[2015] UKFTT 0330 (TC)

# TC04515

**Appeal number: TC/2013/05378**

***EXCISE DUTY – Assessment on the basis that the Appellant held excise goods for a commercial purpose in the UK and was a person making the delivery of the goods or holding the goods intended for delivery within reg. 13 Excise Duty (Holding, Movement and Duty Point) Regulations 2010 – penalty issued pursuant to paragraph 20, Schedule 41, FA 2008 on the basis that the Appellant's conduct in not taking reasonable care to avoid an evasion of excise duty was "deliberate" – held that on the evidence the Appellant was no more than a courier paid to transport the goods into the UK and, being an innocent agent, was not holding the goods in the UK or making delivery of the goods* – R v Taylor and Wood [2013] EWCA 1151 *applied – appeals against both assessment and penalty allowed***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**JEFFREY WILLIAMS** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE JOHN WALTERS QC**
**AMANDA DARLEY**

**Sitting in public at the Royal Courts of Justice, London on 17 and 18 February 2015**

**Tristan Thornton, Consultant, TTTax, for the Appellant**

**Joanna Vickery, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

DECISION

1. This is a consolidated appeal by the Appellant, Mr Jeffrey Williams, against an assessment to excise duty in the amount of £143,557 in relation to 13,852.80 litres of spirits and a wrong-doing penalty in the amount of £55,269.44.

2. We had before us two Witness Statements made by Officer Kevin Daglish and one Witness Statement made by Officer Simon Carr. Both officers attended to give oral evidence and were cross-examined by Mr Thornton. We also had before us a Witness Statement made by Mr Williams, with exhibits. Mr Williams also gave evidence and was cross-examined by Miss Vickery.

**The evidence**

3. We set out the relevant evidence below, which we accept except to the extent otherwise indicated.

4. Mr Williams, who was 49 at the time of the hearing of the appeal, has been a professional driver since the age of 21 and has carried out international work since he was about 23.

5. On 25 September 2012 at 23:30 hours, Mr Williams was intercepted by border force officers at Dover Eastern Docks driving a tractor unit with Dutch registration, drawing a trailer.

6. Mr Williams produced to the border force officers a CMR document, signed by him, reference BL004098 and dated 25 September 2012. According to this document, Mr Williams was transporting "3320 CS2 "MIX WINES" "30 Pallet" from Polley Logistique ("Polley"), which is a bonded warehouse in Calais, France, to Plutus (UK) Limited ("Plutus"), which is a bonded warehouse in Liverpool.

7. The CMR document showed Plutus's client as "6689 king trading" and the party responsible for the transport costs as "TAGER TRADING LTD". It showed an ARC number as 12FRG007400038691258. (An ARC number is a unique Administrative Reference Code generated in relation to an individual movement of goods by an electronic movement and control system, access to which must be authorised by a Member State – therefore the control of ARCs is – relatively - secure.) The carrier was stated to be "MONNEY TRANSPORT". The seal number was stated to be B331223.

8. The CMR document was accompanied by a "Bordereau de Livraison" document apparently issued by Polley, stating the destination of the load as Plutus and quoting the above ARC (incorrectly because there were four zeros between the '4' and the '3'. Rather than three as on the CMR document) and describing the load as 3,320 cases of six named types of wine, on a total of 30 pallets.

9. The border force officers searched the trailer and found that it contained 14 pallets of Glen's Vodka and 12 pallets of High Commissioner Whisky, all without duty stamps. In evidence was a copy of Officer Kinch's notebook. He was an officer on duty on the night of 23 September 2012, who carried out a search of the trailer, together with Officer Carr. He recorded that Officer White seized the vehicle and the goods from Mr Williams.

10. Officer Carr was the officer who stopped Mr Williams's vehicle. His notebook, a copy of which was in evidence, records Mr Williams as asking: "Was all that shouting back there for me?", Officer Carr replying: "I'm afraid it was, yes" and Mr Williams responding: "OK I thought it was for that truck in front of me, all I saw was lots of arms waving about". The border force immediate event notification indicated that Mr Williams had attempted to evade border controls.

11. At an interview with Officer Carr, Mr Williams is recorded as saying that he collected the load from Polley, he did not look in the back of his trailer, but backed up on to a ramp and Polley staff loaded the trailer through the back door and sealed it.

12. A copy of Officer White's notebook was also in evidence, signed by Mr Williams, indicating that he was happy with the facts. It stated that Officer White arrested Mr Williams on suspicion of being involved in the evasion of excise duty on a quantity of spirits, and cautioned him. But shortly afterwards, after Officer White was informed that HMRC were not progressing the case, he informed Mr Williams that he was no longer under arrest.

13. After that, Mr Williams was interviewed by Officer Dyer, in the presence of another officer. Mr Williams said that he had owned the vehicle for 6½ years and that he also owned the trailer. He told Officer Dyer that he worked for "anybody – I take what I can". He said he did not have a contact number for SWT, but that they ring him. He said that he had worked for SWT before and had been carrying their load when he was stopped and searched the previous week. If something went wrong, Mr Williams is recorded as saying that he would phone the customer at the delivery address.

14. Mr Williams is recorded as saying that he sent SWT an invoice every 5-6 weeks, to Monaghan, Ireland: he said that he did not know their address or postcode. He charged £825 for the delivery from Polley to Plutus. He said he had taken the trailer over empty and parked at Depanne in Belgium. Then, following instructions, he went to Polley to load, but when he got there, the load was not ready.

15. Mr Williams is recorded as saying that he did not see the pallets being loaded, but he could see the forklift trucks loading. He confirmed that the seal was attached at Polley. He is recorded as saying that he had never heard of Monney Transport. He said he had tachographs for the previous few days to substantiate his journey.

16. A search by officers showed that the ARC number given was not valid.

17. Investigations by HMRC carried out on 27 September 2012 showed that Plutus was not expecting the load and had no knowledge of 6680 king trading/Tager Trading, Polley or Monney Transport.

18. Investigations carried out by HMRC showed that Monney Transport was a small company delivering mail in the Paris area and that they did not move alcohol to the UK.

19. Checks carried out on SWT showed that alcohol had been seized from them on 22 February 2012, 25 May 2012 and 6 July 2012. Checks made by HMRC found no trace of king trading or Tager Trading.

20. In view of this information, Officer Daglish invited Mr Williams to a further interview. After various postponements, this interview took place on 25 February 2013. Officer Daglish, Officer Hughes, Mr Williams, Victoria Williams and Andy Scott (representing Mr Williams) were present.

21. The duty on the seized goods was stated to be £145,557 and Officer Daglish told Mr Williams that he was responsible for that duty as being the person holding the goods at the time of importation, and that a penalty of potentially 100% of that amount was chargeable, subject to any reductions for "Telling", "Helping" and "Giving". Mr Williams indicated that he understood this.

22. Mr Williams confirmed that he had not watched what had been loaded onto his trailer, but said that he had "taken his eye off the ball", and that his usual practice was to watch. Mr Williams said that he had been told not to watch. He had gone to walk in to Polley but had been told that it was a bonded warehouse and that he was not allowed in.

23. Mr Williams told the Officers that he had not been able to contact SWT since Christmas (2012) but that they had agreed to pay him £6,000 for the seized truck. "As a gesture" SWT had been paying for Mr Williams's ferry crossings since October (2012) at £400 per week.

24. Mr Williams insisted that he was intending to deliver the load to Plutus. Officer Daglish said that he was "not going down the deliberate side" and that Mr Williams would receive the full deduction from the maximum penalty for "Telling", "Helping" and "Giving". The penalty would be between 20% and 30% of the potential lost revenue (of £143,557).

25. On 27 February 2013, Officer Daglish raised the assessment for excise duty in the sum of £143,557. The assessment was raised on the basis that Mr Williams was liable to pay the duty by virtue of regulation 10(1) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ("HMDP Regs"), which states that:

> 'The person liable to pay the duty when excise goods are released for consumption by virtue of regulation 6(1)(b) (holding of excise goods outside a duty suspension arrangement) is the person holding the excise goods at that time'.

26. On 5 March 2013, Officer Daglish hand-delivered a pre-penalty warning letter to Mr Williams, stating his intention of issuing a penalty in the sum of £28,711.40. The explanation of the penalty stated that HMRC considered the behaviour which led to his holding non-duty paid Excise goods was "non-deliberate", explained as follows:

> 'You were interviewed on 25 February 2013, you confirmed the reason you signed the CMR and checked the seal number was to take responsibility for the goods you were carrying. However, you stated you did not check what was being loaded onto your vehicle and did not know what they were. These goods were subsequently seized as being non duty paid. Nobody has claimed ownership of these goods and they were forfeited to the Crown and subsequently disposed of. Furthermore almost all of the companies listed on the CMR do not exist, the goods listed were incorrect, the pallets you counted differed to those listed and the ARC number the goods were travelling under did not exist. I have considered your argument that you would not be able to check the company details but you were aware that you are responsible for the goods on your vehicle, you will receive the minimum penalty on this occasion.'

27. The letter gave Mr Williams 28 days to provide any further information for consideration.

28. On 28 March 2013, Mr Thornton, on behalf of Aegis Tax LLP, wrote to HMRC requesting a review of Officer Daglish's decision and the assessments raised. In that letter technical arguments were raised, which have also formed the basis of submissions to us.

29. Having received no further information from Mr Williams with regard to the proposed penalty, Officer Daglish issued a Notice of Penalty Assessment on 5 April 2013 in the sum of £28,711.40, in accordance with the pre-penalty warning letter.

30. On 11 April 2013, Mr Thornton, again on behalf of Aegis LLP, wrote to HMRC with a submission that Mr Williams had had a reasonable excuse for not having inspected the loading of goods into his trailer at Polley. The reasonable excuse was argued to be the fact that he was prevented by the warehouse staff from watching the loading from close quarters, that he nevertheless did observe it from afar and did his best to check the number of pallets loaded, and, further, that it was reasonable for him to rely on the position, office and status of the warehouse keeper at Polley to load goods in accordance with the accompanying CMR.

31. Officer Daglish replied to this letter on 15 April 2013 to the effect that he did not consider that Mr Williams had had a reasonable excuse because he did not take reasonable care to avoid the relevant act or failure (cf. paragraph 20, Schedule 41, Finance Act 2008). In Officer Daglish's view, Mr Williams should have inspected the load after the loading had taken place (even if this involved breaking the seal and re-sealing) – such inspection would have immediately shown that it was not wine that had been loaded, but spirits.

32. On 26 April 2013, Mr Thornton, again on behalf of Aegis LLP, wrote to HMRC asking for a review of the decision to impose a penalty, explaining why they thought Officer Daglish's view was wrong and adding a submission that the penalty sought to be imposed was disproportionate.

33. On 15 May 2013, Officer Daglish was advised by HMRC Review and Appeals Team that the assessment raised on 27 February 2013 should be withdrawn because it had been based on the incorrect regulation for the duty point – it should have been raised pursuant to reg. 13, HMDP Regs., which relevantly provides as follows:

> '(1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.
>
> (2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person-
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> (a) making the delivery of the goods;
>
> (b) holding the goods intended for delivery; or
>
> (c) to whom the goods are delivered.'

34. Officer Daglish accepted the advice of the Review and Appeals Team and on 15 May 2013 withdrew the assessment raised on 27 February 2013 and issued a new assessment on the basis that Mr Williams was the person making the delivery of the goods in issue in accordance with reg. 13(2)(a) HMDP Regs. The assessment was in the same amount (£143,557). On 5 June 2013, Mr Thornton, again on behalf of Aegis LLP, sent a long submission, in large part reiterating the arguments already made in relation to the first assessment, and request a review of the decision to issue the replacement assessment.

35. On 23 May 2013, Officer Daglish received the information that Anne-Sophie Dardenne, of Polley, had informed the French customs authorities (in response to a request from them to confirm the CMR carried by Mr Williams, which he had said had been issued to him by Polley) that that CMR was not of the form used by Polley and, further, that Plutus did not appear in the stock account of Polley or in the list of its clients, the ARC did not correspond to any ARC number issued by Polley, and that CMR reference BL004098 corresponded to a CMR issued by Polley in relation to a consignment on 16 August 2012, rather than 25 September 2012.

36. This information appeared to Officer Daglish to cast doubt on the version of events given by Mr Williams and Officer Daglish and Officer Daglish arranged to interview Mr Williams again on 18 June 2013.

37. At that interview, Mr Williams was accompanied by a Mr Mike Gibbons, a solicitor from Aegis LLP. Officer Daglish was accompanied by Officer Badrock.

38. At that interview, Officer Daglish put to Mr Williams that the ARC number on the CMR which had been produced by Mr Williams did not exist, that Plutus were not expecting the load, had not handled Glen's Vodka and High Commissioner Whisky for years, and had never heard of 6689 King Trading, Monney Transport or Tager Trading Ltd. Mr Williams's response was that he had been unable to check this out.

39. Mr Williams insisted that he was taking the load to Plutus. When Officer Daglish told him that Polley had stated that their format of CMR did not match the CMR which had been produced by Mr Williams, and that Polley had never heard of Plutus, Mr Williams again responded that he could not have known this.

40. Officer Daglish put it to Mr Williams that he had not loaded his vehicle at Polley. Mr Williams insisted that he had, and asked that Polley should produce their CCTV evidence and also comment on their routine procedures. Officer Daglish said that he would ask Polley for that. Mr Gibbons, for Mr Williams, suggested that Polley might not be a fully legitimate company. Officer Daglish responded that there was no evidence that they were not. Mr Gibbons also mentioned that Mr Williams had had a tachograph, which would have proved that he had gone to Polley. Officer Daglish was sceptical about this and said that often hauliers had gone to bonded warehouses so that it *appeared* that they had loaded there. Mr Williams insisted that tachograph evidence would show the entire details of his movements and that there was a company in Warrington that was expert in analysing tachograph data. The interview finished with Mr Williams urging that the matter should be swiftly concluded because of his personal circumstances. Officer Daglish said that he would request the information from Polley that day, but that he was in the hands of the French Customs and that they usually took some time to reply.

41. Polley responded in June 2013 that they were unable to provide the CCTV for the date in question. (Officer Daglish stated in his Witness Statement that that date had been 26 September 2013, but Mr Thornton pointed out, correctly, that the relevant date was 25 September 2012 – to this, Officer Daglish responded that he did not know whether he had asked for the correct day and year). Polley confirmed that their format of CMR had not changed since June of 2012. They also gave an account of their standard procedures which did not match Mr Williams's version of events. In particular, Polley stated that their administrative team gave drivers the CMR after loading, whereas Mr Williams had stated that the fork-lift driver who had loaded his vehicle had given him the CMR documentation.

42. Border Force informed Officer Daglish on 19 June 2013 that there were no tachographs on their files but that an officer's notebook had made reference to them.

43. Despite Officer Daglish having concluded on the evidence that Mr Williams had not in fact picked up the load from Polley and did not intend to deliver it to Plutus, he decided not to alter the penalty from "non-deliberate" and giving a full reduction for disclosure 'on the basis of Mr Williams's personal circumstances and desire for a quick solution'. He stated this in his letter to Mr Williams dated 4 July 2013.

44. However, Officer Paton of the Appeals and Reviews Unit of HMRC upheld Officer Daglish's assessment to excise duty and Officer Dunn of the same Unit wrote to Mr Williams on 30 August stating that the penalty imposed by Officer Daglish would be cancelled without prejudice to any other action HMRC might take (including the issue of a further penalty) on the basis that Officer Daglish had taken into account irrelevant matters in assessing the degree of culpability.

45. In considering the matter of issuing a further penalty, Officer Daglish accepted the view of the Review Officer that Mr Williams's personal circumstances and desire for a quick solution were irrelevant matters and that his conclusion that he had not in fact picked up the load from Polley and did not intend to deliver it to Plutus justified the imposition of a penalty calculated on the basis that Mr Williams's behaviour had been deliberate. A pre penalty warning letter was issued to Mr Williams by Officer Daglish on 6 November 2013 stating his intention to impose a penalty in the sum of £55,269.44. The penalty in that amount was issued on 20 November 2013. Besides being calculated on the basis that the wrongdoing was deliberate, the calculation gave 20% rather than 30% reduction for "Telling", because Mr Williams had not admitted the suspected wrongdoing. A complaint was made on Mr Williams's behalf about the revision of the penalty. Officer Daglish said that he did not recall seeing the letter in which the complaint was made, but that he was aware that a complaint had indeed been made.

46. Officer Daglish said in evidence that he was relatively inexperienced in this area, this being the first seizure of goods which he had dealt with. He had issued about 10 wrongdoing penalties in total. His approach was to follow guidance given to him in the matter of issuing penalties. He said that in confirming the penalty on a non-deliberate basis he had had regard to Mr Williams's personal circumstances – *viz:* the health of his partner – which he had considered to be 'special circumstances' within paragraph 14, Schedule 41, FA 2008, but that he had been advised that this was irrelevant to the question of degree of culpability. On this basis he had re-examined the evidence himself and formed the view himself that he should reissue the penalty on the basis that the wrongdoing was deliberate.

47. Officer Daglish accepted that he had not followed up his request for the CCTV evidence. He had made enquiries about the tachograph evidence and received an email dated 21 June 2013 from Officer Dyer, who had spoken to Mr Williams during the initial interview at Dover Eastern Docks. In that email Officer Dyer stated as follows:

> 'When I spoke to the driver during the interview at Dover Eastern Docks, he said he could provide the tachos, and therefore it was note-booked accordingly as to what he said. He did not have them with him on his person in the interview room (about 200 yards from the vehicle). We agreed that he would provide them afterwards instead of breaking up the interview.
>
> After the interview, I agreed with the case officer that they would leave the tachos, other paperwork and their completed notebooks in a sealed bag, ready for us to collect in one go later on so we could continue with our caselog.

> The following night shift I attended the Eastern Docks, collected the officers notebooks etc., but the tachos weren't there. I can only assume the driver did not have any tachos, or the officer forgot to take them. It wasn't followed up, as we had other priorities at the time and the load was solid seizure, despite CI not being interest in the spirits.'

48. Officer Daglish stated in his (second) Witness Statement that he was not disputing the tachograph information explained during the interview by Mr Williams, but that he considered that the tachographs would only show that Mr Williams had travelled a short distance, and obtaining them would not add to the evidence.

49. Officer Carr is a Border Force officer, who, on 25 September 2012 was on duty at the Inward Freight Examination Area, Easter Docks, Dover. At 10:20 pm on that day he approached Mr Williams's vehicle, which was then in the A20 exit lane, in a stationary queue with other vehicles at traffic lights. Officer Carr had been advised by radio that Mr Williams's vehicle had failed to follow directions to the Border Force Scanner from the Border Force Forward Selection Kiosk. Officer Carr spoke with Mr Williams, who indicated that he had heard shouting but was not aware that it was 'for him'. Officer Carr then requested Mr Williams to pull out of the line of traffic, which he did.

50. In cross-examination, Officer Carr said that he was not aware what symbol had been given to Mr Williams to direct him to the Border Force Scanner, or that Mr Williams had seen any such symbol.

51. Mr Williams's evidence was that he had received instructions to go to Polley, a bonded warehouse in or near Calais, in France, to pick up a load. The instructions came from a man referred to as "Alan", at an organisation called SWT, based in Kerry in Ireland. Mr Williams had done work for SWT before, but only on a few occasions. Mr Williams did not know the surname of "Alan". Nor did he know the full address of SWT.

52. His instructions were to collect a load of wine from Polley and to take it to Plutus, a bonded warehouse in Liverpool.

53. Mr Williams had collected goods from Polley on five occasions before this instruction and had driven the goods to other destinations in mainland Europe.

54. A tachograph had been installed in his vehicle. He was obliged by law to carry tachographs for the last 28 days and the one being used at the time. He said that he had been told by Officer Carr that the tachographs had been seized with the rest of the documentation, but he had never heard anything more about the tachograph discs.

55. The CMR which he had been carrying (for details, see: paragraph 7 above) had been in quadruplicate. The first copy had been left at Polley, the other three had been carried by Mr Williams – copy 2 to go to the delivery point, copy 3 to be kept by him as carrier, and copy 4 to be attached to the invoice for payment. He said he had counted 26 pallets being loaded – he had not noticed that this did not match the 30 pallets as stated in the CMR.

56. He accepted in cross examination that he did not know the full address of SWT. He had made a mistake at the second interview in saying that SWT were at Monaghan, when they were at Kenmar in Kerry. He also said that he had made a mistake at the first interview in saying that he would not phone SWT, when in fact he did have a number for them and would phone them.

57. After the seizure of the goods in issue, and the seizure of his vehicle, he had contacted SWT who had compensated him by allowing him to use their account for about 15 or 16 ferry crossings from October 2012. But communication with SWT stopped after Christmas 2012. The use of their account for ferry crossings had compensated him adequately for the loss of his vehicle, which he estimated had a net value of £2,000.

58. Mr Williams's evidence was that he had been to Polley, where the goods had been loaded. He had been given the CMR by the fork-lift driver who had done the loading and there was nothing unusual in that. He had not been able to see what was being loaded, but had counted the pallets (26), but had not noticed the discrepancy with the CMR – which stated 30 pallets.

59. He said he did not regard the reference on the CMR to Monney Transport as 'carrier' as odd. He thought Monney was the main transporter, SWT was their subcontractor and he was the sub-sub-contractor. He said he might have stamped the first copy of the CMR (which had been left at Polley) with his stamp in the box (box 6) which mentioned Monney Transport.

60. Mr Williams accepted that the evidence showed that there had been an illicit movement of goods and that he had been "set up" by someone. He had not taken any steps to find out who had done this "setting up" – because he said there was "no point". He asserted that Polley and SWT must have been involved.

**The issues**

61. That being the evidence, we state the issues raised for our decision in the appeal.

62. As stated above, the assessment to excise duty was raised under reg. 13, HMDP Regs., which relevantly provides as follows:

> '(1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.
>
> (2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person-
>
> (a) making the delivery of the goods;
>
> (b) holding the goods intended for delivery; or

(c) to whom the goods are delivered.'

63. Mr Thornton's first point is that the assessment is bad because the goods in issue (the spirits) were not "held for a commercial purpose in the United Kingdom" for relevant purposes. In making this submission he relies on a decision of the Court of Justice of the EU, *Dank Transport og Logistik v Skatteministeriet* (Case C- 230/08). We refer to this point as 'the *Dansk* point'.

64. Mr Thornton's second point is that, even if we are not with him on the *Dansk* point, Mr Williams should not be regarded as a person who is liable under reg.13 (2) HMDP Regs. because he was not 'making the delivery of the goods' for relevant purposes because he was an innocent agent. In making this submission, he relies on *R v Taylor and Wood* [2013] EWCA 1151. We refer to this point as 'the *Taylor and Wood* point'.

65. Mr Thornton's third point is that the assessment is bad in that it is not compliant with the spirit of the Excise Directive (Directive 2008/118/EC). This is because, he submits, the Directive makes it clear that excise duty is a duty on consumption and should not be charged where goods have been destroyed or irrevocably lost. The importance of consumption being the justification for excise duty to be levied is not reflected in the HMDP Regs. He submits that HMRC cannot properly act contrary to the aims of the Directive by assessing for excise duty on goods which they have seized and condemned, or, alternatively, even if duty is chargeable, it ought to be remitted back in the circumstances of this case, and so it is not reasonable to raise an assessment to excise duty in the first place. We refer to this point as 'the Consumption point'.

66. Mr Thornton's fourth point is that the assessment is bad in that to raise it in addition to seizing the goods is a disproportionate response. He submits that HMRC are attempting to seek a duplication of remedy for a perceived wrong. We refer to this point as 'the Proportionality point'.

67. As will have been seen, the *Dansk* point, the *Taylor and Wood* point, the Consumption point and the Proportionality point are all attacks on the validity of the assessment to excise duty.

68. In addition, assuming the assessment to excise duty should be upheld, we have to deal with the appeal against the penalty imposed.

69. Mr Thornton attacks, in particular, HMRC's decision to reissue the penalty on the basis that the alleged wrongdoing on the part of Mr Williams was deliberate. We must therefore decide on the evidence we have seen whether (assuming the assessment should be upheld) Mr Williams ought to be penalised for a deliberate wrongdoing. Mr Thornton also submits that article 6 of the European Convention on Human Rights is engaged on the basis that the penalty should be considered to be the subject of a criminal charge against Mr Williams and that he should have the protection of the right to a fair trial, and that the criminal standard of proof should apply. We refer to this issue as 'the Deliberate Wrongdoing issue'.

70. Mr Thornton also submits, in relation to the appeal against the penalty, that in the circumstances of his collection of the goods from Polley, as Mr Williams represents them, he had a reasonable excuse for any wrongdoing and the penalty ought to be completely discharged on that basis. We refer to this issue as 'the Reasonable Excuse issue'.

71. We deal with these issues in turn.

**The *Dansk* point**

72. The *Dansk* point is essentially a submission that in all the circumstances we should hold that no duty point occurred at all and accordingly no liability to excise duty arose.

73. *Dansk Transport og Logistik* concerned three disputes relating to customs and tax debts in connection with the smuggling of cigarettes in the course of operations covered by the Customs Convention on the International Transport of Goods under Cover of TIR Carnets for which Dansk had issued TIR carnets and acted as guarantor. In two of the cases, the goods were transported to Denmark by sea and, in the third case, by land – through Germany (see: *ibid.* [36]).

74. The cases where the goods were transported to Denmark by sea were cases where the goods entered the Community customs territory when the ferry carrying the lorries concerned crossed the Danish border on a voyage to Denmark from Klaipeda, in Lithuania, which was not at the relevant time (2 May 2000) a Member State of the European Union ('the EU').

75. The case where the goods were transported to Denmark by land was a case where goods were brought illegally into the Community customs territory when the lorry carrying them crossed the border between Poland (at that time not yet a Member State of the EU) and Germany (see: *ibid* [38]).

76. Although the Court of Justice in *Dansk* dealt with the position on liability to customs duties and VAT, as well as excise duties, it seems to us that its relevance to this appeal is limited to its interpretation of the Excise Duty Directive (Directive 92/12/EEC of 25 February 1992) and in that case only in relation to the case where the smuggled cigarettes were transported to Denmark by land *via* Germany. That is because the spirits in this appeal were brought to the UK from France.

77. The relevant part of the Court of Justice's judgment in *Dansk* is introduced at *ibid.* paragraph 100, where the Court's consideration of the fourth question referred to it begins. The passage relating specifically to excise duty begins at *ibid.* paragraph 112.

78. The Court of Justice interpreted article 7 of the Excise Duty Directive (92/12/EEC) which was relevantly in the following terms:

> '1. In the event of products subject to excise duty and already released for consumption in one Member State being held for commercial purposes in

another Member State, the excise duty shall be levied in the Member State in which those products are held.

2. To that end, without prejudice to Article 6, where products already released for consumption as defined in Article 6 in one Member State are delivered or intended for delivery in another Member State or used in another Member State for the purposes of a trader carrying out an economic activity independently or for the purposes of a body governed by public law, excise duty shall become chargeable in that other Member State.

3. Depending on all the circumstances, the duty shall be due from the person making the delivery or holding the products intended for delivery or from the person receiving the products for use in a Member State other than the one where the products have already been released for consumption, or from the relevant trader or body governed by public law.

…'

79. It is plain, and, as we understand, not disputed, that the spirits carried by Mr Williams had been in a state of being released for consumption in France before they were brought to the United Kingdom. Whether they were actually released for consumption (in the sense of becoming released for consumption) in France is, of course unknown to the Tribunal and HMRC and probably also to Mr Williams.

80. The Court of Justice drew a distinction between goods discovered and seized which were (at the time of discovery and seizure) being held for commercial purposes – which it stated was a matter for the national court to assess – and goods discovered and seized which were not (at that time) being held for commercial purposes.

81. In the case of such goods which are held for commercial purposes in the second Member State (in *Dansk*, Denmark, and, for the purposes of this appeal, the United Kingdom), then that Member State is competent to recover excise duty (*ibid.* paragraph 114).

82. In the case of such goods which are not held for commercial purposes in the second Member State, the first Member State into which the goods were imported (in *Dansk*, Germany) remains competent to recover the excise duty pursuant to Article 6 of the Excise Duty Directive, even if unlawfully introduced goods were only discovered subsequently by the authorities in another Member State (Denmark) (*ibid.* paragraph 115).

83. Thus, the important issue, so far as the application of *Dansk* is concerned, is whether the spirits in issue were held for commercial purposes in the United Kingdom by Mr Williams. This is a matter to which we shall return.

84. We note that the Excise Duty Directive in force for the purposes of this appeal is not Directive 92/12/EEC, but its replacement, Council Directive 2008/118/EC of 16 December 2008 ("the current Excise Duty Directive").

85. Article 33 of the current Excise Duty Directive is the relevant provision. It reads, so far as relevant, as follows:

> '1. Without prejudice to Article 36(1) [Distance selling], where excise goods which have already been released for consumption in one Member State are held for commercial purposes in another Member State in order to be delivered or used there, they shall be subject to excise duty and excise duty shall become chargeable in that other Member State.
>
> For the purposes of this Article, 'holding for commercial purposes' shall mean the holding of excise goods by a person other than a private individual or by a private individual for reasons other than his own use and transported by him, in accordance with Article 32.
>
> 2. The chargeability conditions and rate of excise duty to be applied shall be those in force on the date on which duty becomes chargeable in that other Member State.
>
> 3. The person liable to pay the excise duty which has become chargeable shall be, depending on the cases referred to in paragraph 1, the person making the delivery or holding the goods intended for delivery, or to whom the goods are delivered in the other Member State.
>
> 4. Without prejudice to Article 38 [Irregularities during the movement of excise goods], where excise goods which have already been released for consumption in one Member State move within the Community for commercial purposes, they shall not be regarded as held for those purposes until they reach the Member State of destination, providing that they are moving under cover of the formalities set out in Article 34 [goods moving under cover of a CMR].
>
> …'

86. Thus, Article 33 envisages that excise goods held for commercial purposes in the second (or subsequent) Member State, in order to be delivered or used there, are chargeable in that Member State. Again, the issue is whether the goods were held for commercial purposes in that Member State. This replicates the position as determined in the *Dansk* decision.

87. As Mr Thornton submitted, the Court of Justice in *Metro Cash & Carry Danmark ApS v Skatteministeriet* (Case C-315/12) held that Article 32 to 34 of the current Excise Directive do not substantially amend Article 7 to 9 of Excise Duty Directive 92/12/EEC but reproduce the content of those articles while clarifying it.

88. It is relevant to note that Article 38 of the current Excise Duty Directive deals with irregularities during the movement of excise goods under duty suspension arrangements. In such a case, the basic rule is that such goods are subject to excise duty and excise duty shall be chargeable in the Member State where the irregularity occurred (Article 38(1)).

89. However, where the irregularity is detected in a Member State other than the Member State in which the goods were released for consumption, and it is not possible to determine where the irregularity occurred, the irregularity is to be deemed to have occurred and the excise duty is to be chargeable in the Member State where the irregularity was detected (Article 38(2)).

90. In a case falling within Article 38, 'any person who participated in the irregularity' is among the class of persons from whom the excise duty is to be due (Article 38(3)).

91. Thus, whether the *Dansk* point can assist Mr Williams will depend, at least in part, on whether he held the spirits in the United Kingdom for a commercial purpose. We note that this is a threshold issue arising for decision on the application of reg. 12 HMDP Regs. to this case.

92. In *Taylor and Wood*, the Court of Appeal, construing regulation 13 of the Tobacco Products Regulations 2001, pursuant to which the person holding the tobacco products at the excise duty point is, *inter alios*, made liable to pay excise duty, laid down that control, directly or through another, of the asset, with the intention of asserting such control against others, whether temporarily or permanently amounted to 'holding' for relevant purposes. The Court of Appeal also laid down that such control was not to be attributed to a person (Yeardley and Heijboer on the facts of *Taylor and Wood*) who, although in physical possession of the cigarettes in issue, was an entirely innocent agent of those found to be criminal conspirators in that case (*ibid.*[29] to [31]).

93. This would suggest that the question of whether Mr Williams 'held' the spirits in issue for the purposes of the current Excise Directive and reg. 13 HMDP Regs. would turn on whether or not Mr Williams was an entirely innocent agent of those persons, presumably SWT and/or Polley, who might have been responsible for the excise duty fraud the commission of which, it is common ground between the parties, was attempted.

94. HMRC submit, however, that we do not have jurisdiction to determine this issue, because the spirits are deemed, pursuant to paragraph 5, Schedule 3, Customs and Excise Management Act 1979 ("CEMA"), to have been duly condemned as forfeited. (Mr Thornton accepts that the spirits are deemed to have been duly condemned as forfeited pursuant to that provision.)

95. HMRC submit that this jurisdictional issue has been settled by the Court of Appeal in *HM Revenue and Customs v Jones and Another* [2011] EWCA Civ 824, as followed by the Upper Tribunal in *HM Revenue and Customs v Race* [2014] UKUT 0331.

96. In *Jones*, the Court of Appeal held that the effect of paragraph 5, Schedule 3, CEMA was that this Tribunal must accept, as given, the fact that such goods have been duly condemned as forfeited as illegally imported goods, and that was a

determination that such goods had been illegally imported for a commercial purpose (*ibid.* [71(4)]).

97. In *Race*, the Upper Tribunal (Warren J) stated that following *Jones* it was clear that a condemnation of goods to be forfeited, whether in fact or as the result of the statutory deeming, the condemned goods, having been bought in a Member State and then imported into the UK, were not held by Mr and Mrs Jones for their own personal use in a way which exempted them from duty (*ibid.* [26]).

98. In this appeal, HMRC submit (paragraph 14.4 of Miss Vickery's Skeleton Argument), following a reference to *Jones* and *Race*, that '[t]he Appellant had brought the goods from France into the UK. As such, the goods were released for consumption in another Member State and were held for a commercial purpose. Accordingly, and pursuant to [reg. 13(1) HMDP Regs.] a duty point has arisen'.

99. We accept that *Jones* and *Race* make it clear that this Tribunal has no jurisdiction to investigate whether or not the spirits in issue in this case were held for a commercial purpose in the UK. However, the issue is whether or not they were so held *by Mr Williams* – Mr Thornton's point being that they were not, on the basis that Mr Williams was an entirely innocent agent, following *Taylor and Wood*. It seems to us that *Jones* and *Race* are not authority for the proposition that this Tribunal does not have jurisdiction to consider this issue. It is a question of fact for us to find, whether or not Mr Williams was, as he claims, an entirely innocent agent.

100. Concluding our consideration of the *Dansk* point, we reject the submission made by Mr Thornton that we should apply the reasoning of the Court of Justice in *Dansk* in relation to customs duty and excise duty on goods brought into the territory of the EU to the effect that such duties can only be charged if smuggled goods are detected after having passed the first customs office situated within the territory of the EU. This reasoning is directed at the particular circumstance that customs duties apply to importations into the EU from outside the EU and the duty point for excise duties on similar importations should follow the same scheme as for customs duties to 'ensure a coherent interpretation of the Community legislation at issue' (see: e.g. *ibid.*[84]). No analogy can be drawn between the circumstances of an importation into the EU from outside and a movement between Member States, simply because customs duties do not apply to such movements. Furthermore, the Court of Justice addressed the position on the application of excise duties in relation to such movements in *ibid.* [112] *et seq.*, to which we have made reference above.

**The *Taylor and Wood* point**

101. If we decide that Mr Williams held the spirits in issue for the purposes of reg. 13(1) HMDP Regs., Mr Thornton submits that Mr Williams is not liable for the duty chargeable by reference to the excise duty point on the basis that, as HMRC submit, he was 'the person making delivery of the goods' or 'the person holding the goods intended for delivery' within reg. 13(2) HMDP Regs.

102.Mr Thornton relies on dicta in *Taylor and Wood* as follows. At *ibid.* [31], the Court of Appeal said:

> 'To seek to impose liability to pay duty [under the domestic regulation] 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.'

and at *ibid.* [39] and [40], the Court of Appeal addressed the same point by reference to the Excise Duty Directive 92/12/EEC as follows:

> '39. For the same reasons that have already been elaborated in interpreting Regulation 13(1) of the Regulations, both the language and purpose of Article 7(3) strongly support the conclusion that a person who has *de facto* and legal control of the goods at the excise duty point should be liable to pay the duty. The conclusion is all the more compelling where the person in actual physical possession does not know, and has no reason to know, the (hidden) nature of the goods being transported as part of the fraudulent enterprise to which he is not a party. To seek to impose liability on entirely innocent agents such as Heijboer or Yeardley, rather than upon the appellants [Taylor and Wood], would no more promote the objectives of the Directive than those of the Regulations.
>
> 40. The same considerations apply to the further basis of liability, namely, "delivery" of the goods. It was Heijboer, as agent of Yeardley, who actually carried the goods. However, Wood, through Events, and Taylor, through TG, made all the arrangements necessary for delivery and controlled the delivery throughout the carriage. Neither Heijboer nor Yeardley knew the true nature of what was being delivered, and were no more than innocent agents. It was the appellants exploiting such innocent agents who in reality effected delivery within the meaning of Article 7(3) of the Directive. The basis of liability under domestic law (causing the goods to reach the excise duty point) rests ultimately on the real and substantial responsibility of the appellants for delivery of the goods to the excise duty point, and that basis corresponds entirely with the alternative basis of liability under EU law.'

103.We consider that these dicta apply equally to Regulation 13(2) HMDP Regs. and Article 33 of the current Excise Directive. The point at issue, therefore, is whether Mr Williams, being the person in actual physical possession of the spirits in issue in this appeal knew, or had any reason to know of the fraudulent enterprise constituted by the irregular movement. This point is also brought out by Article 38(3) of the current Excise Directive, where liability for excise duty chargeable in respect of a movement of excise goods during which an irregularity has occurred is placed on, *inter alios*, 'any person who participated in the irregularity'.

104.While submitting, as her main submission on this point, that regulation 13 should be given its natural meaning and that it was plain that Mr Williams was both holding the goods intended for delivery and making the delivery of the goods, Miss Vickery

recognised that, if we accepted Mr Thornton's submissions on *Taylor and Wood*, the burden of proof would be on HMRC to show that Mr Williams knew, and/or had reason to know, the (hidden) nature of the goods being transported as part of the fraudulent enterprise – namely that they were spirits on which duty had not been paid rather than wine within duty suspension.

105. Again, as in relation to the *Dansk* point, so in relation to the *Taylor and Wood* point, it is a question of fact for us to find, whether Mr Williams was, as he claims, an entirely innocent agent, or whether, on the other hand, he knew and/or had reason to know that he was carrying spirits on which duty had not been paid.

**The Consumption point**

106. Mr Thornton submits that, in a case where excise goods have been destroyed or irrevocably lost, the current Excise Directive makes clear that excise duty should not be charged, or, if charged, it should be remitted, because excise duty is a duty on consumption of excise goods and destruction or irrevocable loss of excise goods after seizure and condemnation of them by HMRC prevents consumption of them for the purposes of the current Excise Directive.

107. In HMRC's Statement of Case it is said that the HMDP Regs. entitle HMRC to assess those who hold or supply excise goods in respect of which the excise duty has not been paid up to 100% of the excise duty payable, "even if those goods have been irrevocably lost of [*sic*] destroyed".

108. We will assume (without deciding) for the purposes of consideration of the Consumption point that the spirits in issue in this appeal were destroyed when under the possession or control of HMRC following seizure and forfeiture.

109. Mr Thornton referred us to the 9th recital to the current Excise Directive which is as follows:

> '9. Since excise duty is a tax on the consumption of certain goods duty should not be charged in respect of excise goods which, under certain circumstances, have been destroyed or irrevocably lost.'

110. He also referred us to Article 1 of the current excise Directive which states that excise duty is levied directly or indirectly on the consumption of excise goods.

111. The relevant Article of the current Excise Directive relating to destruction and losses is Article 37. It provides relevantly as follows:

> '1. In the situations referred to in Article 33(1) [excise goods which have already been released for consumption in one Member State, which are held for commercial purposes in another Member State in order to be delivered or used there] and Article 36(1) [distance selling to a person in a Member State of excise goods already released for consumption in another Member State], in the event of the total destruction or irretrievable loss of the excise goods during their transport in a Member State other than the Member State in which they

were released for consumption, as a result of the actual nature of the goods, or unforeseeable circumstances, or force majeure, or as a consequence of authorisation by the competent authorities of that Member State, the excise duty shall not be chargeable in that Member State.

The total destruction or irretrievable loss of the excise goods in question shall be proven to the satisfaction of the competent authorities of the Member State where the total destruction or irretrievable loss occurred or, where it is not possible to determine where the loss occurred, where it was detected.

…

2. Each Member State shall lay down its own rules and conditions under which the losses referred to in paragraph 1 are determined.'

112. Mr Thornton also pointed out to us that Article 38 of the current excise Directive, which provides for the charge to excise duty where an irregularity has occurred during a movement of goods in duty suspension in the Member State where the irregularity occurred, contains an exception in Article 38(4), as follows:

> '4. For the purposes of this Article, 'irregularity' shall mean a situation occurring during a movement of excise goods under Article 33(1) or Article 36(1), *not covered by Article 37(1)*, due to which a movement, or a part of a movement, of excise goods has not duly ended.' (emphasis added)

113. Mr Thornton submitted that the United Kingdom had enacted the provisions of Article 38 in reg. 21 HMDP Regs, but had not enacted Article 37 (destruction and losses). We do not accept that this is accurate. Reg. 21 HMDP Regs does, at any rate to an extent, enact the provisions of Article 37, but Mr Thornton is correct in so far as the exclusion from excise duty on total destruction or irretrievable loss of excise goods is limited to events that would otherwise have given rise to an excise duty point under reg.16(1) or 17(1). In other words, the exclusion does not cover events that would otherwise have given rise to an excise duty point under reg. 13 (which is, of course, the relevant regulation in this appeal).

114. In the light of these provisions, Mr Thornton submits that HMRC cannot properly act contrary to the aims of the Excise Directive by assessing excise duty on goods they have seized and condemned. In the alternative, he submits that even if duty is chargeable, it ought to be remitted back in these circumstances, and so it is not reasonable or proportionate to raise an assessment in the first place.

115. Miss Vickery did not present any detailed submissions on the Consumption point. Clearly the Consumption point could be relevant even in a case where we found that Mr Williams knew and/or had reason to know that he was carrying spirits on which duty had not been paid. We indicated at the hearing of the appeal that, if we needed to consider the Consumption point further, we would relist the appeal for further argument.

**The Proportionality point**

116.The Proportionality point was (like the Consumption point) a 'high level' submission, not concerned with the detailed facts of this case.

117.Mr Thornton contended that it was well settled that any actions of the state should go no further than was necessary to meet the objective of such actions. He submitted that the relevant objective in this case was the protection of excise duty from evasion. The actions taken against Mr Williams by HMRC had been cumulative. HMRC had seized the spirits and Mr Williams's lorry in which the spirits had been found, and they had also assessed Mr Williams for excise duty on the spirits which had been seized and condemned as forfeit, and they had also imposed a wrongdoing penalty.

118.He submitted that this submission had particular force if we were to find that Mr Williams's actions had been 'non-deliberate'.

119.He submitted that the HMDP Regs. made specific provision (in reg. 89) for the imposition of a civil penalty under section 9, Finance Act 1994 ("FA 1994") in the case of contravention or non-compliance with any relevant regulation, and that a civil penalty under section 9, FA 1994 was lower than the wrongdoing penalty sought to be imposed in this appeal under Schedule 41, FA 2008. This, he submitted, pointed to the wrongdoing penalty issued in this case being plainly disproportionate.

120.Again, Miss Vickery did not present any detailed submissions on the Proportionality point, which clearly could (like the Consumption point) be relevant even in a case where we found that Mr Williams knew and/or had reason to know that he was carrying spirits on which duty had not been paid. We indicated at the hearing of the appeal that, if we needed to consider the Proportionality point further, we would relist the appeal for further argument.

**The Deliberate Wrongdoing issue**

121.This issue relates primarily to the appeal against the issue of the penalty against Mr Williams.

122.In their Statement of Case, HMRC accepted that for the purposes of the European Convention on Human Rights the penalty 'is classified as criminal', but they assert that they have paid proper and due regard to Mr Williams's rights under Article 6 of the Convention.

123.Mr Thornton submits that the burden is on HMRC to prove dishonesty, and Miss Vickery, as we understood it, accepted that. Mr Thornton went on to submit that the criminal standard of proof should apply. Miss Vickery submitted that the civil standard of proof (the balance of probabilities) was the correct standard. She accepted that the civil standard required cogent evidence to be adduced.

124.We were referred to the decision of the Supreme Court in *S-B Children* [2009] UKSC 17, from which we conclude that the simple balance of probabilities test should be applied (see: *ibid.* [12], [34]).

125.We must decide on the evidence we have seen (assuming the assessment should be upheld) whether Mr Williams ought to be penalised for deliberate wrong doing, as opposed to non-deliberate action which, without the Border Force's intervention, would have resulted in evasion of excise duty.

126.This is also, as a matter of substance, the same point as we have concluded is raised in relation to the *Dansk* point and the *Taylor and Wood* point, whether, as a matter of fact, Mr Williams was, as he claims, an entirely innocent agent, or whether, on the other hand, he knew and/or had reason to know that he was carrying spirits on which duty had not been paid.

127. In this connection, we were referred to 3 decided cases. The first was *R v White and Others* [2010] EWCA Crim 978. Of relevance is the statement of the Court of Appeal at [188] and [189] of that judgment:

> '[188] … at the conclusion of the hearing we asked for written submissions about a driver's liability for excise duty, where a driver is no more than a courier paid to transport the load into this country. We have received those submissions.
>
> [189] We have decided that we shall not resolve the issue given that it is both complex and does not arise in this case. 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.'

128.The second decided case was *Gerald Carlin v Commissioners for HM Revenue and Customs* TC/2013/03410, a decision of this Tribunal (Judge Alastair J. Rankin), sitting in Belfast on an appeal against an assessment to excise duty. Mr Carlin was a lorry driver who was stopped at Dover and questioned by the UK Border Agency as a result of which his lorry and the goods he was carrying were seized as liable to forfeiture. The Tribunal described Mr Carlin as 'not a convincing witness' who frequently contradicted the information given to the Border Agency at interview, explaining these contradictions as being due to the lapse of time and his failing memory. However, the Tribunal criticised the witness for HMRC at the hearing on the basis that HMRC had failed to carry out the most basic checks to ascertain whether Mr Carlin was the holder of the goods or merely the courier. Mr Carlin's appeal was allowed on the basis that the Tribunal decided that he was merely the courier.

129.The third case was *Liam Patrick McKeown v Commissioners for HM Revenue and Customs* TC/2013/07422, also a decision of this Tribunal (Judge Alastair J. Rankin), sitting in Belfast on an appeal against an assessment to excise duty. In that case a load of vodka had been at Dover as they were travelling under an invalid ARC. The Tribunal dismissed Mr McKeown's appeal because it was satisfied that HMRC had proved that Mr McKeown knew what he was carrying (vodka) and gave false information to the officer who intercepted him at Dover. Therefore, following *Taylor*

*and Wood*, the Tribunal accepted that Mr McKeown was holding the goods within the meaning of Reg. 13(2) of the HMDP Regs. and *Carlin* was distinguished because in *McKeown*, HMRC had not failed to carry out the most basic checks.

130. Miss Vickery submitted that the evidence showed that Mr Williams knew or ought to have known that he was carrying spirits on which duty had not been paid rather than wine within duty suspension. She also submitted (in answer to the *Carlin* point) that there had been a reasonable investigation by HMRC of the circumstances relevant to the question of whether Mr Williams was "holding" the spirits for the purposes of the HMDP Regs., although she accepted that the investigation was not 'perfect' and submitted that the Tribunal should not expect it to have been 'perfect'.

131. Miss Vickery also accepted, from Officer Carr's evidence that she could not submit that there was positive evidence to show that a signal had been given to Mr Williams to pull over at the docks, which he had ignored.

132. Nevertheless she submitted that the fact that there were 26 pallets (of spirits) in the load, as opposed to the 30 pallets (of wine) declared on the CMR was evidence of Mr Williams's knowledge that he was carrying an illegal load of spirits.

133. She submitted that Mr Williams had not picked up the load at Polley. The evidence she relied on was the information obtained by HMRC from Polley, namely: (1) that the CMR form carried by Mr Williams was not of the form used by Polley; (2) that Plutus did not appear in the stock account of Polley or in the list of its clients; (3) that the ARC number did not correspond to any ARC number issued by Polley; (4) that the CMR reference BL004098 corresponded to a CMR issued by Polley in relation to a consignment on 16 August 2012, rather than 25 September 2012; and (5) that Polley's standard procedures did not match Mr Williams's version of events, in particular that Polley had stated that their administrative team gave drivers the CMR after loading, whereas Mr Williams had stated that the fork-lift driver who had loaded his vehicle had given him the CMR documentation.

134. She relied on the fact that HMRC investigations had shown: (1) that the ARC number presented by Mr Williams on the CMR did not exist; (2) that Plutus was not expecting the load and had not received Glen's Vodka or High Commissioner whisky for years; (3) that the named transport company, Monney Transport, was clearly not connected with the load as it was a parcel delivery company local to the Paris area, which did not deliver alcohol; (4) that Mr Williams had not been able to give either the telephone number or the complete address of SWT, the company which he claimed had instructed him to carry the load; (5) that Polley could not have issued the CMR presented by Mr Williams and that their account of their procedures was at variance with Mr Williams's story of what had happened.

135. She submitted that Mr Williams was not a credible witness – in particular that his evidence had been contradictory on his dealings with SWT – at the first interview he had said that he did not have a contact number for SWT and that he sent invoices to them to Monaghan, and in evidence he had said that this was a mistake and that SWT were at Kenmar in Kerry and he did in fact have a phone number for them, which he

had used to contact them. His credibility was also, in her submission, called into question by his evidence that he had watched 26 pallets being loaded, but had signed a CMR referring to 30 pallets.

136. Even if Mr Williams did not actually know that he was carrying an illegal load, he ought, in Miss Vickery's submission, to have known that fact. He had said at the interview on 23 February 2013 that he had not, contrary to his usual practice, watched what had been loaded on to his trailer because he had been told not to watch by the staff at Polley. This, she submitted, showed constructive knowledge of the fact that he had been carrying an illegal load.

137. Mr Thornton, for Mr Williams, submitted that we should accept Mr Williams's evidence that he had picked up the spirits at Polley, that he had not known that they were in fact an illegal load and that there was no basis on the evidence for a finding that he ought to have known of this fact.

138. While accepting that Mr Williams had given some inconsistent evidence (in relation to his contact at SWT) he submitted that the fact that the CMR contained the inaccuracies which it did was not evidence that Mr Williams knew or should have known that he was carrying an illegal load. He suggested that more plausible explanation was that there had been a conspiracy between SWT and persons unknown at Polley (which may or may not have involved the management of Polley) to use Mr Williams as a mere courier to bring the illegal load to the United Kingdom.

139. Mr Thornton suggested that the crucial evidence required to make good HMRC's case was missing. It would have been contained in Polley's CCTV images, which would have established that Mr Williams did indeed collect the load at Polley, and in the tachograph fitted to Mr Williams's lorry, which would have shown his movements, again to confirm his version of the story. However neither the CCTV evidence nor the tachograph evidence had been considered by Officer Daglish before making the assessment and issuing the penalty, nor was such evidence before the Tribunal.

140. Mr Thornton criticised HMRC for not doing enough to obtain the relevant CCTV evidence. Officer Daglish had asked Polley for it (apparently asking for evidence from the wrong date, 26 September 2013, instead of 25 September 2012), but in any event had not taken the matter further, when Polley responded that it was unable to provide it. In the face of an allegation that Polley might have been involved in masterminding the illegal load, Mr Thornton submitted that, as in *Carlin*, HMRC's investigation had not been adequate to establish its case that Mr Williams knew or ought to have known that he was carrying an illegal load.

141. Mr Thornton also criticised HMRC for failing to contact SWT. In response, Miss Vickery submitted that Mr Williams had not assisted HMRC in doing this because the telephone number which he held for SWT had not been passed to HMRC. However, against this, we note that HMRC found out that checks carried out on SWT showed that alcohol had been seized from them on 3 occasions in 2012 before the events giving rise to this appeal – see: paragraph 19 above. It was not explained to us how

such checks could have been carried out and yet HMRC was not able to verify the circumstances of this case with SWT.

142.Mr Thornton also criticised HMRC directly for failing to retain the tachograph evidence. Mr Williams had said at the first interview that he had the relevant tachographs in the vehicle, but when the other documentary evidence was collected by Officer Dyer the night following that interview the tachographs were not there. Officer Dyer said in his email dated 21 June 2013 that he could only assume that Mr Williams did not have the tachographs, or that the officer forgot to take them. The matter was not followed up, because the Border Force had other priorities at the time.

143.Officer Daglish in his second Witness Statement did not dispute Mr Williams's statement at the first interview that he had the relevant tachographs in the vehicle. He was content to accept that the reason for the evidence not being available was that the Border Force officer had forgotten to take them. That did not disturb Officer Daglish, however, because he considered that the tachographs would only show that Mr Williams had travelled a short distance, and obtaining them would not add to the evidence. Again, in respect of the tachograph evidence, Mr Thornton submitted that, as in *Carlin*, the investigation had not been adequate to establish that Mr Williams knew or ought to have known that he was carrying an illegal load.

144.Mr Thornton's other main submission was that Officer Daglish had said at the interview on 25 February 2013 that he was "not going down the deliberate side", which amounted to an acceptance that any wrong-doing on Mr Williams's part had been non-deliberate.

145.Officer Daglish had said this at a time when he had taken Mr Williams through the results of HMRC's investigations, that the given ARC number was not valid, that Plutus was not expecting the load, that Plutus had no knowledge of 6680 king trading/Tager Trading, Polley or Monney Transport, that Monney Transport was a small mail-delivery company in the Paris area, and that alcohol had been seized from SWT on 3 occasions earlier in 2012.

146.Officer Daglish had also said this at a time when he had heard Mr Williams's admission that he had "taken his eye of the ball" when the goods had been loaded and that he had been prevented from inspecting the loading at Polley. Officer Daglish at this time accepted that Mr Williams had not checked what was being loaded onto his vehicle and did not know that the goods which had been loaded had been. He had also 'considered' Mr Williams's argument that he would not have been able to check the company details on the CMR.

147.What had changed by the time Officer Daglish re-issued the penalty on a "deliberate" basis was his receipt of the information from Polley referred to at paragraph 35 above which appeared to him to cast doubt on the version of events given by Mr Williams. This led to the interview on 18 June 2013, where Officer Daglish put it to Mr Williams that he had not loaded his vehicle at Polley. In response, it was suggested to Officer Daglish that Polley might not be a fully legitimate company and that the CCTV and tachograph evidence would clarify what had

happened. Even at this stage, Officer Daglish had decided not to alter the penalty from "non-deliberate" to "deliberate", but this was 'on the basis of Mr Williams's personal circumstances and desire for a quick solution'. When he had been advised by Officer Dunn that Mr Williams's personal circumstances and desire for a quick solution were not relevant in assessing the degree of culpability, Officer Daglish had re-issued the penalty on a "deliberate" basis.

148. Mr Thornton criticised HMRC for not producing Officer Dunn as a witness (although we note that no application for a Witness Summons had been made on behalf of Mr Williams). He also suggested that the decision to re-issue the penalty on a "deliberate" basis may have been prompted by the ground of appeal which had at that time been submitted, suggesting that the fact that HMRC considered Mr Williams's conduct to be "non-deliberate" was a factor showing that the assessment itself should not stand (on *Taylor and Wood* grounds).

149. Our conclusion on the Deliberate Wrongdoing Issue is that HMRC has failed to establish to the required civil standard that Mr Williams knew or ought to have known that he was carrying an illegal load. We find that he was a 'mere courier'.

150. Although, like the Tribunal in *Carlin*, we did not find Mr Williams to be a wholly convincing witness, we do accept that the evidence shows that a reasonable interpretation of events was that this was a conspiracy between SWT and staff at Polley to cause the illegal load to be brought to the United Kingdom and that Mr Williams was unwittingly used by SWT for this purpose.

151. That reasonable interpretation might have been excluded if HMRC had been able to show that the CCTV evidence and the tachograph evidence was inconsistent with it, or that it had become impossible, despite HMRC's best endeavours, to obtain this evidence. But so far from that being the case, Officer Daglish appears to have asked Polley for CCTV evidence relating to the wrong date and to have taken their simple refusal to supply it as a reason for not taking the matter further. So far as the tachograph evidence is concerned, on the evidence, it is as likely as not that a failure of procedures within the Border Force was responsible for that evidence not being available. It is no answer, in our view, for Officer Daglish to have taken little notice of this factor on the basis that the evidence was unlikely to have assisted anyway.

152. The failure to obtain CCTV and tachograph evidence, or to take sufficient account of the absence of that evidence, in our view invalidates the change in HMRC's approach to the basis on which the penalty should be calculated from "non-deliberate" to "deliberate". We consider, as Mr Thornton submitted, that it is significant that up until the receipt of the (possibly partial) information from Polley, Officer Daglish's view on the evidence was that Mr Williams's conduct had been "non-deliberate". In our view the receipt of that information from Polley did not, of itself, justify the change to view that conduct as having been "deliberate".

153. It follows from our findings on this issue that the appeal against the assessment and against the penalty both succeed. It is therefore not necessary for us to decide

either the Consumption Issue or the Proportionality Issue and we say no more about them.

**The Reasonable Excuse issue**

154. Although in the light of our decision there is no need for us to decide whether Mr Williams has shown a reasonable excuse for any conduct constituting wrong-doing, whether "deliberate" or "non-deliberate", since the point was argued, we will state that, were it relevant, we would find that Mr Williams had not shown that he had a reasonable excuse for his conduct.

155. Mr Thornton submitted that the fact that Mr Williams was prevented by warehouse staff at Polley from watching the loading at close quarters, and that he nevertheless did observe it from afar and did his best to check the number of pallets loaded, and relied on the position, office and status of the warehouse keeper at Polley to load goods in accordance with the accompanying CMR amounted to a reasonable excuse.

156. We consider that as Mr Williams was the carrier of goods into the United Kingdom it was his responsibility (confirmed by his signing of the CMR and checking the seal number) to ensure as far as reasonably possible that the goods he was carrying reflected what was recorded on the CMR. In our view he did not do everything reasonably possible to this end. He could, and should, have insisted on seeing the goods loaded onto his vehicle, even if it was necessary to break the seal, and have the consignment resealed, in order to do this.

**Disposition**

157. Nevertheless, for the reasons given above, we allow the appeal.

158. 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.

**JOHN WALTERS QC**

**TRIBUNAL JUDGE**
**RELEASE DATE: 6 July 2015**