



TC08002

ALCOHOLIC LIQUOR DUTY – Part 6A Alcoholic Liquor Duties Act 1979 – Alcoholic Liquor Wholesaling – penalty for contravention of s88F (wholesale purchase from unapproved seller) – meaning of “sold wholesale” – “incidental sale” exception – one-off purchase of 840 bottles of gin on special offer from authorised retailer – was it proved that the sale was not “incidental” to seller’s authorised retail sales? – held: no – contravention of s88F not proved – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/05619

BETWEEN

MILLENNIUM CASH & CARRY LIMITED

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY’S REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: JUDGE ZACHARY CITRON
MR NOEL BARRETT**

The hearing took place on 12-14 August 2020. The form of the hearing was V (video). It was held on the Tribunal video platform. A face to face hearing was not held because of the risk to public health during the coronavirus pandemic. The documents before the Tribunal were a 629 pdf page hearing bundle in four volumes, a 658 pdf page authorities bundle, a 3-page “agreed statement of facts”, skeleton arguments of both parties, and a third witness statement of Mr R Lakhani

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Mr David Bedenham, counsel, instructed by TT Tax, for the Appellant

Mr Howard Watkinson, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This was an appeal against a £4,200 penalty under the Alcoholic Liquor Duties Act 1979 (“ALDA”) for contravention of s88F ALDA, a statutory prohibition on wholesale alcohol purchases from sellers without approval under the alcohol wholesaler registration scheme (the “AWRS”).
2. It concerned a transaction (the “Sale”) in early January 2018 whereby the appellant (“MCC”) purchased a pallet (140 cases of 6 bottles each) of Bombay Sapphire gin (the “gin”) from a Nisa Local convenience store in Canning Town, East London operated by JetBros Ltd (“JBL”), which did not hold any AWRS approval.
3. We gave our decision orally at the end of the hearing, finding that it was not sufficiently proved that the Sale was a contravention of s88F ALDA and so allowing the appeal. The parties asked that we provide a decision notice accompanied by full written findings of fact and reasons for the decision.

THE PENALTY AND THE APPEAL

4. A £6,125 penalty assessment notice under paragraph 6 Schedule 2B ALDA for the period 30 December 2017 to 6 January 2018 was issued to MCC on 2 April 2019. A penalty explanation schedule sent earlier (on 21 January 2019) had set out that the penalty was assessed on the “deliberate not concealed” basis, was based on a prompted disclosure, and that there had been a reduction for the quality of disclosure of 25% of the maximum reduction.
5. On statutory review (HMRC’s review conclusion letter dated 17 July 2019) the reduction for the quality of disclosure was increased to 80% of the maximum reduction (based on an increase to 10% for “telling”, an increase to 40% for “giving help” (the maximum under HMRC’s scheme), and an increase to 30% for “giving access” (again, the maximum under HMRC’s scheme)). The penalty was accordingly reduced to £4,200.
6. By notice of appeal dated 2 August 2019 MCC appealed.

EVIDENCE

7. The documentary evidence included:
 - (1) witness statements of
 - (a) Mr Rishi Lakhani, a director and the chief executive of MCC (two witness statements in the hearing bundle and a third witness statement delivered shortly before the hearing)
 - (b) Mr Tristan Thornton of TT Tax, adviser to MCC
 - (c) Mr Feisal Issimdar, Officer of HMRC
 - (2) extract from MCC’s purchase ledger for the February 2019 VAT quarter, showing the Sale
 - (3) MCC bank statement showing payment of £12,222 to JBL on 10 January 2018
 - (4) copies of 35 till receipts issued by Nisa Local JBL and dated 30 and 31 December 2017 and 2-6 January 2018
 - (5) copy of Nisa debit note for £9,975 plus VAT addressed to JBL dated 21 December 2017 relating to the gin

- (6) copy of MCC “supplier registration form” in respect of JBL
- (7) JBL bank statement 9-15 January 2018
- (8) transcript of a meeting between Mr Lakhani, Mr Thornton and HMRC officers (including Mr Issimdar) on 24 July 2018
- (9) transcript of a meeting between Mr Lakhani, Mr Thornton and HMRC officers (including Mr Issimdar) on 27 November 2018
- (10) transcript of a meeting between Mr Nilesh Jethwa (director of JBL), Mr Thornton and HMRC officers on 4 October 2019
- (11) letter from Mr Jethwa to Mr Lakhani dated 27 April 2020
- (12) copy of Finance Act 2015 explanatory notes
- (13) copy of Excise Notice 2002: AWRS
- (14) copy of online Government guidance on AWRS
- (15) extracts from HMRC internal manual on AWRS

8. Mr Lakhani and Mr Issimdar gave oral evidence and were cross examined at the hearing. We found their oral evidence to be generally credible; where there was inconsistency with other factual evidence and such inconsistency was material to findings of relevant facts, we have explained how we resolved the inconsistency in what follows.

9. HMRC did not challenge the contents of Mr Thornton’s witness statement and so he was not cross examined.

FACTS ABOUT THE SALE AGREED BY THE PARTIES

10. We find the following facts as they were agreed by the parties and consistent with the evidence:

- (1) The Sale took place as a single supply: MCC paid JBL by a single bank transfer on 10 January 2018 in the sum of £12,222.
- (2) The recommended retail price per bottle for the gin was £16. MCC purchased it from JBL at £14.50 per bottle.
- (3) MCC asked JBL prior to the Sale if it would supply the gin.
- (4) MCC knew that JBL was a retailer licenced to sell alcohol and not (unlike MCC) approved under the AWRS.
- (5) JBL knew that MCC would on-sell the gin as part of its business.
- (6) JBL purchased the gin from its supplier, Nisa Retail Limited (“Nisa”), on or around 21 December 2017 for £9,975 plus VAT (£11,970). Nisa was an AWRS-approved wholesaler which supplied stock to retail outlets including JBL.
- (7) JBL issued 35 till receipts to MCC, dated 30 and 31 December 2017 and 2-6 January 2018, each of which was for four cases of gin. The till receipts on their face stated that the supply had been paid for in cash totalling £12,180 including VAT (£10,150 net of VAT).

BACKGROUND FACTS ABOUT MCC AND JBL FOUND BY THE TRIBUNAL

11. We find the following background facts about MCC and JBL based on the evidence:

- (1) MCC was a wholesaler and distributor of both alcoholic and non-alcoholic goods, operating since incorporation in 1999. As at January 2019 it employed 59 people full-

time, eight part-time and had 11 contract workers. In the year to 31 May 2018 its “cost of sales” (i.e. purchases) exceeded £95 million. It was VAT registered and approved by HMRC as an owner of duty suspended goods and under the AWRS. MCC was owned by Mr Lakhani’s family.

(2) JBL was licenced to sell alcohol and was also a member of the Nisa buying group. Being a member of the Nisa buying group meant that JBL was eligible for special offers on goods from Nisa from time to time.

(3) MCC purchased most of its alcoholic goods from “brand-owners”. MCC also bought some stock (not just alcoholic goods but also, for example, confectionery) from retailers as, at times, they offered prices lower than MCC could obtain from “brand-owners”. The retailer could be a large chain, like Tesco, or a smaller retailer. A smaller retailer, like JBL in this case, could have access to special offers on goods because they were part of a larger franchise (in JBL’s case, Nisa).

RELEVANT LAW

Prohibition on buying liquor wholesale from non-AWRS approved person (s88F ALDA)

12. The AWRS was created by Finance Act 2015, which introduced Part 6A (Wholesaling of Controlled Liquor) to ALDA. Section 88C (in broad terms) prohibited non-approved persons selling “controlled alcohol” wholesale, whilst s88F – of particular relevance to this case – prohibited the buying of such alcohol wholesale from non-approved UK persons.

13. As, in this case, the gin was “controlled alcohol” and JBL was a non-approved UK person, the key provisions were those dealing with the meaning of “wholesale”:

- (1) Section 88A ALDA provided that controlled liquor is sold “wholesale” if—
 - (a) the sale is of any quantity of the liquor,
 - (b) the seller is carrying on a trade or business and the sale is made in the course of that trade or business,
 - (c) the sale is to a buyer carrying on a trade or business, for sale or supply in the course of that trade or business, and
 - (d) the sale is not an incidental sale, a group sale or an excluded sale.
- (2) It further provided that a sale is an “incidental sale” if—
 - (a) the seller makes authorised retail sales of alcoholic liquor of any description, and
 - (b) the sale is incidental to those sales.
- (3) A sale is an “authorised retail sale” if it is made by retail under and in accordance with a licence or other authorisation under an enactment regulating the sale and supply of alcohol.

14. Section 88B ALDA empowered HMRC, by regulations, to make provisions as to the cases in which sales are, or are not, to be treated as inter alia incidental sales. The Wholesaling of Controlled Liquor Regulations 2015 (SI 2015/1516) are silent as to cases in which sales are to be treated as incidental sales.

15. The consequences of contravention of s88C or s88F ALDA include both offences and penalties.

Penalty for contravention of s88F ALDA

16. Paragraph 1 Schedule 2B ALDA sets out that a penalty is payable by a person who contravenes s88F ALDA.

17. Paragraph 2 of that schedule sets out the penalty quantum based on behaviour as follows:

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

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

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

(4) The contravention is—

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

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

18. The “maximum amount” is £10,000 (paragraph 10).

19. Paragraphs 3 and 4 of the schedule set out reductions that are to be applied to the quantum of the penalty for disclosure.

“3(1) Paragraph 4 provides for reductions in penalties under this Schedule where P discloses a contravention.

(2) P discloses a contravention by—

(a) telling the Commissioners about it,

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

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

(3) Disclosure of a contravention—

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

(b) otherwise, is “prompted”.

(4) In relation to disclosure “quality” includes timing, nature and extent.

4(1) Where P discloses a contravention, the Commissioners must reduce the penalty to one that reflects the quality of the disclosure.

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

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

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

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

- (3) If the disclosure is unprompted, the penalty may not be reduced below—
- (a) in the case of a contravention that is deliberate and concealed, 30% of the maximum amount,
 - (b) in the case of a contravention that is deliberate but not concealed, 20% of the maximum amount, and
 - (c) in any other case, 10% of the maximum amount.”

20. Under paragraph 5 HMRC may reduce the penalty if they think it right because of special circumstances (which does not include ability to pay).

21. Paragraph 7 sets out that where the relevant contravention is not deliberate, no liability to a penalty arises where the person assessed satisfies either HMRC, or the Tribunal on appeal, that there is a reasonable excuse for the contravention. Where the person assessed relied on any other person to do anything, that is not a reasonable excuse unless the assessed person took reasonable care to avoid the contravention.

Jurisdiction

22. A decision to impose a penalty pursuant to Schedule 2B ALDA (and the amount of that penalty) is a “relevant decision” (see s13A(2)(ea)(ii) Finance Act 1994) and the Tribunal has full appellate jurisdiction including “power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal” (s16(5) Finance Act 1994).

FINANCE ACT 2015 EXPLANATORY NOTES

23. Finance Act 2015 explanatory notes said this by way of “background note” to the section introducing Part 6A ALDA:

“50. Alcohol duty fraud in the UK costs taxpayers an estimated £1.3bn per annum. The most prevalent form of alcohol fraud involves the smuggling or diversion of alcoholic drinks into the UK in large commercial quantities, duty unpaid.

51. The wholesale sector is the major point where illicit alcohol is diverted into retail supply chains to intermingle with legitimate goods because it is the only element of the alcohol supply chain not required to be authorised by HMRC or the licensing authorities. Introducing a requirement for wholesalers to register with HMRC will reduce opportunities for fraud.

52. Following a 2012 formal consultation on alcohol anti-fraud measures the government announced that it would consult further on the introduction of a registration scheme for alcohol wholesalers and launched a further consultation in 2013. The government announced at Autumn Statement 2013 that it would proceed with plans to introduce the alcohol wholesaler scheme from April 2017, and draft legislation was published at Autumn Statement 2014.

53. Since consultation the legislation has been revised to clarify procedures for new criminal offences for trading without approval and buying from an unapproved wholesaler.”

ISSUES FOR DETERMINATION

24. The following issues arose for determination:

- (1) Whether HMRC have proved on the balance of probabilities that the Sale falls outside the scope of “incidental sale” and so was a contravention of s88F ALDA
- (2) If so, whether HMRC have proved on the balance of probabilities that the contravention was deliberate
- (3) If the contravention was not deliberate, whether MCC has proved on the balance of probabilities that there was a reasonable excuse for the contravention, with the effect that there is no liability to a penalty

(4) In any case, whether and to what extent special circumstances apply to reduce the liability of a penalty (MCC accepted that it bore the burden of establishing special circumstances)

(5) If MCC is liable to a penalty and that penalty is not reduced due to special circumstances, whether there should be further reduction for the quality of disclosure

HMRC'S SUBMISSIONS

Issue 1 - "incidental sale"?

25. HMRC submitted that there was no lack of clarity as to what does not amount to an "incidental sale" within s88A ALDA such that the provision is bad for ambiguity. Each case will turn on its facts.

26. Having regard to the manner in which the Sale took place, in the context of a legislative scheme whose purpose was to restrict fraud in the alcohol wholesale sector, HMRC submitted that on a reasonable and objective view the Sale was not an incidental sale.

27. HMRC submitted that the Sale was not "incidental" to JBL's authorised retail sales by reference to the following features of the transaction:

(1) value and volume – this was a single sale of 140 cases (a pallet) of gin to the value of more than £12,000. HMRC submitted that there was nothing "incidental" about the value and volume to JBL's authorised retail sales;

(2) price – JBL sold the goods at £14.50, well below the RRP of £16; HMRC again submitted that there was nothing "incidental" about the price at which the goods were sold to JBL's authorised retail sales, nor was the negotiation of price "incidental" to the manner in which one would ordinarily purchase from goods from a local off-licence; and

(3) transaction structure - this was a "pre-ordained" business-to-business ("B2B") purchase where MCC had asked JBL to purchase a pallet of gin effectively on its behalf. Again, HMRC submitted that there was nothing "incidental" to JBL's authorised retail sales about the manner in which the transaction was structured,

28. HMRC submitted that perhaps the best indicator that this was not an "incidental sale" to JBL's authorised retail sales was that JBL took extraordinary actions in issuing till receipts which made it look as if the Sale was like JBL's normal sales.

29. HMRC submitted that no one could have reasonably and objectively thought that purchasing a pallet of gin in a "pre-ordained" wholesale transaction from a local off-licence was within the scope of an "incidental sale."

30. HMRC submitted that Mr. Lakhani suggested in his witness statement that the quality of "incidental" is restricted to numerical quantification of the value of the transaction in issue by reference to the total value of the transactions carried out by that body in e.g. a year. HMRC submitted that there is no such restriction. The value of the transaction is only one facet of whether or not a sale was "incidental", which involves an assessment of all the objective circumstances of the sale, both qualitative and quantitative, in the context of legislation whose purpose is to ensure the registration of those who wholesale alcohol.

Issue 2 - "deliberate" contravention of s88F by MCC?

31. HMRC submitted that MCC knew that purchasing a pallet of gin from JBL was not "incidental" to JBL's retail alcohol sales.

32. HMRC submitted that there is no suggestion that Mr. Thornton was asked to opine on this particular transaction.

33. HMRC submitted that the nutshell advice that Mr. Lakhani said he received from Mr Thornton does not withstand scrutiny. If Mr Thornton was right that the key was whether a sale was “occasional”, that would allow MCC to purchase an unlimited amount of alcohol from a local off-licence, as long as it was a single “occasional” transaction that was not repeated. HMRC submitted that in the context of legislation whose purpose is to reduce the opportunities for fraud in the alcohol wholesale sector that is an absurd analysis, and both Mr. Thornton, and more importantly, Mr. Lakhani would have known that; it is not, as Mr. Lakhani said in his witness statement, “a logical and reasonable interpretation of the rules.”

34. HMRC submitted that the Sale did not fit within what Mr. Thornton said he initially advised his understanding of “incidental sales” to cover. At paragraphs 10 – 11 of his witness statement Mr. Thornton said:

“However, a shop which sometimes bought more than they needed when there were promotions available, and made ad-hoc sales of that surplus, would not be substantially acting as a wholesaler. That person would be taking advantage of an occasional opportunity that presented itself as part of their retail business and therefore selling on excess volume from that promotion would seem to be incidental to that business....

In light of this, when my clients, including Millennium Cash and Carry Ltd asked what I thought of incidental sales I outlined this interpretation.”

35. HMRC submitted that JBL did not buy more than it needed and sell the surplus on an ad hoc basis. The Sale was a pre-arranged wholesale transaction.

36. HMRC submitted that later in his witness statement Mr. Thornton gave a more simplistic, yet heavily caveated version of his advice:

“To the best of my recollection I outlined that the key issue was likely to be how often the sales were occurring more than how much was bought. One off or rare purchases from particular retailers seemed likely to qualify as an incidental sale.”

37. HMRC submitted that Mr Thornton did not explain how his advice became simpler, and less detailed, over time. Further, none of this advice was committed to writing.

38. HMRC submitted that had Mr. Lakhani read HMRC’s published guidance in an objective way he would have concluded that the Sale was not an “incidental” sale: HMRC referred to

(1) Excise Notice 2002 paragraph 4.3 which they said indicated that because this was an intentional and knowing wholesale sale by JBL, it was not “incidental” in HMRC’s view;

(2) paragraph 4.4 of that notice, which they said indicated that a retailer who knowingly and intentionally sets out to make a wholesale sale has, in HMRC’s view, to be approved for AWRS;

(3) paragraph 13.4 of that notice, which they said indicated that the “incidental sales” exception did not apply where the supplier was aware that the customer was purchasing the goods for resale;

(4) online government guidance AWRS which they said indicated that HMRC’s view was that the “incidental sales” exemption did not apply to retailers who set out to make

sales of alcohol to other businesses and only applied to either unintentional and unplanned wholesales, or uninvited and exceptional wholesales; and

(5) HMRC's internal AWRS manual, which they said indicated that HMRC's view was that if a business was intentionally setting itself out to make a wholesale sale then it was not an "incidental sale".

Issue 3 - reasonable excuse?

39. HMRC submitted that MCC has not discharged the burden of showing that it had a reasonable excuse. Even if Mr. Lakhani truly believed that the purchase was "incidental" on the sole basis that it was a "one off", that was not an objectively reasonable belief. This was not a case of "ignorance of the law", but an objectively unreasonable view of the law being taken by MCC.

Issue 4 - special circumstances?

40. HMRC submitted no special circumstances arise on the facts of this appeal.

Issue 5 - further reductions for disclosure?

41. HMRC submitted that there is no warrant for further reduction of the penalty for disclosure. This was a prompted disclosure of a transaction for which various explanations were advanced. The maximum proper reduction was applied.

Documents relied on

42. The documents on which HMRC said they relied to make their case were:

- (1) the 35 till receipts
- (2) the MCC bank statement
- (3) the Nisa invoice
- (4) MCC's "supplier registration form" in respect of JBL
- (5) JBL bank statement 9-15 January 2018
- (6) HMRC report of meeting between HMRC (Officer Walkinshaw) and JBL on 25 July 2018
- (7) transcripts of meetings between MCC and HMRC on 24 July and 27 November 2018
- (8) transcript of 4 October 2019 meeting between JBL and HMRC
- (9) Mr Jethwa's letter to Mr Lakhani of 27 April 2020

43. HMRC said their case also relied on the absence of documents one would expect to see in a normal commercial transaction, such as a purchase order, a record of terms, documentation of the discussion of terms, or a delivery note.

MCC'S SUBMISSIONS

Issue 1 - "incidental sale"?

44. MCC submitted that, at the very least, the Sale was capable of falling within the definition of an "incidental sale" Given the penal consequences that attach to a contravention of the statutory provision, the MCC submitted that the Tribunal should adopt the "interpretation which will avoid the penalty in any particular case [or]... If there are two reasonable constructions, we must give the more lenient one" (*Tuck & Sons v Priester* (1887) 19 QBD 629).

45. Although not a submission as such, we mention here that in, his witness statement, Mr Lakhani commented on a version of JBL's accounts as at 29 December 2018 (the version contained a balance sheet but no profit and loss account). Stock at hand on this day was recorded as £79,500 and cash at bank and in hand recorded as £134,091. Mr Lakhani expected 29 December to be a low point for a retailer's stock holdings: stock would have built up in November for the Christmas peak which would have mostly passed by this point. But even if this was reflective of an average day's stock and cash holdings, the Sale represented around 15% of the stock held on one day and 9% of the cash. Mr Lakhani expected that stock to turn over at least every two weeks. Carried that over the course of a year and the Sale would represent only around 0.6% of JBL's sales for the year.

Issue 2 - "deliberate" contravention of s88F by MCC?

46. MCC submitted that HMRC's case that MCC *knew* the Sale was in contravention of s88F ALDA:

- (1) was not supported by the evidence (and not "distinctly" proved); and
- (2) failed to give adequate consideration to *why* an established business of the size of MCC would knowingly contravene the legislation by making a purchase with a value that equated to a tiny percentage of MCC's annual purchases.

47. MCC submitted that HMRC could not properly maintain that MCC *knew* that the Sale was a contravention, given that MCC received professional advice that a one off (or sporadic) purchase from a retailer would not constitute a wholesale purchase because it fell within the "incidental sale" exception.

48. MCC did not accept HMRC's argument that, had Mr Lakhani read HMRC's guidance in an objective way, he would have concluded that this was not an 'incidental' sale, since the guidance was far from clear:

- (1) Paragraph 4.3 of Excise Notice 2002 stated that "the purpose of the incidental sales exception is to exclude, *for example*, a retailer who makes a wholesale sale *unknowingly or unintentionally* in the course of their day to day retail activity" (emphasis added).

However, the same paragraph then went on to give the example of a "corner shop that does not in any way set out to make wholesale sales *but is aware* that the local pub landlord may exceptionally run out of a particular line and call in the shop to make an ad hoc purchase – this would be an *exception rather than the rule* and would be classed as an incidental sale" (emphasis added).

This example suggests that that a retailer who is aware (i.e. is *not* unknowingly and unintentionally making a sale to another business) is still within the incidental sale carve out because that sale was the "exception rather than the rule".

- (2) Online government guidance AWRS stated (emphasis added):

You do not need to apply for approval for AWRS if you're a trader who's *mainly a retailer* and you're covered by the exemption.

This exemption applies if you're an authorised retailer, with a retail licence, *who does not set out to make sales of alcohol to other businesses* and you:

- only make wholesale sales that take place unintentionally in the course of your retail activity and without your prior knowledge (like unplanned sales through a supermarket checkout)

- *knowingly make wholesale sales but they're uninvited by you and only on an exceptional basis* (perhaps the village fete once a year)

MCC submitted that this guidance suggests that a trader who is “mainly” a retailer can *knowingly* make a wholesale supply provided that it’s not a regular occurrence. The requirement to “not set out” to make wholesale supplies must mean that the retailer should not “hold itself out” as a wholesaler (because otherwise it is difficult to reconcile “*does not set out*” with “*knowingly make wholesale supplies*”).

(3) HMRC’s internal manual gave the following example of an incidental sale: “an occasional sale. Where the customer makes it known they are buying for their business...the concept of ‘occasional’ is a difficult one and what may seem occasional for one business, could be a regular occurrence for another when viewed in relation to their business as a whole. For that reason, every case will have to be considered individually”. It also stated:

“Note: Actual quantity is not a factor in determining whether someone is making wholesale sales.”

MCC submitted that it was far from clear why the Sale was not an “occasional” sale.

49. MCC submitted that, in any event, Mr Lakhani did not (subjectively) find the HMRC guidance clear and helpful but did take professional advice from Mr Thornton about the scope of the incidental sales exception.

Issue 3 - reasonable excuse?

50. MCC submitted that its behaviour was objectively reasonable in the circumstances given:

- (1) the AWRS was a new regime so that there was no judicial decision on the relevant points;
- (2) HMRC’s published guidance was not clear and at points appears contradictory;
- (3) HMRC had not used the regulation making powers given to it so as to circumscribe what sales falls within the exception; and
- (4) MCC took advice from a specialist who was well placed to consider the HMRC guidance and advise on the scope of the exception.

Issue 4 - special circumstances?

51. MCC submitted that “special circumstances” apply here because:

- (1) the AWRS was a new regime
- (2) this was the first such penalty charged under the AWRS
- (3) there was lack of clarity about the meaning of “incidental” sales in HMRC’s guidance
- (4) the fact that MCC took advice from TT Tax
- (5) the fact that HMRC did not charge JBL with any form of penalty; there was no proper basis for treating MCC differently.

Issue 5 - further reductions for disclosure?

52. MCC submitted that 100% of the maximum reduction of the penalty for disclosure should have been given (as opposed to the 80% of the maximum reduction, given by HMRC)

- on HMRC's scheme for applying such reductions, MCC's reduction for "telling" should have been the maximum 30%, rather than the 10% given by HMRC.

FURTHER FINDINGS OF FACT BY THE TRIBUNAL

53. We make the following further findings of fact. We explain in the following section how we dealt with problems with the evidence, in coming to these further factual findings.

Further details of the Sale

54. Nisa ran a promotion on Bombay Sapphire gin between 13 November and 31 December 2017. At a family/social event attended by the father of Mr Lakhani, who had retired from the MCC business and was in his 70s, and Mr Jethwa of JBL, around this time (the two men were friends), Mr Jethwa mentioned the Nisa special offer to Mr Lakhani's father in the course of conversation. Mr Lakhani's father later mentioned the Nisa special offer to his son, who saw an opportunity to buy at a better price than MCC could get from the "brand-owner". Mr Lakhani accordingly asked one of MCC's "buyers" to purchase the gin from JBL. The MCC buyer duly contacted JBL, which acceded to MCC's request and so bought the gin from Nisa under the terms of the special promotion, in order to sell it to MCC.

55. The 35 till receipts issued by JBL in respect of the Sale, although correctly reflecting the goods sold and the overall price of the Sale (£12,180), were inaccurate in their recording that the Sale took place at 35 points of time over seven days between 30 December 2017 and 6 January 2018. In fact, as found above, the Sale was a single transaction. On the balance of probabilities, we find that the gin was picked up by MCC from JBL's Nisa Local shop on the date of the last till receipt; it was paid for by bank transfer four days later. The bank transfer was for £12,222 rather than £12,180 (a difference of £42), due to simple error.

56. The reason JBL issued 35 till receipts was that it did not want Nisa to discover that it sold all the gin to a single buyer (Nisa had access to the system that recorded JBL's sales), as this would indicate that the gin had been sold B2B rather than to retail customers. If Nisa had discovered this, it could have upset JBL's relationship with Nisa (resulting, for example, in Nisa not giving JBL access to future special offers).

57. Nisa delivered the gin in the same way as it delivered other goods to JBL – there was capacity for about ten pallets to be delivered to a storage area at the rear of the Nisa Local shop. MCC duly collected the gin from this storage area using its own vehicles.

58. The Sale was a "one off": JBL did not have any pattern of selling to MCC (nor did MCC have any pattern of selling to JBL).

59. JBL made a profit of £210 on the Sale (£12,180 less £11,970).

Mr Thornton's advice and Mr Lakhani's beliefs

60. Mr Thornton was a tax consultant specialising in excise matters and operating through his own consultancy, TT Tax, since 2014. He advised MCC on a variety of excise, VAT and AWRS matters. Mr Thornton's advice to MCC was largely given orally in conversations and meetings with Mr Lakhani which took place regularly – as often as twenty times a week. After the AWRS was introduced in 2015, and before the Sale, Mr Thornton gave advice orally to Mr Lakhani about compliance with the AWRS where MCC was buying alcohol from retailers. His advice was

- (1) if the retailer concerned was regularly selling B2B, that would probably fall outside the exception for "incidental" sales (and so the retailer would need to be AWRS registered);

(2) B2B alcohol sales by large supermarket chains were thus likely to require that the supermarket chain be AWRS registered, as the supermarket chain as a whole was regularly selling B2B;

(3) the key issue was likely to be how often a retailer was selling B2B rather than how much was bought: one off or rare purchases from particular retailers seemed likely to fall within the exception for incidental sales;

(4) HMRC's published guidance was contradictory because in parts it said that the B2B supply had to be unknowing on the part of an unapproved retailer, whilst other parts gave examples of an unapproved retailer who knows that he is supplying a business customer; and

(5) there was no statutory definition of "incidental" and no reason in principle why a B2B sale could only be incidental if it was inadvertent.

61. Mr Lakhani's evidence was that at the time of the Sale

(1) he had reviewed HMRC's published guidance but not found a clear conclusion as regards an occasional B2B purchase from an unapproved small retailer like JBL; and

(2) based on Mr Thornton's advice, he believed that JBL did not need to be AWRS-registered to undertake the Sale because it was a retailer which did not regularly wholesale alcoholic drinks.

We make findings in respect of this evidence in the Discussion section below (see [87]).

62. HMRC did not prosecute either MCC or JBL for offences under Part 6A ALDA, or charge penalties on JBL, in relation to the Sale.

HOW WE DEALT WITH PROBLEMS WITH THE EVIDENCE

The Sale - one transaction or 35?

63. The till receipts gave the impression that the Sale was 35 separate sales of four cases each, over seven days – and some of the other evidence supported this:

(1) At the 24 July 2018 meeting with HMRC, Mr Lakhani appeared to portray the Sale as MCC's staff walking into JBL's Nisa Local to take advantage of a promotion that was being run, with JBL most likely being unaware that this was a sale to a wholesaler.

(2) At the meeting with HMRC on 4 October 2019, Mr Jethwa initially posited that a till receipt was issued each time a driver collected four cases from JBL's premises; later, though, he said he could not explain why 35 receipts were issued.

64. In our view, Mr Lakhani was speaking somewhat off the cuff at the 24 July 2018 meeting when it came to the Sale: it was a relatively lengthy meeting, covering a variety of topics; MCC had not been notified in advance that the Sale would be discussed; the discussion of the Sale itself was brief, relative to the meeting as a whole; and although Mr Lakhani had been aware of the Sale at the time it took place (seven months earlier), it was a very small transaction in the context of MCC's business as a whole. Taking all of this into account, it seems to us most likely that Mr Lakhani simply made an error in suggesting the Sale was effected by MCC staff going into JBL's Nisa Local and taking gin off the shelves. When the Sale was raised again by HMRC at the 27 November 2018 meeting between MCC and HMRC, Mr Lakhani had done no further research into the details in the meantime (as, again, it had not been put on an agenda for discussion); however, this time, as the matter was discussed in more detail, Mr Lakhani was more careful, making it clear that he was

“guessing” and would have to confirm details with his staff, if HMRC wanted details confirmed.

65. As for Mr Jethwa’s statements at the meeting on 4 October 2019, we consider that these reflect a reluctance to disclose the actual reason for JBL’s having issued 35 receipts, being that JBL did not want Nisa to discover that the gin had been all sold to one buyer.

66. It will be clear from the above that we do not make adverse inferences as to Mr Lakhani’s credibility as a witness from these events, or from the fact that his initial portrayal of the Sale at the 24 July 2018 meeting was more consistent with the inaccurate impression of the Sale created by the issuance of 35 till receipts by JBL. We do not find that Mr Lakhani or MCC wished, or took any deliberate steps, to perpetuate that inaccurate impression.

Which party initiated the Sale?

67. Mr Jethwa’s description of how the Sale came about (made at the meeting with HMRC in October 2019) was that he received a call from MCC. This is arguably inconsistent with Mr Lakhani’s evidence to the effect that the origin of the Sale was an informal conversation between his father and Mr Jethwa at a social event, in which Mr Jethwa mentioned Nisa’s special offer on the gin. We do not see this as a material inconsistency in the evidence: whilst the Sale originated, informally, in information passed by Mr Jethwa to Mr Lakhani’s father, it was only formalised when a member of MCC staff telephoned JBL to request the gin.

When was Mr Thornton’s advice given and did it change over time?

68. Neither Mr Thornton’s nor Mr Lakhani’s evidence provided details as to precisely when Mr Thornton’s advice to MCC was provided, other than that it was some time before the Sale. We find that this is a consequence of the oral and informal style of the advice, given over the course of a number of conversations. We do not find that the inability of the witnesses to recall exactly when the advice was given, materially impairs the credibility of their evidence as to what the content of the advice was. Furthermore, we do not find that Mr Thornton’s advice on the particular point of retailers selling excess goods wholesale (paragraph 10 of his witness statement) was inconsistent with his more general advice (in later paragraphs of his witness statement) that “incidental” sales needed to be occasional – and we do not regard these two aspects of Mr Thornton’s as evidence that Mr Thornton’s advice to MCC on the “incidental sale” exception changed in material respects in the period prior to the Sale.

Significance of the MCC “supplier registration form” for JBL

69. JBL had completed a one-page form sent by MCC’s to its suppliers: under the heading “supplier registration form”, it contained some basic details about JBL. We do not find this form materially inconsistent with other evidence that JBL did not have a regular pattern of making supplies to MCC: it indicates no more than that JBL on at least one occasion made a supply to MCC. JBL’s bank details on the form are different from those used to wire payment for the Sale to JBL, which suggests that the occasion of JBL completing this form was not the Sale but some other supply made to MCC.

DISCUSSION

Issue 1 – “incidental sale”?

70. It was common ground that the question of whether the Sale was a contravention of s88F ALDA turns on whether it fell within the “incidental sale” exception. We approach this applying the basic principles of interpreting statutes as set out by the higher courts in numerous cases, one of which is the High Court in *R (The Good Law Project) v Electoral Commission & Ors* [2018] EWHC 2414 (Admin) at [33]:

“The basic principles are that the words of the statute should be interpreted in the sense which best reflects their ordinary and natural meaning and accords with the purposes of the legislation...”

71. This emphasis on the ordinary and natural meaning of words echoes, in our view, the approach taken by the Court of Appeal to the question of whether something was “incidental” in the context of copyright proceedings in *Football Association Premier League Ltd and other v Panini UK Ltd* [2003] EWCA Civ 995. Mummery LJ, agreeing with Chadwick LJ who gave the leading judgment, said at [39]:

“39. ... The question whether the inclusion of copyright material in an artistic work is “incidental” is not answered by rushing to dictionaries or by searching the Internet for substitute words and expressions; or by inquiring into the subjective intentions, motives, views or states of mind of the makers, distributors or collectors of the stickers and albums; or by the use of a non-statutory check list of possible indicators; or by recourse to the Copyright Act 1956 (section 9(5)) or to Hansard reports of the parliamentary debates preceding the enactment of the 1988 legislation; or by working conscientiously through the range of hypothetical situations ingeniously devised by Mr Howe. “Incidental” is an ordinary descriptive English word. Parliament chose not to give it any special meaning. There is no need for the courts to define it. The range of circumstances in which the word “incidental” is commonly used to describe a state of affairs is sufficiently clear to enable the courts to apply it to the ascertainable objective context of the particular infringing act in question. ...”

72. In our view, and having checked the dictionary definition¹, the expression “incidental to ...” has two main nuances in this context. The first nuance is that, for occurrence X to be incidental to occurrence Y, X must be minor or insignificant in relation to Y. The other nuance is that X must be in some sense a by-product of Y – something that happens in conjunction with Y, but which occurs casually or fortuitously, and not as the outcome principally sought. We are deliberately using loose language here: we do not want to fall into the error of substituting alternative precise formulations for the statutory language. These nuances give shape to our thinking but, at the end of this discussion, our determination will address the statutory language.

73. As for the purpose of Part 6A ALDA, it is to combat alcohol duty evasion in the wholesale part of the alcohol supply chain by bringing those selling alcohol wholesale into a scheme of regulation by HMRC - the AWRS - with a few limited exceptions. The reason the retail sector is, generally speaking, not within Part 6A, is that this part of the alcohol supply chain had a pre-existing scheme of regulation (licencing by local authorities) - and so the problem of alcohol duty evasion was already addressed.

74. The exception within the scheme of Part 6A we are dealing with here is, in a sense, the boundary between the AWRS and the pre-existing regulation of retailers: what happens when regulated alcohol retailers sell “wholesale”? The legislation’s answer is pragmatic rather than prescriptive: in a nutshell, it says that, provided the retailer’s B2B sale is sufficiently closely associated with its authorised retail sales, it does not require AWRS regulation on top of the existing regulation of the retail sector; but beyond this point, it does. The nuances of the expression “incidental to ...”, as described above, accord with a legislative purpose of setting out an appropriate closeness of association between a particular B2B sale and the seller’s authorised retail sales.

¹ The OED defines “incidental” as “occurring or liable to occur in fortuitous or subordinate conjunction with something else of which it forms no essential part; casual”

75. We turn now back to the Sale itself. With respect to the first of the nuances of the expression “incidental to ...”, there was little if any evidence before the Tribunal about the volume and pattern of JBL’s authorised retail alcohol sales, and how those sales were organised and conducted. As the burden of proof on this issue lies with HMRC, this absence of evidence indicating that the Sale was other than minor and insignificant in relation to JBL’s authorised retail alcohol sales favours our concluding that the Sale did have these attributes.

76. HMRC’s case addressed the other nuance of the expression “incidental to ...” (broadly expressed, that the Sale needed to be a casual by-product of JBL’s authorised retail sales, to fall within the exception). HMRC’s case emphasised the differences between the Sale and what we might call a “passive” B2B sale by a retailer – the case where a business, like MCC, sent staff into JBL’s shop to take alcohol off the shelf and purchase it at the till. Here, JBL was not “passive” in this sense – it clearly took deliberate steps to facilitate the Sale, the nature of which, in HMRC’s case, meant that the Sale could not be incidental to JBL’s authorised retail sales.

77. It is clear to us (and we do not think HMRC were arguing otherwise) that the “passive” B2B sale (as described above) is not the only case that falls within the “incidental sale” exception. The statutory language is not so prescriptive. In particular, in our view, the fact that occurrence X is deliberate (rather than inadvertent) does not mean it cannot be “incidental to” occurrence Y: all the facts need to be looked at in the round. It is, however, instructive to compare the Sale with the “passive” case and then evaluate, as a matter of fact and degree, whether the similarities and differences take the Sale over the line of what we might describe, in shorthand, as a “casual by-product” of JBL’s authorised retail sales.

78. We find the following key differences between the Sale and the “passive” case in terms of JBL’s conduct:

- (1) it sold 840 bottles of gin to a single customer in a single sale (retail customers, it can be assumed, normally bought no more than a few bottles at a time)
- (2) it ordered the gin from Nisa as a result of a pre-order by the customer (retail customers, it can be assumed, did not normally pre-order)
- (3) it never put the gin on the shop shelves – instead, the customer picked the gin up from the loading area at the back of the shop, where Nisa made its deliveries
- (4) it took payment by bank transfer, rather than cash or card at the till
- (5) it issued 35 till receipts for a single transaction.

(HMRC argued that the price per bottle of gin was another difference but we find this not to be proved – there was no evidence before the Tribunal as to how JBL normally priced alcohol bought on special offer from Nisa, and so no evidence that JBL’s sale of the gin at a 9% discount to the recommended retail price (£14.50 vs £16) was other than standard practice for its authorised retail alcohol sales).

79. On the other hand, in the following respects JBL’s conduct of the Sale was typical of its retail alcohol sales:

- (1) it ordered the gin from Nisa, its usual supplier
- (2) Nisa processed and delivered the order to JBL in the usual way – the evidence did not indicate that Nisa, in supplying to JBL, had to do anything out of the ordinary due, for example, the unusual size of the order

80. Turning now to the weight and significance we place on these differences and similarities in deciding if the Sale was, in short hand, a casual by-product of JBL's authorised retail sales:

(1) In our view the similarities have particular significance in the context of Part 6A ALDA and its purpose, because they relate to the supply chain: viewed through the lens of the risk of non-duty-paid alcohol entering the supply chain, the Sale was entirely typical of JBL's authorised retail alcohol sales.

(2) It seems to us that differences (1), (3) and (4) in [78] above, rather than requiring JBL to "go out of its way" to effect the Sale, actually involved JBL doing slightly less than it "normally" did with its authorised retail sales: the high volume sold meant JBL handled one transaction rather than many; the buyer picked up the goods from the loading bay, so JBL did not have to put them on the shelf; and payment was made by bank transfer, so no need to process a cash or card payment.

(3) Difference (2) in [78] above – taking the pre-order from MCC – was, on the evidence before us, a matter of a telephone call between the MCC buyer and someone from JBL. This involved JBL going somewhat out of its way, but not, in our view, to a material extent from a realistic business perspective.

(4) From such a perspective, in our view, differences (1)-(4) were insignificant. This accords with the very small profit JBL made on the Sale: this was not a significant business transaction from JBL, but rather a minor one-off whose origins lay in a conversation in a social context between members of the families that owned JBL and MCC respectively. JBL's taking these four steps did not, in our view, cross the line from a "casual by-product" of JBL's authorised retail sales.

(5) The last of the differences listed at [78] has a somewhat different character: it involved JBL going out of its way to make the Sale look as if it had been 35 different transactions over seven days, in order to obscure, to Nisa, the fact that there was a single buyer (which in turn would indicate that the gin had been sold B2B). This makes the Sale look less "casual" and to that extent inclines against finding the Sale "incidental". On the other hand, the point of issuing the 35 till receipts was to protect JBL's authorised retail alcohol sales by protecting its relationship with Nisa – indeed, the purpose of the receipts was to make the Sale look more like JBL's authorised retail alcohol sales. In this respect, this fact inclines towards seeing the Sale as "incidental", because it shows the Sale was subordinate and secondary to JBL's retail alcohol sales.

81. The balance of these indicators pointed, in our view, to the Sale being incidental to JBL's authorised retail sales. In summary:

(1) it was not proven that the Sale was other than insignificant in relation to those sales;

(2) there was a close association between the Sale and those sales, in terms of the sourcing of the Sale from Nisa, and this was a particularly important factor from the perspective of non-duty paid alcohol entering the supply chain;

(3) most of the steps JBL took to effect the Sale, outside the ordinary course of its authorised retail sales, were insignificant from a realistic business perspective;

(4) issuing 35 receipts for a single sale was an extraordinary step to take from a business perspective, but it was taken to protect JBL's authorised retail sales and, indeed, to make the Sale look more like these; and

(5) the Sale was a one-off whose origins were a conversation in a social context between family members who owned the parties concerned – it was not a significant business transaction for JBL.

82. We thus find, on the evidence before us and the balance of probabilities, that the Sale fell within the “incidental sale” exception and so was not a contravention of s88F ALDA. This means the appeal is allowed. We now go on, however, to give our findings on the other issues, on the hypothetical basis that, contrary to what we have just concluded, the Sale was not within the “incidental sale” exception and so was a contravention of s88F.

Issue 2 – deliberate contravention of s88F?

83. The issue here was whether MCC knowingly contravened s88F, on the basis that it knew the Sale was not incidental to JBL’s authorised retail sales. It was common ground that Mr Lakhani was the directing mind of MCC in respect of these matters, and so it was his personal knowledge that decided this question.

84. The starting point is Mr Lakhani’s own evidence that he did not think, or know, that the Sale was not “incidental”, principally because he had received professional advice that sales like this one were. The question for us is whether it can be inferred from the evidence as a whole that Mr Lakhani’s evidence is, on the balance of probabilities, not accurate in this respect – and so find that he did know, subjectively, at the time, that the Sale was not incidental to JBL’s authorised retail sales.

85. We have found that Mr Thornton, MCC’s professional adviser in these matters, had advised, prior to the Sale, that one off or rare purchases from particular retailers seemed likely to fall within the “incidental sale” exception. This in our view is a strong indicator that Mr Lakhani did not “know” that the opposite was the case as regards the Sale, which was a one-off purchase from JBL.

86. HMRC argued that Mr Lakhani subjectively knew that Mr Thornton’s advice was wrong because:

(1) the advice suggested (though did not say explicitly) that any one-off B2B sale, no matter how large, could be within the “incidental sale” exception; and this was patently incorrect; and

(2) Mr Lakhani had read HMRC’s published guidance and this made clear that Mr Thornton’s advice was not in accordance with HMRC’s view.

87. We do not accept these arguments:

(1) In our view, it is a leap of reasoning to say that, because advice may not be valid if taken to its extreme logical limit, that the recipient of the advice therefore subjectively did not consider it valid for the actual case being considered. We are unable to make such a leap, on the balance of probabilities.

(2) HMRC’s published guidance (relevant extracts from which are set out in the Appendix to this decision), unsurprisingly, did not provide an unambiguous statement of HMRC’s views in a situation on “all fours” with the Sale. It stated in several places a view that “knowing” B2B sales would not fall within the “incidental sale” exception; however, in other places, it said that a “one off” B2B sale, where the seller was aware that this happened from time to time, would fall within the exception. The HMRC manual said that the concept of “occasional” was “difficult” and so every case had to be considered individually. In our view, it cannot be said that, on account of his reading this material, that Mr Lakhani knew that the Sale was outside the “incidental sale” exception.

88. We conclude that, if the Sale was a contravention of s88F ALDA, the contravention was not deliberate on MCC's part.

Issue 3 – reasonable excuse?

89. Following the recommended process for this Tribunal when considering whether there is a reasonable excuse for a person's actions as set out in *Perrin v HMRC* [2018] UKUT 156 at [81]:

- (1) The facts giving rise to MCC's excuse for contravening s88F ALDA are that MCC took professional advice from Mr Thornton which indicated that it "seemed likely" that a transaction like the Sale would fall within the "incidental sale" exception.
- (2) We have found these facts to be proven: see [60(3)] above.
- (3) Do these facts amount to an objectively reasonable excuse for the contravention?
 - (a) Mr Thornton's advice was given in somewhat vague terms – it "seemed likely" that the exception would apply – and was given over the course of several conversations and not reduced to writing. The advice did not specifically address the facts of the Sale. In our view, a reasonably conscientious taxpayer in MCC's position and with its experience – in particular, one of its size that had ready access to Mr Thornton's advice and was aware of the potentially serious consequences of contravening s88F ALDA in terms of criminal and civil liability – would have gone further than MCC did to check whether the Sale fell on the right side of the line: it would have obtained Mr Thornton's opinion on the detailed facts of the Sale, including what was known about JBL and its authorised retail sales, and it would have required Mr Thornton to put his advice in writing. By doing this, MCC would have obtained the clear and specific advice that, objectively speaking, was reasonably required as it contemplated undertaking the Sale.
 - (b) MCC's arguments as to the newness of the legislation and the ambiguity of HMRC's published guidance only underline, in our view, the conclusion that a reasonably responsible taxpayer in MCC's circumstances would have sought clear and specific advice.
 - (c) We thus find that it was not objectively reasonable for MCC to rely on somewhat vague, oral advice, given MCC's circumstances and the nature of the risk.

90. We conclude that, if the Sale was a contravention of s88F ALDA, there was no reasonable excuse for the contravention.

Issue 4 - special circumstances?

91. We do not consider that any of the circumstances adduced by MCC in arguing its case amount to special circumstances which make it right to reduce the penalty; in particular,

- (1) the newness of the legislation or the fact that no penalty such as this may previously have been charged, is not in our view a special circumstance making it right to reduce the penalty: compliance with the law cannot be dependent on whether it is recent or longstanding;
- (2) the fact that HMRC's published guidance did not provide a clear statement of HMRC's views in a situation like the Sale is also not a special circumstance justifying reduction of the penalty: it was reasonably clear from that guidance that HMRC

regarded “one off” sales as borderline cases, to be decided on all the facts – and there is nothing special about such a view on HMRC’s part;

(3) the fact that HMRC chose not to impose a penalty on JBL for contravention of s88C ALDA is, likewise, not a special circumstance that makes it right to reduce the penalty – the law does not require HMRC to act “symmetrically” and their decision, for whatever reason, not to penalise JBL, does not in our view make it right to reduce MCC’s penalty.

92. We therefore, like HMRC, do not think it right because of special circumstances to reduce the penalty.

Issue 5 - further reductions for disclosure?

93. In the circumstances, we agree with HMRC’s scheme for reducing the penalty, resulting in 80% of the maximum reduction being given (80% being the sum of 10% for “telling” (of the 30% maximum under HMRC’s scheme), 40% for “giving help” (the maximum under HMRC’s scheme), and 30% for “giving access” (again, the maximum under HMRC’s scheme)). In particular, we agree that the quality of MCC’s disclosure in terms of telling HMRC about the contravention was about a third of the maximum quality of such disclosure we would expect from a taxpayer in its circumstances: MCC told HMRC about the Sale in bare-bones terms via its VAT returns, but, even after being prompted as to a possible contravention at the meeting with HMRC in July 2018, it took MCC some months to give HMRC the detailed facts and background to the Sale.

94. However, as we have found that any contravention was not “deliberate”, this means that the maximum penalty was £3,000 and the maximum reduction was £1,000, and so giving 80% of the maximum reduction results in a penalty of £2,200.

CONCLUSION

95. As we have decided issue 1 in MCC’s favour, the appeal is allowed and the decision to raise the penalty is quashed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

96. 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.

ZACHARY CITRON

TRIBUNAL JUDGE

RELEASE DATE: 25 JANUARY 2021

APPENDIX: EXTRACTS FROM PUBLISHED HMRC GUIDANCE

Excise Notice 2002

4.2 If you unknowingly or unintentionally make an occasional wholesale sale

AWRS is not designed to capture retailers who trade with the intention of making sales solely to the general public. An ‘incidental sale’, that is, a wholesale sale that is not made knowingly or intentionally by the retailer is excluded from the scheme.

4.3 What is meant by an ‘incidental sale’

A sale is incidental (and therefore excluded) if the:

- seller makes authorised retail sales of alcohol of any description
- sale is incidental to those sales

The purpose of the incidental sales exclusion is to exclude, for example, a retailer who makes a wholesale sale unknowingly or unintentionally in the course of their day to day retail activity.

For example, often where the purchaser is unknown to them, the only indication a retailer may have that the purchase is being made for commercial purposes is if a tax invoice is requested.

This exclusion only refers to persons who are authorised retailers who hold a relevant authorisation for example, an alcohol retail licence. If you do not hold an alcohol retail licence or relevant authorisation and are carrying out, or intend to carry out, a controlled activity, then you must be approved under the scheme.

Examples of incidental sales:

- a supermarket that sells to another business through the checkout and would not know at the time of sale that they were selling to another business, this would be unintentional and therefore an incidental sale
- a small corner shop that does not in any way set out to make wholesale sales but is aware that the local pub landlord may exceptionally run out of a particular line and call in the shop to make an ad hoc purchase - this would be an exception rather than the rule and would be classed as an incidental sale

Further information to help you decide if your business is covered by the incidental sales exclusion (<https://www.gov.uk/guidance/the-alcohol-wholesaler-registration-scheme-awrs>) is available. RL1/34

4.4 When a retailer might also be considered a wholesaler for the purposes of AWRS

Retailers who only make retail sales to the general public are not required to be approved. But, some retailers may also have a separate wholesale arm to their business, or set out knowingly and intentionally to make wholesale sales. If they do, then they must be approved.

Some examples are a:

- supermarket advertises on their website that they sell alcohol to other businesses and perhaps offers a reduced price for bulk purchases - in this example the supermarket is intentionally setting themselves out as a wholesaler as well as a retailer and would need to be approved

- cash and carry makes wholesale and retail sales of alcohol to both the trade and the general public - customers have to be members of the cash and carry in order to make purchases (in this case the incidental sales exclusion does not apply as the cash and carry set themselves out as making wholesale as well as retail sales - they would be required to be approved)

Online government guidance AWRS

Incidental sales

You do not need to apply for approval for AWRS if you're a trader who's mainly a retailer and you're covered by the exemption.

This exemption applies if you're an authorised retailer, with a retail licence, who does not set out to make sales of alcohol to other businesses and you:

- only make wholesale sales that take place unintentionally in the course of your retail activity and without your prior knowledge (like unplanned sales through a supermarket checkout)
- knowingly make wholesale sales but they're uninvited by you and only on an exceptional basis (perhaps the village fete once a year)

This can happen if you do not know the buyer and the only indication you might have that the purchase is being made for commercial purposes is if a tax invoice is requested.

These are known as 'incidental sales'.

HMRC manuals AWRS20800

Incidental sales

It is not the purpose of the scheme to capture businesses who are primarily retailers, yet may make occasional, and potentially unwitting, trade sales of alcohol, for example, a restaurant owner who runs out of a certain type of wine, and so buys a couple of bottles from the local corner shop.

In ALDA 1979 S88A(4) a sale is incidental if

- the seller makes authorised retail sales of alcoholic liquor of any description and
- the sale is incidental to those sales.

This exclusion only applies to businesses who are retailers who hold a relevant authorisation, for example, an alcohol retail licence under the Licensing Act 2003 in England and Wales or equivalent in other areas of the UK.

The key to whether a business is making wholesale sales or incidental wholesale sales is their intent; are they intentionally setting themselves out to make wholesale sales? You should consider whether the wholesale sale is made knowingly or intentionally. If the business is making regular wholesale sales and could reasonably be expected to know that they are wholesale sales, you should consider whether they should be approved as a wholesaler.

Some indicators might be:

- How they hold out their business in terms of advertising/what do customers think their business is?

- Do they have separate processes for wholesale sales e.g. invoices instead of cash/separate accounting procedures?
- Are wholesale sales part of their business model?
- Does the business initiate the sale rather than being approached by another business to make a sale without the business's prior knowledge?

These indicators are not exhaustive, and each case will have to be judged individually on its merits.

Note: Actual quantity is not a factor in determining whether someone is making wholesale sales. A wholesale sale is "any quantity" of controlled liquor S88A(3)(a) ALDA 1979.

Examples of incidental sales:

- sales through a supermarket checkout or retail outlet where the identity of the customer is unknown and the wholesale sales are made unintentionally
- an occasional sale. Where the customer makes it known they are buying for their business, for example, sales from shops to the local restaurant or village fete or to cover the odd occasion where a business asks a supermarket for their wholesaler registration number. The concept of "occasional" is a difficult one and what may seem occasional for one business, could be a regular occurrence for another when viewed in relation to their business as a whole. For that reason, every case will have to be considered individually.

It does not exclude from the requirement to be approved:

- businesses such as cash and carries who hold a retail licence but also hold themselves out as wholesalers
- supermarkets who set out to make wholesale sales for example, selling surplus stock to other retailers
- smaller retailers who set out to make wholesale sales, for example, bulk buy and sell on to other retailers.