



**TC04243**

**Appeal number: TC/2012/10308**

***Excise Duty –whether dutiable goods diverted as alleged – goods seized and forfeited - duty assessed – penalty issued –whether on the facts a tax point arose as a result of diversion***

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**HENRY HUGHES**

**Appellant**

**- and -**

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

**TRIBUNAL:    JUDGE CHRISTOPHER HACKING  
                         MR TONY HENNESSY**

**Sitting in Belfast on 5 February 2014 and 22 October 2014**

**Danny McNamee, Solicitor appeared on behalf of the Appellant**

**Brad Pomfret, counsel, instructed by the Office of the Solicitor and General Counsel to HMRC appeared for the Respondents**

## DECISION

### *Background to the appeal*

- 5 1. This was an appeal against decisions of the Commissioners:
- (i) to issue an assessment for excise duty in the sum of £23,359; and
- (ii) to issue a penalty of £10,628.34
- 10 2. The appeal was heard over two full days in February and October 2014

### *The facts as stated by the Respondents*

- 15 3. The facts can be stated quite briefly and are not substantially disputed although the proper inferences to be drawn from those facts are in contention.
4. The Respondents' Statement of Case provides a useful summary of the facts as follows.
- 20 5. On 29<sup>th</sup> November 2011 at around 22:00hours Officers Stamps, Nagra, Dunckley and Villers visited the premises of Global Cash and Carry Limited. They observed vehicle T841 NRD with tractor unit 95XF reversing into the premises. The roller door to the unit was being opened as the vehicle was reversing in.
- 25 6. As the officers entered the yard and approached the vehicle the roller doors were brought down and the people within the unit did not respond when the officers knocked on the doors.
- 30 7. The driver of the vehicle was the Appellant. When the Officers asked him why he was there he stated that he was turning around to drop off the trailer somewhere in Smethwick, for safe storage, and then he was off to Liverpool.
- 35 8. The Appellant presented an International Consignment Note ("CMR") for the load of beer in his trailer and an Excise Accompanying Document ("EAD") dated 28 November 2011.
9. These documents showed the delivery address as being Seabrook Welbeck, Welbeck Wharf, River Road, Barking, Essex, IG11 0JE
- 40 10. The Appellant stated that he had picked up the goods from MT Manutention in France. This was the dispatching warehouse shown on the paperwork and is also approved to hold excisable goods in duty suspension
- 45 11. The officers were of the opinion that the goods had been diverted, and excise duty had not been paid on them and as such the goods and the trailer were seized and removed. The schedule of goods seized annexed to the Respondent's Statement of

Case discloses a volume of 26,082.24 litres of mixed lager type beers involving a potential loss to the Revenue of £23,359 in excise duty.

5 12. The Commissioners investigations revealed that the EAD reference (also referred to in the evidence of Officer Martin as an ARC reference) matched that of an authentic duty suspended movement with the stock detailed on it being exactly the same stock as the stock found in the Appellant's trailer.

10 13. The EAD reference referred to above was not receipted by Seabrook Welbeck but instead was manually closed by the French authorities.

14. Following the Commissioners investigations the decision to assess excise duty in the sum of £23,359 was issued on 17 July 2012 and the penalty was issued on 8 November 2012.

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*The Appellant's account*

15. The Appellant's evidence can be summarised thus:

20 16. On the evening in question Mr Hughes accepts that he was reversing his tractor trailer unit in the yard of Global Cash and Carry Limited. He had made an arrangement with a business colleague to store the trailer unit containing the beer at Safe Parking, a secure facility in Smethwick which was some 5 miles away.

25 17. Thereafter Mr Hughes planned to travel to Liverpool to pick up an empty trailer unit which he would then drive to Cambridge to pick up farm machinery for delivery to Ireland. The trailer with the machinery would be left at the port in Liverpool. This was, said Mr Hughes, a regular monthly trip.

30 18. He would then return to Smethwick to pick up the trailer and deliver the beer to the Seabrook address given which was a bonded warehouse. Mr Hughes told the Tribunal that the Seabrook facility would not accept the delivery of the beer until Friday morning. The delivery was booked in for that time and having had previous experience of attempting to deliver before a booked appointment and having had the  
35 delivery rejected he was unwilling to do other than to deliver at the time booked.

19. Mr Hughes explained that he had left the motorway with his load intending to go directly to Safe Parking at Smethwick. However there were road works that night and he was obliged to divert along a road which took him in the wrong direction. The  
40 road he had wanted to use had been blocked off. He realised his error quickly and sought a suitable place to turn his tractor and trailer unit around. He spotted open doors into the Global Cash and Carry yard.

45 20. Mr Hughes said that he was only halfway in when a car pulled up in front of him. His immediate thought was that he was going to be told not to turn round. Mr

Hughes said that he explained what he was doing to the officers and offered to bring them along to the secure yard at Safe Parking. That offer was refused.

21. Mr Hughes was cross examined on his account. He was asked whether his proposed journeys to Smethwick, Liverpool, Cambridge, Smethwick and Seabrook in Essex were possible having regard to the rules concerning driver's hours. Mr Hughes said that this was within the tachograph limits as on the Wednesday he had only driven 200 miles.

22. Mr Pomfret asked whether he had in fact made arrangements for the trailer to be stored at Smethwick. Mr Hughes said that he had made arrangements with a Mr Donnelly. He knew from past experience that this was a safe place suitable for the storage of the trailer. Liverpool was not safe in his view even for farm machinery. Smethwick was on the way to Liverpool.

23. Asked why he had not mentioned any of this to the officers at the time he was stopped Mr Hughes insisted that he had done so. He had given his home address and had offered to take the officers to the storage facility at Smethwick.

24. Mr Hughes said that he had not thought that he was doing anything wrong. He had been driving "wagons" for a long time and had never been stopped. He was not into smuggling and was only going to do what he had told the officers. He said that he did not understand why the trailer was seized. The tractor unit which he owned was subsequently returned to Mr Hughes without payment being required.

25. Mr Hughes was asked why it was that Seabrook had made no mention of the non-receipt of the load. Mr Hughes was unable to comment on this.

26. Asked about the opening of the roller doors Mr Hughes said that he had not noticed this. Asked further why there was no mention in the officers' notes about the night road works and the problems to which these gave rise Mr Hughes was unable to comment.

*Kevin Donnelly's evidence*

27. Evidence was then given to the Tribunal by Mr Kevin Donnelly. Mr Donnelly said that he had been made aware of the fact that Mr Hughes had been stopped on 29 November 2011 and that goods had been seized. Asked by Mr McNamee whether Mr Hughes had contacted him about the storage of a trailer at the London Road Smethwick storage facility. Mr Donnelly explained that his company had an arrangement concerning the parking/storage of vehicles through Hanson Haulage at the Smethwick site. That arrangement covered both his own vehicles and those which belonged to others with whom he worked including those of the Appellant.

28. Mr Donnelly explained that his own business was the purchase and sale of trucks and trailers including their export. This business was conducted through Grove Commercials Limited of which company he was a director. This company had been

formed in 2007. The telephone call from Mr Hughes was not unusual. He spoke on the phone with Mr Hughes as many as 3 or 4 times a week as Mr Hughes undertook haulage for his company. Mr Donnelly recalled the particular request from Mr Hughes concerning the storage of a trailer as Mr Hughes had explained to him that the delivery address was not ready to accept the trailer. Mr Donnelly said that it was agreed that he might park the trailer at the Smethwick facility.

29. Mr Donnelly confirmed that the Smethwick facility was secure. It was walled around with a locked gate and had a security guard service at night.

30. At this point Mr Pomfret on behalf of the Respondents sought an adjournment of the hearing so that further instructions might be taken and if thought appropriate further written or oral evidence given. The hearing was adjourned to 22 October 2014.

15 *The Respondents' evidence given at the adjourned hearing*

31. The Respondents' evidence appeared in 5 statements provided by Officers Louise Martin (6 October 2014); Harjinder Nagra (7 October 2014); Surbit Stamps (9 October 2014); Stephen Dunckley (7 October 2014) and Lesley Villers (20 October 2014). All statements contained a Statement of Truth. These statements had been served in a timely way prior to the first hearing date in February 2014.

32. Only Officer Nagra was called to give evidence to the Tribunal. Mr McNamee appeared content to accept the written statements of the other officers as they stood.

33. The evidence of Officer Martin was formal evidence by the officer who made the decisions under appeal on the basis of the evidence before her. The evidence of the other officers related directly to the events on the evening of 29 November 2011 when the diversion of the dutiable goods is said to have occurred.

34. The statement of Officer Stamps when dealing with what he observed includes the following:

35 "At approximately 22.10 hrs I saw a tractor unit and trailer vehicle, registration number T841 NRD, reversing into the yard of Global Cash & Carry. I with the other officers challenged the vehicle as it was reversing towards the entrance of Global Cash & Carry.

40 The shutter door that the trailer unit was reversing towards was being opened by an unknown male who, upon seeing HMRC officers, closed the shutter door"

35. Officer Stamps goes on to say that he then interviewed Mr Hughes who refused to give his home address without a solicitor present but who did give his name and date of birth. Mr Hughes gave an account of what he was doing stating that he was going to drop off his trailer at Smethwick although Mr Hughes was unable to give the address of the premises.

36. Officer Dunckley's statement is in similar terms. He states:

“.....I saw that the gates were now open and a tractor unit Registration number T841 NRD coupled to a trailer was reversing into the yard which is an open space in front of a number of industrial units.

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One of these units is the premises of Global Cash & Carry. At 22.10 hours the other officers and I challenged the driver of the vehicle and asked to inspect the premises of Global Cash and Carry. The shutter door of the unit was opening when this challenge took place.

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An individual closed the shutter door and, whilst it was evident from the noises and lights inside the unit that there were people inside the premises, no one was prepared to either come out or open the premises.

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As Officer Nagra and I were about to interview Mr Hughes, we were approached by a number of Asian males who had arrived in a car and who said they were from a tyre company that occupied the same yard as Global Cash and Carry. They told me that they had responsibility for locking the gates and asked us to remove all of the vehicles from the yard in order to do so. This we subsequently did.

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Officer Nagra and I subsequently interviewed the driver of the tractor unit, Henry Hughes....”

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37. Officer Lesley Villers statement deals with the interview with Mr Hughes and includes an extract from the handwritten notes made by her at the time. Mr Hughes confirmed that he had collected the trailer from “M T Manutes” in Calais and was due to deliver to Seabrooks in Barking on Friday morning. He also confirmed that he was intending to drop the trailer off at Smethwick although he did not know the address. Asked what he was doing “here” Mr Hughes replied “I was just turning around”

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38. It would appear from the statements of the officers that they did not leave the premises until well after midnight.

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39. Officer Stamps says in his statement “I left the vicinity with the other officers at 1.40 hrs”

40. Officers Dunckley and Nagra in their statements confirm this time of departure.

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41. Officer Villers says in her statement “At 00.10 hours I left the premises with the other officers.” This is in apparent conflict with the statements of the other officers.

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42. Although all of the officers were present and available for cross examination by the Appellant’s solicitor at the adjourned hearing only Officer Nagra gave evidence to the Tribunal. Having affirmed that his evidence would be truthful Officer Nagra assisted the Tribunal by reference to photographs of the premises in question. One of these colour photographs showed the entrance to the yard with signage indicating

“Welcome to Global.....” This photograph appears to have been taken at nighttime but further photographs exhibited to Officer Nagra’s statement show quite clearly that the opening into the yard is wide and displays a significant splay onto and when viewed from the road.

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43. The second photograph referred to by Officer Nagra was an aerial view of the yard and of the Cash & Carry premises which occupied a significant part of the site as a whole. There were a considerable number of vehicles in the yard area – approximately 30 trucks and/or trailers of different sizes. The white shutter of the entrance to Global Cash and Carry was clearly visible as was the ramp down to the shutter.

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44. Asked by the Tribunal where Mr Hughes’ vehicle was when he was challenged Officer Nagra said that Mr Hughes was “three quarters of the way down and was reversing down to the shutters which were opening”

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45. Officer Nagra said in answer to a question from Mr McNamee that he did not hear Mr Hughes saying that he was going to another address in Smethwick.

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46. A map prepared by Officer Nagra was also produced. He had, he said, been asked to produce this so as to show where Mr Hughes was stopped by the officers in relation to where he had said to one of the other officers he was going. The Global Cash & Carry site was, according to this map, some 5 miles away from the Smethwick premises of Safe Storage, an old GKN site. The Global site was perhaps 2 to 2.5 miles on the “wrong side” of the M5 motorway from the Smethwick premises.

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47. Officer Nagra agreed that at the time the vehicle and trailer was first seen it was dark. There was some floodlighting in the yard but this did not cover the whole of the yard. The area which was best illuminated was the entrance ramp to the Cash and Carry premises of Global.

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48. It was confirmed by Officer Nagra that no further enquiries whether to establish Mr Hughes account or to discredit it had been made. In fact Officer Martin does refer in her statement to some enquiries concerning the relevant documentation relating to the load carried by Mr Hughes.

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*The Tribunal’s consideration of the appeal*

49. The law with respect to duty suspension is not in issue between the parties.

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50. Regulation 6 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 states quite plainly that excise goods are released for consumption in the United Kingdom at the time when the goods “leave a duty suspension arrangement” On such a release a duty point arises and the relevant duty becomes payable.

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51. In this appeal the goods were on route from MT Manutention an authorised bonded warehouse to the Seabrook facility at Barking in Essex, another bonded warehouse. Had the delivery been made to Seabrook, as Mr Hughes says he was planning, no question of duty would arise until the goods were released from Seabrook to a purchaser or other party not involved in any further duty suspended movement of the goods.

52. It is not disputed by Mr McNamee that had the goods been delivered by Mr Hughes to Global Cash and Carry that would have been a diversion of the goods occasioning a duty point to arise. Although he made no such concession the Tribunal would not have been surprised if Mr McNamee had been prepared to accept that even if it was clear on the evidence that Mr Hughes was in the process of delivering the goods in the trailer to Global Cash and Carry that too might be sufficient to trigger a duty point.

53. Mr McNamee's case is however that Mr Hughes had no such intention. Mr Hughes had diverted from his planned route to Smethwick by reason only of road works on or adjacent to the exit from the M5 motorway which had taken him down the road in the wrong direction. Mr Hughes sole purpose when apprehended by the officers concerned was, says Mr McNamee, to turn his vehicle and trailer around and to get back to where he had booked a parking place for the night at Smethwick.

54. The dispute between the parties is therefore substantially one of fact for the Tribunal to determine on the evidence before it.

55. The burden of proof rests with the Respondents who allege an attempt to deliver the goods to Global Cash and Carry.

56. The standard of proof required is the civil standard namely that of the balance of probabilities.

57. The evidence of the officers concerned in this matter is not, we find, entirely satisfactory. We say this for the following reasons.

58. Although Officer Nagra in his evidence given to the Tribunal refers to Mr Hughes as being "three quarters" the way down to the opening shutter door this is not evidence which appears in the statements originally made either by him or his colleagues.

59. In his statement of 7 October 2014 Officer Nagra states "At 22.10 hours I observed the driver of the tractor unit and trailer.....reversing into the aforementioned yard" He goes on to state "As I observed the lorry reversing into the yard and towards Global Cash and Carry down the ramp....."

60. In his handwritten note which is understood to have been made at the time, Officer Nagra states: "At time of challenge the tractor unit was being reversed towards the entrance of Global Cash and Carry" Nothing was said to the effect that

the tractor and trailer unit was almost at the shutter door as the Respondents, through Officer Nagra, would have the Tribunal accept.

5 61. There is no mention of this close proximity to the shutter door in any of the other statements of the officers that night. Officer Stamps says that he saw the tractor and trailer vehicle “reversing into the yard.....” and that the challenge was made as the vehicle “was reversing towards the entrance of Global Cash and Carry”

10 62. Officer Dunckley does not even mention an approach down the ramp towards the Cash and Cary. He states “I saw that the gates were now open and a tractor unit.....coupled to a trailer **was reversing into the yard which is an open space in front of a number of industrial units**” (*emphasis added*). The Tribunal accepts this to be a more accurate statement of the true position. It is one which substantially accords with what Mr Hughes says.

15 63. We also find less than convincing the account given by the officers of the interview with Mr Hughes. According to the Respondents’ evidence Mr Hughes did not know where in Smethwick he was going. Mr Hughes told the Tribunal that he made clear to the officers that he was going to safe parking premises in Smethwick and that he offered to take the officers there, an offer which was he says declined.

20 64. Officer Villers’ brief account does confirm that the Smethwick premises were mentioned by Mr Hughes but officer Nagra makes no mention of this. He states that it was Officers Stamps and Villers who actually spoke with Mr Hughes which explains this but it does seem surprising that he apparently knew nothing of what Mr Hughes was contending when the decision, to which he was party, was made to seize the tractor and trailer.

25 65. Officer Stamps appears to go even further than Officer Villers in stating that when asked where in Smethwick he was going to drop the trailer off Mr Hughes said to him that he did not know. This is quite different from the account of his colleague Officer Villers.

30 66. The evidence of the officers makes no reference to Mr Hughes’ offer to show them where he had booked the tractor/trailer unit in for safe parking. Equally no mention is made of the fact that Mr Hughes did (according to his evidence) eventually relent and gave his address as requested.

35 67. It was submitted by Mr McNamee on behalf of Mr Hughes that the entire process of seizure started at approximately 10.10 pm on the evening of 29 November 2011 and went on until around 01.40 the next morning, a period of over 3 hours yet the account of the interview appears to be limited to a number of brief statements which clearly favour the Respondents’ case. It seems unlike to the Tribunal that Mr Hughes made no further relevant statements than those attributed to him in the 3 hours  
40 following his first being approached.  
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68. Mr Hughes' account seems to the Tribunal to make rather more sense than that of the Respondents. He says that he came off the M5 at a point where road works were being executed such that he managed to get himself on the wrong road in precisely the opposite direction from that intended. He needed to turn his vehicle  
5 around. We can readily accept that this would be no easy task given the length of the vehicle. The trailer was 40 feet long to which must be added the length of the tractor unit. The appearance of the open gates at Global must have been very welcome from Mr Hughes point of view. He had to reverse his vehicle in. It comes as no surprise to the Tribunal that he would want to back into a well lit area such as the entrance to the  
10 Cash and Carry rather than to risk negotiating reversing into an ill lit area which would be likely to be populated with other vehicles.

69. Mr Hughes' evidence was that he was unaware of the shutter doors opening when he was stopped by the officers. We conclude from this that he had reversed as far as he needed and was paying attention to moving forward at the time, although he  
15 may not have actually started to do this.

70. There is also the matter of the evidence given by Mr Donnelly. If his evidence is accepted by the Respondents, and no significant challenge was made to it by Mr  
20 Pomfret, then it seems bizarre that Mr Hughes would have gone to the trouble of booking a parking place for what would presumably have been an empty trailer.

71. Stranger still would have been Mr Hughes plan to travel all the way to Liverpool the next day to pick up an empty trailer if he already had one parked up in Smethwick.  
25 We accept Mr Hughes evidence. He did not appear to be doing other than telling the truth. He answered questions readily and was in general terms a witness who gave the Tribunal some confidence.

72. We did not form the view that Mr Donnelly was other than a truthful witness  
30 and we prefer the account of Mr Hughes therefore that he had intended to leave the trailer at Smethwick until he was able to drive back down to Seabrook to deliver the trailer as booked on the following Friday.

73. We find it disappointing that the Respondents felt it to be unnecessary to make  
35 any further enquiries in this matter which might have had the result of making it clear that either Mr Hughes' account was a truthful one or that he had been untruthful in his explanation of what he was doing when stopped by the Respondents' officers on the night in question.

40 74. For example it would not have been difficult to establish whether as Mr Hughes states he had arranged to deliver the goods to Seabrook on the Friday morning. The Respondents did not trouble to do this.

75. Similarly, having been made aware of Mr Hughes's account (even if according  
45 to the Respondents' account this was later in the chain of events) that arrangements had been made to store the trailer at the old GKN facility at Smethwick it would not

have been difficult to confirm this fact avoiding the necessity of Mr Donnelly having to be called to testify to this effect.

5 76. The Respondents could also have checked, even after the event, the evidence of Mr Hughes concerning the road works with the appropriate highway authority to see what works were being undertaken that night and whether the account of a road being blocked off or diverted was likely to be true. Again we heard no evidence about this and have to assume that the Respondents did not trouble to investigate this aspect.

10 77. It was also something of a puzzle to the Tribunal that the officers had chosen to intervene before any act clearly consistent with a diversion of the goods had actually taken place. The Tribunal asked about this and was told that experience had shown in cases of this nature that there was a danger that the trailer unit and its tractor would entirely enter into the Cash and Carry premises so that the enquiry could not be followed up and more particularly the goods would have either disappeared or would have been too difficult to identify.

15 78. We find this explanation unconvincing. Had the tractor/trailer unit disappeared into Global Cash and Carry we would have had very little difficulty in concluding that a diversion of the goods had taken place and that a duty point had arisen. The premises could be examined the next day either by consent of the owners or with enforcement powers assisted if necessary by the police. A watch could have been kept overnight on any suspicious movements and any vehicle thought to have been carrying the goods could have been stopped and checked. We find it difficult to accept that these or other steps which could have clearly established what was going on could not have been taken by the Respondents.

25 79. The regrettable impression with which the Tribunal has been left following hearing the evidence of the Respondents is one of an exercise in which the officers concerned had already determined the Appellants' intention to deliver the goods to the Cash and Carry and that they were doing no more than they considered necessary to confirm that view.

30 80. This might not have mattered quite as much had we perhaps been made privy to the reason why the officers concerned had attended at the yard in the first place. Had we learned that as a result of enquiries the officers had good reason to believe that Mr Hughes intended to deliver the contents of the trailer to Global the officers' somewhat early intervention might have made some sort of sense.

35 81. It became clear however that no evidence of this sort was to be advanced. Indeed there was simply no explanation for the attendance of the officers on the night in question. For all the Tribunal knows the officers were keeping a particular watch on the activities of Global rather than Mr Hughes. This could explain the haste with which the person operating the shutter door closed it and refused to respond to the officers after they had identified themselves. This is of course speculation and cannot form a basis for a proper assessment of the facts. It does however demonstrate the essentially inadequate nature of the evidence adduced to the Tribunal.

82. Two other points were made on behalf of the Respondents which it is right that the Tribunal should address.

5 83. The first concerns the fact that, to the knowledge of the Respondents, no one has  
turned up at Seabrook to claim the goods or has questioned where they may be.  
Adverse inference against the Appellant is drawn from this circumstance. However  
the Tribunal heard that no enquiries had been made of Seabrook so it is unclear how  
10 this statement can be made with any degree of certainty. Quite what the position with  
respect to the absence of any claimant might be is unclear and, again, at best  
speculative. For all we know an insurance claim may have been made in respect of the  
loss. Again this is speculation only. How adverse inference can be drawn against Mr  
Hughes who may know just as much or little about the matter as the Respondents in  
this respect is less than clear to the Tribunal.

15 84. The second matter concerns the record maintained in relation to the movement  
of the goods on the electronic Excise Movement and Control System (EMCS) referred  
to in the statement of Officer Louise Martin.

20 85. Officer Martin explains in her statement that when a duty suspended movement  
commences it is incumbent upon the dispatching warehouse to input the details of that  
movement in the EMCS and to obtain a reference number (ARC number) which must  
be quoted on the documents accompanying the load.

25 86. When the load is received by the consignee in the receiving warehouse, it is  
their responsibility to record the receipt on the EMCS.

30 87. In the case of the goods the subject of this appeal the Respondents were advised  
by the EMCS team that the record of the ARC showed that the consignee had not  
recorded receipt of the goods but the French consignor warehouse had manually  
receipted the movement on the EMCS system.

88. This says Officer Martin:

35 “suggested to me that they had been advised by the receiving warehouse that  
they had received the load but for some reason they could not acknowledge this  
on the EMCS and as such the warehouse in France had closed off the movement  
manually.

40 It would be wholly incorrect for any party to record the load as having been  
received if that had in fact not happened.

45 If the UK warehouse had received the expected load then the one being carried  
by the Appellant would be a duplicate load, travelling illegally on the same  
ARC reference number, and as such the Appellant, who was holding the goods  
at the duty point would be liable for the excise duty.....”

89. The simpler and, we would suggest, rather obvious explanation which Officer Martin does not canvas is that the goods did not arrive at Seabrook because they were seized by the Respondents. Officer Martin neglected to point out that the movement of these goods had been manually closed in France as long after the non-delivery to Seabrook as 6 August 2012 (i.e. nearly 9 months later) no doubt simply to remove this from the records.

90. Officer Martin's conjecture and account of a possible duplicate load is in our view, fanciful and cannot reasonably be said to amount to evidence which is relevant to what Mr Hughes was doing on the night of 29 November 2011.

91. For the reasons we have outlined above we cannot be satisfied on the balance of probabilities that the Respondents have discharged the burden of proof on them. We find that the account given by Mr Hughes represents the more reasonable explanation of the events on the night of 29 November 2011.

92. We should mention the fact that quite apart from dealing with the facts of this appeal Mr McNamee raised another objection to the Respondents' decisions in the event that the Tribunal was not persuaded as to the veracity of his client's account. This concerned the question whether as a matter of law Mr Hughes could properly be considered as being the person who had de facto or legal control of the goods at the duty point and was therefore liable to the assessment and penalty as the Respondents contend. Mr McNamee referred to the Court of Appeal case of *Wood and Taylor and the Queen* (Neutral Citation Number [2013] EWCA Crim 1151).

93. In view of our findings on the facts it is unnecessary to make any findings or express any view concerning the arguments advanced by Mr McNamee in this respect and we do not do so.

94. It follows from what has been stated above that this appeal must be allowed. It is understood that the tractor unit was unconditionally released back to Mr Hughes and that he was told that the trailer unit would also be returned on the same basis subject to proof of ownership. We trust that this has now been dealt with.

95. The assessment to duty is to be discharged as is the penalty.

96. This document contains full findings of fact and reasons for the decision set out above. Any party dissatisfied with either of the decisions has a right to apply for permission to appeal against it/them 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.

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**CHRISTOPHER HACKING**

**TRIBUNAL JUDGE**

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**RELEASE DATE: 21 January 2015**

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