



[2019] UKFTT 690 (TC)

TC07463

Appeal number: TC/2018/02344

Excise and Customs Duty – importation of tobacco products – appeal against an assessment for Excise Duty pursuant to s 12(1A) of Finance Act 1995 and Civil Evasion Penalties pursuant to Schedule 41 Finance Act 2008 – Regulation 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations – meaning of ‘Holding’ – whether the appellant was ‘holding the goods’ – yes – whether allowances given to reduce penalties correct – yes – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BOGDAN MAZUREK

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER DUNCAN MCBRIDE**

**Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 14
October 2019**

Mr Michael Wiencek for the Appellant

Mr Christopher Vallis, Officer of HMRC, for the Respondents

DECISION

1. This is an appeal by Mr Bogdan Mazurek (“the appellant”) against a decision by
5 HMRC (“HMRC”) to raise an assessment for excise duty pursuant to s 12(1A) of the
Finance Act 1994 (“the 1994 Act”) in the sum of £60,542 (“the Assessment”) and a
wrongdoing penalty in the sum of £30,271 (“the Penalty”) issued pursuant to Schedule
41 of the Finance Act 2008 (“the 2008 Act”).

2. The Assessment and the Penalty were raised by HMRC after the appellant entered
10 the United Kingdom with a number of cigarettes concealed within the lorry cab and
trailer that he was driving.

3. The appellant’s case is that he acknowledges responsibility for 162,400 cigarettes
found in the cab during an initial search of the vehicle, but that he did not have
knowledge, actual or constructive, of 75,819 cigarettes concealed in the cab and trailer,
15 which were discovered during a second search some hours later, after he had left. He
asserts that he was not, therefore, “holding” the cigarettes for the purposes of regulation
13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010.

4. It is HMRC’s case that there were 238,219 cigarettes. It is the appellant’s case
that he only brought 162,400 cigarettes into the UK and that the quantum of Assessment
20 and the Penalty should be reduced accordingly.

5. It is not in dispute that an assessment is appropriate. Nor is it in dispute that a
penalty is appropriate and that the appellant’s behaviour was deliberate and concealed.

Background

6. At 23:30 on 10 February 2017 the appellant was intercepted by UK Border Force
25 (“UKBF”) officers at Coquelles [which is part of the United Kingdom for the purposes
of Regulation 13 of the Excise Goods (Holding, Movement and Duty Point)
Regulations 2010]. He was driving a Renault lorry cab with number plate “WK45825”
 (“the Vehicle”) connected to a Renault trailer with number plate “WK672AC” (“the
Trailer”).

7. During a search conducted in the early hours of 11 February 2017, UKBF officers
30 discovered, concealed within the Vehicle and the Trailer, 162,400 cigarettes.

8. In an interview on 11 February 2017 the appellant told UKBF Officer Daynes:

- 1) that he did not have any cigarettes, tobacco or excise goods on or with him;
- 2) that he was on his way to Manchester to collect some cars with the
35 intention of taking them to Poland;
- 3) that he has made this trip five or six times before;
- 4) that he owned the Vehicle; and
- 5) that he paid for the trip himself.

9. At a subsequent interview with Officer Daynes, after UKBF's discovery of the concealed cigarettes had been revealed to the appellant, he told Officer Daynes:

- 1) that he owned the lorry cab;
- 5 2) that he and a friend packed the cigarettes into the frame of the lorry cab in Poland (although he later clarified that he did not know where in the lorry cab the cigarettes were hidden because his friend packed them but that he (the appellant) knew about their existence);
- 3) that he paid for the Eurotunnel ticket himself;
- 10 4) that he did not intend to remove or sell the cigarettes upon arrival in the UK;
- 5) that he intended to hand over the lorry to someone who would take the lorry and trailer and load cars which the appellant would take back to Poland;
- 15 6) that he knew that it is illegal to import excise goods to sell in the UK

10. During the interviews, the appellant, who is a Polish national and speaks very little English, had the benefit of a translator.

11. The officers considered that it was not reasonable that the appellant could not be aware of the concealed cigarettes and accordingly as they were not satisfied that they were being imported for personal use, the cigarettes were being imported for commercial purposes.

12. The cigarettes, the Vehicle and the Trailer were seized by UKBF pursuant to s 139 of the Customs and Excise Management Act 1979 ("CEMA") at 07:20 on 11 February 2017.

25 13. The appellant was issued with a BOR 156 (Seizure Information Notice); a BOR 162 (warning letter about seized goods); a Notice 1 (Travelling to the UK); and a Notice 12A (What you can do if things are seized).

30 14. On 12 February 2017 Officer Daynes and other officers continued the search of the Vehicle and Trailer. A further 75,620 additional cigarettes were found concealed at the rear of the Trailer ramps and the front tank of the lorry cab, as recorded by Officer Daynes in his notebook, (opened 23 December 2016.)

15. On 7 March 2017 a second BOR156 was sent to the appellant at his address in Poland, formally notifying him that an additional 75,620 cigarettes had been found and recorded as seized.

35 16. The appellant did not challenge the legality of the seizures which were therefore deemed to have been duly forfeit and condemned in accordance with paragraph 5 of Schedule 3 to CEMA.

40 17. On 25 July 2017, Karen Allison of HMRC's Individual and Small Business Compliance Customs International Trade and Excise Department, wrote to the appellant at his address in Poland, informing him that as the driver responsible for the movement and holding of goods at the time of seizure, he may be liable for the UK

excise duty under regulation 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010. If he believed he was not liable for the duty he was asked to explain the reasons. Officer Allison only referred to the initial 162,400 cigarettes that had been discovered. She did not refer to the additional 75,620 cigarettes, as it seems
5 that at the time, she was unaware of the second discovery and seizure. The appellant was asked to respond by 25 August 2017.

18. On 24 August 2017 the appellant asked for an extension to 9 September 2017 within which to respond in full. On 25 August 2017 this was agreed by Officer Allison.

19. On 7 September 2017 the appellant made the following admission:

10 “Cigarettes I took for the first time. I admit I did wrong. I regret it but I was in a difficult financial situation and I wanted to earn. Cigarettes I wanted to sell in parking lots for other random drivers please ask for a mild penalty and return your car.”

He said that the business he was operating had ceased and that he was now unemployed. He provided a medical certificate that he was suffering from diabetes. He did not own
15 any property. He lived with his father who has a medical condition and is his carer.

20. On 22 September 2017, Officer Allison became aware of the second seizure (12 February 2017).

21. On 29 September 2017, HMRC notified the appellant of the amount of Excise Duty and the Penalty that would be issued, being respectively £60,415 and £30,271. The
20 Duty and Penalty were based on a total of 238,219 cigarettes having been seized, (whereas a total of 238,020 had been recorded by UKBF as seized). Because the 238,219 quantity did not correspond with the information provided in the Seizure Information Notices Officer Allison has queried this with Border Force and she was told that the goods were finally totalled when they reached the secure warehouse and
25 the final amount was confirmed as 238,219 cigarettes.

22. Also, on 29 September 2017, Officer Allison issued an Excise Duty letter detailing the type and quantity of cigarettes seized and a calculation of Excise Duty in the sum of £60,542 as below:

30	a) Pal-mal Blue 12 packets (10 packs x 20 items) -	2,380
	b) Winston blue 500 packets (10 packs x 20 items) -	148,299
	c) NZ Gold 300 packets (10 packs x 20 items) –	46780
	d) NZ Black	<u>40760</u>
	TOTAL:	<u>238,219</u>

It appears that the schedule which accompanied the letter erroneously referred to
35 162,400 cigarettes.

23. On 10 November 2017 Officer Allison issued the appellant with confirmation of the Excise Assessment and also an Excise Wrongdoing Penalty in the amounts of £60,542 and £30,271.

24. On 5 December 2017 Officer Allison received a letter from the appellant's representative stating that the appellant was not aware of the 12 February 2017 search and does not accept that he should be liable for the extra 75,620 cigarettes discovered. They said that he did not receive the 7 March 2017 BOR156 which notified him that purportedly an additional 75,620 cigarettes had been found.

25. On 30 January 2018 HMRC sent an amended "Penalty explanation" letter and schedule in order accurately to reflect the actual quantity of cigarettes discovered (238,219) with an explanation that due to an administrative error the previous version of the schedule had stated that 162,400 cigarettes were found.

26. On 22 February 2018 the Appellant provided HMRC with details of the description and quantity of cigarettes he had concealed, namely 162,400 as below:

e) Pal-mal Blue 12 packets (10 packs x 20 items) -	2,400
f) Winston blue 500 packets (10 packs x 20 items) -	100,000
g) NZ Gold 300 packets (10 packs x 20 items) -	<u>60,000</u>

TOTAL: 162,400

27. After a further exchange of correspondence, the appellant's representatives requested a review of the decision to issue an Excise Assessment and Excise Wrongdoing Penalty.

28. On 8 March 2018 Officer Jordan Danks undertook an independent review of the decision. He addressed the issue raised by the appellant's representative, that the appellant was not aware of the 12 February 2017 search and did not accept responsibility for the additional 75,620 cigarettes. The reviewing officer acknowledged that the appellant was not present at the time the second search was carried out and that BOR156 forms had to be sent via post on 7 March 2017. As the cigarettes found on 11 February 2017 were concealed, Officer Danks considered that the goods found concealed on 12 February 2017 were also the appellant's goods. As he had taken responsibility for the original seizure of 162,400 he was also liable to the associated increase in Assessment and Penalty for the additional 75,620.

29. Officer Danks also acknowledged that the UKBF paperwork was inconsistent. 162,400 and 75,620 did not add up to 238,219. As a result he had followed this up with Officer Allison, who contacted two different Border Force Officers, who both confirmed that on 12 February 2017 a re-rummage found the extra cigarettes and a final count gave the figure of 238,219 cigarettes. This count took place once the vehicle and goods had reached a secure location on 12 February 2017.

30. Officer Danks said that the appellant had failed to challenge the seizure of the goods which were accordingly now forfeit to the Crown and deemed to be imported for commercial purposes. Two searches discovered 238,219 cigarettes concealed within the Vehicle and Trailer and the Assessment of £60,542 was legally and technically correct. He therefore upheld the decisions.

31. Officer Danks explained that the range of the 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 or unprompted. HMRC had also considered the level of co-operation shown during their enquiry.

32. Officer Danks explained that the penalty was calculated in accordance with Schedule 41 Finance Act 2008. The wrongdoing was deliberate and concealed with a disclosure prompted by HMRC. Therefore, the range of the Penalty was set between 50% and 100% of the Potential Lost Revenue (“PLR”). A reduction was allowed based on the quality of disclosure the appellant provided, which resulted in the Penalty being for the amount of 50% of the PLR. 50% of £60,542.00 = £30,271.00.

33. On 5 April 2018, the appellant lodged a Notice of Appeal with the Tribunal appealing both the Excise Duty and Penalty Assessments on the grounds that only 162,400 cigarettes were brought into the UK and that the quantum of Assessment and the Penalty should be reduced accordingly.

Evidence

34. Each party provided a bundle of documents. These included copies of the seizure information notices, the witness statement of Officer Daynes, copy notebook entries of Officer Daynes, and Officers Keeler and Mapp (who had been involved in the additional search on 12 February 2017) copy correspondence, copy Excise Duty and Excise Penalty Assessments, copy relevant legislation and case law authorities. The bundle also included the appellant’s notice of appeal, and his witness statement.

35. A Polish translator was provided at the hearing.

Relevant legislation

The Law

36. The legislation relevant to this appeal is:

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

“2 Charge and remission or repayment of tobacco products duty.

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

“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;
- (d) other smoking tobacco; and
- (e) chewing tobacco,

5 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 37. 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.

 (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-

25 (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.

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

40 (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

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

39. 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-

(a) making the delivery of the goods;

15 *(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

20 *(b) by a private individual ('P'), except in a case where the excise goods are for P's own use and were acquired in, and transported to the United Kingdom from, another Member State by P.*

(4) For the purposes of determining whether excise goods referred to in the exception in paragraph (3)(b) are for P's own use regard must be taken of-

25 *(a) P's reasons for having possession or control of those goods;*

(b) whether or not P is a revenue trader;

(c) P's conduct, including P's intended use of those goods or any refusal to disclose the intended use of those goods;

(d) the location of those goods;

30 *(e) the mode of transport used to convey those goods;*

(f) any document or other information relating to those goods;

(g) the nature of those goods including the nature or condition of any package or container;

35 *(h) the quantity of those goods and, in particular, whether the quantity exceeds any of the following quantities-*

10 litres of spirits,

20 litres of intermediate products (as defined in article 17(1) of Council Directive 92/83/EEC),

40 *90 litres of wine (including a maximum of 60 litres of sparkling wine),*

110 litres of beer,

[800 cigarettes],

400 cigarillos (cigars weighing no more than 3 grammes each),
200 cigars,
[1 kilogramme] of any other tobacco products;

(i) whether P personally financed the purchase of those
5 goods;

(j) any other circumstance that appears to be relevant.

(5) For the purposes of the exception in paragraph (3)(b)—

(a) “excise goods” does not include any goods chargeable with excise duty by
10 virtue of any provision of the Hydrocarbon Oil Duties Act 1979 or of any order
made under s 10 of the Finance Act 1993;

(b) “own use” includes use as a personal gift but does not include the transfer
of the goods to another person for money or money's worth (including any
reimbursement of expenses incurred in connection with obtaining them).

(6) Paragraphs (1) and (2) do not apply—

15 (a) where the excise duty point and the person liable to pay the duty are
prescribed by the Excise Goods (Sales on Board Ships and Aircraft)
Regulations 1999; or

(b) in the case of chewing tobacco.”

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,

25 those goods shall be liable to forfeiture.”

40. Article 7(2) of Directive 2008/118 states:

“For the purposes of this Directive, “release for consumption” shall mean any of
the following;

30 (a) the departure of excise goods, including irregular departure, from a
duty suspension arrangement;

(b) the holding of excise goods outside a duty suspension arrangement where
excise duty has not been levied pursuant to the applicable provisions
35 of Community law and national legislation;

(c) the production of excise goods, including irregular production,
outside a duty suspension arrangement;

(d) the importation of excise goods, including irregular importation unless,
the excise goods are placed, immediately upon importation, under a duty
40 suspension arrangement.”

41. Section 139 Customs and Excise Management Act 1979 ('CEMA') states:

5 “(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.

(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—

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

(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.

15 (3) Where the person seizing or detaining any thing 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.

20 (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-

25 (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.

30 (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.

35 (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.

40 (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].

5 (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.*”

Section 154 CEMA states in material part:

10 “(2) *Where in any proceedings relating to Customs or Excise any question arises as to the place from which any goods have been brought or as to whether or not-*

 (i) *any duty has been paid or secured in respect of any goods; or*

15 *then, where those proceedings are brought by or against the Commissioners, a law officer of the Crown or an officer, or against any other person in respect of anything purporting to have been done in pursuance of any power or duty conferred or imposed on him by or under the Customs and Excise Acts, the burden of proof shall lie upon the other party to the proceedings.*”

Paragraph 5 Schedule 3 CEMA states as follows:

20 *“If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of any thing 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.”*

42. The Commissioners’ power to assess the tax due from the Appellant is at s 12(1A) of the 1994 Act:

25 “12.

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

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

30 (ii) *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.]”

43. Finance Act 2008 states at Schedule 41:

Paragraph 4:

35 “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

5 (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.”

10 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”

15 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,

20 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:

25 “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:

30 “(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,

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

35 (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”.

5 *(4) In relation to disclosure “quality” includes timing, nature and extent.”*

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

10 *“(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.*

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

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

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

(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

20 *(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>

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

(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

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

Paragraph 14 states:

35 *“(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 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.”

5 **Appellant’s submissions**

44. The appellant disputes the quantity of cigarettes, citing inconsistencies in HMRC’s correspondence and referring to the evidence attached to his letter of 22 February 2018.

45. The appellant accepts that there were 162,400 cigarettes. He disputes that there were an additional 75,819 cigarettes.

10 46. He does not dispute that an assessment is appropriate.

47. It is not in dispute that a penalty is appropriate.

HMRC’s submissions

48. The only issue is the quantity of cigarettes held by the appellant, although it is accepted by the appellant that there were at least 162,400.

15 The Assessment

49. The basis of the appellant’s liability for the Assessment and Penalty is that he was ‘holding’ the excise goods (i.e. the cigarettes) on which duty had not been paid before the goods were brought into the UK.

50. Section 12(1A) FA 94 has been satisfied. In particular:

20 a. excise duty became due from the appellant:

i. Regulations 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 provides that:

25 *“Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom, the excise duty point is the time when those goods are first so held.”*

ii. Regulation 20 of HMDP provides that:

“duty must be paid at or before an excise duty point.”

iii. The appellant was holding such excise goods (i.e. the cigarettes) whose duty had not been paid before the appellant’s entrance to the UK.

30 The Penalty

51. While the fact that a penalty is due is not disputed by the appellant, it is clear that a penalty is due under paragraph 4(1) to Schedule 41 of the 2008 Act.

52. The penalty was calculated as a percentage of the PLR, which in this case was the amount of duty (£60,542).

53. The failure of the appellant was deliberate and concealed because he took conscious decisions not to pay the duty on the cigarettes and to hide, or allow to be hidden, cigarettes within the Vehicle and the Trailer. Therefore, the maximum penalty is 100% of the PLR, in accordance with paragraph 6B, Schedule 41 of the 2008 Act.

54. The failure was prompted because it was not disclosed to HMRC by the appellant before it was discovered. Therefore, the minimum penalty is 50% of the PLR, in accordance with paragraph 13, Schedule 41 of the 2008 Act.

55. HMRC's reduction of the penalty to 50%, the lowest possible percentage of the PLR as allowed by the legislation, is appropriate in the circumstances.

56. There are no circumstances that might allow a special reduction.

Quantum

57. The sole point of dispute is the quantity of cigarettes that were held by the appellant. It is not disputed that the 162,400 cigarettes were held for a commercial purpose.

58. The appellant was however holding 238,219 cigarettes:

- i. the lorry cab and Trailer in which the cigarettes were found was owned by the appellant (this is not in dispute);
- ii. the Vehicle and Trailer were being driven by the appellant (this is not in dispute);
- iii. UKBF officers discovered a total of 238,219 cigarettes concealed within the lorry cab and Trailer.

59. As Officer Daynes confirmed in his witness statement, 162,400 cigarettes were found by UKBF officers initially. The search then continued and an additional 75,819 cigarettes were found. The search had to be carried out in two stages, because it took the UKBF Officers a considerable amount of time to find the cigarettes. It was clearly an extremely sophisticated concealment.

60. The appellant has explained that it was his friend who hid the cigarettes. He therefore says he could not have known how many cigarettes were hidden in the vehicles.

61. There were in fact 238,219 cigarettes and, therefore, the Assessment and Penalty were raised in the correct amount (£60,542 and £30,271 respectively).

Conclusion

62. The only issue for determination by the Tribunal is the quantity of cigarettes held by the Appellant. He appeals the Assessment and Penalty on the basis that even if the

additional 75,819 cigarettes were found in his Vehicles (which he does not concede) he was unaware of those cigarettes and therefore was not ‘holding’ the goods, within the meaning of regulation 13 of the 2010 Regulations. He says that the concealment of the additional cigarettes were an unexpected event that could not have been reasonably
5 foreseen and was beyond his control

63. His grounds of appeal are in effect that he was in the position of an “innocent agent” or similar and the wrongdoing was not deliberate.

64. Although not specifically referred to, the appellant appears to rely on paragraph 20 of Schedule 41 to the Finance Act 2008 which provides:

10 “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.”

65. “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 Directive: *Stanislav Gross v*
15 *Hauptzollmant Braunschweig* - see paras. 25 to 27 of Case C-165/13.

66. The meaning of “holding goods” was considered by the Court of Appeal in *R v Taylor & Wood* [2013] EWCA 1151. Section 13 of the 2010 Regulations imposed the liability to excise duty on the person holding the tobacco products at the excise duty point. According to Kenneth Parker LJ at paras. 29 of the judgment:

20 “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
25 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.”

67. The meaning of “holding” was concisely and helpfully stated by the *Court of Appeal* in *R v Tatham* [2014] EWCA Crim 226 at [23] of its judgment, at [39], and included
30 the following:

35 “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]).”

68. The appellant initially said that he was not carrying any tobacco. He later conceded that he was, but that his friend had packed the (162,400) cigarettes. He now says that his friend (or some unknown third party) must have concealed the additional cigarettes of which he denies any knowledge. However, by not supervising what was being
40 hidden, he was at the very least knowingly complicit in the concealment of the goods,

irrespective of whether he was aware of the exact quantity. 12,560 of the 75,819 cigarettes were found by Officer Keeler very well hidden in the draw-bar of the ramps of the trailer and could only be extracted by the use of an angle grinder. The remaining 63,259 were found in the front tank (of the lorry cab). Both the lorry cab and Trailer belonged to the appellant.

69. If the appellant did not know, as he claims, where the cigarettes had been hidden by his friend, he could not differentiate and say with any certainty which of those discovered in the first search and those discovered in the second he was unaware of. It is improbable that those additional cigarettes were hidden without his knowledge. The appellant was in possession of and capable of exercising control over the cigarettes. He was therefore 'holding' the goods.

70. The appellant was aware that he was carrying goods that were chargeable to excise duty that had not been paid. The appellant was knowingly concerned in the fraudulent evasion of that duty, so he was not an innocent agent in the transportation of the goods.

71. The appellant says that there were inconsistencies in the number of cigarettes recorded as seized. That is true, but the error was corrected and verified after a further re-count.

72. The appellant has already been given the benefit of the maximum available discount (50%) on the basis that this was a case of concealed, deliberate and prompted discovery.

73. The appellant suggests that he cannot afford to pay the penalty. The Finance Act 1994, s 8(5)(a) and Finance Act 2003, s 29(2) and (3)(a) preclude the Commissioners or on appeal the Tribunal from taking into account the insufficiency of the funds available to pay when considering reduction of the penalty. The appellant's financial hardship cannot be taken into account as regards special circumstances or reasonable excuse.

74. For the above reasons the appeal is dismissed and the Assessment and Penalty confirmed.

75. 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: 13 NOVEMBER 2019