



TC06819

Appeal number: TC/2013/05457

Excise and Customs Duty - importation of tobacco products - appeal against an assessment for Excise duty pursuant to s 12(1A) of Finance Act 1994 and Civil Evasion Penalties pursuant to Schedule 41 Finance Act 2008 - Regulation 13 of the Excise Goods (Holding Movement and Duty Point) Regulations 2010 - meaning of 'Holding' - persons with no actual or constructive knowledge - whether the Appellant was 'holding' the goods - no - appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SLAWOMIR RACZKOWSKI

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER SUSAN LOUSADA**

Sitting in public at Alexandra House, 14-22 The Parsonage, Manchester on 1 May 2018

Mr Ben Channer of Counsel for the Appellant

Ms Sadiya Choudhury, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by Mr Slawomir Raczkowski (“the Appellant”) against a decision
5 by HMRC (“HMRC”) to raise an assessment for excise duty pursuant to s 12(1A) of
the Finance Act 1994 (“the 1994 Act”) and regulation 13(1) of the Excise Goods
(Holding, Movement and Duty Point) Regulations 2010 (“the 2010 Regulations”) in
the sum of £22,378 (“the Assessment”) and a wrongdoing penalty in the sum of £21,259
10 (“the Penalty”) issued pursuant to Schedule 41 of the Finance Act 2008 (“the 2008
Act”).

2. The Appellant’s case is that he was an innocent agent and did not have
knowledge, actual or constructive, of cigarettes concealed in the vehicle he was driving.
He was not, therefore, “holding” the goods for the purposes of regulation 13(1) of the
2010 regulations.

3. Although the events which give rise to this appeal arose in 2012, the appeal is late
15 coming to a hearing as it was twice listed in 2015, and then stayed pending the decision
of the Upper Tribunal in *McKeown & others v HMRC* [2015] UKUT 0479 (TCC), the
decision in which was released in 2016.

Background

4. On 27 September 2012, the Appellant was driving vehicle B1 1456K when it was
20 intercepted at Dover. The Appellant was driving for Colo Trans sp. z.o.o. (‘Colo Trans’) a
road haulage company registered at Osiedle Północ 21, 64-300 Nowy Tomyśl, Poland.
He is no longer employed by Colo Trans and at the date of his witness statement, 20
January 2015, was employed by Barteks Transport, Xrajowy i Miedzynamciowy, Zofia,
25 Rauzkowska

5. The vehicle was stopped for scanning by UK Border Force Officer Andrew
Redman.

6. When questioned by Officer Redman the Appellant initially indicated that he did
not smoke and that he was not carrying any tobacco products. There is no indication in
30 the Officers’ notebook entries that the Appellant could not understand English.

7. The Appellant’s cab was then searched by Officer Duncan Percy who noticed
that the lining above the driver’s door was loose and cigarette cartons could be seen
through the gap. The driver was again questioned and this time said that he was carrying
20 cartons (4,000 cigarettes). The driver’s cab was searched and Officers discovered a
35 total of 103,960 cigarettes in the driver’s door lining, in panels above both doors, behind
lockers at the windscreen, in the roof lining and behind the upper bunk area lining.

8. The Officers considered that it was not reasonable that the Appellant could not
be aware of these concealments and accordingly, as they were not satisfied that they
were being imported for personal use, the cigarettes were seized as being imported for
40 commercial purposes.

9. Seizure Information Notices, Notice 12A and warning letters, were all issued to the Appellant.

10. On 7 December 2012, HMRC wrote to the Appellant at his address in Poland, 3 Stycznia 31, 64.300 NowyTotwl, Poland, issuing an Assessment for excise duty in the amount of £22,378. He was informed that he had 30 days within which to appeal the Assessment. Alternatively, he could have his case reviewed by an Officer not previously involved in the case or reviewed by an independent tribunal. He was also informed that he was liable to a penalty under Schedule 41 of the 2008 Act for handling goods that were subject to unpaid excise duty.

10 11. The Appellant responded on 16 January 2013 stating:

15 “I work for Colo Trans Sp. Z.o.o., Jacek Robak, Polnoc 21/18 64-300 NowyTomyil and I am a truck driver. I was going to England and on the border I was checked by HM Customs. It turned out that cigarettes were found in the trailer and then seized. When I found out what happened I asked for Polish interpreter to be able to explain everything, but unfortunately I was not given one. I do not know how and when the cigarettes were put into the trailer as I am only a driver. Two weeks before this incident another truck from the same company was also stopped and checked at the UK border and cigarettes were also found in the trailer and then seized. I have sued the managing director of the company (Jacek Robak) for putting me in such a situation.

20 I would like to ask for the excise duty and financial penalty to be either withdrawn or transferred to Mr Jacek Robak due to the fact that I did not have anything to do with these cigarettes. I am a driver and my job is to drive the truck from one place to another. I do not know what the contents of the trailers are.”

25 12. On 30 January 2013, HMRC wrote to the Appellant repeating their earlier statement that the Appellant could apply for an independent review of the Assessment or appeal to the Tribunal. The officer dealing with the case, Andrew Cawley, added that as the Appellant was the driver of the vehicle he was “considered the person responsible, and therefore the duty and a shortly to be calculated Penalty” was also his responsibility.

30 13. On 20 February 2013, the Appellant’s agent Ms Patrycja Wochowska emailed HMRC stating that he wished to have the decision independently reviewed.

14. On 21 February 2013 HMRC asked the representative to provide a formal written authority from the Appellant. This was supplied on 25 February 2013.

15. HMRC replied on 13 March 2013, asking for the following further information:

- 35 1. Is Mr. Raczkowski an employee or a contract/agency driver? If an employee who employs him?
2. Who owns the tractor and trailer he was using at the, time?
3. How frequently does he visit the UK? Are they regular runs to and from the same locations for the same customers?
- 40 4. On this occasion did he witness the loading of the trailer he was hauling?
5. Does he always drive the same tractor and/or use the same trailer all the time?

6. Does he use the same tractor all the time to collect pre-loaded trailers or does he drive empty trailers to be loaded?
7. Please ask him to confirm where the cigarettes were concealed in the whole unit
8. What happens when he arrives at the customer? Does he wait whilst the trailer is unloaded and then return to Poland with it empty/full; does he leave the trailer and collect a different one using the same tractor; does he leave the tractor and trailer unit at the customers and collect a wholly different vehicle for the return/onward journey?

16. On 26 April 2013 the Appellant replied as below (HMRC say this was not received until 8 May 2013):

1. I worked in Colo-Trans Z.o.o Jacek Robak from 1st July 2011 to 31st July 2012 (contract). When I was stopped in Dover on 27th September 2012 I did not have any contract, permanent or temporary, with the company, because the previous contract was not extended and it expired on 31th July 2012.
2. To the best of my knowledge Mr Jacek Robak, owner of Colo-Trans is the owner of truck and trailer.
3. When I worked in Colo-Trans I used to enter the UK every week, because this company deals with transport of goods between Poland and the UK only. We had permanent orders from Sweedwood Chistawa and we transported furniture for Ikea to Warrington, Manchester, Leeds, Bristol, Cardiff. We also had orders from other companies.
4. In this particular case, I saw the trailer being loaded, in Katy Wroclawskie (Poland).
5. I usually drove the same trailer Daf XF 105, reg number BI 1546K, trailer reg number BI 9004A, but there were cases when I had a different trailer, which I was given in the UK to transport to Poland. I always entered the UK with the same trailer, B1 9004A.
6. I usually had the same truck and the same trailer for loadings.
7. The cigarettes were apparently located in the cabin under upholstery. I suspect that Mr Robak may have done it as he had two sets of keys and he used to go to the truck and into the cabin and he did something there when the truck was in a secure car park in Nowy Tomysl.
8. When we reach our destination in the UK the trailer is unloaded according to monitory note.

The Appellant added that he had been driving as an international truck driver since 2003 and had never had any problems whether in the UK or Europe and never infringed any laws. He attached a copy of his CRB check dated 8 May 2013 from Poland, (a 'Certificate of No Criminal Record' obtained in Poland at the Information Office of the National Criminal Register in Warsaw).

17. HMRC wrote to the Appellant on 20 June 2013 explaining that because the request for a review of the Assessment was not received until 8 May 2013, the request was made outside of the time limit and issued an explanation notice regarding the wrongdoing penalty to be issued the Appellant.

18. On 18 July 2013 HMRC issued the Appellant with a Penalty Assessment in the sum of £21,259. The letter went on to consider the matter and concluded that if a review had been carried out, the Assessment would have been upheld. The Penalty was calculated in accordance with Schedule 41 of the 2008 Act as equal to 95% of the duty

as the behaviour which had led to it being imposed was deliberate and concealed and the disclosure was prompted. A reduction was applied, however, as the Appellant had stated that he had 20 cigarette cartons after cigarettes had first been found.

5 19. On 15 August 2013, the Appellant lodged a Notice of Appeal with the Tribunal appealing both the excise duty and Penalty Assessments. The Appellant asked that the excise duty and financial Penalty be either withdrawn or transferred to Mr Jacek Robak, for the reasons previously stated.

10 20. On 8 November 2013, the Appellant's representatives, Henry & Co Solicitors, lodged a hardship application, setting out the Appellant's limited financial circumstances. HMRC allowed the hardship application on 9 December 2013.

21. On 30 April 2015 the Tribunal issued directions to the parties with permission for the Appellant to file an amended Notice of Appeal.

15 22. On 27 May 2015, the Appellant lodged his amended appeal on the grounds that he did not 'hold' the excise goods within the meaning of Regulation 13 of the 2010 Regulations. Pursuant to the test set out by the Court of Appeal in *R v Taylor & Wood* [2013] EWCA 1152, he did not know and could not have known that he had physical possession of excise goods at the excise duty point. He appealed the Penalty on the basis that the wrongdoing was not deliberate and that he had a reasonable excuse for his conduct, namely the goods hidden in the cabin were an unexpected event that could not have been reasonably foreseen and were beyond his control.

20 23. The appeal was listed for hearing on 6 November 2015, but on the application of HMRC, was stood over until 90 days after the release of the determination of appeals to the Upper Tribunal in respect of the First-tier Tribunal's determination in *Liam McKeown v HMRC* (TC/2013/07442) and the First-tier Tribunal's determination in *Michael Duggan v HMRC* (TC/2014/00918). The Appellant in each case had been assessed for excise duty pursuant to Regulation 13 of the 2010 Regulations but claimed to be in the position of a "mere carrier" or "innocent agent" or similar.

25 24. In *McKeown* the Upper Tribunal was to specifically consider how the requirement applied to a person who claims to have no proprietary or beneficial interest in the relevant goods and no legal right of disposition.

Evidence

30 25. The combined bundle of documents included copy notebook entries, the witness statements of the Appellant, UK Border Officers Redman and Percy and Officer Andrew Cawley, the decision maker. The Bundle also included the Appellant's notices of appeal, copy correspondence, copy relevant legislation and case law authorities. All witnesses gave evidence on oath.

26. We were informed by Ms Choudhury for HMRC that Officers Redman and Cawley had been released, as their witness statements had been agreed by the Appellant and therefore they would not be giving oral evidence.

27. At the request of the Appellant a Polish translator was available at the hearing.

The Appellant's evidence

28. The Appellant says in his witness statement:

5 “When I arrived in Dover, my vehicle was directed for an inspection. My trailer was radiographed and I was informed that further search of the trailer and tractor needed to be conducted. I was informed by one of the officers that they were conducting the search, as recently a vehicle transporting goods for Colo - Trans Sp. z o.o. was found to be smuggling large quantity of cigarettes. Following my vehicle and trailer being searched, 520 boxes of cigarettes were discovered. I did not know about the cigarettes nor could I
10 have been reasonably expected to discover them.

I contacted my employer immediately, informing that I would not be able to deliver the goods, because my vehicle had been seized following discovery of cigarettes, Ms Marzena Romezak, the partner of company owner, Jacek Robak, called me to ask how many cigarettes were in the vehicle and how many had already been found. I could not
15 answer those questions, as I did not have any knowledge as to the cigarettes. I believe that Mr Robak attempted to recover losses incurred when a previous lorry was seized and chose me to be the driver, as I never had any conflicts with law. More importantly, I have never been stopped by the UK Border Force or elsewhere in connection with smuggling and I had never been involved in a search that would have resulted in a seizure of a
20 vehicle, prior to or after the incident in question.

I was questioned by Customs officials, but I do not speak English and I was not able to explain and/or discuss the finding of cigarettes with the officers without an interpreter, I simply did not understand questions asked and I believe this was clear to everyone that tried to communicate with me on that day.

25 Other than the usual visual checks of the tractor and trailer I did not search the cabin and/or the trailer, as I had no reason to suspect that any illicit goods may have been placed in the vehicle. The tractor had not been left unattended during the journey...”

29. In oral evidence the Appellant said that he could not specifically remember asking for an interpreter but the Officers must have known he could not speak English and
30 arranged for an interpreter. He said that he could not recall answering questions in English. He did understand some of the questions.

30. Normally he returns to Poland from an assignment on a Friday night and goes home. He leaves his vehicle in a lorry car park which is owned by a third party. On a Monday morning he then goes to collect his vehicle. His employer, who had a separate
35 set of keys, would sometimes use the vehicle over the weekend. Access to the car park was not secured; it was open to the public. When he collected the vehicle everything seemed normal. He did not notice any loose upholstery in the cab. He took the vehicle's trailer to be loaded at Katy Poland, which took approximately two hours.

31. On that particular trip he recalls that he set off either on a Monday or possibly
40 Tuesday from Poland and was stopped on the Thursday of that same week. It normally takes two days to drive from Poland to the UK. Before starting his journey he had not carried out any special checks of the vehicle as nothing seemed untoward.

32. The Appellant said he recalled that it took the UK Border Officers between two and three hours to take all the cigarettes out of the cab and that in his estimation it would have taken at least that long to put them in.

5 33. He said that when he was stopped there were several Officers all asking questions which he did not understand. He was in shock. He had never been stopped before and had been driving for 15 years. He could not remember the questions he was asked or, given his very limited English, the answers he tried to give. He agreed that he may have said “no smoking”.

10 34. The Appellant said that other drivers had told him that ‘the boss regularly had vehicles seized’ but he did not know this until after the seizure. His boss had another business named ‘Plan Trans’ but then set up a new business in the name of ‘Colo - Trans’.

35. He said that he was not aware that cigarettes imported to the UK were subject to duty. He had only discovered this afterwards.

15 The UKBF Officers’ evidence

Officer Percy

20 36. Officer Percy says in his witness statement that while on duty at the Dover Eastern docks freight inbound controls, at approximately 16:15 hours he was asked by Officer Redman to examine the cab of a Polish white Daf tractor unit. Within a couple of minutes of starting to examine the cab interior he:

25 “.....looked at the lining of the driver’s door and could feel that the join was loose and so pulled it back to see. Inside there were packets of L & M cigarettes visible. He notified Officer Redman and escorted the vehicle with its trailer to the examination bays and with other Officers removed cigarettes from upper panels on the driver’s and passenger’s sides, behind lockers, over the windscreen, the roof lining and behind the upper bunk lining.”

30 37. In oral evidence, Officer Percy said that the interior of a Daf normally feels quite sturdy, but he banged on it and it seemed “hollow with movement behind”. He had to loosen the small lock caps which secured the interior cab lining and he found the cigarettes quite easily. He said that he accepted the Appellant may not have known initially about the concealed cigarettes but said “they were everywhere”. He had never found so many concealed cigarettes. He said that normally the cigarettes have an odour, which over a period of time becomes quite strong but in fact on this occasion he could not detect any odour, although he commented that by then the door of the cab had been open for a while. The cigarettes were mainly in their cartons taped together with duct tape.

Officer Redman

38. In his witness statement Officer Redman said that at approximately 16:10 hours he spoke to the Appellant as follows:

- Redman: Do you speak English?
- The Appellant: No
- Redman: Do you have any cigarettes or tobacco?
- The Appellant: No, no smoking
- 5 • Redman: Any cigarettes or tobacco for colleagues in England?
- The Appellant: No
- Redman: Do you have any beer alcohol or wine?
- The Appellant: Beer
- Redman: How much beer? One flascher, two?
- 10 • The Appellant: One box- in trailer
- Redman: Do you understand no narcotics, no heroin, hashish, cocaine?
- The Appellant: No
- Officer Redman says that he pointed to box 1 on the CMR ex CeDo and asked -
Do you load here in Poland?
- 15 • The Appellant: Yes
- Redman: And you offload here, Telford?
- The Appellant: Yes
- Officer Redman says that he advised the Appellant that his cab would be
searched. Shortly afterwards he was informed by Officer Percy that cigarettes
20 had been found concealed in the cab lining.
- Redman: How many cartons?
- The Appellant: No smoking
- Redman: How many cartons?
- The Appellant: 20
- 25 • 20:20 hours Officer Redman seized the cigarettes and the Unit and issued the
Appellant with the seizure information notices and other documentation. He
invited the Appellant to read and sign his notebook, the Appellant refused to do
so or sign a receipt for the seizure documentation.

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The Law

39. The legislation relevant to this appeal is:

Section 2 Tobacco Products Duty Act 1979 (“TPD”), which imposes a duty of
excise upon tobacco products.

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“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.”*

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“Tobacco products” are defined in section 1 TPD. The definition includes hand
rolling tobacco.

“1 Tobacco products

(1) In this Act “tobacco products” means any of the following products, namely,-

- (a) cigarettes;
- (b) cigars;
- (c) hand-rolling tobacco;
- 5 (d) other smoking tobacco; and
- (e) chewing tobacco,

which are manufactured wholly or partly from tobacco or any substance used as a substitute for tobacco, but does not include herbal smoking products.”

10 40. The Commissioners have the power under s 1 Finance (No. 2) Act 1992 to make regulations that fix the time when the requirement to pay a duty owed will come into effect. The time at which a person becomes required to pay such a duty is known as an ‘excise duty point’.

“1. - Powers to fix excise duty point.

15 (1) Subject to the following provisions of this section, the Commissioners may by regulations make provision, in relation to any duties of excise on goods, for fixing the time when the requirement to pay any duty with which goods become chargeable is to take effect (“the excise duty point”).

20 (2) Where regulations under this section fix an excise duty point for any goods, the rate of duty for the time being in force at that point shall be the rate used for determining the amount of duty to be paid in pursuance of the requirement that takes effect at that point.

25 (3) Regulations under this section may provide for the excise duty point for any goods to be such of the following times as may be prescribed in relation to the circumstances of the case, that is to say-

- (a) the time when the goods become chargeable with the duty in question;
- (b) the time when there is a contravention of any prescribed requirements relating to any suspension arrangements applying to the goods;
- (c) the time when the duty on the goods ceases, in the prescribed manner, to be suspended in accordance with any such arrangements;
- 30 (d) the time when there is a contravention of any prescribed condition subject to which any relief has been conferred in relation to the goods;
- (e) such time after the time which, in accordance with regulations made by virtue of any of the preceding paragraphs, would otherwise be the excise duty point for those goods as may be prescribed;
- 35

and regulations made by virtue of any of paragraphs (b) to (e) above may define a time by reference to whether or not at that time the Commissioners have been satisfied as to any matter.

40 (4) Where regulations under this section prescribe an excise duty point for any goods, such regulations may also make provision-

- (a) specifying the person or persons on whom the liability to pay duty on the goods is to fall at the excise duty point (being the person or persons having the prescribed connection with the goods at that point or at such other time, falling

no earlier than when the goods become chargeable with the duty, as may be prescribed); and

(b) where more than one person is to be liable to pay the duty, specifying whether the liability is to be both joint and several. (...)”

5

41. The material regulations are the Excise Goods (Holding, Movement and Duty Point) Regulations 2010.

Regulation 13 of those Regulations states:

10 *(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-

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(a) making the delivery of the goods;

(b) holding the goods intended for delivery; or

(c) to whom the goods are delivered.”

Regulation 88 of the 2010 Regulations states:

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

(a) a contravention of any provision of these Regulations, or

(b) a contravention of any condition or restriction imposed by or under these Regulations,

those goods shall be liable to forfeiture.”

25

42. Section 139 Customs and Excise Management Act 1979 (‘CEMA’) states:

“(1) Anything liable to forfeiture under the Customs and Excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard.

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(2) Where anything is seized or detained as liable to forfeiture under the Customs and Excise Acts by a person other than an officer, that person shall, subject to subs (3) below, either-

(a) deliver that thing to the nearest convenient office of Customs and Excise; or

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(b) if such delivery is not practicable, give to the Commissioners at the nearest convenient office of Customs and Excise notice in writing of the seizure or detention with full particulars of the thing seized or detained.

(3) Where the person seizing or detaining anything as liable to forfeiture under the Customs and Excise Acts is a constable and that thing is or may be required

for use in connection with any proceedings to be brought otherwise than under those Acts it may, subject to subs (4) below, be retained in the custody of the police until either those proceedings are completed or it is decided that no such proceedings shall be brought.

5 (4) *The following provisions apply in relation to things retained in the custody of the police by virtue of subs (3) above, that is to say-*

10 (a) *notice in writing of the seizure or detention and of the intention to retain the thing in question in the custody of the police, together with full particulars as to that thing, shall be given to the Commissioners at the nearest convenient office of Customs and Excise;*

(b) *any officer shall be permitted to examine that thing and take account thereof at any time while it remains in the custody of the police;*

(c) *nothing in the Police (Property) Act 1897 Is 31 of the Police (Northern Ireland) Act 1998] shall apply in relation to that thing.*

15 (5) *Subject to subsection (3) and (4) above and to Schedule 3 to this Act, anything seized or detained under the Customs and Excise Acts shall, pending the determination as to its forfeiture or disposal, be dealt with, and, if condemned or deemed to have been condemned or forfeited, shall be disposed of in such manner as the Commissioners may direct.*

20 (6) *Schedule 3 to this Act shall have effect for the purpose of forfeitures, and of proceedings for the condemnation of anything as being forfeited, under the Customs and Excise Acts.*

25 (7) *If any person, not being an officer, by whom anything is seized or detained or who has custody thereof after its seizure or detention, fails to comply with any requirement of this section or with any direction of the Commissioners given thereunder, he shall be liable on summary conviction to a penalty of [level 2 on the standard scale].*

30 (8) *Subsection (2) to (7) above shall apply in relation to any dutiable goods seized or detained by any person other than an officer notwithstanding that they were not so seized as liable to forfeiture under the Customs and Excise Acts.”*

Paragraph 5 Schedule 3 CEMA states as follows:

35 *“If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of anything no such notice has been given to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with, the thing in question shall be deemed to have been duly condemned as forfeited.”*

40 43. The Commissioners’ power to assess the tax due from the Appellant is at s12(1A) of the 1994 Act:

“12.

[(1A) Subject to subs (4) below, where it appears to the Commissioners-

(a) that any person is a person from whom any amount has become due in respect of any duty of excise; and

(b) that the amount due can be ascertained by the Commissioners,
the Commissioners may assess the amount of duty due from that person and notify
that amount to that person or his representative.]”

44. Finance Act 2008 states at Schedule 41:

Paragraph 4:

“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.

(2) In sub-paragraph (1)–

“excise duty point” has the meaning given by section 1 of F(No.2)A 1992; and “goods” has the meaning given by section 1(1) of CEMA 1979.”

Paragraph 16(4) states insofar as relevant:

“(4) An assessment of a penalty under any of paragraphs 1 to 4 must be made before the end of the period of 12 months beginning with–

(a) the end of the appeal period for the assessment of tax unpaid by reason of the relevant act or failure in respect of which the penalty is imposed, or”

Paragraph 6(B) states:

“The penalty payable under any of paragraphs 2, 3(1) and 4 is –

- for a deliberate and concealed act or failure, 100% of the potential lost revenue,

- for a deliberate but not concealed act or failure, 70% of the potential lost revenue, and

- for any other case, 30% of the potential lost revenue.”

Paragraph 10 states:

“In the case of acquiring possession of, or being concerned in dealing with, goods the payment of duty in which is outstanding and has not been deferred, the potential lost revenue is an amount equal to the amount of duty due on the goods.”

Paragraph 12 states:

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

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

(a) telling HMRC about it,

5 *(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-

10 *(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.”

15 Paragraph 13 states in so far as relevant (note that the Table only includes what is relevant and HMRC rely on prompted disclosure):

“(1) If a person who would otherwise be liable to a penalty of a percentage shown in column 1 of the Table (a “standard percentage”) has made a disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure.

20 *(2) But the standard percentage may not be reduced to a percentage that is below the minimum shown for it-*

(a) for a prompted disclosure, in column 2 of the Table, and

(b) for an unprompted disclosure, in column 3 of the Table.

25 *(3) Where the Table shows a different minimum for case A and case B-*

(a) the case A minimum applies if-

(i) the penalty is one under paragraph 1, and

30 *(ii) HMRC become aware of the failure less than 12 months after the time when the tax first becomes unpaid by reason of the failure, and otherwise, the case B minimum applies.*

<i>Standard %</i>	<i>Prompted Disclosure %</i>	<i>Unprompted Disclosure %</i>
<i>100</i>	<i>50</i>	<i>30</i>

(6) Where a person who would otherwise be liable to a 30% penalty has made a prompted disclosure, HMRC shall reduce the 30% -

35 *(a) if the penalty is under paragraph 1 and HMRC become aware of the failure less than 12 months after the time when tax first becomes unpaid by reason of the failure, to a percentage not below 10%, or*

(b) in any other case, to a percentage not below 20%, which reflects the quality of the disclosure.”

Paragraph 14 states:

- 5 “(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any of paragraphs 1 to 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
10 potential over-payment by another.
 (3) In sub-paragraph (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.”

15

‘Holding’

45. “Holding” is a concept of EU law that must be given a wide interpretation in order to give effect to the object and purpose of the Council Directive 2008/118
20 EC article 7: *Stanislav Gross v Hauptzollamt Braunschweig* -see paras. 25 to 27 of Case C-165/13.

46. Section 13 of the 2010 Regulations imposed the liability to excise duty on the person holding the tobacco products at the excise duty point.

47. The meaning of “holding goods” was considered by the Court of Appeal in
25 *R v Taylor & Wood* [2013] EWCA 1151. The question in that case was whether the Appellants, Taylor and Wood, who had used their businesses to arrange transportation of smuggled cigarettes to the UK, were liable for the unpaid excise duty under the 2001 Regulations, then in force. On the facts, neither had ever taken physical control of the cigarettes. Instead, they had arranged for a firm of hauliers,
30 Yeardley, to bring the cigarettes from Belgium to the UK. Yeardley had sub-contracted the job to a Dutch firm, Heijboer. The documentation which accompanied the goods described the goods as textiles and when the shipment was inspected by HMRC Officers, it was found that the top four boxes in each pallet contained textiles, but beneath these were further boxes containing cartons of
35 cigarettes, which had not had excise duty paid on them. The Court records at [7] that:

 “No one at Yeardley knew the true nature of the goods that Yeardley would be collecting, transporting and delivering to the United Kingdom, and there is nothing to suggest that Yeardley, or anyone working at Yeardley, would have agreed to
40 transport the relevant load if it had known or suspected that it involved a cache of counterfeit cigarettes.”

48. The Court reached a similar conclusion in relation to Heijboer’s state of knowledge, namely that no one at Heijboer had any idea that the shipment contained counterfeit cigarettes.

49. According to Kenneth Parker LJ at paras. 29 to 31 of the judgment:

5 “29 “Holding” is not defined in the Finance Act or in the Regulations, and there appears to be no authority on its meaning. 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 10 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.

15 30 In this case Heijboer [the road haulier] had physical possession of the cigarettes at the excise duty point, but Heijboer was acting as no more than the agent of the primary carrier, 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, as explained above. If Yeardley had known, or perhaps even ought to have 20 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. That important fact then turns the focus on the person or persons who were exercising control over the cigarettes at the excise duty point. 25 There is no doubt that Wood (through Events) was such a person. Wood, as a matter of fact, under the contract with Yeardley gave instructions throughout the transportation to the carrier... Under the Convention, as a matter of law, Wood (through Events) had the legal right of control over the goods. It is also known that Taylor (through TG) was acting together with Wood in exercising control over the 30 cigarettes throughout the transportation....

35 31 ...To seek to impose liability to pay duty on either Heijboer 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 [emphasis added].”

40 50. *Taylor & Wood* was applied in the First-tier Tax Tribunal (‘FtT’) case of *Duggan v HMRC* [2015] UKFTT 0125 (TC) which, as here, concerned an excise duty assessment issued to a lorry driver under Regulation 13 of the 2010 Regulations.

45 51. In *Duggan*, Mr Duggan had driven a truck between Calais and Dover which had a load of beer. The vehicle was seized and both Mr Duggan and companies to do with the haulage received letters as to the seizure of the goods. Mr Duggan's evidence was that he was a self-employed driver who was told by an unknown person to go to a truck stop where he should collect a vehicle and empty trailer

and drive it to Calais. The keys would be under the bonnet. He would receive a fixed fee, paid in cash. After doing so, he was then told, by another anonymous phone call, to drive on to a secure compound in Boulogne,

52. The Tribunal found Mr Duggan’s evidence wholly unconvincing, “simply not credible” and rejected his evidence. The Tribunal went on to say at paragraph 30:

10 “The paragraphs quoted above from *R v Taylor and Wood* make it clear that an entirely innocent agent who does not know and could not have known that he had physical possession of excise goods at the excise duty point does not hold the goods for the purpose of the regulations imposing excise duty.”

53. The Tribunal held that the Appellant did not satisfy this test and the assessment to duty was upheld.

54. *Duggan* was one of three FtT appeals heard by the Upper Tribunal in *McKeown & others v HMRC [2016] UKUT479 (TCC)*. All three appeals involved 15 HGV drivers who were found to have been carrying substantial quantities of alcoholic beverages in the trailers of their vehicles when intercepted by UK Border Force in Dover on return from Calais. One of the issues in the appeal before the Upper Tribunal was whether the Appellants had been “holding the goods intended for delivery” within the meaning of Regulation 13 (2) of the 2010 Regulations.

20 55. At [64], the UT stated that it considered the meaning of “holding” had been concisely and helpfully stated by the Court of Appeal in *R v Tatham [2014] EWCA Crim 226* at [23] of its judgment, which was quoted by the UT at [39], and included the following:

25 “d. ...”holding” for the purposes of Regulation 13(1) 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*, [28-40]).

30 e. There is no need for the person to have any beneficial ownership in the goods in order to be a “holder” (or indeed to have “caused” their importation). 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” within Regulation 13(1) - *Taylor & Wood*, [30 –31], [35].”

35 56. The UT’s conclusions on the question of whether any of the Appellants had been “holding” goods for the purposes of Regulation 13 is at [66] and [68] of its decision:

40 “[66] A person who has de jure and de facto control of goods but who lacks both actual and constructive knowledge of them and the fact that duty is payable on them, cannot be said to be ‘holding’ the goods for the purposes of reg 13....

5 [68] In conclusion, we consider that the tribunals in all three appeals did not make any error of law when they concluded that the Appellants were ‘holding’ the alcoholic products within the meaning of reg 13(2)(b) of the 2010 Regulations. In each case, the Appellants were in possession of the goods and capable of exercising de facto and de jure control over them. The Appellants were aware that they were carrying goods that were chargeable to excise duty that had not been paid. Further, the tribunals found that the Appellants were knowingly concerned in the fraudulent evasion of that duty so were not innocent agents in the transportation of the goods. It follows, in our opinion that the Appellants were properly found to be ‘holding’ the goods for the purposes of reg 13 of the 2010 Regulations and were, therefore, liable to pay the excise duty chargeable on those goods.”

15 57. *Taylor v Wood, Tatham and McKeown* were all more recently considered by the UT in *HMRC v Perfect* [2017] UKUT 476 (TCC), which upheld the decision of the FTT that a lorry driver who was aware that he was carrying excise goods but had no actual or constructive knowledge that duty had not been paid on them was not liable for the duty or a penalty.

The Appellant’s case

The assessment

- 20 58. The Appellant’s grounds of appeal are set out in paragraph 22 above.
- 20 59. He says that he was only the driver, not the owner of the vehicle. He was simply employed by Colo Trans to drive the vehicle from one place to another and does not know the contents of trailers. He did not know how and when the cigarettes got into the trailer, but suspects they may have been placed there by Jacek Robak the Managing Director of Colo Trans Sp, as he holds two sets of keys.
- 25 60. The Appellant maintains that he cannot speak English and when questioned by Customs officials, was unable to fully understand the questions put to him, or to discuss the discovery of the cigarettes with the investigating officers without an interpreter. An interpreter was not provided.
- 30 61. The Appellant was employed by a company as a truck driver, sometimes driving the same truck and sometimes driving other trucks. The system was that trailers were loaded and then parked overnight in a secure car park. The next day the driver would collect the vehicle and drive it to its location. The Appellant believes that the company's owner may have concealed the cigarettes in the truck whilst it was parked overnight.
- 35 62. The Appellant conducted a visual inspection of the vehicle before proceeding. The Appellant saw nothing to alert him to the fact of the concealed cigarettes.
63. For the avoidance of doubt, the Appellant does not challenge the forfeit or seizure of the goods. He does not own the cigarettes and not being his goods, he is unable to challenge their seizure.
- 40 64. The Appellant’s case is that both the excise duty and the Penalty may be dealt with in the same way. The case rests on whether the Appellant was “holding the goods”

within the meaning of the Regulations. Whether the Appellant was “holding the goods” in turn, turns on whether he had knowledge of them. He asserts that he did not know about, let alone own, the cigarettes. Therefore he did not “hold the goods” within the meaning of Regulation 13.

5 65. Established case law makes clear the following principles:

- (a) The holding of goods entails possession of some form.
- (b) Possession includes an intention of asserting control of the asset against others.
- (c) Knowledge of the asset is a crucial element to the holding of goods.
- 10 (d) Not having knowledge of the goods either actual or constructive makes the person an “entirely innocent agent”.

15 66. In the cases of *Bradley Willis v HMRC* [2015] UKFTT 205 (TC) and *McAleer v HMRC* [2015] UKFTT 202 (TC), the drivers of vehicles from which excise goods were seized were found not to be holding the goods. In *Bradley Willis*, the goods had been described in the CMR as “engine oil”. They were loaded on to the trailer in shrink-wrapped pallets. The driver noticed that one of the pallets was leaking and was told that this was oil. The Tribunal found that those who had planned the importation of the cigarettes had gone to some trouble to ensure that the load would appear as being
20 consistent with the CMR description as engine oil and it was possible, perhaps even probable, that the oil leak was no more than a ruse to reassure the driver as to the nature of his load. Furthermore, he could not reasonably be expected to break open heat shrunk wrapping unless there was a very good reason why he should have done so (paras. 71 and 72 of the Decision).

25 67. In *McAleer v HMRC* [2015] UKFTT 202 (TC), there was no concealment of excise goods: instead the unique ARC number under which the goods were being transported had already been used to transport goods by another vehicle and trailer (para. 7 of the decision). The Tribunal discharged the assessment as it found that there was no evidence that the driver had been aware that a previously identical CMR had
30 been used (para. 56 of the decision).

68. Mr Channer for the Appellant says that this is the basis of the Appellant’s case. The Appellant was an entirely innocent agent who did not know, and could not have known, that he had physical possession of the cigarettes. He therefore did not ‘hold’ the goods for the purposes of the duty imposing regulations.

35 *The Penalty*

69. The Appellant’s primary case is that the cigarettes are not his, he was not holding them and that a penalty is therefore not due.

70. HMRC suggest that the answers given by the Appellant when responding to the questions of the investigating Officers were deceptive and for this reason, a
40 proportionately higher level of penalty has been charged.

71. The Appellant could only speak little or no English and was not in a position to understand the questions of the Officers investigating. Indeed, the Appellant required the assistance of a translator throughout the proceedings to date. The answers he gave to questions he may not have understood fully cannot be relied upon to charge a penalty.

5 72. Further, the Appellant relies on paragraph 20 of Schedule 41 to the 2008 Act which provides:

“Liability to a penalty under any of paragraphs 1, 2, 3(1) and 4 does not arise in relation to an act or failure which is not deliberate if P satisfies HMRC or (on appeal) the First-tier Tribunal that there is a reasonable excuse for the act or failure.”

10 73. HMRC Manual CH92100 provides the following guidance:

15 “A person will not be liable to a penalty if they have a reasonable excuse for their conduct and they remedy their action without unreasonable delay after the excuse ends. There is no statutory definition of reasonable excuse, which “is a matter to be considered in the light of all the circumstances of the particular case”. The guidance goes on to provide that “A reasonable excuse is normally an unexpected or unusual event that could not be reasonably foreseen or is beyond the person's control, and which prevents the person from complying with the underlying obligation.””

20 74. In these circumstances, the concealment of the cigarettes by someone other than the Appellant in the truck he drove was an unexpected or unusual event that was beyond his control.

HMRC’s case

25 75. The Appellant does not challenge the forfeiture or seizure of the goods because he did not own the goods. He is therefore unable to challenge their seizure. He says that the cigarettes were owned by Colo Trans, alternatively Jacek Robak. However, no notice of claim was received from either Colo Trans or Mr Robak within a month of the date of the seizure in respect of the cigarettes or even the vehicle.

30 76. As the legality of the seizure has not been challenged, the Tribunal is required to deem the seized goods as duly condemned as forfeit under para. 5, Sch. 3, Customs and Excise Management Act 1979 on the grounds that they were imported without the payment of duty. See *HMRC v Jones & anor* [2011] EWCA Civ 824 [2011] STC 2206 and in particular the Court’s conclusions at para. 71.

35 77. *Jones* had concerned an appeal to the Tribunal against a refusal to restore a vehicle. The Upper Tribunal has since confirmed in *HMRC v Nicholas Race* [2014] UKUT 0331 (TCC) that the conclusions in *Jones* regarding the jurisdiction of the Tribunal to consider the legality of a seizure in the light of the deeming provision in para. 5, Sch. 3, also applied to appeals against assessments to excise duty (see, in particular, paras. 26, 31, 33, 34 and 42 of the decision).

40 78. The fact that the Appellant was only the driver, not the owner of the cigarettes, or was not involved in their sale and purchase, does not prevent him from “holding the goods” within the meaning of Regulation 13 according to *Taylor & Wood*. The answer

to this question depends on whether the Appellant knew or should have known that he had possession of the cigarettes at the excise duty point and that duty was payable on them, as is clear from the UT's conclusion in *McKeown* at [68].

79. The Appellant was holding the cigarettes at the excise duty point for the purposes of Regulation 13. This is because he either did know or should have known that he was carrying concealed cigarettes in the driver's cab. HMRC rely, in particular, on the quantity of cigarettes found in the driver's cab, the fact that they had been concealed in more than one location in the cab and that after initially saying that he did not have any cigarettes, when some were found in the cab he stated that he was carrying 20 cartons of cigarettes. The fact that the cigarettes were concealed in the driver's cab is a crucial distinction between this appeal and the cases referred to in which excise goods were concealed (*Taylor, McKeown & ors and Bradley Willis*), as there the excise goods were hidden in the vehicle's trailer. The facts in *McAleer* are too dissimilar to provide any assistance to the Tribunal in this appeal.

15 Penalty

80. The penalty imposed on the Appellant ought to be upheld in its entirety because, the Appellant had possession of the cigarettes; was concerned in "carrying them" after an excise duty point had arisen in respect of them, and at the time he had possession of them, payment of the duty was outstanding and had not been deferred.

20 81. The range of Penalty is determined based on a number of factors, including whether HMRC believe that the wrongdoing was deliberate or non-deliberate, concealed or non-concealed and whether the disclosure was prompted by HMRC or was unprompted. HMRC also considers the level of co-operation shown by the Appellant during the enquiry.

25 82. The Appellant's behavior was "*deliberate and concealed*" because when first stopped he said he had no smoking materials with him, but when some packs were first found in the lining above the driver's door he said he had 20 cartons. However, a total of 103,960 cigarettes were found in the cab. The Appellant also refused to sign the paperwork. Para. 6(2)(a) provides that the penalty for a deliberate and concealed failure is 100%.

83. The disclosure made by the Appellant was "prompted" because he did not inform HMRC of the wrongdoing before HMRC discovered or were about to discover the concealed cigarettes. Where the penalty is 100%, the minimum percentage for prompted disclosure is 50%. The penalty range is therefore between 50% to 100%.

35 84. The penalty was subject to a reduction based on the quality of the disclosure in accordance with the categories referred to in para. 12(2) (i.e., "telling, helping and giving"). The reductions that can be given in respect of each of these categories are set out in HMRC's published guidance. In the present case, HMRC have given a 10% reduction for telling because the Appellant stated that he had 20 cartons of cigarettes after the inspection of the driver's cab had begun. However, no reductions were given for helping and giving.

85. The total penalty chargeable was then calculated as set out in stage 3 of the penalty explanation schedule. The difference between the maximum and minimum penalty percentages was determined (100% - 50% = 50%). This was then multiplied by the reduction of 10% to give a percentage reduction of 5%. This reduction was
5 subtracted from the maximum penalty of 100% to give the penalty percentage of 95%.

86. In light of the wrongdoing in question, i.e. the attempted smuggling of a large quantity of cigarettes, the penalty is reasonable and proportionate. Nor are there any special circumstances which require the penalty to be reduced further.

87. The Appellant has appealed the penalty on the grounds that he had a reasonable
10 excuse within the meaning of para. 20 as “the concealment of the cigarettes by someone other than him in the truck he drove was an unexpected or unusual event that was beyond his control”. However, para. 20 only applies where the act or failure in question was not deliberate. The penalty has been imposed on the grounds that the Appellant’s behaviour was deliberate and para. 20 therefore has no application.

15 88. However, if, para. 20 did apply, HMRC submit that there is no reasonable excuse for the Appellant’s behaviour on the grounds that he would have been aware of the concealment of the cigarettes in the truck cab and this was therefore not an unexpected event that was beyond his control.

Conclusion

20 89. The Assessment was issued pursuant to Regulations 13(1) and 13(2) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010. Regulation 13(1) provides for the occurrence of an excise duty point and Regulation 13(2) identifies the person liable for the duty, in this case it is the Appellant, if it can be said that he was ‘holding’ the cigarettes.

25 90. The Appellant was travelling to the UK from within the European Union, the duty Assessment has been calculated on the basis of the quantity of tobacco seized (103,960 of L & M mixed branded cigarettes) and the Assessment was also issued within the time limit provided by FA 1994, s 12(4).

30 91. Following *Jones and Race*, by operation of paragraph 5 Schedule 3 CEMA it is clearly established that the cigarettes were held by the Appellant for a commercial purpose. Accordingly, under Regulation 13 of The Excise (Holding Movement and Duty Point) Regulations 2010, the excise duty was due and payable at the point at which he held the cigarettes in the United Kingdom.

35 92. Prima facie therefore, the Assessment and Penalty have been properly raised. However the Appellant denies all knowledge of the cigarettes and that the wrongdoing was not deliberate; he had a reasonable excuse for his conduct, namely, the goods hidden in the cabin were an unexpected event that could not have been reasonably foreseen and were beyond his control.

40 93. It is unfortunate that Officers Redman and Crawley were released prior to the hearing and therefore not available to give evidence on oath to the Tribunal. Officer

Redman's account of his conversation with the Appellant clearly contradicts the Appellant's assertion that he does not understand or speaks very little or no English. That calls into question his credibility. In our view the Appellant has a limited ability to speak basic English.

5 94. Had Officer Redman given oral evidence he would have been able to tell us
whether the Appellant provided any reasons for his refusal to sign the Officer's
notebook or a receipt for the seizure documentation, or indeed whether he had asked
the Appellant for an explanation for his refusal. It may have been that the Appellant
was reluctant to provide a signature if he thought that to do so, somehow implicated
10 him in a smuggling activity and exposed him to possible penalties. Officer Redman
would have also been able to give us his views on the extent to which the cigarettes had
been concealed, that is, so adequately concealed that a driver would not be aware of
their presence by sight, sound, odour or otherwise during a two to three day journey
from Poland to the UK.

15 95. We were not provided with any visual evidence of the inside of a DAF tractor
unit, in terms of its layout and materials used to clad the interior of the vehicle to its
structure and frame. Officer Percy spoke of a plasticised fabric of relatively fairly
sturdy construction, similar to that found in most vehicles, which ordinarily is not loose
and not designed to become accidentally loose. Officer Percy said in evidence he
20 noticed that part of the cladding above the driver's door was loose, but that he had to
release a button lock before being able to pull back the cladding to see the concealed
cigarettes.

96. We were not given any evidence as to how the cigarettes were distributed behind
the cladding, that is the door lining, above the doors, in the roof lining, behind the upper
25 bunk area and lockers or to what extent the presence of the cigarettes may ordinarily
have been detected by an innocent driver during the course of a two to three day
journey. Officer Percy said that normally tobacco/cigarettes, when in a confined space
for a period of time, can readily be detected by their odour, but on this occasion he had
not noticed an odour, although he commented that prior to the search the door had been
30 open for a while.

97. The Appellant made frequent trips from Poland to the UK. He says he has never
previously been stopped or had his vehicle searched. He has been driving
internationally since 2003 and the evidence shows that he has a clean CRB record. As
far as we are aware the Appellant's vehicle was only stopped, because two weeks
35 previously another vehicle from the same Colo Trans was stopped, checked, and
cigarettes found in the trailer.

98. The owners of the seized vehicle, the value of which must have been
considerable, did not appeal the seizure. Indeed there does not appear to have been any
contact from the transport company whatsoever, clearly indicating that the company
40 may have been complicit in the smuggling attempt.

99. The Appellant's evidence was not particularly helpful, in that to many questions
he simply answered that he could not remember. The seizure took place in September

2012, that is six years ago and so hardly surprising. On the other hand, he was able to give a detailed factual account of events to those representing him when preparing his witness statement.

100. The Appellant argues that he is an innocent and unwitting agent. The burden of proof is the civil standard and assessed on the balance of probabilities. Once HMRC have shown that the Assessments and Penalty have been correctly issued, the burden of proof falls on the Appellant, to show on a balance of probabilities that the grounds of which his appeal is brought have been established. *Revenue and Customs Commissioners v. Khawaja* [2008] STC 2880; *N'Diaye v. Revenue and Customs Commissioners* TC04562); *Sahib Restaurant v. HM Revenue and Customs*, unreported, February 2008.

101. We have to take into account that there are obvious difficulties in requiring the Appellant to prove a negative proposition, namely that he had no knowledge, actual or constructive, of the criminality in which he had become involved.

102. The fact that the Appellant was only the driver, not the owner of the cigarettes, or was not involved in their sale and purchase, does not prevent him from “holding the goods” within the meaning of Regulation 13 according to *Taylor & Wood*. The answer to this question depends on whether the Appellant knew or should have known that he had possession of the cigarettes as is clear from the UT’s conclusion in *McKeown* at [68] and other cases referred to above.

103. Taking all the evidence into account we conclude that the Appellant has demonstrated a reasonable excuse for his act (namely the act of carrying the goods). He was not ‘holding’ the goods within the meaning of Regulation 13 of the 2010 Regulations. His reasonable excuse is that he lacked any knowledge, actual or constructive, of the criminal enterprise to smuggle excise goods and was innocent of any wrongdoing.

104. For the above reasons the appeal is allowed and the Assessment and Penalty discharged.

105. 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.

MICHAEL CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 14 November 2018