[2018] UKFTT 180 (TC)

TC06440

Appeal number: TC/2017/03819

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

FIRST-TIER TRIBUNAL
TAX CHAMBER

EWA GONDEK **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Taylor House, Rosebery Avenue, London on 8 March 2018

The appellant appeared in person by video link

Ms Levine for the Respondents

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DECISION

Video Hearing and language

1. In this hearing the Tribunal used for the first time the new technology currently being trialled which allows either or both parties to appear remotely at the hearing via a computer. Ms Gondek was offered this facility because it had become available and because she indicated that neither she nor her witness would be able to travel to the UK for the hearing. She accepted the offer and HMRC did not object, although HMRC did elect to attend the hearing in person. I considered it was an appropriate case in which to use the technology as evidence was in dispute and would be untested if Ms Gondek and her witness did not attend the hearing either in person or remotely.

2. Neither Ms Gondek nor her driver spoke much English. Therefore, I also arranged for the hearing to be assisted by an interpreter, so that everything in English was translated into Polish, and everything in Polish was translated into English. The interpreter also attended the hearing via the video link.

The penalty

3. Ms Gondek lodged an appeal against an excise duty assessment for £47,059. Just before the hearing it became clear Ms Gondek believed that the hearing would also determine an appeal against an assessment to an excise penalty for £9,411.80 arising out of the same events. The Tribunal, however, appeared never to have received an appeal from Ms Gondek in respect of the penalty and certainly had never allocated an appeal reference number to it nor created a file in respect of it. HMRC were similarly ignorant of any appeal to the Tribunal against the penalty and had operated on the assumption that it was not under appeal.

4. Ms Gondek, however, was able to produce both her electronic appeal forms, both of which showed 19 May 2017 as the date on which they were generated. Moreover, she had emails from the Tribunal, one timed at 11.45 and one timed at 12.28 to say that her appeals had been successfully submitted. Ms Levine indicated that in those circumstances, HMRC were satisfied that an appeal had been lodged in time against the penalty and considered it convenient to deal with it in today's hearing.

5. I agreed. I accepted that the appeal had been lodged in time and that it was appropriate for it to be determined in this hearing, particularly as neither party had any extra evidence that they wished to serve in respect of the penalty.

Background to the dispute

6. Mr Lukasz Piotr Bagnicki, driving a lorry owned by the appellant and doing so in the course of his employment by her, was stopped by UK Border Force Officer Pearson on 15 April 2016 at Immingham docks, en route from Poland to Sheffield. He was carrying 21, 924 litres of Karpackie beer (9% strength). Mr Bagnicki produced a SAAD with a movement authorisation number and a letter from HMRC's Duty Paid Movements Team dated 28 March 2016 confirming payment of excise duty of £36,246.95 ('the duty paid letter'). Officer Pearson was suspicious and enquiries

revealed the movement authorisation number ('UCI number') was false. The beer, cab and trailer were seized, although the cab restored to the driver free of charge.

The legality of the seizure

7. The legality of this seizure was not challenged by anyone.

8. Ms Gondek was not the owner of the seized beer. She suggested at the hearing that because she was not the owner, she could not have challenged the legality of the seizure, and that therefore the seizure could not be deemed to be lawful in so far as she was concerned and that the deeming provisions in §5 of Sch 3 of CEMA, which deemed the seizure to be lawful in the absence of a timely challenge to it, did not apply to her.

9. I do not agree for a number of reasons. Firstly, the appellant has the burden of proving that the assessment was wrong, and that means she has the burden of proving that the beer was (at the point of importation) either duty paid or not liable to excise duty. See s 154(2)(a) and (b) of Customs and Excise Management Act 1979. And she has not proved either that the beer was duty paid nor that it was exempt from the payment of duty, irrespective of the deeming provisions in §5 of Sch 3 of CEMA. While Mr Bagnicki had produced documents which purported to show payment of duty, I am satisfied by the unchallenged evidence of Officer Connelly (see below) that they were forged. So, in conclusion, the beer was duty unpaid and was duly seized and forfeited.

10. Secondly, in any event, the Upper Tribunal in their recent decision in *Hodson* [2017] UKUT 439 (TCC) ruled that a person does not have to be the owner of the goods in order to challenge their seizure [22] and in any event, where no one challenged the seizure (as in this case), the seizure was deemed lawful as against all persons [23]. Therefore, the seizure and forfeiture of the beer was deemed to be lawful as against Ms Gondek.

11. In so far as her complaint is that she was not given notice of the seizure of the beer, she was not the owner and not entitled to the notice under §1 of Sch 3 of CEMA. In any event, the beer was seized in the presence of her employee and under §1(2) of Sch 3 of CEMA that means no notice of seizure need be given even to an owner. Lastly, the failure to give notice under §1 does not prevent the deeming effect of §5 from operating.

12. In conclusion, the beer was lawfully seized and duly forfeited.

The dispute

13. Ms Gondek's case is that she was the victim of a fraud; her lorry was used unbeknown to her to smuggle duty unpaid alcohol into the UK. HMRC accept that but their position is that she is liable to the duty because she *ought* to have known her lorry was being used to smuggle duty unpaid alcohol into the UK.

The facts

The witnesses

Mr Bird

14. HMRC served a witness statement by Officer Bird in which he gave evidence about his involvement in securing the alcohol the subject of this appeal. While Ms Gondek had received this statement, she had not arranged to have it translated.

15. HMRC had asked in advance that Mr Bird be excused attendance but Ms Gondek had not replied. He was not present at the hearing. As it was quite short, his statement was read out to Ms Gondek in the hearing in Polish. Ms Gondek then agreed that she had no objections to the statement nor questions for Mr Bird.

16. Therefore, I accepted Mr Bird's evidence and his absence was not an issue. In any event, I did not see that anything in his brief witness statement was relevant to the matters in dispute.

Mr Robin Pearson

17. Mr Pearson is a UK Border Force officer who was working at Immingham Dock at the time in issue; he intercepted the lorry driven by Mr Bagnicki, asked him questions about the load, and at the same time referred the UCI number on the (purported) duty paid letter to the Border Force's revenue fraud detection team. Hearing back from them that the load and lorry were to be seized, he seized them. Shortly afterwards he allowed Mr Bagnicki to take restoration of the cab but not trailer.

18. He answered questions from Ms Gondek at the hearing. I accepted his evidence, which did not appear to be in dispute.

Mr Steven Connelly

19. Mr Connelly is an HMRC officer. As part of his duties in the excise team, he was asked to investigate the importation of the Karpackie beer at issue in this appeal. He established that the documentation produced by Mr Bagnicki was fabricated and that the consignee (MPM Drinks Supplier Ltd) had once before been involved in a similar incident. So he referred the matter to another arm of HMRC to consider whether to bring criminal proceedings against the consignee. As the consignee was dissolved in November 2016, it appears HMRC decided not to pursue criminal proceedings any further and the civil investigation was handed back to Mr Connelly.

20. Mr Connelly decided that the appellant was liable for the unpaid excise duty and on 8 February 2017 issued the assessment the subject of this appeal. Subsequent to this he had a number of telephone conversations with Ms Gondek via an interpreter. He assessed the penalty on 4 May 2017.

21. I accepted his factual evidence, which did not really appear to be in dispute. I did not rely on his opinions.

Ms Ewa Gondek

22. I accepted Ms Gondek's evidence, which is summarised in my findings of fact below. HMRC did not suggest she had any knowing involvement in the smuggling of the beer nor did they suggest her evidence was unreliable.

Mr L Bagnacki

23. Mr Bagnacki had been employed by Ms Gondek for a number of years as a driver, and was, as I have said, the driver of the lorry containing the beer at issue in this appeal. He gave a short witness statement originally written in Polish but which had been translated into English, and like Ms Gondek, he gave oral evidence at the hearing via the video link and interpreter.

24. There were discrepancies between his witness statement and his oral evidence: in his statement, although consistent that the beer had been loaded in Poland, he said that the beer was loaded by, and travel documents handed to him, by employees of Codognotto (the freight forwarder). In oral evidence, however, he said that loading was done, and documents handed to him, by GAGA employees (the consignor). It was also pointed out that in his interview with Mr Pearson he had said his load was destined for Hull (the location of the consignee) whereas the CMR recorded his destination as Sheffield.

25. HMRC considered that his evidence was unreliable. While I agree that these discrepancies do not appear to be adequately explained by Mr Bagnicki's incomplete understanding of the English language, and that therefore I am cautious of putting much weight on what he said, much of what he said was confirmed by Ms Gondek. In particular, it was not suggested that Ms Gondek nor Mr Bagnicki were aware that the beer they transported was duty unpaid and so while it appears Mr Bagnicki's evidence was in part confused, I read nothing sinister into that.

The facts

26. Based on the above evidence (to the extent accepted) and the documents, I find as follows.

Due diligence

27. Ms Gondek relied on her freight forwarder (Codognotto). She had never had any issues with haulage arranged by them before although she accepted she had not carried alcohol before. Because of this reliance, she did not carry out any due diligence on the sender or recipient of the beer, nor read any of the documents related to the transportation in advance of the job, although I find there would have been time to do such due diligence as documentation from Codognotto showed that the transportation was arranged a few days before it took place.

28. If she had carried out such checks, what would they have revealed? They would have revealed discrepancies in the document which stated that duty had been paid, as I explain below.

Discrepancies in the travel documents

29. This 'duty paid letter' showed the haulier to be Todo SP Z.O.O., the intended date of dispatch as 12/4/16 and intended date of arrival as 14/4/16; the intended delivery address was shown as the Hull address of MPM Drinks Supplier Ltd.

30. Ms Gondek, obviously, would have known that the haulier was herself and not Todo; she would have known the dates of despatch and arrival were one day later than stated on the document; she would have known she was contracted to deliver the goods to an address in Sheffield.

31. There were two other discrepancies in the duty paid letter: it quoted the wrong duty rate and therefore the wrong amount of duty, and it carried an invalid 'UCI number'.

32. Mr Connolly's evidence, which I accept, is that information on duty rates could have been discovered on HMRC's website from which it would have been apparent that 9% strength beer carries a higher duty rate than the one specified in the 'duty paid letter'. While I recognise that it would have been virtually impossible for Ms Gondek in practice to read any document on HMRC's website as she does not speak or read English, the information was available and she could have employed an English speaking person to check HMRC's website.

33. As she did not see the documents, she also did not try to check that the duty paid letter was genuine and the quoted UCI number was valid. The UCI number was very significant: it was the identifying number which indicated (as it turned out, falsely) that this particular load of beer was duty paid. Could she have verified it? Mr Connelly's evidence was that, had she rung the HMRC telephone number on the letter, HMRC could have told her whether or not the UCI number was valid, as that was not considered to be confidential information.

34. I find, on the balance of probabilities, that if telephone enquiry had been made of HMRC using the telephone number on the letter, Ms Gondek would have discovered that the letter was not genuine. HMRC would have known the UCI number was false; therefore, it seems more likely than not that they would have told Ms Gondek not to rely on the duty paid letter. They would also have been able to tell her the wrong duty rate was quoted. While I recognise that in practice it would have been virtually impossible for Ms Gondek to telephone HMRC, as she does not speak or read English, she could have employed an English speaking person to do so. I also recognise that in practice she did not think to make such enquiries as she did not see the 'duty paid letter' until after the seizure.

Checking the travel documents

35. Ms Gondek did not see the duty paid letter, CMR and other documents before Mr Bagnacki returned to Poland and so she did not notice the discrepancies until it was too late. Ms Gondek agreed with HMRC that the discrepancies mentioned in §29 would have raised alarm bells with her had she had a chance to check them in advance.

36. Mr Bagnacki was handed the documents before leaving Poland but did not read them. Ms Gondek accepted that she had not given any training to her driver on how to check a load of alcohol being transported was not contraband. Indeed, it was her case that it wasn't Mr Bagnicki's job to check the documents (she expected the freight forwarder to do that). Mr Bagnicki's own evidence is that he did not really look at the travel documents handed to him and certainly did not spot any discrepancies.

37. Ms Gondek's evidence was that the freight forwarder ought to have checked the documents, but if Codognotto did so, they either failed to spot, or failed to act on, the obvious discrepancies outlined above at §29.

38. I do not accept that Ms Gondek had no chance to check the documents. Firstly, it is clear from the documentation produced by her that she had agreed to transport this load as early as 11 April 2016, some 3 days before the transportation took place. She could have asked to see the SAAD, CMR and duty paid letter to satisfy herself. Had she asked for, had translated and then checked the documents, at least the first three of the five discrepancies identified above (§29) would have been immediately apparent to her.

39. Secondly, Mr Bagnicki was her employee and acting in the course of his employment. She could have trained him to read and check travel documentation, and bring potential discrepancies to her notice before setting out.

40. Lastly, if Codognotto was her agent, she could have checked with them that they had properly vetted the duty paid status of the alcohol.

Checking the consignee

41. It appears Ms Gondek did not check the existence and bona fides of the consignee either. Her position was that she did not even know the identity of the consignee (MPM Drinks Supplier Ltd) until afterwards.

42. But if she had carried out due diligence on the consignee, what would she have discovered? MPM Drinks Supplier Ltd was a genuine company (although later dissolved). However, it had been associated with at least one earlier failed smuggling attempt (see §19). HMRC suggest that due diligence would have uncovered this fact. I do not accept that. HMRC are constrained by their duty of confidentiality to taxpayers and cannot reveal information about traders to other persons. Mr Connelly's evidence was consistent with this: even if Ms Gondek had rung HMRC to ask about MPM Drinks Supplier Ltd, he did not think trader-specific information would have been given to her.

Checking the delivery address

43. The CMR had given the delivery address in Sheffield under the name 'MPM Trade'. Mr Connelly's evidence was that 'MPM Trade' was not a valid company name and I accept that evidence as it was not in dispute. But it does not appear relevant: the name 'MPM Trade' never appeared in any document with 'Limited' or 'Ltd' afterwards and so it appears it was never held out to be a company. The CMR shows the consignee as MPM Drinks Supplier Ltd with an address in Hull and the

delivery address as 'MPM Trade' at a location in Sheffield. A reasonable assumption would be that MPM Trade was merely a trading name for MPM Drinks Supplier Ltd, and that MPM Drinks Supplier Ltd traded from more than one premises.

44. Mr Connelly's evidence was that the Sheffield address was industrial. Ms Gondek's evidence was that she had checked it existed on a map. As she did not know the consignee was MPM Drinks Supplies Ltd, nor that the delivery address was 'MPM Trade', so it follows that she did not check that the Sheffield address was a business address of MPM Trade. I accept from Mr Connelly's evidence that, had she tried to do so, she would not have been able to discover any connection between MPM Trade and the Sheffield address.

The reasons why little due diligence was carried out

45. Ms Gondek had no prior experience of transporting alcohol. She agreed with Ms Levine that she was unaware of the risks inherent in moving alcohol across national borders. She relied entirely on Codognotto, the freight forwarder. They had a contractual obligation to her (she said) to check the documents and check the legality of the transportation: if anyone, they should have checked the cargo was duty paid.

46. She agrees she has learnt from the experience and would check the documentation more carefully if she transported alcohol again. She would be careful to verify the recipient.

47. HMRC pointed out that a document published on their website *Notice 204b Commercial importers and tax representatives: EU trade in duty paid excise goods* contained a section which warned transporters to check the supply chain and know with whom they were dealing. She was not aware of this: she could not read English in any event.

48. She considers herself a victim of fraud and reported the matter to the Polish police who are investigating.

Should Ms Gondek have been aware the beer was contraband?

49. I find that Ms Gondek should have checked the documentation in advance. It ought to have been obvious to anyone that transporting beer across a national boundary would most likely give rise to excise duty implications. I also consider that it stands to reason that anyone transporting goods into a foreign country ought to check the national rules on what it is lawful to bring in, or what can only be brought in on payment of duty. In any event, Mr Bagnacki (on behalf of Ms Gondek) was handed the 'duty paid letter' which clearly indicated that excise duty was payable on importation of beer into the UK, so Ms Gondek knew (or ought to have known) that the importation of beer into the UK triggered a liability to excise duty.

50. Knowing that duty would arise on importation of beer into the UK, I also consider it ought to have been obvious to Ms Gondek, as the person transporting the beer into the UK, that she might be at risk of liability to that duty unless the excise duty had already been paid. Checking the validity of the document which purported

to prove payment of excise duty seems to me to be the only sensible course of action she could have taken and she ought to have checked it in advance of the transportation.

51. And had Ms Gondek had the 'duty paid letter' checked, significant discrepancies would have been immediately apparent. In my view, those three discrepancies outlined at §29 ought to have concerned her and indicated that further checks ought to be carried out. The lack of link between MPM Trade and the delivery address also ought to have concerned her. These four, easy-to-spot, discrepancies should have led to a decision by her to undertake the more time consuming and difficult enquiries discussed at §§31-34 above. The discrepancies should have prompted her to make enquiries with HMRC. I consider that had she undertaken those enquiries (perhaps via her freight forwarder or an English-speaking contact), she would have discovered that the letter was a forgery, because it quoted the wrong duty rate, but even more importantly, carried an invalid UCI number. Knowing that the duty paid letter was a forgery would mean that she would know the load was duty unpaid.

52. I do not consider that being non-English speaking is a good reason for making fewer enquiries than an English speaking person would reasonably make: a person importing alcohol into the UK ought to make reasonable enquiries to ensure that the importation is lawful. They have no lesser duty merely because they do not speak English. It was open to her to make all the above checks by using the services of someone who could speak and read English.

53. In conclusion, she ought to have known that the beer was duty unpaid.

The law

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

> (1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the UK in order to be delivered or used in the UK, the excise duty point is the time when those goods are first so held.
>
> (2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person –
>
> (a) making the delivery of the goods;
>
> (b) holding the goods intended for delivery; or
>
> (c) to whom the goods are delivered.
>
> (3) For the purposes of paragraph (1) excise goods are held for a commercial purpose if they are held –
>
> (a) by a person other than a private individual; or
>
> (b) by a private individual ('P'), except in a case where the excise goods for for P's own use and were acquired in, and transported to the UK from, another Member State by P.

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

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

I will deal with each condition in turn.

Released for consumption in another Member State?

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

> (1) Excise goods are released for consumption in the UK at the time when the goods -
>
> (a) leave a duty suspension arrangement;
>
> (b) are held outside a duty suspension arrangement and UK excise duty on those goods has not been paid, relieved, remitted or deferred under a duty deferment arrangement;
>
> (c) are produced outside a duty suspension arrangement; or
>
> (d) are charged with duty at importation unless they are placed, immediately upon importation, under a duty suspension arrangement.

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

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

59. On the 'physical' side, my finding at §24 is that the alcohol was loaded onto the appellant's lorry in Poland (this was not in dispute in any event). The beer was therefore clearly 'held' in Poland (I was not informed where Karpackie beer is manufactured). On the 'tax' side, what evidence there is, is that the beer was being

sent to the UK under forged documents. That means I find it extremely unlikely that the owner of the goods (GAGA) would have complied with Polish excise duty law. So I find the beer was not in a duty suspension arrangement: if it had been it would not have required forged duty paid documents.

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

Held for a commercial purpose in the UK?

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

62. Putting aside the meaning of 'held', the person who transported the goods into the UK was Mr Bagnacki, but he had not 'acquired' the goods (he had no title to them) and they were not for his own use. They were to be delivered to someone else. Even if the holder of the goods was seen to be Ms Gondek, clearly they were not for her own consumption.

63. So the conclusion must be that the beer was held for a commercial purpose in the UK.

Goods to be delivered or used in UK?

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

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

Is Ms Gondek liable for the duty?

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

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

67. The preceding words are 'Depending on the cases referred to in paragraph (1)' and paragraph (1) makes it clear that the excise duty point is the time when the goods are first held for a commercial purpose in the UK. I have already explained this

alcohol was held for a commercial purpose the whole time it was in the UK and therefore the moment the excise duty liability arose was at the moment of importation.

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

69. With respect to both (a) and (b) there is a question whether Ms Gondek could be said to be doing anything in respect of the beer when it was in a lorry driven by Mr Bagnacki and I will address that first. Then there is a second question and that is whether there is a particular state of knowledge required for liability under (a) or (b). There is a lot of authority on this for Reg 13(2)(b) and so I will address that before considering, thirdly, possible alternative liability under Reg 13(2)(a).

Can a person hold goods without physical possession?

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

> [39] ...both the language and purpose of the [relevant legislation] strongly support the conclusion that a person who has de facto and legal control of the goods at the excise duty point should be liable to pay the duty. That conclusion is all the more compelling where the person in actual physical possession does not know, and has no reason to know, the (hidden) nature of the goods being transported as part of a fraudulent enterprise to which he is not a party. To seek to impose liability on entirely innocent agents ....rather than upon the [criminals] would no more promote the objectives of the Directive than those of the Regulations.

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

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

> ....'holding' ...can be a question of law, and does not require physical possession of the goods, and the test is satisfied by constructive possession. The test for 'holding' is that the person is capable of exercising *de jure* and/or *de facto* control over the goods, whether temporarily or permanently, either directly or by acting through an agent (see *Taylor & Wood)....*
>
> There is no need for the person to have any beneficial ownership in the goods in order to be a 'holder'....A courier or person in physical possession who lacks both actual and constructive knowledge of the goods, or the duty which is payable upon them, cannot be the 'holder'.....

73. In conclusion, Ms Gondek could be, subject to the question of knowledge, 'holding' the goods if she had legal or factual control over the goods. And it seems to

me that she does in this instance. The goods were factually in the possession of her employee Mr Bagnacki. He was transporting the goods in accordance with her instructions and therefore doing so in the course of his employment. The goods were therefore in her control as they were factually in the control and possession of her employee, Mr Bagnacki, acting in the course of his employment.

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

What element of knowledge is required?

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

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

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

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

79. I have found as a fact at §53 that she should have known it. Ms Gondek was therefore 'holding' the beer and is liable for the duty.

80. This Tribunal is not bound by the findings of fact in any other Tribunal, nevertheless I note that in *Perfect* at first instance ([2015] UKFTT 639 (TC)), whose findings were not challenged in the Upper Tribunal, the decision was the driver did not have did not have constructive knowledge that the alcohol was duty unpaid even though there were a number of oddities in the transactions he undertook. But each case turns on its own particular facts, and I have concluded here that there were enquiries she should have made, and had she made them, she would have discovered the duty unpaid status.

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

81. That conclusion makes it unnecessary to consider whether in addition she was liable to assessment under Reg 13(2)(a) as a person 'making the delivery of the goods'. There is little authority on this provision so far as I am aware. I wondered whether it has the same knowledge requirements as Reg 13(2)(b). Would Ms Gondek be liable to the assessment under Reg 13(2)(a) even if I had concluded she did not have the requisite constructive knowledge to be 'holding' the goods under Reg 13(2)(b)?

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

> [57] ....the 2008 Directive must be interpreted in a manner which complies with EU law principles, including the principles of fairness and proportionality. That is a point echoed by s 1(4) of the Finance (No. 2) Act 1992, which permits regulations which specify the person to be liable where the "prescribed connection" is established, in relation to which this Tribunal is required to have regard to the scope of what the legislature contemplated as a "fair and reasonable justification" for imposing the liability (see *Taylor and Wood* at [20]). We do not accept that it is fair, proportionate or reasonable to impose liability for evaded excise duty on HGV drivers who are found in possession of the goods at the point that the evasion is discovered, but who lack any involvement in or knowledge of the criminal enterprise; they are not aware that tax has been evaded on the goods they are carrying, and nor can it be said that they should have been aware. To impose liability on those drivers simply because they are in possession of the goods at the time that the fraud is discovered, but without knowledge of what has occurred or is intended, is neither fair nor proportionate.....

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

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

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

84. However, that is not relevant to the question of tax liability. As is clear from the title of the Convention, it regulates the contractual position between sender and carrier. It does not regulate the position between tax authorities and importers. The Convention may give Ms Gondek a right of action against Gaga or Codognotto, but

this Tribunal is concerned only with Ms Gondek's liability or otherwise to the British Government for the amounts assessed on her.

Decision on assessment

85. In conclusion, I find the duty assessment is valid and the appeal against it is dismissed.

Decision on penalty

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

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

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

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

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

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

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

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the relevant act or failure, and

(c) [not relevant]

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

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

93. She does not suggest that she relied on her driver, Mr Bagnacki, to check the documents that should have started a train of enquiry that would have led to the discovery of the forgery (see §36). She does say that she relied on her freight forwarder, Codognotto, to do so (see §27). Sub-paragraph (2)(b) provides that reliance on a third party is not a reasonable excuse unless she took reasonable care to avoid the relevant failure.

94. However, Ms Gondek herself agrees that she did nothing to check the legality of the importation. She relied entirely on Codognotto without taking any steps to ensure that Codognotto had done anything to check that the documents were in order. She has not shown me that Codognotto even owed her a contractual duty to ensure the importation was lawful. So I do not find her reliance on Codognotto to be a reasonable excuse.

95. And while I accept that, because she does not speak English, some of the enquiries would have been more difficult for her, I do not consider that to be a reasonable excuse for not making them. If she had noticed the three easy to spot discrepancies in the duty paid letter, she should have recognised that such additional enquiries needed to be made, and a reasonable person would have obtained help from someone who could speak English.

96. In conclusion, I do not consider that Ms Gondek has a reasonable excuse for the excise duty violation.

Special circumstances

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

Special reduction

14(1) if HMRC think it right because of special circumstances, they may reduce a penalty under ... paragraph ....4.

(2) In sub-paragraph (1) 'special circumstances' does not include –

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In subparagraph (1) the reference to reducing a penalty includes a reference to

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

98. Then §19(3) of Sch 41 provides that the Tribunal has jurisdiction to consider a special reduction but only in circumstances where HMRC's decision in respect of special circumstances was 'flawed', in the sense that HMRC took into account irrelevant factors, failed to take into account relevant factors, or reached an unreasonable decision; a decision by HMRC is also 'flawed' in this sense if HMRC simply failed to think about the matter at all.

99. There is no test of what 'special circumstances' are set out in the legislation but it seems to me that the alleged special circumstances must be an unusual event or situation which does not amount to a reasonable excuse but which renders the penalty in whole or part significantly unfair and contrary to what Parliament must have intended when enacting the provisions.

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

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

Mitigation

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

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

12 Reductions for disclosure

(1) Paragraph 13 provides for reductions in penalties under paragraphs 1-4 where P discloses a relevant act or failure

(2) P discloses a relevant act or failure by-

(a) Telling HMRC about it,

(b) Giving HMRC reasonable help in quantifying the tax unpaid by reason of it, and

(c) Allowing HMRC access to records for the purpose of checking how much tax is so unpaid.

(3) Disclosure of a relevant act or failure –

(a) Is 'unprompted' if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the relevant act or failure, and

(b) Otherwise, is 'prompted'

(4) In relation to disclosure 'quality' includes timing nature and extent.

104. HMRC classified the disclosure given by the appellant as 'prompted' because it was not 'unprompted'. While HMRC considered that the quality of disclosure was at the maximum of 100%, any cooperation given by the appellant was necessarily after HMRC had discovered alcohol was duty unpaid. I consider HMRC were therefore right to classify the disclosure as 'prompted' as it did not fall into the definition of 'unprompted'.

105. I agree with HMRC that that meant that the appropriate range of the penalty under paragraph 13 was 20-30%. As I have said HMRC gave the maximum permitted reduction to reflect the quality of disclosure resulting in a penalty of 20% of the potential lost revenue (being the excise duty that would otherwise have been evaded). That was £9,411.80. I have no jurisdiction to reduce this further.

Penalty lacks proportionality?

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

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

108. Ms Gondek's point is that the penalty is harsh when she was not knowingly involved: but I do not consider a 20% for failing to take reasonable care is 'plainly unfair'.

Conclusion

109. The appeal against the penalty is also dismissed.

110. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to

"Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 11 APRIL 2018