal provisions relying on jurisprudence that is subject to appeal and non-determinative.

- 19.2 The decision-maker and reviewer have incorrectly and improperly relied on EU law and caselaw dated 10 June 2021 when it was procedurally improper to do so in the light of the departure of the United Kingdom from the EU.
- 19.3 The reviewer has relied on what he terms a “basket of evidence” which makes no reference at all to evidence that favours the Appellant – his decision therefore on who is the “liable party” is procedurally fatally flawed.
- 19.4 The reviewer, in concluding that the wrongdoing was deliberate and concealed, has failed entirely to follow due process by including the points raised on this issue by the Appellant.
- 19.5 This ground was omitted in the copy before the Tribunal and neither party was able to assist the Tribunal.
- 19.6 The Excise Duty Assessment has been miscalculated as a matter of law and fact.
- 19.7 The interpretation of special circumstances has been unfairly restrictive.
- 19.8 The Excise Wrongdoing Penalty has been miscalculated as a matter of law and fact.
- 19.9 The decision maker and reviewer have acted in procedurally incorrect and unlawful fashion formulating decisions that have no evidential basis and conducting inadequate investigations into the areas in dispute including inadequate inquiries with other involved parties.
- 19.10 The decision maker and reviewer have unfairly relied on weak circumstantial evidence to make improper findings of fact.
- 19.11 The decision maker and reviewer have unfairly relied on suspicion to make improper findings of fact.
- 19.12 The decision maker unfairly and procedurally improperly used the under caution interviews of another party against the Appellant without giving the Appellant an equal opportunity for interview under caution, in breach of the procedural requirement of ECHR.
- 19.13 The decision maker and reviewer have acted unfairly, have failed to take into account relevant considerations, have taken into account irrelevant considerations, have acted unreasonable, disproportionately and have both fettered their discretion.
20. In addition to these grounds (which were submitted by the Appellant’s previous solicitors) Mr McNamee put forward the following arguments:
- 20.1 The Appellant was not holding the Goods under the terms of HMDP Regulations as defined within the case of *R v Taylor* [2013] EWCA Crim 1151. Essentially the Appellant was acting as a freight forwarder and the person with the de jure and de facto control of the Goods was Burgess Road Haulage Limited.
- 20.2 Nothing in the case of *The Commissioners for Her Majesty’s Revenue and Customs v Martyn Glen Perfect* [2022] EWCA Civ 330 (*Perfect*), as relied upon by HMRC, could fix the Appellant with liability.
- 20.3 Assessing the carrier for the duty runs contrary to the International Carriage of Goods by Road which Mr McNamee claimed was brought into domestic law by the Transport Act 1965. Article 11 of the convention states:
- “1. For the purposes of the Customs or other formalities which have to be completed before delivery of the goods, the sender shall attach the necessary

documents to the consignment note or place them at the disposal of the carrier and shall furnish him with all the information he requires.

2.The carrier shall not be under any duty to enquire into either the accuracy or the adequacy of such documents or information ...”

20.4 While Mr McNamee accepted that the concealment demonstrated a highly sophisticated attempt to smuggle the Goods, the professionalism of the concealment should have been considered as a point in favour of the Appellant as this was the reason why neither the Appellant nor Mr Burgess could have been aware of the presence of the contraband within the consignment.

#### HMRC’S CONTENTIONS

21. There was no challenge to the legality of the seizure by way of condemnation proceedings and accordingly, the Goods were duly condemned and subject to forfeiture pursuant to paragraph 5, Schedule 3 of CEMA.

22. The Court of Appeal held in *Revenue and Customs Commissioners v Jones & anor* [2011] EWCA Civ 84 that the Tribunal does not have jurisdiction to go beyond the deeming provisions in paragraph 5, Schedule 3 of CEMA which constitutes a conclusive determination that the Goods were lawfully seized as being held for a commercial purpose without payment of the duty, such that the Respondents can assess for duty under section 12 of the Finance Act 1994.

23. The sole issue for determination in this appeal is therefore the Appellant’s liability for the duty pursuant to Regulation 13(2) of the HMDP Regulations.

24. The Appellant was, at the relevant time, the person making delivery of the Goods within the meaning of Regulation 13(2)(a) of the HMDP Regulations. Further, or alternatively, the Appellant held the Goods within the meaning of Regulation 13(2)(b) of the HDMP Regulations through its agent.

25. The Appellant arranged to transport the Goods to the UK, and they were being transported in the Appellant’s vehicle and on the Appellant’s instructions by Mr Burgess.

26. Regulation 13(2)(c) does not apply as no delivery took place, and the delivery address was not a genuine place of business.

27. Pursuant to Schedule 41 of the Finance Act 2008 the Respondents are entitled to impose a penalty on a person who, after the excise duty point, acquires possession of the Goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the Goods. For the reasons given at paragraph 24 above, the Appellant was clearly a person concerned in carrying the Goods.

28. The Respondents contended that the Appellant’s behaviour was deliberate and concealed. The Goods were present in large quantities and were well-concealed to avoid detection (they were found in cardboard boxes hidden within planks of timber) which is indicative of a sophisticated smuggling operation. The Respondents also relied on the evidence set out below which points overwhelmingly to the Appellant being involved in a deliberate attempt to deliver excise goods without payment of UK excise duty:

28.1 The due diligence conducted by the Appellant was cursory, despite the Appellan never having traded with TF Fionnradharc Ltd (the purported consignee) before.

28.2 TF Fionnradharc Ltd did not exist at the address to which the Appellant was meant to be delivering the Goods in Dublin and does not appear to be a genuine business. Basic due diligence checks would have established that the delivery address provided was not a genuine place of business.

- 28.3 The emailed instructions purportedly received from TF Fionnradharc Ltd lacked detail and did not include a corporate logo or any contact details for the company. TF Fionnradharc Ltd does not operate from the premises listed on the CMR (Carrickedmond Business Park).
- 28.4 Mr Burgesss confirmed at interview that a trailer swap was planned when he arrived back in the UK and there was another set of licence plates in the vehicle with registration numbers FJ05 ZKE and 131LH901. The Appellant has failed to offer a plausible explanation for this. Mr Burgesss also admitted to driving without the tachograph card being inserted. It is submitted that this is indicative of excise diversion fraud as it seeks to disguise any movement of trailers.
- 28.5 Hooymeijer Stevedoring B.V and Burger Logistics Services Ltd denied having any knowledge of the Goods or any dealings with the Appellant, Mr Burgesss or Tinnelly European Transport.
- 28.6 The Appellant was involved in another seizure arising out of similar circumstances where a large quantity of excise goods was seized from a vehicle operated by the Appellant.
29. The Respondents classified the disclosure given by the Appellant as prompted. While the Appellant did co-operate with the Respondents' enquiries, the disclosure was necessarily made after the UKBF had discovered the Goods. A disclosure is only "unprompted" where the taxpayer notifies the Respondents of their liability before any action is taken.
30. The standard amount of the penalty where the act is deliberate and concealed is 100% of the PLR (paragraph 6B, Schedule 41 to the Finance Act 2008). The penalty issued to the Appellant has been calculated at 60% of the PLR.
31. The Respondents applied a total discount of 80% to reflect the quality of the Appellant's disclosure as follows:
- 31.1 A 10% discount was applied for 'telling'. The maximum discount has not been applied as the Appellant did not admit to any wrongdoing and has failed to produce any tachograph evidence or provide an explanation for the presence of other licence plates in the vehicle at the time of the seizure.
- 31.2 The Appellant was awarded the maximum discounts for helping (40%) and telling (30%) as the Appellant has engaged with the Respondents' enquiries.
32. . The Respondents considered whether there were any special circumstances which would justify a further reduction in the amount of the penalty but concluded that no special circumstances existed. It was submitted that the Respondents had acted reasonably and taken all relevant factors into account; accordingly, the Tribunal does not have jurisdiction to interfere with the Respondents' decision in this respect. While the Appellant has stated that payment of the penalty would result in severe financial hardship and potential closure of the business, ability to pay does not amount to a special circumstance pursuant to paragraph 14(2)(a) of Schedule 41 to the Finance Act 2008.
33. As the Respondents deemed the behaviour to be deliberate, there is no provision to consider whether there was a "reasonable excuse" for the wrongdoing within the meaning of paragraph 20 to Schedule 41 of the Finance Act 2008.

#### **RELEVANT LEGISLATION**

34. At all material times, the UK was an EU Member State and references below to legislation are to the legislation in force at the time the Goods were seized.

35. The HMDP Regulations implement the provisions of Council Directive 2008/118/EC. Regulation 13 of the HMDP Regulations provides in material part:

“(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 delivery of the goods;
- (b) holding the goods intended for delivery; or
- (c) to whom the goods are delivered.

36. Regulation 13 of HMDP was enacted by Parliament in order to reflect Article 33 of Directive 2008/118/EC (the “Directive”), which lays down common rules within the European Union (the “EU”) on the holding, movement and monitoring of goods that are subject to excise duty. Article 33 of the Directive relevantly provides:

“1. Without prejudice to Article 36(1), where excise goods which have already been released for consumption in one Member State are held for commercial purposes in another Member State in order to be delivered or used there, they shall be subject to excise duty and excise duty shall become chargeable in that other Member State.

2...

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

37. Regulation 6 of the HMDP Regulations states that goods are released for consumption in the UK at the time when the goods:

- (1) leave a duty suspension arrangement;
- (2) are held outside a duty suspension arrangement and UK excise duty on those goods has not been paid, relieved, remitted or deferred...;
- (3) are produced outside a duty suspension arrangement; or
- (4) are charged with duty immediately upon importation unless they are placed, immediately upon importation, under a duty suspension arrangement.

38. Regulation 88 of the HMDP Regulations provides so far as is relevant:

“If in relation to any excise goods that are liable to duty that has not been paid, there is:

- (a) a contravention of any provision of these Regulations; and
  - (b) a contravention of any condition or restriction imposed by or under these Regulations
- those goods shall be liable to forfeiture.”

39. Section 139 of CEMA provides that anything liable to forfeiture under CEMA may be seized or detained by any officer.

40. Paragraph 3, Schedule 3 of CEMA provides:

“any person claiming that any thing seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure, or where no such notice has been

served on him, within one month of the date of the seizure, give notice of his claim in writing to the Commissioners.”

41. Where a notice of claim is not given, paragraph 5, Schedule 3 of CEMA states as follows: “If on the expiration of the relevant period under paragraph 3 above for giving a notice of claim in respect of any thing no such notice has been given to the Commissioner, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with the thing in question shall be deemed to have been duly condemned as forfeited.”
42. Section 12 of the Finance Act 1994 states:
  - (1) ...
  - (1A) Subject to subsection (4) below, where it appears to the Commissioners—
    - (a) that any person is a person from whom any amount has become due in respect of any duty of excise; and
    - (b) that the amount due can be ascertained by the Commissioners, the Commissioners may assess the amount of duty due from that person and notify that amount to that person or his representative.
  - (2) ...
  - (3) Where an amount has been assessed as due from any person and notified in accordance with this section, it shall, subject to any appeal under section 16 below, be deemed to be an amount of the duty in question due from that person and may be recovered accordingly, unless, or except to the extent that, the assessment has subsequently been withdrawn or reduced.
  - (4) An assessment of the amount of any duty of excise due from any person shall not be made under this section at any time after whichever is the earlier of the following times, that is to say—
    - (a) subject to subsection (5) below, the end of the period of 4 years beginning with the time when his liability to the duty arose; and
    - (b) the end of the period of one year beginning with the day on which evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge;but this subsection shall be without prejudice, where further evidence comes to the knowledge of the Commissioners at any time after the making of an assessment under this section, to the making of a further assessment within the period applicable by virtue of this subsection in relation to that further assessment.”
43. Paragraph 4 of Schedule 41 of the Finance Act 2008 (“FA 2008”) provides that a penalty is payable by a person who acquires or is concerned in carrying, removing, depositing, keeping or otherwise dealing with excise goods on which duty is outstanding and has not been deferred. The penalty is calculated as a percentage of the potential lost revenue (“PLR”), being the unpaid duty (see paragraphs 4, 5 and 6 Schedule 41 FA 2008).
44. Paragraph 5(4) of Schedule 41 sets out the “degrees of culpability” as follows:

“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.”



45. The Supreme Court's decision in *HMRC v Tooth* [2021] UKSC 17 considered the meaning of "deliberate". At paragraph 43 the Supreme Court stated,

"Deliberate is an adjective which attaches a requirement of intentionality to the whole of that which it describes, namely "inaccuracy".

46. This definition was considered and applied in the context of a Schedule 41 wrongdoing penalty in *Hare Wines Limited v HMRC* [2023] UKFTT 25 (TC) at [121] – [131], with the FTT concluding at [131]:

"A person is liable to a penalty under Sch 41 if he "acquired possession of...goods on which a payment of duty is outstanding and has not been deferred", with higher penalties charged if that person acted "deliberately". Applying the meaning of "deliberate" as established in *Tooth* to that statutory context, I find that a person has acted "deliberately" if he intentionally acquires possession of goods knowing that the payment of duty is outstanding, and intentionally does not pay that duty."

47. Paragraph 6B provides that the penalty payable under paragraph 4 for an act which is deliberate and concealed is 100% of the PLR, and for an act which is deliberate but not concealed is 70% of the PLR. Paragraph 10 provides that the PLR is the amount of excise duty due on the goods. Paragraphs 12 and 13 provide for reductions in penalties under paragraph 4 where the person 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."

48. For prompted disclosures, the penalty range is 50%-100% of the PLR for deliberate and concealed acts.

49. Paragraph 14 of Schedule 41 provides that

"if HMRC think right because of special circumstances, they may reduce a penalty."

50. Inability to pay cannot amount to a special circumstance.

51. Whilst special circumstances are not defined, the Upper Tribunal decision in *Barry Edwards v HMRC* [2019] UKUT 131 sets out the relevant test at:

"73. The FTT then said this at [101] and [102]:

"101. I appreciate that care must be taken in deriving principles based on cases dealing with different legislation. However, I can see nothing in schedule 55 which evidences any intention that the phrase "special circumstances" should be given a narrow meaning.

102. It is clear that, in enacting paragraph 16 of schedule 55, Parliament intended to give HMRC and, if HMRC's decision is flawed, the Tribunal a wide discretion to reduce

a penalty where there are circumstances which, in their view, make it right to do so. The only restriction is that the circumstances must be “special”. Whether this is interpreted as being out of the ordinary, uncommon, exceptional, abnormal, unusual, peculiar or distinctive does not really take the debate any further. What matters is whether HMRC (or, where appropriate, the Tribunal) consider that the circumstances are sufficiently special that it is right to reduce the amount of the penalty.

74. We respectfully agree. As the FTT went on to say at [105], special circumstances may or may not operate on the person involved but what is key is whether the circumstance is relevant to the issue under consideration”.

52. Paragraph 20 of Schedule 41 provides that liability to a penalty does not arise if there was a reasonable excuse for the act or failure. This provision only applies to acts or failures which are not deliberate. A reasonable excuse must be determined after consideration of the taxpayer's personal attributes; *Perrin v HMRC* [2018] UKUT 0156 (TCC).

53. Paragraph 17(1) of Schedule 41 provides for an appeal to the FTT against a decision that a penalty is payable. Paragraph 17(2) provides for an appeal to the FTT against the amount of the penalty. The FTT may affirm HMRC’s decision or make any other decision which HMRC was entitled to make. However, the FTT can only substitute its decision for that made by HMRC regarding special circumstances where HMRC’s decision was “flawed” applying judicial review principles.

#### **EVIDENCE AT THE HEARING**

54. In his witness statement Mr Aaron Tinnelly, the sole director and shareholder of the Appellant stated that Mr Burgess was a self-employed driver with his own company, Burgess Road Haulage Ltd. Mr Burgess had been recommended to him by a friend but before giving him the job to transport the Goods he conducted a telephone interview with him as Mr Burgess was based in England. Having satisfied himself with the answers provided by Mr Burgess, Mr Tinnelly offered him the job including informing him how to pick up the vehicle and trailer.

55. Mr Tinnelly informed the Tribunal that he had received instructions for the transport of the Goods from Rotterdam to Carrickedmond Business Park, Carrickedmond, Dundalk, County Louth, Republic of Ireland via an email enquiry from Mr John Edgar with an email address [tffionradharcltd@gmail.com](mailto:tffionradharcltd@gmail.com). Although the delivery address was about 18 miles from where Mr Tinnelly operated he did not check out the premises before accepting the job.

56. Mr Tinnelly advised that it was not unusual to receive such requests by email. As the initial instructions were received on 17 December 2018 and the client was insisting on delivery before Christmas Mr Tinnelly agreed an enhanced fee of £2,750.00. The outlay for diesel used and two channel tunnel tickets would have been around £1,000.00. Mr Burgess was paid £120.00 per day.

57. Mr Tinnelly satisfied himself that the reference number, collection address and contact number all appeared to check out.

58. Mr Tinnelly further advised the Tribunal that Mr Burgess had informed him he, Mr Burgess had to strap the load down using straps and ratchets and while doing so he saw nothing untoward and could see straight through the bales and in between each plank. Mr Burgess noted nothing suspicious.

59. During the loading process the forklift truck had hit one of the planks of wood. Mr Burgess did not notice anything inside but sent Mr Tinnelly a photograph of the damage. This was the only photograph of the Goods before the Tribunal.

60. Mr Tinnelly claimed that the tachograph on the vehicle showed that it would not have been possible for the vehicle to travel to another location to insert the contraband although he also informed the Tribunal that it had been adjusted 21 days beforehand to allow Mr Burgess more time.

61. Mr Tinnelly had expected Mr Burgess to telephone to him before entering the Channel Tunnel but did not hear from him until Mr Burgess was released from custody on 20 December whereupon Mr Tinnelly tried to get in touch with Mr Edgar and TF Fionnradharc by email and by telephone but with no reply.

62. Mr Tinnelly, accompanied by his father, then went to Carrickedmond Business Park but was told to leave immediately by men he suspected were from some form of organised criminality.

63. During cross-examination by Ms Brown Mr Tinnelly was asked why he was not suspicious about the delivery address as a Google search showed the occupants of the business park to be a paint shop and a toy shop.

64. Mr Tinnelly explained that it was not uncommon for spare licence plates to be in a lorry as each time they collected a trailer they had to ensure the licence plate on the trailer was the same as the licence plate on the lorry. This is why one often sees licence plates hanging on fences at ports when drivers have forgotten to change licence plates. Mr Burgess had referred at his interview on 20 December 2018 to two licence plates – FJ05ZKE and 131LH901. Mr Tinnelly explained that he had bought a lorry with the former licence plate in 2016 or 2017 at an auction in Northern Ireland. He had taxed and insured it in Northern Ireland and it had undergone the appropriate tests in Northern Ireland. The second licence plate was in respect of a Republic of Ireland lorry about which he knew nothing.

65. Mr John A Westoe, a trainee VAT Officer with HMRC in his witness statement explained to the Tribunal that HMRC became aware of the seizure on 9 January 2019 when Border Force made a referral. He sent five initial contact letters on 27 September 2019 to all the parties he believed were involved – Mr Aaron Tinnelly of Tinnelly European Transport, Mr Flemming of TF Fionnradharc Ltd, (with a Dublin address), TF Fionnradharc Ltd, (with a Carrickedmond address), Hooymeijer Stevedoring BV, Koningin Wilhelminahaven Noordzijde in the Netherlands and Mr Paul Burgess.

66. He could find no evidence that TF Fionnradharc Ltd existed but wrote to it at the Carrickedmond address provided. He did not receive a reply but he did find a reference to a similarly named company trading as Allied Damp Solutions with an address at a business park in Dublin. This company responded stating that they had nothing to do with the Goods. Likewise the Netherlands company explained that their involvement was simply to decant a load of timber from a 40 foot container and load it onto an open trailer.

67. Mr Burgess telephoned to Mr Westoe's office on 28 October 2019 expressing surprise at receiving the letter as he had been informed by Border Force that they were taking no further action. He confirmed that he was not aware that he was carrying cigarettes.

68. By letter dated 1 November 2019 the Appellant's then solicitors informed Officer Westoe that the lorry was being operated by the Appellant. This was the first time the Appellant's name had been mentioned. Following a Police National Computer check Officer Westoe was able to confirm that the Scania lorry registration number MX53HXV did belong to the Appellant.

69. Officer Westoe responded to the solicitor's letter on 18 December 2019 with an enquiry letter to the Appellant as he now believed that the Appellant was operating the lorry at the time of the seizure.

70. Following a review of the case with his Senior Officer Manager, Mr Westoe issued a protective assessment on 8 January 2020 in order to prevent the assessment falling out of time. Further correspondence ensued between Officer Westoe and the Appellant's then solicitors which included a reference by Officer Westoe to a further seizure case in February 2019 involving the Appellant which was very similar to this case.

71. On 30 March 2020 upon reviewing the case and the responses received Officer Westoe formed the view that the Appellant had control of and held the Goods reasoning as follows:

59.1 Border Force officers had carried out a search of a lorry and trailer that was owned and operated by the Appellant. Following the search 2,311,400 cigarettes were found inside cardboard boxes which were concealed inside and among planks of wood and which were seized as they were for a commercial purpose.

59.2 The Appellant had not challenged the seizure by submitting a Notice of Claim to Border Force within one month of the seizure.

59.3 The cigarettes were found in the Appellant's trailer at the time of the seizure and were under the control of and held by the Appellant.

72. Officer Westoe sent a pre-penalty letter to the Appellant and the Appellant's then solicitor on 7 August 2020 – the delay having been caused by the Covid-19 pandemic. Officer Westoe advised that on this occasion HMRC were treating this as a civil matter and he intended to issue the Appellant with an excise wrongdoing penalty as well as raising the assessment.

73. Although Officer Westoe had the option of concluding that the Appellant had in fact been duped and therefore HMRC would take no further action he remained of the opinion that the Appellant had intended to import the Goods into the United Kingdom for financial gain. Accordingly on 23 September 2020 he decided to issue a wrongdoing penalty for £408,132.60. This was for the following reasons:

61.1 Mr Burgess had stated at his interview by Border Force on 20 December 2018 that there were two other sets of registration plates inside the cab. Officer Westoe considered number plate swapping is an established feature of excise diversion fraud.

61.2 Officer Westoe was never given any credible evidence that Mr Tinnelly had carried out due diligence on their proposed customer before agreeing to transport the load. The emails from TF Fionnradharc Ltd did not contain a logo, company graphics or any contact details.

61.3 As this was the first time the Appellant had dealt with TF Fionnradharc Ltd Officer Westoe would have expected the Appellant to have checked that the consignee company had a genuine place of business. As a result Officer Westoe concluded that the true place of delivery for the Cargo was elsewhere.

61.4 Officer Westoe's research informed him that Carrickedmond Business Park was a very small business park with possibly 3 or 4 small units.

61.5 The Appellant had given no explanation as to how the Cargo was found to be concealed in the Appellant's trailer.

61.6 Officer Westoe became aware of another seizure involving the Appellant on 16 February 2019 which mirrored the current case though it involved counterfeit vodka.

61.7 Mr Burgess had explained to Border Force that he had been given the name of Mike Wessels as a contact. Mike Wessels had informed Officer Westoe that he had no knowledge of Mr Burgess and had never used Tinnelly European Transport.

74. The Appellant did not provide any tachograph evidence to Officer Westoe but Mr Burgess admitted to Border Force that he drove without the tachograph card inserted.

75. Officer Westoe concluded that the disclosure was prompted and that the Appellant's behaviour was deliberate and concealed. He calculated the penalty at 60% of the potential lost revenue. He considered there were no special circumstances to justify a reduction.

76. Mr McNamee during his cross-examination of Officer Westoe claimed that the assessment issued on 8 January 2020 was out of time as the seizure had happened over 12 months previously on 19 December 2018 while the legislation required any assessment to be issued within 12 months. Ms Brown objected to this point being raised at the hearing for the first time. While the Tribunal had sympathy for Ms Brown's objection, we felt it was important to ascertain whether the assessment had in fact been issued within the statutory twelve month period as stated in section 12(4)(b) of the 1994 Finance Act.

## DISCUSSION

77. The United Kingdom was at all material times an EU Member State and EU legislation was applicable by virtue of section 2 of the European Communities Act 1972 and section 1A(2) and (3) of the European Union (Withdrawal) Act 2018.

78. The judgment of the CJEU dated 10 June 2021 in Case C-279/19 *Commissioners for Her Majesty's Revenue and Customs v WR* constitutes retained EU law and is therefore binding on UK Courts and Tribunals by virtue of Articles 4, 86 and 89 of the Withdrawal Agreement and section 7A of the European Union (Withdrawal) Act 2018 notwithstanding the UK's departure from the EU. This was confirmed by the Court of Appeal in *Perfect*.

79. Accordingly, Ms Brown did not consider the Appellant's grounds to constitute valid grounds of appeal. The decision of the Court of Appeal in *Perfect*, which is binding on the Tribunal, confirmed that liability for excise duty under Regulation 13 of the HMDP Regulations is strict. A person need not be aware that they are in possession of excise goods or that excise duty is being evaded on those goods to be holding or making delivery of goods for the purposes of Regulation 13. Nor do they require a right or interest in the goods.

80. Ms Brown claimed that the Respondent's decision-making process was not flawed as alleged, or at all. They paid due regard to the representations made by the Appellant during their investigation and as part of the statutory review process and made appropriate enquiries of the other parties named on the CMR.

81. The Tribunal's statutory jurisdiction in this appeal is set out at section 16(5) of the Finance Act 1994 and does not extend to what is in essence a public law challenge to the fairness and reasonableness of the assessment. The First-Tier Tribunal has no general supervisory jurisdiction over HMRC's conduct. As such, the Respondents did not consider these grounds to constitute valid grounds of appeal and the Tribunal agrees with this point.

82. Ms Brown denied that the Respondents acted unfairly by relying on the information provided by Mr Burgess during his under-caution interviews. While Mr Burgess provided important evidence as to the circumstances of the seizure, this was not the only evidence relied upon. The Respondents carried out their own investigations before making the decision to issue the Appellant with an assessment and penalty. Ms Brown claimed there is no requirement to interview the Appellant under caution for the purposes of issuing an assessment or a penalty and no prejudice had been caused by the Respondents' failure to do so. Ms Brown maintained that the Appellant's rights of defence had been fully respected and, insofar as the ECHR is engaged, the requirements of Article 6 had been satisfied. The Appellant was issued with a Notice of Seizure and had the opportunity to contest the legality of the seizure which it failed to do. The Appellant had also been afforded ample opportunity to make submissions during

the Respondents' investigation as is demonstrated by the extensive correspondence between the Respondents and the Appellant's representatives.

83. The tobacco was seized under section 139 of the Customs and Excise Management Act 1979 ("CEMA") as the officer formed the view that it was held for a commercial purpose. The vehicle was seized under section 141 CEMA as it was used to carry the tobacco. The legality of the seizure of the goods was not challenged and therefore the cigarettes were condemned as forfeit as per paragraph 5 to Schedule 3 to CEMA 1979.

84. When a person will be "holding" goods has been considered by the CJEU following the Court of Appeal reference in *Perfect*. In Case C-279/19 *Commissioners for HM Revenue & Customs v ("WR")* the CJEU considered the following referred questions:

"1. Is a person ... who is in physical possession of excise goods at a point when those goods become chargeable to excise duty in Member State B liable for that excise duty pursuant to Article 33(3) of Directive [2008/118] in circumstances where that person:

(a) had no legal or beneficial interest in the excise goods;

(b) was transporting the excise goods, for a fee, on behalf of others between Member State A and Member State B; and

(c) knew that the goods he was in possession of were excise goods but did not know and did not have reason to suspect that the goods had become chargeable to excise duty in Member State B at or prior to the time that they became so chargeable?

2. Is the answer to Question 1 different if [the person in question] ... did not know that the goods he was in possession of were excise goods?"

85. In answer to the questions referred, the CJEU held that:

"[24] The concept of a person who 'holds' goods refers, in everyday language, to a person who is in physical possession of those goods. In that regard, the question whether the person concerned has a right to or any interest in the goods which that person holds is irrelevant.

[25] Moreover, there is nothing in the wording of Article 33(3) of Directive 2008/118 to indicate that the status of person liable to pay the excise duty, as being 'the person holding the goods intended for delivery', depends on ascertaining whether that person is aware or should reasonably have been aware that the excise duty is chargeable under that provision.

...

[31] Furthermore, an interpretation limiting the status of person liable to pay the excise duty as being 'the person ... holding the goods intended for delivery', within the meaning of Article 33(3) of Directive 2008/118, to those persons who are aware or should reasonably have been aware that excise duty has become chargeable would not be consistent with the objectives pursued by Directive 2008/118, which include the prevention of possible tax evasion, avoidance and abuse (see, to that effect, judgment of 29 June 2017, *Commission v Portugal*, C-126/15, EU:C:2017:504, paragraph 59).

...

[33] ...the Advocate General observed in point 29 of his Opinion, the intention of the EU legislature was to lay down a broad definition, in Article 33(3) of Directive 2008/118, of the category of persons liable to pay excise duty in the event of a movement of excise goods already 'released for consumption' in one Member State and

held, for commercial purposes, in another Member State in order to be delivered or used there, so as to ensure, so far as possible, that such duty is collected.

[34] However, to impose an additional condition requiring that the 'person ... holding the goods intended for delivery', within the meaning of Article 33(3) of Directive 2008/118, is aware or should reasonably have been aware that excise duty is chargeable would make it difficult, in practice, to collect that duty from the person with whom the competent national authorities are in direct contact and who, in many situations, is the only person from whom those authorities can, in practice, demand payment of that duty.

[35] That interpretation of Article 33(3) of Directive 2008/118 is without prejudice to the possibility, where provided for by national law, for the person who, under that provision, has paid the excise duty that has become chargeable to bring an action for a contribution or indemnity against another person liable to pay that duty (see, by analogy, judgment of 17 October 2019, *Comida paralela 12*, C-579/18, EU:C:2019:875, paragraph 44).

[36] In the light of the foregoing, the answer to the questions referred is that Article 33(3) of Directive 2008/118 must be interpreted as meaning 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.”

86. The CJEU decision in *WR* is binding upon this Tribunal notwithstanding the UK’s withdrawal from the EU (see *Newey LJ* (with whom *Baker* and *Snowden LJ* agreed) in *HMRC v Perfect* [2022] EWCA Civ 330 at [13] to [23]).

87. Prior to *WR*, there are a number of domestic decisions which suggest that de facto or de jure control of goods, without physical possession of them, can also amount to “holding” for these purposes; – in the Court of Appeal, Criminal Division, in *R v Taylor* and another [2013] EWCA Crim 1151 (“*Taylor*”) and *R v Tatham* [2014] EWCA Crim 226 and the Upper Tribunal in *Dawson's (Wales) Limited v HMRC* [2019] UKUT 296 (TCC) (“*Dawson's UT*”) at paragraphs [131] to [149]. Following the Court of Appeal in *Dawson's (Wales) Limited v HMRC* [2023] EWCA Civ 332 (“*Dawson's CA*”) at [66], all decisions preceding *WR* now need to be construed “through the prism of the decision of the CJEU in [*WR*]” and so the term “holding” must be given an independent EU law meaning.

88. The issue in *Dawson's CA* was whether prior to the appellant, which had been assessed to excise duty on the basis that it had physical possession of the goods, there was a prior holding of the goods that could be identified. The appellant alleged that its supplier, who had never had physical possession of the goods, had had de facto and/or legal control of the goods and was, by virtue of that, “holding” the goods so that the earlier excise duty point arose. Whilst that case concerned the application of Articles 7 and 8 of the Directive, as opposed to Article 33 of the Directive both parties in *Dawson's CA* agreed and the Court of Appeal held at [70], [97] and [98] that the word “holding” in Articles 7 and 8 of the Directive must be given the same meaning as in Article 33 of the Directive and as the HMDP gave effect to the Directive, they needed to be construed in conformity with the Directive.

89. In considering whether an earlier “holder” of the goods could be identified and therefore an earlier excise duty point could be established, the Upper Tribunal in *Dawson's UT* held that this was a mixed question of fact and law and required the answer to the following four questions (see [149] of *Dawson's UT*):

- (1) who had physical possession of the goods at the time when the alleged earlier excise duty point occurred?
- (2) who is the person alleged to have had de facto or legal control over the goods who it is said should be assessed rather than the subsequent holder (if it is the case that it is not appropriate to assess the person who was in physical possession of the goods) and how is that person said to have had control and on what basis was it being exercised?
- (3) the time at which the excise duty point arose; and
- (4) where the goods were being held at the relevant time.

90. This approach was endorsed in *Dawson's CA* by Asplin LJ, with whom Arnold and Elisabeth Laing LJ agreed, who agreed that this was a mixed question of fact and law and held that the answers to questions (1), (3) and (4) posed by the Upper Tribunal in *Dawson's UT* were crucial to the determination of whether an earlier “holder” of the goods outside the duty suspension arrangement could be identified and an earlier excise duty point arose. As regards question (2) Asplin J noted that it was not disputed by the appellant in that case. She went on to say that she expressed no view on the question of whether de facto or legal control of goods, without physical possession, could be sufficient to amount to “holding” for the purposes of the Directive and the Regulations, noting that “[that] issue was not directly before us and may need consideration on another occasion” (*Dawson's CA* at [72]).

91. “Another occasion” has recently arisen, in the case of *Agnieszka Hartleb T/A Hartleb Transport v The Commissioners for His Majesty's Revenue and Customs* [2024] UKUT 00034 (TCC) (“*Hartleb*”). A very useful summary is set out by the FTT in *Kent Couriers Ltd v Revenue and Customs Commissioners* [2024] UKFTT 145 (TC):

28. ...In *Hartleb*, the Upper Tribunal was considering whether the FTT had erred in concluding that an employer was “holding” goods which, at the excise duty point, were in the physical possession of her employee acting in the course of his employment. In dismissing the appeal, the Upper Tribunal:

- (1) referred to the cases cited above as demonstrating that:
  - (a) the word “holding” in Regulation 13 of the Regulations and Article 33 of the Directive needs to be interpreted consistently across all Member States in the context of the Directive and its objectives and not from the perspective of UK domestic law;
  - (b) the word should be defined broadly in order to ensure that, so far as possible, the excise duty is collected;
  - (c) the determination of “holding” is a mixed question of fact and law; and
  - (d) the four questions identified by the Upper Tribunal in *Dawson's UT* are “a useful guide in determining who to regard as holder in circumstances where physical possession and *de facto* and/or legal control are separated as they are in our situation, noting in this regard that the second factor must now be seen in the context of *Perfect* and *WR*” – see *Hartleb* at paragraph [78];
- (2) said that the four questions posed by the Upper Tribunal in *Dawson's UT* were just as applicable in the circumstances of *Hartleb* - where the appellant was claiming that she should not be liable to duty on the basis that she did not have physical possession and was therefore not “holding” the goods - as it was in *Dawson CA* and *Dawson UT* - where the matter in issue



was whether there was an earlier excise duty point against which the assessment should have been made;

(3) went on to say the following:

“Although the initial focus, given the scheme and wording of the legislation together with the case law, is necessarily on the physical location of goods so giving weight to physical possession – that is not the end of the matter and a more detailed consideration of the facts is needed” - see *Hartleb* at paragraph [82]

(4) identified the fact that, whereas the appellant’s employee had had physical possession of the goods at the excise duty point, the appellant herself had had *de facto* and/or legal control of the goods at that point;

(5) held that, in the circumstances of that case, where the appellant had entered into an arrangement with the manufacturer of the goods for the transportation of the goods by her business and was discharging her obligations under that arrangement by directing her employee to deliver the goods accordingly, it was legally correct and consistent with the operation of the Directive and the Regulations to treat the appellant and not her employee as “holding” the goods. “Put simply, the circumstances in which the Appellant had control outweigh the fact that physical possession of the excise goods was with her employee” – see *Hartleb* at paragraph [90]; and

(6) referred to passages from the Advocate General’s opinion in *WR* at paragraphs [37] to [39] which suggested that, in the Advocate General’s view, where an employee was making a delivery of goods on behalf of his employer and was therefore in physical possession of the goods, it was the employer - with *de facto* or legal control over the goods - who would be the person liable for the duty and not the employee.

29. We are, of course, bound by the decision in *Hartleb*. It follows that we are bound to hold that *de facto* and/or legal control of goods without physical possession of them can be sufficient to amount to “holding” the goods in an appropriate case. However, that does not mean that *de facto* and/or legal control of the goods will always be sufficient to amount to “holding” the goods. In each case, it is necessary to consider all of the relevant facts by reference to the four questions set out in *Dawson’s UT*.

30. Of critical significance in this regard is that it is implicit in the nature of the four questions – and indeed it is explicit in the decision in *Hartleb* at paragraphs [88] to [90] - that, in a case where physical possession of the goods and *de facto* and/or legal control of the goods are in separate hands at the excise duty point, we are bound to decide which of the relevant persons is to be regarded as “holding” the goods at that point to the exclusion of the other or others. It is not possible to treat more than one of the relevant persons as “holding” the goods at that point. In *Hartleb*, the Upper Tribunal applied the four questions set out in *Dawson’s UT* to determine whether it was the appellant or her employee who should be treated as “holding” the goods at that point. It did not suggest that both the appellant and her employee could be treated as “holding” the goods at that point. Similarly, in *Dawson’s UT* at paragraph [147], the Upper Tribunal did not suggest that both the person in physical possession and the person with *de facto* or legal control of the goods at the excise duty point could be treated as “holding” the goods at that point. It clearly envisaged that one of the persons would be “holding” the goods at that point to the exclusion of the other. We are bound to adopt a similar approach in this case and therefore to consider whether, on the basis

of applying the four questions set out in *Dawson's UT* to the facts in this case, it was the Appellant or someone else – whether Palletways, as the controller of the Network through which the delivery was being made, or the driver of the lorry carrying the goods – who should be treated as “holding” the goods at the excise duty point. A finding that one of those persons was “holding” the goods at the excise duty point necessarily precludes a finding that the other or others was or were doing so and therefore a comparative exercise is required in which the position of each potential candidate must be weighed up against the other or others.”

92. The FTT in *Kent* then went on at [32] to summarise *Hartleb* in determining whether someone is “making delivery” rather than “holding the goods:

““Making the delivery”

32. As for the question of whether the Appellant should be regarded as “making the delivery” of the alcohol at the excise duty point, the Upper Tribunal in *Hartleb*:

(1) noted that:

(a) there is no legislative definition of the term “making the delivery” for the purposes of the Directive and the Regulations and there is little authority on the meaning of the term;

(b) in line with the approach which it considered to be correct in relation to the meaning of “holding”, the words “making the delivery” should be interpreted in accordance with their normal meaning unless that interpretation is contradicted by the purpose of the provision or by general principles of law and should be interpreted in context; and

(c) to its knowledge, the meaning of the term had not been considered juridically. Although there was a suggestion in the Advocate General's opinion in *WR* at paragraph [43] that physical possession was necessary in order to be “making the delivery”, the Advocate General had not elaborated on this and the CJEU's decision in *WR* was focused solely on the question of “holding”;

(2) went on to say as follows:

“111. We would expect the determination of whether someone is “making the delivery” of excise goods to follow a similar approach to the determination of whether a person is “holding” excise goods. Regs. 13(2)(a), (b) and (c) are, in effect, tracking the physical movement of goods from leaving a duty suspension arrangement to being in the possession of the end user and are sequential.

112. Given the Excise Directive's focus on the physical location of the excise goods we would, therefore, expect physical possession of the excise goods to form an important part of the determination of whether a person is “making delivery of” those goods although, as with “holding”, for physical possession to not be definitive.”

33. The above suggests that the absence of physical possession, whilst not being definitive, is a significant factor in reaching the conclusion that the person in question is not “making the delivery” in any particular case.”

93. HMRC is required to assess the first duty point that it can establish. Section 12(1A) of the Finance Act 1994 (“FA 1994”) empowers HMRC to issue an assessment to a person from whom any amount has become due in respect of any duty of excise. Sections 13A(2)(b) and 16(1B) of FA 1994 provide for an appeal to this Tribunal against a decision of HMRC to issue an assessment to excise duty under s 12(1A) of that Act. 32. Section 16(5) of FA 1994 Act

provides that the power of the Tribunal in such an appeal includes the power to quash or vary any decision and the power to substitute its own decision for any decision quashed on appeal. Section 16(6) of FA 1994 provides that subject to certain exceptions that are not relevant in these proceedings, in such an appeal to the Tribunal against an assessment, it is for the Appellant to show that the grounds on which any such appeal is brought have been established.

94. As noted at [39] of *Kent*, it is not necessary for a taxpayer to be liable for an excise assessment in order to be liable to a wrongdoing penalty in respect of that duty. What is required is that the Appellant acquires possession of the goods or is concerned in the carrying, removing, depositing, keeping or otherwise dealing with the goods.

#### DECISION

95. Applying the four tests in *Dawsons UT* we find as follows:

95.1 Physical possession was with the Appellant's employee who was acting under the Appellant's control and direction;

95.2 The Appellant owned and operated the lorry and trailer transporting the goods and therefore had de facto and legal control of the Goods;

95.3 The excise duty point arose at Coquelles when the Goods were seized; and

95.4 The Goods were being held at Coquelles.

96. HMRC only became aware that the Appellant was the owner of the lorry and trailer upon receipt of the Appellant's then solicitor's letter dated 1 November 2019. The assessment dated 8 January 2020 was issued within the twelve month time limit required by the legislation.

97. The photographic evidence of the damage to the Cargo appears to show gaps between each plank. While this aspect of the photograph was not explored at the hearing the Tribunal finds it strange that each plank does not sit snugly on the plank below. (page 56). The Tribunal notes that Mr Tinnelly in his witness statement at paragraph 12 states that Mr Burgess informed him that he could see "straight through the bales and in between each plank". In view of the exceedingly large number of cigarettes found hidden in the Cargo the Tribunal is unable to accept the veracity of this statement as it must have been impossible to see through the bales which Mr Tinnelly accepts already contained the Goods.

98. Answering the thirteen grounds of appeal we find as follows:

98.1 Neither Officer Westoe nor the Review Officer misinterpreted or misapplied the relevant legal provisions.

98.2 Neither Officer Westoe nor the Review Officer incorrectly or improperly applied EU law and caselaw.

98.3 The Review Officer was correct to rely on the "basket of evidence" and his review as to who is the "liable party" is not procedurally flawed.

98.4 The Review Officer was correct to conclude that the wrongdoing was deliberate and concealed and did not fail to follow due process.

98.5 As neither party was able to explain this paragraph the Tribunal makes no comment.

98.6 The Excise Duty Assessment has not been miscalculated either as a matter of law or fact.

98.7 The interpretation of special circumstances is not unfairly restrictive.

98.8 The Excise Wrongdoing Penalty has not been miscalculated either as a matter of law or fact.

98.9 Neither Officer Westoe nor the Review Officer have not acted in a procedurally incorrect and unlawful fashion. Their decisions are based on the evidence and carried out adequate investigations and inquiries.

98.10 Neither Officer Westoe nor the Review Officer relied on evidence which was neither weak nor circumstantial.

98.11 Neither Officer Westoe nor the Review Officer relied on suspicion or improper findings of fact.

98.12 Both Officer Westoe and the Review Officer were entitled to rely on the under caution interview evidence and were not required to give the Appellant an equal opportunity for interview under caution.

98.13 Neither Officer Westoe nor the Review Officer acted unfairly, did not fail to take into account relevant considerations, did not take into account irrelevant considerations, did not act unreasonably or disproportionately and did not fetter their discretion.

The appeal against both the assessment and penalty is accordingly dismissed.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

99. 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.

**ALASTAIR J RANKIN MBE  
TRIBUNAL JUDGE**

**Release date: 08<sup>th</sup> APRIL 2024**