



TC03899

Appeal number: TC/2013/03410

Excise Duty – two journeys on consecutive days – one electronic administrative document alleged to cover both journeys – goods seized and forfeited – implied liability of carrier – inadequate checks carried out by HMRC

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

GERALD CARLIN

Appellant

- and -

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

**TRIBUNAL: JUDGE ALASTAIR J RANKIN
 MR ANTHONY HENNESSEY**

Sitting in public at Tribunals Unit, 3rd floor, Bedford House, 16-22 Bedford Street, Belfast, BT2 7DS on 9 July 2014

Mr Danny McNamee of McNamee McDonnell Duffy Solicitors LLP for the Appellant

Mr Richard Chapman instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

5 1. This case concerns an appeal by Gerald Carlin (Mr Carlin) against an assessment raised by HMRC on 14 February 2013 under section 12(1A) of the Finance Act 1994 following the seizure of goods at the port of Dover on 10 May 2012. The assessment of duty was originally for £27,752.91 and was issued by John Netherway, a Higher Officer with HMRC's Leeds Alcohol Team. The assessment was revised by Mr Netherway on 1 March 2013 to £28,227.00.

10 2. The solicitors for Mr Carlin by letter dated 20 March 2013 requested a review of the assessment to be carried out by HMRC. This review was carried out by David Paton of HMRC's Appeals & Reviews Unit who upheld the assessment. The basis for upholding the assessment was that there was an opportunity of condemnation proceedings in a court of law when the goods were seized. No challenge to the liability of the goods was made and therefore paragraph 5 of schedule 3 of the
15 Customs and Excise Management Act 1979 deems the goods to be duly condemned as forfeited.

3. On 26 April 2013 HMRC issued a Penalty explanation letter charging Mr Carlin a penalty of £9,879.45 in addition to the actual duty assessment.

20 **The Facts**

4. The basic facts are not in dispute. Mr Carlin is a lorry driver. On 10 May 2012 the United Kingdom Border Agency Fraud Protection Team (UKBA) stopped Mr Carlin in a lorry with the registration plate KIW696 (the Lorry). The Lorry was attached to a trailer marked PMT7 which contained mixed beers (the Goods) which
25 consisted of 25,255.68 litres of beers.

5. Mr Carlin provided UKBA with a delivery note (the Delivery Note) from a French warehouse named Consortium dated 9 May 2012 stating that the place of delivery was Seabrook Warehousing Ltd in Barking, Essex (Seabrook). He also provided UKBA with a CMR International Consignment Note (the CMR) which
30 stated that the Goods were under the cover of an Electronic Administrative Document (the e-AD). The CMR also stated that the carrier of the Goods was European Transport Services.

6. During interviews with Mr Carlin UKBA established that Mr Carlin and the Lorry had travelled from France to the United Kingdom (the UK) on 9 May
35 manifested as having carried foodstuffs. Mr Carlin did not know what this load consisted of as he did not really check his loads but he had been instructed to take it to a yard in West Thurrock, Essex. He did not know to whom he was delivering the load. Mr Carlin stated that he was working for Kevin Woods (Mr Woods) of Woods Transport, Dungannon, Northern Ireland.

7. Mr Carlin received separate instructions to go to France to pick up another consignment which he did returning to the UK on 10 May when he was stopped at Dover and questioned by UKBA.

8. UKBA concluded that the e-Ad had been used to cover a duplicate load on 9 May 2012 and that the Goods were liable for payment of UK duty. As a result the Lorry and the Goods were seized as liable to forfeiture.

9. Seizure notices were sent to Mr Carlin, Seabrook, Mr Woods (care of Mr Carlin), Consortium and Castle Trade Services Limited (who were shown on the delivery note).

10. UKBA claim to have been unable to locate or identify Mr Woods or Woods Transport and accordingly addressed the seizure notice to Mr Woods care of Mr Carlin.

The Evidence

11. Mr Carlin gave evidence under oath. He was not a convincing witness and frequently contradicted the information which he had given to UKBA during the interview in Dover on 10 May 2012. He explained these contradictions as being due to the lapse of time and his failing memory.

12. Mr Carlin stated he did not know whether or not Woods Transport was a limited company. He employed his accountant to prepare all the invoices. Most trips were for a fixed price. Mr Woods owned the Lorry and at the start of a trip gave Mr Carlin £500.00 to cover the cost of fuel. During the ferry trip to France Mr Carlin converted the sterling cash to euros at a bureau de change on board the ship. He then bought fuel in France using the euros as it was cheaper.

13. On 9 May 2012 Mr Carlin sat in his cab while the trailer was being loaded. He always checked his trailers for illegal goods or illegal immigrants. However he did not always know what the load was as it is not always obvious. He does not usually check the documentation as 'this is somebody else's responsibility'. Mr Carlin could not remember where his instructions had come from. He admitted that on the balance of probabilities there was beer in the load which he delivered to West Thurrock on 9 May.

14. Mr Netherway then gave evidence again under oath. After confirming that the information in his witness statement dated 4 February 2014 was correct to the best of his information and belief Mr McNamee quizzed him at length on paragraph 9 where he stated that:

'As I was unable to identify the haulier which Mr Carlin was employed by I deemed Mr Carlin liable for the UK Excise Duty as per regulation 13(1) and 13(2) of the Holding and Movement Duty Point Regulations 2010 and also liable for a Schedule 41 Finance Act 2008 Excise Wrongdoing Penalty.'

15. Mr Netherway confirmed that he had not checked for the registered owner of the Lorry, had not checked for the owner of the road freight licence, had not tried to trace Mr Woods through HMRC records or telephoned Mr Woods using the mobile number provided by Mr Carlin during the interview on 10 May 2012. He maintained it was for others in HMRC to make these checks.

The Submissions on behalf of Mr Carlin

16. Mr McNamee maintains that HMRC is not entitled to draw the conclusion that simply because Mr Carlin transported a load of foodstuffs from France to the UK on 9 May 2012 that this load was being covered by the same e-AD as the Goods on 10 May. It is accepted by both parties that the e-AD used by Mr Carlin on 10 May was a valid document. The question is simply whether it had already been used by Mr Carlin on 9 May.

17. Schedule 3 of the Customs and Excise Management Act 1979 (the 1979 Act) requires any person claiming that anything seized as liable to forfeiture is not so liable shall give notice of his claim to HMRC. As Mr Carlin was not the owner of the Lorry or of the trailer it was not open to Mr Carlin to give notice of such a claim. The fact that nobody made such a claim within the specified time period only results in the Lorry and the trailer being condemned as forfeited. Any proceedings in the Magistrate's Court to have the seized items restored are proceedings in rem whereas the duty imposed under the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (the 2010 Regulations) and the Finance Act 1994 are in personam.

18. Mr McNamee further argues that Mr Carlin could not be deemed to be holding the Goods at any point for the purposes of section 13(2)(a) or (b) of the 2010 Regulations and referred the Tribunal to the case of Ian Leslie White and others v The Crown [2010] EWCA Crim 978 where Lord Justice Hooper at paragraph 190 cites the case of R v May where it was said that mere couriers or custodians or other very minor contributors to an offence, rewarded by a specific fee and having no interest in the property or the proceeds of sale, are unlikely to be found to have obtained that property.

19. Finally Mr McNamee argues that the imposition of the duty on Mr Carlin as a result of the condemnation proceedings where he had no standing to challenge such proceedings is a breach of Article 13 of the European Convention on Human Rights and is also contrary to the European Court of Human Rights judgment in Paulet v The United Kingdom, a judgment delivered on 13 May 2014.

The Submissions on behalf of HMRC

20. Mr Chapman submitted that having failed to challenge the forfeiture of the Lorry and the Goods it is not now open to Mr Carlin to argue that duty is not payable. Following the judgment of Mummery LJ in the case of Commissioners for HMRC v Jones and another [2011] EWCA Civ 824 it is clear that without a claim for restoration the Lorry and the Goods were duly condemned as forfeited as illegally imported goods. This Tribunal does not have the power to conclude that the Lorry and

the Goods were illegally seized by HMRC due to the deeming provisions of paragraph 5 of Schedule 3 of the 1979 Act though Mr Chapman did admit that Mr Carlin does not appear to have been the owner of the Goods or the Lorry. However he was served with the notice of seizure and could according to Mr Chapman have
5 challenged the seizure if he so wished.

21. Mr Chapman was unable to produce any evidence that the e-AD related to the goods which had been imported on 9 May 2012 rather than the Goods imported on 10 May. During cross-examination of Mr Carlin, Mr Chapman repeatedly asked him whether he transported similar items on both 9 May and 10 May. Mr Carlin
10 eventually admitted, not unreasonably, that with the passage of time he could not remember.

22. Mr Chapman then referred to paragraph (2)(b) of Regulation 12 of the 2010 Regulations which states that the person liable to pay the duty is the person 'holding the goods intended for delivery'. Although there is no definition of 'holding' the
15 Tribunal was referred to the case of R v Taylor and Wood [2013] EWCA Crim 1151 where Kenneth Parker J stated:

'[Holding] can broadly be described as control, directly or through another, of the asset, with the intention of asserting such control against others, whether temporary or permanently.'

20 23. Kenneth Parker J went on to state that if the person who had physical possession, in the present case Mr Carlin, of the Goods at the excise duty point had known, or perhaps even ought to have known, that he had physical possession of [the Goods] its possession might have been sufficient to constitute a holding.

24. In the present case Mr Carlin had physical possession of the goods and knew
25 that on 10 May 2012 they consisted of beer. As such he was holding the Goods for the purposes of the 2010 Regulations.

The Legislation

25. Section 139(1) of the 1979 Act provides that 'Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer...'.
30 Paragraph 3 of Schedule 5 of CEMA states 'If on the expiration of the relevant period...for the giving of notice of claim in respect of any thing no such notice has been given to the Commissioners...the thing in question shall be deemed to have been duly condemned as forfeited.'

26. Regulation 13(1) of the 2010 Regulations provides 'where excise goods already
35 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.' By regulation 13(2) the person liable to pay the duty is the person (a) making delivery of the goods; (b) holding the goods intended for delivery; or (c) to whom the goods are delivered.'
40 Regulation 13(3) provides that excise goods 'are held for a commercial purpose if they are held (a) by a person other than a private individual...'

27. Regulation 88 of the 2010 Regulations states that any goods liable to duty that has not been paid shall be liable to forfeiture.

28. Section 12 of Finance Act 1994 provides that where it appears to the Commissioners – (a) that any person is a person from whom any amount has become
5 due in respect of any excise duty; 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.

29. Finally section 154(2) of the 1979 Act provides that in any proceedings relating to customs or excise any question arises as to the place from which any goods have
10 been brought or as to whether or not – (a) any duty has been paid or secured in respect of any goods....then, where those proceedings are brought by or against the Commissioners.... The burden of proof shall lie upon the other party to the proceedings.

The Decision

15 30. The Tribunal considers Mr Carlin was not holding the Goods for the purposes of the legislation. Following the decision of Lord Justice Hooper in R v May the Tribunal believes Mr Woods or Woods Transport was the holder of the goods and Mr Carlin was merely the courier. The Tribunal was most unhappy with Mr Netherway's
20 response that checking for the existence of Mr Woods or Woods Transport was not his responsibility. A simple search should have been able to ascertain the owner of the Lorry. HMRC failed to carry out the most basic checks. They were supplied by Mr Carlin with a mobile telephone number for Mr Woods which they did not ring. They could easily have checked the Lorry's registration number to ascertain the name and address of the registered owner. As the seizure notice was addressed to Mr Woods
25 care of Mr Carlin it is possible Mr Woods was never notified of his right to appeal to the Magistrates Court.

31. HMRC failed to produce any evidence to convince the Tribunal that the e-AD used by Mr Carlin in connection with the transportation undertaken on 10 July had
30 already been used in connection with the transportation undertaken on the previous day. HMRC failed to carry out sufficient checks to ascertain the true owner of the Lorry and the employer of Mr Carlin.

32. The Appeal is therefore allowed and the assessment to excise duty of £28,227.00 is cancelled. It follows that the penalty of £9,879.45 is also cancelled.

33. This document contains full findings of fact and reasons for the decision. Any
35 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)"
40 which accompanies and forms part of this decision notice.

**ALASTAIR J RANKIN
TRIBUNAL JUDGE**

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RELEASE DATE: 12 August 2014