TC07862

Penalties – Alcoholic Liquor Duties Act 1979 - Alcohol Wholesaler Registration Scheme - beer sale before registration – whether the disclosure was prompted or unprompted – prompted – whether or not there was a reasonable excuse based upon the appellant's lack of knowledge of the need for approval – no – whether or not there was a reasonable excuse based upon HMRC's guidance – no – whether or not there were any special circumstances – no – appeal dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/04850

BETWEEN

LANGDALE BREWING COMPANY LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE RICHARD CHAPMAN QC
MS ANN CHRISTIAN

Sitting in public at Alexandra House, 14-22 The Parsonage, Manchester, M3 2JA on 17 December 2019

Mr Paul Fry for the Appellant

Miss Rebecca Young, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This is an appeal against a penalty issued on 24 April 2018 in the sum of £2,000 in respect of the sale of beer by Langdale Brewing Company ("Langdale") without being registered under the Alcohol Wholesaler Registration Scheme ("AWRS"). HMRC rightly accepted from the outset that Langdale did not act deliberately and this was reflected in the calculation of the penalty. Similarly, Langdale rightly accepted that beer had been sold prior to registration under the AWRS and does not challenge HMRC's entitlement in principle to impose the penalty. In short, Langdale's position is that its voluntary disclosure of the sales was unprompted and that it has a reasonable excuse (or alternatively special circumstances exist) by virtue of the way in which the need for registration of the AWRS was publicised by HMRC. For the reasons set out below, we reject these arguments and dismiss the appeal.

FINDINGS OF FACT

2. There was very little factual dispute between the parties and so it is convenient to set out our findings of fact at the outset. In doing so, we bear in mind that the burden of proof is upon HMRC to establish the entitlement to impose the penalty and is upon Langdale to establish a reasonable excuse or special circumstances. The standard of proof in both respects is that of the balance of probabilities. We heard evidence from Officer Christopher Smith and Officer Badrul Pervaiz on behalf of HMRC and from Mr Paul Fry on behalf of Langdale. All three witnesses were honest, credible and were doing their best to assist the Tribunal.

3. Langdale carries on business as a brewer of beer. Although the appeal documentation refers to Langdale's trade name "Langdale Brewing Company", it appears from various documents (including in particular a report by Officer Pervaiz) that it is a limited company. Mr Fry is the sole director and sole shareholder. Mr Fry is also the managing director and 32% shareholder of a company which owns and manages The Britannia Inn ("The Britannia"), a public house with accommodation in Elterwater in the Lake District. Mr Fry has, through The Britannia, been involved in the pub industry for over twenty years.

4. Langdale began business in June 2017 with a plan to brew beer for sale in public houses and possibly shops, as well as the possibility in the future of bottling tonic water and manufacturing gin.

5. On 23 September 2017, Langdale made an application to brew beer ("the Brewery Application"). As one of the pages on the application form was missing Mr Fry submitted a substitute application form for the Brewery Application on 8 November 2017. It is not clear whether the page was missing because of Langdale or HMRC and so we make no findings in that regard. Mr Fry engaged the assistance of a friend who was also a brewer to help him fill out these forms.

6. On 8 January 2018, Officer Smith and another HMRC officer, Officer Morris, visited Langdale's premises in order to discuss the Brewery Application ("the January Visit"). In the course of the January Visit, Mr Fry informed Officer Smith that he had already been brewing beer and making sales. Officer Smith's evidence as to how this admission came about was that Mr Fry said that he had been brewing without approval, whereupon Officer Smith said that he would have to cease production and also asked Mr Fry what he was doing with the goods. Mr Fry said that he was selling the beer to pubs. Mr Fry did not dispute this evidence in cross-examination, in his own evidence or in submissions. We therefore accept Officer Smith's evidence in this regard.

7. Officer Smith's evidence was that he then informed Mr Fry that Langdale would need to apply for AWRS registration, that a business need would have to be demonstrated and that,

as he was not approved to produce beer there was currently no business need. He then (on Officer Smith's evidence) said that he would have to submit the application on the outcome of his Brewery Application. Mr Fry's evidence as to this was that Officer Smith said that Langdale would not receive AWRS approval. HMRC say that Mr Fry's evidence in this regard is misleading. We do not agree with HMRC's view of Mr Fry's evidence; we find that this is wholly consistent with Officer Smith's evidence and is really a summary of what Officer Smith said. Mr Fry does not suggest that Officer Smith was saying that Langdale would never receive AWRS approval; merely that approval could not be obtained before a successful Brewery Application. Indeed, Mr Fry himself relies upon an email exchange on 10 and 11 January 2018 in which he asked Officer Smith to confirm the position with AWRS, to which he responded "In regards to the AWRS application it would need to [be] submitted once the approval has been dealt with." We therefore accept the evidence of both Officer Smith and Mr Fry in this regard.

8. The Brewery Application was successful. Langdale then made an application for AWRS registration by a form dated 6 February 2018 ("the AWRS Application"). On that form, Langdale stated that the date it wanted to start a new alcohol wholesaler business from was 16 September 2017. Officer Pervaiz arranged to visit Langdale on 20 February 2018 ("the February Visit") in order to progress the AWRS Application. In advance of the February Visit, Officer Pervaiz wrote to Langdale on 16 February 2018 to explain the records and information which he would need. This included lists of customers, information as to Langdale's finances, and its business plan.

9. The February Visit took place as arranged. In the course of the February Visit, Mr Fry told Officer Pervaiz that he and the friend who had helped him with the Brewery Application did not know of the need for an AWRS Application. As such, he had been selling beer to other businesses (including The Britannia) from 23 September 2017 until 5 January 2018. It appears from the invoices in the hearing bundle that the amount of beer sold was modest. He had stopped selling beer when he was told by Officer Smith that he needed AWRS registration to do so. Mr Fry's evidence was that Officer Pervaiz had said that Officer Smith was wrong. Officer Pervaiz's evidence was that he did not remember saying that Officer Smith was wrong but did remember saying that it was possible to make a Brewery Application and an AWRS Application at the same time. Given that Mr Fry has a positive recollection of Officer Pervaiz saying that Officer Smith was wrong as distinct from Officer Pervaiz simply not recollecting it, we accept Mr Fry's evidence in this regard. We note, however, that Officer Pervaiz was not saying that beer could be sold before an AWRS registration; he was simply saying that it could be made at the same time as the Brewery Application rather than (as Officer Smith had said) it having to await the outcome of the Brewery Application.

10. The AWRS Application was subsequently granted. However, by a notice dated 14 March 2018 Officer Pervaiz issued a penalty for carrying on a controlled activity without AWRS approval from HMRC. This was in the sum of £2,000, calculated on the basis of a non-deliberate, non-concealed, prompted disclosure. This was 20% of the maximum amount for such a penalty of £10,000 and, having given the maximum amount of available reduction, was at the lowest amount possible for a non-deliberate, non-concealed, prompted disclosure. Officer Pervaiz stated as follows in respect of his reasoning for treating the disclosure as prompted rather than unprompted:

> "I have considered the additional information sent in purporting the disclosure was unprompted:
>
> i. You notified alcohol approval regime in HMRC.

ii. When you made the application for the brewery the website did not make any reference to AWRS registration.

iii. I have also considered your comments that you were instructed by HMRC Officer to register for AWRS and were advised the AWRS approval would be issued once approval for the brewery was complete.

Brewery/Alcohol approvals are administered under separate legislation to AWRS consequently AWRS is considered separate to Alcohol Approvals.

HMRC consider any disclosure prompted once an enquiry has started. Prompted is also considered if an HMRC officer offers advice or instructions.

If Chris Smith (HMRC Officer) did not inform you to be registered for AWRS there is a possibility that you would have continued to trade without AWRS approval.

It was at the time of investigating your Brewery application to identify if you [sic] your company was suitable for a brewery approval did a HMRC officer identify you were selling wholesale alcohol and informed you that you need an AWRS licence. As the enquiry commenced and under the instruction of the officer you submitted the AWRS application.

You are a Managing director of The Britannia Inn (Ellter Water) Ltd. It is a reasonable consider [sic] that you may have had an awareness of AWRS, as the suppliers of alcohol goods are required to print AWRS references on you're [sic] the business purchase invoice.

Taking these factors into consideration I do not consider any reason to change my initial view of a prompted disclosure."

11. Mr Fry responded on 19 March 2018 and 4 April 2018, maintaining that the disclosure was not prompted by HMRC and seeking a review of the decision. A review took place and the penalty was upheld by Review Officer Clydesdale in a letter dated 6 July 2018. HMRC considered in this review whether or not there was a reasonable excuse or special circumstances and found that there was not. As regards special circumstances, Officer Clydesdale said that the sales without approval were not exceptional or uncommon circumstances.

12. A notice of appeal was issued on 24 July 2018.

ISSUES

13. Mr Fry's grounds of appeal are as follows:

"1. Had it not been for the "prompt" then my understanding is that there would be no penalty. The alleged "prompt" which was given by Chris Smith verbally on the 4th January 2018 is null and void because he said I could not apply for a AWRS as I didn't have a brewing license. My position is I can't be prompted to do something I can't do!

2. Second point is that if you use google to research registering to become a brewery then it takes you to your page for Beer production registration and there is no mention on AWRS on that page.

There is one link on that page that refers to help the implication being help to complete an obvious form. It links to the Beer Notice which if you don't need a help filling in a form you wouldn't click on.

It is entrapment on the part of HMRC to penalize people for not doing what they haven't told them about.

3. It is not obvious to assume that you need an AWRS after all you have a license to produce, why would you produce it if you weren't going to sell it."

14. The combination of the grounds of appeal and the arguments raised in the documents and in the course of the hearing give rise to the following issues:

(1) Whether or not Langdale's disclosure was prompted.

(2) The effect, if any, of Officer Smith's advice.

(3) Whether or not Langdale has a reasonable excuse as a result of not knowing about the need for AWRS approval and/or the quality of the guidance given by HMRC.

(4) Whether or not there are any special circumstances such as to reduce the penalty.

LEGAL FRAMEWORK

15. Section 88C of the Alcoholic Liquor Duties Act 1979 ("ALDA 1979") provides a prohibition upon carrying on a controlled activity otherwise than in accordance with an approval given by HMRC. Pursuant to section 88A(8) of ALDA 1979, "controlled activity" includes selling controlled liquor wholesale.

16. The relevant paragraphs of schedule 2B to ALDA 1979 provide as follows:

"1.

A penalty is payable by a person ("P") who contravenes section 88C(1) or 88F.

2.

(1) If the contravention is deliberate and concealed, the amount of the penalty is the maximum amount (see paragraph 10).

(2) If the contravention is deliberate but not concealed, the amount of the penalty is 70% of the maximum amount.

(3) In any other case, the amount of the penalty is 30% of the maximum amount.

(4) The contravention is—

(a) "deliberate and concealed" if the contravention is deliberate and P makes arrangements to conceal the contravention, and

(b) "deliberate but not concealed" if the contravention is deliberate but P does not make arrangements to conceal the contravention.

3.

(1) Paragraph 4 provides for reductions in penalties under this Schedule where P discloses a contravention.

(2) P discloses a contravention by—

(a) telling the Commissioners about it,

(b) giving the Commissioners reasonable help in identifying any other contraventions of section 88C(1)or 88F of which P is aware, and

(c) allowing the Commissioners access to records for the purpose of identifying such contraventions.

(3) Disclosure of a contravention—

(a) is "unprompted" if made at a time when P has no reason to believe that the Commissioners have discovered or are about to discover the contravention, and

(b) otherwise, is "prompted".

(4) In relation to disclosure *"quality"* includes timing, nature and extent.

4.

(1) Where P discloses a contravention, the Commissioners must reduce the penalty to one that reflects the quality of the disclosure.

(2) If the disclosure is prompted, the penalty may not be reduced below—

(a) in the case of a contravention that is deliberate and concealed, 50% of the maximum amount,

(b) in the case of a contravention that is deliberate but not concealed, 35% of the maximum amount, and

(c) in any other case, 20% of the maximum amount.

(3) If the disclosure is unprompted, the penalty may not be reduced below—

(a) in the case of a contravention that is deliberate and concealed, 30% of the maximum amount,

(b) in the case of a contravention that is deliberate but not concealed, 20% of the maximum amount, and

(c) in any other case, 10% of the maximum amount.

5.

(1) If the Commissioners think it right because of special circumstances, they may reduce a penalty under this Schedule.

(2) In sub-paragraph (1) *"special circumstances"* does not include ability to pay.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

…

7.

(1) Liability to a penalty does not arise under this Schedule in respect of a contravention which is not deliberate if P satisfies the Commissioners or (on an appeal made to the appeal tribunal) the tribunal that there is a reasonable excuse for the contravention.

(2) For the purposes of sub-paragraph (1), where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the contravention.

…

10.

(1) In this Schedule *"the maximum amount"* means £10,000.

…"

PROMPTED DISCLOSURE

17. Miss Young submits that the disclosure was prompted for the reasons set out in Officer Pervaiz's explanation of the penalty in the original decision and upheld in the review.

18. Mr Fry submits that Langdale could not have been prompted as it was not able to obtain approval until after (or at the earliest, at the same time as) a successful Brewery Application. Mr Fry further submitted that Langdale did everything that it could do, had no intention not to comply, and did not know about the need for AWRS approval. He also submits that he was misled by HMRC's website as there was no mention in the documents relating to the Brewery Application that AWRS approval was also necessary.

19. We find that the disclosure was prompted. This is for the following reasons.

20. First, Mr Fry's argument that Langdale could not be prompted to do something that it was not able to do appears to treat the issue as being whether or not HMRC prompted Langdale to make the AWRS Application. However, this is not the relevant "prompt". Instead, whether or not the disclosure is prompted focuses upon whether or not Langdale's disclosure was prompted, and so whether it was prompted in informing HMRC that it had sold beer to other businesses without AWRS approval.

21. Secondly, we accept that Langdale did not know about the need for AWRS approval until the January Visit. However, whether or not a disclosure is prompted depends upon an objective assessment of the facts rather than an analysis of the disclosing party's subjective intention. We take this from the decision of *United European Gastroenterology Federation v HMRC* [2013] UKFTT 292 (TC) ("*United European Gastroenterology Federation*") (Judge Kevin Poole and Mrs Shameem Akhtar) at [60]:

> "[60] We reject Miss Bailey's submission that the "no reason to believe" test is a subjective one. Paragraph 9(2)(a) of Schedule 24 requires the question to be asked: "At the time the disclosure was made, did the person making it have no reason to believe that HMRC had discovered or were about to discover the inaccuracy?" The question is not whether the person actually held that belief, it is whether there was any reason for them to hold that belief. To answer that question, an objective examination of the facts is required, not an enquiry into a subjective state of mind."

22. We note that *United European Gastroenterology Federation* is a First-tier Tribunal decision and so is not binding upon us. However, we agree with it and reach the same conclusion. Further, although *United European Gastroenterology Federation* was dealing with different legislation. However, the definition of "prompted" is the same.

23. We also note that the relevant discovery is of "the contravention" and so here the fact of sales to businesses without approval. This does not entail the disclosing party knowing that the underlying facts, as a matter of law, constitute a contravention of the legislation.

24. We find that it cannot be said that Langdale had no reason to believe that HMRC were about to discover that it had been making sales to businesses without approval. The purpose of the January Visit was to consider the Brewery Application which necessarily involved a consideration of Langdale's business and brewing operations. On an objective analysis of the facts, it cannot be said that there was no reason to believe that whether or not Langdale had already been brewing beer and what it had done with that beer would not be part of those considerations and investigations.

25. Thirdly, further or alternatively, the disclosure in the January Visit about sales was an answer to a direct question by Officer Smith as to what happened to the beer. The unsolicited element of what Mr Fry had said was therefore as to the brewing of the beer without approval, not the sale of the beer. We find that if Officer Smith had not asked about what had happened to the beer, Mr Fry would not have disclosed its sale. We make this finding because Mr Fry did not say at the outset that Langdale had already sold beer (only saying that it had been brewed) and because Mr Fry said that he did not know about the need for AWRS

approval until he was told about it by Officer Pervaiz. We find that a disclosure cannot be unprompted if it is elicited by a question from HMRC in such circumstances.

26. Fourthly, the guidance on HMRC's website and notices cannot have any bearing upon whether or not the disclosure was prompted as this does not impact upon what HMRC had discovered or were about to discover. In any event, we do not accept that the website and notices were misleading. The Excise Notice 226 in the hearing bundle was an updated version. However, the review decision recites the contents of this notice in its form at the relevant time as follows at paragraph 3.1:

> "3.1. You must be registered as a brewer before you start brewing unless you're covered by one of the exemptions listed in paragraph 4.4. The proprietor, partnership or company intending to brew beer must apply for registration. A separate registration is required for each premises in which beer is produced.
>
> If you aren't a brewer but you package bulk beer, you may apply to be registered if you wish to receive the beer in duty suspension for packaging.
>
> You must also register for the Alcohol Wholesaler Registration Scheme if you sell duty paid alcohol to another business. It is the responsibility of any business who purchases alcohol for onward sale or supply to check that the wholesaler they purchase from has been approved by HMRC.
>
> Therefore from April 2017, any business purchasing beer for onward sale or supply from you should check that you have been approved as an alcohol wholesaler. To apply for approval, see Excise Notice 2002: Alcohol Wholesaler Registration Scheme."

27. Fifthly, even if Excise Notice 226 had not signposted the need for AWRS approval, Excise Notice 2002 is freely available and provides a full explanation. We note that Mr Fry does not criticise Excise Notice 2002 itself criticises Excise Notice 226 (in the form it was not in) for not leading him to the appropriate guidance.

OFFICER SMITH'S ADVICE

28. Miss Young submitted that Officer Smith's advice as to when to apply for AWRS approval was correct in that no business need could be made out without the Brewery Application. In any event, she submits that this has no bearing upon the penalty.

29. Mr Fry submitted that Officer Smith was wrong to say that the AWRS Application could not be made until after the outcome of the Brewery Application because Officer Pervaiz said that they could be made at the same time. He said that this lost revenue for Langdale which should be set off against the penalty.

30. We find that Officer Smith's advice has no impact upon the penalty. For this purpose we assume that Officer Pervaiz was correct to say that the Brewery Application and the AWRS Application could have been made at the same time (although we do not make any finding in this regard). However, our only jurisdiction in this appeal is in respect of whether or not the penalty was properly imposed and calculated, whether or not there was a reasonable excuse and whether or not there were special circumstances. We do not have any jurisdiction to award any damages or apply any set off against a penalty if any advice by HMRC has caused any loss to Langdale. We note that in any event this cannot give rise to a reasonable excuse or any special circumstances in respect of the penalty as Officer Smith's advice was given after Langdale had ceased selling the beer without approval.

REASONABLE EXCUSE

31. Miss Young submitted that Mr Fry had not established a reasonable excuse.

32. Mr Fry relied upon the fact that Langdale did not know of the need for AWRS approval, the lack of any intention to deceive HMRC, and what he said was HMRC's misleading guidance on its website.

33. We find that Langdale does not have a reasonable excuse. This is for the following reasons.

34. Guidance as to the consideration of a reasonable excuse was given by HHJ Medd QC in *The Clean Car Co Ltd v Customs and Excise Commissioners* [1991] VATTR 234:

> "It has been said before in cases arising from default surcharges that the test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?

35. We agree that Langdale did not intend to deceive HMRC and that there is rightly no attack on the integrity of either Langdale or Mr Fry. However, this is already reflected in the fact that the penalty was on a "non-deliberate" basis. Whether or not there is a reasonable excuse turns upon whether or not Langdale acted reasonably.

36. Mr Fry's submissions about its lack of knowledge of the need for approval turn upon whether or not it was reasonable not to know about the requirement. The circumstances in which lack of knowledge of the law can be a reasonable excuse were considered by the Upper Tribunal in *Christine Perrin v HMRC* [2018] UKUT 156 (TCC) (Judge Timothy Herrington and Judge Kevin Poole). The Upper Tribunal stated as follows at [81] to [82]:

> "[81] When considering a "reasonable excuse" defence, therefore, in our view the FTT can usefully approach matters in the following way:
>
> (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"
>
> (4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times.
>
> [82] One situation that can sometimes cause difficulties is when the taxpayer's asserted reasonable excuse is purely that he/she did not know of

> the particular requirement that has been shown to have been breached. It is a much-cited aphorism that "ignorance of the law is no excuse", and on occasion this has been given as a reason why the defence of reasonable excuse cannot be available in such circumstances. We see no basis for this argument. Some requirements of the law are well-known, simple and straightforward but others are much less so. It will be a matter of judgment for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long. *The Clean Car Co* itself provides an example of such a situation."

37. We find that it was not objectively reasonable for Langdale not to know about the need for AWRS approval. Importantly, the need for approval is well set out in Excise Notice 2002 and Excise Notice 226, which is easily accessible. Further, it was reasonable for Langdale to investigate what approvals it needed. It was able to do this in respect of the Brewery Application and so there is no reason for it not to have been able to do so in respect of the need for AWRS approval. Further, Mr Fry had been involved in the pub industry for over 25 years through the Britannia and so it was reasonable for him to be aware of the need for approval, (albeit in the context of The Britannia purchasing from approved sources rather than needing approval itself) or to be in a position to reveal this through investigations and research.

38. For the reasons set out above, we find that HMRC's guidance was not misleading. As such, we find that this cannot be the basis of a reasonable excuse.

SPECIAL CIRCUMSTANCES

39. Miss Young submitted that there were no special circumstances as there was nothing out of the ordinary.

40. Mr Fry again relied upon the fact that Langdale did not know of the need for AWRS approval, the lack of any intention to deceive HMRC, and what he said was HMRC's misleading guidance on its website.

41. In considering the existence of special circumstances, we bear in mind Upper Tribunal's decision in *Barry Edwards v HMRC* [2019] UKUT 0131 (TCC) (Nugee J and Judge Timothy Herrington). The Upper Tribunal stated as follows at [72] to [74]:

> "[72] In our view, as the FTT said in *Advanced Scaffolding (Bristol) Limited v HMRC* [2018] UKFTT 0744 (TC) at [99], there is no reason for the FTT to seek to restrict the wording of paragraph 16 of Schedule 55 FA 2019 by adding a judicial gloss to the phrase. In support of that approach the FTT referred to the observation made by Lord Reid in *Crabtree v Hinchcliffe* at page 731D-E when considering the scope of "special circumstances" as follows:
>
> > "the respondent argues that this provision has a very limited application… I can see nothing in the phraseology or in the apparent object of this provision to justify so narrow a reading of it".
>
> [73] The FTT then said this at [101] and [102]:
>
> > '101. I appreciate that care must be taken in deriving principles based on cases dealing with different legislation. However, I can see nothing in schedule 55 which evidences any intention that the phrase "special circumstances" should be given a narrow meaning.
> >
> > 102. It is clear that, in enacting paragraph 16 of schedule 55, Parliament intended to give HMRC and, if HMRC's decision is flawed, the Tribunal a wide discretion to reduce a penalty where there are circumstances which, in their view, make it right to do so. The

> only restriction is that the circumstances must be "special". Whether this is interpreted as being out of the ordinary, uncommon, exceptional, abnormal, unusual, peculiar or distinctive does not really take the debate any further. What matters is whether HMRC (or, where appropriate, the Tribunal) consider that the circumstances are sufficiently special that it is right to reduce the amount of the penalty.'
>
> [74] We respectfully agree. As the FTT went on to say at [105], special circumstances may or may not operate on the person involved but what is key is whether the circumstance is relevant to the issue under consideration."

42. For the same reasons as set out in respect of reasonable excuse (and for which purpose we repeat paragraph 37 above), we find that the fact that Langdale did not know of the need for AWRS approval and the lack of any intention to deceive HMRC are not special circumstances. Crucially, these features are not sufficiently special to justify a reduction because, as set out above, it was not objectively reasonable for Langdale not to know about the need for AWRS approval or to find out about such a need. Further, the lack of any intention to deceive is already reflected in the designation of the penalty as non-deliberate. This cannot be a special circumstances as the legislation already anticipates penalties being imposed for non-deliberate behaviour.

43. Again, for the reasons set out above, we find that HMRC's guidance was not misleading. As such, we find that this cannot be the basis of special circumstances to reduce the penalty.

DISPOSITION

44. For the reasons set out above, we must dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

45. 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.

RICHARD CHAPMAN QC
TRIBUNAL JUDGE

RELEASE DATE: 02 OCTOBER 2020