Neutral Citation: [2024] UKFTT 1011 (TC)

Case Number: TC09349

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal reference: TC/2022/13233

EXCISE DUTY AND WRONGDOING PENALTY – whether Appellant was "holding" tobacco at the excise duty point as she had arranged the transport of 36 euro bins unaware that the shipment was actually rolling tobacco – all paperwork in Appellant's name - yes - whether liable to wrongdoing penalty as she was 'concerned in carrying, removing, depositing, keeping or otherwise dealing' – HMRC reduced penalty to non-deliberate prompted disclosure – appeal dismissed

Heard on: 14 and 15 October 2024
Judgment date: 05 November 2024

Before

TRIBUNAL JUDGE ALASTAIR J RANKIN MBE
TRIBUNAL MEMBER PATRICIA GORDON

Between

KERRIE BRENNAN

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Sitting in public in the Lands Tribunal, Royal Courts of Justice, Chichester Street, Belfast, BT1 3JF

<u>Representation:</u>

For the Appellant: Mr Daniel McNamee of McNamee McDonnell Solicitors

For the Respondents: Mr Scott McCreedy, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The Appellant is appealing against the Respondents' decisions to issue her with an assessment to excise duty and a subsequent penalty for excise wrongdoing, both issued on 15 April 2022. The excise assessment was issued under Section 12(1A) Finance Act 1994 ("FA 1994") for £1,206,142.00. The wrongdoing penalty was issued under Schedule 41 to Finance Act 2008 ("FA 2008") based on deliberate and concealed behaviour for £783,992.00, that being 65% of the duty due. During the hearing the Respondents provided a revised calculation of £277,412.00 based on the non-deliberate behaviour of the Appellant.

2. On 20 April 2021, UK Border Force carried out a routine check of shipping containers which had been shipped from Rotterdam to Belfast. The paperwork for one such container stated that it included 36 euro bins (large bins on wheels), which were being shipped from Tectro SMT GmbH ("Tectro") in Germany to the Appellant in Northern Ireland. The Lettre de Voiture Internationale ("CMR") stated that the goods were being transported to Belfast by NV Logistics and being collected for delivery to Kerrie Brennan, 154 Brogies Road, Newry, Northern Ireland by NI Truck Ireland.

3. Upon physical examination of the cargo, a Border Force officer discovered a total of 4444.15kg of tobacco with an estimated market value of £2.2 - £2.7 million in the bins. Over the course of the following months, the Respondents worked with the German and Dutch authorities to obtain all of the paperwork pertaining to the illicit container. In particular, in June 2021, contact was established with Tectro. Tectro confirmed that they had no knowledge of this shipment, that the euro bins included had not come from them and that they had not arranged any transport to Northern Ireland. They also confirmed that the Tectro invoices and packing lists that had been included in the shipment paperwork were fake as they did not correspond with the design and format of their actual paperwork. Tectro also confirmed that they do not deliver goods to Great Britain and Northern Ireland.

4. On 4 November 2021 Officers Salt and Connolly from the Respondents interviewed the Appellant in the presence of her solicitor, Mr Danny McNamee. The Appellant answered either "no" or did not respond to every question being advised by Mr McNamee not to answer the particular question. The reason for this was that the interview was being carried out under caution with the possibility of a criminal prosecution (the "PACE interview").

5. On 23 February 2022, the Respondents issued a letter to the Appellant asking for information about the shipment. The Appellant failed to reply. On 16 March 2022, the Respondents issued pre-assessment and penalty explanation letters to the Appellant, detailing the assessment and penalty they intended to raise and asking the Appellant to make contact if she disagreed with any aspect of this. Again the Appellant failed to reply. On 15 April 2022, the Respondents issued the excise assessment and Schedule 41 penalty detailed at paragraph 1 above.

6. On 28 April 2022 the Respondents received an undated letter from the Appellant in response to their earlier letter dated 23 February 2022 in which the Respondents asked the following questions:

> 6.1 Did you order 36 Euro Bins from Tectro SMT GmbH? If so what was the purpose of the order?
> Answer: No, I didn't order the 36 euro bins.
> 6.2 Who arranged the transport of the goods to Belfast?
> Answer: I did, as part of my role with Cruz Deliveries Ltd. organising work and payments using my personal contact for convenience.

6.3 How did you pay for them, ie credit/debit card, bank transfer or some other method?
Answer: Bank transfer
6.4: If a card or bank transfer was used, who is the card holder (personal or business)?
Answer: I used my personal account which I frequently used for Cruz Deliveries Ltd. transactions, including wages and payments for parts and labour
6.5 If you did not order the euro bins, how could your name and contact details have appeared on the paperwork?
Answer: Rental tenant Jamie McKeown who asked me to arrange shipping of his goods.
6.6 The address (154 Brogies Road, Newry, Co Down, Northern Ireland BT35 8NE) is not the same as the residential address held by HMRC – what is your connection to 154 Brogies Road, Newry?
Answer: It is used by Cruz Deliveries Ltd. for storage and distribution services.
6.7 I note that you are employed by Cruz Deliveries Ltd. Companies House shows the only director is a Mr Lawrence McGuinness but you are shown as a person with significant control. What is your role in Cruz Deliveries Ltd?
Organisational Manager
6.8 Given the low level of pay you receive from Cruz Deliveries Ltd, do you have another job or means of income?
Answer: No
6.9 Are you in receipt of benefits?
Answer: No
6.10 Is there a website for Cruz Deliveries Ltd? If not how do you advertise the services of the company?
Answer: No we don't have a website. We have used a local newspaper for advertising and mostly word of mouth as we have had drivers operating in a wide range of areas.
6.11 What type of items does Cruz Deliveries Ltd deliver and to whom?
Answer: Most commonly clothing items, but a range of products are delivered to Cruz Deliveries Ltd. The majority of deliveries are to residential homes but there are many business deliveries also.

7. Also on 28 April 2022 Mr McNamee emailed the Respondents to request a statutory review of both the assessment and penalty. On 27 July 2022 the Respondents issued their Review Conclusion letter, upholding both decisions in full. On 08 August 2022 Mr McNamee notified an in-time appeal to the Tribunal.

POINTs AT ISSUE

8. Did the Appellant 'hold' the goods to which the excise assessment applies?

9. Was the Appellant's excise wrongdoing in regard to these goods deliberate and concealed or, in the alternative, deliberate or, in the alternative, non-deliberate?

EVIDENCE AT THE HEARING

10. The Appellant gave oral evidence as well as having provided a witness statement. In her witness statement she stated that she operated a distribution storage business through a company called Cruz Deliveries Ltd ("Cruz") at 154 Dublin Road, Newry. This business hires out storage units one of which was hired by Mr Jamie McKeown who had requested that Cruz arrange for the delivery of a shipment to him at 154 Dublin Road to be facilitated through the company's account.

11. The Appellant made the arrangements on behalf of Cruz but claimed she had no responsibility for the shipment. She stated that without her knowledge Mr McKeown had arranged for the shipment to be consigned to her personally. She had no responsibility for the

consignment and was at all times acting as an officer of Cruz. She claimed that she did not and never had operated a distribution business in her own right.

12. While giving oral evidence she explained that only her husband had access to Cruz's bank account and he was often away making deliveries. She therefore arranged for Mr McKeown to make payments to her personal bank account from which she then paid for the transhipment. Her personal bank account showed a receipt of £1,000.00 from Mr Jamie McKeown on 30 March 2021and a further receipt of £1,600.00 on 6 April 2021. The same bank account showed a payment by the Appellant on 16 April 2021 of £1,128.87 to "J McK Pallets Neele VAT Logist".

13. The Appellant explained that the receipt of £1,000.00 from Mr McKeown was in respect of three months' rent of 25 square meters space at 154 Dublin Road from 1 April 2021. This was confirmed by an email from Mr McKeown to the Appellant dated 26 March 2021. On 27 March 2021 the Appellant provided bank details to Mr McKeown and stated "I might get an agreement done and send it on to you just to keep us both right". The Appellant confirmed that no written agreement was ever drafted.

14. The Appellant was referred to various emails between herself and Edwin Dejager of Neele-VAT Transport BV ("Neele-VAT") starting with an email dated 1 April 2021 in which she said the following:

> "My name is Kerrie, I'm taking over some work from Brendan Morgan. I know Brendan had hoped to be in contact with you today at some stage but he passed on your contact details to me.
>
> I just wanted to forward you on my information in order to set up an account with you.
>
> I have included the address of my warehouse below along with my contact details….
>
> …
>
> There is a consignment of 18 euro pallets for delivery to yourselves next week. If you could arrange a consignment number and forward me on the invoice, I will arrange payment for Monday…."

15. She was then taken to several emails between the Appellant and people at Neele-VAT establishing an account for the Appellant. Neele-VAT sent the Appellant an invoice addressed to her at Brogies Road 154 for the shipment dated 12 April 2021 for €1,270.50. The appellant confirmed that she paid this from her personal account on 16 April 2021 the sterling equivalent being £1,128.87.

16. The Appellant was referred to an invoice from Tectro dated 2 April 2021 for 18 white Euro bins and 18 black euro bins at a total cost of €15,660.00. The invoice was addressed to her at 154 Brogies Road and the shipping address was also stated to be to her at 154 Brogies Road. The Appellant confirmed that she did not pay the invoice. She also confirmed that 154 Brogies Road and 154 Dublin Road were the same address.

17. The Appellant was referred to an email dated 2 April from her to Edwin Dejager in which she stated that she was in the process of setting up her own registered company but was just going to set up the account in her own personal name for now. She confirmed that this proposed company was to be used for international shipments but it did not proceed. She confirmed that she did not nor did Cruz create separate records for each customer and neither she nor Cruz had any physical address for Mr McKeown.

18. Mr McNamee referred the Appellant to parts of the transcript of her PACE interview under caution on 4 November 2021. In particular he pointed out that it was stated that the

Appellant was willing to give the Respondents full details of the customers, emails, shipping details outside of the interview under caution.

19. Mr Barry Gallagher, an officer with the Respondents gave oral evidence having submitted a witness statement dated 8 March 2024 in which he recited how his colleague Officer Elaine McLeish had decided to issue the assessment and the penalty as she had deemed the Appellant to have been holding the goods for the purposes of Regulation 13(1) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2020 ("HMDP"). He explained that Officer McLeish noted the CMR, the invoice and the packing list all identified the Appellant as the consignee, the freight agent had confirmed all the Appellant's details but she had not provided any information or assistance to the Respondents during her PACE interview on 4 November 2021.

20. Officer Gallagher admitted that there were errors in his witness statement. First, he stated that Border Force had found 4444.15kg of Golden Virginia hand rolling tobacco. The seized goods were not Golden Virginia. Secondly, in his conclusion he stated that the Appellant admitted paying for the goods when she had in fact only admitted to paying for the transport of the goods.

21. Officer Gallagher then explained the actions he had taken after taking over from Officer McLeish. He had been in contact with Tectro who had confirmed that their invoice was false. He had attempted to get in touch with Brendan Morgan but without success. He admitted that he did not try to get in touch with Jamie McKeown on whose behalf the Appellant alleged she was arranging the shipment through Cruz. He claimed he was unable to get in contact with Jamie McKeown as the Appellant had not given him any information to assist him in tracing him. At the time when the Respondents issued the assessment and penalty the Appellant had not provided copies of her bank statements.

THE LEGISLATION

22. The burden of proof for the excise assessment is on the Appellant to demonstrate that she should not be liable according to section 16(6) of the Finance Act 1994 ("FA 1994") and section 154)2)(a) of the Customs and Excise Management ACT 1979. In respect to the Wrongdoing Penalty, the Respondents bear the burden of proof to demonstrate that the penalty is correct and appropriate. Once that is proved the burden shifts to the Appellant to demonstrate that there was a reasonable excuse (or special circumstances) for their act or failure.

23. The Respondents are empowered to make the excise assessment by section 12(1A) of FA 1994, which provides that

> "where it appears to the Commissioners that any person is a person whom any amount has become due in respect of any duty of excise…the Commissioners may assess the amount of duty due from that person".

24. Section 12(4)(b) of FA 1994 provides that any such assessment must be made within:

> "the end of the period of one year beginning with the day on which evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge."

25. In this appeal, the hand rolling tobacco was seized on 20 April 2021, and the Excise Assessment was made less than one year later, on 15 April 2022, so the Excise Assessment was made within time.

26. In Northern Ireland the provision governing the excise duty point for goods already released for consumption in an EU Member State and persons liable to pay duty thereon is regulation 13 of The Excise Goods (Holding, Movement and Duty Point) Regulations 2010) ("HMDP") which are the domestic regulations which implemented Directive 2008/118/EC

("the "Excise Directive") into UK law. Regulation 13 of the HMDP Regulations, as it applied in Northern Ireland at the time which is material to the instant appeal, provided as follows:

> "(1) Where excise goods already released for consumption in an EU Member State are held for a commercial purpose in Northern Ireland in order to be delivered or used in Northern Ireland, the excise duty point is the time when those goods are first so held."

27. The excise duty point was therefore created at the time when the excise goods were first held for a commercial purpose in Northern Ireland. Regulation 13(2) governs who is liable to pay the duty in such a case. This 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.

It will be noted from the word 'or' that the person in question need only fall into one of the above three categories.

28. Regulations 13(3) and (4) then read, insofar as relevant, as follows:

> "(3) For the purposes of paragraph (1) excise goods are held for a commercial purpose if they are held –
>
> (a) by a person other than a private individual; or
>
> (b) by a private individual ('P'), except in a case where the excise goods are for P's own use and were acquired in, and transported to Northern Ireland from, an EU Member State by P.
>
> (4) For the purposes of determining whether excise goods referred to in the exception in paragraph (3)(b) are for P's own use regard must be taken of… …
>
> (h) the quantity of those goods and, in particular, whether the quantity exceeds any of the following quantities– …3200 cigarettes, 400 cigarillos… 200 cigars,

29. Regulation 13 was revoked in the rest of the UK on 31 December 2020 but remained in force in Northern Ireland by virtue of The Excise Duties (Northern Ireland Miscellaneous Modifications and Amendments) (EU) Regulations 2020.

CASE LAW

30. In *Kent Couriers Ltd v The Commissioners for His Majesty's Revenue and Customs* HMRC [2024] UKFTT 145 (TC), ("*Kent Couriers*") the First-tier Tribunal conducted a review of the case law authorities relevant to a person's liability under regulation 13(2) and whether or not the Appellant in that case was 'holding' or 'making the delivery' of goods. They explained that the normal meaning of 'holding' according to the decision of the Court of Justice of the European Union ("CJEU") in Case 279/19 *The Commissioners for Her Majersty's Revenue and Cusatoms v WR* ("*WR*") is physical possession and that this is used as the starting point.

31. However, according to the decision of the Upper Tribunal in *Agniezska Hartleb T/A Hartleb Transport* [2024] UKUT 34 (TCC) ("*Hartleb")*

> "80. We also take into account the fact that *Dawson* and the majority of cases considered in it, including *Perfect,* involve persons arguing that they should not be assessed to duty simply on the basis of having physical possession of excise goods. The Appellant's position is, in effect, the reverse as she contends that she should not be assessed to duty as she did not have physical possession of the relevant goods. Although the situation is

the reverse, we consider that the principle of physical possession not being determinative must apply equally.

81. The approach of the UT and Court of Appeal in *Dawson* demonstrates that the determination of "holding" is a question of law and fact. Although the initial focus, given the scheme and wording of the legislation together with the case law, is necessarily on the physical location of goods so giving weight to physical possession – that is not the end of the matter and a more detailed consideration of the facts is needed.

32. The Respondents claimed that the above is analogous with the present appeal in that the Appellant was similarly contending that she should not be assessed to duty as she did not have physical possession of the relevant excise goods.

33. In *Kent Couriers*, the First-tier Tribunal stated:

"29. We are, of course, bound by the decision in *Hartleb*. It follows that we are bound to hold that de facto and/or legal control of goods without physical possession of them can be sufficient to amount to "holding" the goods in an appropriate case. However, that does not mean that *de facto* and/or legal control of the goods will always be sufficient to amount to "holding" the goods. In each case, it is necessary to consider all of the relevant facts by reference to the four questions set out in *Dawson's* UT.

34. The "four questions set out in *Dawson's* UT" are a reference to the four questions formulated by the Upper Tribunal in *Dawson's (Wales) Ltd v The Commissioners for Her Majesty's Revenue & Customs* [2019] UKUT 296 (TCC) ("Dawson's UT"), which questions the Upper Tribunal in *Hartleb* (at 78) considered to be "a useful guide in determining who to regard as holder in circumstances where physical possession and de facto and/or legal control are separated". They are so separated in the present appeal.

35. The four *Dawson's* UT guidelines are, in summary, as follows:

35.1 Who had physical possession of the goods at the time when the alleged earlier excise duty point occurred?;

35.2 Who is the person alleged to have had de facto or legal control over the goods, how is that person said to have had control and on what basis was it being exercised?;

35.3 The time at which the excise duty point arose; and

35.4 Where the goods were being held at the relevant time.

36. In *Kent Couriers* the First-tier Tribunal continued:

"30 …it is implicit in the nature of the four questions – and indeed it is explicit in the decision in *Hartleb* at paragraphs [88] to [90] - that, in a case where physical possession of the goods and de facto and/or legal control of the goods are in separate hands at the excise duty point, we are bound to decide which of the relevant persons is to be regarded as "holding" the goods at that point to the exclusion of the other or others. It is not possible to treat more than one of the relevant persons as "holding" the goods at that point…A finding that one of those persons was "holding" the goods at the excise duty point necessarily precludes a finding that the other or others was or were doing so and therefore a comparative exercise is required in which the position of each potential candidate must be weighed up against the other or others."

37. *R v Taylor and another* [2013] EWCA Crim 1151 ("*Taylor*") was a Court of Appeal case concerning a provision analogous to regulation 13 of the HMDP Regulation, namely regulation 13 of the Tobacco Products Regulations 2001 which provided that the person liable to pay the duty was the person 'holding' the tobacco products at the excise duty point. The Court of Appeal attributed liability in that case to the person who "made all the arrangements necessary for delivery".

38. The judgment of the Court of Appeal in *R v Tatham* [2014] EWCA Crim 226, another case concerning the same provision under the Tobacco Products Regulations 2001, provides assistance as to what constitutes 'holding':

> "23 …'holding'...can be a question of law, and does not require physical possession of the goods, and the test is satisfied by constructive possession. The test for 'holding' is that the person is capable of exercising de jure and/or de facto control over the goods, whether temporarily or permanently, either directly or by acting through an agent…
>
> 26 … The Convention allocates passage of title and risk so that constructive 'delivery' of the goods (so as to be in the legal possession of the buyer) takes place when the seller delivers them to the carrier. This matches the rebuttable presumption as to the time that title passes from seller to buyer in section 32 of the Sale of Goods Act 1979. On either analysis, a buyer or consignee of goods transported from abroad into the UK would have constructive possession of such goods at the time of the imposition of the export duty, and likely its evasion."

39. The Upper Tribunal in *Hartleb* cited the remarks of Aspin LJ in *Taylor*:

> "54 …There is also no question but that the HMDP Regulations must be interpreted in conformity with the Excise Directive.
>
> 55. It is clear, therefore, that a contextual interpretation which takes into account the purpose of the legislation is necessary.
>
> 56.We agree with Mr Carey's submissions on the underlying policy of the Excise Directive. This was described by the Advocate General in his opinion in *WR* as follows:
>
> > As far as the aims of the Directive are concerned … the *broad wording* of the provisions at issue, which concern a series of persons potentially liable for the duties without any order of priorities being established, and who are jointly liable, seeks to guarantee that the tax debt is paid effectively and for this purpose *someone must be held responsible.*"
>
> 57. The CJEU decision in *WR* (at [33]) summarised this as reflecting the intention of the EU Legislature to lay down a broad definition of the persons liable to pay excise duty on goods released for consumption in order to ensure that so far as possible that the duty is collected.
>
> 58. The principle of ensuring the collection of tax was recognised also by Baker LJ in the Court of Appeal when it first considered *Perfect* in 2019 ([2019] EWCA Civ 465) and again by Newey LJ when it subsequently applied the CJEU determination of the question.
>
> "We agree that the underlying policy of the 2008 Directive is, as identified by the Upper Tribunal in [*B&M Retail Ltd v Revenue and Customs Comrs* [2016] UK UT 429 TC, [2016] STC 2456], that it is the obligation of every Member State to ensure that duty is paid on goods that are found to have been released for consumption."

40. The Respondents claim therefore that it is apparent that the HMDP Regulations, including the question as to whether a person was 'holding' goods subject to unpaid excise duty, should be interpreted broadly to ensure that, insofar as possible, excise duty is collected.

PENALTIES UNDER SCHEDULE 41 OF FA 2008

41. Paragraph 4 of Schedule 41 to FA 2008 ("Schedule 41"), entitled 'Handling goods subject to unpaid excise duty', provides that a penalty is payable by a person who acquires possession of or is concerned in carrying, removing, depositing, keeping or otherwise dealing

with excise goods on which duty is outstanding and has not been deferred (a “paragraph 4 penalty”).

42. Paragraph 16(4) requires a paragraph. 4 penalty to be raised within 12 months of the end of the appeal period for the assessment to which it relates. As the penalty and assessment were raised on the same day, 15 April 2022, the penalty was raised within time.)

43. A paragraph. 4 penalty is calculated as a percentage of the potential lost revenue (“PLR”), which is the amount of the unpaid excise duty. Paragraph 5(4), provides for degrees of culpability:

> “(a) “deliberate and concealed” if it is done deliberately and P makes arrangements to conceal it,
>
> (b) “deliberate but not concealed” if it is done deliberately but P does not make arrangements to conceal it.”

44. The leading authority on deliberate behaviour is *Revenue and Customs Commissioners v Tooth* [2021] UKSC 17 (“*Tooth*”), in which the Supreme Court held:

> “47. It may be convenient to encapsulate this conclusion by stating that, for there to be a deliberate inaccuracy in a document within the meaning of section 118(7) there will have to be demonstrated an intention to mislead the Revenue on the part of the taxpayer as to the truth of the relevant statement or, perhaps, (although it need not be decided on this appeal) recklessness as to whether it would do so.”

45. The Upper Tribunal in *CF Booth Ltd v Revenue and Customs Commissioners* [2022] UKUT 217 (TCC) (“*Booth*”) stated that in seeking to demonstrate the above, the Respondents need not demonstrate dishonesty:

> “41. There is in our judgment no requirement for HMRC to plead or prove dishonesty when seeking to impose a penalty for deliberate inaccuracy under Schedule 24 FA 2007.”

46. The appropriate penalty is determined by two factors: type of behaviour and type of disclosure. During the hearing the Respondents submitted an amended penalty calculation based on the Appellant ‘s non-deliberate prompted disclosure resulting in a penalty calculation of £277,412.66 being 23% of the PLR.

SUBMISSION ON BEHALF OF THE APPELLANT

47. At the conclusion of the hearing on the first day both parties offered to prepare written submissions which they would then speak to on the second day.

48. Mr McNamee on behalf of the Appellant submitted that the Appellant accepted that, in the normal course, as regards an assessment of duty, the onus is on an Appellant to demonstrate that she was not the holder of the goods at the duty point. The onus only properly falling upon an Appellant in circumstances where the statutory body has fully discharged its investigative duties. He submitted that the Respondents had not properly discharged their duties.

49. Mr McNamee contended that his client had produced compelling documentary evidence of the fact that she organised the delivery at the request of Jamie McKeown through her employment at Cruz Deliveries Ltd. She had given full and cogent evidence of the nature of the business that was conducted on behalf of the company and explained the practice that developed of her using her own bank account for business purposes, examples of such activity being obvious on the face of the banking documents provided. The email chain of correspondence tied in with the monies deposited by Mr McKeown into the Appellants bank account. The Respondents had ignored the fact that the consignee address is the warehousing operated by Cruz deliveries and is its registered address and operating centre.

50. The factual underpinning of the assessment was the statement of the Respondent's only witness Officer Gallagher. In the course of his oral evidence, he conceded that there were a number of factual errors in his statement, the first being where he misidentified the tobacco as Golden Virginia. He then conceded in relation to the assertion that the Appellant had paid for the goods that this was incorrect and that this error undermined a number of the assertions in his statement.

51. Officer Gallagher conceded that there was no evidence that the Appellant either ordered or paid for the goods. He accepted that the only payment made by the Appellant was for the shipping of the goods. He further accepted that there was evidence in the bank statements of the Appellant using her account for other business of Cruz. He asserted that the Tectro documents were entirely false.

52. Officer Gallagher conceded that the Appellant had offered to assist the Respondents at the time of interview in November 2021. In that interview the Appellant's solicitor stated;

> "Well there is no doubt that as you should be aware of Ms Brennan is involved in a delivery company quite a substantial delivery company which employs a very large number of people of based outside of Newry. She arranges for deliveries as part of her work on a daily basis. Any of those details, if we see the document, we can deal with that and the company itself can deal with it. There is no issue whatsoever in relation to any particular (inaudible) there was a seizure (inaudible – papers rustling) documents we can give you full details of the customers, customers details, emails sent to the company, emails sent from the company, shipping details, who arranged shipping details, all those things can be given.
>
> But you are interviewing Ms Kerrie Brennan under caution in relation to a criminal offence which she is not involved in.
>
> But I mean what I would like to state for the record is there's a whole audit trail in relation to every delivery that would have been made in relation to that business as *(inaudible) wants to see it".

53. Mr McNamee submitted on behalf of the Appellant that no criticism could be levied against the Appellant given the fact that she attempted to provide details to the Respondents outside of the auspices of the PACE interview. She subsequently answered the pre-assessment queries as set out by the Respondents and received no further queries from them.

54. The failure of the Respondents to accept the material being offered after the November 2021 PACE interview was inexplicable and the failure of Officer Gallagher to enquire into the relationship between the Dutch shipping agent and Brendan Morgan is again a matter which, Mr McNamee submitted, must cause the Tribunal grave concern, especially given the fact that apart from Mr Morgan being identified in the email from the Appellant dated 1 April 2021 (referred to in paragraph 14 above) to the shipping agent there were extensive references to Mr Morgan in the interview.

55. The Tribunal should note Mr Gallagher appears not to have been aware of any material which would have identified Mr Morgan or given details of his relationship with the Dutch shipping agent. This was highly relevant to the Appellant's case according to Mr McNamee as it put in proper context the dealings of the Appellant on behalf of Cruz Deliveries Ltd concerning the trade which had already been established by Mr Morgan.

56. Mr McNamee submitted that these matters taken cumulatively should in themselves cause the Tribunal to have grave concerns in relation to the conduct of the Respondent's

investigation. He submitted that the investigation was so flawed that it entirely undermined the basis upon which the Respondents seek to resist the present appeal.

57. The Respondents sought to justify the assessment on the grounds set out in Officer Gallagher's statement which were essentially repeated within the Respondent's statement of case. The Tribunal should note that Officer Gallagher resiled from many of his factual conclusions during the course of his evidence. The Appellant therefore submitted that the overwhelming majority of the Respondent's factual grounds for raising the assessment were accepted by their only witness as being incorrect.

58. The only ground upon which Officer Gallagher sought to maintain the assesment was the inclusion of the Appellant's details in the false documents. In this regard the Tribunal is referred to the First-tier Tribunal decision in *McGeown Transport Limited v The Commissioners for His Majesty's Revenue and Customs* (TC 2018/00143) where at paragraph 53(7) in circumstances where similar fabricated documents were sought to be relied upon by the Appellant, the Respoindents contended that no reliance could be placed upon the contents of such documents. This view was accepted by Judge Heidi Poon at paragraph 62. It was therefore submitted that for the Respondents to seek to argue the opposite in this appeal would constitute a grave abuse of process.

59. Officer Gallagher explained to the Tribunal that any person whose name appeared in such documents would be "considered" for assessment, it being up to any such person to have themselves excluded from any such liability. Mr McNamee submitted on behalf of the Appellant that it was the manner in which the Respondents failed to carry out its investigation which prevented this Appellant from being so excluded and he stated that this Tribunal should, having viewed the consistency of the Appellant's evidence in this matter, be satisfied that this Appellant personally was not holding the goods at the duty point. He submitted that the evidence of this Appellant on this matter had been clear and cogent. She did not operate a delivery business in her own right, and at all times she was conducting herself as an employee of Cruz Deliveries Ltd.

60. Mr McNamee claimed it was not open to the Respondents to amend their case from that as set out in their statement of case and the statement of Officer Gallagher. The factual underpinning of this case has now been accepted by the Respondents' only witness to be incorrect.

61. Mr McNamee asked the Tribunal to note that the concession made on the morning of the hearing by the Respondents to the effect that the penalty had been reduced to reflect a finding of non-deliberate as regards the conduct of the Appellant, is important in a number of regards.

62. First, it was an acceptance that there was no deliberate or intentional wrongdoing on behalf of the Appellant. Such a finding was inevitable after the presentation of the documentation by the Appellant and after it was accepted by the Respondent that the Appellant had offered to provide this and any other information in her possession at an earlier stage.

63. Concerning the case law cited in support of the Respondents defence of this appeal the quotations from *Taylor and Wood* have been taken out of context and are to a great extent misleading. The Court in *Taylor and Wood* made it clear that an innocent agent such as this Appellant should not be fixed for liability under the legislation. A more fulsome exposition of the facts in this and the other cases cited would demonstrate that there is nothing in the case law which assists the Respondents in this appeal.

64. In conclusion, based upon all of the evidence before the Tribunal, Mr McNamee claimed the Tribunal must make a finding that the Appellant was entirely blameless in this attempted importation and that at all times the Appellant was acting as an agent of Cruz Deliveries Ltd,

which was acting on behalf of Jamie McKeown. The person who is responsible for the shipping of this consignment was Jamie McKeown using the services of Cruz Deliveries Ltd and not the Appellant. The Appellant and Cruz Deliveries Ltd have a position in this matter analogous to that of Heijboer and Yeardley in *Taylor and Wood*. This being the case, the Appellant is not liable, not having been holding the goods and therefore neither the assessment nor the penalty should have been raised against her.

SUBMISSION ON BEHALF OF THE RESPONDENTS

65. Mr McCreedy submitted a lengthy written submission running to 13 pages. His overarching submission on the Excise Assessment issue is that the Appellant was either 'holding' the goods or 'making the delivery' of the goods in respect of the shipment in question, and that she was therefore liable for the Excise Assessment under regulation 13.

66. In short, the position in law is that whilst 'holding' can mean simple physical possession of goods, the concept of 'holding' is not necessarily equivalent to actual physical possession, nor is determined merely by it according to the Upper tribunal in *Hartleb*.

67. In *Kent Couriers*, the First-tier Tribunal explained that the normal meaning of 'holding' – according to the decision of the CJEU in *WR* is physical possession and that this is used as the starting point. However, according to the Upper Tribunal in *Hartleb* physical possession "is not the end of the matter and a more detailed consideration of the facts is needed." Mr McCreedy submitted that this was analogous with the present appeal in that the Appellant in the current appeal did not have physical possession of the relevant excise goods.

68. Mr McCreedy submitted that the goods were transported under the direction of the Appellant and were within her legal and/or de facto control at the time of the excise duty point in accordance with the second guideline in *Dawson UT.* The Appellant was the consignee on the CMR Document and, in law, the consignee has legal control of the goods in transit. The Appellant in *Kent Couriers* was found to have had legal control on this precise basis.

69. Mr McCreedy further submitted, for the following reasons that it is clear from the facts and evidence in this case that the Appellant was also exercising de facto control over the Goods. The Appellant admitted under cross-examination that she was the person who arranged the shipment. Whilst she claimed that she had done so on behalf of Cruz as opposed to on her own account, Mr McCreedy rejected this contention and submitted that all the evidence indicates that the Appellant arranged the shipment personally.

70. The Appellant admitted that she provided her own personal contact details, including mobile number and email address, to the Freight Agent, Neele-Vat. Her evidence was that she used her own personal bank account for all transactions related to the shipment – both to take payment from Jamie McKeown and to pay Neele-Vat for the cost of transporting the goods. Mr McCreedy submitted that it was highly unorthodox for a company not to use a company bank account for genuine company transactions. He further submitted that the Tribunal was entitled to take judicial notice of the fact that banking apps can generally be downloaded and logged into by multiple persons with the same login credentials, and that the Appellant's account in this regard was not credible.

71. As the Appellant accepted, there was not a single mention of Cruz Deliveries Ltd in the contemporaneous email correspondence. Mr McCreedy contended that it was plain from this correspondence that the Appellant was transacting on her own account. She herself said as much in her email to Neele-Vat dated 2 April 2021:

> "Quick question, I am in the process of setting up my own registered company so was just going to set up the account in my own personal name for now, would that be OK?"

The Appellant did not mention Cruz Deliveries Ltd; instead, she mentioned an as-yet-unincorporated new limited company. Cruz Deliveries Ltd was already incorporated, so there was nothing to stop her from setting up the account with Neele-Vat in the name of Cruz Deliveries Ltd, had she wanted to do so. Mr McCreedy submitted this clearly showed that she herself was transacting on her own account and remained personally responsible for the shipment. Similarly to the point made regarding the bank account which was used, he submitted that it is unorthodox for a company not to transact using the company name.

72. The CMR, and both the Tectro Invoice and the Tectro Packing List, which the Appellant accepted she was in possession of and sent copies of to Neele-Vat, all name the Appellant – and not Cruz – as the consignee. She claimed in her evidence that she did not know what was meant by 'consignee'. The Respondents understand that consignee is a common term in the transport industry, which is used both domestically and internationally, and submitted that it was not credible that the Appellant, whose evidence was that she had worked in the industry for a number of years, would not have understood the term. In any event, she did accept that she had seen the documents referred to and that she had seen from them that she was the recipient of the goods.

73. There was no documentary evidence before the Tribunal that the Appellant ever challenged Jamie McKeown on the inclusion of her name in the said documents, nor that she raised this as an issue with NeeleVat.

74. Mr McCreedy submitted there was reference in the Appellant's evidence to Brendan Morgan having previously been the one to arrange shipping for Jamie McKeown. However, there was no evidence that Brendan Morgan had anything to do with the specific shipment which is at issue in this appeal. The Excise Assessment and Excise Wrongdoing penalty in this case only relate to that specific shipment.

75. The other basis for liability for an Excise Assessment under regulation 13 of the HMDP Regulations is where the person was 'making the delivery' of duty unpaid excise goods under regulation 13(2)(a). Mr McCreedy submitted that if the Appellant was not the 'holder' of the goods then, in the alternative, she was 'making the delivery'. The meaning of 'making the delivery' is discussed at paragraphs 32-34 of *Kent Couriers* which refer to the need for a contextual interpretation of the term and suggest that the determination of whether someone is 'making the delivery' should follow a similar approach to whether someone is 'holding' excise goods. The Appellant was 'making the delivery' because she made all the arrangements for delivery, and on the basis of the same reasons that have been set in relation to 'holding' above.

76. The Appellant in *Kent Couriers* was held not to have been 'making the delivery' because, as at the excise duty point, the goods in question were being carried by a Member who was unknown to the Appellant and whose route to the UK and time of entry into the UK were similarly unknown to the Appellant. Mr McCreedy submitted that, in this respect, the instant case could be distinguished from *Kent Couriers*.as here the Appellant knew who the delivery agents were and was in an active dialogue with them about when the goods were due to arrive. It is clear he submitted that those agents were 'making the delivery' of the goods into Northern Ireland on the Appellant's behalf.

77. Mr McCreedy submitted there were three points that arise regarding the Excise Wrongdoing Penalty, namely: (i) how liability for such a penalty is determined; (ii) how the quantum of such a penalty is determined; and (iii) any potential applicability of a 'reasonable excuse' defence.

78. The relevant provision under which an Excise Wrongdoing Penalty is payable is paragraph 4(1) of Schedule 41 which provides that a penalty is payable by a person who, in respect of duty unpaid excise goods, either:

"(a) … acquires possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods, and

(b) … a payment of duty is outstanding and has not been deferred."

79. Mr McCreedy submitted that, on the facts of the instant case, the Appellant either "acquired possession of" the goods; or alternatively she was concerned in the carrying, removal, depositing or keeping; or, failing either of these, she was – at the very least – "otherwise dealing" with the goods.

80. One other important principle on which Mr McCreedy relied regarding liability for an Excise Wrongdoing Penalty arises out of *General Transport SPA v The Commissioners for Her Majesty's Revenue and Customs* [2019] UKUT 0004 (TCC) where the Upper Tribunal stated:

"85. First, the wording of paragraph 4(1) Schedule 41 is clear: it contains no requirement that the taxpayer should have knowledge (actual or constructive) of the fact that a third party had deliberately evaded the payment of duty. Instead, paragraph 20 Schedule 41 provides for a "reasonable excuse" defence provided that the taxpayer can satisfy either HMRC or the Tribunal that the defence has been made out. Therefore, reading the two provisions together, a taxpayer who falls within paragraph 4(1) is only liable to a penalty if there is no "reasonable excuse". A taxpayer who did not know and could not reasonably be expected to know that a third party had deliberately evaded duty may well be able to establish the "reasonable excuse" defence. However, that does not mean that the HMRC must prove the presence of knowledge in order to charge a penalty under paragraph 4(1)."

86. Secondly, it is clear from paragraph [34] of David Richards LJ's judgment in *Euro Wines* that a penalty can be charged under paragraph 4(1) Schedule 41 even though the trader did not have specific knowledge of the evasion of excise duty. In that case the taxpayer company had purchased various excise goods from a company called Galaxy (a "cash and carry" business). HMRC subsequently established that the goods had been supplied to Galaxy by Vanguard Breweries, although on a visit to the latter's premises HMRC discovered that the address was wasteland. There had at one time been a pub at that address, but it had burned down. HMRC concluded that excise duty had not been paid on the goods and assessed the taxpayer to excise duty. The taxpayer appealed against that assessment and provided evidence of the delivery of the goods to it by Galaxy. The excise duty assessment on the taxpayer was withdrawn on the basis that the taxpayer had not been the first person to have physically held and controlled the goods in question. Subsequently, HMRC issued a notice of penalty assessment under paragraph 4(1) Schedule 41. Section 154 of the Customs and Excise Management Act 1979 ("CEMA") (which is not applicable in the present appeal) provided that the burden of proof fell upon the taxpayer. The taxpayer appealed against the penalty, arguing that the penalty imposed on it amounted to a criminal charge for the purposes of Article 6 of the European Convention on Human Rights (Article 6), thereby engaging that Article, and that section 154 infringed the presumption of innocence.

87. The Upper Tribunal, reversing the FTT on this point, held that the penalty imposed under paragraph 4(1) Schedule 41 was a criminal charge for the purposes of Article 6. In reaching that conclusion, the Upper Tribunal observed at [24]:

> "In our judgment, [the penalty] clearly was [punitive]. It sought both to deter taxpayers from acquiring excise goods in respect of which duty was unpaid, and to punish them if they found themselves in possession of such goods, *even through no fault of their own (subject only to defences of reasonable excuse and special circumstances).*" (Emphasis added)

> 88. It is clear from these comments that the Upper Tribunal considered that a penalty under paragraph 4(1) Schedule 41 could be a "no fault" penalty, subject to a defence of reasonable excuse."

81. Mr McCreedy submitted that the wording of paragraph 4(1) Schedule 41 is clear: it contains no requirement that the taxpayer should have knowledge (actual or constructive) of the fact that a third party had deliberately evaded the payment of duty.

82. Concerning the quality of closure or mitigating factors Mr McCReedy informed the Tribunal that the Respondents had allowed 0% for telling, 40% for helping and 30% for giving resulting in a quality of disclosure score of 70%. As the Respondents were now conceding that the Appellant had made a non-deliberate prompted disclosure this resulted in a 10% reduction giving an overall 7% quality of disclosure. As the maximum penalty was 30% the applicable penalty for potential lost revenue of £1,206,142 was 23% or £277,412 rounded down. Mr McNamee did not discuss the actual penalty calculations.

83. Mr McCreedy submitted that for the Appellant to have a reasonable excuse she must have demonstrated that she had taken all reasonable steps to ensure that duty had been paid on the goods and that she had undertaken due diligence regarding the transaction. She had failed for the following reasons:

83.1 As the Appellant confirmed in her evidence she personally had never previously arranged a delivery of goods for Jamie McKeown. This was a man that she had not dealt with before.

83.2 The Appellant had no rental agreement in place with respect to Jamie McKeown and her evidence generally indicated that the knowledge and records she held about him were scant.

83.3 Under cross examination, the Appellant admitted that despite having no business relationship with Jamie McKeown, she took no steps to check what was being shipped: when asked if she had taken sufficient care to check what she was shipping, she replied, "absolutely not".

83.4 This was in spite of the fact that she had never worked with Jamie McKeown before, she had never shipped goods from Tectro before, and in fact, she stated this was her first international shipment. It is submitted that in these circumstances, a reasonable person in the Appellant's position would have taken much greater care.

83.5 She forwarded falsified paperwork to the Freight Agent without taking steps to check the authenticity of the details.

84. As the Appellant failed to take any, let alone reasonable, steps in this case, she has no reasonable excuse for her actions according to Mr McCreedy.

DECISION

85. The Tribunal considers the Appellant was "holding" the rolling tobacco in accordance with the definition of the Upper Tribunal in *Hartlieb.* It was not necessary for the Appellant to have actual physical possession of the tobacco. She had both de fact and/or legal control of the tobacco. As all the paperwork showed her name and address, she was the only person who could give directions concerning the delivery of the tobacco.

86. The CMR invoice and the packing list identified the consignee as the Appellant. The freight agent confirmed that the Appellant's name, address and contact telephone number were those of the Appellant. Although the Appellant claimed that she was working for Cruz

Deliveries Ltd her explanation as to why all the paperwork was in her name rather than that of the company did not convince the Tribunal.

87. As Mr McCreedy informed the Tribunal the Appellant produced no evidence concerning the existence of Jamie McKeown for whom she claimed she was arranging the shipment. Although the Appellant produced copies of her bank statements showing Mr McKeown paying his initial rent of £1,000.00 on 30 March 2021 and £1,600 for the shipment of the 36 euro pallets (which the Appellant referred to as 18 euro pallets in her initial email to Mr Dejager on 1 April 2021) on 6 April 2021 no other information about him has been produced. The Appellant accepted that she had not undertaken any due diligence about him and in particular that she had not checked whether duty had been paid.

88. In her initial email to Mr Dejager dated 1 April 2021 the Appellant stated she was taking over some work from Brendan Morgan. Again, no evidence was produced concerning this person.

89. Mr McNamee maintained that due to there being several factual inaccuracies in Officer Gallagher's witness statement the Respondents did not properly discharge their duties and this failure resulted in the onus of proof passing to the Respondents. He produced no case law to support this contention. The Tribunal rejects this argument. In any event Officer Gallagher did not issue either the excise duty assessment or the penalty assessment – both were issued by Officer McLeish on 15 April 2022.

90. It was only after the Appellant responded on 28 April 2022 to the Respondents' enquiries that they were able to make enquiries which established that the Tectro invoice was a forgery and that the goods had travelled under false documents.

91. The Appellant had a history of being slow to produce documents. The Respondents wrote to her on 23 February 2022 and 16 March 2022, the latter letters included a pre duty assessment and a penalty explanation. Only after Officer McLeish issued the excise duty assessment and penalty assessment on 15 April 2022 did the Appellant respond (see paragraph 6 above). Even then she produced no supporting evidence.

92. When the appeal was listed for hearing on 24 July 2024, Mr McNamee produced nine pages of bank statements, 24 single page emails and one 10 page email. As a result, the hearing had to be adjourned and we issued Directions. No reason has been provided by Mr McNamee as to why he could not have produced these documents at an earlier time. (The Respondents had applied on 19 July 2024 for permission to admit one further piece of evidence.)

93. The Tribunal finds that there was no audit trail to show that Cruz Deliveries Ltd was the entity that arranged the shipment which was in fact arranged by the Appellant. It does not appear that Jamie McKeown would have been holding the rolling tobacco at the excise duty point as he had yet to come into factual or legal possession of it and owing to the seizure he never did. The Appellant has not shown that Brendan Morgan had any involvement with the shipment.

94. The Tribunal is unable to accept the Appellant's claim that only one person could have access to the bank account of Cruz. The Tribunal considers Mr McCreedy to be correct when he stated that it should be possible for more than one signatory on a bank account to have electronic access.

95. The Tribunal accepts that the Appellant neither ordered the goods nor paid for them but as she made all the arrangements for the shipment she came within the definition of "holding" or in the alternative "making the delivery".

96. The Appellant was “holding” or in the alternative “making the delivery” of the rolling tobacco for the purposes of Regulation 13 of the HMDP Regulations and is therefore liable for the excise assessment. She is also liable for the non-deliberate excise wrongdoing penalty under paragraph 6B)c) of Schedule 41 as she has no reasonable excuse.

97. The appeal is dismissed and the excise assessment and amended wrongdoing penalty are both upheld.

98. After the appeal hearing had finished Mr McCreedy sent an email to the Tribunal, which was copied to Mr McNamee, concerning the decisions in *Taylor and Wood*, *Hartlieb* and *Dawson’s (Wales) Ltd.* While the Tribunal considered these decisions in the course of our deliberations we did not consider the points made by Mr McCreedy nor the subsequent response received from Mc McNamee nor the further email from Mr McCreedy.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

99. 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.

TRIBUNAL JUDGE
ALASTAIR J RANKIN MBE
TRIBUNAL MEMBER
PATRICIA GORDON

Release date: 05th NOVEMBER 2024