[2017] UKFTT 561 (TC)

TC06003

Appeal number: TC/2013/2369

Excise Duty- driver collecting tobacco coming from Belgium in UK - whether assessable to duty under Regs 5,6 and 7 of Excise Goods (Holding, Movement and Duty Point) Regulations 2010 –held No; but assessable under Reg 13.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MICHAEL FRYDRYSIAK **Appellant**

- and -

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

TRIBUNAL: JUDGE CHARLES HELLIER
ELIZABETH BRIDGE

Sitting in public at 45 Bedford Square WC1 on 8 July 2014 (with later submissions)

Magdelene Dabrowska of MK Accountancy Professionals Ltd for the Appellant

Will Hays, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION AND DIRECTIONS

1. This decision relates to an appeal against an excise duty assessment (there is also an issue in relation to a penalty assessment). It follows more than two years after the hearing of the appeal. The reason for the delay is that during the course of the hearing the tribunal was made aware that an issue as to the construction of the law relevant to this appeal had been raised by the decision of the first tier tribunal in the appeal of B&M Retail and that an appeal against that decision was to be heard by the Upper Tribunal. This appeal was thus stayed awaiting the decision of the Upper Tribunal in that case. That decision was released at the end of October 2016 and drawn to our attention earlier this year.

Introduction

2. Shortly after 11:30 pm on 30 November 2011 Mr Frydrysiak was driving a van along Yeomans Drive, close to the Blakelands industrial estate in Milton Keynes, and was stopped by two police officers. They looked into the back of the van and found a large quantity (about 1/5th of a ton) of hand rolling tobacco.

3. The police officers phoned HMRC. They asked a few questions of Mr Frydrysiak and then took him home. They seized the van and the tobacco which they took to Milton Keynes police station.

4. On 21 November 2012, after some correspondence had taken place between Mr Frydrysiak and HMRC, HMRC made an assessment on Mr Frydrysiak for £30,228 for excise duty on the tobacco in the van. On 2 May 2013, after some further correspondence, HMRC assessed a penalty on Mr Frydrysiak of £6,045. This is a decision in relation to Mr Frydrysiak's appeal against the assessment. We consider the issue of the penalty at the end of the decision.

5. We shall return to the details of the relevant law later, but in summary, HMRC say that the effect of the Excise Goods (Holding Movement and Duty Point) Regulations 2010 (the "Regulations") is that: a person who "holds" tobacco outside a duty suspension arrangement on which duty has not been paid in the UK, or who "holds" tobacco for a commercial purpose for delivery in the UK is liable to excise duty on the tobacco. They say that Mr Frydrysiak "held" the tobacco in the van and that it was held both outside the duty suspension arrangement and for a commercial purpose for delivery in the UK.

The Evidence and our Findings of Fact.

6. We heard oral evidence from Karin Quarterman, the officer of HMRC who issued the assessment to excise duty under appeal (she also provided a witness statement), from Sarah Clements who was one of the two policemen who stopped Mr Frydrysiak on 30 November 2011, and, with the benefit of Mrs Dabrowska's translation, from Mr Frydrysiak.

7. We had before us a witness statement from Paul Chaplin, another officer of HMRC, who recounted inspecting the van and its contents at Milton Keynes police station later on 1 December 2011 and also a telephone call to Mr Frydrysiak. Mr Chaplin did not give oral evidence but save as noted elsewhere there was nothing contentious in his statement.

8. In the papers before us there were copies of correspondence between the parties, notes of a meeting between Mrs Quarterman and Mr Frydrysiak on 23 January 2013, a witness statement made by PC Howes, the second of the two policemen who stopped Mr Frydrysiak on 30 November 2011, and copies of pages from the notebooks of Mr Chaplin and Mr D Thompson, another officer of HMRC involved after the police detained the van and its contents.

9. An issue arises in relation to the admissibility of one part of this evidence. PC Howes' statement includes a report of what Mr Frydrysiak told him when he had been stopped. Mrs Dabrowska argued that because Mr Frydrysiak was not offered the services of a translator at the time that questions were asked and answered, this evidence should, having regard to the provisions of the Police and Criminal Evidence Act 1994 and Code A, not be admitted.

10. Section 2(2) of the Police and Criminal Evidence Act 1984 ("PACE") provides that if a constable contemplates a search of a vehicle under the power conferred by section 1 of that Act it shall generally be his or her duty "to take reasonable steps before he commences the search to bring to the attention of the appropriate person" inter alia the object of the proposed search and the constable's grounds for proposing to make it.

11. Mrs Dabrowska notes that section 3.11 of Code A – the Code of practice applicable under section 67 PACE - provides that if "a person in charge of a vehicle to be searched does not appear not to understand what is being said, or there is any doubt as to [his] ability to understand English, the officer must take reasonable steps to bring information regarding his rights and any relevant provision of the Code to his attention" – to enable him to understand. She says that the officers conducting the search had failed to take into account Mr Frydrysiak's limited English. Mr Frydrysiak had not been taken to a police station; had he been taken to a station and had the circumstances been explained to him in a way he could have understood, he could have given considered answers to PC Howes' questions rather than guesses directed to his concern that the police thought the goods in the van were stolen.

12. Mrs Dabrowska said that it followed from *R v King* that evidence should not be admitted where in circumstances such as these it would be unfair to do so. We understood this to be a reference to *King and Provan v Regina* [2012] EWCA Crim 805 in which the Court of Appeal considered the application of s 78 PACE which provides that:

> 78 (1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the

evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

13. In that case however the Court of Appeal made clear that whilst, "the deliberate flouting of a statutory duty for the purpose only of creating an opportunity for a covert recording may, depending upon the circumstances, result in the exclusion of evidence" a breach by an officer of a duty did not necessarily render the evidence which resulted unfair. Pitchford LJ said at [25] "As Auld J observed, each case must be examined on its own particular facts for an assessment of the fairness of the proceedings.".

14. On these bases Mrs Dabrowska argued that we should not admit the evidence of the two policemen, or at the very least should recognise that Mr Frydrysiak did not understand what was going on and that the short record of what Mr Frydrysiak had said in the witness statement of PC Howes was a later, summary, reconstruction.

15. Rule 15 of the Rules of this tribunal provides that the tribunal may admit evidence whether or not the evidence would be admissible in a civil trial. It seems to us that this rule indicates that the tribunal is not required to exclude evidence which would be inadmissible in a criminal trial. But whether or not evidence should be admitted by the tribunal is governed by the overriding objective of dealing with cases fairly and justly. The power to refuse to admit evidence in a criminal trial deriving from section 78 PACE has in this tribunal its counterpart in that objective. In our judgement this means that we should make an assessment of Mr Frydrysiak's English language abilities and of the circumstances in which his statements were recorded to determine whether it would be unfair to admit that evidence and if so what weight should be given to it.

Mr Frydrysiak's command of English.

16. Mrs Dabrowska translated into Polish the questions which were put to Mr Frydrysiak at the hearing and translated Mr Frydrysiak's Polish answers into English. On occasion however Mr Frydrysiak was able to answer in English a simple question without the help of Mrs Dabrowska. Mr Frydrysiak also told us that he had understood Mrs Dabrowska's initial exposition in English of his case to the tribunal.

17. PC Clements told us that she and PC Howes had asked basic questions of Mr Frydrysiak such as: "where do you come from?" and had received understandable if limited answers in English. She told us that when she had seen the quantity of tobacco in the back of the van she had said "you've got quite a habit" to which Mr Frydrysiak had answered "for friends and family as well". She described Mr Frydrysiak as having a basic but low-level command of English.

18. Mr Chaplin's witness statement he says that he had received a telephone call from Mr Frydrysiak in January 2012 in which Mr Frydrysiak had told him (in English) of certain developments.

19. Mrs Quarterman told us that Mr Frydrysiak telephoned her on 17 April 2012: she described his English as stilted but that, broadly, they understood each other.

20. Mr Frydrysiak told us that he had lived in England for eight years, during the last seven of which he had worked for John Lewis picking and packing items in a warehouse.

21. We find that Mr Frydrysiak has a modest command of English which suffices for everyday basic communication, which probably enables him to understand sentences that he would not be able to construct, and which may have lead to a lack of precision in what he said. That lack of precision would in our view have been exacerbated in the circumstances of being stopped by the police on suspicion of carrying stolen goods.

22. We consider that it is fair to admit PC Howes' evidence because it is likely that Mr Frydrysiak understood what PC Howes meant. We think however that it would be unjust to treat PC Howes' record of what Mr Frydrysiak said as a precise and accurate record of what he said or meant.

The events leading to the seizure

23. Mr Frydrysiak told us that late on the evening of 30 November 2011 he had been at home watching TV and had received a telephone call from a Mr Tejkowski. He said that at that time he had known Mr Tejkowski for a few months and that he met him occasionally, generally at Mr Tejkowski's request. Mr Tejkowski was also Polish. Mr Frydrysiak said that he believed his friend owned and ran a shop in Bedford in which he sold Polish food.

24. Mr Tejkowski, he said, had asked him for a favour: he said that he had been to a party the day before at which he had been drinking and that he was not now able to drive. But he was expecting a delivery of food: would Mr Frydrysiak take Mr Tejkowski's van and collect the food for him? Mr Frydrysiak told us that he agreed; he said that Mr Tejkowski spoke good English, was wealthy and would no doubt be able to return the favour. Mr Frydrysiak went to see Mr Tejkowski and picked up Mr Tejkowski's van.

25. Mr Tejkowski told him to go to a particular road in the Blakelands industrial estate. There he would find a lorry parked at the side of the road with parcels for Mr Tejkowski. The driver would be Polish, short, about 35 to 40 years old, with dark brown hair. Mr Frydrysiak was not told the name of the driver. Mr Tejkowski said the driver had come a long way and was passing through Milton Keynes at that time. Mr Frydrysiak should explain to the driver that he had come on behalf of Mr Tejkowski to collect the parcels. Mr Tejkowski gave Mr Frydrysiak a plastic wrap containing money to give the driver. Mr Tejkowski said it contained about £5000.

26. Mr Frydrysiak said that he followed these instructions. He went to the appointed road where he found a lorry. He knocked on the door of the lorry and asked the driver, whom he had not met before, if he had goods for Mr Tejkowski. The driver said yes. The boxes were placed behind Mr Frydrysiak in the back of the van and Mr

Frydrysiak gave the driver the money; the driver did not count it. Mr Frydrysiak said that the lorry driver had told him he had come through Belgium. Mr Frydrysiak said that he was not told by the lorry driver what the boxes contained.

27. We accept this evidence. There was nothing in the other evidence which cast doubt on it. In particular there was evidence that the registered keeper of van was, at the time of the stop, Mr Tejkowski.

28. It appears that Mr Frydrysiak then set off in the van. He told us that it was 15 to 20 minutes drive to Mr Tejkowski's house. But he was stopped by PC Howes and PC Clements on the way. He did not return the way he said he had come - he told us that he had come from Bicknell St (to the west of Blakelands) but he was stopped after driving down Delaware Drive, which appeared to be a quieter road to the east of Blakelands.

29. PC Clements told us that PC Howes had written the witness statement in which he had recorded his account of stopping Mr Frydrysiak, on his return to the police station. Mr Chaplin's witness statement indicated that he was given the witness statement at about midday on 1 December 2011 at the police station. The statement said it was completed at 1.30am. We conclude that the statement was written very shortly after Mr Frydrysiak was stopped.

30. PC Clements confirmed the account in PC Howes' witness statement that they had stopped Mr Frydrysiak suspecting that he might have been carrying goods stolen from lorries in Blakelands industrial estate. She told us that PC Howes had talked to Mr Frydrysiak while she had inspected the van. She could not therefore attest to the accuracy of PC Howe's account of his conversation with Mr Frydrysiak.

31. PC Clement told us that the normal procedure would have been for PC Howes to introduce himself (and her), to explain the grounds for stopping the van and to set out the objectives of the search. We think it likely that he did so and that he conveyed to Mr Frydrysiak their suspicion that the van contained stolen goods. Mr Frydrysiak's statements must be seen in that light.

32. She told us that when the back of the van was opened she saw that it was pretty much full of boxes of different sizes, some of which had been opened –she could see that these contained green pouches of Virginia tobacco - and others which looked sealed.

33. In his witness statement PC Howes said that Mr Frydrysiak appeared quite nervous. Mr Frydrysiak told us that he did not wish the police to think he had stolen goods in the van.

34. In his witness statement PC Howes recounted Mr Frydrysiak as saying of the boxes:

> "I bought off a Polish lorry driver, he is a friend, I paid him £5000, he got them from Belgium and I have just collected it. It is mine. I give it to friends and family."

35. In his evidence to us Mr Frydrysiak said that he did not say that he had "bought" the goods, but had said that he had paid for them. His concern was to let the officers know he had not stolen them. We accept this account.

36. Mr Frydrysiak accepted that he had said that the person he had paid was Polish and a lorry driver. But a fairer record would be that he said that he had paid a Polish lorry driver for the goods rather than that he had bought the goods from him. We accept this account. .

37. Mr Frydrysiak denied that he had said that the goods had come from Belgium. He said that he had known that the lorry driver came from Belgium and may have given the impression that the goods also came thence.

38. Mr Frydrysiak accepted that he had "just collected" the goods, but was not sure whether he had said "it is mine.".

39. Mr Frydrysiak denied that he had said "I give it to friends and family". He told us that he was thinking about making a telephone call to friends and family to assist him in a situation in which he found himself. Given Mr Frydrysiak's similar response to PC Clements' joke (see [17] above) that he had "quite a habit" we think it likely that he did indicate that the goods could be for friends and family.

40. In his witness statement PC Howes continues, after his record of his recollection of what Mr said Frydrysiak said, to say:

> "he told me his friends' name was Darius & he gave his number as 07864 540328, however when he showed me this number on his phone it was under the name of "Marcin".

41. Mr Frydrysiak told us that Darius and Marcin were Polish friends whom he wished to contact to obtain help. They lived in Milton Keynes. We accept this.

Evaluation

42. From this evidence we conclude:

> (1) that PC Howe's witness statement is likely to contain an accurate summary of what happened when he stopped Mr Frydrysiak, but, given the shortness of the recorded conversation may not be a verbatim record of Mr Frydrysiak's words, or, given Mr Frydrysiak's nervousness and poor command of English, wholly accurately reflect the information that Mr Frydrysiak intended to convey; we accept that Mr Frydrysiak, being nervous, and having a limited command of English did not intend to say that the goods were his or that he had "bought" them, but had intended to say (and meant) that they had been paid for and were not stolen;
>
> (2) that Mr Frydrysiak collected the goods in the van from a lorry parked in beside the road in a trading estate in the dark shortly before being stopped by the police;

(3) that the lorry had recently passed through Belgium;

(4) that the boxes of tobacco were transferred from the lorry to the van;

(5) that Mr Frydrysiak paid the lorry driver about £5000;

(6) that it is likely that Mr Frydrysiak knew that there was tobacco in the boxes. That is because:

(a) given that Mr Frydrysiak was of muscular build, it was unlikely that he simply sat in the van while the lorry driver loaded the boxes into the back. It is likely that he participated in loading the van

(b) we accept PC Clements' evidence that some of the boxes had been opened and consider it likely that Mr Frydrysiak have seen the contents of some of those boxes;

(c) this quantity of tobacco would have released some smell which it is unlikely that Mr Frydrysiak did not notice;

(d) the payment of £5000 (or £25 per kilogram) indicated that the goods were not ordinary groceries; nor were they bottled: had there been there would have been some clinking in transit or loading.

(7) Even if Mr Frydrisiak had not seen or smelled the contents of the boxes, the sum he paid, and the circumstances of the collection (and his taking quieter roads on the way back) meant it was likely that he knew that the contents were not groceries.

Events after Mr Frydrysiak was stopped.

43. Having taken Mr Frydrysiak home, the van and the contents were taken to Milton Keynes police station whence Mr Chaplin arranged for them to be taken away. The tobacco consisted of 138 kg of Golden Virginia hand rolling tobacco and 61kg Amber Leaf hand rolling tobacco.

44. Mrs Quarterman told us that she had been told by the seizing officer that the goods bore a Belgian Tax stamp. She showed us an email of 24 September 2013 from Mr Chaplin in which he said that the goods bore a BNL (Belgium Netherlands Luxembourg) tax stamp[1]. Mr Chaplin's seizure report said that the goods appeared to be of Belgian origin. We conclude that duty had been paid in Belgium on the goods on their release for consumption in that State.

45. Mr Frydrysiak told us that later, on 1 December 2011 he phoned Mr Tejkowski to tell him what had happened. In the note of the meeting with Mrs Quaterman on 23 January 2013 Mr Frydrysiak is recorded as having said that in the course of that telephone call Mr Tejowski had said that there must have been a mistake with the delivery and that he would sort everything out.

[1] That email had not been previously disclosed to Mr Frydrysiak or his advisers, but we did not consider it unfair to the Appellant to permit it to be admitted in evidence.

46. Mr Chaplin then wrote to Mr Tejkowski on 12 December 2011 asking for an explanation, and to Mr Frydrysiak on 14 December 2011 warning of liability to prosecution. Mr Frydrysiak is recorded at the 23 January 2013 meeting as saying that he took the letter from Mr Chaplin to Mr Tejkowski who repeated that there must have been a mistake, there was nothing to worry about, not to tell anyone else about it, and that he would take care of the matter.

47. Then on 9 January 2012 Mr Frydrysiak rang Mr Chaplin and said: (i) Mr Tejkowski had left the UK; (ii) Mr Tejkowski had asked Mr Frydrysiak to pay £4000 for the van. Mr Frydrysiak told us however that Mr Tejkowski was present beside him when he made this call and told him what to say to Mr Chaplin. Mr Tejkowski had written it out phonetically for him to say. He told us that he had not paid £4000 for the van.

48. On 20 January 2012 Mr Frydrysiak said, in a letter to HMRC, that Mr Tejkowski, being afraid of what might happen to him, had left the UK to go back home. The letter also said that Mr Frydrysiak had offered to pay for the van "as a goodwill gesture being that I had caused the situation". He had since registered the van in his name. The letter said that Mr Tejkowski was "adamant" that he did not want to be involved in any way.

49. Mr Frydrysiak told us that the letter had been written by Mr Tejkowski but that he had signed it.

50. On 22 March 2012 Mrs Quarterman wrote to Mr Frydrysiak asking him to contact her. The letter enclosed various fact sheets in English. Mr Frydrysiak telephoned in response on 17 April 2012 and said that, since his English was not very good he would need an interpreter. There was further discussion and correspondence in the following six months in the course of which Mrs Quarterman sent fact sheets in Polish, and at a meeting was arranged - which Mr Frydrysiak missed.

51. On 19 December 2012 Mr Frydrysiak wrote a formal letter to HMRC. It was clear that he had had help with its composition. It was not in the same type script or style as letter of 9 January 2012 to Mr Chapman. It looked as if it had been drafted with professional help. In the letter he explained that he had trusted Mr Tejkowski's the assurances and that he had been taken advantage of. The goods were not his and he was not the owner of the contents of the boxes.

Evaluation

52. We accept that Mr Frydrysiak would not have written the letter of the 20 January 2012 by himself. The language was that of someone more familiar with English than Mr Frydrysiak.

53. Although there are contradictions in parts of Mr Frydrysiak's accounts, and Mr Frydrysiak admits telling untruths (albeit under Mr Tejkowski's direction), we find that it was likely that Mr Tejkowski had been involved in the acquisition of the tobacco and that Mr Frydrysiak was in some way working with or for him. We do not

accept the suggestion made by Mr Hays that Mr Frydrysiak duped Mr Tejkowski and the £4000 was paid to Mr Tejkowski in compensation.

The assessments

54. On 21 November 2012 Mrs Quaterman wrote to Mr Frydrysiak with an assessment for £30,228. Mr Frydrysiak sought a review, and on 25 February a reviewing officer upheld the assessment. By a notice of appeal of 25 March 2103 Mr Frydrysiak appealed to this tribunal.

55. We address the assessment to a penalty at the end of this decision.

Discussion – the assessment

56. This appeal concerns tobacco products duty, a duty of excise charged by section 2 of the Tobacco Products Duty Act 1979.

57. In *HMRC v B&M Retail* [2016] UKUT 429 (TCC) (which as we have noted was the appeal before the Upper Tribunal behind which this appeal was stayed after the hearing) the Upper Tribunal considered the legislative framework under which excise duties were levied. Its discussion was in the context of Alcoholic Liquor Duty, but the provisions it considered related to the collection of excise duties generally and are equally applicable to the levying and collection of tobacco duty

58. The Tribunal noted that Council Directive 2008/118/EC "lays down general arrangements for excise duty which seek to harmonise the principles to be applied across member states as regards the point at which excise duty should be levied on goods [and] principles governing the duty-suspended movement of goods between Member States". After setting out the text of some of the Articles of the Directive it made the following observations which it derived from the wording of the Directive::

> [24] First, Article 1 makes it clear that excise duty is a tax to be levied on the consumption of excise goods, although Article 2 provides that those goods become subject to excise duty at the time of their production within, or importation into, the EU.
>
> [25] Secondly, Article 7 provides that excise duty becomes chargeable at the time of the "release for consumption" of the goods in the Member State in which they are so released, and the person who then becomes liable to pay the excise duty at that point is determined by the application of Article 8, the identity of that person depending on the event concerned which causes the release for consumption.
>
> [26] Thirdly, there is a distinction to be drawn between the concept of chargeability to excise duty and the levy and collection of that duty, Article 9 providing that the matter is to be determined according to the procedure laid down by the Member State in which the goods have become chargeable with excise duty..

> [27] The 2008 Directive therefore proceeds on the basis that the event that triggers the chargeability of the goods to excise duty will take place in one Member State alone, with the goods then becoming subject to duty in that Member State. The only exception to that principle is Article 33, which makes provision for excise duty to be charged again in a second Member State after the goods have been already released or consumption in another Member State. That can happen in respect of goods which have already been released for consumption in the first Member State but which subsequently become held in the second Member State for commercial purposes.
>
> [28]We observe, however, that the goods do not become chargeable in the second Member State on the basis that there is a second release for consumption within the EU, but rather on the basis that the goods become held in the second Member State for a commercial purpose. In that situation, the chargeability conditions and rate of excise duty to be applied shall be those in force when the duty becomes chargeable in the second Member State. Double taxation is avoided because the excise duty paid in the Member State where the release for consumption took place must be reimbursed or remitted upon request.

59. The Tribunal then observed that Finance (No 2) Act 1992 contained the authority for making regulations to implement the provisions of the Directive, and introduced the concept of the "excise duty point" by reference to which the time at which goods become chargeable to excise duty would be ascertained.

60. The Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (the "Regulations") were made under the authority of the 1992 Act, and thus of the Directive. Regulation 5 provides that there is "an excise duty point at the time when goods are released for consumption in the United Kingdom", and Regulation 6(1) that "goods are released for consumption in the United Kingdom when the goods…(b) are held outside a duty suspension arrangement and UK excise duty on those goods has not been paid…".

61. HMRC's primary position before us was that an excise duty point arose in relation to the tobacco in the van Mr Frydrysiak was driving once he had the tobacco in the van.

62. Regulation 10 provides that the "person liable to pay the duty when excise goods are released for consumption by virtue of regulation 6(1)(b)…is the person holding the excise goods at that time" but that any other person involved in holding the excise goods be jointly and severally liable to pay the duty.

63. HMRC's primary position was that Mr Frydrysiak was holding the tobacco at the time it was released for consumption by virtue of regulation 6(1)(b) and that therefore he was liable for the duty.

64. Regulation 13(1) provides that "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".

65. In *B&M* the Upper Tribunal said at [146] that Regulation 13 implemented "Article 33 of the Directive which, once excise duty goods as a matter of fact become held in the UK for commercial purposes, allows anybody who is holding the goods to be assessed for outstanding excise duty."

66. HMRC's secondary case was that the tobacco had already been released for consumption in Belgium and that it was delivered to Mr Frydrysiak for a commercial purpose so that an excise duty point arose under this Regulation.

67. Regulation 13(2) provides that "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."

68. On their secondary case, HMRC then assert that Mr Frydrysiak held the goods intended for delivery and thus was liable for the duty by virtue of this Regulation.

69. In *B&M* the Upper Tribunal concluded that the Directive and the Regulations permitted the recognition of more than one "release for consumption" in a member State and allowed the recognition of one or more excise points so that even if a prior event occurred which was a release for consumption in the Member State, that did not preclude assessing excise duty in respect of a later event which also constituted a release for consumption. As a result *if* Regulations 5, 6 and 10 were relevant to Mr Frydrysiak, the fact that the goods might have already been held (perhaps by the lorry driver) in the UK outside a suspension arrangement would not prevent assessment by reference to their being held by Mr Frydrysiak.

70. However, it seems to us that the Upper Tribunal's description of the effect of Articles 1 to 17 of the Directive, and their contrast of those Articles with Article 33, mean that if the goods were previously subject to excise duty in Belgium, their holding by Mr Frydrysiak could not be treated as a release for consumption in the UK.

71. Regulation 5 and 6 implement those earlier Articles of the Directive, and are not therefore be construed as giving rise to a second release for consumption where goods have earlier been released for consumption in another Member State.

72. HMRC's statement of case indicated that the tobacco bore a "BNL" duty stamp indicating that the tobacco had been subject to duty in Belgium the Netherlands or Luxembourg. We have concluded that the goods appeared to have come from Belgium and that it was likely that the goods had been released for consumption in Belgium. Accordingly a charge cannot arise on Mr Frydrysiak under those regulations. .

73. But in such a case, Article 33 and its implementation in Regulation 13 would be applicable and Mr Frydrysiak could be liable to the duty if he "held" the tobacco, or if

the lorry driver first "held" the tobacco and Mr Frydrysiak either made delivery of it, held it or was the person to whom it was delivered.

74. We conclude that it is only under Regulation 13 that Mr Frydrysiak can be liable to pay the duty.

75. In order for Regulation 13 to apply the goods must have been "held for a commercial purpose in the UK in order to be delivered or used in the UK". The question to which we now turn was whether or not the tobacco had been so "held" by Mr Frydrysiak.

76. In *Stephen Taylor, Robert Ward v The Queen* , [2013] EWCA Crim 1151 the Court of Appeal considered the meaning of "holding " in the context of whether for the purpose of a regulation of the Tobacco Products Regulations 2001 persons were liable to duty as the persons "holding the tobacco products at the excise duty point". It seems to us that the principles applicable in that case are equally applicable in construing Regulation 13.

77. Kenneth Parker J said at [30] that it was plain that "holding" denoted some concept of possession of the goods and that while possession itself was incapable of precise definition it could broadly be described as control with the intention of asserting such control against others. In a bailment legal possession was shared by bailee and bailor.

78. In that case one of the defendants at the request of the other had instructed Y, a firm of international hauliers, to pick up goods in Belgium and bring them to the UK. Y was an innocent and did not know that the goods were illicit cigarettes. Y in turn instructed a firm of road hauliers, H, to collect and deliver the goods. H like Y was an innocent agent.

79. Kenneth Parker J said that H had physical possessions but was no more than an agent of Y. Y was the bailee and shared possession with the person having the right of control. If Y "had known, or perhaps even ought to have known" that it had physical possession of the cigarettes that "might have been sufficient to constitute "holding" of the cigarettes at that point". However Y had no such actual or constructive knowledge and that turned the focus on the persons who were exercising control over the cigarettes at the excise duty point. They were exercising control and "held" the cigarettes ([32]). He said that this interpretation was not inimical to the purposes of the Finance Act and the Regulations:

> [31]…"To seek to impose liability to pay duty on either [H or Y], 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"

By contrast he said the defendants were exercising de facto and legal control.

80. Thus we consider that whether or not Mr Frydrysiak was liable to the duty is dependent upon whether or not he had knowledge of what he was carrying.

81. We find that Mr Frydrysiak had the requisite knowledge. We have found that he knew that he was carrying tobacco, not groceries. The circumstances of the loading of his van – in the dark on a trading estate, coupled with a large cash payment – were such as to put him on notice that this may have been an illicit transaction. He was thus not wholly innocent: he did not simply pick up and deliver a package. He was not in the position of H and Y in *Taylor and Wood*.

82. It may seem unfair that Mr Frydrysiak should in effect suffer a penalty for carrying these goods without knowing in advance what they were. What could he have done when he received them? The answer is that he could have returned them or that he could have telephoned the police to ask for guidance. He could have left the van and told Mr Tejkowski what he had done. Those would have been awkward and difficult things to do, but they were avenues open to him.

83. Regulation 13 makes it a condition of liability t the duty that the goods are held for a commercial purpose. Given the quantity – $1/5^{th}$ of a ton – it is plain to us as a matter of fact that they were so held.

84. Having come to that conclusion we do not need to consider Mr Hays' argument that since the owner of the goods had not sought condemnation proceedings they were to be treated being lawfully forfeit and therefore held for a commercial purpose.

85. We conclude that the effect of Regulation 13 is that Mr Frydrysiak was liable to the duty assessed

86. We therefore dismiss the appeal against the excise duty assessment.

The Penalty Assessment

87. In her letter of 21 November 2012 accompanying the assessment to the excise duty Mrs Quaterman also said: "In addition [to the assessment] you are liable to a penalty for handling goods subject to unpaid excise duty…You can however reduce the level of the penalty charge."

88. In a letter to HMRC of 19 December 2012 Mr Frydrysiak said "I would like to appeal against your decision [on the assessment] …and the penalty as it is not my fault".

89. In a letter of 20 March 2013 HMNRC wrote to Mr Frydrysiak setting out the penalty HMRC "intended to charge".

90. On 25 March 2013 Mr Frydrysiak signed his Notice of Appeal.

91. A penalty assessment was sent to Mr Frydrysiak on 2 May 2013.

92. Mr Frydrysiak wrote to HMRC appealing against the penalty on 31 May and on 2 June HMRC replied including a form on which to notify the appeal to the tribunal.

93. It appears that that form was not sent to the tribunal. However the Notice of Appeal against the assessment dated 25 March 2013 (before the formal assessment but after notification that he "was liable" for a penalty) indicates that the appeal is against both an assessment and a penalty and contains a full paragraph devoted to reasons why a penalty should not be exigible.

94. In their statement of case of 3 October 2013 HMRC contend that the appeal could not relate to the penalty since the notice of appeal was filed before the penalty was assessed. The grounds suggest that Mr Frydrysiak confirm that he wished to appeal against the penalty and add any further arguments to his Grounds of Appeal. No written response was made.

95. Before us Mrs Dabrowska sought permission formally to include an appeal against the penalty in appeal, and if necessary for permission to appeal out of time. She said that the only reason Mr Frydrysiak did not send a notice of appeal against the penalty is that he had already appealed against it, and thought HMRC knew that. We asked HMRC for their submissions. By a Notice of Objection of 16 July 2014 HMRC objected to Mrs Dabrowska's application. They say that the assessment explained how to appeal, and the letter of 5 June 2013 contained information on how to appeal; the statement of case sought clarification and there was none, and the amount stated in the 25 March Notice of appeal was for the assessment only.

96. The tribunal's rules require us to exercise our functions to deal with cases fairly and justly. It seems to us that no prejudice arises to HMRC by permitting Mr Frydrysiak to make an appeal out of time against the penalty assessment and dealing with that appeal as part of the appeal against the assessment. HMRC must have known in good time that it was Mr Frydrysiak's's intention to appeal against the penalty, they knew from his Notice of Appeal and letters what the grounds of such an appeal were, and they knew that his command of the detail of legal procedure or understanding of legal documents was not likely to be good. In contrast if the tribunal enforce the formalities Mr Frydrysiak would face a substantial penalty without a chance to make his case against it.

97. Our Rules enjoin regard to the resources of the parties (which must include their educational resources and linguistic abilities), avoiding unnecessary formality and seeking flexibility. Those injunctions also point towards the fairness of allowing the application.

98. This is not to say that HMRC have done anything wrong. The request made in their statement of case was fair and sensible. But it could have been taken as permitting the confirmation to be made at the hearing – as it was.

99. In their Objection HMRC seek directions permitting an opportunity to make submission on the penalty. That of course is quite proper. We DIRECT as follows:

1. That the grounds of appeal against the penalty hitherto communicated at the hearing or in writing to the tribunal or HMRC stand as Mr Frydrysiak's grounds of appeal against the penalty assessment UNLESS within 21 days of the release of this

document Mr Frydrysiak writes to the tribunal (with a copy to HMRC) with additional grounds;

2. That within 42 days of the issue of this document HMRC make such further submission in relation to the penalty as they see fit, sending them to the tribunal and a copy to HMRC.

100. We shall then determine that appeal.

Conclusions

101. The appeal against the excise duty assessment is dismissed. The appeal against the penalty assessment is yet to be determined.

102. We assume that HMRC will explain to Mr Frydrysiak how to reclaim the "BNL" duty paid (see [28] *B&M* quoted at [58] above),

Rights of appeal.

103. 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.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 13 JULY 2017