Neutral Citation: [2022] UKFTT 00398 (TC)

Case Number: TC08626

FIRST-TIER TRIBUNAL
TAX CHAMBER

Held at Taylor House, London

Appeal reference: TC/2019/06117

EXCISE DUTY AND PENALTY – inward diversion fraud – whether Appellant owned the goods on which the duty charged – held, yes – whether Appellant innocent victim or whether acted deliberately – held, acted deliberately – whether mitigation for "telling" – meaning of "telling" – duty assessment and penalty confirmed

Heard on: 22 September 2022
Judgment date: 21 October 2022

Before

TRIBUNAL JUDGE ANNE REDSTON
MR MICHAEL BELL

Between

CASA DI VINI LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Tristan Thornton, of TT Tax, instructed by the Appellant

For the Respondents: Mr Richard Evans of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION AND SUMMARY

1. This was the appeal of Casa di Vini Ltd ("CdV") against an excise duty assessment of £43,691 ("the Assessment") and an excise wrongdoing penalty of £18,350 ("the Penalty"). The case involved "inward diversion fraud", and it was common ground that this type of fraud generally operated as follows :

(1) Goods subject to excise duty can be moved between EU countries in a state of "duty suspension", which allows them to be transported between approved warehouses with duty only becoming payable when they are released into free circulation.

(2) To move goods under duty suspension the despatching warehouse creates an electronic Administrative Document known as an e-AD on an EU wide computer system, known as the EMCS. The uploading of each e-AD creates a unique Administrative Reference Code or "ARC".

(3) The ARC number travels with the goods and must be provided to the relevant authorities on request. The lifespan of the ARC has to be sufficient to allow the goods to complete their journey to the next warehouse, and therefore typically spans several days.

(4) Inward diversion fraud occurs when more than one load of excise goods travels on the same ARC within its validity period; these are referred to as the original load and the mirror load(s). In relation to the UK, the fraud relies on the fact that only some vehicles have their ARCs checked by the UK Border Force ("UKBF") when entering the country.

2. CdV is a wholesaler of food and alcoholic goods. It purchased a consignment of mixed wines which were being held in an approved warehouse in France, and an ARC was issued to allow the wine to be transferred to an approved warehouse in the UK operated by Edwards Beers and Wine Ltd ("Edwards Bond").

3. One load of wine left for the UK under cover of that ARC on 7 November 2017; that lorry was not stopped by the UKBF. On 9 November 2017, the same vehicle with the same driver entered the UK with another load of wine under cover of the same ARC. This second load was stopped by UKBF, who seized the goods on the basis that they were being illegally imported. On 21 December 2018, HMRC issued CdV with the Assessment and the Penalty.

4. It was common ground that CdV owned the goods imported on 7 November 2017. It was CdV's case that it did not own the goods imported and seized on 9 November 2017 ("the seized goods"), and that in consequence was not liable to the duty charged by the Assessment or to the Penalty.

5. We found as facts that CdV owned the seized goods and had arranged to transport those goods under cover of an ARC which had already been used two days earlier. We therefore find that CdV was liable to the duty and the Penalty. Its appeal was dismissed and the Assessment and the Penalty upheld.

THE EVIDENCE

6. The evidence consisted of documents and witness evidence.

The documents

7. HMRC provided the Tribunal with a Bundle of documents which included:

(1) correspondence between the parties and between the parties and the Tribunal;

(2) a witness statement from Officer Jacqueline Perkins, who was on duty when the second load entered the UK, and who identified that the ARC had already been used;

(3) the notebook of Officer Karen Beer, who seized the goods;

(4) a notice of claim made by CdV for the seized goods;

(5) the order for condemnation of the seized goods made by East Kent Magistrate's Court, and a note about that hearing written by Ms Mackenzie of the UKBF;

(6) notes of two visits to CdV's premises made by HMRC officers in January and February 2018;

(7) a witness statement of Mr Pocklington Bailey of the UKBF relating to a different case, which sets out a summary of the rules for importing goods under duty suspension and how inward diversion fraud generally operates; and

(8) part of an attendance note by Mr Andrew Stone of Counsel, who represented CdV at a magistrate's hearing on 4 March 2019, following a later seizure on 25 January 2018, see further §46. The first paragraph of his attendance note was redacted.

8. Mr Thornton also handed up a copy of email communications involving CdV, of which only some pages had been included in the Bundle, and a copy of an attachment to one of those emails. Mr Evans did not object to the provision of these documents and we admitted them into evidence.

The witness evidence

9. Ms Christine Henderson, the HMRC Officer who issued the Assessment and the Penalty, provided a witness statement with related exhibits; gave evidence-in-chief led by Mr Evans and was cross-examined by Mr Thornton. The Tribunal found her to be an honest and credible witness.

10. Mr Ervin Islamaj, CdV's sole director, provided a witness statement with exhibits which included emails and invoices. He gave evidence-in-chief led by Mr Thornton, was cross-examined by Mr Evans, and answered questions from the Tribunal. We found him to be an unreliable witness in relation to the key matters in dispute for the following reasons:

(1) The evidence he gave at this Tribunal directly contradicted statements he had previously made, as set out below:

(a) he gave sworn evidence at an earlier FTT hearing that CdV owned the seized goods, but the basis of his appeal before this Tribunal was that CdV did not own those goods.

(b) When he met with HMRC in January and February 2018 (see §44ff):

(i) he said CdV was the owner of the seized goods, whereas his evidence in these proceedings was that CdV did not own those goods;

(ii) he said CdV was not the owner of the goods imported on 7 November 2018, but his evidence in these proceedings was that those goods were owned by CdV; and

(iii) he said the seized goods had originally been booked into Edwards Bond, but that Edwards Bond later advised that they could not accept the goods "as they did not have room". That evidence is inconsistent with the email evidence submitted for this hearing, that Edwards Bond never accepted the booking because of unexplained "due diligence" issues.

(2) His evidence that the first load had been misappropriated by persons unknown could not be reconciled with his failure to contact the haulage company or the sending or receiving warehouse to enquire what had happened to that load, see HMRC's submissions on this issue at §75 and the Tribunal's findings at §79.

(3) It was not credible that Mr Islamaj was unable to provide any documentary evidence of contact with the haulage company or with the sending or receiving warehouses, other than two emails, one of which consisted only of question marks and a second which was unreliable for the reasons given at §38. In addition, many of the other emails he exhibited in evidence were unreliable, see §29ff.

(4) Mr Islamaj initially gave oral evidence to the Tribunal that he had paid the invoice for the seized goods before he knew about the seizure, but changed his position when taken to the documentary evidence, see §28.

11. We make the findings of fact in this decision on the basis of the evidence summarised above, including our findings on credibility. Most of our findings are in the next following part of this decision, but some are made later: where this is the case, those findings are identified as such.

FINDINGS OF FACT

12. CdV has been a wholesaler of food and alcoholic good since 2015, importing wine from the EU and sells it to restaurants and other retail businesses.

13. On 9 November 2016, before the events with which this case is concerned, the UKBF seized a consignment of almost 15,000 litres of wine belonging to CdV, because the driver had provided an ARC which had already been used for another consignment. Those goods were not restored.

The emails of 6 and 7 November 2017 with Edwards Bond and CJM

14. On Monday 6 November 2017 at 4.55pm, Mr Islamaj emailed Edwards Bond asking to book space in its warehouse to receive 28 pallets on Friday 10 November, made up of 768 cases of prosecco, 1,065 cases of white wine and 1,940 cases of red wine. The email also said the wine would be delivered from Wybo, an approved warehouse in France operated by Wybo Transports SARL, a Belgian company.

15. On Tuesday 7 November at 9.45am, before Mr Islamaj had received a response from Edwards Bond, he emailed CJ Mason Transport Ltd ("CJM"), a haulage company, saying "please can you arrange the transportation of 28 pallets from Wybo France to Edwards Bond. For more information please do not hesitate to contact me".

The first consignment

16. The EMCS system showed that on the same day, Tuesday 7 November, at 11.45am:

(1) a consignment of mixed wines left Wybo for delivery to Edwards Bond;

(2) the consignment was travelling under ARC 17FRG0126000286323554 ("the ARC");

(3) the wine was transported by CJM using a vehicle with the registration number GJ57DXX together with a trailer with the index number 19808;

(4) the driver was Mr Mark Stephen Spooner; and

(5) the transportation had been arranged by CdV.

17. Also on the same day, at 16.05, a lorry with the same registration number as that recorded in the ARC entered the UK. It was carrying goods manifested as alcoholic beverages and was

travelling under cover of the ARC. We find as a fact that this load was the wine which had left Wybo earlier the same day.

18. It was not in dispute that CdV owned this consignment of wine. However, Mr Islamaj said it was never received by CdV, but had instead been "misappropriated by others". However, he gave no evidence either in his witness statement or from the witness box that he had contacted any of (a) Wybo, the despatching warehouse (b) CJM, the haulier or (c) any UK warehouse, asking what had happened to this consignment and there were similarly no emails evidencing contact. We therefore find as a fact that Mr Islamaj did not contact any of CJM, Edwards Bond or Wybo, asking what had happened to this consignment.

19. It was also not in dispute that (a) these goods were insured by CJM and (b) CdV did not seek to recover the cost of the goods from CJM.

20. When Mr Islamaj was asked in cross-examination whether he had reported this alleged theft to the police, he said it had been reported "eventually". There was nothing to that effect in his witness statement and there were no exhibits (such as a police report) to support his oral evidence. Mr Evans asked us to reject Mr Islamaj's late evidence as not credible, and we agree. We find as a fact that Mr Islamaj never reported the alleged theft of the first consignment to the police: had he done so he would have referred to it in his witness evidence, and exhibited the related police report.

The second consignment

21. On the following day, Wednesday 8 November 2017, at 23.35, the same lorry with the same trailer and the same driver (Mr Spooner) arrived at Dover under cover of the same ARC. The consignment was made up of 1,190 cartons of white wine, 1,190 cartons of red wine and 768 cartons of sparkling wine.

22. Ms Perkins, a UKBF officer who works for the fraud detection team in Dover, checked the EMCS and identified the earlier load which had entered the UK the previous day. She also noted that Wybo, Edwards Bond and CJM had all been involved in previous seizures during the same financial year.

23. At 1.25am on Thursday 9 November 2017, Ms Perkins called her colleagues at Dover Docks, and asked that the driver of the lorry be asked for relevant paperwork. Officer Beer asked Mr Spooner for the paperwork for the previous load. Mr Spooner said he did not have it because he "gave it to another driver". The UKBF seized the goods and the lorry, and gave Mr Spooner a seizure information notice.

24. On the same day, the UKBF wrote to CJM and to CdV saying that 14,166 litres of wine had been seized as liable to forfeiture. The reason given was that:

> "Border Force has identified that BX08HHG travelled to the UK at 16:05 hours on 7/11/17 manifested as alcoholic beverages. This previous trip was within the lifetime of the e-AD and ARC and was carrying the goods that were covered by ARC number 17FRG0126000286323554."

25. On the following day, 10 November 2017, Mr Islamaj was telephoned by CJM and informed of the seizure; this call was followed at 1pm by an email attaching a copy of the seizure information notice given to Mr Spooner.

The invoice

26. On 7 November 2017, S&B Distribution Ltd ("S&B"), based in Enfield, invoiced CdV for 3,144 cases of wine which was being held in bond by Wybo. This was the same day that the first consignment left Wybo for delivery to Edwards Bond.

27. Mr Islamaj's evidence was that this invoice related to the seized goods, not to those which had been imported in the first consignment. His witness statement confirmed that the wine on the invoice matched the wine listed on the CMR for the seized goods, namely 1,190 cases each of red and white wine, and 768 cases of prosecco.

28. The invoice totalled £22,716.95. Mr Islamaj's oral evidence was that he made the payment on 7 November 2022, before he knew that the goods had been seized. However, the bottom of the invoice stated that £20,000 was paid by CdV on 25 November 2017 by bank transfer, and the balance was paid in cash on 28 November 2017. When Mr Islamaj's attention was drawn to this part of the invoice, he accepted that his earlier evidence had been incorrect.

Emails with Edwards Bond and Wybo

29. Mr Islamaj exhibited a number of emails between himself, Edwards Bond and Wybo dated 7 and 8 November 2017. As a result of the inconsistencies and gaps identified in the next following paragraphs, together with the conflict between these emails and the information subsequently given to HMRC (see §45) we find that these emails fall very far short of providing a reliable record of what happened at the relevant time, and we place no weight on them. Mr Islamaj also exhibited a further email dated 12 November 2017 from Wybo. We find that email to be unreliable for the reasons given at §39.

The emails dated 7 and 8 November 2017

30. Mr Islamaj exhibited an email dated 7 November 2017 and timed 14.52pm (after the first load had left Wybo) in which Stacey of Edwards Bond emailed Mr Islamaj asking "can you provide me with a copy of your suppliers invoice please and advise what your plans are if we are able to accept this consignment".

31. Mr Islamaj sent Edwards Bond an email which he said was in response to Stacey's request. It read:

> "Thank you for your email. I'll pay the duty and take out the goods. I am out of the office so will send the supplier invoice by this evening."

32. However, that email was timed at 14.45pm, before the email had been sent by Edwards Bond at 14.52. Since both Edwards Bond and Mr Islamaj were in the UK, this time difference is unexplained. In an email timed at 14.59, Stacey replied "ok if you can get this information to me please then I can confirm if we can accept this booking".

33. The next exhibited email was between Stacey and Wybo's office in Belgium. It was timed at 15.58; as there is a one hour time difference between the UK and France, it was therefore sent by Stacey at 14.58 UK time. Stacey said that "At present arc number 17FRG0126000286323554 for casa di vini, will not be accepted at Edwards as we still need to do some due diligence on this account".

34. Wybo forwarded that email to Mr Islamaj without any comment other than a row of question marks. The earliest that email could have been forwarded to Mr Islamaj was 15.59 Belgian time, or 14.59 UK time. However, Mr Islamaj's computer records that it was received at 14.47. This too was unexplained.

35. Mr Islamaj's evidence is thus that he knew by 14.47 on Monday 7 November 2017 that Edwards Bond had not agreed to accept the goods travelling under the ARC. This was after the first load had been collected by CJM, but before it had arrived at Dover. Mr Islamaj did not contact CJM to advise them that Edwards Bond had not currently agreed to accept the goods.

36. Mr Islamaj sent Edwards Bond a further email timed at 15.18, which read: "attached to this email is the invoice from the supplier". When giving oral evidence, Mr Islamaj could not

recall why he was able to locate the invoice so quickly despite his email of around half an hour earlier saying he was out of the office and would send it "by this evening".

37. On Tuesday 8 November 2017, Stacey of Edwards Bond sent a further email to Mr Islamaj, timed at 13.34. This said "I'm still in the process of doing some due diligence and not able to confirm a booking for you".

The email of 12 November 2017

38. On Sunday, 12 November 2017, three days after the seizure, Wybo emailed Mr Islamaj saying:

> "Apparently the load loaded from our warehouse to Edwards is rejected by Edwards bond [sic]. Can you please give instructions to your transport company to bring the goods back to our warehouse in Godewaersvelde as they will not take the goods in Edwards Bond. Please give me an update when the stock will arrive in my bond. Waiting for your reply."

39. Wybo was the despatching warehouse named on the ECMS, and was also in regular and direct contact with CJM (see §13). It is not credible that Wybo was unaware of the seizure some three days after it had happened. We thus find this email to be unreliable and place no weight on it.

The claim at the Magistrate's Court

40. On 1 December 2017, RM Legal Solicitors LLP ("RM") acting on behalf of CdV, wrote to the UKBF. Their letter began "we are instructed by Casa di Vini Ltd, the owner of 14,166 litres of mixed wine seized at Dover Eastern Docks on 9 November 2017". It also says:

> "Border Force stated that the reason for the seizure was that when the lorry BX08HHG travelled to the UK at 16.05 hours on 7/11/17 it was using the same ARC as that used for the transportation of the goods belonging to Casa di Vini on 9.11.17."

41. RM went on to say that CJM had informed them that different ARCs were used for these two consignments. CdV has subsequently accepted that this was not the case.

42. On 23 January 2018, RM filed a notice of claim in the Magistrate's Court on the basis that the seizure had not been legal. The hearing took place on 22 October 2018. Mr Islamaj had planned to attend the hearing to swear ownership of the seized goods but did not do so because he had confused the date of the hearing. His barrister requested an adjournment which was refused, and the Court issued a condemnation order the same day.

43. It was common ground that because the seized goods had been condemned as forfeit on the basis that they had not been imported under valid duty suspension arrangements, the Tribunal had to find as a fact that the ARC did not relate to the seized goods, and we so find.

The HMRC meetings

44. Meanwhile, in January 2018 two HMRC officers, Mr Christopher Nash and Ms Veronica Foss, had visited CdV's premises to carry out an excise duty compliance check. It was not in dispute that during this meeting Mr Islamaj:

(1) denied having imported the goods in the first load, which arrived in the UK on 7 November 2017;

(2) said CdV was the owner of the seized goods, and had paid for the goods; and

(3) confirmed that CdV was still using CJM as the haulier to transport its goods.

45. On 13 February 2018, Mr Nash returned to CdV with Officer Shaheen Rehman. Mr Nash's handwritten contemporaneous meeting notes include the following:

> "EI (Mr Islamaj) books goods in by email at the time the ARC is raised before it leaves France. CN asked why the seized load was not booked into Edwards. EI advised it was. … EI advised that after the goods were booked in, Edwards advised could not accept as they did not have room! The goods were originally booked in on 10/11/17…EI advised did not import any goods on 7/11/17…"

The other seizures, the assessments and the hearing

46. On 25 January 2018 and 7 June 2018, two further consignments destined for CdV were seized by the UKBF; these were condemned (or deemed condemned) as forfeit.

47. On 21 December 2018, some two months after the seized goods at issue in this appeal were condemned as forfeit by the Magistrate's Court, HMRC issued the Assessment of £43,691 and the Penalty of £18,350.

48. On 2 and 3 November 2020, an FTT hearing took place before Judge Zaman and Mr Shearer; the issue in dispute was HMRC's refusal to approve CdV under the Alcohol Wholesaler Registration Scheme. Mr Islamaj gave sworn evidence during that hearing that CdV owned the seized goods. In the course of his cross-examination during this appeal, Mr Islamaj confirmed he had given that evidence.

CDV'S GROUNDS OF APPEAL

49. CdV originally relied on four grounds of appeal. The first of these was that there was no excise duty point because the goods had been seized and destroyed by the UKBF; there could thus be no liability to excise duty and no penalty. This ground was abandoned after the publication in March 2020 of the Court of Appeal's judgment in *General Transport Service SPA v HMRC* [2020] EWCA Civ 405.

50. The remaining three grounds are as follows:

(1) CdV was not liable for the duty charged by the Assessment, or to the Penalty, because it did not own the seized goods and was not otherwise within the scope of the relevant provisions.

(2) CdV did not act deliberately so as to be liable for the Penalty.

(3) CdV has a reasonable excuse for any action taken, and in any event insufficient mitigation was given by HMRC.

ISSUE ONE: OWNERSHIP OF THE GOODS

51. We first set out the relevant legislation in the context of the facts of this case, followed by the submissions of each party and our view.

The legislation

52. The Assessment was issued under s 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ("the HMDP Regs") read with Finance Act 1994, s 12. The former provision identifies when an excise duty point arises and who is liable to pay the duty: it reads

> "(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.

(3) For the purposes of paragraph (1) excise goods are held for a commercial purpose if they are held -

(a) by a person other than a private individual;.."

53. The Assessment was made on the basis that CdV was "making delivery of the goods and/or holding the goods" and so came within s 13(2)(a) or (b). CdV asked for a statutory review, and the Review Officer stated that the Assessment had been validly issued because CdV was "involved in the delivery" of the seized goods and as it was the owner, it had "control over the movement and delivery of those goods".

54. Mr Evans relied on *Dawson's v HMRC* [2019] UKUT 296 ("*Dawson's*"), a judgment of Falk J and Judge Herrington, which held at [131(1)]:

> "A person who is able to exercise legal or de facto control of excise goods in respect of which duty remains unpaid, and intends to assert that control against others, whether temporarily or permanently, is to be regarded as 'holding' those goods for the purposes of the 2008 Directive and the [HMDP] Regulations"

55. Mr Thornton did not take issue with that analysis, and the appeal therefore proceeded on the basis that if CdV owned the seized goods, it would be the "holder" of those goods for the purposes of the HMDP Regulations.

56. Finance Act 1994, s 12 provides:

"(1) … where it appears to the Commissioners

(a) That any person is a person from whom any amount has become due in respect of any duty of excise; and

(b) That there has been a default falling within subsection (2) below,

the Commissioners may assess the amount of duty due from that person to the best of their judgement and notify that amount to that person or his representative.

(1A) …where it appears to the Commissioners-

(a) that any person is a person from whom any amount has become due in respect of any duty excise; and

(b) that the amount due can be ascertained by the Commissioners,

The Commissioners may assess the amount of due from that person and notify that amount to that person or his representative."

HMRC's case

57. In submitting that CdV owned the seized goods, Mr Evans relied in part on Mr Islamaj's own statements and actions:

(1) Mr Islamaj told the UKBF through his solicitor that CdV owned the seized goods, see §40 above;

(2) he told the HMRC officers who visited the premises in January and February 2018 that CdV owned the seized goods;

(3) he was planning to attend the condemnation hearing at which he would have sworn ownership of the seized goods on behalf of CdV; the only reason he did not attend was because he had confused the date of that hearing, see §42; and

(4) when giving sworn evidence at the FTT hearing on 2 and 3 November 2020, he confirmed that CdV owned the seized goods.

58. Mr Evans also relied on the following points:

(1) It was Mr Islamaj's own evidence that the invoice related to the seized goods, and this is supported by the fact that the details of the invoice match those on the CMR for the seized goods, see §26.

(2) It was also Mr Islamaj's evidence that CdV had paid for those goods. If the seized goods did not belong to CdV, as Mr Islamaj now submitted was the position, there would have been no reason for CdV to pay for those goods.

59. Mr Evans also noted that CdV's contention that it did not own the seized goods was first raised after HMRC had issued the Assessment and the Penalty. In Mr Evans' submission, the issuance of those assessments was the only reason for CdV's change of position, because Mr Islamaj was aware that if CdV did not own the seized goods, the company would have a defence to the Assessment and the Penalty.

The Appellant's case

60. Mr Thornton submitted that it was reasonable for Mr Islamaj continue to assert that CdV owned the seized goods, because:

(1) CdV was required by law to challenge the seizure within 30 days, and when his solicitors did so on 1 December 2017, it "could not be determined" whether the seized goods were the "genuine movement", or whether the first consignment was the genuine movement.

(2) It was the condemnation order which determined that the seized goods had not been legally imported, and it was a necessary inference from that finding that the genuine movement was the first consignment. Thus, in his submission, it was only after the condemnation hearing that Mr Islamaj knew CdV had owned the first consignment and not the second.

61. Mr Thornton added that although the seized goods can be matched to the goods ordered by CdV and set out on the invoice, it does not necessarily follow that CdV owned those goods. There was no information about the make-up of the goods imported in the first consignment, so those too could have been exactly the same as those on the invoice.

The Tribunal's view

62. We agree with Mr Evans and find as a fact that the seized goods were owned by CdV. We come to that finding for the following reasons:

(1) Mr Islamaj was informed by a letter issued by the UKBF on the day of the seizure that there had been two movements under cover of the same ARC and that the second consignment had been seized, see §24. If Mr Islamaj had owned only one of the two consignments, but did not know whether his goods had made up the first load or second load, he would have immediately made enquiries about the location of the first consignment, which he knew had arrived in the UK. However, no such enquiries were made, see §18.

(2) Ms Islamaj instructed solicitors to claim the seized goods on the basis that they were owned by CdV; he told HMRC officers on two occasions that CdV owned the seized goods; he was intending to attend the magistrate's court to swear ownership on behalf of CdV and he confirmed under oath that this was the case during the FTT hearing on 2 and 3 November 2020, two years after the condemnation hearing. This alone undermines Mr Thornton's submission that Mr Islamaj's change of position can be explained by the decision made by the Magistrate's Court.

(3) The seized goods exactly match those ordered by CdV from S&B, namely 768 cases of prosecco and 1,190 cases each of red and white wine, and CdV paid for those goods. We noted Mr Thornton's submission that the goods imported on 7 November may have been identical, so that the invoice could have related to that first consignment. However, it was Mr Islamaj's own evidence that the invoice was for the seized goods.

(4) CDV paid for the seized goods. We agree with Mr Evans that if CdV did not own the seized goods, it would not have paid for them. Again, it was Mr Islamaj's own evidence that CdV had paid for the seized goods.

63. We therefore found as a fact that CdV owned the seized goods. We further find, in line with *Dawson's*, that as the owner CdV was holding the goods for a commercial purpose in the UK and was thus liable to pay the duty.

Conclusion on Issue One

64. For the reasons set out above, we decide Issue One in favour of HMRC and confirm the Assessment.

ISSUE TWO: WHETHER PENALTY DUE ON BASIS OF DELIBERATE BEHAVIOUR

65. The second issue was whether CdV acted deliberately so as to be liable for a penalty. We first set out the legislation together with the meaning of "deliberate", followed by the parties' submissions and our conclusion, which includes further findings of fact.

The penalty and the meaning of "deliberate"

66. The penalty was charged under Schedule 41 Finance Act 2008. Para 4(1) of that Schedule provides:

> "A penalty is payable by a person (P) where—
>
> (a) after the excise duty point for any goods which are chargeable with a duty of excise, P acquires possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods, and
>
> (b) at the time when P acquires possession of the goods or is so concerned, a payment of duty on the goods is outstanding and has not been deferred."

67. Under the heading "degrees of culpability" para 5(4) reads:

> "P's acquiring possession of, or being concerned in dealing with, goods on which a payment of duty is outstanding and has not been deferred…is –
>
> 'deliberate and concealed' if it is done deliberately and P makes arrangements to conceal it, and
>
> 'deliberate but not concealed' if it is done deliberately but P does not make arrangements to conceal it."

68. We have already found as facts that CdV owned the seized goods, and that no duty was paid on them. Thus, CdV was liable for a penalty under Sch 41, para 4(1). The Penalty was issued on the basis that CdV acted deliberately (but not on the basis that arrangements were made to conceal its underpayment).

69. The burden is on HMRC to prove that CdV acted deliberately. In *Tooth v HMRC* [2021] UKSC 17 at [43], in the context of the Taxes Management Act 1970 ("TMA") the Supreme Court said:

> "Deliberate is an adjective which attaches a requirement of intentionality to the whole of that which it describes, namely 'inaccuracy'."

70. The Court added at [47], with reference to the relevant section of the TMA:

> "for there to be a deliberate inaccuracy in a document within the meaning of section 118(7) there will have to be demonstrated an intention to mislead the Revenue on the part of the taxpayer as to the truth of the relevant statement."

71. In *Auxilium Project Management v HMRC* [2016] UKFTT 249 (TC) at [63] the Tribunal (Judge Greenbank and Mr Bell) similarly held that "a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document".

72. Applying those principles, we find that in the context of excise duty wrongdoing, a person who imports a consignment of goods under cover of an ARC which he knows has already been used for an earlier consignment has acted with the intention of evading duty on that second consignment and thus "deliberately".

Findings of fact about the Penalty

73. On 13 November 2018, Ms Henderson issued a "penalty explanation letter" to CdV, attached to which was a schedule "explaining the penalty". In relation to "Behaviour which led to the wrongdoing, that schedule said:

> "You have failed to take sufficient care to ensure that the wine you had ordered moved legitimately. An email from your organisation to Edwards Bond the receiving warehouse shows they were to expect 3773 cases of wine, whereas the CMR accompanying the wine which was seized on the 9/11/17 shows a quantity of 3148 cases. There is also evidence to show that Edwards would not be accepting the said load but you went ahead with the import of the wine anyway."

74. Ms Henderson issued the Penalty of £18,350 to CdV on 21 December 2018. CdV asked for a statutory review, and on 15 August 2019, the Review Officer, Ms Gordon, issued her review decision. In relation to whether the behaviour had been "deliberate", she said:

> "You were shown as the owner of the goods during the movement on 7 November 2017, which indicated a genuine use of the ARC. You were again shown as the owner when the same paperwork was reused on 9 November 2017. As the owner of the goods on both occasions you would have been fully aware the same paperwork was being reused on 9 November 2017. The second use of the paperwork is considered to be a deliberate act."

HMRC's case on deliberate behaviour

75. Since CdV owned the goods imported on 7 November 2017, and also owned those imported on 9 November 2017 under cover of the same ARC, it was HMRC's case that CdV deliberately imported the second consignment knowing that the ARC had already been used. In Mr Evan's submission, it was not credible that the first consignment had been stolen by unknown third parties. Instead, CdV owned and organised both consignments and would have received both, had the second not been seized.

76. Mr Evans drew attention to the following points:

(1) Both consignments were brought into the UK by the same driver, on the same lorry, arranged by the same haulier, CJM.

(2) Mr Islamaj did not ask CJM, Wybo or Edwards Bond what had happened to the first consignment, despite it allegedly never having arrived at an approved warehouse to the account of CdV after being transported by CJM.

(3) CdV did not report the alleged theft to the police.

CdV's case on deliberate behaviour

77. Mr Thornton submitted that HMRC's case was "insufficiently cogent and particularised" to meet its burden of proving that CdV had deliberately imported the second consignment under cover of an ARC which it knew had already been used a few days previously. He said CdV was "inherently unlikely" to have acted deliberately because there is a "well-established principle that people do not ordinarily commit fraud". In relation to the third of Mr Evan's points above, he said it was entirely reasonable for CdV not to have reported the theft to the police, because the goods were insured by CJM.

78. Mr Thornton also referred to Ms Henderson's statement in the schedule to the penalty explanation letter that CdV had "failed to take sufficient care to ensure that the wine [CdV] had ordered moved legitimately", and submitted that this was insufficient to ground a penalty for deliberate behaviour. However, he very fairly acknowledged that Ms Gordon's review decision did provide a basis for the Penalty.

The Tribunal's view and further findings of fact

79. The Tribunal agrees with Mr Evans, for the reasons he gave. We add the following points which provide further support for the same conclusion:

(1) Mr Spooner had transported both loads on behalf of CJM, and the first load had allegedly been hijacked. If CdV had been the innocent victim of an orchestrated fraud in which Mr Spooner was plainly playing an active a part:

(a) CdV would have contacted CJM for further information about Mr Spooner's involvement, but did not do so; and

(b) in the absence of an explanation for Mr Spooner's involvement, CdV would not have continued to use CJM to transport its consignments. However, CdV was still using CJM some two months after the seizure, see §44.

(2) We do not agree with Mr Thornton that the failure to report the alleged theft of the first consignment to the police can be explained by the fact that the goods were insured by CJM, because:

(a) as Mr Evans said, irrespective of the insurance position, reporting a theft increases the chance that the goods are recovered; and

(b) CdV did not in any event ask CJM to make an insurance claim to recover the cost of the goods, see §19.

(3) We instead find as facts that:

(a) Mr Islamaj did not ask CJM to make an insurance claim because both CdV and CJM knew that the goods in the first consignment had not been stolen by an unknown third party, but had instead been imported at the direction and for the account of CdV;

(b) he did not report it to the police for the same reason; and

(c) it follows from the above, read together with our finding that CdV owned the seized goods, that CdV arranged to transport that second consignment under cover of an ARC which had already been used two days earlier.

80. We noted the paragraph in Ms Henderson's penalty explanation letter as to the basis for the penalty. As Mr Thornton rightly observed, if CdV had acted with insufficient care, any penalty would be on the basis of careless rather than deliberate behaviour. However, Ms Gordon upheld the Penalty on review because Mr Islamaj had been "fully aware" that the same ARC was reused on 9 November 2017, and this second use of the ARC was "a deliberate act". As is clear from the above, we agree.

Conclusion on Issue Two

81. We therefore find that CdV acted deliberately and so was liable to a penalty on that basis.

ISSUE THREE: QUANTUM OF THE PENALTY

82. CdV's third ground of appeal was that "CdV has a reasonable excuse for any action taken and in any event insufficient mitigation was given by HMRC". We first set out the legislation, followed by findings of fact relating to the Penalty, the parties' submissions and our view.

The legislation

83. Finance Act 2008, Sch 41, para 6B provides that the penalty for a deliberate but not concealed failure within para 4 is 70% of the potential lost revenue ("PLR").

84. Para 10 provides that the PLR is the amount of excise duty due on the goods. Para 13(1) says that if a person who would otherwise be liable to a penalty of a "standard percentage" has made a disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure. The Table set out at the end of the same paragraph provides that where the person has acted deliberately, the 70% referred to above is the "standard percentage".

85. Para 13(2) provides that the standard percentage cannot be reduced below a minimum, and the Table provides that where the disclosure is "prompted", the minimum for a deliberate but not concealed penalty is 35%.

86. Para 12 provides, so far as relevant:

> "(2) P discloses the relevant act or failure by
>
> (a) telling HMRC about it,
>
> (b) giving HMRC reasonable help in quantifying the tax unpaid by reason of it, and
>
> (c) allowing HMRC access to records for the purpose of checking how much tax is so unpaid…
>
> (3) Disclosure of a relevant act or failure
>
> (a) is 'unprompted' if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the relevant act or failure, and
>
> (b) otherwise, is 'prompted'.
>
> (4) In relation to disclosure "quality" includes timing, nature and extent."

87. Para 20 provides that where an act or failure is not deliberate, a person is not liable to a penalty if there is a reasonable excuse for the act or failure.

Findings of fact about the Penalty

88. Ms Henderson said she had charged the Penalty on the following basis:

(1) The behaviour was prompted, because CdV did not "tell us about the wrongdoing before it had "reason to believe we had discovered it or were about to discover it". The penalty range was thus between 70% and 35% of the PLR.

(2) The penalty range of 35% was reduced by 80% for the quality of disclosure as follows:

(a) For "telling", 10% out of a possible 30% on the basis that CdV had provided some co-operation with HMRC's officers.

(b) For "helping us understand it", 40% out of 40%, as CdV was not required to provide any such help.

(c) Giving us access to records, 30% out of 30%, again because CdV was not asked to give access.

(3) The 35% penalty band was thus reduced by 80%, leaving only 20%. The additional amount was thus 7% (35 x 20), making a penalty charge of 42% (35 + 7) of the PLR.

(4) As the PLR was £43,691, the Penalty was £18,250.

The parties' submissions and our view

89. Mr Thornton's submissions on reasonable excuse fall away because the behaviour was deliberate, see Sch 41, para 20 referenced above. Mr Thornton also submitted that HMRC should have given a full discount for "telling", adding that the basis for the restriction had not been clearly explained. Mr Evans responded by saying that HMRC had awarded appropriate reductions and no further mitigation should be given.

90. Neither party referred to the Notes on Clauses, published when Sch 41 was introduced. In the context of "disclosure", the Notes say that "telling" means "telling HMRC that there is or may be an act or failure".

91. That is of course the normal meaning of "disclosure", namely the provision of information. The Oxford English Dictionary defines "disclosure" as "the action or fact of disclosing or revealing new or secret information". HMRC's guidance at CH9500 similarly explains, in our view entirely correctly, that "telling" includes:

(1) admitting the wrongdoing;

(2) disclosing the wrongdoing in full; and

(3) explaining how and why the wrongdoing arose.

92. Ms Henderson allowed 10% out of a possible 30% for "telling" on the basis that Mr Islamaj had co-operated with HMRC's officers. However, Mr Islamaj never admitted the wrongdoing, so there is no basis for any reduction under this heading. Nevertheless, as the meaning of "telling" was not argued before us, and as HMRC did not ask the Tribunal to increase the penalty, we decided it would be unfair to remove the 10% reduction.

Conclusion on Issue Three

93. For the reasons set out above, the quantum of the Penalty is unchanged.

OVERALL CONCLUSION AND RIGHT TO APPLY FOR PERMISSION TO APPEAL

94. The Tribunal confirms the Assessment and the Penalty and refuses CdV's appeal.

95. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this preliminary 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.

ANNE REDSTON
TRIBUNAL JUDGE

Release date: 21st OCTOBER 2022