Neutral Citation: [2023] UKFTT 00967 (TC)

Case Number: TC08988

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, 88 Rosebery Avenue, London
EC1R 4QU

Appeal reference: TC/2019/04534

EXCISE DUTY AND WRONGDOING PENALTY-was the driver of the lorry carrying the excise goods liable to pay the excise duty-had the driver "deliberately" attempted to evade excise duty.

Heard on: 29 September 2023
Judgment date: 06 November 2023

Before

TRIBUNAL JUDGE MARILYN MCKEEVER
MR MICHAEL BELL

Between

MR DAN ANDREI HAGI-NICOVICI

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Emil Lixandru of Counsel

For the Respondents: Mr Jonathan Metzer of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. On 10 May 2018, the Appellant, who was driving a lorry with a load of 26,064 litres of mixed beers (the Goods), was stopped by Border Force at Dover docks. No excise duty had been paid on the load. The lorry and its load were seized, and the Appellant was subsequently assessed for the excise duty in the sum of £32,251 and a wrongdoing penalty on the basis of deliberate behaviour of £11,287. The Appellant appeals against those assessments.

2. We have carefully considered all the authorities and arguments put to us, although we have not necessarily set them all out in detail.

THE STATUTORY FRAMEWORK

3. Regulation 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (the Regulations) in force at the time provided:

> "13.—
>
> (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…."

4. It is not disputed that the Goods had been "released for consumption" nor that the Goods were held for a "commercial purpose". Accordingly, the excise duty point had occurred at the time when the lorry driven by the Appellant was stopped and no duty had been paid at that point.

5. Consequently, the Goods were liable to forfeiture under Regulation 88 of the Regulations.

6. Section 139 of the Customs and Excise Management Act 1979 (CEMA) sets out the powers in relation to forfeiture. Schedule 3 of CEMA provides that a seizure of goods may be challenged in the magistrates' court within one month of the seizure. Paragraph 5 of Schedule 3 of CEMA provides:

> "If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of any thing no such notice has been given to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with, the thing in question shall be deemed to have been duly condemned as forfeited."

7. The Appellant did not challenge the seizure in the magistrates' court, so the Goods are deemed to have been duly condemned as forfeit.

8. It follows from this that there is an irrebuttable presumption, in the present case, that there was an attempt to evade duty and that duty had not been paid. It is not open to the Appellant to argue that the Goods were imported legally, or that duty had been paid. The presumption of "due" forfeiture also applies to the penalty charged. See *HMRC v Jones* [2011] EWCA Civ 824, *HMRC v Nicholas Race* [2014] UKUT 0331 and *HMRC V Jacobson* [2018] UKUT 00118 (TCC). These are all binding authorities.

9. Section 12 of the Finance Act 1994 (FA94) enables HMRC to assess the excise duty and section 13 FA94 permits penalties to be assessed.

10. The provisions about penalties are set out in schedule 41 Finance Act 2008 (schedule 41). We will refer to these provisions in more detail below.

11. The issues to be determined are:

(1) Whether the Appellant is liable for the duty as the person "making delivery of the goods" or "holding the goods intended for delivery".

(2) Whether the Appellant is liable for an excise wrongdoing penalty and if so, whether his behaviour was correctly categorised as "deliberate" and whether the penalty has been properly calculated.

BURDEN OF PROOF

12. The burden is on HMRC to prove, on the balance of probabilities, that they have validly made the assessments to the duty and penalty.

THE FACTS

13. In addition to the documentary evidence, we heard oral witness evidence from Officer Craig Murray, HMRC's decision maker and from the Appellant, Mr Hagi-Nicovici.

The seizure and the enquiries

14. On 10 May 2018 Mr Hagi-Nicovici drove a vehicle and trailer off a ferry from Dunkirk and into Dover Western Docks where he was stopped by an officer of the UK Border Force.

15. It was noted that the number on the trailer was stencilled in black marker pen on a blank white plate.

16. The Appellant was interviewed by Officer Lee. The Appellant handed over the CRM (Cross Movement Record) and the Delivery Note. The CMR stated that the sender was a French company IEFW, the consignee was an Irish company called Euromax Commodities Ltd, and the Carrier was a Bulgarian company, P & E Logistics Ltd. The registration number of P & E Logistics' vehicle on the CMR was 04DL7813 and the trailer number was G1768. The CMR also included the ARC (Administrative Reference Code). All this information was printed on the CMR. In the box headed "Successive Carriers" the name "JPH Transport Ltd" [no address] (JPH) and the vehicle registration MX59AFK and trailer number G1768 had been written on in manuscript. The Appellant admitted that he had written in the successive carrier information. The CMR had been stamped and signed by IEFW. Upon examination, it was found that this was not a "wet ink" stamp and signature; the CMR had been photocopied. That is, the CMR was a copy and not an original document.

17. During the interview, Mr Hagi-Nicovici said that he had worked for JPH Transport Ltd since December 2017. In his witness statement he said that he had picked up an empty trailer in Ashford Kent and had taken it to Calais, where he had picked up the sealed loaded trailer at a car park near Calais. He then drove the vehicle and trailer to Dunkirk.

18. The Appellant's evidence was that French border officers carried out a random security check. They broke the seal on the trailer and after examining the load obtained a new ferry crossing for him (as he had missed the original one) and returned the broken seal. The check occurred late at night or in the early hours of the morning. Mr Hagi-Nicovici did not inform his employer about the check or the breaking of the seal. As discussed below, we do not accept this evidence.

19. The Appellant told Officer Lee that he was taking the load to Holyhead, but he did not have a booking and that he had delivered a load to the same consignee the previous week.

20. Officer Lee then asked Officer Beer to examine the load and tally the goods to the Delivery Note and CMR. The load consisted of 28 pallets of mixed beer. Officer Beer noted a discrepancy in the load compared with the Delivery Note in that there were two pallets of Kestrel Super when the Delivery Note said there was one and the Delivery Notes listed a pallet of Zubr but there was none in the trailer. She also searched the cab of the lorry and the Appellant handed her the broken seal.

21. Officer Lee referred the matter to HMRC's Revenue Fraud Detection Team who instructed him to seize the vehicle, trailer and Goods.

22. The goods seized notice sent to the Appellant on 14 May 2018 stated that the seized goods were 25,448 litres of mixed beer. The letter made it clear that this was an untallied total taken from the delivery note. When the Goods were properly examined and tallied it was discovered that the correct total was 26,064 litres of beer and this formed the basis of the assessment and penalty. We find as a fact that the correct amount of beer seized was 26,064 litres of beer, based on the Tally Sheets which were provided in the course of the hearing following a challenge to the figures from the Appellant's representative.

23. Enquiries carried out by HMRC showed that the ARC number on the CMR was a genuine number, but it related to a movement on 7 May 2018 (three days before the Appellant picked up his load). The despatch time of that movement was 15:25 hours and the journey time, from France to the Ireland was shown as five days. The goods were shown as 24 lines of mixed beers, sent by IEFW to Euromax Commodities Ltd. (Euromax), the sender and consignee shown on the CMR. The transport arranger was stated to be a company called Erkin Ltd. The vehicle number was 04DL7813 and the trailer number was G1768. Records showed no trace of a vehicle or trailer with those numbers. In other words, the CMR accompanying the Goods, and the ARC number on the CMR, did not relate to the Goods, but had previously been used in relation to another movement of excise goods.

24. The actual Goods did not match the despatch note or the Electronic Accompanying Document (e-AD).

25. Vehicle registration number MX59AFK did exist and was registered to JPH Transport Ltd who had acquired it on 24 February 2018. It had no MOT nor had vehicle excise duty been paid.

26. Officer Murray became involved in the case on 5 November 2018.

27. On 7 November 2018 he wrote enquiry letters to the Appellant and to the companies which appeared on the CMR, namely, P & E Logistics Ltd, JPH Transport Ltd, and Erkin Ltd (the transport arranger). The letters were all similar in nature setting out what HMRC already knew, asking various questions and indicating that the addressee might be liable for the excise duty. Although the letters were very similar, some of the questions were tailored to the role of the addressee. It was acknowledged that some of the letters contained typographical errors. We do not find them material. At that point, Officer Murray was conducting enquiries to determine which of the parties was liable for the duty.

28. The letters to P & E Logistics Ltd and Erkin Ltd were returned undelivered.

29. JPH did not respond to the enquiry letter, but on 15 November 2018, Mr Murray received a telephone call from a person who said he was the agent of JPH. The agent said that the director of JPH was in Dubai and they had not spoken for some time. Mr Murray resent the enquiry letter to the agent but he received no response.

30. Enquiries were made of the Irish authorities in relation to Euromax and the French authorities in relation to IEFW, under the mutual assistance procedure.

31. Mr Murray received no response from the French authorities.

32. Mr Murray referred to an interview carried out with Euromax. He explained that Border Force would provide a list of questions but Irish customs officers would have carried out the interview. He had seen the report (although it could not be included in the bundle because it contained sensitive information). Euromax said that the goods were due to arrive on 14 May 2018. The seal number given by Euromax tallied with that on the seal provided by the Appellant, but the seal had been broken at the time of seizure. The e-AD provided by Euromax showed the load as having been received, but the ECMS (Excise Movement and Control System-a computerised system for monitoring the movement of excise goods under duty suspension in the EU) showed that the Goods had not been received. Clearly, the Goods could not have been received as they were seized.

33. Euromax said that the supplier and owner of the goods was a company called Swarley Ltd. Officer Murray was unable to trace the company or find any address for it and so was unable to send it an enquiry letter.

34. Officer Murray's opinion, based on the above enquiries and the lack of any evidence from the Appellant or French customs about the breaking of the seal, was that the broken seal belonged to a previous legitimate load and was kept in the cab and reused along with the copy of the CMR bearing the ARC number which had also related to a previous load. We find this a plausible explanation and discuss it further below.

35. The Appellant's agent, Andreea Moscovici, wrote to Officer Murray on 5 December 2018 enclosing various items such as bank statements, tenancy agreement and a contract for services with an employment company entered into after the seizure. The enclosures were not relevant to the decisions on the assessment and penalty. The letter set out the circumstances relating to how Mr Hagi-Nicovici obtained the job and his account of what happened. We return to this below. The agent also stated that Mr Hagi-Nicovici's instructions were that he knew he was transporting alcohol but had no reason to suspect that the paperwork was wrong or invalid.

Procedural history

36. On 20 December 2018 Mr Murray issued a pre-assessment and penalty letter setting out that he was considering assessing the Appellant for the excise duty and a wrongdoing penalty based on deliberate behaviour. Having completed his enquiries, the assessment and penalty notice were issued on 31 January 2019.

37. On 1 March, the Appellant's agent wrote to Mr Murray with additional information including copies of job applications and the enclosures previously provided. The enclosures were received by email on 19 March 2019. The information did not relate to the seizure itself. The 1 March letter requested reconsideration of the duty assessment and penalty and contended that the Appellant was an "innocent agent" and so should not be assessed.

38. Mr Murray replied on 22 March 2019 to say that he had considered the additional information, but it did not affect his decision.

39. On 11 April 2019, the Appellant's agent requested a review, and the original decision was upheld in a letter of 29 May 2019.

40. The Appellant appealed to the Tribunal on 27 June 2019.

41. The Appeal was, in January 2020, stayed behind the case of *HMRC v Perfect*. The Court of Appeal released their first decision, *HMRC v Perfect* [2019] EWCA Civ 465 (*Perfect 1*) in 2019. Mr Perfect was a lorry driver who had been driving a load of beer into Dover and excise duty had not been paid. The FTT found that Mr Perfect was an "innocent

agent" and did not have actual or constructive knowledge of the smuggling attempt. HMRC assessed him for the excise duty and a wrongdoing penalty. HMRC referred the question whether an innocent agent was "holding" the goods, and therefore liable for the duty, to the CJEU.

42. The Court of Appeal released their second decision, following the decision of the CJEU, in 2022 under the reference *HMRC v Martyn Glenn Perfect* [2022] EWCA Civ 330 (*Perfect 2*)

43. On 28 April 2022, HRMC emailed the Appellant with information about the *Perfect 2* decision and asked if he wished to proceed with his appeal. The Appellant confirmed he did want to proceed and following an application by HMRC, provided Particulars and Grounds of Appeal on 7 November 2022.

The pre-seizure events

44. The following findings of fact are derived from the statements made by the Appellant himself via his agent, from the interview with Border Force, the documentary evidence in the Hearing Bundle, the Exhibits to Officer Murray's witness statement and from the Appellant's oral evidence at the hearing. We did not find the Appellant a reliable witness.

45. The Appellant had been a professional driver since 2009. He originally had a Class II licence and had other jobs (besides driving) in his native Romania. He obtained a Class I licence in 2017 in order to come to the UK and came to the UK in August 2017.

46. He said that the job with JPH was his first job in the UK. He had a problem finding work as a Class I driver because many of the potential employers wanted experience which he did not have.

47. He was with a friend, who was a lorry driver, at the Moto Services at Thurrock when he was approached by a man who said he was looking for lorry drivers and he was offered a job even though he had no experience. The man gave him a mobile phone number and told him to contact a "Mr Dave". He did so and Mr Dave gave him instructions about where to pick up the unit, details of the unit and so on. He knew this person only as Mr Dave. He assumed he was working for JPH as the vehicle licence was in the name of that company. He worked regularly for JPH after that for a period of four or five months from December 2017 to May 2018. He left JPH immediately following the seizure.

48. Despite working for the company for that period, he never received any payslips. He did not know whether tax and/or National Insurance Contributions were paid. He did not have a contract of employment. The Appellant made no enquiries to find out any details or to check the identity of his employer. He said he had requested a contract of employment but there was no evidence of this. There were no written communications between him and JPH regarding the employment or the jobs to be completed or tax matters. Mr Dave would send him an SMS message booking him for a delivery. He stated he could not provide copies of these as his old phone was broken. He did not know Mr Dave's surname, nor the name of any other person connected with JPH.

49. The Appellant was paid in cash. He was paid between £500 and £650 for each job. The cash was left in an envelope in the cab of the lorry. He was expected to pay for expenses such as fuel out of this cash. No records were kept of the expenses.

50. The Appellant would normally pick up a vehicle from a yard behind a Matalan shop in Ashford, Kent. This was not the premises of JPH. The keys would be left inside the cab.

51. In relation to the present matter, the Appellant picked up the vehicle from Ashford and drove it to Calais where he picked up a loaded trailer from a car park near Calais. He then

drove to Dunkirk where he said that the French customs officers carried out a random control check on the trailer and broke the seal. He further said that they found nothing amiss and as he had missed his original crossing they provided him with another booking. The trailer was not resealed and the French customs officers provided no paperwork to confirm the position. He was not concerned about the unsealed trailer, despite saying in his witness statement that he was unable to break the seal, as a driver, implicitly indicating that he understood the importance of the seal remaining intact. He did not report the opening of the trailer to JPH, nor the fact that his crossing had been delayed and did not seem to think this was necessary. We consider it more likely than not that the seal was not broken by French customs officers.

52. The Appellant saw nothing wrong with the fact that the number plate of the trailer was not a normal plate but the number was stencilled on in black marker pen.

53. The letter from the Appellant's agent of 5 December 2018 said that the vehicle documents stated that the owner is JPH Transport Ltd and "Our client also confirmed that the CMR was filled with a transporter as JHP Transport Ltd (sic). Out Client, therefore, had a reasonable belief that he was working for the above company". At the hearing, the Appellant admitted that he had written in the details of JPH as a successive carrier in the CMR himself.

54. The Appellant told the Border Force officer that he was heading for Holyhead but did not have a booking. The agent's 5 December 2018 letter stated that "Our Client's instructions are that he… was required to deliver the goods to Ireland, Cork Warehouse…". Euromax's address was in Cork. In his evidence, the Appellant said he did not have a booking for the ferry from Holyhead to Ireland.

55. The Appellant also said he had not booked the load into the receiving warehouse in Ireland. It is normal procedure for a driver to "book" the load with the recipient, i.e. contact them to state the expected time of arrival so that the recipient knows when to expect the load. He had told Border Force and his agent that he was taking the Goods to Ireland, to the same warehouse where he had delivered a load the previous week. At the hearing he gave two different reasons for not booking the load which suggested he had never intended to go to Ireland. First, he said he had not booked in because he was not going to Ireland. He had asked for a day off as he had a young child and he wanted to be at home. He said that, had the lorry not been seized, he was taking it to a postcode in Ashford and he would be replaced with another driver. He subsequently said that because of the delay at the French customs he had exceeded his permitted driving hours and could not therefore continue with the job. He had not made a booking because he could not make concrete plans as a result of the restrictions on his driving hours. He did not provide any evidence for any of this. We find, on the balance of probabilities that he did not intend to take the load to Ireland, but to deliver it to an address in the UK.

56. Following the seizure, the Appellant rang Mr Dave and told him what had happened. When he tried to ring again, the phone did not work.

57. At the time of the seizure, the Appellant was requested to complete a questionnaire by Border Force. It was not mandatory to complete this, but the form stated "the information requested may accelerate the outcome of our enquiries and of any restoration request/decision of the vehicle and goods.". The questionnaire was in English and Romanian. The Appellant answered some of the questions but left many of the answers blank including how much he was being paid, how and when he was to be paid, how he got the job and who made arrangements for the trip. Among the answers he did provide were, first, that he was due to deliver the load to Cork in Ireland and that he had completed the CMR "like a second transporter".

THE EXCISE DUTY ASSESSMENT

58. As set out above, the goods are deemed by paragraph 5 of schedule 3 of CEMA to have been duly condemned as forfeit. It is not open to the Appellant to deny that there was an attempt illegally to evade customs duty. The deeming provision also applies to penalties.

59. The question is whether the Appellant is liable for the duty as a person "holding" the goods or "making delivery of the goods" within Regulation 13 of the Regulations.

This matter is conclusively determined by the Court of Appeal decision in *Perfect 2*.

60. Following the UK's withdrawal from the EU, decisions of the CJEU made after 31 December 2020 are not normally binding on the UK courts. However, the Withdrawal Agreement, Treaty Series No. 3 (2020) as implemented in domestic law by the European Union (Withdrawal) Act 2020

> "provides for judgments of the CJEU handed down after 31 December 2020 to have "binding force in their entirety on and in the United Kingdom" if given in respect of references made by United Kingdom Courts and Tribunals before the end of 2020."
>
> (see *Perfect 2* at [13]-[17]):

61. The Court of Appeal was therefore bound by the CJEU's decision. The Court of Appeal held at [22]:

> "… it seems to me that we are bound by the CJEU's judgment of 10 June 2021 to hold, as was anyway this Court's inclination in 2019, that article 33 of the 2008 Directive and, hence, also regulation 13 of the 2010 Regulations:
>
> > "must be interpreted as meaning that a person who transports, on behalf of others, excise goods to another Member State, and who is in physical possession of those goods at the moment when they have become chargeable to the corresponding excise duty, is liable for that excise duty, under that provision, even if that person has no right to or interest in those goods and is not aware that they are subject to excise duty or, if so aware, is not aware that they have become chargeable to the corresponding excise duty".
>
> In other words, a person need not be aware that excise duty is being evaded to be "holding" or "making … delivery of" goods for the purposes of regulation 13 of the 2010 Regulations or article 33 of the 2008 Directive.
>
> 23. It follows that the fact that Mr Perfect had neither actual nor constructive knowledge of the smuggling of the beer he was carrying cannot exempt him from liability from excise duty."

62. It is clear from *Perfect 2*, that a person who is physically in possession of dutiable goods at the excise duty point is liable for the excise duty irrespective of the individual's knowledge or culpability in relation to the smuggling attempt. The liability is strict.

63. Accordingly, as Mr Hagi-Nicovici was in physical possession of the Goods at the time they became liable for duty, he is liable for that excise duty.

THE PENALTY ASSESSMENT

64. The excise penalty regime is separate from the excise duty regime and is contained in schedule 41 to the Finance Act 2008.

65. Paragraph 4 of schedule 41 provides that a penalty will be payable by a person ("P") where:

> "(a) after the excise duty point for any goods which are

chargeable with a duty of excise, P acquires possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods, and

(b) at the time when P acquires possession of the goods or is so concerned, a payment of duty on the goods is outstanding and has not been deferred."

66. The penalty is based on the "potential lost revenue" (PLR) which is defined by paragraph 10 of schedule 41 to be an amount equal to the amount of duty due on goods on which the payment of duty is outstanding.

67. The amount of the penalty depends on the degree of culpability of the person liable for it. Under paragraph 6B of schedule 41, the levels of penalty are:

> "(a) for a deliberate and concealed act or failure, 100% of the potential lost revenue,
>
> (b) for a deliberate but not concealed act or failure, 70% of the potential lost revenue, and
>
> (c) for any other case, 30% of the potential lost revenue."

68. Paragraph 12 of schedule 41 provides for the penalties to be reduced where P co-operates with HMRC and discloses relevant information and documents. Reductions are available for "telling" HMRC what happened, "giving" HMRC help to quantify the unpaid tax and "allowing access" to records.

69. Paragraph 13 of schedule 41 sets out a table for determining the minimum and maximum levels of penalty depending on whether the disclosure that tax was due was "prompted" or "unprompted". Paragraph 12(3) provides that a disclosure is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the relevant act or failure. Otherwise, a disclosure is "prompted".

70. Where P has "failed to take reasonable care", a penalty may be waived if P has a "reasonable excuse" for their action (paragraph 20 of schedule 41). This does not apply where the behaviour is deliberate. Under paragraph 14, HMRC may reduce a penalty if they think it right to do so because of "special circumstances".

In the present case HMRC assessed the wrongdoing penalty on the basis that Mr Hagi-Nicovici's behaviour was "deliberate" but not concealed and that disclosure was "prompted". In the circumstances of this case, the maximum penalty was 70% of the Potential Lost Revenue and the minimum was 35%. HMRC gave the Appellant the maximum deduction for telling, giving and allowing access, so the penalty percentage was reduced to the minimum 35%. The PLR was £32,251 and the penalty (35% of the PLR) is £11,287.85.

71. The question we must now address is whether the Appellant acted "deliberately". The burden is on HMRC to prove, on the balance of probabilities, that he did so act.

72. The Supreme Court in *Tooth v HMRC* [2021] UKSC 17 explained the meaning of "deliberate" in the context of a "deliberate inaccuracy" in a tax return. At [43] of the decision the Court said that "Deliberate is an adjective which attaches a requirement of intentionality to the whole of that which it describes…". And at [47]:

> "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."

73. Mr Metzer submitted that a person could be regarded as acting "deliberately" where there was no intention to avoid tax (*Contractors 4 U Ltd v HMRC* [2016] UKFTT 17 (TC) at [51]) and that knowledge of wrongdoing was not required (*Kinesis Positive Recruitment Ltd v HMRC* [2016] UKFTT 178 (TC) at [58]. Both these cases involved the issue of VAT invoices by companies that were not VAT registered.

74. In our view, the meaning of "deliberate" must be determined in the context of the particular charging provision and in the light of the principles set out in *Tooth*. Deliberate conduct is a more serious matter than "careless" conduct attracting higher penalties and longer time limits for assessments to be made. It requires a greater degree of culpability. In the context of paragraph 4 of schedule 41, we consider that HMRC must prove, on the balance of probabilities that Mr Hagi-Nicovici knew that the goods he was carrying were dutiable goods, that duty had become due and that it had not been paid or deferred. That is, HMRC must show that he intended to avoid the payment of the duty.

75. Mr Metzer submitted that full knowledge was not necessary for conduct to be deliberate, citing the *obiter* comment in *Tooth* that recklessness might be sufficient. He also submitted that action could be "deliberate" where a person chose, consciously or intentionally not to find out the correct position, in particular, where the circumstances are such that the person knew that he should find do so. That is deliberate behaviour included the situation where a person has deliberately shut his eyes to the true factual position. He found authority for the "Nelsonian blindness" approach in three First Tier Tribunal decisions: *Clynes v HMRC* [2016] UKFTT 369 (TC), *Cannon v HMRC* [2017] UKFTT 859 (TC) and *Scott v HMRC* [2019] UKFTT 413 (TC).

76. In *Perfect 1*, the Court referred to the facts of that case, as found by the First Tier Tribunal. The FTT had found that Mr Perfect could not have known from the information and documents available to him that the goods (beer) were subject to a smuggling attempt. The documentations which he had were consistent with a valid movement of goods under duty suspension. The FTT considered whether he should have been put on enquiry by various matters that HMRC considered suspicious. In particular, his only contact at the company who provided the work (Mr Perfect considered himself self-employed, which may or may not have been the case) was a man called "Des", he was paid in cash and he did not have a written contract. The FTT observed that:

> "In the world in which Mr Perfect operated these informal arrangements were not to be regarded as unusual with lorry drivers from time to time, as he did for the reasons he explained in his evidence, treating themselves as self- employed (whether the circumstances justified that conclusion or not), being paid in cash without any documentation to back up the arrangements, being disinterested in the identity of those engaging them and remaining off the radar as far as HMRC was concerned. These sort of arrangements proliferate regardless as to whether they involve the smuggling of alcohol. Consequently in our view these circumstances **should not in themselves without any stronger evidence** have put Mr Perfect on enquiry as to whether he was going to be involved in the smuggling of alcohol." (our emphasis)."

77. Even if one accepts that in Mr Hagi-Nicovici's world the arrangements for transport jobs were often somewhat casual, in this case, we have considered a number of additional factors.

78. As noted, we did not find Mr Hagi-Nicovici a credible witness. He was vague and evasive in his answers to the questions put to him in cross-examination and contradicted himself on important matters, in particular, where he had planned to take the goods.

79. When Mr Metzer put to him that certain facts should have raised his suspicions, he simply denied that they were suspicious without comment or explanation.

80. Unlike Mr Perfect, the Appellant considered himself to be employed by JPH but he had no employment contract, no correspondence of any kind with his "employer", received no payslips and had no idea whether or not tax and National Insurance Contributions were being paid. This is as consistent with an intention to evade tax on his earnings as it is with illegal transport movements, but it does suggest that the "employer" was not entirely legitimate.

81. The Appellant did not consider a load worth £30,000 to be valuable, so saw nothing odd in picking it up in a car park. Nor did he find it suspicious that he picked up the vehicle with the keys inside.

82. His payment was left, in cash, in an envelope in the vehicle and there was no separate provision for expenses, and in particular, fuel.

83. The Appellant claimed that he could not provide the texts with Mr Dave or evidence of payment by his employer because his old phone was broken. We do not find this credible.

84. Mr Hagi-Nicovici said he had had trouble finding a job because he did not have Class I experience, yet he did not find it odd to be offered a job in a motorway service area and to be told experience was not required.

85. He had no explanation for the fact that he had picked up the Goods in Calais and then driven to Dunkirk and his evidence was inconsistent as to whether he had come from Calais or Dunkirk (though he told Border Force it was Dunkirk).

86. He did not find it odd that the number plate on the trailer had been stencilled on a blank plate with a marker pen. The number did not match the vehicle's registration and he did not answer when it was put to him this was not a real number plate.

87. We accept that, if the Appellant were innocent, he would probably not have been able to tell that the CRM was a copy of the original and would not have known that the ARC had been used on a previous load as that information is not available to the driver.

88. There are four matters which we consider particularly significant.

89. First, the Appellant failed fully to complete the questionnaire he was given by Border Force at the time of the seizure. The questions were in both English and Romanian, so he could not say he did not understand them, and in any event, although his English was not perfect, it was of a reasonably good standard. The answers omitted included those to such questions as:

(1) How much are you being paid for this trip?

(2) How and when will you be paid for this job?

(3) Have you checked whether the load is expected at its destination?

(4) How did you obtain this job?

(5) Who made arrangements for your trip?

(6) From where did you collect the load?

(7) Are you aware of what the load contained and if so, how did you know?

90. All these questions (and others) were questions to which Mr Hagi-Nicovici knew the answers. Mr Metzer suggested that he was withholding the information as Border Force would have found it suspicious and we think it is more likely than not that this was the case.

91. Secondly, the Appellant inserted details of JPH Transport Ltd, the registration number of the vehicle and the trailer in manuscript on the CRM. The box for "successive carriers" was originally blank, suggesting that there was no successive carrier, and the Appellant had completed the box to correspond with the vehicle he was driving. This is not normal practice.

92. Thirdly, the Appellant had initially told Border Force that he was taking the load to Holyhead to deliver it in Ireland. He had no ferry reservation. He had not booked in the load with the receiving warehouse, which was normal practice, so that the receiving warehouse knew when to expect the goods. Mr Hagi-Nicovici's evidence was contradictory as to why this was the case. He initially told Border Force he was taking the goods to Ireland. In evidence he first said that he had taken the day off (so he never intended to go to Holyhead) and then said that, because of the delay in France he had exceeded his permitted hours and so would not have been able to go further, had he not been stopped at Dover. Apart from the supposed day off this does not explain why he did not have a ferry reservation and none of it explains why he had not booked in the load with the receiving warehouse. We consider that it is more likely than not that the Appellant never intended to take the goods to Ireland.

93. Fourthly, the Appellant's account of the check by French customs is not credible. It is unfortunate that the mutual assistance procedure did not give rise to more assistance, as that would have determined the matter.

94. Mr Hagi-Nicovici was aware of the importance of a load being sealed and stated in his initial grounds of appeal that a driver was not allowed to break the seal of the trailer. He repeated this in his Particulars and Grounds of Appeal. In that document he stated that "…the Appellant stopped firstly at the French border point of Calais where the French Border Force officers checked the trailer, the goods and the papers by breaking the seal". He repeated this in his Skeleton Argument. This is inconsistent with the information he provided to Border Force at the time. In his witness statement, the Appellant did not specify where he was stopped by French customs. At the hearing he initially said he had travelled from Dunkirk then became vague as to whether it was Calais or Dunkirk.

95. He said that the French customs officials broke the seal, examined the load, found nothing amiss and send him on his way without providing any paperwork. He was unconcerned about the broken seal and did not consider it necessary to inform his employer. He provided no evidence or paperwork to prove this had happened.

96. He gave the broken seal, which he had in the cab, to Border Force at Dover.

97. We do not accept this. We consider it reasonable to assume (although there was no evidence on this point) that had French customs officers examined the load they, like Border Force would have noted a discrepancy and seized the load. If they did not find any discrepancy, it is unlikely that they would not have provided some sort of paperwork to state that they had broken the seal. Nor do we find it credible that a responsible driver would be unconcerned about the fact that the seal on his load had been broken. It is not credible that a responsible driver would make no attempt to notify his employer or obtain confirmation from French customs that they were responsible for the broken seal in order to protect his own position.

98. We have noted the Appellant's vague and unconvincing evidence, his inconsistencies and contradictions and we place little weight on it.

99. Having taken all the evidence, documentary and oral, into account, we find it more likely than not that the Appellant did not intend to deliver the goods to Ireland and that he had not been stopped by French customs but had been provided with the broken seal from a previous, legitimate load.

100. These circumstances and the evidence taken as a whole lead us to conclude that the Appellant knew that excise duty was due on the goods and that he knew the duty had not been paid; he knew he was engaged in a smuggling attempt. We therefore find that the Appellant was correctly assessed for a wrongdoing penalty under schedule 41 on the basis of deliberate behaviour.

101. We do not need to consider the question of "Nelsonian blindness".

102. HMRC has already reduced the penalty to the minimum allowed in recognition of the Appellant's cooperation. "Reasonable excuse" is not relevant as that relates only to a "careless" act and we find no reason to interfere with HMRC's conclusion that there were no special circumstances justifying a reduction in the penalty. We consider that the amount of the penalty is appropriate.

103. We have not said much about the submissions on behalf of the Appellant. For completeness, we confirm that we have considered them but we did not find them to address the material points relevant to the decision.

104. Mr Lixandru placed considerable emphasis on typographical errors and irrelevant mistakes in the enquiry letters. He refused to accept the explanation as to why the initial volume of beer stated on the seizure notice changed when a proper tally had been carried out. He challenged the thoroughness of HMRC's enquiry. We find that HMRC had made proper enquiries of all the people who appeared to be involved and they sought to establish if anyone else was liable for the duty. The other parties did not exist, did not respond or had disappeared. We have no criticism of the enquiry carried out by HMRC.

105. He submitted that as the seal number, CRM and ARC number were accurate that demonstrated there were no suspicious circumstances. He took no account of the fact that the CRM and ARC were copied documents previously used in respect of another load.

106. Mr Lixandru made extraordinary assertions that HMRC had fabricated the evidence, that there was no evidence, that HMRC had built a case on false allegations and had picked on the Appellant for no reason. We consider it a serious matter to make such allegations against HMRC without a shred of evidence. As set out above, we consider that there is ample evidence to support the liability of the Appellant.

DECISION

107. We have found that the Appellant was the person "making delivery of the goods" or "holding the goods intended for delivery" and so has properly been assessed for the unpaid excise duty.

108. We have further found that a penalty is due under paragraph 4 of schedule 41 on the basis of deliberate behaviour and there is no reason to interfere with the amount of the penalty charged.

109. Accordingly, for the reasons set out above, we dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

110. 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.

MARILYN MCKEEVER
TRIBUNAL JUDGE

Release date: 06th NOVEMBER 2023