



TC04330

Appeal number: TC/2014/00918

Excise Duty – alcohol, vehicle and trailer seized – instructions received from unknown person by mobile telephone - appellant made two cross-channel return trips in quick succession – trailer swaps – appellant could not contest seizure – Regulation 13(2) making delivery or holding

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MICHAEL DUGGAN

Appellant

- and -

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

**TRIBUNAL: JUDGE ALASTAIR J RANKIN
 MR DAVID MOORE**

Sitting in public at Tribunals Unit, 3rd floor, Bedford House, 16-22 Bedford Street, Belfast, BT2 7DS on 3 March 2015 at 10.30

Mr Terence McCleave BL for the Appellant

Mr Joshua Shields BL, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by Michael Duggan against a decision by The Commissioners for Her Majesty's Revenue and Customs (HMRC) to assess him for alcohol products excise duty of £27,247.00 for holding goods for a commercial purpose in the United Kingdom without payment of duty. The assessment was issued under cover of a letter dated 22 February 2013.

The Facts

2. The basic facts are not in dispute. On 13 November 2012 Mr Duggan drove vehicle registration number GN54OKE together with an empty trailer on the 16.40 sailing from Dover to Calais. He returned on the 02.20 sailing on 14 November 2012 from Calais to Dover with goods manifested as 26,000 kgs of foodstuffs. Mr Duggan then drove the same vehicle with an empty trailer on the 13.55 sailing from Dover to Calais on 14 November 2012 and returned on the 07.45 sailing from Calais to Dover on 15 November 2012 with goods manifested as 25,343.04 litres of alcoholic beverages. For all four journeys the driver was shown as Duggan with the hauliers shown as TR Logistics and T&R Logistics.

3. When Mr Duggan arrived in Dover around 09.00 on 15 November he was stopped by Border Force officers. Mr Duggan produced various documents for the load of beer which were faxed to the Revenue Fraud Detection Team (RFDT) for checking. These documents were first a CMR with reference BL007542 dated 13 November 2012 listing mixed beers consigned from Les Vins Du Tunnel from the account of Malt Beverages BVBA, showing the goods were destined for Dynamic Storage Ltd for the account of Edward James, the haulier was shown as Visima Limited vehicle registration number N306DPU and the trailer as T7 and the Administrative Reference Code (ARC) as 12FR0074000044918197. Secondly Mr Duggan produced a Bon de Livraison with reference BL007542 dated 13 November 2012 showing the same companies and goods as the CMR.

4. Mr Duggan informed the Border Force officer that he had not seen the trailer being loaded as he completed a trailer swap. The officer was then advised by RFDT by telephone to seize the vehicle, the trailer and the load. The officer advised Mr Duggan of the seizure and served on him a Seizure information notice and a Warning letter about seized goods. Mr Duggan then declined to stay for interview as he thought he could be of no further assistance to the officer as he was neither the owner of the lorry nor the owner of the goods.

5. On 21 November 2012 Revenue Fraud Detection Team sent identical letters to Mr Duggan, Les Vins Du Tunnel, Edward James Ltd, MV Haulage, Visima Limited, Malt Beverages BVBA and Dynamic Storage Ltd advising that the vehicle, the trailer and the goods were seized as liable to forfeiture under regulation 88 of The Excise Goods (Holding Movement and Duty Point) Regulations 2010 and section 170B of The Customs and Excise Management Act 1979. The letters also advised that if any

of them wished to claim the goods were not liable to forfeiture they had one month from the date of seizure to give notice.

5 6. The legality of the seizure was challenged by Malt Beverages BVBA and Visima Limited. Refusal letters were issued on the grounds that the claims were made out of time.

10 7. By letter dated 8 March 2013 McNamee McDonnell Duffy Solicitors LLP on behalf of Mr Duggan wrote to HMRC requesting a review of the duty assessment issued under cover of HMRC's letter dated 22 February 2013. As HMRC did not have any authority from Mr Duggan to correspond with the solicitors there was a delay while an appropriate authority was provided.

8. By letter dated 31 July 2013 an Appeals and Review Officer of HMRC advised Mr Duggan that the assessment should be upheld.

15 9. By Notice of Appeal dated 23 August 2013 the solicitors appealed the assessment on the grounds that Mr Duggan was simply the driver of the vehicle driving on instructions from the freight forwarder. Mr Duggan had no knowledge of or could not have had any knowledge of the status of the documentation presented with the load. As Mr Duggan was not the owner of the goods he was not in a position to submit a notice of claim or challenge the forfeiture of the goods. As simply the driver of the vehicle Mr Duggan claimed that he was not aware of the identity of the owner and was simply moving the goods under instruction from point A to point B. The solicitors claimed that in law Mr Duggan could not be responsible for raising a duty point. Only the persons responsible for causing these goods to arrive at the duty point could be responsible. Mr Duggan exercised no decision making function in this regard and could not be liable.

25 **The evidence of Mr Duggan**

30 10. Mr Duggan gave evidence under affirmation. He is aged 55 and had been driving lorries since he gained his HGV licence at age 21. He was self-employed in November 2012 and remains self-employed. In November 2012 he was working in the London area. He received a telephone call from someone. He did not know the caller's name but was told to go to Titon Truckstop where he could collect a vehicle and empty trailer which he should drive to Calais. He was advised he would find the keys under the bonnet. He would be paid a fixed fee of £300.00 which would be paid in cash at the end of the week.

35 11. After arriving in Calais Mr Duggan received a telephone call, probably from the same person, to go to a secure compound on the road to Boulogne. At the compound he carried out a trailer swap with the help of a foreign person. He did not look inside the trailer as it was sealed but the paperwork indicated foodstuff. His instructions were to deliver the load back to the Titon Truckstop but at some time during the journey he was told by telephone to go to a layby on the A13 where he should do a trailer swap and drive another empty trailer back to Calais.

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12. At some point he was told to take this empty trailer to the same secure compound in Calais and effect another trailer swap. This time there was nobody else present though he knew where to find the key to the gate of the compound. He swapped the trailers over himself and found the paperwork for the contents of the trailer strapped to the dolly leg of the trailer. Mr Duggan stated that he was paid another £300.00 for this round trip.

13. On cross-examination by Mr Shields Mr Duggan said he had never seen the insurance document which RFDT had found in the lorry and it had never occurred to him to check that the vehicle was insured before he undertook the first journey. He did not carry any personal insurance. Mr Duggan admitted that the person who made the original telephone call did not know Mr Duggan or his address and neither did Mr Duggan know the name and address of the person who made the telephone call. After Mr Duggan left Dover following the seizure he took a bus to London and went to Titon Truckstop where he collected £600.00 in an envelope with his name.

15 **The evidence of HMRC**

14. Mr James David Taylor a CITECH Higher Officer at HMRC affirmed that his witness statement dated 1 July 2014 was correct. This statement advised how he had calculated the excise duty and he confirmed that he had issued the excise duty assessment.

15. Mr James Philip Baker, a Border Force Revenue Fraud Detection Team Officer affirmed that his statement dated 20 February 2015 was correct. The statement had annexed to it a copy of a paper from the insurance company Aviva which had been found in the vehicle. The insured appeared to be Martin Vallely trading as MV Haulage with an address at 52 Armagh Road, BT71. Also annexed to the statement was a licence granted to Michael Joseph McVeigh authorising him to engage in the international carriage of goods by road.

16. Mr Baker in his statement states that ‘if a driver collects a trailer containing excise goods from premises other than a legitimate excise warehouse then he/she should be aware that this carries an element of risk not knowing where the consignment or the paperwork has originated from.’

17. Mr Baker notes in his statement that the trailer identification numbers on both journeys from Calais to Dover were not manifested and that mis-manifesting of trailer numbers is indicative of excise diversion fraud to disguise any movements of trailers associated with an ARC. Mr Duggan had been unable to provide any specific information regarding the earlier movement of goods into the United Kingdom on 14 November, Mr Baker concluded that it was reasonable to assume that Mr Duggan would have known the commodity of the goods and delivery location from a movement the day before.

18. Using Departmental systems Mr Baker had established that the Driver and Vehicle Licencing Agency had no interaction with the seized vehicle registration number GN54OKE for the last three successive years. The Departmental Database

had also failed to find a VAT registration for MV Haulage or for companies at No 52 with a post code BT71.

19. Mr Baker carried out internet checks on MV Haulage, MV Haulage Dungannon and Haulage Armagh Road but to no avail.

5 **The law**

20. The applicable provisions are:

10 20.1 Section 1 of the Finance (No. 2) Act 1992 gives HMRC the power to make regulations that fix the time when the requirement to pay a duty will come into effect. The time at which a person becomes liable to pay such a duty is known as an ‘excise duty point’.

15 20.2 Regulation 13(1) of the 2010 Regulations states that ‘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.

20.3 Regulation 13(2) of the 2010 Regulations states ‘the person liable to pay the duty is the person –

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

20.4 Regulation 13(3) of the 2010 Regulations states ‘For the purposes of paragraph (1) excise goods are held for a commercial purpose if they are held –

- 25 (a) by a person other than a private individual; or
(b) by a private individual (“P”), except in a case where excise goods are for P’s own use and were acquired in, and transported to the United Kingdom from, another Member State by P.

20.5 Regulation 88 of the 2010 Regulations states ‘If in relation to any excise goods that are liable to duty that has not been paid there is –

- 30 (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.’

20.6 Article 7(2) of Council Directive 2008/118/EC, of 16 December 2008, states:

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

- (a) The departure of excise goods, including irregular departure, from a duty suspension arrangement;
- 5 (b) The holding of excise goods outside a duty suspension arrangement where excise duty has not been levied pursuant to the applicable provisions of Community law and national legislation;
- (c) The production of excise goods, including irregular production, outside a duty suspension arrangement;
- 10 (d) The importation of excise goods, including irregular importation, unless the excise goods are placed, immediately upon importation, under a duty suspension arrangement.

20.7 Paragraph 3 of Schedule 3 of the Customs and Excise Management Act 1979 (CEMA) states that ‘Any person claiming that any thing seized as
15 liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of the date of the seizure, give notice of his claim in writing to the Commissioners at any office of customs and excise.’

20.8 Paragraph 5 of Schedule 3 of CEMA states ‘If on the expiration of the
20 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, the thing in question shall be deemed to have been duly condemned as forfeited.’

The Case Law

25 21 It is clear from the legislation quoted in paragraph 17 and from the arguments presented both by Mr McCleave on behalf of Mr Duggan and by Mr Shields on behalf of HMRC that the decision in this appeal concerns the interpretation of the word ‘holding’ in Regulation 13(2)(b).

30 22 In R v White and others [2010] EWCA Crim 978 Hooper LJ in the Court of Appeal states at paragraph 189 that ‘a lorry driver who knowingly transports smuggled tobacco will, for the purposes of the Regulations, have caused the tobacco to reach an excise duty point and will have the necessary connection with the goods at the excise duty point.’ Although the Lord Justice stated this as a tentative view he appears to have been followed in R v Taylor and Wood [2013]
35 EWCA 1151. At paragraph 23 referring to the judgment in White Kenneth Parker J states ‘The correct interpretation of reg 13(1) on this point should be regarded as set out in this judgment’.

23 Kenneth Parker J continues:

[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 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.

[30] In this case Heijboer 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 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. 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. Wood was correctly shown on Yeardley's invoice to be Yeardley's client and the consignee of the goods that were being transported. 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 cigarettes throughout the transportation. TG was shown on the CMR to be the consignee, a designation which represented accurately, if incompletely, the true state of affairs. There is no good reason to distinguish the position, in this context, of the two appellants.

[31] There is nothing, furthermore, in this interpretation and application of Regulation 13(1) to the facts of this case that would be inimical to the purposes of the Finance Act. 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.’

5 24 We have quoted at length from this judgment as it is binding on this Tribunal and appears to be the most recent decision of the Court of Appeal in this area.

25 Mr McCleave referred the Tribunal to the decision *Gerald Carlin v HMRC* [TC/2013/03410]. First it should be noted that the decision in *Carlin* is not binding on this Tribunal. Secondly, there is a typing error in that decision in that in paragraph 30 reference is made to the judgment of Lord Justice Hooper in *R v May*. This should have been a reference to Lord Justice Hooper in *R v White* referred to in paragraph 19 of this decision.

Findings of Fact

15 26 The Tribunal found the evidence of Mr Duggan totally unconvincing. It is simply not credible that a person unknown to Mr Duggan would give him telephone instructions to collect a vehicle from the Titon Truckstop and drive it to Calais where he would receive further instructions concerning the collection of goods which he then drives back to England on the understanding that he was to return to Titon but instead at the last minute receives further telephone instructions to do a trailer swap in a layby near Titon and return with another empty vehicle to Calais where he was left to collect another load totally unsupervised. Despite having his lorry and its contents seized at Dover Mr Duggan was paid in cash for the two trips.

25 27 The Tribunal finds that any reputable vehicle owner would have been concerned by the seizure and would not have paid Mr Duggan for his services in these circumstances. Mr Duggan did not appear to find it strange that an unknown person should pay him in full despite having had the lorry, trailer and the goods seized at Dover.

30 28 The Tribunal therefore rejects the evidence put forward by Mr Duggan. As the CMR clearly detailed the types of beer which Mr Duggan was carrying he knew exactly the nature and quantity of the goods which were seized at Dover.

The Decision

35 29 The Tribunal accepts that Mr Duggan was legally unable to challenge the seizure of the goods or the vehicle as he was not the owner of either the goods or the vehicle. However under the legislation as noted in paragraph 17 the goods and the vehicle are deemed to have been validly seized in the absence of any challenge.

40 30 The paragraphs quoted above from *R v Taylor and Wood* make it clear 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. That is not the

position in this appeal. The Tribunal is satisfied that Mr Duggan was not an innocent party to the transportation of the goods seized.

5 31 As the decision in R v Taylor and Wood does not apply to the facts of this appeal Mr Duggan was therefore within the meaning of either Regulation 13(2)(a) or (b) of the 2010 Regulations.

10 32 The seized goods were travelling under a CMR dated 13 November 2012 but Mr Duggan did not collect them in Calais until late afternoon or early evening on 14 November. Mr Duggan was unable to explain to the satisfaction of the Tribunal why there was a delay between the issuing of the CMR and the transportation to England.

33 The burden of proof is on Mr Duggan to show that the assessment is wrong. Mr Duggan has failed to establish on the balance of probabilities that the goods seized were travelling under a valid CMR.

15 34 The proceedings before this Tribunal are not criminal proceedings for the purposes of Article 6 of the ECHR and therefore Mr Duggan's rights thereunder have not been breached.

35 The appeal is therefore dismissed and the duty assessed remains due for payment by Mr Duggan.

20 36 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.

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30 **ALASTAIR J RANKIN**
TRIBUNAL JUDGE

RELEASE DATE: 18 March 2015

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