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**TC04397**

**Appeal number: TC/2013/06432**

10 **EXCISE DUTY:** *goods seized and forfeited; duty assessed and penalty issued;  
whether driver liable as the person “holding” the goods – no.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

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**BRADLEY WILLIS**

**Appellant**

**- and -**

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

**TRIBUNAL:    JUDGE CHRISTOPHER HACKING  
                         IAN MALCOLM**

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**Sitting in North Shields on 25 February 2015**

**The Appellant, Mr Bradley Willis, appeared in person. He was unrepresented.**

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

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## DECISION

### *Background to the appeal*

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1. This was an appeal against decisions of the Commissioners:

(i) to issue an assessment for excise duty in the sum of £274,746; and

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(ii) to issue a penalty of £54,949

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

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2. The facts concerning the seizure of the dutiable goods on 3 August 2012 can be stated quite briefly and are not substantially disputed although the proper inferences to be drawn from those facts are in contention.

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3. The Respondents' Statement of Case provides a useful summary of the facts as follows.

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4. On 3 August 2012 the Appellant was intercepted by UK Border Agency Officers at Dover Eastern Docks as he travelled into the UK in a vehicle registration number M20 MEB. The vehicle had a trailer attached.

5. When interviewed the Appellant, Mr Willis, stated that the load he was carrying was oil which he had brought from "just near the Dutch/Belgian border"

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6. Mr Willis handed over a CMR (International haulage document which freight drivers travelling across from the Continent are required to carry) marked NL 10018 to the officer who had stopped him (Officer Merricks). Mr Willis added that the trailer was sealed and the haulier was Tru Contracts Ltd.

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7. Officer Merricks subsequently detected a load of cigarettes in the vehicle. The goods, the vehicle and the attached trailer were then seized.

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8. Two further UK Border Agency officers arrived. Mr Willis told them that he had been given the job of driving the load to the UK by telephone and confirmed he was told to pick up the vehicle at the trailer park at Thurrock. He had been offered £300 to pick up a trailer in Holland/Belgium.

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9. When he arrived there an unidentified man met him and directed him to a warehouse where he loaded. He was told to leave the trailer at Thurrock. Asked by Officer Riddell whether he had done any trips like this before, he said he had done some beer runs for which he received £50 a trip.

10. A seizure information notice, a warning letter, Notice 1 and Notice 12A (advice as to what steps can be taken following a seizure of property) were issued to Mr Willis. The warning letter set out in some detail the further action that might be taken against Mr Willis, including the issue of an assessment to excise duty and a wrongdoing penalty.

11. On 24 December 2012 an assessment Reference number EXA 11342/12 in the sum of £274,746 was issued to Mr Willis.

12. On 21 January 2013 Mr Willis met with HMRC Officers Nattras and Tilney at Gilbridge House, Sunderland. He provided further information in relation to the detection of the goods. He told the officers that he had been paid £350 to drive the load

13. Near the collection point on the Dutch/Belgium border he had been met by an unidentified man at an agreed point and was directed to a small industrial unit. When he asked about the load he was told it was 15 pallets of oil. The load was already on pallets and the white boxes he saw were shrink wrapped. Mr Willis said that he had no opportunity to check the load. He noted that only 15 pallets were to be loaded whereas a full load would be between 26 and 28 pallets.

14. On 19 April 2013 a wrongdoing penalty in the sum of £54,949 was issued to Mr Willis under Reference number EXP 5112/13.

15. Mr Willis requested a review of the assessment and penalty decisions. This was completed on 9 August 2013 when the decisions were upheld.

#### *Mr Willis's account*

16. In his Notice of Appeal Mr Willis states:

“I wish to appeal against this decision because I was just a driver doing a delivery. I am not allowed to open the load. It is just put in the wagon. The paperwork is given to me and I deliver it. I am not the owner of the vehicle and do not organise the loads. This has caused me so much stress I had a heart attack on 12 July in Ashford, Kent. I was then sent to University Hospital in County Durham and then to James Cook Hospital in Middlesbrough for triple heart bypass. I have been back in hospital twice since with complications.

Why is the owner of the wagon not taking any responsibility. I have telephoned a solicitor who says I should not be involved.

Most of this form I do not understand. I have put my telephone number on the front if anyone needs to contact me”

#### *The hearing*

17. The evidence presented by the Respondents included a detailed written witness statement by Officer Nattras in which the facts concerning the seizure as related above were confirmed.

18. This statement did however include additional facts relevant to the matter.

19. It appears for example that someone representing the owner of the vehicle took steps to commence condemnation proceedings before the Magistrates' Court within the 30 day period allowed for this. Subsequently however the owner withdrew the restoration request. As a result the Respondents are aware of the identity of the owner of the vehicle.

20. Officer Natrass also states that Mr Willis told Border Force Officers that the job was given to him by a friend of a friend although this person was unknown to him. The discrepancy concerning the precise sum agreed to be paid/which was paid is repeated. (£300/£350).

21. The statement refers to a telephone call made by Mr Willis to Officer Natrass on 7 January 2013 in which he denied all knowledge of the cigarettes in the load and stated that he did not own them. Arrangements were discussed concerning an interview. This was eventually held on 21 January 2013 as recorded above.

22. Officer Natrass gives a detailed account of the interview. Relevant facts which emerge from this interview include the following.

23. Mr Willis told the officers (Officer Tilney was also there) that the man who had given him the job was called Shane but was sometimes also referred to as Sean or Seamus. Mr Willis said that he was, on the day in question, employed by a company called TFM. He also mentioned a name Paul Tabb as another person for whom Mr Willis had worked. He got the call previously referred to asking if he could transport a load of engine oil. He decided to take the job on a self-employed basis. There is no evidence of any written service agreement or contract concerning the job.

24. Mr Willis told the officers that it was not unusual to receive offers for driving work through other drivers. His phone number is, he said, "out there" and drivers will pass it on to one another.

25. He had been told that the price which was to be paid was £350. He was to collect a load in Belgium because a wagon over there, originally intended for the run, had broken down. This price was normal for a job of this nature.

26. Mr Willis said that he had driven to Thurrock services where he left his TFM wagon and picked up the other wagon. He had been given the registration details of the wagon. He was told what bay it was parked in and to locate the keys which had been placed under the grille, He was told to drive towards Maastricht following which someone would be in touch with him to explain where to go. His return ferry ticket had been paid for. He took with him a small holdall with personal effects inside. He confirmed the presence of insurance papers in the wagon but did not take note of any of the details.

27. Concerning the identity of the person/s who instructed Mr Willis to undertake the job Mr Willis said that there were two brothers called Shane (or possibly Sean or Seamus) and Gerard. Both were from Ireland. He had no business or company name for them or addresses. He believed it was Shane who telephoned him to give him  
5 details of the job and Shane also who called him when he was in France as to the further instructions concerning the pick-up point. He had, he said, tried to call Shane but the number dialled was always unavailable. The person who normally drove the truck was called "Pace" who was Shane's brother. Pace's wife was having a baby and that is why the job was offered to him. Mr Willis went on to say that it may have been  
10 a "Geoff or Wok" (who he knows as drivers) who first contacted him telling him about the offer to drive. Mr Willis understood that the job simply to be to "ship out, load and then bring it back and drop it in the yard" when finished.

28, Mr Willis has told the officers that he has tried to find out who owned the  
15 wagon by contacting DVLA but they would not provide any information to him. He had heard that someone had asked for restoration of the vehicle and stated that HMRC should pursue this matter. Mr Willis had brought with him his "Orange" telephone records but these did not cover the relevant dates. He subsequently produced the records between 02/08/2012 and 09/08/2012 which, according to Officer Nattrass's  
20 statement, revealed at least 4 numbers of interest. It appears however that the numbers were for pay-as-you-go mobiles which are not readily identifiable.

29. Mr Willis gave oral evidence to the tribunal although it became quite clear during the course of his doing so that he was suffering considerably from stress. Mr  
25 Willis is not a well man as explained in his Notice of Appeal and he told the tribunal that the worry of this matter hanging over him now for over two and a half years has contributed to a worsening of his condition. At one point during the hearing it became necessary to adjourn as Mr Willis was not able to proceed.

30. 30. Because Mr Willis was unrepresented it was necessary for the tribunal to take his evidence orally directing him where appropriate to relevant issues. Mr Willis was also cross examined by Mr Lloyd.

31. Mr Willis told the tribunal that he had only been working for TMF (the "F" stands for Fitzsimmons) for just over a month. He confirmed that he was a driver by  
35 trade who now worked for a firm called Hargreaves. A friend had told him that working for TMF he could earn good money – between £600 and £800 a week. TMF was based at Thurrock truck stop where it kept its wagons. The people there with whom he worked were "Young Tommy or Chubby (properly called Daniel).

32. Mr Willis said that for about 3 weeks with TMF he had done trips "over the water" (by which the tribunal understood across the Channel). He would pick up goods at a warehouse near to the Channel Tunnel and deliver to either Seabrooks or to  
40 Liverpool, in each case bonded warehouses. He would be paid £450 for a run to Liverpool and between £250 to £300 for delivery to Seabrooks.  
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33. On occasions when he only had an empty trailer for the return journey he would defer his trip back to the UK thus allowing another driver to get a full load back to the UK more quickly and for this “queue jumping” he would receive £50. Sometimes he would do this several times for each of which he would receive £50.

5 34. On the day in question he had received a telephone call from Geoff who told him that there was a problem with a unit intended for delivery back to the UK. It had broken down. The load was near Maastricht. Mr Willis said that because his earnings that week had been very small (around £150 only on changeovers). He jumped at the offer of this trip for which he was told he would earn £350.

10 35. Geoff told him that as he was interested he would pass on his telephone number to the person concerned. Shortly he received a call from someone who said:

“Are you the lad who is going to cover the breakdown for us in Belgium?”

Mr Willis replied “Yes – I am the lad who is going out there”

15 He said “Have you a satnav?”

Mr Willis replied that he had

20 36. Mr Willis told the tribunal that he had some knowledge of the area on the Dutch/Belgian border as he had previously been there when working for Curries International of Dumfries, a large transport company.

25 37. He found his way to the industrial estate where he was to pick up the load. He was contacted there by someone who did not give him his name but who said he would guide him to the pick-up spot. He did so to a warehouse. It did not appear to be a bonded warehouse. The person concerned said “Have you come to pick up this load?” He said “You were due earlier”. Mr Willis continued “The shutter doors of the warehouse were opened and I reversed the back end of my trailer into the shutter doors. I asked how many pallets there were. The man said there were 15 pallets all of which were ready for loading which was achieved using a fork lift and a pump truck”.

30 38. Mr Willis said that he saw one of the pallets leaking. The leak appeared to come from the second box on the top of the pallet. The person helping with the loading removed 4 cans out of the package and wiped these down placing them in a new box. Mr Willis said that he had at some stage been told the load was oil and the liquid leaking from the box was oil.

35 39. The CMR for the load was written out in Mr Willis’s presence in the warehouse office and stated the load to be of “engine oil” ( although the word “engine” had been misspelt).When the loading was complete Mr Willis shut the doors of the trailer which were then sealed. The journey back through France and across the Channel was, he says, uneventful.

#### *The law*

45 40. It is not disputed by Mr Willis that the Respondents were entitled to seize the goods and/or the vehicle and trailer. That a duty point has arisen with the discovery of the smuggled cigarettes is also accepted as correct. The legality of the seizure is not at

issue and accordingly much of the law cited in the Respondents' Statement of Case is not on point.

41. It is of the essence of Mr Willis's appeal that as a driver with no other interest  
5 in the goods concerned he cannot properly be considered to be "holding" the excise goods as the Regulations require.

42. The Respondents rely on the provisions of Regulations 13(1) and 13(2) of the  
10 Excise Goods (Holding Movement & Duty Point) Regulations 2010 ("the Regulations") as follows:

13(1) Where excise goods already released for consumption in another Member State  
15 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 so held.

13(2) Depending on the cases referred to in paragraph (1), the person liable to pay the  
duty is the person  
20 (a) making the delivery of the goods;  
(b) holding the goods intended for delivery; or  
(c) to whom the goods are delivered

43. The Respondents' case is that Mr Willis was "holding" the excise goods  
25 concerned when he was stopped at the docks on 3 August 2012 and has thereby rendered himself liable to be assessed and penalised.

45. In adopting this position the Respondents plead as follows in their Statement of  
Case:

30 "The Appellant is liable to pay the Assessment as he was "*holding the goods intended for delivery*" pursuant to r13(2)(b) of the 2010 Regulations. The Appellant when questioned by Officers stated that he was offered the job (by  
35 phone) of driving a load of goods into the UK from Holland/Belgium where he met an unidentified man. The Appellant has also confirmed that he collected the keys from "under the grille". He was told to leave the trailer at Thurrock in the UK. The Appellant stated he was told the load was oil but did not have an  
40 opportunity to check the load and that the load was shrink wrapped. Given the circumstances surrounding the collection and delivery of the load and the Appellant previous experience as a HGV driver it is not unreasonable to expect him to have been alerted to the possible irregularities. The Respondents therefore submit that the Appellant must have known or should have known that the load he was carrying was not legitimate."

45 46. The tribunal was taken to a number of authorities as to the meaning of "holding". These included the Upper Tribunal decision in *HMRC v Jones and Jones* [2011]EWCA Civ 824; *HMRC and Nicholas Race* [2014] UKUT 0331 (TCC); *R v Taylor and Wood* [2013]EWCA Crim 1151; *R v May* [2008] UKHL 28; *R v White and Ors* [2010] EWCA Crim 978 and the First-tier decision in *Gerald Carlin and The*

Commissioners for Her Majesty's Revenue and Customs [2008]TC/2013/03410. Also referred to is the case of *HMRC v Noor* [2013] UKUT 071 which deals rather more generally with the question of whether the First-tier Tribunal is competent to consider and make decisions concerning an appellant's reasonable expectation (in that case to recover pre-registration input VAT on the supply of services). The relevance of this to Mr Willis's appeal is something of a curiosity as no mention is made of "legitimate expectation" in the Respondents' Statement of Case nor counsel's skeleton argument. Its inclusion appears to be limited to the issue of seizure. The tribunal accepts the principles established in *Noor*, an Upper Tribunal decision, and does not seek to suggest that Mr Willis had any reasonable expectation other than that the Respondents would act according to law. The principle that the tribunal's jurisdiction is circumscribed by the legislation from which its authority is derived is equally accepted.

47. Of the above little help is provided by the *Jones and Jones* and *Nicholas Race* cases as these too largely concerned the question whether the tribunal had jurisdiction to challenge the legitimacy of the seizure. The effect of the "deeming" provisions of the Customs and Excise Management Act 1979 ("CEMA") is accepted by the tribunal as appears more particularly hereafter.

48. The case of *May* is not directly on point, addressing as it does the question of liability in the context of a confiscation order in a criminal case following a guilty plea to a charge involving dishonesty. It does however emphasise the role of behaviour in such cases when the matter of "holding" may be relevant. It is Mr Willis's case that he has acted honestly.

49. The question of a driver's liability to excise duty was not settled in another case involving criminal activity, *White & Ors*, as it was said to be "both complex and does not arise in this case". However the court in its conclusion did go onto state:

"We say only this. It tentatively seems to us 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".

The court continued:

"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"

50. The *Taylor and Wood* and *Carlin* cases are of more immediate significance and we shall return to these in our consideration of the appeal.

51. *Taylor and Wood* was a case in which the facts were somewhat complicated. It was however of the essence of that case, so far as the matters at issue in this appeal are concerned, that parties engaged to transport textile products in which a large quantity of cigarettes were concealed and who were wholly unaware of the

concealment were held not to have been liable to the duty as they were not “holding” the goods for the purposes of regulation 13(1) of the Regulations.

52. In *Carlin* a similar decision was reached on facts not dissimilar to those here considered. This was, however a First-tier decision which is not binding on this tribunal although it is of some persuasive authority.

*The tribunal’s consideration of the appeal*

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53. The tribunal is bound to accept as valid the seizure and subsequent forfeiture of the goods and the vehicles concerned. Apparently there was an initial indication that the owner of the vehicle would proceed to a hearing of his challenge to the seizure of his property in the Magistrates’ Court but he seems to have had second thoughts about this and withdrew his challenge.

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54. The reason that this matter cannot be further explored is that the “deeming” provisions of paragraph 5 of Schedule 3 of CEMA provide that, absent a challenge to the forfeitures in the Magistrates Court, the goods/vehicles are deemed condemned as forfeit and this issue cannot subsequently be addressed by the Tribunal.

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55. If there had been any doubt about this matter it was effectively put to rest in the *Nicholas Race* decision referred to above.

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57. In the *Taylor and Wood* case Mr Justice Kenneth Parker said (at paragraph 31):

“To seek to impose liability to pay duty on either Heijboer or Yeardley (*the innocent hauliers*), 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”

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58. A similar result is recorded in the First-tier decision of *Carlin* in which the tribunal held that Mr Carlin was “merely a courier”.

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59. The tribunal found Mr Willis to be in some respects an unsatisfactory witness. He was at times upset by questions put to him. However the reason for this was quite clearly the stressful situation in which Mr Willis found himself. As indicated above he was at one point unable to continue and it was necessary to adjourn.

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60. It also has to be said that whilst it is apparent that Mr Willis has tried to provide the Respondents with information necessary to track down the owner of the goods and those from whom he took his instructions very little progress appears to have been made in these directions. All the very obvious hallmarks of a criminal conspiracy to smuggle the dutiable cigarettes into the UK are present on the facts revealed to the tribunal. It is the case advanced on behalf of the Respondents that Mr Willis knew or ought to have realised this.

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61. The reasons why that is said to be so appear in the Respondents' Statement of Case and in particular in the text shown at paragraph 45 above. These reasons can conveniently be summarised thus:

- 5       • that he was offered and accepted the job by phone
- .....from someone he did not know
- that he collected the keys of the vehicle used to import the cigarettes from "under the grille"
- that he was told to leave the trailer at Thurrock
- 10       • whilst the Appellant was told that the load was of oil he was not able to check the load as it was shrink wrapped

62. Even accepting that Mr Willis was at times inconsistent with respect to some of the details of the account he gave to the Officers when compared with what he may have subsequently said (for example the agreed payment - £300 later £350) the tribunal has not come to the conclusion that Mr Willis was untruthful. He has we believe done his best to explain the somewhat casual nature of his engagement and the matters which followed.

20 63. We accept Mr Willis's account as substantially correct and as indicating that he was acting honestly in the matter for the following reasons.

64. The arrangements concerning the way in which Mr Willis was introduced to the job were not, in the view of the tribunal, particularly unusual. Mr Willis was contacted by someone he knew (Geoff) who had heard of the problem encountered by another firm and saw a possibility to pass this on to Mr Willis. This does not strike the tribunal as indicative of criminal activity and we do not believe it is reasonable to consider that Mr Willis would have drawn any adverse inference from such a circumstance.

65. Similarly leaving the keys under a grille does not carry with it any indication of dishonesty. Mr Willis told the tribunal and we accept, that the Thurrock facility was a well secured facility for the parking of vehicles. Payment for entry was required. The tribunal has heard that this method of making a vehicle available following agreement was a common experience and no evidence to the contrary has been adduced.

66. In the circumstances leaving the vehicle at Thurrock at the end of the job is hardly surprising. Indeed why this should be considered as in any way suspicious has simply not been explained by the Respondents. Thurrock is a secure park for commercial vehicles and a logical place for hand-over. It has not been suggested that this is not the case.

67. It is said that the load was said to have been oil but that as it was shrink wrapped it could not be checked.

68. The tribunal noted the evidence given by Mr Willis that he saw oil leaking from one of the packages. This was not challenged by counsel (although given the very

apparent problems with Mr Willis's health on the day of the hearing we make no criticism of this as it may have been thought that to press him further at that particular juncture could have caused real harm). However the evidence on this from Mr Willis was quite clear. It was because of this event and also because he saw the CMR completed in his presence indicating that the load was of oil that he came to the reasonable conclusion that what he was carrying was oil. The handling of the goods was as described above by fork lift truck and by pump truck. Mr Willis had no opportunity therefore to judge the weight of the cartons which might have alerted him to the fact that he was not carrying oil but goods which were much lighter.

69. The Respondents' case is that either Mr Willis was part of a criminal conspiracy to smuggle into the UK the cigarettes found in the load or that he failed to take reasonable steps to check that he was not being used as an innocent dupe to facilitate such an activity.

70. The evidence to support either of these contentions is, the tribunal finds, unsatisfactory. Mr Willis did not strike the tribunal as other than an ordinary driver operating as many such do, largely using a network of informal contacts. There was nothing in the circumstances of this particular job which could be said to have alerted him to the real possibility of smuggling. He was not to be paid an amount which was in any way different from the normal rate of pay for such a job. He was told and accepted that in taking the job on he was helping out as a result of a breakdown of the lorry originally to have taken the load. The arrangements for picking the vehicle up and dropping it off seemed normal.

71. No evidence was adduced as to the concealment arrangements concerning the cigarettes. Whatever they were, they were such that the goods as loaded and as seen by Mr Willis were not obviously cigarettes. The reasonable inference to be drawn from this fact is that those who had planned the importation of the cigarettes had gone to some trouble to ensure that the load would appear as being consistent with the CMR description as engine oil. Mr Willis in particular would have little reason to suppose otherwise having seen an oil leak from a carton at the time of loading.

72. It is possible, perhaps even probable that the "oil leak" was no more than a ruse to reassure Mr Willis as to the nature of his load. On the other hand the cigarettes may have been packed behind genuine oil cartons. In either case there was an element of concealment. Mr Willis could not reasonably be expected to break open heat shrunk wrapping unless there was a very good reason why he should have done this. No such reason was advanced on behalf of the Respondents on this particular point.

73. For the reasons explained above we are satisfied on the balance of probabilities that Mr Willis has discharged the burden of proof on him to establish that his actions were those of an honest driver who has unwittingly become involved in an attempt to smuggle dutiable goods into the UK.

74. In the absence of any evidence probative of wrongdoing and in the absence of any proven interest in the goods the tribunal concluded that the Appellant could not be

considered to have the necessary connection with the goods so as to be “holding” the goods for the purposes of regulation 13(1) of the Regulations. There is accordingly no proper basis for the assessment or the penalties and both must be discharged.

5 75. We accordingly allow this appeal.

76. This document contains full findings of fact and reasons for the decision set out above. Any party dissatisfied with the 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  
10 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: 8 May 2015**

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