Neutral Citation: [2023] UKFTT 34 (TC)

Case Number: TC08693

FIRST-TIER TRIBUNAL
TAX CHAMBER

Manchester

Appeal reference: TC/2013/07957

EXCISE DUTY – wrongdoing penalties – whether invalid due to amended excise duty assessment – no – whether reasonable excuse – no – whether special reduction appropriate due to HMRC failure to consider certain information – no – whether penalty disproportionate and unfair – no – appeal dismissed subject to amendment of penalty to reflect amendment of potential lost revenue figure

Heard on: 5 July 2022
Judgment date: 10 January 2023

Before

TRIBUNAL JUDGE ANNE FAIRPO

Between

B&M RETAIL LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr J Pickup KC, counsel instructed by Bird & Bird LLP

For the Respondents: Mr S Charles, counsel instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

Introduction

1. This is an appeal against a notice of penalty assessment dated 8 August 2013 issued under paragraph 4, Schedule 41, Finance Act 2008 (FA 2008) in the amount of £1,175,028.60.

2. The penalty related to six assessments for excise duty, amounting to £5,875,143, which were separately appealed. Following the issue of those assessments, HMRC noted that there was an arithmetic error in the assessments and the total amount of the assessments should be £5,867,948.53. HMRC agreed that, if otherwise upheld, the penalty assessment should also be reduced to £1,172,340.94.

3. The appeal against the assessments was settled between the parties at a reduced assessment amount of £3,993,419.75. The reduction reflected the fact that another party was identified as having held some of the goods at an earlier point in the supply chain and so were liable to the excise duty on those goods.

4. The penalty assessments were calculated on the basis that the behaviour which led to the excise assessments was non-deliberate and that disclosures had been prompted by HMRC.

Background

5. The appellant (B&M) is a retailer, selling a wide range of products including alcohol. On 29 March 2010, HMRC visited B&M with concerns as to whether a consignment of Oranjeboom received by B&M from Ruby Trading Company Ltd (Ruby) was non-duty paid. There were also concerns as to the duty-paid status of a shipment of Italian wine. The goods were seized at a subsequent visit in May 2010 as HMRC had been unable to confirm that duty had been paid on the goods. The goods seized amounted to 14,877 cans of Oranjeboom and 1,473 cases of wine, with 6 bottles in each case.

6. A second visit was made by HMRC to B&M in November 2010 to discuss HMRC's concerns over sourcing alcohol in the grey market from wholesalers.

7. On 11 March 2011, HMRC visited B&M's premises again in connection with a consignment of Wolfblass wine purchased from Ruby. The 6,906 bottles still held by B&M were also detained and were subsequently seized on 13 April 2011 as HMRC hd been unable to confirm that UK duty had been paid on the wine.

8. On 23 November 2011, HMRC visited B&M again. Given the two previous seizures, HMRC had carried out checked on all alcohol purchases made from Ruby. They stated that, following checks, they had been unable to confirm that UK duty had been paid on a substantial number of consignments supplied by Ruby to B&M. At this visit, further goods supplied by Ruby were detained by HMRC on the grounds that, on the balance of probabilities, excise duty had not been paid on the goods. The goods detained and subsequently seized as below were:

(1) 12,887 bottles of Blossom Hill white

(2) 79 bottles of Blossom Hill red

(3) 6,912 bottles of Blossom Hill rose

(4) 5,722 bottles of J P Chenet red

(5) 4,800 bottles of J P Chenet white

(6) 2,520 bottles of J P Chenet rose

(7) 51,840 bottles of Budweiser

9. Following this visit, B&M stopped trading with Ruby. The goods detained in November 2011 were seized on 2 February 2012 on the grounds that HMRC had not been able to obtain sufficient evidence to enable them to trace the provenance of the goods and verify that they were duty paid.

10. On 29 May 2012, HMRC sent a pre-notification of assessment letter to B&M for excise duty in respect of goods supplied by Ruby. On 14 August 2012, a Notice of Assessment was issued to B&M on the basis that they were the person holding the excise duty goods at the excise duty point. Further Notices of Assessment, on the same underlying basis, were issued on 19 October 2012, 5 December 2012, 27 February 2013 (two notices), and 28 February 2013.

11. On 25 July 2013, HMRC issued the Penalty Notice in respect of a wrongdoing penalty calculated on the basis of the original assessment amount, £5,875,143. The penalty was calculated on the basis of prompted, non-deliberate, behaviour with maximum mitigation for disclosure. HMRC did not consider that there were any special circumstances which would merit a further reduction in the penalty.

12. B&M requested a review of the penalty assessment. On 17 October 2013, the review officer upheld the penalty assessment.

13. On 14 November 2013, B&M appealed to this Tribunal in respect of the Penalty Assessment. The appeal was stayed pending determination of preliminary issued by the excise duty appeals noted above and to allow for discussions between the parties.

Grounds of appeal

14. B&M appealed under both paragraph 17(1) Schedule 41 FA 2008, as to whether the penalty is payable at all, and in the alternative under paragraph 17(2) Schedule 41 FA 2008, as to the amount of the penalty. Their grounds of appeal were:

> (1) that the penalty is invalid as it is calculated on the original assessment amount and HMRC have failed to take the appropriate action to correct or adjust the assessment, or to withdraw it and raise a new assessment following the ascertainment of the revised assessment amount;
>
> (2) that B&M had a reasonable excuse such that no penalty should arise;
>
> (3) that special circumstances apply which mean that the penalty should be reduced;
>
> (4) that the disclosure was unprompted such that the penalty mitigation given was incorrect;
>
> (5) that the penalty is disproportionate and unfair

Whether the penalty is invalid

15. B&M argued that the penalty assessment was invalid because it was based on an incorrect amount and HMRC had failed to take action to correct the error within the time limits permitted by statute.

16. They submitted that paragraph 16 of Schedule 41, FA 2008, set out the time limits within which an assessment may be raised, and in which a supplementary assessment may be made in respect of a penalty which had been calculated by reference to an underestimated potential lost revenue amount.

17. This was, it was argued, a point considered in *J C Harness & Co and another* (2019} UKFTT 272 (TC), which also considered the decision of *General Transport SpA* (2019) UKUT 4 in stating at [60-62] that:

> "60. I agree with the appellant that Parliament did intend a cut off point for assessments. There is always the possibility of error in calculations and no reason why the making of such errors would lead to an indefinitely extended time limit for the making of an assessment. So, I think the 12 month starts to run from when the tax is first ascertained, even if that first ascertainment contains an error.
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> 61. I am fortified in that view by consideration of §16(6) ….. The drafter of 16(6) was clearly under the impression that an error in the assessment did not start time running again; on the contrary, sub-paragraph (6) is stated expressly to be subject to sub-paragraph (4), which contains the time limit. So, a further assessment to supplement an assessment made on an underestimate of the duty could only be made within the original time limit.
>
> 62. In conclusion a re-ascertainment of the duty does not re-start the clock."

18. B&M argued therefore that the penalty assessment became invalid in November 2018, when the parties reached a settlement agreement in respect of the excise duty assessment for a lower amount than the potential lost revenue in the original assessment. That assessment should have been withdrawn and replaced with a new assessment for the correct figure. B&M submitted that paragraph 16 should be taken to mean that HMRC could issue a penalty within twelve months of November 2018.

19. Further, B&M argued that there is no power to amend a penalty assessment under Schedule 41. In contrast, Schedule 55 Finance Act 2009 (FA 2009), particularly paragraph 18, contains similar provisions to those in paragraph 16 of Schedule 41. However, paragraph 18 of Schedule 55 permits HMRC to amend an assessment where the liability on which the assessment is based is found to be excessive. In paragraph 16 of Schedule 41, there is only the power to issue a supplementary assessment where the penalty is too low (a power which also exists in paragraph 18 of Schedule 55). The provisions of paragraph 18 which allow for amendment of an assessment replaced earlier provisions which provided for a replacement assessment where the liability had been overestimated.

20. B&M contended that paragraph 19(2) permitted the Tribunal to substitute another decision, rather than amend HMRC's decision, and that this power was limited to "another decision that HMRC had power to make". It was contended that the powers under paragraph 19(2) are limited to the aspects of the appeal brought under paragraph 17(2) and that this does not give the Tribunal the ability to substitute a decision such that an invalid decision becomes valid. B&M quoted the decision in *Duncan Hansard* [2018] UKFTT 292 (TC) at [152-153] in support of this contention.

21. B&M argued that HMRC erred in raising the penalty in the first place, as they considered that HMRC should have waited until the potential lost revenue was determined by the excise duty appeals before raising the penalties, as paragraph 16(4) of Schedule 41 FA 2008 allows a penalty assessment to be raised in the 12 months following the determination of the relevant appeals.

22. It was submitted that, if Parliament had intended that HMRC should be able to amend penalty assessments raised under Schedule 41 which were later found to be excessive, it would have legislated accordingly. In the absence of any such provisions, the only route available to HMRC to deal with penalties based on overestimates was to withdraw the assessment and issue a replacement assessment within the appropriate time limits.

23. HMRC argued that this interpretation of the statute means that paragraph 17(2) of Schedule 41 FA 2008 (allowed an appeal against the amount of a penalty) would be redundant,

as would the Tribunal's powers under paragraph 19(2) on an appeal under paragraph 17(2). No statutory support for the contention had been given and HMRC considered that it was not logical that an error in an amount should invalidate a penalty as, otherwise, a small error in an assessment could risk the entire penalty being invalidated if not discovered in time.

24. It would also, it was submitted, mean that a taxpayer could manipulate the position if they noted an arithmetic error and withheld the information from HMRC until the relevant time limits had expired. It was submitted that it could be the intention of Parliament that a penalty would be invalid as a result of a minor error when not corrected within the time limits for issuing the assessment.

25. HMRC submitted that the decision in *J C Harness* supported their view as a mirror image of the point decided in that case. If re-ascertaining the duty does not extend the time limits for issuing an assessment, neither will such re-ascertainment invalidate the penalty. There was no indication in *J C Harness* (or *General Transport SpA*) that the penalty had become invalid as a result of the re-ascertainment of duty.

26. The submissions on the comparison with paragraph 18 of Schedule 55 FA 2009 were, HMRC submitted, unhelpful. It was equally arguable that there was simply an uncorrected oversight. Further, as Schedule 55 dealt with penalties for failure to file returns, it was inherently more likely that a penalty would prompt the submission of a return and that amounts would be recalculated as information was provided.

27. HMRC further argued that this ground of appeal was misclassified by the appellant, as it should be regarded as an appeal against the amount of the penalty rather than the validity of the penalty. HMRC did not dispute that the penalty assessment should be amended to reflect the revised excise assessments.

Discussion

28. B&M contend that the penalty assessment should have been based on the excise duty amount which was agreed in settlement between the parties and that the penalty is therefore invalid because it was based on an assessment in a different amount.

29. As discussed below, in the context of the arguments on proportionality, the legislation is clear that penalties are based on the potential lost revenue relating to the goods in question and not the excise duty assessment raised on the taxpayer. To that extent, B&M's contention is not sustained as the penalty would therefore not change as a result of a settlement between the parties which reduces the amount assessed on the taxpayer but does not reduce the overall potential lost revenue.

30. However, HMRC accepted that there was an arithmetical error in the calculation of the potential lost revenue in the assessments issued (as noted at [2] above). On that basis, I have considered B&M's contentions in the context of this arithmetical error and whether the error renders the penalty assessment invalid.

31. There is nothing in the legislation which specifically states that a penalty assessment will become invalid if the underlying assessment contains an arithmetical error. No statutory support for the contention was given, nor was there any statutory support for the assertion that HMRC were required to withdrawn and reissue the penalty assessment.

32. I note B&M's submissions as to the comparison with paragraph 18 of Schedule 55, FA 2009. I do not consider that these are particularly helpful as Schedule 55 is dealing with penalties in respect of failures relating to various tax returns. Whilst the penalty regime is intended to be broadly similar across taxes, the legislation which inserted the ability to amend an assessment in paragraph 18 related to RTI returns and was not a wider review or updating of the penalty regime as a whole. Paragraph 18 also does not support B&M's submission that

a penalty is rendered invalid because the amount on which the calculation is based is varied. If this were to be the case, paragraph 18 would refer to the penalty being made valid by the amendment. Paragraph 18 makes no reference to the penalty having been invalid or being made valid.

33. Similarly, and more closely relevant, paragraph 16 of Schedule 41 FA 2008 allows for a supplemental assessment to be raised in the case of a shortfall. If a penalty were invalid because it was calculated on the basis of an incorrect amount, that would logically apply whether the penalty was too high or too low and, accordingly, the legislation would need to do more than permit a 'supplemental' assessment where the penalty assessed was too low.

34. I note that B&M's argument that the penalty should have been withdrawn and reissued also presupposes that the penalty remained valid: if the penalty had become invalid, then arguably no withdrawal would be needed for a new assessment to be raised.

35. Accordingly, I conclude that the penalty did not become invalid when the potential lost revenue was calculated at a lower figure than that originally assessed. The amount of the penalty assessment is capable of being (and has been) appealed under s17(2) Schedule 41 FA 2008 as a result of the reduction in the potential lost revenue amount; that reduction does not render the penalty invalid.

36. As it was discussed, I have also considered the decision in *Duncan Hansard* referred to by B&M. This is not binding on this Tribunal (being a decision of the First-tier Tribunal) and I note that the comment referred to is obiter as there was no appeal against the amount in that penalty. In any case, at paragraph 153, the judge notes that "had there been an appeal against the amount it would be open to the Tribunal to increase that amount". The reference to the time limit having passed is in connection with HMRC's power to issue a replacement assessment. It does not, in my view, mean that the Tribunal had concluded that it could not amend (by substitution) the amount of the original assessment simply because HMRC were out of time to issue a replacement assessment.

37. Further, the power given to the Tribunal is to substitute a decision which HMRC "had power" to make, rather than one which HMRC "has power" to make at the date of the hearing. The constraint is not temporal but, rather, setting the boundaries of the type of decision which can be made by the Tribunal. I note also that the Tribunal in *Duncan Hansard* did not conclude that the penalties were invalid as a result of the incorrect amount (the relevant penalties in that case were cancelled because the Tribunal concluded that they were incorrectly served, not because the penalties were invalid as to the amount).

38. I therefore find, subject to consideration of the other grounds of appeal, that the penalty assessment did not become invalid. I further find that the amount of the penalty assessment should be reduced to £1,172,340.94 to reflect the arithmetical error in the original calculation of the potential lost revenue.

Whether B&M had a reasonable excuse

39. B&M argued in the alternative that they had a reasonable excuse such that no penalty should be due.

40. B&M contended that they had a reasonable excuse within the meaning of paragraph 20, Schedule 41 FA 2008 as they had detailed take-on procedures for each supply from all of their suppliers, including Ruby. The 'proposed sales order' and 'initial' purchase order issued by B&M for each purchase required a warranty from the supplier that the goods complied with UK legislation. The terms and conditions provided for a reimbursement by the supplier for the cost of any breach of this warranty. B&M considered that they did everything that they could to make sure that goods were duty paid.

Evidence of B&M's chief executive officer, Mr Arora.

41. Mr Arora provided a witness statement and gave oral evidence in the hearing. He stated that he set the framework for purchases and the due diligence required during the relevant period. Due diligence procedures were carried by by individual buyers.

42. Following the initial introduction, a B&M buyer would meet the potential supplier and enquire about:

(1) the range of products that could be offered;

(2) the size of the supplier's business;

(3) the length of time that the supplier had been in business;

(4) the history of the business and its ultimate owner;

(5) the supply chain of the goods; and

(6) how the supplier was able to secure its prices.

43. B&M had a "Supplier Take On Procedures" form, which required the following information:

(1) name of supplier

(2) trading address

(3) registered office address

(4) VAT registration number

(5) company registration number

(each of the following was completed yes/no as to whether obtained, with documents to be attached to the checklist)

(6) company information

(a) Companies House search

(b) copy abbreviated accounts for previous two years

(c) nature of the business

(d) names and address of directors with control of the business

(e) identification documents from the ultimate beneficial owners of the supplier

(7) internet research

(a) use of key words such as "VAT fraud" in relation to the directors and the supplier

(b) look up the premises online via Google Maps or Streetview

(8) searches of the insolvency register and a search for disqualified directors

(9) search of case law on the British and Irish Legal Information Institute website

(10) check VAT certificate number on the EC website

(11) obtain certificate of incorporation

(12) seek references from other colleagues or suppliers in the trade

(13) verify identity and residential address of directors, from photographic identity documents such as driving licence or passport and from a utility bill

(14) visit supplier's premises and meet with directors

(15) read HMRC Notice 726 in full, noting in particular:

(a) supplier's history in the trade

(b) whether there was a requirement to make a payment to a third party

(c) whether goods were adequately insured

(d) whether there was a requirement for formal contract arrangements

(e) whether there was any notification from HMRC that previous deals involving this supplier had been traced to a VAT loss and/or involved in carousel movement of goods

(f) any notification from HMRC that other MTIC VAT fraud characteristics had occurred in transaction chains involving the supplier.

(16) any other issues to note.

44. The completed form for Ruby was not provided in evidence.

45. Although the take-on procedures were standardised for all suppliers, and Mr Arora accepted that the processes did not specifically mentioned procedures in respect of alcohol purchases, different areas would be emphasised where there was a particular risk. For example, the safety aspects of due diligence would be emphasised for toy supplier and excise aspects were emphasised for alcohol suppliers. He stated that the procedures were intended to prevent loss to HMRC and were based on HMRC guidance. B&M did not operate any bonded warehouses and did not want there to be about doubt as to the duty paid status of goods. Any updates in procedures would be applied to existing suppliers as well as new suppliers to ensure that there was consistency.

46. The company was also concerned to minimise the risk of exposure to joint and several liability for VAT failures by its suppliers. This was not only because of the potential financial cost but because of the potential reputational damage to the business if found to be dealing with non-compliant goods. Although B&M was a value trader, they did not wish to be involved with "too good to be true" price deals from potential suppliers. Checks were also intended to ensure that suppliers would provide suitable quality goods on time.

47. The terms and conditions as to reimbursement for breach of warranty were intended not only to provide B&M with recourse to the supplier for such breach but also to deter potential suppliers who were not concerned with compliance with legislation, such as rogue traders.

48. Mr Arora stated that suppliers were made aware from the outset of the relationship that B&M would only purchase duty paid excise goods. He was reasonably confident that Mr Nutall would have insisted on confirmation that goods were duty paid at each step of the purchase process, including the purchase order and invoice.

49. B&M dealt with between 3 and 5 new alcohol suppliers each year and preferred to source products from reputable suppliers that it had worked with in the past.

50. The relationship with Ruby had been in place since 2005. At the time of the HMRC visits, the lead buyer was Mr Nutall (who has since retired). Mr Nuttall had provided a witness statement before retiring, which Mr Arora confirmed accorded with his understanding of the way in which orders were placed.

51. Mr Nutall stated in that witness statement that he did not know where Ruby obtained its goods; if he had known, he would have approached their suppliers directly to see whether he

could secure the same products at a lower price. Ruby did not take physical possession of the products supplied; the orders were conveyed to B&M from third parties.

52. The price charged by Ruby was not considered to be materially different to the price charged for the same products by other suppliers. Mr Nutall stated that Ruby were always asked to confirm that the goods were UK duty paid before a purchaser order for those goods was placed. Mr Arora also stated that the supplier would be asked why the supplier was selling stock at the relevant price point and B&M would check that the answer was reasonable. In the case of the Oranjeboom which had been seized, Mr Arora stated that Ruby had advised that the goods had a short (three-month) best-before date and so needed to be sold quickly. Mr Nutall's witness statement included the information that the goods detained in November 2011 and subsequently seized had been bought on a 'normal' basis and were not 'end of line' stock. They had been offered as UK duty paid.

53. Following the initial goods detention, Ruby had assured B&M that the goods were duty paid and that HMRC were mistaken. After the seizure, Mr Arora considered that Mr Nutall would have satisfied himself that Ruby were reputable and not about to become a missing trader before discussing the matter with the managing director. Mr Nutall had discussed each seizure with Mr Arora and had confirmed that he was satisfied that Ruby were reputable and had received assurances from Ruby that they would resolve matters with HMRC. There had been no changes in the relationship, such as a change of address or payment details. Unannounced HMRC visits were reported to the board, although the initial visit was thought to be about general issues with trading in the grey market, rather than with Ruby specifically. It was only at a later meeting that it became clear that HMRC considered that there was an issue with the Ruby supplies in particular.

54. Ruby had also reimbursed B&M after the goods were seized, which Mr Arora considered indicated that they were not a rogue trader. B&M continued to purchase goods from Ruby for a period of time after the detention and subsequent seizure due to these assurances and also because HMRC had not advised, when asked, that B&M should stop trading with Ruby. Mr Arora believed that Ruby Trading were still in business. Mr Arora did not consider that it was necessary to always immediately stop trading with a supplier when HMRC detained and seized goods: there had, for example, been no assessment and no further issue with supplier of the Italian wine seized at the same time as the Oranjeboom.

55. Mr Arora considered that HMRC's view that the business should not make purchases in the grey market, from intermediaries, was not realistic. He considered that all value traders made purchases in that way as it was not otherwise possible to undercut the main supermarkets without purchasing from wholesalers who could sell at a lower price. He considered that there were many legitimate reasons why the grey market existed.

56. Mr Arora considered that there was nothing else that B&M could have done to check that the relevant goods purchased were UK duty paid, and did not think that anyone from HMRC had suggested that there had been a failure in the due diligence procedures.

HMRC evidence

57. Officer Smith of HMRC provided a witness statement and gave oral evidence at the hearing. He had adopted the case in May 2017 as the original decision maker Officer Bowcock, retired from HMRC in October 2017. He had not been involved with the visits or the decision to raise the penalty on B&M.

58. Officer Smith described the penalty regime as having been introduced to target penalties, issuing higher penalties to persistent and/or serious offenders than to those who may have committed less serious wrongdoings.

59. Officer Smith agreed that PN726 was a guide of reasonable checks that a trader could carry out, and that B&M had carried out such checks. However, he considered that HMRC could not be prescriptive as to processes and procedures for due diligence. Whilst he agreed that he could not, on being asked, think of anything else that could have been done in the due diligence procedures, he considered that due diligence alone was not enough. A trader should also consider their position in the supply chain and in particular the risks involved in buying from suppliers who do not take physical possession of the goods that they sell. In this particular case, with hindsight, he considered that B&M could have sourced products from a business that had physical possession of the goods rather than suppliers such as Ruby who resold goods without taking physical possession.

60. He noted that HMRC had raised particular concerns at their second visit in November 2010 about the alcohol purchases in the grey market and the purchase price of some of the goods. In particular, wine purchased for £1.95 per bottle when the duty on that bottle was £1.69 seemed to be unrealistically priced when considering other overheads involved in the goods such as production, storage and transport. This was the price which had been paid for the wine seized in May 2010. The concerns with purchasing in the grey market was considered 'compounded' in a visit report of March 2011 by Mr Nutall stating that he could buy at the same price from much larger companies. Officer Smith considered that there was insufficient margin in some of the prices paid to provide a profit to each party when considering that B&M were not aware how many people were in a given supply chain.

61. Officer Smith considered that a purchase invoice with a "UK duty paid" line was not sufficient evidence that duty had been paid. With regard to Ruby, he considered that the first seizure should have been taken as a warning and that B&M should have responded to the seizures in May 2010 and April 2011. He considered that these subsequent seizures should have alerted B&M to the fact that that particular supply chain had significant risks involved. He did not consider that Ruby had been complicit in the failure, that the missing trader had been earlier in the relevant supply chain. Officer Smith also confirmed that there was no suggestion that B&M had been part of any diversion fraud, but considered that three seizures in respect of one supplier should have set off alarm bells.

62. Officer Smith agreed that HMRC had not been able to determine that duty had been paid, as there was a missing trader in the chain. Any documents which could have shown whether had been paid on the goods leaving a bonded warehouse were unavailable as a result. The assessments were based on the fact that it had not been possible to establish that duty had been paid.

Submissions and discussion

63. Paragraph 20(1) of Schedule 41 of FA 2008 states:

> "(1) Liability to a penalty under any of paragraphs 1, 2, 3(1) and 4 does not arise in relation to an act or failure which is not deliberate if P satisfies HMRC (or on appeal the Tribunal) that there is a reasonable excuse for the act or failure."

64. The test of what amounts to a reasonable excuse is an objective test, as described in *Perrin* (2018) UKUT 156. It held (at [81]) that it was necessary to:

> "(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?"

65. There was no particular dispute as to the due diligence procedures which B&M carried out. The question was whether these amounted to a an objectively reasonable excuse.

66. B&M stated that it had carried out all the checks recommended in PN726 and so, it was submitted, should be regarded as having a reasonable excuse. It was noted that due diligence of this nature had been sufficient to establish a reasonable excuse in the case of *Euro Wines* [2018] EWCA Civ 46.

67. In particular, it was submitted that the following had not been challenged by HMRC:

(1) B&M had undertaken comprehensive and detailed due diligence on all its suppliers, including Ruby. HMRC had not criticised the standard of this due diligence;

(2) suppliers were required to certify that all goods were UK duty paid and a warranty to that effect was written into B&M's standard terms and conditions;

(3) B&M had had a longstanding trading relationship with Ruby which had not experienced any difficulties before March 2010;

(4) B&M had been assured by Ruby that duty had been paid on all goods and that Ruby had not received any assessments for excise duty from HMRC;

(5) Ruby had reimbursed B&M for the non-duty paid Oranjeboom after the assertion by HMRC that the beer was not duty paid.

68. It was submitted for B&M that there was nothing further that they could have done which would have proved that the goods were duty paid, as HMRC themselves were unable to trace the supply chain to establish whether duty had been paid as there was at least one missing trader in the chain. They submitted that their due diligence procedures, coupled with the supplier assurances that duty had been paid, were sufficient such that they provided a reasonable excuse within the meaning of paragraph 20, Schedule 41, FA 2008.

69. HMRC submitted that the due diligence was insufficient, with no reference to alcohol in the take-on procedures. They submitted that the industry was materially different in terms of risk to other areas such as VAT or safety regulations which the take-on procedures were also stated to cover. Further, B&M had provided no documentary evidence as to the take-on procedure actually followed for Ruby. The key question was whether adequate due diligence had been carried out in this particular case, rather than whether the overall due diligence approach could result in adequate due diligence. There was also very little evidence as to any enquiries made of suppliers, to review their processes. HMRC further submitted that there was little evidence to support any due diligence on individual purchases, nor any evidence that B&M had made any changes to processes once the first seizure had taken place. The due diligence was, it was submitted, intended to ensure that B&M was protected rather than to ensure that the supply chain was compliant.

70. Mr Nutall's witness statement described the due diligence take on procedure for new suppliers as being intended to ensure that B&M knew who it was dealing with and that the

relevant supplier was legitimate. The 'Suppler Take On Procedures' form, which required company searches and similar, was stated by both Mr Arora and Mr Nutall to be completed by the supplier.

71. Given the information requested in the form, it is surprising that B&M did not undertake the searches and obtain the required information itself and, instead, relied on the supplier providing complete copies of internet searches against itself, and providing unverified copies of identification documents. It is also difficult to see why B&M would require a supplier to confirm that it had been visited, and to obtain references. The form requires that the checklist be reviewed, but there is no evidence this review was anything more than a check that the requested information had been provided.

72. Given that B&M's evidence was that this information was provided by the supplier, I note that there was no evidence that B&M carried out any check on the completeness or accuracy of the information provided by the supplier and there would be little point in having a supplier provide the information if the same checks were then carried out again by B&M.

73. The completed form for Ruby was not provided in evidence and so there was no documentary evidence available to demonstrate what information had been obtained by way of due diligence in relation to Ruby, nor when that information was obtained, as B&M's evidence was that the supplier information was updated whenever take-on procedures changed.

74. It was agreed that none of the checks described in the take-on procedures specifically relate to excise duty. I note Mr Arora's evidence that suppliers were advised that alcohol goods must be supplied UK duty paid but I find that there was no evidence that B&M undertook any specific checks to ensure that UK duty had been paid on particular supplies of goods.

75. For example, there was no indication that B&M asked for copies for any import declarations. B&M instead relied on the supplier having met their take-on procedure checks where much of the information for which, as noted above, was apparently completed by the supplier, and then relied on their terms and conditions as to compliance with UK legislation and statements in purchase orders and invoices that UK duty had been paid.

76. I do not consider that B&M's terms and conditions' inclusion of a warranty that all UK legislation has been complied with is of any particular assistance. The term is very broad and insufficient to ensure that there has been any compliance with UK duty requirements by suppliers in respect of a particular supply of goods. It may be sufficient to provide B&M with reimbursement if a purchase is not compliant, but that is not the same as providing reliable assurance as to compliance.

77. With regard to the supplies which are the subject of the appeal, the main reference to duty being paid was made by Ruby in the purchase orders and invoices. Each of these, insofar as provided in the bundle, contained a stock item line to the effect that the supply included "1 quantity" of "UK duty paid" at "£0". Whilst the reference to £0 was presumably to ensure that the invoice software did not add duty to the invoice, the line item description did not include any information about the amount of duty paid. B&M agreed that this invoice item, alone, was insufficient evidence that duty was paid but argued that they also relied on their due diligence procedures in general.

78. B&M acknowledged in their skeleton argument that "in the nature of the trade conducted by [B&M, it] was to a degree reliant upon proper due diligence being conducted by those above it in the chain of supply".

79. Mr Arora was asked why B&M believed that they could rely on a supplier's statement that duty had been paid on low priced goods. Mr Arora replied that they relied on the broader due diligence undertaken on the supplier. Mr Arora was also asked what B&M did to check

their suppliers' due diligence processes, as the business did not import goods directly and so was reliant on adequate due diligence being undertaken elsewhere in the supply chain. Mr Arora was unable to provide any details of queries made by B&M as to supplier due diligence processes.

80. I find that B&M's checks of suppliers related to the supplier and not to the supplier's further supply chain, nor was there any check made as to their suppliers' due diligence processes with regard to each supply of goods but, rather, a reliance on the statements made by the supplier both as to whether duty was paid and why the goods were available at a low price to B&M.

81. As such, I find that B&M did not take any substantive steps to confirm whether the supplier's statement that duty had been paid was a reasonable statement for the trader to make in respect of any particular order. B&M's submission that it considered that its terms and conditions, requiring a warranty and reimbursement in the event of a cost to B&M in the event of failure to comply, would deter rogue traders as suppliers does not mean that its due diligence in this context provides them with a reasonable excuse. The terms and conditions simply provide B&M with some potential contractual redress when it incurs costs as a result of a relevant failure in the supply chain.

82. B&M argued that Ruby had refused to provide further evidence of the duty paid status of the goods but Ruby had refused, as this would reveal the identity of their supplier. However, there was no evidence that B&M had sought any information about Ruby's own due diligence processes or (for example) sought redacted evidence of duty payment, neither of which would have required identifying particular suppliers, which could have provided documentary support for any assurances received from Ruby.

83. The decision of the Court of Appeal in *Euro Wines* confirms that what is required for reasonable excuse is that the business can show that they undertook due diligence as to the supply of goods (at [38] onwards). It is not enough to carry out due diligence on the supplier. At [40], the Court approved the wording of the Upper Tribunal in the same case, that "In every case a trader who is at the point of acquiring dutiable goods has the opportunity to take steps in order to satisfy itself about whether duty has been paid before going ahead. A trader who goes ahead without being satisfied knows or ought to know it is at risk". B&M did not take steps to satisfy itself whether duty had been paid when it was at the point of acquiring dutiable goods: it relied on statements made by its suppliers without having taken any steps to confirm that those statements could be relied upon as evidence that duty had been paid.

84. B&M also referred to the length of the trading relationship with Ruby and that its directors were known to B&M personally as supporting its contention that it had a reasonable excuse. However, I consider that this emphasises the point made in *Euro Wines*, that due diligence is required for each supply of goods: despite the length of the trading relationship, a considerable number of consignments from Ruby were unable to be shown to be duty paid. The length of the relationship may go some way to ensuring that the warranty sought by B&M could be met, but it does not particularly assist in ensuring that goods purchased are duty paid throughout the length of the relationship.

85. Without knowledge of the due diligence being undertaken by suppliers, or direct evidence of duty payments, I consider that statements by suppliers that goods are UK duty paid are unsupported. This is particularly the case with suppliers such as Ruby who do not take physical possession of the goods. B&M were, in effect, relying on the fact that traders had been in business for some time and were willing to state that goods were duty paid. I note that Mr Arora's evidence was that questions were asked as to why the goods were available at a particular price but as described this would not have provided any specific evidence as to the

duty paid status of the goods. Being short-dated, for example, does not inevitably mean that duty was paid on the relevant goods.

86. B&M referred to the case of *Martyn Perfect* [2017] UKUT 0476 (TCC), [2019] EWCA Civ 465 where the Upper Tribunal and Court of Appeal accepted that the appellant was an innocent agent, lacking any knowledge of the smuggling attempt in which he was caught up. B&M submitted that they had no specific warning about trading with Ruby even after asking HMRC whether they should stop trading with them, before the November 2011 visit. HMRC had only provided general advice about the dangers of trading in the grey market. Once advised by HMRC of the number of consignments suspected to be non-duty paid, supplied by Ruby, B&M had ceased trading with Ruby.

87. I do not consider that the *Perfect* case is particularly helpful here as a comparison, as the appellant in the case of *Perfect* was a driver with very limited resources to check relevant information. In this case, B&M set the terms and conditions under which they did business with their suppliers and controlled their own due diligence processes. Further, the obligation is clearly on a taxpayer to ensure that they have appropriate procedures, rather than relying on HMRC to tell them who they should or should not trade with.

88. It was also argued that B&M could not have obtained satisfactory proof of duty paid status as even HMRC had been unable to obtain such proof. This rather misses the point: if unable to obtain reasonable evidence that goods were duty paid, I consider that a reasonable taxpayer (in the *Perrin* sense) would not undertake the transaction.

89. I find B&M's due diligence procedures, including their terms and conditions and order documentation, were insufficient to enable them to reasonably conclude that duty had been paid on any particular supply of goods. Whilst I accept that B&M did not intentionally participate in defaulting supply chains, I consider that their due diligence was focussed on the supplier, and the supplier's warranties to B&M that they would compensate B&M for any failure of compliance, rather than ensuring that a particular supply was compliant.

90. I consider it is also clear that B&M relied on a supplier's assurances as to the duty paid status of the particular goods supplied without having undertaken appropriate due diligence to verify whether the supplier had sufficient knowledge of the duty paid status of the goods to be able to reasonably make such assurances.

91. I therefore find that B&M did not have an objectively reasonable excuse within the meaning of paragraph 20, Schedule 41, FA 2008.

Whether special circumstances apply

92. B&M contended that, if it did not have a reasonable excuse, then special circumstances existed that meant that the Tribunal had the ability to reduce the penalty, under paragraphs 14 and 19(2) of Schedule 41.

93. B&M referred to the Upper Tribunal decision in *Barry Edwards v HMRC* (2019) UKUT 131, in which the Upper Tribunal considered the case history and meaning of 'special circumstances' in the context of a penalty under legislation materially identical to the equivalent provision in Schedule 41. At [72] onwards the Upper Tribunal quoted with approval from the FTT decision in *Advanced Scaffolding (Bristol) Limited v HMRC* (2018) UKFTT 0744 (TC):

> "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."

94. B&M contended that the penalty assessment was flawed for the following reasons:

(1) the appellant's advisers had provided detail as to the appellant's due diligence procedures to HMRC on 16 July 2012;

(2) the penalty notice made no reference to either the reasonable excuse provisions in Schedule 41 nor to the due diligence information provided;

(3) the penalty notice requested responses for consideration by 8 August 2013. A detailed response was submitted by that date, referring to the due diligence undertaken. This was acknowledged by HMRC on 13 August 2013;

(4) the penalty assessment was issued on 8 August 2013, the deadline for response, and before HMRC acknowledged receipt of the response.

95. B&M contended therefore that the penalty assessment was raised without any consideration of the response provided on 8 August 2013.

96. B&M further contended that the review officer had not been provided with all the information as his review stated that there was no evidence of due diligence having been completed, despite the information provided by the appellant and their advisers to HMRC. Further, HMRC decision makers appears to believe that penalties would still apply if the goods were duty unpaid even if the appellant had carried out all reasonable checks, contrary to *EuroWines*.

97. B&M therefore submitted that:

(1) the penalty assessment was misconceived and wrong in law;

(2) HMRC made the decision to issue the penalty assessment without considering B&M's response, contrary to proper process and HMRC stated policy;

(3) the penalty assessment was issued without regard to the appellant's due diligence information provided to HMRC; and

(4) the independent review was 'flawed' as the reviewing officer was not provided with, or failed to consider, all of the relevant information.

98. HMRC contended that these submissions were simply a restatement of the appellant's other submissions and that HMRC's decision was flawed because it did not accept those other submissions. HMRC contended that it was not enough to show that an aspect of the decision-making process was flawed and that the appellant had failed to identify any special circumstances which would provide the Tribunal with the discretion to amend the penalty assessment.

Discussion

99. Paragraph 14 of Schedule 41 permits HMRC to reduce a penalty where they think it right because of special circumstances. Paragraph 19(2) of Schedule 41 permits the Tribunal

substitute its own decision where it considers that HMRC's decision with regard to special circumstances under paragraph 14 is flawed.

100. B&M's contention that 'the penalty assessment was flawed' is therefore not particularly helpful. The requirement for the Tribunal discretion to be engaged under paragraph 19(2) is that HMRC's decision as to whether there are special circumstances is flawed, rather than that the original decision-making process was flawed.

101. The penalty explanation letter stated that HMRC did not consider that there were any special circumstances which would merit a reduce in the penalty. B&M did not identify any flaw with that decision as to whether there were special circumstances and, considering the evidence before me, I do not consider that HMRC's conclusion that there were no special circumstances is flawed.

102. If the information provided by the appellant as to why they have a reasonable excuse does not establish on appeal to this Tribunal that they do have a reasonable excuse, a failure by HMRC to consider some of that information does not provide the Tribunal with a reason for reducing the penalty on the basis of special circumstances.

103. I therefore find that there are no special circumstances which would merit a reduction in the penalty.

Whether the disclosure was unprompted

104. The penalty regime under Schedule 41 provides that a lower penalty applies where the penalty arises as a result of an unprompted disclosure. The penalty assessment under appeal was calculated on the basis that the penalty did not arise from an unprompted disclosure.

105. B&M contended that the penalty should have been calculated on the unprompted basis as they had no reason to believe that HMRC had discovered or were about to discover the relevant act or failure. There could not be a prompted disclosure in circumstances where even HMRC were unable to establish whether the goods were or were not duty paid. The Tribunal in *Euro Wines* had considered the same argument but had found against the appellant because of their lack of due diligence. B&M had carried out extensive due diligence and it was submitted that as such good faith could be implied and so the disclosure could be regarded as unprompted.

106. It was submitted that a strict reading of paragraph 12(3) would give rise to a result at odds with the intention of Schedule 41 was, it was submitted, was aimed primality at taxpayers who deliberately avoid their responsibilities to notify HMRC of their obligation to pay tax (per *Hillis* (2013) UKFTT 196 (TC)).

107. In the alternative, it was submitted that the failure to classify this as an unprompted disclosure was flawed such that a reduction should be applied to the penalty for special circumstances.

108. HMRC submitted that the legislation was clear that a disclosure must be either unprompted or prompted and that the appellant was repeating the same 'reasonable excuse' argument in contending that the legislation should not be read strictly. A strict reading of the legislation did not produce an unfair result as taxpayers could reduce the penalty if they had a reasonable excuse, or if there were special circumstances. Further, it was unclear what action B&M had taken that should be regarded as being disclosure. Even if the provision of information was considered to be disclosure, that had taken place after HMRC had begun to investigate the relevant matters.

Discussion

109. Paragraph 12(3) provides that a disclosure:

> "(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, it is prompted."

110. B&M's contention that their due diligence means that the disclosure should be regarded as unprompted and that such a position is supported by *Euro Wines*. However, as set out above, I have found that their due diligence was not sufficient to provide them with a reasonable excuse for the failure; there is no good reason to consider that the due diligence they did undertake should mean that the penalty should be assessed as if there had been an unprompted disclosure by B&M.

111. I note the submissions made as to the intention of the legislation but would also note that the Tribunal in *Euro Wines* had concluded that "the purpose of imposing penalties on persons handling excise goods is to counteract non-payment of duty" [at 103] such that it is not necessarily the case that a penalty in this context could conclusively be said to be contrary to the intention of the legislation.

112. Accordingly, I find that the penalty should not be calculated as if any disclosure was unprompted.

Whether the penalty is disproportionate and unfair

113. B&M argued in the alternative that the penalty was disproportionate and unfair, for the following reasons:

> (1) HMRC were unable to show that the goods in question were non-duty paid and had conceded that the only way in which B&M could guarantee that the goods were duty paid was by paying the duty itself. In such circumstances, a wrongdoing penalty was disproportionate, unnecessary and oppressive;
>
> (2) the penalties are criminal charges for the purposes of Article 6 ECHR. Similar statutory regimes provides statutory defences similar to those of 'reasonable excuse' within the meaning of Schedule 41. As HMRC had not suggested any further measures which B&M might have taken to ensure that the goods were duty paid, it was disproportionate and contrary to the intention of Parliament to impose a wrongdoing penalty;
>
> (3) the penalty had been calculated by reference to the full amount of the assessment, not the reduced amount agreed in settlement. It was disproportionate for the B&M to be assessed for a penalty calculated part by reference to the liability of another person.

114. HMRC contended, in reply that:

> (1) B&M had chosen to purchase goods in the grey market at a price which was only just in excess of the excise duty due on the goods. Such supply chains represent a significant fiscal risk, which the penalties are intended to address, and the legislation therefore places obligations on holders of alcohol. B&M had chosen to accept the risk and it was their obligation to decide how to manage it. The legislation provided a reasonable excuse argument for those who took appropriate steps to manage the risk.
>
> (2) The Article 6 argument is not relevant as, by B&M's own admission, there is a reasonable excuse argument available to taxpayers.
>
> (3) The legislation clearly imposes a penalty based on the potential lost revenue rather than the excise assessment actually raised on the particular taxpayer, and there was no dispute that B&M held the goods in question. The penalty is concerned with the conduct

of those in the supply chain holding excise duty goods on which there is no evidence of duty having been paid, not the holder's eventual assessment to excise duty.

Discussion

115. B&M's arguments with regard to this ground are, in effect, a repetition of their reasonable excuse arguments. B&M were not forced to purchase goods which could not be established to be duty paid; as I have found that their due diligence procedures were not sufficient to provide them with a reasonable excuse, it follows that it is not disproportionate or unfair that they be subject to a wrongdoing penalty where they purchased such goods. Nor do I consider that the penalty is disproportionate because HMRC have not provided B&M with advice as to further measures which they might have taken: the statutory obligation is on taxpayers to take appropriate measures, not on HMRC to provide them with advice as to such measures.

116. With regard to the amount, I consider that it is clear from the legislation that the penalty is based on the potential lost revenue (paragraph 6B of Schedule 41) and the potential lost revenue is "an amount equal to the amount of duty due on the goods" (paragraph 10 of Schedule 41). The legislation does not restrict this to the amount of duty assessed on the taxpayer, as B&M effectively contended should be the case.

117. B&M argued that the principles in the decision in *Trinity Mirror* (2015} UKUT 421 (TCC) applied with regard to proportionality. I note that the decision in *Trinity Mirror* stated that (at [58]):

> "It is not enough for a penalty simply to be found to be disproportionate to the gravity of the default; it must be "so disproportionate to the gravity of the infringement that it becomes an obstacle to [the underlying aims of the directive"]".

118. The aim of the legislation in this case is to ensure that excise duty is paid on alcohol, by placing obligations on each participant in the supply chain in respect of such goods. The obligation is not spread across the supply chain: it is imposed separately on each participant. I consider that this not disproportionate given the aim of the legislation.

119. As the obligation is not reduced pro rata to the participant's involvement in the supply chain, I do not consider that it is disproportionate that the penalty is not reduced pro rata to the participant's liability to any particular excise duty assessment. This is also supported by the fact that HMRC may issue a penalty even where there has been no assessment made of the excise duty (under paragraph 16(4)(b) of Schedule 41).

120. I therefore find that the penalty is not disproportionate or unfair.

Decision

121. For the reasons set out above, the penalty assessment is upheld in the amended amount of £ 1,172,340.94 and the appeal is otherwise dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

122. 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.

ANNE FAIRPO
TRIBUNAL JUDGE

Release date: 10th JANUARY 2023