[2016] UKFTT 617 (TC)

# TC05353

**Appeal number: TC/2014/01211**

***EXCISE DUTY – appeal against assessment to excise duty and penalty – consideration of meaning of holding of goods under regulation 13(2) of the Regulations – appeal dismissed***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**DATRANS ANNA URBANCZYK** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE HARRIET MORGAN**
**MEMBER DUNCAN MCBRIDE**

**Sitting in public at The Royal Courts of Justice, Strand, London on 2 September 2015**

DECISION

1. The appellant appealed against HMRC's decision to issue an excise duty assessment for £204,742 and an excise penalty for £117,726.

## Facts and evidence

2. We have made our findings of fact on the basis of the bundle of documents produced, the evidence of Mr Atkinson who works as a Post Detection Audit Officer at HMRC and the evidence of Ms Anna Urbanczyk, the owner of the appellant. Many of the facts are disputed as set out below.

3. The appellant trades as a road transport business from the address 42-6— Tranowskie Goy Lipowa Street 9, Poland. The appellant has been trading since 2004.

4. On 23 July 2012 a vehicle belonging to the appellant (with the registration number SK2979W and with a trailer with registration number SK79491) was stopped by customs officers at Dover. The vehicle was being driven by Mr Mariusz Korzyniewske (the "**Driver**") who was employed by the appellant.

5. The Driver informed the officers that he saw the loading of the vehicle and that the roofing boards in the vehicle were to be delivered to Ariel Plastics Ltd, Speedwell Industrial Estate, Stavelley, Derbyshire, S43 3JP ("**Arie**l"). The paperwork presented by the Driver referred to corrugated fibre boards for roofing as the load of the vehicle.

6. The vehicle was examined by the officers by way of an electronic scan. The scan showed an anomaly on the bottom pallets. Further examination showed that the pallets had been hollowed out and were found to contain 885,000 concealed Marlboro cigarettes (the "**Cigarettes"**) bearing Polish stamps.

7. The delivery note ("**DN**") has the number WZ 1237/12/OMB. It shows the sender of the goods was Onduline Productions Sp Zo o, uk Wojska Polskiego 3, 39-300 Mielec, NIP 521-27-43-9944, Region 012668639 ("**Onduline**"). It shows the place of release of the goods as OMB warehouse in Mielec and the date of release as 20 July 2012. It showed the goods to be delivered as 4320 standard brown Onduline sheets (180 pcs x 24 p), 50 ordinary brown nails (400 pcs/pack) and 30 roof underlays (the "**Load**"). The form had an Onduline stamp and was stated to be issued by Lukasz Mazur. It also had a stamp showing "Datrans".

8. The International Consignment Note ("**CRM**") showed similar information with Onduline named as the consignor and Ariel as the recipient. It referred to the DN and the consignment was described as standard Onduline sheets 180 x24, ordinary nails 400 x 50 and roof underlay 50 pieces. It had stamps for Onduline and the appellant with the name Anna Urbanczyk under that of the appellant. There appears to be a signature on the appellant's stamp although it is quite indistinct on the copy produced to the tribunal.

9. The goods and vehicle were seized and the Driver was given the seizure paperwork and the relevant notices and his understanding of the same was checked.

10. The appellant was involved in a previous smuggling attempt when another of its drivers and vehicles were involved with the attempted importation of 1.5 million cigarettes concealed in "coffin style" concealment within a load on 21 May 2010 (see 15(3)). The appellant does not dispute that this previous incident occurred.

11. The facts surrounding the order for the delivery of the Load are disputed. The evidence is set out below and, our conclusions on the evidence, are set out in 35 to 44 and in the discussion section. In summary, HMRC asserts that Onduline did not place an order for the delivery of the Load with the appellant, the Load was not ordered by Ariel from Onduline; the delivery documents were falsified. The appellant asserts that the order for the Load was received from Dachpol based in Krakow from their Bochnia branch but that company subsequently disappeared. The appellant states it had no reason to believe that the order was not a legitimate one for the Load and it was deceived in this respect.

*Application for restoration of the vehicle*

12. The appellant applied for restoration of the vehicle and was offered a restoration fee of £4,896. On 18 December 2012 the appellant requested a review of the decision to offer restoration.

13. In a letter of 11 October 2012, the appellant's adviser, Euro Lex Partners LLP ("**EL**"), wrote to Border Force stating that the appellant:

> "received the order from the consignor "Dachpol" Krakow, branch in Bochnia, Poland by fax. This was preceded by a telephone conversation whereby arrangements were made as with regard to the place and time of loading. I did an internet search on "Dachpol" and found a roofing website although it was in Polish."

14. In the October letter EL also stated that the Driver checked the load visually and a fork lift truck driver was in attendance but he was not in position to check inside the packages as they were foil wrapped.

15. Border Force ("**BF**") upheld the restoration decision in a letter of 29 January 2013 which included the following comments:

> (1) "This was no casual concealment or one that could easily be made without the knowledge of both the operator and the driver. In this case, not only were the smuggled cigarettes concealed, but they were placed so deep inside the load that it is most likely that they were put there when the vehicle was loaded with the legitimate consignments in Poland. It is difficult to see how either the operator or the driver could not have known about the concealment. It is possible that the cigarettes could have been hidden later, during the journey from Poland to the UK but that would require most if not all the legitimate consignments to be unloaded and reloaded using a fork lift truck or other

machinery so as to hide the cigarettes. It is unlikely that that could be done without the knowledge or at least the deliberate ignorance of the driver. That would also take some time and the delay should have come to the attention of a reasonably careful operator monitoring the movements of the vehicle (as required by many transport agreements).

(2) The letter went on to note that BF had been in contact with the head of purchasing at Ariel who had confirmed that Ariel had received a load of roofing it was expecting on 24 July 2012 and that Ariel regularly import goods from Onduline in Poland. The Ariel contact confirmed that the maximum number of pallets Ariel allow per trailer is 11, the expected load of roofing was black and green in colour and they had received a bogus delivery note for the seized load which consisted of 24 pallets of brown roofing sheets. BF noted that enquiries with the BF legitimate load team confirm that the load was never released as Ariel were not expecting it:

> "Therefore had this illicit load passed through BF controls unhindered it would have had to be unloaded at a clandestine venue which, in my opinion, could not be achieved without the involvement of either or both the haulier and the driver.

(3) BF notes that the appellant had been involved in a similar incident in 2010:

> "BF records available to me show that another of your client's drivers and vehicle involved with the attempted importation of 1.5 million cigarettes concealed in "coffin style" concealment within a load on 21 May 2010. This present concealment was of a similar modus operandi."

(4) BF concluded that

> "on the balance of probabilities they [the appellant] were at the very least guilty of not making reasonable basic checks of the load and reckless in this particular arrangement. Had the weight of evidence been balanced toward my suspicions, I would have concluded from the evidence available to me that, on the balance of probabilities, the operator was involved or at least complicit in the smuggling attempt and on that basis I would have varied the original decision to that of non-restoration.

*Assessment on Driver*

16. HMRC issued an assessment for the excise duty to the Driver. Following a review, this was withdrawn on 24 April 2013.

*Investigation carried out by Mr Atkinson of HMRC*

17. Mr Atkinson became involved in the case on 19 August 2013. He gave the evidence set out in 20 to 32 which we accept as regards the matters he investigated and his reasons for the issue of the assessments and penalty notice. We have set out

our views on the underlying facts referred to in the correspondence in the course of the investigation in 35 to 44 and in the discussion section.

*Issue of assessment*

18. Following the period of investigation, HMRC issued an assessment for excise duty of £204,742 on 31 January 2014. HMRC reissued the assessment on 25 February 2014 in response to receiving a letter from EL stating that their client had not received it and it should have been sent to EL as well. HMRC checked the Royal Mail website which showed it had been correctly delivered to the appellant but nevertheless reissued the assessment.

*Issue of penalty*

19. HMRC issued a penalty assessment on 27 February 2014 for £102,371 under para (4)(1)(a) of schedule 41 to the Finance Act 2008. Further details of the penalty are set out below.

*Investigation by Mr Atkinson*

20. On 21 August 2013 Mr Atkinson of HMRC wrote to Onduline to obtain information as to their involvement in this matter as they were stated to be the consignor of the Load. He had the following material correspondence with them.

(1) On 28 August 2013 Mr Lukasz Madej of Onduline sent HMRC an email stating that the DN was issued "by our subsidiary who sale our goods just on Polish market". He stated that it was not possible to load 4320 of their sheets on a truck "therefore there is possibility of falsification of our documents".

(2) On 29 August 2013 Mr Atkinson spoke to Ms Clare Hayzer of Onduline in the UK who said she thought that the DN was a false invoice as the facts of delivery are wrong:

(a) Onduline would only get 3300 sheets on a truck which is 300 per pallet. The DN shows 4320 sheets.

(b) The sheets would not be packed by 180 as stated on the DN and the nails would be called PE nails not ordinary nails.

(c) Ariel is Onduline's sales UK based customer. They ordered the goods from their manufacturing plant and book the transport. The sales office in Poland sells to Poland only.

(d) Usually Ariel would order 4000 sheets over three years and not in one order.

She agreed to send HMRC copies of invoices and orders Ariel had made from Onduline.

(3) On 30 August 2013 Mr Madej advised that there was no Lukasz Mazur at Onduline.

(4) On 30 August Ms Hayzer wrote in an email that she had sent specimen invoices to orders sent to Ariel from Onduline's factory in Poland from 15 to 31 July 2012 and she noted that "this differs from the delivery note provided to you". She said that she had been advised by her shipping agents that they do use the appellant for some but not all of their collections from Poland. She also noted that sheet pallets are wrapped in Onduline printed plastic wrapping and not foil.

(5) On 4 September 2013 (at 11.55 am) Mr Atkinson sent an email to Ms Hayzer noting that the records show that Dachpol, Krakow branch in Bochnia ordered the transport company and so it seemed the order originally came from Poland not England. He asked if it was possible that the reference number was correct on the DM and whether Dachpol was a regular customer.

(6) On 4 September 2013 (at 12.43 pm) Mr Madej emailed to say that he had spoken to the appellant and they had stated they do not have documents regarding the shipment as they did not handle transportation from Onduline at the relevant time. He said "Dachpol is not our subsidiary or branch even. As I know (from OMB manager – polish commercial trade) the Dachpol is theirs client and the do sales, but how often, no idea yet."

(7) On 4 September (at 12.54), Mr Adam Korduszewski (who had been copied on the earlier email) wrote:

> "We had client Dachpoll – but from Wloszczowa (ul. Kolejowa 129-100 Wloszczowa) not from Krakow or Bochnia. We do not have any other dachpol in our database, Document wz 1237/12/omb in our system is made for another client and looks totally different that attached."

21. Mr Atkinson did not contact Ariel but relied on the information obtained from Ariel by BF as set out in the review letter of 29 January 2013.

22. On 13 March 2014 Mr Atkinson sent a letter to "Dachpol" based in Zamosc but despite a reminder on 14 April 2014 no response was received. He noted that this company was very easy to trace but there was no trace of a company of that name in Krakow or Bochnia.

*Correspondence with EL/the appellant*

23. In letters dated 23 August 2013 Mr Atkinson wrote to the appellant asking for further information about the Load. He noted the DN showed the goods were due to be delivered from Onduline to Ariel, that the Driver advised he watched the pallets being loaded but they were wrapped in foil so he could not see the Cigarettes and he denied knowing anything about them.

24. On 12 September 2013 EL, wrote in response to Mr Atkinson's letter as follows:

(1) The appellant received the order from the consignor Dachpol, Krakow branch, in Bochnia, Poland in the course of a telephone conversation whereby arrangements were made with regard to the place and time of loading.

(2) The appellant was not contacted by Onduline, only Dachpol. The appellant has tried to contact Dachpol on numerous occasions but in vain. The appellant has not delivered for Onduline before or since the load in question.

(3) Following the incident the appellant had introduced internal regulations.

(4) The appellant does not regularly deliver to Ariel.

(5) The appellant did not check Onduline as it received the order from Dachpol and that company was checked.

25. On 23 September 2013 Mr Atkinson again wrote to EL requesting further information. He again noted the facts given on the DN and that Onduline had advised that the DN is fake and that Ariel had confirmed to BF that the load was not ordered or expected. On 25 September EL responded as follows:

(1) As far as the appellant could remember the delivery address was Zamosc, Poland but the appellant could not remember the exact delivery address. That was on the CRM which was retained by BF.

(2) Contact was made over the telephone and it was to be followed by fax in confirmation. The appellant regrettably does not remember any names as it was more than 1 year ago.

(3) The fax never arrived despite assurances by Dachpol to the contrary. The appellant was to be paid 1,600 Euros at completion of the delivery. The payment was never made.

(4) The appellant had not delivered for Onduline or Dachpol before the incident or since. As regards checks the appellant had internal regulations and generally the load, including the number of pallets is checked against the documentation. The appellant does not regularly deliver to Ariel.

26. In a letter of 23 October 2013 EL again confirmed that the load was taken at Zamosc but the appellant does not have any written evidence on this and the fax from Dachpol was not received.

27. EL stated in this letter that the appellant had tried to contact Dachpol on numerous occasions but the phones were switched off. As regards checks on Dachpol, if the company was registered on the following website (http//prod.ceidg.gov.pl find an entrepreneur") it was assumed it was trading. The appellant was not able to supply a website address for Dachpol. In Poland invoices for transport orders are issued after the service is completed. In this case the invoice was not issued as it was impossible as the company became unavailable.

28. There followed further correspondence and in letters of 6 November 2013 and 13 and 14 January 2014 EL again confirmed the same position as it had set out previously. EL noted that "The delivery note indicated the "place of release" in Mielec. We believe it might not be the same as the place of loading the goods by the

carrier in question." EL again confirmed that the appellant had advised it had been able to find Dachpol on the internet at the time but had not saved the information. EL stated that the information given was all that the appellant could remember more than 1 year after the event.

29. On 20 January 2014 Mr Atkinson wrote to EL with his conclusions:

(1) He referred to the comments in the BF letter of 29 January 2013 set out in 15 above. He noted that in the letter of 11 October 2012 the appellant had said "the instant case is not of the driver's fault or failure".

(2) The internal regulations the appellant had in place were unsuitable and stricter ones should have been introduced sooner.

(3) The appellant was involved in a similar smuggling attempt in 2010.

(4) The DN and CRM shows pick up at Onduline in Mielec whereas the appellant advised the pick up was from Dachpol near Zamosc. Onduline have advised the DN is false. Ariel advised BF they received a roofing load on the day shown in the DN but they were not expecting this one. The Load would not have gone to Ariel if it had avoided detection: "It would no doubt have been unloaded elsewhere and this could not be achieved without the involvement and knowledge of the driver or both driver and haulier". The load of roofing was in effect abandoned after seizure as Ariel had not expected the goods. This suggests it was just a cover load for the Cigarettes.

(5) In their letter of 11 October 2012 EL stated that the appellant initially received the order by phone from Dachpol which was then followed by a fax but in a letter of 25 September 2013 EL advised the fax was not received. The appellant advised they did internet checks but no printouts were kept, no address or website address has been given or any other details. Mr Atkinson found no trace of Dachpol on the internet including on the website provided by the appellant (see 27 above). It is odd that the appellant says they never had any other contact with Dachpol but they were happy to accept a cash on delivery payment arrangement. The appellant could have checked details with Ariel if they had doubts.

(6) The appellant is liable to excise duty under regulation 13(2). The Driver, acting under a contract of employment with the appellant, was at the time of the seizure "physically holding the goods intended for delivery". As the appellant arranged the delivery they were the ones making the delivery of the goods. Mr Atkinson concluded that he would be issuing an assessment for excise duty.

30. On 28 January 2014 EL wrote to Mr Atkinson as follows:

(1) The appellant believed the goods were provided by Dachpol. Even if Onduline loads are not foil wrapped the appellant could not have known this. The appellant was deceived and any discrepancies found later could not have been known or noticed by them at the relevant time. Only those with specialist knowledge could verify such information.

(2) There clearly was a smuggling attempt but if the load was not subsequently claimed by their owners following the seizure that was not the appellant's responsibility and should not be indicative that they were allegedly involved in the attempt.

(3) The appellant had tried to improve their internal regulation. There has been no similar incident since July 2012 which shows they have been successful.

(4) The appellant did not make any printouts of checks they had made previously on the internet as they did not realise it was necessary. Cash payments on delivery are common practice in Poland.

(5) The appellant denies responsibility. It is indicative that the BF was satisfied the appellant had not been involved in the incident; hence why the vehicle was restored. BF concluded that the appellant was mildly reckless by not providing evidence that background or financial checks were taken out on Dachpol (hence the fee). Applying different treatment in the same case leads to uncertainty and unfairness. Once the appellant was absolved from liability by BF it should not be subsequently changed for different purposes.

(6) The appellant did not "hold" the Cigarettes "for a commercial purpose in order to be delivered". They were not aware of their existence.

31. On 30 January 2014 Mr Atkinson wrote to EL upholding his previous view and reiterating many of the same points as set out in his earlier letter. He noted that if the appellant and Driver had done the correct checks they would have established that Dachpol was not a legitimate business. The Driver should have removed the packaging of the goods, the paperwork should have been checked and Ariel contacted. This was the second seizure in 36 months which showed the appellant's internal regulations were not working. The appellant is not absolved from liability for excise duty because BF previously allowed the restoration of the vehicle for a fee.

32. It was put to Mr Atkinson at the hearing that he had not properly investigated the matter as he had not pursued further enquiries with Onduline and Ariel as to whether they could be the smugglers but had simply accepted their explanation. He was asked why he had ruled those parties out as being the smugglers. He said that he had not included Ariel in his own investigation as BF had previously approached them and he was satisfied with the earlier investigation by BF in that regard. On the basis of their answers given to BF and of the answers he had received from Onduline and looking at all the facts and circumstances he had no reason in either case to link them with the smuggling attempt. As regards, Onduline, in particular he had examined the examples of their usual CRMs and delivery notes and concluded from the differences with those in question that they were not those of Onduline. As regards Ariel he noted that they had not wanted to receive the Load which indicated it was a cover load only. He had only concluded that the appellant was the party liable once he had fully investigated the matter.

*Evidence of Ms Anna Urbanczyk*

33. Ms Anna Urbanczyk gave evidence on behalf of the appellant. Ms Urbanczyk is the owner of the appellant and has been since it was established in 2004. We are not able to place much reliance on this evidence due to the conflicting assertions put forward in oral evidence and the witness statement and prior correspondence. Our conclusions on this evidence and the factual matters to which it relates are set out in 35 to 44 and in the discussion section.

34. The evidence was as follows:

(1) Ms Urbanczyk noted that the business was successful but has been in decline since the incident in July 2012. The appellant had a loss of around £243,441 in sterling terms in the period 1 January 2014 to 30 November 2014 and £161,869 in the 2013 calendar year. The excise duty and penalty would be very burdensome on the appellant.

(2) It was put to Ms Urbanczyk that she and the Driver knew about the Cigarettes being in the Load. She said that she did not know about the Cigarettes and that the Driver did not know either.

(3) She said that the appellant had been contacted to deliver roofing materials from Poland to the UK by a company named Dachpol. Ms Urbanczyk was unclear as to how this order was made.

(a) Her witness statement referred to the order being made over the phone to be confirmed by fax and noted that:

> "we regrettably could not locate the aforementioned fax communication to be provided in evidence. It could be that it was not eventually received or was lost. Usually telephone orders are subsequently confirmed by fax."

(b) She stated in oral evidence that usually orders come by fax or email and payment is made under an invoice or in cash. She thought that the arrangements for the Load were probably made on a call but she could not remember the name of the person she had spoken to. The only information she recalls is that the company was called Dachpol and the order was for transport for roofing between Poland and the UK. She then expected a fax in relation to the order.

(c) Ms Urbanczyk was questioned as to why if there was a fax she was not able to produce this. It was put to her that the appellant had confirmed (acting through EL) in a letter sent to HMRC in October 2012 three months after the seizure that the order was received by fax but one year later in 2013 the appellant told HMRC that the fax never arrived. She was asked to explain this inconsistency. Ms Urbanczyk said that the appellant did not keep such documents in the longer term although initially she had thought that the appellant may still have it. She was certain she did not have the fax but she cannot remember whether in fact it was received and subsequently lost or whether it never arrived at all. It was also put to her

that the correspondence referred to Dachpol giving a number of assurances that a fax would arrive and she was asked how many times she had spoken to Dachpol. She said that she could not remember if she spoke to Dachpol more than once.

(4) Ms Urbanczyk was unclear as to whether she knew that Onduline was apparently involved in the transaction. The CRM described the sender as Onduline and contained the stamp of the appellant. There was no discernible date of the appellant's stamp. Ms Urbanczyk stated in her witness statement that "we were told that Dachpol was Onduline's warehouse (agent)". It was pointed out to her that this had not been mentioned in any of the correspondence with HMRC. She said that she was not sure whether she knew that Onduline was involved. She noted that it was normal practice in Poland for there to be an agent between the sender and recipient but she could not remember if she knew of Onduline's involvement in this case.

(5) Ms Urbanczyk said that she had verified Dachpol as a client on the internet before the delivery. She noted that Dachpol means in English "Roof-pol" and it is a recognised company name in Poland. Ms Urbanczyk found their website but did not keep any copies of the internet details. After the incident Dachpol disappeared. She said that it was not a legal requirement to make checks on the internet but she had done this as a precaution as a regular matter. Ms Urbanczyk said she could not recall if she had a name or address for Dachpol.

(6) Ms Urbanczyk noted in her witness statement that Mr Atkinson said he could not find Dachpol on the website address provided. However, Ms Urbanczyk was able to find a list of companies with the name "Dachpol" only by entering the name of the company. When a list was produced to Ms Urbanczyk at the hearing with an internet search of the names "Dachpol" she was not able to identify any of the Dachpols listed as the one who had contacted her regarding the Load.

(7) Ms Urbanczyk stated that it is common practice in her line of business in Poland to take payment by cash on delivery which was the arrangement she made with Dachpol. She had never had a situation where she had been deceived before. It was put to her that this was unusual given she had no contact with this business before. She said she had not given it much thought because it was usually not a problem. She said that the appellant delivers loads for many people and companies that are not personally known to her.

(8) She was questioned as to how it came about that the goods were picked up at a different place to that on the CRM. She said that this was supposition but she thought that the goods were taken on board in Zamosc, at a different location from that set out in the DN, because the Driver probably received some information that he had to go to another place to receive the goods. This sometimes happens. She did not consider this to be suspicious or out of the ordinary.

(9) She said that when the drivers load goods they make basic checks to see the goods are packed in good condition with no damage. It is not practicable to

look more deeply inside the goods by unwrapping them in full. If the driver is forced to spend half a day unloading and packing someone else's goods to see what is inside the deadlines for delivery would be missed.

(10) She was asked if she would expect the Driver to call her and say that there appeared to be a discrepancy because the DN/CRM was in the name of Onduline but the delivery was actually picked up from Dachpol at a different address. She thought it most likely someone who dealt with transport called the Driver as regards the change in pick up address - most likely it would be the appellant's despatcher. She said that it happens a lot that loading takes place in a different location from that initially notified. The despatcher knows what vehicle is assigned to which driver and so would have known who to contact. She does not know if the despatchers keep records of pick up and drop off points. She confirmed that it is likely that she would be told of a change in such location but she could not remember in this case. She acknowledged that the different pick up would have involved additional cost in petrol/diesel but again asserted that a change in location was normal. She could not remember who the despatcher was at the time.

(11) The appellant did not check Onduline or Ariel as it was not known that such obligations were legally imposed on the carrier. The order was dealt with in the same way as usual.

(12) She confirmed that the appellant had been accused of smuggling goods previously in 2010 but it was found that it was not really negligence just a small oversight. However, after that the appellant had introduced internal regulation to prevent similar incidents in the future.

(13) Ms Urbanczyk was shocked by the incident and the subsequent BF proceedings. She was hit even more when HMRC launched their enquiries as she had thought the case was already closed. As an innocent party the appellant had already paid a considerable amount of money to get the vehicle back. She thought HMRC's actions were unfair and they had not taken into consideration the relevant circumstances of the case. It is easy to assess the case from hindsight but at the time the appellant had acted as per their normal practice.

(14) She stated that it is mere speculation that if the appellant had made the necessary and expected checks correctly it would have found that Dachpol is not a legitimate business and that Ariel were not expecting the delivery.

(15) Mr Atkinson was prejudiced and showed no willingness to fairly consider the appellant's explanations. He was determined to assess the case after the event. Speculative inferences cannot constitute a legitimate ground for imposing liability. The smuggling was a third party action for which the appellant cannot be blamed and for which the appellant cannot be required to pay the money in the amount that would destroy the appellant's business. The appellant cannot accept liability for another's wrongdoing because the wrongdoer is not traceable by the authorities.

(16) BF concluded the appellant was mildy reckless but HMRC has concluded that the appellant was involved in the smuggling. This is unfair, biased and speculative. The appellant was not aware of the goods.

(17) The appellant has learned its lesson since the incident and have sought that the drivers are mindful of any potential illegal attempts. Since 2012 there have been no smuggling attempts and the internal regulations have therefore proved successful. The appellant did have regulations before July 2012 but after the incident more formal and detailed ones were introduced.

(18) HMRC did not appreciate that the appellant struggled to provide detailed and precise responses to their queries after more than one year since the incident had taken place. The appellant wanted its case to be properly heard and understood which did not happen.

(19) The appellant company is a reliable haulier awarded with a certificate of reliable haulier dated 31 January 2012. This certificate means that it is deemed reliable as meeting the highest standards of safety and cop-operation.

*Findings of fact as regards the ordering and delivery of the Load*

35. We have concluded the following from the evidence presented to the tribunal as set out above as regards the ordering of the delivery of the Load. Our further conclusions are set out in the discussion section.

36. The Load was not picked up at Mielec in Poland from Onduline, as stated in the DN and CRM, but from another location which was probably Zamosc in Poland.

37. The order for the delivery of the Load was not placed by Onduline and Ariel did not order the Load.

38. We accept Mr Atkinson's evidence that he thoroughly investigated Onduline's involvement in the matter and his reasons as to why he was satisfied that it was not involved in this matter on the basis of the correspondence with Onduline and materials produced by Onduline as set out in 20 above. We place reliance on the documentary evidence, in particular, the invoices and delivery notes produced by Onduline which were in the bundle produced to the tribunal. These were different in layout and presentation to the delivery documents relating to the Load. In particular we note that the DN for the Load was based on the type which would be issued in Poland for domestic use in Poland and does not correlate to the type of documents which Onduline uses for a cross border order of the type this purported to be. Overall the evidence indicates that the DN and CRM were fake documents.

39. We also accept the evidence as regards the steps taken by BF to verify whether Ariel had made the order. In response to BF's enquiries, Ariel stated that whilst it did deal with Onduline it did not make the order for this Load and the Load was not of a type of roofing materials it would order. BF's legitimate load team accordingly did not release the Load to Ariel. Moreover, that Ariel did not order the Load is also supported by the evidence obtained by Mr Atkinson from Onduline (as set out in 20).

40. We are not able to make any finding as to who placed the order for the delivery of the Load with the appellant. The appellant asserts that the order was made by an entity named Dachpol of Krakow, acting through their Bochnia branch, on a telephone call with Ms Urbanczyk, that the appellant verified the existence of that entity by an internet search and that Dachpol subsequently disappeared. There is no documentary evidence which supports that such an order was received. We found such evidence as was presented, including the witness evidence of Ms Urbanczyk, to be unreliable for the reasons set out below.

41. Conflicting accounts have been given of how the order for the delivery of the Load was made:

(1) In the correspondence EL stated (on behalf of the appellant) that the order was made by telephone and that payment and delivery arrangements were made in that initial call. In her witness evidence Ms Urbanczyk stated that she thought the delivery at Zamosc would have been communicated to the Driver via the despatcher at a later stage.

(2) In a letter of October 2012 to HMRC EL said (on behalf of the appellant) that a fax was received from Dachpol confirming the order. In a letter of August 2013 EL said that a fax was requested on many occasions but not received. In her witness statement Ms Urbanczyk said the fax was probably received and in her oral evidence she said that she was sure the appellant did not have such a fax but she really could not remember whether it had been received (and was subsequently lost) or was not received at all.

42. Ms Urbanczyk asserts that an internet search was made which showed the company Dachpol of Krakow but HMRC has been unable to find any trace of such a company on the website provided by the appellant (see 27) or otherwise.

43. Ms Urbanczyk stated in her witness statement that "we were told that Dachpol was Onduline's warehouse (agent)". This was not referred to at any previous time in the correspondence EL had with HMRC. When questioned Ms Urbanczyk said that she was not sure whether she knew that Onduline was involved. She said that it was normal practice in Poland for there to be an agent between the sender and recipient but she could not remember if she knew of Onduline's involvement in this case

44. In the correspondence with HMRC, EL said that the appellant had contacted Dachpol many times but received no response and that they had telephoned Dachpol but the phones were switched off. We note, however, that the appellant has not provided any details at all for Dachpol including any telephone number on which the appellant attempted to contact Dachpol.

*Penalty decision*

45. HMRC regarded the appellant's actions as deliberate and concealed as (a) this was the second seizure involving the appellant as part of a covering load, (b) the appellant failed to do adequate due diligence checks on Dachpol and (c) the Driver failed to check the load and paperwork as the CRM showed pick up was at Onduline

but Onduline knew nothing of the delivery. HMRC noted that Ariel was not expecting the delivery so had the smuggling been successful it would have been diverted without payment of excise duty. This would not be possible without the knowledge of the Driver. The appellant advised that the Driver was not responsible. HMRC regarded this disclosure as made on a prompted basis.

46. HMRC initially gave reductions in the penalty at the maximum rates permitted for each of "telling", "helping" and "giving".

47. On 19 March 2014 EL disputed the penalty on the basis that the appellant knew nothing of the smuggling. The appellant could not have anticipated after the case was closed by BF they would have any further disclosure obligation to HMRC. Whilst the appellant may have failed on minor issues the appellant did not act intentionally or make arrangements to conceal anything. The penalty was disputed in its entirety but if there were to be a penalty is should be confined to 30% of the potential lost revenue. The penalty is disproportionate and undue on the basis of *Ringwood Marketing, Austin Wilkinson and Sons Limited v The Commissioners for Her Majesty's Revenue & Customs* TC 03369 [2014] UK FTT 229. Given BF found the appellant was only mildly reckless it is unfair and against the principle of legal certainty and the protection of legitimate expectations to be held liable for both excise duty and the penalty (*Butlers Ship Stories Limited v The Commissioners for Her majesty's Revenue & Customs* [2013] UKUT 0564.) EL asked for a review and withdrawal of the penalty.

48. Mr Atkinson wrote to EL on 24 March 2014 upholding the penalty for the same reasons as set out before. In relation to the comments on BF's previous decision on restoration he noted that the Driver was issued with a form which advised at the time of the seizure that this was without prejudice to any further action that HMRC may take in connection with the seizure.

49. In a letter of 14 April EL requested a review of the penalty decision. Following this review, on 6 May 2014 Mr Atkinson was asked by the appeals and review team to reconsider the "telling" aspect of the penalty reduction. On 19 May 2014 Mr Atkinson reissued the penalty schedule explaining that he was reducing the reduction for telling to 15% only (rather than the previous 30%) as the appellant failed to advise where the load was to be delivered and the exact location of where it was picked up. He noted that given the scale of the smuggling attempt he would expect the appellant to have done their own investigation at the time into how it happened to get full information on the circumstances especially given their first seizure. He noted that the appellant also failed to acknowledge any wrongdoing.

50. On 2 June 2014 he issued a revised penalty assessment for £117,726.

**Law**

51. Section 2 of the Tobacco Products Duty Act 1979 ("**TPD**") imposes a duty of excise upon tobacco products:

"2 Charge and remission or repayment of tobacco products duty

(1) There shall be charged on tobacco products imported into or manufactured in the United Kingdom a duty of excise at the rates shown in the Table in Schedule 1 to this Act"

52. "Tobacco products" are defined in s 1 TPD to include cigarettes.

53. In this case the issue of who is liable to pay excise duty and when that liability arises is governed by regulation 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (the "**Regulations**"). These implement in the United Kingdom the provisions of Council Directive 2008/118/EC concerning the general arrangements for excise duty. Regulation 13 provides as follows:

> "(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.
>
> (3) For the purposes of paragraph 1 excise goods are held for a commercial purpose if they are held –
>
> (a) by a person other than a private individual; or
>
> (b) by a private individual ("P"), except in a case where the excise goods are for P's own use and were acquired in, and transported to the United Kingdom, from another Member
>
> The 2010 Regulations implement in the United Kingdom the provisions of Council Directive 2008/118/EC concerning the general arrangements for excise duty ("the Directive"). State by P.

54. HMRC's power to assess the tax due on such excise goods and to issue penalties in respect of such tax is given in s 12 and s 13 of the Finance Act 1994.

*Penalties*

55. The penalties provisions operate as follows under schedule 41 to the Finance Act 1994 (and all references to paragraphs below are to paragraphs of that schedule):

> (1) A penalty is payable by a person (P) where (a) after the excise duty point for any goods which are chargeable with a duty of excise, P acquires possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods, and (b) at the time when P acquires possession of the goods or is so concerned, a payment of duty on the goods is outstanding and has not been deferred (para 4).

(2) The amount of the penalty depends on whether the act which enables HMRC to assess an amount of duty as due from P under a relevant excise provision is "deliberate and concealed" or "deliberate but not concealed". This depends on whether P makes arrangements to conceal the situation giving rise to the obligation (para 5(3)).

(3) The penalty payable is 100% of the potential lost revenue for a deliberate and concealed act or failure, 60% of the potential lost revenue for a deliberate but not concealed act and 30% of the lost revenue in any other case (para 6). The potential lost revenue is the amount of any tax which is unpaid by reason of the failure (para 7(10)).

(4) Penalties are subject to reduction in the applicable percentage where 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 unpaid (para 12(1) and (2)).

(5) Where a person has made such a disclosure HMRC must reduce the penalty to one that reflects the quality of the disclosure (para 13(1)). "Quality" includes timing, nature and extent (para 12(4)).

(6) The precise level of the permitted reduction depends on whether the disclosure is prompted or unprompted. Disclosure of a relevant act or failure is (a) 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 (para 12(3)).

(7) For a prompted deliberate and concealed penalty the penalty can be reduced to a minimum of 50% of the potential lost revenue.

(8) HMRC can also reduce a penalty of they think it right because of special circumstances.

## Submissions

*Appellant's submissions*

56. The Cigarettes were not "held" by the appellant "for commercial purposes in the UK in order to be delivered or used in the United Kingdom" within the meaning of Regulation 13(1) and similarly the appellant was not the person "holding" the Cigarettes "intended for delivery" under regulation 13(2).

57. There is simply no proof that the appellant was aware of the Cigarettes in the vehicle at the relevant time given the Cigarettes were so deeply hidden. Ms Urbanczyk has confirmed that she was not aware of the Cigarettes. The appellant was held by BF to be mildly reckless but was not held to be involved in the smuggling. Given this lack of awareness the appellant could not be "holding" the goods for any purpose and could not have had an intention as regards the delivery of the goods.

58. To hold a haulier liable to excise duty on good simply because it had physical possession of the goods would not be right and fair in accordance with the purpose of the legislation. Regulation 13(2)(b) expressly refers to intention. Intent is a determination to perform a particular act or to act in a particular manner for a specific, aimed reason. It is a mental attitude or state of mind with which an individual acts. The appellant had no intention, in that sense, with reference to the Cigarettes.

59. The question of what the term "holding" means was considered by the Court of Appeal in the case of *Taylor, Wood v The Queen* [2013] EWCA Crim 1151:

(1) At [29] the Court stated it means possession as control with the intention of asserting such control against other. As the appellant did not know that it had actual physical possession of the Cigarettes at the excise duty point, its possession could not have been sufficient to constitute "holding" in that sense.

(2) At [30] of that case the Court notes that to seek to impose liability to pay duty on the appellant in that case, who was an innocent party, would raise serious questions of compatability with the objectives of the legislation.

(3) The Court of Appeal referred to *Revenue and Customs Prosecutions Office v Mitchell [2009] EWCA Crim 214 [5 2009] 2 Cr App R (S) 66*] where it was observed that attention was to be directed to the "person who may not be physically making the delivery but is the person who is truly responsible for it being made", the "person who had real and immediate responsibility for causing the product to reach that point, which will typically and ordinarily be the consignor" (at [31] and [32]). Here it cannot be said that the appellant had responsibility for the Cigarettes as the appellant did not know of their existence. Like the relevant carrier in that case, the appellant was "not more than an innocent agent in the importation of the cigarettes" it was not aware of. HMRC has not in fact properly investigated who the responsible person was (see below).

60. As regards the case of *Alexander James Thompson v HMRC* [2015] UKFTT 0336 to which HMRC refer, the factual circumstances of the case are not similar to the present appeal. That case related to movement of goods, alcoholic drinks, between approved excise warehouses with duty suspended. Here the case relates to international transport of goods by road subject to the Convention on the Contract for the International Carriage of Goods by Road 1956 (the "**Convention**").

61. Article 8 of the Convention reads (inter alia):

> "Art. 8(1). On taking over the goods, the carrier shall check:
>
> (a) the accuracy of the statements in the consignment note as to the number of packages and their marks and numbers, and
>
> (b) the apparent condition of the goods and their packaging

62. All the above conditions were complied with by the appellant. There were no other, specific and rigorous legal requirements for the haulier in relation to the transport and checks on the load.

63. In the *Thomson* case the haulier, Mr Thomson, saw the goods and failed to inspect the documents. The element of "knowledge or means of knowledge" considered in *Thomson* related not to the question whether the goods existed at all (regarding the individual's awareness at the time of loading) but whether they were duty paid. The haulier saw the dutiable goods but failed to check the documentation. Had he inspected the documentation accompanying his load, he would have learned that the goods were not duty paid and were to be delivered outside the UK. The warehouse keeper's primary liability was established and the haulier was held liable jointly and severally as the person who caused the goods to reach an excise duty point.

64. That is unlike the current situation where the appellant simply did not know of the existence of the Cigarettes at the time the transportation took place as they were hidden deeply in the Load by a third party. The Driver in this case was not allowed to inspect the load, by opening the packages and checking its contents, but complied with Article 8 cited above. The Driver checked the documentation only but was thus unable to discover the hidden goods.

65. In the present case, the issue relates to "making delivery" of or "holding" the goods intended for delivery and the *Taylor Wood* case is the most relevant authority. As set out, in order to deliver goods or to hold them with the intention of delivery, there must be a mental element present regarding the goods. There is a difference between "causing" dutiable goods the haulier was aware of to reach a duty point (taking the goods onto the vehicle and transporting them in full awareness), as in the *Thomson* case, and "making" delivery or "holding" goods the haulier was not aware of at all, as in this case.

66. In this case HMRC have failed to investigate the matter properly to find out who was responsible for the Cigarettes. In particular they have not checked information provided by the consignor (Onduline) regarding their agent (subsidiary) in Poland who, based on the information provided by Onduline, could in all likelihood be a third party involved in the event (particularly given the order's specific reference number issued by that agent).

67. In *Lindsay v Customs and Excise Commissioners* [2002] EWCA Civ. 267 it was pointed out that HMRC should strike a fair balance between the rights of the individual and the public interest and that there must be a reasonable relationship of proportionality between the mean employed and the aim pursued. In this case the appellant was not involved in smuggling. A public authority should not act in a disproportionate way "however keen it is on a harsh deterrent policy for the greater public good." The carrier's civil liability involving no blameworthy conduct cannot be justified as proportionate.

68. HMRC must take into account all relevant considerations (on the authority of *Customs and Excise Commissioners v JH Corbitt (Numismatists) Ltd* [1981] AC 22) and must apply principles of procedural fairness. HMRC assessed the case from hindsight and disregarded the appellant's explanations. Regulation 13(2) was construed literally and applied blindly by HMRC against the appellant. HMRC

reviewed the appellant's case in breach of correct procedures. As noted HMRC did not take appropriate steps as regards establishing whether Onduline was involved in the smuggling. HMRC also did not take appropriate steps as regards whether Ariel was involved in the smuggling. HMRC has picked on the appellant to assess for excise duty because they did not investigate others properly. Only one letter was sent by HMRC to Ariel and no answer was received. Any one of the parties could be the smuggler.

69. This is not a case where the appellant ought to have known about the goods (even if that were the correct test, which is disputed). The appellant carried out simple basic checks. They were not legally obliged to carry out further checks or to verify the parties as set out above.

70. The appellant has learned a lesson and has introduced appropriate regulations.

71. As regards the penalty the appellant did not act in a deliberate and concealed way. There was no failure. The appellant did not make arrangements to conceal the situation giving rise to the obligation. The argument that the appellant did not hold the goods in question as the appellant only had actual inadvertent possession was entirely disregarded by HMRC.

**HMRC's submissions**

72. The burden of proof is on the appellant to show that HMRC's decision is wrong that it is liable to excise duty under Regulation 13(2).

73. HMRC noted that there is presently little authority as to the circumstances when a person may be said to be "making the delivery" of goods or "holding" goods intended for delivery under Regulation 13(2) of the Regulations. However, the *Taylor Wood* case is authority for the proposition that for a person to be treated as "holding" excise goods it is necessary for the person to know or "possibly" that he "ought to know" that he is holding them.

74. In HMRC's view it must be correct that if knowledge is a requirement, liability is not confined to a person who actually knows but also to a person who ought to have known. Otherwise it would be easy for a company such as the appellant to be used for smuggling. The appellant could simply choose not to delve too deeply into what was taking place. There are strong policy arguments why the test should include "ought to know".

75. HMRC also referred to the *Thompson* case. One of the issues in that case was whether the appellant "causes or caused" goods (alcohol) to reach an excise duty point (on their transportation between warehouses). The appellant argued, amongst other things, that this test was not met as he did not know that the goods were duty unpaid. HMRC stated that the tribunal decided in that case that there was no mental element or knowledge requirement as regards that test. It could perhaps be argued then that there is no such requirement in this case.

76. In HMRC's view, in any event the appellant knew or ought to have known that the vehicle contained excise goods on the basis that the appellant failed to conduct a number of basic and reasonable checks which would have revealed the smuggling attempt.

77. The evidence points to the fact that the appellant knew about the Cigarettes or at the least the facts are such that the appellant was put on notice as to the existence of smuggling in general and this particular smuggling attempt:

(1) There is an obvious and inherent risk involved in any haulage business especially those involved in cross border transport.

(2) The appellant was involved in a similar smuggling attempt in 2010.

(3) The asserted facts as to the ordering of the Load by Dachpol are not credible. On the appellant's own evidence either the booking was made by Dachpol over the phone but no individual contact name was taken or contact details taken which were not kept. On the appellant's evidence it appears either there was no fax confirming the booking or it was not retained. Surely if there had been a fax confirming the order the appellant would have wanted to keep it.

(4) It is not credible that the despatcher would not keep records of the place of delivery and changes in address.

(5) There are a number of matters which should have been apparent to the Driver. He failed to check the Load, the CRM indicated a different pick up location to the actual one, the CRM should have been prepared by Dachpol not Onduline. This is indicative of the parties simply "turning a blind eye".

78. The appellant asserts the Driver was not at fault in that "he could not have been cognisant of the goods". For this reason it is appropriate for the failings of the Driver to be laid at the door of the appellant. It is another reason why the evidence shows the appellant knew or ought to have known it was transporting excise goods.

79. There are a number of factors which should cause the tribunal to doubt the diligence of the appellant's operation.

(1) The appellant cannot recall where the Driver picked up the Load.

(2) The appellant was apparently prepared to accept that Dachpol, as a new customer it knew little about, would pay in cash on delivery. Although the appellant asserts this was normal practice, HMRC question whether that would really be the case for a new customer about which the appellant had such little knowledge.

(3) Ms Urbanyczk was unable to answer a number of questions about the procedures of the appellant such that it is unclear what role she actually plays.

80. There are a number of steps which the appellant could have taken to ensure that Dachpol, which the appellant had never done business with before, was a legitimate business:

(1) The appellant should have made adequate checks on the nature of its business, where its business was located and the names of staff members. Had the appellant done this it would have established that Dachpol was not a legitimate business.

(2) The appellant should have made adequate checks of Ariel. That would have revealed, as Mr Atkinson has established, that Ariel did not make the order.

(3) The appellant should have made adequate checks of Onduline which would have revealed that the invoice was fake. From the appellant's evidence it is not clear whether Ms Urbanyczk knew of the purported involvement of Onduline or not. She asserted that she was aware of this in her witness statement but this was never mentioned in previous correspondence with HMRC and she did not really give an answer in her oral evidence. If anything there is a stronger case that the appellant knew it was holding the goods if Ms Urbancyzk was aware of Onduline but took no steps to check the position with them.

81. The appellant did not make basic checks which would have revealed the delivery was not legitimate such that it can be said the appellant knew (which explains why the appellant chose not to make the relevant checks) or ought to have known that the Load contained excise goods. The appellant is therefore liable

82. The penalty was properly imposed on the appellant on the basis that the appellant had possession of the Cigarettes at the relevant time. The appellant's behaviour is correctly categorised as deliberate and concealed for the reasons set out above. The full permitted reductions have been applied except as regards "telling" for the reasons set out in Mr Atkinson's evidence.

83. In arguing that the penalty is unfair and against the principle of legal certainty and the protection of legitimate expectations, the appellant is seeking to introduce matters of public law into this appeal. Following the decision in *HMRC v Abdul Noor* [2013] UKUT 071 (TCC) the tribunal does not have jurisdiction to consider such matters.

**Discussion**

84. The issue is whether the appellant has been correctly assessed to excise duty and a related penalty in relation to the Cigarettes. The appellant carries on a road transport business in Poland. The Cigarettes were uncovered at Dover in July 2012 in a vehicle belonging to the appellant which was being driven by the Driver who was employed by the appellant. They were hidden at the bottom of pallets of roofing materials which were the apparent load. The facts set out in 2 to 10 which further sets this out are not disputed.

85. There is no dispute that the Cigarettes are potentially liable to excise and that the Cigarettes were located in the vehicle as an attempt to smuggle them into the UK without payment of excise duty. The appellant argues, however, that it is not liable for that duty as it had no knowledge that the Cigarettes were in the Load.

86. The liability to pay duty is triggered at the excise duty point. 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 (under Regulation 13(1) of the Regulations). 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.

87. The dispute is whether the excise duty point was triggered when the Cigarettes were brought into the UK by the Driver in the appellant's vehicle and whether the appellant is liable for duty as the person making the delivery of the goods or holding the goods intended for delivery. There is not any dispute that the appellant was in possession of the goods at the relevant time; the goods were physically located in a vehicle which belonged to the appellant driven by the Driver who was employed by the appellant to deliver the Load in which the goods were concealed. The appellant asserts that this does not suffice for it to be regarded as holding the goods intended for delivery or as making delivery of the goods. It argues that a person is not liable under these provisions where it had no knowledge of the Cigarettes being present in the vehicle, which the appellant asserts to be the case. HMRC argue that, if this is a requirement, the evidence supports the contrary conclusion that the appellant was aware of the attempted smuggling of the Cigarettes without the payment of excise duty. They argue that in any event, it would suffice for the appellant to be liable if the appellant ought to have known that the Cigarettes were in the Load and that in these circumstances the appellant failed to take reasonable steps which would have revealed the goods.

88. As the parties have noted there is little authority on the correct application of this test. We were referred by both parties, however, to the *Taylor Wood* case which relates to a criminal confiscation order under the Proceeds of Crime Act 2002.

89. In summary, certain individuals (including Mr Taylor and Mr Wood) acted together to arrange for the purchase of counterfeit cigarettes concealed in a load of textile materials purportedly ordered from Belgium by a UK customer. The UK business, which the conspirators presented as the customer who purportedly ordered the textile materials, carried on a legitimate textiles business, had no knowledge of the arrangements and was never intended to receive the delivery. One of the parties involved instructed a freight forwarder (a business controlled by one of the conspirators) to deliver the load. The freight forwarder carried on some legitimate business and was found by the Court of Appeal to be involved to add a veneer of legitimacy.

90. Mr Wood, through the freight forwarder, instructed another freight forwarder, Yeardley, to transport the goods to the UK. Yeardley instructed a Dutch firm of road hauliers to make the delivery of the textiles load in which the cigarettes were concealed. Both Yeardley and the Dutch hauliers were held to be entirely unaware of the concealment of the excise goods in the textiles load. They were described as being no more than "innocent agents" of the criminal conspirators. Following instructions received from the conspirators the goods were delivered by the Dutch

haulier to a different address to that shown on the delivery note (which was a yard owned by one of the conspirators) which was then the cigarettes were found.

91. One of the issues considered by the Court of Appeal was whether Yeardley and the Dutch haulier were liable to pay excise duty on the goods as persons "holding" the goods (under Regulation 13(2)) at the excise duty point.

92. As [29] the court noted that "holding" is not defined in the legislation and there appears to be no authority on its meaning but they drew the following conclusions:

> "It is plain that it denotes some concept of possession of the goods. Possession is incapable of precise definition; its meaning varies according to the nature of the issue in which the question of possession is raised (a good example being *Re Atlantic Computer Systems plc* [1990] BCC 899, CA). But it can broadly be described as control, directly or through another, of the asset, with the intention of asserting such control against others, whether temporarily or permanently: see, for example, *Goode on Commercial Law, Fourth Edition, p 46*. In a case of bailment, the bailee has actual, or physical, possession and the bailor constructive possession. In other words, if the bailee holds possession not for any interest of his own but exclusively as bailee at will, legal possession will be shared by bailor and bailee."

93. At [30] the Court of Appeal noted that the Dutch haulier had physical possession of the cigarettes at the excise duty point but was acting as no more than the agent of Yeardley. Yeardley was, therefore, in law the bailee of the cigarettes at the excise duty point and, not apparently having any interest of its own in the goods, shared legal possession with the person having the right to exercise control over the goods. The Court continued that:

> "If Yeardley had known, or perhaps even ought to have known, that it had physical possession of the cigarettes at the excise duty point, its possession might have been sufficient to constitute a "holding" of the cigarettes at that point. However, Yeardley had no such knowledge, actual or constructive, and was entirely an innocent agent.

94. The Court considered that this "important fact" (that Yeardley had no knowledge of the goods) then turns the focus on the person or persons who were exercising control over the cigarettes at the excise duty point. The Court considered that was the individuals who were in fact instrumental in arranging the smuggling attempt.

95. At [31] the Court noted that there is nothing in this interpretation of the rules as applied to the facts of this case that would be inimical to the purposes of the Finance Act:

> "To seek to impose liability to pay duty on either [the Dutch haulier] or Yeardley, who, as bailees, had actual possession of the cigarettes at the excise duty point but who were no more than innocent agents, would raise

> serious questions of compatibility with the objectives of the legislation. Imposing liability on the appellants raises no such questions, because they were the persons who, at the excise duty point, were exercising de facto and legal control over the cigarettes. In short, responsibility for the goods carries responsibility for paying the duty."

96. The Court also considered that this interpretation was consistent with the basis of liability under Article 7(3) of the 1992 directive where a person is "holding" the products intended for delivery. The Court referred to the fact that there appeared to be no interpretation of the concept of "holding" in the jurisprudence of the European Court of Justice. In the absence of this, the Court of Appeal concluded that both the language and purpose of Article 7(3) strongly support the conclusion that a person who has de facto and legal control of the goods at the excise duty point should be liable to pay the duty. The court went on to say at [ 39] :

> "That conclusion is all the more compelling where the person in actual physical possession does not know, and has no reason to know, the (hidden) nature of the goods being transported as part of a fraudulent enterprise to which he is not a party. To seek to impose liability on entirely innocent agents such as [the Dutch agent] or Yeardley, rather than upon the appellants, would no more promote the objectives of the Directive than those of the Regulations. "

97. As noted in the submissions, the *Thompson* case raised by HMRC related (in part) to whether the appellant in that case caused the relevant goods to reach the duty excise point. The tribunal referred to the *Taylor Wood* case as the Court of Appeal had concluded that the appellants had caused the products to reach a duty excise point in that case. They had made the arrangements for transportation of the goods and had taken steps to conceal the fraudulent importation. As such it would not have affected the decision if they no longer held the goods. At [93] Judge Cannan quotes from *Taylor Wood* at [34] as follows

> "This conclusion is entirely consistent with *Revenue and Customs Prosecutions Office v Mitchell* [2009] EWCA Crim 214 [5 2009] 2 Cr App R (S) 66 where Toulson LJ, as he then was, observed that the choice of language in Regulation 13(3) was likely to have been chosen to make clear that attention is "being directed to the person who may not be physically making the delivery but is the person who is truly responsible for it being made" (paragraph 31); and that Regulation 13(3) "is directed at that person or body who had real and immediate responsibility for causing the product to reach that point, which will typically and ordinarily be the consignor" (paragraph 32*).*"

98. Judge Cannan goes on to note that what the Court of Appeal said in this respect was not necessary for its decision and as such is not binding on the tribunal but it is persuasive. At [94] he notes:

> "We do not, however, consider that the Court was saying that anything less than knowing involvement in duty evasion would not satisfy the requirement for causation."

99. He goes on to conclude that Mr Thompson in that case did cause the goods to reach the duty excise point. On the question of knowledge he concludes at [99] that

> "We do not consider that any ignorance on the part of Mr Thompson as to the law surrounding excise duty movements assists his case. What fixes liability is not what he knew or should have known. Regulation 5(6)(b) does not make reference to knowledge or means of knowledge. It is the fact that he was responsible for moving excise goods from a bonded warehouse and out of a duty suspension arrangement that fixes liability."

100. The comments in *Taylor Wood* as regards the agents' position are not part of the binding decision as that case was concerned with the liability of Mr Taylor and Mr Wood and not that of the relevant agents in question. However, the comments of the Court of Appeal are very persuasive authority that a person is not liable for excise duty on the basis that he is "holding" or "making delivery of the goods" if he is an entirely innocent party with no knowledge that he is in possession of goods liable to unpaid excise duty. We note the comments in this tribunal in the *Thompson* case set out above but those were made in the context of a different set of provisions and we do not see this case as authority for the proposition that intention may never be relevant in these circumstances.

101. Our view is that on their natural meaning the term "holding" goods "intended for delivery" or "for a commercial purpose" allows scope for the interpretation that some degree of knowledge or intent must be present. It is difficult to see that a person can be holding goods in the required way (as to intending to deliver them or for a commercial purpose) if he simply has no idea that goods liable to excise duty are in his possession. If knowledge is relevant, however, as the Court of Appeal in Taylor Wood indicate, it would not seem appropriate that a person could claim he did not have the required intent if he simply turns a blind eye or wilfully ignores the relevant circumstances which should have alerted him to the presence of the goods subject to unpaid duty. However, we do not find it necessary to reach a definitive view on this. Our view is that the appellant is liable for the duty in issue in this case adopting the appellant's own position that knowledge of the presence of the dutiable goods is required.

102. We consider that, on the evidence available, on the balance of probabilities the appellant knew that it was carrying a Load in its vehicle in which Cigarettes were concealed as an attempt to avoid the payment of excise duty on those Cigarettes. In the case of a corporate entity we take the relevant knowledge to be that which may be attributed to the entity acting through individuals involved in its operation such as, in particular, Ms Urbanczyk, as the owner of the business who was actively involved in its operation. In our view, the fact that the appellant was, as the carrier of the Load, in possession of the Cigarettes at the point of entry into the UK, in circumstances where it knew that those Cigarettes were concealed in the Load in an attempt to bring them

into the UK without payment of excise duty, renders it liable to excise duty as the person "holding" the relevant goods. This is not a case where the carrier of the goods was a wholly innocent agent as in the *Taylor Wood* case.

103. The material factors in forming this view are as follows.

(1) We note that the appellant was involved in a previous smuggling attempt in 2010 (see 10 and 15(3)). We draw no conclusion from that as regards the current situation except to note that, given such a previous incident, a business acting innocently could be expected to be particularly vigilant as regards further smuggling attempts.

(2) For the reasons set out in full above, we accept that the order for the delivery of the Load was not made by Onduline and that Ariel had not placed an order for the Load. In particular we note that it is clear that the DN was a fake. From this it is clear that the Load was a cover load only and someone intended to smuggle the Cigarettes into the UK without payment of excise duty. That there was such a smuggling attempt is not disputed by the appellant but the appellant asserts in effect that it was deceived and was carrying the Cigarettes in complete ignorance of their presence.

(3) As Ariel had not made the order for the Load and so was not expecting it, it is clear that, if the Load had not been intercepted, it would have had to be disposed of and the Cigarettes retrieved by the smuggling party. This alone, given, in particular, the number of Cigarettes concealed and the way in which they were very deeply concealed in the pallets, makes it highly unlikely that the smuggling attempt could have taken place without both involvement on the part of the Driver and the knowledge of the appellant (as was the view of BF).

(4) The appellant maintains that the Driver was not aware of the presence of the Cigarettes in the Load. The correspondence records that he stated to BF that he visually inspected the Load without unwrapping the pallets and that they were foil wrapped. A consignment from Onduline would not be foil wrapped but we accept that the Driver and the appellant could not be expected necessarily to know that. The appellant states that a visual inspection only is in line with what can be expected; to unwrap such a load and look inside each item would take too long so affecting delivery times. However, in our view, in these circumstances, where the collection of the Load was from a different party and location than that shown in the delivery documents, if the parties were acting genuinely it is to be expected that further checks would have been made, if not on the Driver's own initiative (and we note he had the delivery documents with him) at any rate on the instructions of his employer (see (9) and (10)).

(5) The appellant in effect argues that it was deceived as it received the order for the delivery of the Load from a business purporting to be a legitimate business, Dachpol of Krakow acting through its Bochnia branch, which Ms Urbanczyk says she verified through an internet search but which subsequently disappeared. There are a number of difficulties with this explanation.

(a) There is no documentary evidence in support of this and the appellant's account is inconsistent. In particular the appellant, acting

through Ms Urbancyzk has given conflicting accounts of how the order was made and whether a fax confirming the order was received or not.

(b) The appellant has provided no contact details at all for Dachpol although it is asserted in the correspondence that repeated efforts were made to contact this entity following the apparent placing of the order for delivery of the Load. The appellant is not able to provide the name of any contact at Dachpol or the phone number used to make contact. We note that HMRC have not been able to find any trace of this entity on any internet search including on the website provided by the appellant (see 27).

(c) The appellant has given conflicting accounts of how the location for the delivery was specified under this apparent order. The correspondence from EL to HMRC seems to suggest that the location was specified by Dachpol in the initial telephone order but Ms Urbanczyk suggested in her evidence that the location was probably specified on a later call to a despatcher who informed the Driver.

(6) On Ms Urbanczyk's account the appellant accepted an order from this unknown entity, with which it had no prior dealings, on the basis, on her account, of an internet search only, on terms that the appellant would accept payment on delivery of the Load. It is not credible that a business acting innocently would accept an order from an unknown entity on those terms without any further verification of it.

(7) The appellant asserted on a number of occasions in the correspondence that it had no knowledge of Onduline but in her witness statement, Ms Urbanczyk said that she knew Dachpol was acting as warehouse agent for Onduline. When questioned she said she could not remember whether she knew of Onduline's involvement or not. The CRM has a Datrans stamp with the signature of Ms Urbanczyk. Given that it appears that Ms Urbanczyk herself signed the CRM on behalf of the appellant, we find it more likely than not that she was aware herself that the apparent consignor was Onduline. Moreover, there has been no assertion that the delivery documents were not processed by the appellant.

(8) In any event, if the appellant was contacted over the phone by someone purporting to be Dachpol of Krakow with whom it had no prior dealings and who asked for payment on delivery terms, it is not credible that a business acting genuinely would not have looked at the delivery documents relating to that order. On that basis, given the terms of the fake DN and CRM show a different entity as the consignor, a business acting genuinely could be expected to make further enquiries from the entities named on the delivery documents as well as from Dachpol. This is particularly the case, given that the appellant states it had no prior business dealings with Onduline and did not regularly deliver for Ariel (and given the previous smuggling attempt in one of the appellant's vehicles in similar circumstances). The appellant made no attempt to contact Onduline or Ariel or to verify that Dachpol was a legitimate business otherwise than through an internet search.

(9) Moreover, whether the Zamosc address for collecting the Load was, on the appellant's account, specified on the initial call or at a later time, it is not credible that the use of an address which is not in accordance with the delivery documents would not, in the light of all of the other circumstances, prompt a business acting genuinely in these circumstances to query the legitimacy of the transaction (again particularly given the previous smuggling attempt).

(10) Our view is that all of these circumstances taken together would surely prompt a business acting genuinely not only to check the situation with the relevant entities but also, if necessary, to ensure that further steps were taken to check the Load than merely a visual look at what is in the vehicle.

104. On the basis of the above, we have concluded that the assessment for excise duty has been validly raised by HMRC.

105. As regards the penalty, our view is that HMRC have correctly raised the penalty on the basis that the act which enables HMRC to assess an amount of duty as due from the appellant was "deliberate and concealed". In our view, on its natural meaning, the use of the term "deliberate" in this context requires that the relevant person must to some extent have acted consciously or with intent as regards the circumstances which resulted in a liability to excise duty. The act is concealed if the person makes arrangements to conceal the situation giving rise to the obligation to pay excise duty. On the basis of our findings as set out above, we consider that the appellant's actions in bringing the Load with the concealed Cigarettes into the UK was deliberate and concealed within the meaning of these provisions. HMRC have given the maximum reduction as regards two of the permitted categories. We cannot see any reason for any further reduction as regards the third "telling" category or that there are any special circumstances which would justify any further reduction.

106. We note the appellant's arguments that HMRC acted unfairly and disproportionately in making its decision referring to the *Lindsay* and *Corbett* cases. However, those case were concerned with the parameters and exercise of the tribunal's powers in circumstances where, under the relevant statutory provision, the tribunal is essentially confined to assessing whether HMRC had acted reasonably in making the relevant decision. In *Lindsay* for example the question of proportionality was relevant to the tribunal's review of HMRC's decision that goods which had been seized under their customs and excise powers should not be restored.

107. In this case the tribunal has full appellate jurisdiction. Its task is to decide, on all the evidence before it and having heard the arguments from both sides, whether as a matter of law the appellant is liable for the excise duty and the penalty which HMRC have assessed. If the tribunal finds, as we have done, that the excise duty is correctly assessed under the law, the tribunal has no power to mitigate the amount assessed. The tribunal can decide that the amount of a penalty should be altered (within the same parameters as HMRC are permitted to make reductions) but we set out we do not see any reason for any further reduction in this case (and as noted two of the permitted categories of reduction have been allowed in full).

## Conclusion

108. For all the reasons set out above, the appellant's appeal is dismissed.

109. 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.

**HARRIET MORGAN**
**TRIBUNAL JUDGE**

**RELEASE DATE: 26 August 2016**