[2021] UKFTT 0478 (TC)

TC 08352V

EXCISE PENALTY – W5 remittance advices submitted but not paid – whether conduct was deliberate – yes – whether further mitigation should be given – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/06769

BETWEEN

BURLEIGHS GIN LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE AMANDA BROWN QC
DR CAROLINE SMALL

The hearing took place on 13 December 2021. With the consent of the parties, the form of the hearing was a video using the Tribunal video platform/etc]. A face-to-face hearing was not held because of the ongoing covid restrictions. The documents available to the Tribunal were contained in a hearing bundle consisting of 363 pages, a legislation and authorities bundle of 255 pages and a skeleton argument prepared by HM Revenue and Customs.

Mr J Priday of Prydis Accounts Limited and Mr S Watson director of the Burleighs Gin Limited appeared for the Appellant

Mr J Carey counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs appeared for the Respondents

DECISION

INTRODUCTION

1. This appeal concerns the imposition of an excise wrongdoing penalty pursuant to paragraph 4 Schedule 41 Finance Act 2008 in the sum of £63,939.13 notified to Burleighs Gin Limited (**the Appellant**) on 27 June 2019.

SUMMARY

2. Prior to January 2018 the Appellant had compliantly prepared and submitted Excise Warehouse Returns (**W1s**) and Excise Warehouse Remittance Advices (**W5s**) in connection with excise goods released for consumption or treated as so released.

3. In the period between January 2018 and October 2018 whilst the W5s were submitted, in the majority of instances, the duty required to be paid prior to release of the goods was not paid with the consequences that the Appellant rendered themselves liable to an excise assessment and penalty.

4. On the basis of the available evidence the behaviour of the Appellant in making declarations on W5s and not making the accompanying payment was deliberate behaviour. HMRC's decision on mitigation was not flawed. The Appeal is therefore dismissed.

BURDEN OF PROOF

5. As the Appellant accepts that it did not pay the excise duty at the duty point and is therefore liable to a penalty the burden of proof rests with it to show that HMRC were wrong to determine that the behaviour giving rise to the default was not deliberate and/or to show that HMRC's decision on mitigation is flawed.

EVIDENCE AND FACTS FOUND

6. The relevant evidence available to the Tribunal was in the form of; 1) emails between the Appellant and HMRC in the period from an unannounced visit which began on 24 July 2018 to 27 June 2019 (when the penalty was issued); 2) visit reports dated 24 July 2018, 15 August 2018 and 13 June 2019; 3) HSBC bank statements; 4) witness statements of Mr Samuel Watson and Mr James O'Connell; 5) W5 forms and 6) the oral information provided at the hearing (no formal evidence was taken) by Mr Watson, Mr O'Connell and Mr Priday.

7. From that evidence the Tribunal finds the following facts.

8. The Appellant operates as a trade facility warehouse which produces gins that are sold to the home market and to export. Pursuant to its authorisation to operate and by reference to the relevant statutory provisions (which are not disputed in this case), the Appellant is required to pay excise duty on the earlier of the date on which the gin is released for sale and 30 days after production.

9. At all times relevant to this appeal the W5 document stated: "You can avoid financial penalties by making sure … that you submit the form and pay the duty prior to release of the goods from the warehouse."

10. Prior to 28 January 2018 the Appellant business had completed the W5 declarations in respect of all dutiable goods produced at the statutory duty point and had, in the main, paid the associated duty as required and prior to the goods entering free circulation.

11. On 28 January 2018 Alex Turner and Stephanie Hamblin resigned as directors of the Appellant and were replaced by Mr Graham Veitch and two other directors. Mr Veitch had formerly been employed by the Appellant until 22 December 2015 as the distiller. At the time of his previous employment he had not been responsible for preparation and submission of the

W5s nor for payment of the sums due in connection with them. Between December 2015 and December 2017 Mr Veitch had experience working as a brewer.

12. During the period 1 January 2018 – 12 October 2018 W5s were submitted by the Appellant on 2 January, 5 February, 6 March, 13 and 30 April, 7 and 19 June, 3 July, 10 August, 7 September and 11 October. Only those submitted on 30 April, 7 and 19 June were paid.

13. HMRC made an unannounced visit on 24 July 2018, that visit continued on 15 August 2018. In the course of those visits HMRC officers met with a number of individuals employed within the business including Mr Veitch and Mr Watson. From the information provided at the time of the visits, as recorded in the visit reports, it is not clear whether, following his return to the Appellant, Mr Veitch was the director responsible for the W5s (they were not signed by him) however, he was responsible for the bank account but believed that the "accounts girl" (who was at that time on maternity leave) was responsible for making the relevant payments.

14. At the time of the visit Mr Veitch undertook to produce bank statements evidencing payment and other statutory records (including sales and purchase invoices). The bank statements were produced on 3 September 2018 but did not evidence that the missing payments had been made. The other records were not produced at that time at further requests were made by HMRC.

15. The Appellant operated the Xero accounting system and did not retail hard copies of the documents requested. The Appellant offered HMRC access to their accounting package and HMRC provided a drop box and invited that the Appellant upload the requested documentation. Eventually, HMRC narrowed the documentation request, and the documents were finally provided in June 2019. These documents corroborated the accuracy of the declarations of dutiable goods going into free circulation and on which the Appellant was liable to duty.

16. On 16 May 2019 HMRC notified excise assessments in respect of the excise duty as declared on the W5s dated 2 January, 5 February, 6 March, 13 April, 3 July, 10 August, 7 September and 11 October 2018 in the sum of £158,855. The Appellant accept that the sum so assessed is properly due. However, as at the date of the hearing the sum remained unpaid.

17. HMRC notified the Appellant that they intended to issue penalties in respect of the excise duty assessments. The basis of on which the penalties were to be charged was stated to be:

> "As part of our compliance checks into your business it was established that you had failed to make a number of payments to HMRC following submission of your W5 warrants. You supplied information to us on 22 October 218 which confirmed that numerous payments had either not been paid ort underpaid. This has resulted in you handling goods subject to unpaid excise duty. Checks carried out with the National Warrant Processing Unit confirm that further payments have been made late, since the initial non-compliance was identified."

18. HMRC classified the behaviour as deliberate but not concealed on the basis that the company was "fully aware of the requirement to submit W5 warrants and make the necessary payments to HMRC". As such the penalty range fell between 35% and 70% of the amounts assessed. HMRC gave full mitigation in respect of the Appellant's actions in "telling" and "helping" HMRC but limited the mitigation for "giving". The limited mitigation for giving on the basis that the Appellant "allowed [HMRC] access to some records but have failed to provide all of the business records that have been requested". Mr O'Connell explained that he had given some mitigation for giving on the basis that the bank statements had been provided reasonably promptly and that the statements had established conclusively non-payment of the duty. However, he considered that as the other primary records had not been provided until approximately 10 months after they had been requested and in circumstances in which it was

the administrative inconvenience of doing so that had caused the delay applying a 50% mitigation to the maximum permissible for giving was reasonable.

19. The penalty was issued on 27 June 2019.

20. The visit report for a meeting held on 13 June 2019 indicates that Mr Veitch was informed that there would be a deliberate penalty assessment and that he accepted that position. By his witness statement Mr O'Connell also stated that Mr Veitch had indicated that the Appellant was cash starved at the time payments were not made – it is to be noted that this asserted admission is not recorded on the meeting note. This was not accepted my Mr Priday and Mr Watson at the hearing. They explained that the Appellant had sufficient cash to make the payments as a consequence of limited positive cash balances at the bank, recourse to factoring arrangements and through a secured bond administer by Prydis Accountants Limited. They pointed to the bank statements which evidenced transfers from the factoring company.

21. The evidence on this issue was mixed and none of it conclusive. HMRC contended that the evidence to be preferred was that of the contemporaneous (but contemporaneously unrecorded) statement made by Mr Veitch to Mr O'Connell that there were cash issues for the business. HMRC contended that such other evidence as there was did not meet the burden of proof on the Appellant.

22. The Tribunal notes that the business appears to have been transferred by liquidators to Mr Veitch and others on 28 January 2018 indicating that it was a business which, at that time, must have been in some financial distress; however from that date the Appellant was in new ownership and may have had access to new sources of funding. Mr Priday stated that there were issues with access to funding once the investigation by HMRC commenced but that there was a factoring arrangement with Metrobank and it was said (and the Tribunal accepts) that there were the secured bond arrangements.

23. On balance, and by reference to all of the evidence, the Tribunal considers that it is likely that there were times where cash was likely to have been an issue for the business; however, the Tribunal is prepared to accept, and so finds, that the Appellant did have access to funds to make the payments.

SUMMARY OF RELEVANT LEGISLATION

24. Pursuant to Regulations 5, 6 and 10 Excise Goods (Holding, Movement and Duty Point) Regulations 2010 the person holding goods liable to excise duty is required to pay the duty on them as soon as such goods are held outside a duty suspension arrangement in circumstances inter alia, where duty has not been paid. In practice, the sequence of events is that the intention to release is notified, payment is made, HMRC acknowledge payment and then the goods are released into free circulation.

25. By virtue of paragraph 4 Schedule 41 Finance Act 2008 a person is liable to a penalty where they are in possession of goods on which duty is unpaid. Paragraph 6 provides that a penalty arising where the actions giving rise to it are deliberate but not concealed shall be 70% of the potential lost revenue; the penalty arising where the actions giving rise to it are neither deliberate nor concealed is 30%. In both instances the penalty may be mitigated pursuant to paragraphs 12 – 14 by reference to the actions of the person in telling HMRC about the default, giving reasonable help to quantify the tax and allowing HMRC access to the records for the purposes of checking how much tax was unpaid.

26. Section 118B Taxes Management Act 1970 provides for the giving of information relating to any good supplied to or by a taxpayer, this includes all primary records.

PARTIES CASES

27. The Appellant accepts that the excise duty which has been assessed as payable is so payable (it reflecting their own W5s). By this appeal the Appellant does not challenge that the disclosures giving rise to the assessment were prompted but it challenges the penalty in two regards:

(1) That the behaviour giving rise to the penalty was not deliberate; and/or

(2) That the penalty should be fully mitigated as they had ultimately provided HMRC with all the information and documentation requested and that there had never been an intention not to provide it, it was simply the logistics of doing so which had caused the delay in its provision

28. The Appellant contends that the behaviour of the company fell short of deliberate behaviour. It relies on two arguments: firstly, it is contended that Mr Veitch believed that the same regime applied to beer as to gin and that there was some time to make payment after the submission of the W5. Secondly, it contends that Mr Veitch believed that the payments had been made as and when they were due to be made and that he expected the bank statements to evidence that position.

29. On mitigation the Appellant contends that there was no more that they could have done, they worked with HMRC to provide the information requested and that the information was ultimately provided.

30. HMRC reference the recent Supreme Court judgment in *HMRC v Tooth* [2021] UKSC 17 and its, in principle, application to the schedule 41 penalty regime in *Donatas Odinas v HMRC* [2021] UKFTT 0303. They contend that deliberate behaviour is established where there is a demonstrated intention to mislead the Revenue or behaviour demonstrating a recklessness as to whether their behaviour would so mislead. In this appeal they contend that the signature of the W5 documents which expressly reference a requirement for payment of the excise duty before the goods may be released intentionally or recklessly misled HMRC that payment would be made.

31. In connection with the mitigation for giving HMRC contend that the Appellant had swiftly given only some of the documents full mitigation should not be permitted.

DISCUSSION

32. If the penalty imposed were not considered to be one arising from deliberate behaviour the amount of the penalty could not exceed 30% of the potential lost revenue and, applying the same mitigation as permitted by HMRC the penalty sum would be materially reduced. We therefore consider the question of deliberate behaviour first.

33. As set out above the Tribunal has found that the Appellant company had corporate knowledge that payment was required at the time the W5 was submitted and prior to release of the dutiable goods. Until 2 January 2018 (and shortly before the departure of the previous directors) payment had been made on that basis and in accordance with the terms of the W5s themselves.

34. Mr Veitch re-joined the business but did not adopt that corporate knowledge or reflect of the differences of which he was, or should have been, aware between the duty points relevant to brewing (where goods can be released prior to payment of duty) and those applicable in distilling. Mr Veitch, as the person said to have been responsible within the Appellant for ensuring compliance, did not given sufficient attention to the importance of compliance. It was stated to HMRC that he was the director responsible for the management of the bank account,

but he did not, it would appear, check, or at least systematically check, the bank statements and ensure that these significant and statutory sums were being paid.

35. Whilst Mr Veitch's behaviour might be described as reckless (and by reference to the Supreme Court recklessness is possibly sufficient to constitute deliberate) the Appellant is not one man, two individuals within the business sufficiently senior to be charged with the responsibility of signing the W5s signed a declaration which is immediately preceded by a statement which notifies of the need to pay and in circumstances in which payment had previously been regularly made on time and in accordance with the statutory provisions. They too did not check that payment had been made.

36. Reliance may, or may not, have been put on an external and third party "accounts girl" however, she was on maternity leave and, in all likelihood, not accountable for non-payment.

37. Further, after HMRC commenced the visit on 24 July 2018 the Appellant made no attempt to rectify the position until after 11 October 2018. HMRC confirmed to the Appellant that for the periods which were in default no payment should be made pending the issue of the assessment, however, that did not prevent immediate remediation for future periods nor did it prevent payment of the unchallenged assessment once issued.

38. Taking all the evidence into account and on the basis of the facts found the Tribunal concludes that the behaviour giving rise to submission of W5s without payment of the associated duty was deliberate.

39. As regards the mitigation for giving. The jurisdiction of the Tribunal, in respect of an appeal as to the amount of a penalty, permits the Tribunal, following an evaluation of the evidence, to substitute its own decision provided that when considering the level of mitigation given the Tribunal concludes that HMRC's decision is flawed. Flawed is defined by reference to the principles of judicial review and as such a Tribunal may only interfere with a decision on mitigation to the extent that it considers HMRC have failed to take account of relevant evidence available or has taken into account irrelevant evidence or otherwise acted wholly unreasonably.

40. By refence to the basis on which Mr O'Connell explained his rationale for giving only partial mitigation in connection with the Appellant's actions in connection with the production of documentation the Tribunal does not consider the approach to have been flawed. It may have been slightly generous but on the basis that 1) the key documents regarding payment were provided swiftly and 2) the production of the invoices was materially delayed but once provided confirmed that the W5s were accurate, the Tribunal confirms the mitigation provided.

DECISION

41. For the reasons given the Appellant's appeal is dismissed and the penalty is upheld in the sum of £63,939.13.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

42. 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.

AMANDA BROWN QC
TRIBUNAL JUDGE

Release date: 23 DECEMBER 2021