[2016] UKUT 0479 (TCC)

Appeal number: UT/2015/0048
UT/2015/0075
UT/2015/0152

EXCISE DUTY – meaning of 'holding' in Article 33(3) EU Council Directive 2008/118/EC and reg 13(2)(b) Excise Goods (Holding, Movement and Duty Point) Regulations 2010 – whether finding that Appellants knowingly involved in fraudulent evasion of duty breached Appellants' rights under Article 6(2) European Convention on Human Rights - appeals dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN:

LIAM MCKEOWN
MICHAEL DUGGAN
THOMAS MCPOLIN

Appellants

- and –

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: Judge Colin Bishopp
Judge Greg Sinfield

Sitting in public in Belfast on 12 and 13 September 2016

Danny McNamee of MMD Solicitors Limited for the Appellants

Jessica Simor QC and Ben Lloyd, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. These appeals from decisions of the Tax Chamber of the First-tier Tribunal ('FTT') were listed and heard together with the agreement of the parties because they arise from similar facts and raise common issues of law.

2. The Appellants, Liam McKeown, Michael Duggan and Thomas McPolin, are all HGV drivers who are based in Northern Ireland. On different dates in 2012, the Appellants were stopped by the UK Border Force ('UKBF') in Dover when returning from Calais. They were found to be carrying substantial quantities of alcoholic beverages in the trailers of their vehicles. The drivers produced documentation which was, in each case, found to be invalid and, because the UKBF believed that UK excise duty was due on the goods and had not been paid, the tractors, trailers and loads were all seized. The Appellants stated that they were merely the drivers and not the owners of the vehicles or of the goods. As they were not the owners of the items, they could not and did not subsequently contest the seizures. In 2013, the Respondents ('HMRC') assessed the Appellants for excise duty of £86,367 (Mr McKeown), £27,247 (Mr Duggan) and £28,677 (Mr McPolin) on the ground that they had been holding alcoholic products for a commercial purpose when they entered the United Kingdom at which point excise duty became due.

3. Each Appellant appealed to the FTT against his assessment. The appeals were heard separately by different tribunals (although the same judge heard the appeals of Mr McKeown and Mr Duggan but with different members) in Belfast. In three separate decisions, the tribunals dismissed the Appellants' appeals. In all three appeals, the tribunals found that the Appellants were not innocent parties to the importation of alcoholic products without payment of excise duty. The tribunals held that, at the time that they were stopped, the Appellants were 'holding' the alcoholic products within the meaning of reg 13(2) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ('the 2010 Regulations'). The tribunal in Mr Duggan's appeal also held, in the alternative, that he was 'making the delivery of the goods' within reg 13(2)(a) of the 2010 Regulations. Regulation 13 is set out at [26] below.

4. The Appellants now appeal, with leave given variously by the FTT and the Upper Tribunal, against their respective decisions. The common issues in the appeals are as follows:

> (1) whether the Appellants were 'holding the goods intended for delivery' within reg 13(2) of the 2010 Regulations; and
>
> (2) whether the tribunals breached the Appellants' rights under Article 6(2) of the European Convention on Human Rights ('ECHR') in finding that they were knowingly involved in the fraudulent evasion of duty.

5. A separate issue arises in the appeal of Mr McPolin only, namely whether the tribunal in that case erred in relying on section 154 of the Customs and Excise Management Act 1979 ('CEMA') to make Mr McPolin liable to pay the duty.

6. For the reasons given below, we dismiss the appeals.

Background

7. The primary facts of each appeal, which are described more fully in the decisions, were not in dispute and may be summarised as follows.

Mr McKeown

8. On 1 August 2012, officers of the UKBF stopped a vehicle and trailer driven by Mr McKeown at Dover docks; he had entered the UK from France. The trailer contained 8,636.6 litres of vodka. Mr McKeown provided an international consignment note ('CMR') that showed the goods as being from IEFW, a bonded warehouse in France, destined for Dynamic Storage, a bonded warehouse in the UK, for the account of Sonic Trading. An Administrative Reference Code ('ARC'), which is a unique reference number generated in order to identify a duty-suspended movement of excise goods, appeared on the paperwork. The number was found to be invalid when it was checked on the Excise Movement Control System (the European Union system which tracks duty-suspended movements of excise goods between Member States) because it had never been issued. When questioned by UKBF officers, Mr McKeown said that he was working for Morgan Transport, although the CMR showed the haulier as Polley Transport. The UKBF seized the goods as liable to forfeiture. Notices of seizure were issued to Mr McKeown and also to the other parties shown on the CMR. In a letter dated 21 August 2012, IEFW advised the UKBF that neither the ARC reference number nor the delivery note existed on their system. IEFW also stated that they were not authorised for the intra-community movement of spirits and did not deal with spirits. No other responses to the seizure notices were received.

9. On 1 July 2013, HMRC assessed Mr McKeown for excise duty of £86,367 under reg 13 of the 2010 Regulations and s 12(1A) of the Finance Act 1994 for holding excise goods for a commercial purpose in the UK without payment of duty. Mr McKeown appealed to the FTT on the grounds that he was simply the driver and had no involvement in the transactions that caused the goods to reach the duty point.

10. At the hearing of the appeal in December 2014, Mr McKeown said that he was telephoned by Mr Ciaran Campbell, who was a driver for Morgan Transport. Mr Campbell asked Mr McKeown if he wanted driving work in England and told him to travel to Dartford Services for the following Monday. At Dartford, Mr McKeown met a man called Tony who gave him the keys to a vehicle and told him where to go. Tony told Mr McKeown that he was driving for Morgan Transport of Tullygooligan Industrial Estate in Armagh. In accordance with his instructions, Mr McKeown took the Dover ferry to Calais, collected a trailer at Transmart Services and then returned to the UK. Mr McKeown knew from the paperwork that he was given that the load in the trailer was vodka. He was unable to explain why the CMR showed the carrier as Polley Transport when he was working for Morgan Transport. Mr McKeown said that he expected to be paid between £200 and £300 for each trip but he had not been paid for this trip. HMRC's evidence was that no trace could be found of Morgan Transport or Polley Transport.

Mr Duggan

11. On 13 November 2012, Mr Duggan drove vehicle registration number GN54OKE with an empty trailer onto the 16:40 sailing from Dover to Calais. He returned to Dover on the 02:40 sailing from Calais on 14 November with goods manifested as 26,000

kilograms of foodstuffs. Mr Duggan then drove the same vehicle with an empty trailer on the 13:55 sailing from Dover to Calais on 14 November.

12. On 15 November, at 07:45, Mr Duggan was stopped by officers of the UKBF when he returned to Dover in the same vehicle and trailer. He was found to have 25,343 litres of mixed beer in his trailer. Mr Duggan produced a CMR dated 13 November. The CMR listed mixed beers consigned from Les Vins Du Tunnel from the account of Malt Beverages BVBA, showing that the goods were destined for Dynamic Storage for the account of Edward James. The CMR also showed the haulier as Visima Limited, the vehicle registration number as N306DPU and the trailer as T7. The CMR quoted an ARC.

13. After making some further enquiries, the UKBF officers concluded that the ARC had been used, on either 13 or 14 November, to support a movement made by a different vehicle. As the ARC had already been used for one movement, it could not legitimately be used for a second. The UKBF seized the vehicle, the trailer and the load. Mr Duggan declined to stay to be interviewed, saying that he could not be of any further assistance as he was neither the owner of the vehicle nor the owner of the goods.

14. Having received notification of the seizure, Malt Beverages BVBA and Visima Limited sought to challenge it but the challenge was rejected on the grounds that the claims were made out of time.

15. In February 2013, HMRC decided that Mr Duggan had been holding alcoholic goods for a commercial purpose in the United Kingdom without payment of duty and assessed him for excise duty of £27,247.

16. Mr Duggan appealed to the FTT. At the hearing of his appeal in March 2015, Mr Duggan stated that, in November 2012, when he was working in the London area, he received a telephone call from someone whose name he did not know who told him to go to a truck stop where he could collect a vehicle and empty trailer which he should drive to Calais; the keys would be under the bonnet. He was told that he would be paid a fixed fee of £300 in cash at the end of the week. Mr Duggan said that, after arriving in Calais, he received a telephone call, probably from the same person, and was told to go to a secure compound on the road to Boulogne. At the compound, he carried out a trailer swap with the help of another person. He said that he did not look inside the trailer as it was sealed but the paperwork indicated that it was loaded with foodstuffs. He had been told to deliver the load back to the truck stop but, at some point during the journey from Dover to the truck stop, he was told by telephone to go to a layby on the A13 where he should do another trailer swap and drive an empty trailer back to Calais, in order to effect yet another trailer swap at the same secure compound. Mr Duggan knew where to find the key to the gate of the compound and swapped the trailers over himself. He said that he found the paperwork for the contents of the trailer strapped to its dolly leg. He said that, after he left Dover following the seizure, he took a bus to London and went to the truck stop where he collected £600—£300 for each trip—in an envelope with his name on it.

17. HMRC's evidence to the FTT was that they had found within the tractor documents suggesting that it had been insured by a Mr Martin Vallely, trading as MV Haulage, but they had no record of a VAT registration for MV Haulage and could not find any trace of a business of that name on the internet.

Mr McPolin

18. On 17 May 2012, at 14:50, officers of UKBF stopped a vehicle, registration number 00MN3622, with a trailer, registration number 2014, at Dover docks. The vehicle, driven by Mr McPolin, had recently arrived from Calais. The trailer contained 24,531.28 litres of mixed beer. The CMR he produced was dated 15 May at 14:20 (the time of dispatch) and related to a load of beer, almost exactly coincident with the load found within the trailer. However, UKBF's records showed that the same trailer, towed by a different tractor, 02MN38725, but using the same CMR, had entered the UK at 00:40 on 16 May with a load manifested as foodstuffs. The officers concluded that in this case too the ARC had been used more than once.

19. The haulier's name shown on the documents which accompanied the goods on 17 May was 'Fingal International Logistics, Dublin, Ireland'. Mr McPolin told the UKBF officers, however, that he was employed by Paul Sheridan Transport, although the front of the cab unit bore the sign-written name 'AP Haulage'. The number on the trailer appeared to have been stencilled on. A search of the vehicle found a letter stencil kit, five CMRs which were blank with the exception of the 'sender' box, which had the details of 'Les Vins du Tunnel' stamped on them, and trailer plate numbers 2014 and 7269 loose in a box. Mr McPolin was asked to stay for an interview but declined saying that there was no point as the UKBF were going to seize his vehicle anyway. The tractor, trailer and goods were seized and subsequently deemed condemned as forfeit.

20. On 14 May 2013, HMRC assessed Mr McPolin for excise duty of £28,677 under reg 13 of the 2010 Regulations and s 12(1A) of the Finance Act 1994 for holding goods for a commercial purpose in the UK without payment of duty.

21. Mr McPolin appealed to the FTT. At the hearing of the appeal in November 2014, Mr McPolin said that he had done several jobs for Paul Sheridan who had paid him in cash when he called at Mr McPolin's house. Mr McPolin said that he communicated with Mr Sheridan by telephone but he did not know his number. He also said that he had only met Mr Sheridan once. HMRC's evidence was that no trace could be found of Paul Sheridan Transport or Sheridan Transport. Further attempts to trace the owner of the vehicle and trailer were also unsuccessful. Mr McPolin could not explain the delay between the time when the goods were shown to have been dispatched and the time when they arrived in the UK. He explained the blank CMRs found in his cab by saying that he had bought them for the sender to fill in if necessary.

Legislation on liability to pay excise duty

22. The legislation that was in force and applicable to these appeals is contained in Council Directive 2008/118/EC concerning the general arrangements for excise duty (the '2008 Directive') and the 2010 Regulations. In order to understand the case law that is discussed below and the submissions in this case, it is necessary to set out some earlier legislation. The 2008 Directive repealed Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products ('the 1992 Directive'). The 2008 Directive reproduced a number of provisions previously found in the 1992 Directive. In Case C-315/12, *Metro Cash & Carry Danmark ApS v Skatteministeriet* [2013], the Court of Justice of the European Union (the 'CJEU', formerly the 'ECJ') confirmed, at [42], that Articles 32 to 34 of the 2008 Directive did not substantially amend Articles 7 to 9 of the 1992 Directive but reproduced the content of those articles

while clarifying it. Accordingly, any ECJ or CJEU cases interpreting those provisions of the 1992 Directive are relevant and helpful in interpreting the corresponding provisions in the 2008 Directive.

23. Article 7 of the 1992 Directive provided that, where products subject to excise duty and already released for consumption in one Member State were held for commercial purposes in another Member State, excise duty was chargeable in the Member State where the products were 'held'. Article 7(2) and (3) provided:

> '2. To that end, without prejudice to Article 6, where products already released for consumption as defined in Article 6 in one Member State are delivered or intended for delivery in another Member State or used in another Member State for the purposes of a trader carrying out an economic activity independently or for the purposes of a body governed by public law, excise duty shall become chargeable in that other Member State.
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> 3. Depending on all the circumstances, the duty shall be due from the person making the delivery or holding the products intended for delivery or from the person receiving the products for use in a Member State other than the one where the products have already been released for consumption, or from the relevant trader or body governed by public law.'

24. Article 33(3) of the 2008 Directive provides as follows:

> '3. The person liable to pay the excise duty which has become chargeable shall be, depending on the cases referred to in paragraph 1, the person making the delivery or holding the goods intended for delivery, or to whom the goods are delivered in the other Member State.'

25. Regulation 13 of the Tobacco Products Regulations 2001 ('the 2001 Regulations'), which is referred to in some of the cases discussed below, provided so far as is material:

> '13. Person liable to pay the duty
>
> (1) The person liable to pay the duty is the person holding the tobacco products at the excise duty point.
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> (2) Any person (not being the person specified in paragraph (1) above) who is described in paragraph (3) below is jointly and severally liable to pay the duty with the person specified in paragraph (1) above.
>
> (3) Paragraph (2) above applies to –
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> (a) the occupier of the registered premises in which the tobacco products were last situated before the excise duty point;
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> (b) any REDS [registered excise dealer and shipper who is authorised, in the course of his business, to import without payment of excise duty goods from other member states, but who is not authorised to hold or consign those goods without

first paying that duty] to whom the tobacco products were consigned.

(c) any person who arranged for a REDS to account for the duty on the tobacco products;

(d) any person approved as an occasional importer under regulation 15 of the Excise Goods (Holding, Movement, Warehousing and REDS) Regulations 1992 to whom the tobacco products were consigned;

(e) any person who caused the tobacco products to reach an excise duty point.'

26. The 2010 Regulations came into force in the UK on 1 April 2010. They were introduced for the purpose of implementing the 2008 Directive. Regulation 13 of 2010 Regulations provides (so far as material):

'(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.'

27. Part 15 of the 2010 Regulations is headed 'Obligations, Conditions and Restrictions' and contains regulations 86 and 87 which, so far as relevant, are as follows:

'General conditions and restrictions

86. The Commissioners may in a notice published by them -

…

(d) impose on transporters and on persons undertaking the carriage of excise goods requirements concerning the keeping and preserving of the documents that are required by these Regulations to accompany the goods.

Obligations of owners and transporters

87. (1) Every owner and every transporter of excise goods to which these Regulations apply must ensure that the EU requirements are complied with at all times.

(2) Every transporter of excise goods to which these Regulations apply must, while the goods remain in that transporter's custody or under that transporter's control, produce or cause to be produced to an officer any documents that are

required by these Regulations to accompany the goods when required to do so.

(3) This regulation also applies to -

(a) any person who undertakes the carriage of excise goods who is not the transporter; and

(b) the driver of any vehicle in which the goods are being carried,

as it applies to the transporter.'

Case law on holding

28. In *R v May* [2008] UKHL 28 ('*May'*), the House of Lords decided that in order to make an order for the confiscation of criminal assets under the Criminal Justice Act 1988 against a person who has evaded a liability (in that case, VAT), the offender must have been personally liable for the duty (see also *R v White* [2010] EWCA Crim 978 ('*White'*) at [4]). In *May*, the Report from the Appellate Committee stated, at paragraph 48(6), that a person will ordinarily be held to have obtained a pecuniary advantage for the purposes of the legislation 'if (among other things) he evades a liability to which he is personally subject.'

29. In *White*, Hooper LJ stated at [82] and [83]:

'82. In our view and notwithstanding the reference to "depending on all the circumstances" and the absence of any reference to joint and several liability, the 1992 Directive clearly envisages that any person who fits within the listed categories is liable to pay the excise duty. Given that one of the aims of the Directive is the collection of excise duty, it is unlikely that it was envisaged that a Member State, in the words of the appellant, "must ... make a determination that a particular person is liable in the circumstances of the case", even though, for example, the excise duty could not in fact be collected from him and even though another person or other persons would be liable. That is not to say that the Directive would permit recovery of more than the excise duty due – but we do not need to decide that issue in these appeals.

83. Nor do we accept the argument that, under the 1992 Directive, only owners of the goods are liable for the duty. Nothing in the language of the Directive suggests that only owners are liable. The respondent referred us to the judgment of the First Chamber in *United Antwerp Maritime Agencies NV and another Belgium* Case C-140/04, judgment given on 15 September 2005. That case concerned the collection of customs duties from a freight forwarding company from whose premises goods, upon which customs duties had not been paid, were stolen. The Court held that, under the relevant Community legislation, a person "who holds the goods after they have been unloaded in order to move or store them" is liable for the

> customs debt, that person being the person who has custody or possession of the goods.'

30. In *White*, the Court of Appeal asked for written submissions about a driver's liability for excise duty, where a driver is no more than a courier paid to transport the load into the UK, although that was not part of the facts of any of the appeals in that case. Having received those submissions, Hooper LJ stated at [189] and [190]:

> '189. We have decided that we shall not resolve the issue given that it is both complex and does not arise in this case. We say only this. It tentatively seems to us that a lorry driver who knowingly transports smuggled tobacco will, for the purposes of the Regulations, have caused the tobacco to reach an excise duty point and will have the necessary connection with the goods at the excise duty point. We are concerned as to whether the driver falls within Article 7(3) [of the 1992 Directive], assuming that is it is necessary for him to do so.
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> 190. If he does so, it would remain a matter of domestic law whether he has obtained a benefit for the purposes of confiscation proceedings. We note, in this respect, that in paragraph 48 of *May* it was said that a defendant "ordinarily obtains a pecuniary advantage if (among other things) he evades a liability to which he is personally subject" (underlining added) and that: "Mere couriers or custodians or other very minor contributors to an offence, rewarded by a specific fee and having no interest in the property or the proceeds of sale, are unlikely to be found to have obtained that property".'

31. In *R v Taylor and Wood* [2013] EWCA Crim 1151 ('*Taylor and Wood*'), the Court of Appeal considered appeals against confiscation orders that had been imposed following pleas of guilty to being knowingly concerned in the fraudulent evasion of duty payable on the importation of cigarettes. The appellants' co-defendant had arranged for 600,000 cigarettes to be delivered from Belgium. The appellants had used their businesses ('Events' and 'TG') to arrange the transportation so as to make it appear legitimate. The question was whether, despite never having taken physical control of the goods (because they were seized before delivery), they could nevertheless be said:

> (1) to have been 'holding' them because they had de facto and de jure control over them; and/or
>
> (2) to be liable, in any event, under reg 13(3)(e) as having caused them 'to reach an excise duty point.'

32. The Court considered the question whether those in actual possession, namely the hauliers, should, in the normal course of events, be said to be the ones 'holding' the goods. Mr Wood had instructed a firm of hauliers, Yeardley, to bring the load to the UK. Yeardley sub-contracted the work to Heijboer. Both were misled as to the content of the load they were carrying, being told that the load consisted of textiles, which is how it was described in the relevant transportation documents. In fact, the load consisted of cigarettes hidden under a few pallets of textiles. At [7], the Court of Appeal stated as follows:

> ‘No one at Yeardley knew the true nature of the goods that Yeardley would be collecting, transporting and delivering to the United Kingdom, and there is nothing to suggest that Yeardley, or anyone working at Yeardley, would have agreed to transport the relevant load if it had known or suspected that it involved a cache of counterfeit cigarettes. Yeardley, therefore, was no more than an innocent agent in the importation of the cigarettes.’

33. In the Crown Court, the judge had held that Taylor and Wood had benefited from their criminal conduct in that each had evaded a liability, namely the excise duty on the tobacco, to which they were personally subject because they were ‘holding’ the tobacco and/or had ‘caused’ it to reach the excise duty point. In its judgment, the Court of Appeal discussed the concept of ‘holding’ under reg 13 of the 2001 Regulations (which implemented the 1992 Directive). The Court considered that the physical carriers of the goods, (ie Yeardley and Heijboer), could not be said to have been ‘holding’ the goods within the meaning of the regulation because, whilst in possession of them, they were not aware and there was nothing to suggest that they should have been aware of their nature: they were ‘innocent agents’.

34. The Court held, at [29] to [31], that:

> ‘29. “Holding” is not defined in the Finance Act or in the Regulations, and there appears to be no authority on its meaning. It is plain that it denotes some concept of possession of the goods. Possession is incapable of precise definition; its meaning varies according to the nature of the issue in which the question of possession is raised (a good example being *Re Atlantic Computer Systems plc* [1990] BCC 899, CA). But it can broadly be described as control, directly or through another, of the asset, with the intention of asserting such control against others, whether temporarily or permanently: see, for example, Goode on Commercial Law, Fourth Edition, p 46. In a case of bailment, the bailee has actual, or physical, possession and the bailor constructive possession. In other words, if the bailee holds possession not for any interest of his own but exclusively as bailee at will, legal possession will be shared by bailor and bailee.
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> 30. In this case Heijboer had physical possession of the cigarettes at the excise duty point, but Heijboer was acting as no more than the agent of the primary carrier, Yeardley. Yeardley was, therefore, in law the bailee of the cigarettes at the excise duty point and, not apparently having any interest of its own in the goods, shared legal possession with the person having the right to exercise control over the goods, as explained above. If Yeardley had known, or perhaps even ought to have known, that it had physical possession of the cigarettes at the excise duty point, its possession might have been sufficient to constitute a “holding” of the cigarettes at that point. However, Yeardley had no such knowledge, actual or constructive, and was entirely an innocent agent. That important fact then turns the focus on the person or persons who were exercising control over the

> cigarettes at the excise duty point. There is no doubt that Wood (through Events) was such a person. Wood, as a matter of fact, under the contract with Yeardley gave instructions throughout the transportation to the carrier. Wood was correctly shown on Yeardley's invoice to be Yeardley's client and the consignee of the goods that were being transported. Under the Convention, as a matter of law, Wood (through Events) had the legal right of control over the goods. It is also known that Taylor (through TG) was acting together with Wood in exercising control over the cigarettes throughout the transportation. TG was shown on the CMR to be the consignee, a designation which represented accurately, if incompletely, the true state of affairs. There is no good reason to distinguish the position, in this context, of the two appellants.
>
> [31] There is nothing, furthermore, in this interpretation and application of Regulation 13(1) to the facts of this case that would be inimical to the purposes of the Finance Act. To seek to impose liability to pay duty on either Heijboer or Yeardley, who, as bailees, had actual possession of the cigarettes at the excise duty point but who were no more than innocent agents, would raise serious questions of compatibility with the objectives of the legislation. Imposing liability on the appellants raises no such questions, because they were the persons who, at the excise duty point, were exercising de facto and legal control over the cigarettes. In short, responsibility for the goods carries responsibility for paying the duty.'

35. The Court then considered the basis of liability for duty under Article 7(3) of the 1992 Directive. At [37] to [40], the Court observed:

> '37. Article 7(3) of the Directive has, as one basis of liability, "holding" the products intended for delivery. There is again no definition of "holding" in the Directive, and there appears to be no interpretation of this concept found in the Directive in the jurisprudence of the Court of Justice. The question was explored in *White and Others v R* [2010] EWCA Crim 978, where counsel for the Crown submitted that "holding" meant possession or control, relying upon *United Antwerp Maritime Agencies NV and another v Belgium* Case C-140/04, [2004] ECR 1 – 8633. Some caution needs to be exercised in respect of that case in the present context. It concerned the effect of Article 184(1) of the Implementing Regulation made to implement the Customs Code, under which "any person who holds goods after they have been unloaded in order to move or store them shall become responsible for compliance" with the obligation of re-presenting the goods in question wherever the customs authorities so require. When goods had been unloaded, the person (such as the consignor or consignee) who had signed the summary customs declaration temporarily lost physical control of them and could not, if directed, re-present them to the

> customs authorities. Only the person who had physical possession or control could as a practical matter re-present the goods in that scenario.
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> 38. It was, therefore, in the judgment of the Court of Justice, only that person who was required under the fourth indent of Article 203(3) of the Customs Code to fulfil the obligations arising from temporary storage of the goods, and who was hence liable to pay the customs debt when the goods were in the event stolen and could not, on request, be re-presented to the customs authorities. Article 7(3) of the Directive is set in a quite different context, where actual physical possession or control of the goods is neither necessary or, in certain cases, sufficient for liability.
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> 39. For the same reasons that have already been elaborated in interpreting Regulation 13(1) of the Regulations, both the language and purpose of Article 7(3) strongly support the conclusion that a person who has de facto and legal control of the goods at the excise duty point should be liable to pay the duty. That conclusion is all the more compelling where the person in actual physical possession does not know, and has no reason to know, the (hidden) nature of the goods being transported as part of a fraudulent enterprise to which he is not a party. To seek to impose liability on entirely innocent agents such as Heijboer or Yeardley, rather than upon the appellants, would no more promote the objectives of the Directive than those of the Regulations.
>
> 40. The same considerations apply to the further basis of liability, namely, "delivery" of the goods. It was Heijboer, as agent of Yeardley, who actually carried the goods. However, Wood, through Events, and Taylor, through TG, made all the arrangements necessary for delivery and controlled the delivery throughout the carriage. Neither Heijboer nor Yeardley knew the true nature of what was being delivered, and were no more than innocent agents. It was the appellants exploiting such innocent agents who in reality effected delivery within the meaning of Article 7(3) of the Directive. The basis of liability under domestic law (causing the goods to reach the excise duty point) rests ultimately on the real and substantial responsibility of the appellants for delivery of the goods to the excise duty point, and that basis corresponds entirely with the alternative basis of liability under EU law.'

36. Mr Danny McNamee, for the Appellants, also referred us to *R v Mackle* [2014] UKSC 5 ('*Mackle'*). There was no evidence that the appellants in *Mackle* had ever held the tobacco products which were in issue in that case at the excise duty point. Their involvement came later. Nevertheless, and under a misapprehension, they had consented to confiscation orders which they subsequently appealed. There were two questions before the court. The first was whether consent to a confiscation order given under a mistake of law was nevertheless binding. That issue is not relevant to this

appeal. The second question was whether a defendant, who knowingly comes into physical possession of dutiable goods in respect of which he knows the duty has been evaded and plays an active role in the handling of those goods so as to assist in the commercial realisation of the goods, benefits from his criminal activity by obtaining those goods for the purposes of s 158 of the Proceeds of Crime Act 2002 ('POCA 2002'). In considering the second question in *Mackle*, Lord Kerr, with whom the other Justices of the Supreme Court agreed, stated at [66]:

> 'Two assumptions must be guarded against, therefore. Firstly, it is not to be assumed that because one has handled contraband one has had possession of it in the manner necessary to meet the requirements of the relevant legislation. Secondly, participation in a criminal conspiracy does not establish that one has obtained a benefit – as Toulson LJ said, this is to confuse criminal liability with resulting benefit.'

37. Mr McNamee relied on that passage but we consider that it is of very limited assistance to the Appellants in this case. The 'relevant legislation' referred to by Lord Kerr is the relevant sections of POCA 2002 and the articles of the Proceeds of Crime (Northern Ireland) Order 1996. They import a different test, as is clear from the answer to the second question given by Lord Kerr at [68]:

> 'I would therefore answer the second certified question, "Not necessarily. Playing an active part in the handling of goods so as to assist in their commercial realisation does not alone establish that a person has benefited from his criminal activity. In order to obtain the goods for the purposes of section 156 of POCA 2002 or article 8 of the Proceeds of Crime (Northern Ireland) Order 1996, it must be established by the evidence or reasonable inferences drawn therefrom that such a person has actually obtained a benefit."'

38. The reasoning in *Taylor and Wood* and other authorities was considered by the Court of Appeal in the case of *R v Tatham* [2014] EWCA Crim 226 ('*Tatham'*), which also addressed the issue of the proper construction of reg 13 of the 2001 Regulations, which applied in that case. In *Tatham*, the appellant had pleaded guilty to being knowingly concerned in the fraudulent evasion of duty chargeable upon the importation of tobacco products (cigarettes) into the UK. The appellant was sentenced to a period of imprisonment and made subject to a confiscation order which he appealed. The issue in *Tatham* was whether the appellant was personally liable for the import duty under the 2001 Regulations as the 'holder' of the goods at the excise duty point (ie when they were imported) or because he had 'caused' them to reach the duty point (in accordance with reg 13(1) and/or reg 13(3)(e) of the 2001 Regulations).

39. In *Tatham*, the Court of Appeal considered several of its earlier decisions that dealt with the subject of confiscation orders in relation to evasion of duty, namely *R v Mitchell* [2009] EWCA Crim 214, per Toulson LJ (as he then was) at [19] - [33]; *White*, per Hooper LJ at [56] - [115]; *R v Bajwa* [2012] 1 WLR 601 per Aikens LJ and *Taylor and Wood*, per Kenneth Parker J at [18] - [41]. At [23], the Court of Appeal set out a number of important principles derived from those cases which are to be applied when construing the 1992 Directive and the 2001 Regulations as follows:

> ‘a. Mere couriers or incidental custodians, who are rewarded by way of fixed fee and have no beneficial interest in the tobacco, are likely to be excluded from the definition of “obtaining property” for the purposes of confiscation orders: *May* [48].
>
> b. The time at which the duty becomes chargeable on tobacco is when the ship carrying it enters the limits of the UK port (*Bajwa* at [32], [75] and [89]) and, as long as the requisite *mens rea* is present, “evasion” occurs from the moment that the excise duty is charged on the goods, as above (*ibid* [90-94]).
>
> c. Whether a person “causes” the importation under Regulation 13(3)(e) is a question of fact (see per Toulson LJ in *Chambers* [*R v Chambers* [2008] EWCA Crim 2467] at [58]) and causation must not be too remote (*Taylor & Wood* [20]); furthermore, section 1(4) of the Finance (No 2) Act 1992 imports indirectly the test that such a person “causing” must retain a “connection” to the goods at or after the excise duty becomes payable: *Bajwa* [39].
>
> d. By way of contrast, “holding” for the purposes of Regulation 13(1) 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 (see *Taylor & Wood*, [28-40]).
>
> e. There is no need for the person to have any beneficial ownership in the goods in order to be a “holder” (or indeed to have “caused” their importation). A courier or person in physical possession who lacks both actual and constructive knowledge of the goods, or the duty which is payable upon them, cannot be the “holder” within Regulation 13(1) - *Taylor & Wood*, [30 - 31], [35].
>
> f. The proper construction of Regulation 13(3)(e) in light of Article 7(3) of the Directive almost certainly operates to make the consignor liable for excise duty (*Mitchell* at [31] - [32]); in all the circumstances, the consignee will usually be a holder of the goods, but the time at which he becomes such will depend on the mode of shipment (*White* at [143]).’

40. The Court of Appeal in *Tatham* concluded that, in the circumstances of the case, the appellant had ‘caused’ the goods to reach the excise duty point because he had made some investment in the enterprise and was financially interested in the purchase and importation of tobacco with the intention of evading excise duty. He was, accordingly, jointly liable for the excise duty and properly subject to the confiscation order.

41. The Court of Appeal then considered the alternative basis of liability, namely whether the appellant was the holder of the goods at the time they were imported. The Court, applying the analysis in *Taylor & Wood* and *Bajwa*, concluded that he was the consignee of the goods because he had constructive possession of them at the time of

excise duty evasion and, with the necessary actual knowledge and intent to defraud, he was liable for the excise duty as a 'holder' within reg 13(1).

The decisions in the FTT

42. The different tribunals reached the same conclusion for broadly the same reasons.

Mr McKeown

43. In a decision issued on 31 December 2014, which has not been published on the FTT website, the FTT (Judge Rankin and Mr A Hennessey) dismissed Mr McKeown's appeal. The conclusions of the FTT are set out at [34] to [39] of the Decision. The FTT held that the relevant standard of proof was the balance of probabilities. The FTT accepted that HMRC had proved that Mr McKeown knew what he was carrying and that he had given false information to the UKBF officer when he was intercepted at Dover. The FTT found that they were unable to rely on the evidence of Mr McKeown. The FTT concluded, in [38], as follows:

> 'The Tribunal accepts that Mr McKeown was holding the goods within the meaning of Regulation 13(2)(b) of the 2010 Regulations as he knew he was transporting vodka. It is reasonable to infer from the false paperwork which Mr McKeown was carrying at the time of the seizure that he knew he was involved in the importation of vodka without paying the relevant duty.'

Mr Duggan

44. In a decision issued on 18 March 2015 with reference [2015] UKFTT 0125 (TC), the FTT (Judge Rankin and Mr D Moore) rejected the evidence put forward by Mr Duggan as totally unconvincing and found that, as the CMR clearly detailed the types of beer which he was carrying, Mr Duggan knew exactly the nature and quantity of the goods which were seized at Dover. The FTT stated at [30] of the decision that it was clear from *Taylor and Wood* that 'an entirely innocent agent who does not know and could not have known that he had physical possession of excise goods at the excise duty point does not hold the goods for the purpose of the regulations imposing excise duty.' The FTT then concluded that they were satisfied that Mr Duggan was not an innocent party to the transportation of the goods seized. At [31], the FTT held that:

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

45. The FTT held that the burden of proof was on Mr Duggan to show that the assessment was wrong and that he had failed to establish, on the balance of probabilities, that the goods seized were travelling under a valid CMR. At [34], the FTT rejected a submission made on behalf of Mr Duggan that the proceedings were criminal proceedings for the purposes of Article 6 of the ECHR and that Mr Duggan's rights under the Article had been breached. The FTT confirmed the assessment for duty and dismissed Mr Duggan's appeal.

Mr McPolin

46. In a decision issued on 20 May 2015 with reference [2015] UKFTT 0243 (TC), the FTT (Judge Connell and Ms C Corrigan) dismissed Mr McPolin's appeal. The conclusions of the FTT are set out at [60] to [71] of the decision. The FTT noted that the UKBF had been unable to trace either Paul Sheridan or Paul Sheridan Transport and concluded that they did not exist. In relation to the submissions of Mr McNamee, who represented Mr McPolin, that *Taylor and Wood* supported his arguments, the FTT stated in [65]:

> '… we take the opposite view. The Appellant had direct possession and control of the Goods. He was in a position to assert such control against others, whether temporarily or permanently. He knew that he was in physical possession of the alcohol at the excise duty point, and in such circumstances as recognised in *Taylor and Wood* possession is sufficient to constitute a "holding" of the alcohol at that point. He was exercising "de facto and legal control" over the alcohol and responsibility for the Goods carries responsibility and liability for payment of the duty.'

47. The FTT stated that they did not find Mr McPolin to be a credible witness. At [66], the FTT tribunal stated:

> 'In our view an innocent driver unaware he was carrying illicit or smuggled goods and keen to protect his good name by disassociating himself from the wrongdoers, would have readily agreed to interview.'

The FTT considered that Mr McPolin's evidence was very vague in parts and inherently improbable in others.

48. The FTT noted, in [69], that Mr McPolin bore the burden of proving that any excise duty had been paid. The FTT concluded, in [70] and [71], that Mr McPolin had been holding the goods when they were brought into the UK, dismissed the appeal and confirmed the assessment for the excise duty payable on those goods.

Grounds of appeal

49. The grounds on which leave to appeal has been granted can be summarised as follows:

(1) the FTT, in each case, erred in law in their interpretation and application of reg 13 of the 2010 Regulations in concluding that the Appellants were 'holding the goods intended for delivery'; and

(2) the FTT, in basing their decisions upon a finding that each of the Appellants had been involved in criminal conduct, acted in breach of the FTT's duties under the Human Rights Act 1998 and in contravention of each of the Appellant's rights under Article 6(2) of the ECHR.

50. Leave was also granted in relation to the following grounds of appeal either on the basis that they are properly subsumed within the leave granted in relation to the issue identified in [39(1)] above or on a freestanding basis:

(1) the FTT erred in their interpretation of the 2010 Regulations as a result of misinterpreting the decisions in *May, White, Taylor and Wood* and *Mackle*; and

(2) the FTT erred in failing to understand that regs 86 and 87 of the 2010 Regulations provide for the responsibilities of a transporter or a driver in relation to the goods being transported and that the Appellants had fully complied with them.

51. Mr McPolin was granted leave to appeal on the ground that the tribunal in his appeal misdirected themselves in relation to section 154(2) CEMA and, as a result, erred in law in finding that Mr McPolin had the burden of proving that he was not personally liable to pay the excise duty.

Submissions on meaning of holding

52. On behalf of Appellants, Mr McNamee submitted that all three tribunals had misinterpreted the judgment of the Court of Appeal in *Taylor and Wood* which formed the basis of his primary submission. In *Taylor and Wood*, the two carriers were unaware that the excise goods had been concealed within the load being transported. Mr McNamee submitted that the Court of Appeal in *Taylor and Wood* did not say that a person in physical possession, as Heijboer was, could only not be 'holding' goods if he was unaware of the existence of the goods. Such an interpretation, he submitted, would be contrary to the actual reasoning of the case which is that 'holding' does not require physical possession of the goods. Indeed, Heijboer, whose driver was in charge of the vehicle and had physical possession of the goods at the excise point, was held not to be liable. It was acting as no more than the agent of the primary carrier, Yeardley. It was Yeardley which was in law the bailee of the goods and the person who shared legal possession with the person having the right to exercise control over the goods. Mr McNamee submitted that the proper test set out by the Court of Appeal in *Taylor and Wood* is refined in [31] in a succinct sentence:

> 'In short, responsibility for the goods carries responsibility for paying the duty'.

53. Mr McNamee submitted that, because the driver of a vehicle simply transporting goods does not have responsibility for the goods, either under the 2010 Regulations or under any other commercial legislation, the driver is not responsible for paying the duty.

54. He argued that the FTT's (and HMRC's) interpretation of *Taylor and Wood* would mean that the two carriers, Heijboer and Yeardley, who were otherwise described as innocent agents of Taylor and Wood, would have been liable for the duty if they had been aware that the load they were carrying contained excise goods. He contended that this could not be a correct interpretation of the case. He said that it was inconceivable that Yeardley or Heijboer would have been held to be liable for the duty on the cigarettes if they had been concealed within a load of beer merely because the beer was dutiable.

55. Mr McNamee submitted that simple possession in the course of transportation is not enough to constitute 'holding' and make the driver liable for the duty on the goods. He also submitted that fixing drivers of vehicles with such liability would be disproportionate in circumstances where the goods involved had been seized, were never placed on the open market and there was no real loss to HMRC.

56. Mr McNamee submitted that *May*, *White* and *Mackle* (together with *Taylor and Wood*) also supported the Appellants' interpretation of the meaning of 'holding' in reg 13 of the 2010 Regulations. Although the cases concerned whether and in what amount criminal confiscation orders should be made against persons who had been found guilty of the criminal offence of being knowingly concerned in fraudulent evasion of duty, he contended that they all dealt with the issue of the liability to pay duty under the excise duty regulations. Mr McNamee submitted that the cases showed that conviction for the offence of fraudulent evasion of duty was not enough to establish that the person is liable to pay the duty. Mr McNamee submitted that 'de facto and legal control' or responsibility for the goods was required before any liability for the duty could arise. He submitted that the Appellants in this appeal were in an identical position to Heijboer in *Taylor and Wood* and did not have the necessary connection with the goods to render them liable to pay the duty.

57. Mr McNamee also submitted that the tribunals had failed to interpret and apply regs 86 and 87 of the 2010 Regulations correctly. He contended that the responsibilities and obligations of transporters and drivers under the 2010 Regulations are comprehensively and exclusively set out in regs 86 and 87, and that a driver transporting excise goods has no further obligations under the 2010 Regulations and, in particular, is not liable to pay duty under reg 13. He contended that if Parliament had intended transporters or drivers to be liable for the duty in the circumstances of these cases then there would have been no need for regs 86 and 87. He submitted that the existence of those provisions undermined HMRC's interpretation of 'holding'. Mr McNamee contended that the Appellants had complied with regs 86 and 87 and the tribunals had failed to understand that such compliance supported the Appellants' arguments that they were not 'holding' the goods.

58. Ms Jessica Simor QC, leading Mr Ben Lloyd, for HMRC, and relying on Case C-165/13 *Stanislav Gross v Hauptzollamt Braunschweig* at [28], submitted that 'holding' the goods in reg 13(1) of the 2010 Regulations is a concept of EU law that must be given a wide interpretation in order to give effect to the object and purpose of the Directive. HMRC's position is that the concept of 'holding' is intended to be straightforward: in essence, it relates to the physical possession of the goods in question and does not require legal or beneficial ownership. Ms Simor stated that the case law showed that there are two exceptions to that position. First, persons who are not in possession of the goods may nevertheless be found to be 'holding' those goods where they are capable of exercising de facto and/or de jure control over those goods, as was the case in *Taylor and Wood*. Secondly, persons who, despite having physical possession of the goods, are not aware (and should not have been aware) that they are in possession of such goods are not 'holding' the goods for the purposes of reg 13.

59. She submitted that the cases showed that two stages must be satisfied for an individual to be 'holding' excise goods within the meaning of reg 13(2)(b). First, the person must be capable of exercising de jure and/or de facto control over the goods, whether temporarily or permanently. Ms Simor submitted that this would necessarily be the case where the goods were being transported by an individual at the excise duty point as they would be within his possession and control. Secondly, the person must have actual or constructive knowledge of the nature of the goods over which he has de facto or de jure control ie he must know or he should have known that they were goods subject to excise duty. Ms Simor accepted that if the individual was not aware of the nature of the goods then it could not be said that he was 'holding' those goods. She

submitted that, where a driver is capable of exercising control over the goods, whether temporarily or permanently, and provided he has actual or constructive knowledge of the goods, he will be 'holding' them in the sense used in reg 13(2)(b).

60. Ms Simor submitted that, in all three cases, the tribunals applied the correct test for 'holding'. She said that the FTT was correct to conclude that each of the Appellants was holding the goods within reg 13(2)(b): all three not only had de facto and de jure control of the goods, being in physical possession of them and acting pursuant to a contractual obligation, but were also aware of the nature of the goods and, moreover, of the fact that excise duty was payable on those goods.

61. Ms Simor contended that the provisions of regs 86 and 87 did not assist with the proper construction of reg 13 as compliance with the provisions of regs 86 and 87 has no bearing on whether a driver is 'holding' goods for the purposes of reg 13(2)(b).

62. She also submitted that the decisions in *May* and *White* were of no assistance to the Appellants as to the proper interpretation of reg 13.

Discussion of the meaning of holding

63. The Appellants' primary argument is that a person must have responsibility, both in law and in reality, for the excise goods in order to be 'holding' them for the purposes of reg 13. They contend that possession, without more, cannot constitute 'holding' even when combined with guilty knowledge. We do not accept this submission.

64. It is clear that 'holding' in reg 13(2)(b) of the 2010 Regulations and Article 33(3) of the 2008 Directive must have the same meaning. The concept of 'holding' is not defined in the 2008 Directive or the 2010 Regulations and so we must look to case law for guidance on the interpretation of the term. We consider that the meaning of 'holding' is concisely and helpfully stated in *Tatham* at [23] which is set out at [39] above. It is worth noting that the judgment in *Tatham* was given by Leveson LJ who was a member of the Court in *Taylor and Wood*. In those cases, the Court of Appeal reviewed the previous case law on this issue including all the cases relied on by the parties in this case and referred to above. It was in that context that the Court of Appeal distilled what had been said before into the six important principles contained in [23] of *Tatham* which, in our view, cannot be improved upon or elucidated. We do, however, need to consider how they apply to the facts of these cases.

65. There is no question that the Appellants had physical possession of the goods but that is neither necessary nor, by itself, enough to constitute 'holding' for the purposes of reg 13. In order to be 'holding the goods', a person must be 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. In this case, as the tribunals found, the drivers had control over the goods. That was, in our view, obviously correct. The Appellants, as drivers, had custody of the goods and were responsible for them during their transportation. The fact that the drivers had obligations to others, who had engaged them to transport the goods, and those others had control over the drivers does not mean that the drivers did not also have de jure and de facto control, albeit subject to obligations owed to and direction by the others.

66. A person who has de jure and de facto control of goods but who lacks both actual and constructive knowledge of them and the fact that duty is payable on them, cannot be

said to be 'holding' the goods for the purposes of reg 13. In these cases, however it was not disputed that the Appellants knew the nature of the goods they were carrying and that they were subject to excise duty. In Mr McKeown's case the FTT made an express finding that he knew that the duty had not been paid. There is no equivalent finding in the other decisions but it can readily be inferred that the tribunals had reached the same conclusion from the finding in Mr Duggan's appeal that he was not an innocent party to the transportation of the goods and, in Mr McPolin's case, that he had not behaved as an innocent driver would have done. Moreover, Mr McNamee accepts that the tribunals made findings of fact that the Appellants were knowingly concerned in the fraudulent evasion of duty. There is no challenge to those findings and, indeed, they form the basis of Mr McNamee's submissions in relation to article 6 of the ECHR, which we discuss below. It is notable that the Court of Appeal in *Tatham* does not distinguish between the innocent agent and the agent who has guilty knowledge in determining whether a person is 'holding' goods for the purpose of reg 13. That may be because there was no dispute that Mr Tatham was knowingly concerned in the fraudulent evasion of duty although, unlike in these appeals, he had been charged with that offence (and had pleaded guilty). Alternatively, it may be because the Court of Appeal in *Tatham* unlike, it seems, the Court of Appeal in *Taylor and Wood*, did not consider that guilty knowledge is relevant in determining whether a person is 'holding' excise goods for the purposes of reg 13. As there is no dispute, for the purposes of these appeals, that the Appellants were knowingly concerned in the fraudulent evasion of excise duty, we do not have to resolve the question of whether there is any conflict between the analysis in *Tatham* and in *Taylor and Wood*.

67. Mr McNamee also contended that the FTT erred in law in failing to understand that regs 86 and 87 of the 2010 Regulations provide comprehensively for the responsibilities of a transporter or driver in relation to the goods being transported and that the Appellants had fully complied with them. We do not accept this submission. In our view, regs 86 and 87 are not relevant to the issue of whether the Appellants were 'holding' the goods. Those regulations are in a different part of the 2010 Regulations and make no reference to reg 13 or 'holding'. They are concerned with, and only with, record-keeping obligations. Accordingly, the fact that the Appellants complied fully with regs 86 and 87 cannot relieve them from liability to pay the duty.

68. In conclusion, we consider that the tribunals in all three appeals did not make any error of law when they concluded that the Appellants were 'holding' the alcoholic products within the meaning of reg 13(2)(b) of the 2010 Regulations. In each case, the Appellants were in possession of the goods and capable of exercising de facto and de jure control over them. The Appellants were aware that they were carrying goods that were chargeable to excise duty that had not been paid. Further, the tribunals found that the Appellants were knowingly concerned in the fraudulent evasion of that duty so were not innocent agents in the transportation of the goods. It follows, in our opinion, that the Appellants were properly found to be 'holding' the goods for the purposes of reg 13 of the 2010 Regulations and were, therefore, liable to pay the excise duty chargeable on those goods.

69. We are reinforced in our conclusion by the facts of a decision of the CJEU in a case that was not cited to us, Case C-175/14 *Ralph Prankl* [2015] STC 1375. Mr Prankl was a long distance lorry driver who knowingly smuggled cigarettes from Hungary to the UK on behalf of a third party. In the course of doing so, Mr Prankl drove through Austria. The Austrian tax authority assessed Mr Prankl for €1,249,820 of tobacco duty

on the ground that he had held the cigarettes and had brought them into Austria. Mr Prankl said that he had been hired by a third party, did not have any information about the amount of cigarettes loaded on the lorry or the plans for selling them and argued that a mere HGV driver did not have any right of disposal and so had not 'obtained' (the word used in the Austrian law) them. His final argument was that duty could not be levied on cigarettes that merely transited through Austria. The first instance court took the view that Mr Prankl knew that he was smuggling and, as the driver of the lorry used to transport them, had custody of the cigarettes for commercial purposes in Austria and was therefore liable to pay the duty. The appeal court referred a question to the CJEU but not on whether Mr Prankl had custody (which we equate with holding). The issue referred was whether excise duty could be levied in a transit state as well as in the state of destination. The CJEU decided that EU law did not permit each Member State through which smuggled goods passed on their way to their destination to impose duty on them. It followed that the Austrian duty claim should fail but that the UK, the final destination of the smuggled cigarettes, would be entitled to impose duty on the cigarettes. We consider that the case shows that the Austrian courts accept that a lorry driver in the position of Mr Prankl (and, therefore, in the same position as the Appellants) is holding the cigarettes even though he is only the driver and does not have the right to dispose of them. Further, it may be significant, to put it no higher, that the CJEU made no observations to the contrary despite setting out those facts.

70. Finally, we mention that, in his skeleton argument, Mr McNamee also submitted that the manner in which HMRC sought to fix the Appellants with liability to pay the excise duty constituted a breach of the Appellants' rights under Article 1 of the First Protocol to the ECHR. A similar argument was put forward in *Taylor and Wood* and in *Tatham* and rejected by the Court of Appeal on both occasions. We gratefully apply the Court's reasoning (which is binding on us in any event) and reject this argument.

Was Article 6 ECHR engaged?

71. Mr McNamee not only accepted but positively asserted that, in all three cases, the tribunals had found that the Appellants had been knowingly involved in the evasion of duty. He submitted that such a finding of dishonesty engaged the Appellants' rights under Article 6(2) of the ECHR. Article 6(2) provides that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. Mr McNamee contended that the appeals in the FTT did not provide the necessary procedural rights and safeguards and did not comply with the requirements of Article 6(2). In support of his submissions, Mr McNamee relied on *Gale and Another v Serious Organised Crime Agency* [2011] UKSC 49 (*'Gale'*) as showing that the criminal standard of proof applied to civil proceedings where there was a sufficient link with criminal conduct. Mr McNamee submitted that the findings of the tribunals showed that there was a sufficient link in these cases.

72. For HMRC, Ms Simor submitted that the proceedings in the FTT were not criminal proceedings because none of the Appellants had been charged with a criminal offence nor were they at risk of being found guilty of having committed any criminal offence. She also submitted that *Gale* did not assist the Appellants. Ms Simor contended that the tribunals were entitled to make findings of fact as to the conduct of the Appellants and their knowledge. The fact that those findings, if proved to a criminal standard, could also found a criminal charge, did not engage Article 6(2) of the ECHR.

Ms Simor also contended that *Ferrazzini v Italy* ECHR Case 44759/98 [2002] STC 1314 showed that Article 6(2) does not apply to tax proceedings.

73. We do not consider that there is anything in this ground of appeal. The appeals concerned assessments for excise duty and were not criminal proceedings for the purposes of the ECHR because they did not meet the three criteria for proceedings to be considered criminal outlined by the European Court of Human Rights ('ECtHR') in *Engel and Others v. The Netherlands* [1976] 1 EHRR 647 at [82] and [83] (see also *Ezeh and Connors v. United Kingdom* ECHR Cases 39665/98 and 40086/98). Further, as Ms Simor submitted, tax (including excise duty) disputes are outside the scope of article 6 of the ECHR as they are civil rights and obligations (see *Ferrazzini v Italy* ECHR Case 44759/98, [2001] STC 1314.

74. In our view, *Gale* does not support Mr McNamee's submission but rather tends to show that the tribunals did not make any error of law in these cases. In *Gale*, the Supreme Court held that proceedings under Part 5 of the Proceeds of Crime Act 2002 for the recovery of property obtained by unlawful, ie criminal, conduct were not sufficiently linked to criminal proceedings to engage article 6 of the ECHR. In *Gale*, an order for the recovery of property to the value of some £2 million was made against Mr and Mrs Gale on the basis that their wealth had been obtained through unlawful conduct. In the High Court, Griffith Jones J made the order notwithstanding the fact that Mr Gale had never been convicted of any drug trafficking offences although he had been prosecuted and acquitted of drug trafficking in Portugal and criminal proceedings for drug trafficking had been started in Spain but discontinued. Nevertheless, Griffiths Jones J held that the evidence, including evidence not available to the court in Portugal and not used in the proceedings in Spain, was sufficient to establish to the civil standard of proof that Mr and Mrs Gale had obtained property by unlawful conduct. Lord Phillips stated, at [54], that:

> 'The commission by the appellants in the present case of criminal conduct from which the property that they held was derived had to be established according to the civil and not the criminal standard of proof.'

At [55], Lord Phillips held that the judge at first instance was entitled to find, applying the civil standard of proof, that the appellants in that case were implicated in criminal activity.

75. Lord Dyson described the circumstances in which the principle of article 6(2) may apply where there is a sufficient link between the civil proceedings and criminal proceedings at [138] and [139] as follows:

> '138. It seems, therefore, that the necessary link can be created by this route only if the court in the civil proceedings bases its decision adverse to the defendant using language which casts doubt on the correctness of an acquittal. The rationale must be that in such a case the court has chosen to reach its decision by explicitly finding that a criminal charge has been committed. If it chooses to reach its decision in that way, then the protections afforded by article 6(2) should be available as if the civil proceedings were criminal proceedings. But if the decision in

> the civil proceedings is based on reasoning and language which goes no further than is necessary for the purpose of determining the issue before that court and without making imputations of criminal liability, then the necessary link will not have been created. The distinction can be illustrated by reference to the common example of the case where A is acquitted of assaulting B, but B brings a claim for damages in tort. The ECtHR recognises in principle that article 6(2) does not apply to the claim for damages: see, for example, *Ringvold* para 38. Thus the acquittal ought to stand in the compensation proceedings, but it does not "preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof". The fact that the findings of fact in the compensation proceedings may implicitly cast doubt on the acquittal is not enough to import article 6(2). What is required is that the decision in the compensation proceedings contains a "statement imputing criminal liability" (emphasis added) (Y v Norway para 42) for article 6(2) to be imported.
>
> 139. The idea seems to be that article 6(2) applies if the court treats the compensation proceedings as if they are proceedings in which the issue of criminal liability falls to be determined. The most obvious way of doing this is to state expressly or, perhaps by necessary implication, that the defendant was wrongly acquitted. There is, of course, no need for the court to create the link with the criminal proceedings in this way because, as the ECtHR explains in *Ringvold*, the compensation proceedings are not directly concerned with the outcome of the criminal proceedings."

76. The Supreme Court dismissed the appellants' appeal in *Gale*. Our view is that *Gale* shows that the tribunals did not breach the Appellants' rights under article 6 of the ECHR in concluding, applying the civil standard of proof, that they were not innocent agents in the movement of the goods without payment of excise duty but were knowingly concerned in the fraudulent evasion of the duty. In our view, Article 6 was not engaged and the tribunals made no error of law on this point.

Section 154 CEMA issue

77. This issue relates solely to Mr McPolin's appeal. Section 154 CEMA is headed 'Proof of certain other matters' and, so far as it is material, sub-s (2) provides:

> '(2) Where in any proceedings relating to customs or excise any question arises as to the place from which any goods have been brought or as to whether or not —
>
> (a) any duty has been paid or secured in respect of any goods; or
>
> …
>
> then, where those proceedings are brought by or against the Commissioners, a law officer of the Crown or an officer, or against any other person in respect of anything purporting to

> have been done in pursuance of any power or duty conferred or imposed on him by or under the customs and excise Acts, the burden of proof shall lie upon the other party to the proceedings.'

78. Having set out s 154(2) CEMA at [33], the only reference to it in the FTT's decision is at [69]:

> '69. Under s 154(2) CEMA, where any question arises as to whether or not any duty has been paid or secured in respect of any goods then, the burden of proof lies upon the Appellant. In our view the Appellant has not discharged that burden.'

79. The FTT then continues with [70]:

> '70. The assessment for the duty has therefore been correctly issued against the Appellant as he was holding the goods when they were brought into the United Kingdom.'

80. Mr McNamee submitted that the tribunal relied on s 154(2) to make Mr McPolin liable to pay the duty. He said that the reliance was shown by the use of the word 'therefore' in [70]. He contended that the tribunal wrongly interpreted section 154(2) as creating a presumption that a person who brought an appeal against an assessment for excise duty was liable to pay the duty and had the burden of rebutting the presumption. Mr McNamee accepted, however, that [70] could be read another way.

81. Ms Simor submitted that the tribunal did not misdirect itself in relation to section 154 CEMA and did not rely on the section to impose a personal liability on Mr McPolin to pay excise duty. Ms Simor contended that the tribunal correctly stated in [69] that s 154(2) placed the burden of proving that excise duty on the alcohol products had been paid on Mr McPolin. In [70], the tribunal stated their finding in relation to the subject matter of the appeal which was not merely a conclusion that followed from [69].

82. We agree with Ms Simor on this ground. Section 154(2) placed the burden of proof in relation to the issue of whether excise duty had been paid on Mr McPolin. In fact, it appears from the decision that Mr McPolin did not dispute the seizure and deemed condemnation of the goods as forfeit on the basis that the duty had not been paid. It might therefore be said that the tribunal's observations about the effect of s 154 were entirely otiose. It is clear, however, that the tribunal were not relying on the section to impose liability for the duty on Mr McPolin. Liability to pay the excise duty in relation to the beer was imposed by reg 13(2) of the 2010 Regulations. We also consider that it is clear from reading [70] in context that it is not simply the conclusion that followed from [69]. In [60] to [69], the tribunal discuss various points that had arisen in the course of evidence or argument and were relevant to the outcome of the appeal. There can be no doubt that [70] is the overall conclusion to that discussion and this is made clear by the fact that it is immediately followed by [71], which is the final operative paragraph of the decision, in which the tribunal state:

> '71. The appeal is accordingly dismissed and the assessment for alcohol products excise duty in the sum of £28,677 is confirmed.'

83. For the reasons set out in the preceding paragraph, we reject this ground of appeal.

Disposition

84. For the reasons given above, the Appellants' appeals are dismissed.

Colin Bishopp
Upper Tribunal Judge

Greg Sinfield
Upper Tribunal Judge

Release date: 9 November 2016