TC03185

Appeal number: TC/2013/02756

CUSTOMS DUTY- failure to register as a registered consignor - two movements of goods from port to warehouse- appellant applied retrospectively for registration 'unprompted' on first movement- aware of position on second movement- penalty confirmed on second movement only- case allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

HENRY DIAPER & CO LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE DAVID S PORTER
PETER WHITEHEAD

Sitting in public at Civil & Family Court, Liverpool on 29 November 2013

Mr Kevin Williams, Operations Director, for the Appellant

Mr Simon Charles, of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.

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DECISION

1. Mr Kevin Williams (Mr Williams) appealed on behalf of Henry Diaper & Co Ltd (the Company) against a penalty of £32,401,38 issued on 24 September 2012 for dispatching, on two occasions, excise goods namely twenty two containers of beer from China, on behalf of the Company's customers Halewoods International Limited (Halewoods) without being registered as a Registered Consignor. Mr Williams said that the Company made a genuine error and that its past record for compliance was exemplary. The Respondents (HMRC) said that as the Company was not registered as a Registered Consignor and, although the failure was not deliberate, HMRC had had to 'prompt' the Company for it to disclose the transactions and the penalty arose therefrom.

2. Mr Williams, the Operations Director for the Company, appeared on its behalf supported by Alan Power, his advisor. Mr Williams also gave evidence to the Tribunal. Mr Simon Charles, of Counsel, appeared for HMRC and called Mrs Gillian Wood, who gave evidence. He also produced a bundle of documents.

The Law

3. Mr Charles helpfully took us through the relevant legislation.

Finance Act 2008 (the Act) Schedule 41 Penalties; failure to notify and certain VAT and Excise wrongdoing

Failure to notify etc.

1 A penalty is payable by a person (P) where P fails to comply with an obligation specified in the Table below (a 'relevant obligation')

Tax to which obligation relates	Obligation
…….	…….
Excise Duties	Obligation to dispatch excise goods under duty suspension arrangements upon their release for free circulation in accordance with Article 79 of Council Regulation 2913/92/EEC only if approved and registered (or approved and registered) as a Registered Consignor under regulations under section 100G or 100H of CEMA 1979 (registered excise dealers and shippers etc)

5(1) A failure by P to comply with a relevant obligation is-

(a) "deliberate and concealed" if the failure is deliberate and P makes arrangements to conceal the situation giving rise to the obligation, and

(b) "deliberate but not concealed" if the failure is deliberate but P does not make arrangements to conceal the situation giving rise to the obligation, and

(2) …….

(3) …….

(4) ……..

6. (1) This paragraph sets out the penalty payable under paragraph 1

(2) If the failure is in category 1, the penalty is

(a) for a deliberate and concealed failure,100% of the potential lost revenue,

(b) for a deliberate but not concealed failure, 70% of the potential lost revenue

(c) for any other case 30% of the potential lost revenue.

(3) ..…..

(4) ……

(5) ……

6A. (1) A failure is in category 1 if-

(a) it involves a domestic matter, or

(b) …..

(2) …….

(3) …….

(4) …….

(5) A failure "involves a domestic matter" if it results in a potential loss of revenue that is charged on or by reference to anything not mentioned in subparagraphs (4) (a) to (d)

Potential lost revenue.

7. (1) "The potential lost revenue" in respect of a failure to comply with a relevant obligation is a follows -

……..

(10) In the case of a failure to comply with a relevant obligation relating to any other tax, the potential lost revenue is the amount of any tax which is unpaid by reason of the failure.

12. (1) Paragraph 13 provides for reductions in penalties under paragraphs 1 to 4 where P discloses a relevant act or failure.

(2) P discloses a relevant act or failure by –

(a) telling HMRC about it

(b) giving HMRC reasonable help in quantifying the tax unpaid by reason of it, and

(c) allowing HMRC access to records for the purpose of checking how much tax is so unpaid.

(3) Disclosure of a relevant act or failure –

(a) is "unprompted" if made at the time when the person making it has no reason to believe that HMTC have discovered or are about to discover the relevant act or failure.

(b) other wise it is " prompted".

(4) ……

13. (1) If a person who would otherwise be liable to a penalty of a percentage shown in column 1 of the Table (a "standard percentage") has made a disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure.

(2) But the standard percentage may not be reduced to a percentage that is below the minimum shown for it

(a) for a prompted disclosure, in column 2 of the Table, and

/ (b) for an unprompted disclosure, in column 3 of the Table.

(3) Where the Table shows a different minimum for case A and case B –

(a) the Case A minimum applies if –

(i) the penalty is under paragraph 1, and

(ii) HMRC become aware of the failure less than 12 months after the time when the tax first became unpaid by reason of the failure, and

(b) otherwise, the Case B minimum applies.

Standard %	Minimum % for prompt disclosure	Minimum % for unprompted disclosure
30%	Case A: 10% Case B: 20%	Case A: 0% Case B: 0%
……..	……..	…….

14. (1) If HMRC think it right because of special circumstances, they may reduce a penalty under any of paragraph 1 to 4

(2) (2) In sub-paragraph (1) "special circumstances" does not include –

(a) ability to pay, or

(b) the fact that the potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

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

(a) staying a penalty, and

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

20. (1) Liability to a penalty under any 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 an appeal notified to the tribunal) that there is a reasonable excuse for the act or failure.

(2) for the purposes of sub-paragraph (1) –

(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the relevant act or failure.

(c) where P had a reasonable excuse for the relevant act or failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the relevant act or failure is remedied without unreasonable delay after the excuse ceased.

The Case

4. We were referred to *James Hillis* Special Case Digest TC02611. The case concerned a solicitor who had set up business and who had not appreciated that he should have registered for VAT on a 'rolling year' basis and not a 'financial year' basis. The solicitor had done all that he could to raise the necessary VAT, but his bank would not grant him any further facility. He therefore applied to the Legal Services Commission to provide funds in advance of his entitlement but it had taken an inordinate length of time to pay the £18,000 he needed to cover his VAT. As soon as the solicitor received the monies from the Legal Services Commission he paid the outstanding VAT. The solicitor received a penalty of £2,502, being the minimum penalty permitted under the legislation, because the failure was non-deliberate and there had been an unprompted disclosure. The solicitor argued that there were special circumstances, HMRC's policy defined special circumstances as either uncommon or exceptional or where the strict application of the penalty law produces a result that is contrary to the clear compliance intention of the law. The Tribunal was satisfied that HMRC's decision on special circumstances was flawed in that HMRC did not consider whether the penalty met the clear compliance intention of the law having regard to the appellant's individual circumstances.

The Facts

5. Mr Williams has provided in the bundle a detail of the history and present position of the Company. It is clear from that evidence that the Company is a substantial and respected organisation. The accounts to 31 March 2013 reveal a turnover of £4,941,853 and a profit on ordinary activities, after tax of £64,028. The Company operates with 46 staff from a large site. It deals in mixed products of food, chemicals, bonded goods and duty suspended goods. One of its principle customers is Halewoods, which has a warehouse some six miles from the Company's site. Halewoods was concerned about the costs of moving its goods from the port to its warehouse and suggested that it would have to make other arrangements. As the Company had spare capacity at its warehouses, it was suggested that Halewoods' goods could be stored in the Company's warehouse. We were told by Mr Williams that the Company made a profit of only £16 for each container, Mr Williams said, however, that it was important that they did not lose Halewoods business.

6. The Company was aware of changes, which were proposed in relation to the moving of goods from the port to its warehouse. We were advised that the changes were introduced on 1 April 2010, but did not come into effect as far as the Company was concerned until January 2011. Mr Williams openly admitted that the Company had been more concerned with regard to the installation of the appropriate software so that it could access the new regime. He had thought that the regime was a paper exercise and had not appreciated that the Company needed to register as a 'Registered Consignor'. He understood that the computer connection would involve the Company, its customers and Customs. The Company had been concerned to have the system working correctly. It had taken some time to implement the system and it had been used for the first time when the first delivery of 22 containers of beer from China to Halewoods occurred on 15 September 2011. The Company had raised an import pre-

lodgement through the Customs Handling of Import & Export Freight System. The goods were cleared under CPC 07 00 00 (goods in free circulation for customs with excise duty and VAT suspended), the Company was issued with clearance advice notes. We understand that this was under the old system when the goods were delivered directly to Halewoods. We were surprised that the authorities at the point of import had not queried the delivery.

7. At some point between 19 September 2011 and 23 September 2011 the 22 containers were moved to the Company's tax warehouse. The goods were recorded on the Company's system as being under duty suspension. On 22 September 2011 the Company accessed its computer to confirm receipt of the goods using the new software, but discovered that no Electronic Accompanying Document ("e-AD") had been raised by its freight forwarding department to cover the goods. When the Company attempted to raise the e-AD it discovered that a Registered Consignor approval number was required. The Company did not have the appropriate number and it applied for approval on 22 September 2011.

8. A copy of that application was produced to the Tribunal. The form contains two sheets of A 4. There is no fee needed for registration and the form merely has details of the Company, its registrations details for its VAT liability, the Companies 'Badge number' as an import agent and its warehousekeeper's authorisation number. It indicates on the top of the form that the application should reach HMRC at least 30 days before the date from which an applicant wishes to be registered. Mr Williams conceded that he had not indicated to HMRC that a delivery had already been received and that another was on the way.

9. When giving evidence, Mrs Wood advised that the application form would have been processed in Glasgow and that she would have been notified. That was the reason that she had arranged a meeting with the Company on 12 October 2011. We had asked whether Glasgow automatically sent a copy of the application to the appropriate tax district. She said that it did, but surprisingly she was unable to say when she had received it. She thought it that it must have been two days before she arranged the meeting with the Company. We note that the 12 October was a Wednesday so the application must have been notified to her on the Monday or some time earlier. We think it is unlikely that she could arrange an appointment with the Company so quickly and we suspect that she had received the notice somewhat earlier.

10. Under the old system between the 6 and 13 October 2011 the Company received a second batch of 22 containers of beer from China into its tax warehouse and entered its goods on its stock records as being duly suspended. As a result of the notification from Glasgow, Mrs Wood attended at the Company on 12 October 2011 when she met Joanne McDonald the company's Bond Manager. Mr Williams was not available.

Part of the note of the meeting recorded:

> "Mrs Wood asked if any shipments had been received and was advised that 1 arrived 22/09/11. Mrs McDonald realised when accessing the EMCS system for

this import that Henry Diapers were not registered as Consignors. The movement from port was not covered by the EMCS system. Mrs McDonald advised that Kevin Williams when talking with Halewoods about taking on this aspect of work had advised that Diapers were registered as a Consignor. It was only when Mrs McDonald went into the system she realised that Diapers were not.

She had phoned the National registration Unit but they were unable to locate a registration for Diapers. She advised that Diapers are approved/ registered for many aspects of Custom and Excise regimes/procedures. So she felt Kevin Williams said Diapers were registered as he assumed they were."

11. Mr Charles indicated that Mrs McDonald had not advised Mrs Wood of the second delivery. Mr Willams confirmed that that was correct, but that he had telephoned Mrs Wood the next day and advised her of the delivery. We also understood that the Company had used third parties to move other goods until the application for registration had been received. He confirmed to the Tribunal that the failure to register was an error on the Company's part. The company had spent a considerable amount of time to make its computer compliant and it was aware of the proposed changes. The deliveries had been on route from China when the application had been made and he did not believe that they would not be appointed Registered Consignors. In fact they were so registered on 25 October 2011. He stressed again that it was important that the Company retained Halewoods' business.

12. Mrs Wood attended at the Company's offices once more on 25 October 2011 and indicated to John E P Harvey (Mr Harvey), the chairman, and Mr Williams that a 'wrongdoing' penalty might be issued to the Company. Mr Harvey felt strongly that the fault lay with the Liverpool Port which could have linked the CHIEF and EMCS systems. Mr Willams had agreed that the Company had been in error, but that at no time was there any risk as the alcohol had always remained 'under bond' and in safe storage. A 'wrongdoing' penalty was not issued as Mrs Wood accepted that neither of the transactions had been carried out deliberately. Mrs Williams had discussed the likely penalty with Mr Harvey and indicated that, as she had approached the Company, the disclosure had been 'prompted' by HMRC. Mr Harvey had asked if it was possible to negotiate what the penalty should be. We were told by Mr Williams that the Company had offered to pay £21,989.38 but that Mrs Wood had not been prepared to agree and a penalty of £32,401.38 was raised on 24 September 2011. The Company asked for the decision to be reviewed and on 23 March 2013 the review was carried out by officer Kunderan, who upheld the decision.

Summing up

13. Mr Charles submitted that the failure had been prompted as a result of Mrs Wood's visit and fell within section 13 (2) (a) of the Act. HMRC did not however consider that either of the failures was deliberate. As the discovery of the failures had arisen within 12 months, it fell within Case A of the Act. As a result, HMRC considered that the penalty should be charged at 10% of the duty giving rise to a penalty of £32,401.38. There had been no loss of revenue. He submitted that the Company had discovered the error, but had done nothing about it. When submitting

the application to Glasgow the Company had not alerted Glasgow to the fact that another delivery was on route. As a result, the failure was only admitted when Mrs Wood attended for the first interview. At that interview Mrs McDonald had not told Mrs Woods that there was another delivery, that information was only revealed when Mr Williams telephoned the next day. The Company had not appreciated that it had made an error. He submitted that an honest mistake does not give rise to a reasonable excuse and that there were no special circumstances, as the provisions of the system were no more onerous to the Company than any of its competitors. Special circumstances must relate to organisations at large. Mr Charles accepted that the Company had a good compliance history but Mr Williams had thought that the penalty was unduly harsh. He had accepted that the provisions were readily understood and it is for that reason, Mr Charles submitted, that there could not be special circumstances. The Company has not argued that it had a reasonable excuse. In fact Mr Williams has confirmed that the Company had made an error. In the circumstances the penalty should be confirmed.

14. Mr Williams said that he had little to add to the evidence that he had already given. He accepted that the company had made an error. He considered that Mrs Wood's visit arose from the notification from Glasgow and that amounted to an unprompted disclosure by the Company. There had been no loss of revenue, because duty had been paid as the goods left the warehouse under the old regime. In fact the duty had been paid earlier than would have been the case if the Company had been registered as a Registered Consignor. As a result the Company had attempted to negotiate a settlement, which he understood HMRC were empowered to do, on the basis that as the duty had been paid on goods which had left the warehouse, the penalty should be assessed on the value of the goods still in the warehouse. As those had been valued at £219,893.80 it had been suggested that the Company would be prepared to pay 10% of that figure, namely £21,989.38.

15. Mr Williams submitted that he had genuinely believed that the new system was designed to trace the movement of goods. He believed that as it was in force goods should not have been removed from the port without the appropriate authority. As the Company had been able to move the goods from the port to its warehouse it had not occurred to the Company that they had done anything wrong. It would not have been to the Company's benefit to conceal what it was doing. In fact it had applied immediately for registration and it assumed, in light of its good compliance, that it would be so granted. The registration was granted just one month after the application without any comment. At no time had HMRC been at risk and as a result the penalty should be set at nil.

The decision

16. We have considered the law and the evidence and allow the appeal in part. We are satisfied that the Company has always complied properly with its tax obligations. We are satisfied from the evidence given by Mr Williams that a genuine mistake was made and that, quite properly, the Company has not suggested it has a reasonable excuse or, indeed, that there any special circumstances. Its actions were not deliberate and it appears to have believed that the application for the Registered Consignorship

was a formality. In fact, given its compliance history, that there was no fee for the application, and that the form was very straight forward, we consider the Company was entitled to assume that the registration would be supplied automatically, as it was. We do not accept that the form itself was appropriate notice to Glasgow that the Company was non-compliant. The receipt of the form by Mrs Wood alerted her to the non-compliance and gave rise to her first visit. She had worked with the Company before, and she was aware of their activities. We accept that she might not have known about the actual delivery until she made her first visit, but there had been no attempt by the Company to do anything other than to regularise its position. Therefore, we do not accept that the first visit was prompted. As it was unprompted we have decided to reduce the penalty to nil in relation to the first consignment of beer,

17. The position with regard to the second delivery is somewhat more problematic. There is no doubt that on the second delivery the Company was aware of the position. Mr Charles has suggested that HMRC is not taking the view that the Company's action was deliberate but that it had been prompted. As a result, the penalty should be fixed at 10%. There is no doubt that Mr Williams telephoned Mrs Wood as a result of Mrs McDonald advising him of the visit and the fact that Mrs McDonald had not told Mrs Wood of the second delivery. The Company had clearly been prompted.

Section 12 (3) states:

> " (3) Disclosure of a relevant act or failure –
>
> (a) is "unprompted" if made at the time when the person making it has no reason to believe that HMTC have discovered or are about to discover the relevant act or failure.
>
> (b) other wise it is " prompted".

We therefore impose a penalty of 10% amounting to £16,200.69 arising on the second delivery but reduce the penalty to nil in relation to the first delivery.

18. 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.

DAVID S PORTER
TRIBUNAL JUDGE

RELEASE DATE: 6 January 2014