[2019] UKFTT 534 (TC)

TC07328

CUSTOMS DUTY—Civil evasion penalty—Inaccuracies in customs declarations leading to an under-declaration of duty—Whether the Appellant's conduct involved dishonesty (s 25 FA 2003)

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/00341

BETWEEN

AUTO-KIT INTERNATIONAL LTD **Appellant**

-and-

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MR SIMON BIRD

Sitting in public at Birmingham on 21 February 2019

Mr K Mangat of the Appellant

Ms P Patel, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This case concerns the definition of "dishonesty" for purposes of a penalty under s 25 of the Finance Act 2003.

2. The Appellant appeals against a customs civil evasion penalty imposed under that provision on 14 December 2017, in respect of inaccuracies in customs declarations submitted between 2013 and 2017.

FACTUAL BACKGROUND

3. The Appellant company is a wholesaler of motor vehicle parts and accessories. It imports fabric and leather car seat covers into the UK from outside the EU.

4. Following a visit on 13 September 2011, HMRC advised the Appellant in a letter dated 13 February 2012 amongst other matters of the following.

(1) Fabric and leather seat covers were being imported by the Appellant from outside the EU using the incorrect commodity code, thus resulting in an underpayment of duty. The correct commodity codes were 6304 9300 90 for nylon removable car seat covers, and 9401 9080 90 for leather car seat covers. The Appellant should accordingly advise its clearing agents immediately of the correct commodity codes.

(2) In cases where the Appellant supplied to the manufacturer free of charge the fabric to be used in the manufacture of the product subsequently supplied by the manufacturer to the Appellant, the Appellant when calculating the customs value of the product had to add the value of that fabric, as per Article 32(b) and (e) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code. In the case of certain fabric seat covers imported from India, the value of the fabric that had been supplied by the Appellant to the manufacturer amounted to 17% of the value of the goods.

That letter contained schedules setting out a re-computation of the Appellant's duty liabilities in respect of imports over the previous 3 years.

5. Following further correspondence between the parties, on 19 March 2012 HMRC issued a post-clearance demand note to the Appellant for the amount of the underpaid duty (a "C18"). This was upheld in a review decision dated 25 October 2012, and was subsequently duly paid by the Appellant.

6. On 12 April 2012, HMRC issued a customs civil penalty warning letter, stating that the Appellant had through its failure to provide the correct particulars on customs declarations for the period January 2009 to December 2011 rendered itself liable to a penalty in accordance with the Customs (Contravention of a Relevant Rule) Regulations 2003, that on this occasion HMRC had decided not to charge a penalty, but that if within the following two years the Appellant again provided incorrect particulars in a customs declaration a penalty might be applied without further warning.

7. In a subsequent letter to the Appellant dated 10 June 2013, HMRC stated as follows. A review of the Appellant's import declarations relating to goods imported from outside the EU for the period 1 January 2012 to 30 April 2013 indicated that the Appellant was still using incorrect commodity codes for seat covers, and that an uplift was still not being included to take account of material provided by the Appellant to the manufacturer free of charge. The

letter stated that a demand for the underpayments would be issued in due course, and that the Appellant could within 30 days respond with further evidence or arguments.

8. No response to that letter was received from the Appellant. HMRC in due course issued a C18 to the Appellant for the amount of the underpaid duty, and this was paid by the Appellant.

9. In a letter to the Appellant dated 30 July 2013, HMRC stated their intention to impose a penalty of £250 in respect of the incorrect declarations referred to in paragraph 7 above. The letter noted that the maximum penalty that could be imposed was £2,500. The Appellant was given 30 days to make representations in response to the proposed penalty. No response was received from the Appellant. On 30 August 2013, HMRC issued the £250 penalty, which was subsequently paid by the Appellant.

10. In an e-mail to the Appellant dated 1 December 2015, HMRC stated that there continued to be issues with the Appellant's import declarations, noting that the Appellant was apparently still using incorrect commodity codes for car seat covers, and seeking confirmation that the Appellant had added to the customs value the cost of fabric supplied by the Appellant free of charge to the manufacturer. HMRC chased a response to this e-mail on 4 February 2016. On 8 January 2016, the Appellant's then financial controller, Geoff Smith, responded that it would take some time to review the import declarations and that a response would be provided when further information was obtained.

11. In a letter to the Appellant dated 16 March 2016, HMRC stated that in the absence of any response from the Appellant, HMRC proposed to calculate the additional customs charges due to the best of judgment using the same methodology as previously. The letter set out the additional charges proposed to be demanded by HMRC, and the Appellant was advised that it could within 30 days respond with further evidence or arguments. Following a response from the Appellant's financial controller arguing that a lesser amount of duty was owing, HMRC issued a C18 to the Appellant in the lesser amount proposed by the Appellant's financial controller, and this was duly paid by the Appellant.

12. Meanwhile, in a letter dated 14 April 2016, HMRC advised the Appellant that HMRC had reason to believe that the Appellant was engaging in conduct involving dishonesty in relation to its customs obligations, and that it intended to conduct an enquiry under Public Notice 300 (customs civil investigation of suspected evasion).

13. On 5 August 2016, HMRC conducted a meeting with the Appellant under HMRC's Public Notice 300. At that meeting, Mr Mangat, the director of the Appellant, stated as follows. The Appellant no longer imported goods from India. Goods were imported from China and Indonesia. Material was shipped to the manufacturer in Indonesia from Taiwan free of charge. The manufacturer in Indonesia then made goods on the Appellant's behalf and shipped them to the UK. Before being so informed by HMRC, the Appellant did not know that the invoice value of the goods had to include the material supplied free of charge to the manufacturer. The Appellant sent letters to the factories abroad in Indonesia and India in June 2014, and then when no response was received, again in July 2015. The Appellant also spoke with its freight forwarders, DHL, about how to deal with the material costs. The only supplier now was in Indonesia. They responded that as they were in a bonded zone in Indonesia, it was a legal requirement for them under Indonesian law that the declared export value matched the amount of money going in to their account. In October 2015, the Appellant sent the manufacturer in Indonesia a further letter pressing for a solution. The Appellant was having difficulty in coming to a solution.

14. At that meeting, Mr Mangat proposed that HMRC carry out an audit on a quarterly basis and assess the Appellant each quarter for the underpaid duty. Mr Mangat acknowledged that since the last C18, the Appellant had not done any uplifts of invoice values to take account of

materials provided free of charge. HMRC stated at the meeting that they would look into and advise the Appellant on the possibility of the Appellant reviewing all its imports on a quarterly basis, and submitting a voluntary declaration in respect of the 17% uplift.

15. In a subsequent letter to the Appellant dated 21 September 2016, HMRC stated as follows. As the Appellant had advised in the 5 August 2015 meeting that no action had been taken to declare imports with a 17% uplift and with the correct commodity codes, HMRC had recalculated the Appellant's liability to import duties for the period 2 November 2015 to 7 September 2016. The letter stated that a demand for the underpayments would be issued in due course, and that the Appellant could within 30 days respond with further evidence or arguments. A C18 was then issued on 28 October 2016.

16. HMRC subsequently had communications with the Appellant's shipping agent, WM Shipping Ltd, and DHL, seeking to ascertain what instructions they had from the Appellant. In an e-mail dated 23 February 2017, DHL confirmed that they had instructions from the Appellant to use commodity code 9401 9080 90 for leather car seat covers, and 6304 9300 90 for waterproof fabric car seat covers. In a further e-mail dated 15 March 2017, DHL confirmed that there had been no change in their instructions from the Appellant since 2012, apart from a change of address in 2015.

17. In an e-mail to the Appellant dated 21 March 2017, HMRC advised that the Appellant's imports still appeared to be incorrect, and recommended a further meeting. A further meeting was held on 12 May 2017.

18. In a subsequent letter to the Appellant dated 16 May 2017, HMRC stated as follows. As the Appellant had advised in the 12 May 2017 meeting that no action had been taken to declare imports with a 17% uplift and the with the correct commodity codes, HMRC had recalculated the Appellant's liability to import duties since the last demand issued in October 2016. The letter stated that a demand for the underpayments would be issued in due course, and that the Appellant could within 30 days respond with further evidence or arguments.

19. In a letter to the Appellant dated 14 December 2017, HMRC stated that they considered the actions of the Appellant in submitting incorrect customs declarations to be dishonest, and that HMRC intended to charge a civil evasion penalty under s 25(1) of the Finance Act 2003. The letter stated that it was proposed to impose a penalty in the amount of 80% of the amount of duty evaded, a 10% reduction being given for disclosure and 10% for cooperation. The letter indicated that the penalty covered the period 2013 to 2017.

20. The penalty was issued on 14 December 2017.

21. On 13 January 2018, the Appellant commenced the present Tribunal appeal.

APPLICABLE LEGISLATION

22. Section 25(1) of the Finance Act 2003 states:

> In any case where –
>
> (a) a person engages in any conduct for the purpose of evading any relevant tax or duty and
>
> (b) his conduct involves dishonesty (whether or not such as to give rise to any criminal liability),
>
> that person is liable to a penalty of an amount equal to the amount of the tax or duty evaded or, as the case be, sought to be evaded.

23. Section 26 of the Finance Act 2003 relevantly provides:

> (1) If, in the case of any relevant tax or duty, a person of a prescribed description engages in any conduct by which he contravenes—
>
> (a) a prescribed relevant rule, or
>
> (b) a relevant rule of a prescribed description,
>
> he is liable to a penalty under this section of a prescribed amount.
>
> (2) Subsection (1) is subject to the following provisions of this Part.
>
> …
>
> (5) Any amount prescribed under subsection (1) as the amount of a penalty must not be more than £2,500.
>
> (6) The Treasury may by order amend subsection (5) by substituting a different amount for the amount for the time being specified in that subsection.
>
> …
>
> (8) In this Part *"relevant rule"*, in relation to any relevant tax or duty, means any duty, obligation, requirement or condition imposed by or under any of the following—
>
> (a) the Customs and Excise Management Act 1979 (c. 2), as it applies in relation to the relevant tax or duty;
>
> (b) any other Act, or any statutory instrument, as it applies in relation to the relevant tax or duty; …

24. For purposes of s 26 of the Finance Act 2003, penalties are prescribed by the Customs (Contravention of a Relevant Rule) Regulations 2003/3113.

25. Section 29 of the Finance Act 2003 states:

> (1) Where a person is liable to a penalty under section 25 or 26 –
>
> (a) the Commissioners (whether originally or on review) or, on appeal, appeal tribunal may reduce the penalty to such amount (including nil) as they think proper; and
>
> (b) the Commissioners on a review, or an appeal tribunal or an appeal, relating to a penalty reduced by the Commissioners under this subsection may cancel the whole or any part of the reduction previously made by the Commissioners.
>
> (2) In exercising these powers under subsection (1), neither the Commissioners nor an appeal tribunal are entitled to take into account any of the matters specified in subsection (3).
>
> (3) Those matters are –
>
> (a) the insufficiency of the funds available to any person for paying any relevant tax or duty or the amount of the penalty,
>
> (b) the fact that there has, in the case in question or in that case taken with any other cases, been no or no significant loss of any relevant tax or duty,
>
> (c) the fact that the person liable to the penalty, or a person acting on behalf, has acted in good faith.

26. Section 31 of the Finance Act 2003 relevantly provides:

> (1) A demand notice may not be given—
>
> (a) in the case of a penalty under section 25, more than 20 years after the conduct giving rise to the liability to the penalty ceased, or
>
> (b) in the case of a penalty under section 26, more than 3 years after the conduct giving rise to the liability to the penalty ceased.
>
> (2) A demand notice may not be given more than 2 years after there has come to the knowledge of the Commissioners evidence of facts sufficient in the opinion of the Commissioners to justify the giving of the demand notice.

27. Section 33(7) of the Finance Act 2003 provides:

> On an appeal under this section-
>
> (a) The burden of proof as to matters mentioned in section 25(1) or 26(1) lies on HMRC but
>
> (b) It is otherwise for the appellant to show that the grounds on which any such appeal is brought have been established.

APPLICABLE LEGAL PRINCIPLES

28. Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. That is to say, if by ordinary standards an appellant's mental state would be characterised as dishonest, it is irrelevant that the appellant judges by different standards.

29. When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of the belief is a matter of evidence (often in practice determinative) going to whether the appellant held the belief, but it is not an additional requirement that the belief must be reasonable; the question is whether it is genuinely held.

30. Once the Appellant's actual state of mind as to knowledge or belief as to facts is established, the question whether the Appellant's conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the appellant must appreciate that what he or she has done is, by those standards, dishonest. (See *Ivey v Genting Casinos t/a Crockfords* [2017] UKSC 67 at [62]-[63], [74].)

31. Honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety. (See *Royal Brunei Airlines v Tan* [1995] 2 AC 378 at 389.)

DOCUMENTARY EVIDENCE PROVIDED BY THE APPELLANT

32. The Appellant has provided copies of letters to suppliers in India and Indonesia dated 2 June 2014 and 6 July 2015, stating that invoices issued by the supplier needed to indicate that the value of the goods for customs purposes including materials was 17% higher than the amount to be paid by the Appellant to the supplier.

33. A letter from the supplier in Indonesia dated 10 July 2015 explains that as the supplier is in a bonded zone area in Indonesia, the value of the goods stated on the invoice needed to be equal to what the supplier was paid.

34. A letter from the Appellant to the supplier in Indonesia dated 1 October 2016 proposed a solution to the problem.

THE EVIDENCE OF KAWALJEET MANGAT

35. Mr Mangat is the managing director of the Appellant company, which he founded in 2000.

36. After the original HMRC visit, Mr Mangat presumed that the Appellant's then financial director, Kevin Kennedy, had cleared up any issues. The Appellant also contacted DHL seeking a solution but none was found. Kevin Kennedy then left the Appellant company, which then moved premises, putting significant pressure on all resources. The Appellant had communicated the correct commodity codes to its freight agents, but they all make errors. The Appellant had proposed that HMRC do a desktop quarterly audit of the Appellant, so that the Appellant could just pay over any shortfall each quarter, however HMRC have said that this cannot be done. HMRC have never given the Appellant a workable solution to the issue. HMRC is acting unfairly. The Appellant is not dishonest, but simply cannot find a solution to the problem. The Appellant would be content for HMRC to send a C18 every month.

THE HMRC WITNESS EVIDENCE

37. A witness statement of HMRC Officer McKane, who issued the penalty, sets out the history of the case, and the reasoning applied by Officer McKane when issuing the penalty.

38. A witness statement of HMRC Officer Greener, line manager of HMRC Officer McKane, adopts the witness statement of the latter, and stated that Officer Greener would have made the same decision.

THE APPELLANT'S ARGUMENTS

39. HMRC provided the Appellant with inaccurate and vague answers to questions asked by the Appellant, or did not respond at all. The Appellant seeks a clear written directive or process flow from HMRC of how the Appellant should approach the import of these particular products. To clear its imports through customs, the Appellant uses clearing agents who have varying processes which may be outside the control of the Appellant.

40. Alternatively, the Appellant seeks a significantly reduced penalty.

THE HMRC ARGUMENTS

41. HMRC advised the Appellant on numerous occasions of errors being made, of how to use the correct codes and how to deal with the 17% uplift. On 13 February 2012, HMRC advised the Appellant to inform its agents of the correct commodity code, and explained the 17% uplift requirement. The Appellant did not thereafter take action to ensure that the correct commodity code and 17% uplift were applied, despite being notified again by HMRC on more than one occasion that they were still applying incorrect commodity codes and were not applying the 17% uplift. The Appellant was non-responsive to communications from HMRC. It was only in 2016 that the Appellant first contended that they were having difficulties resolving the issues. Despite advice from HMRC in August and October 2016 as to how to resolve the issues, there is no evidence that the Appellant advised its agents of the correct commodity code and uplift until 14 June 2017, some 4 years after they were advised by HMRC of the problems.

42. The solution is not for HMRC to continually raise C18s when errors become apparent (as suggested by the Appellant) but for the Appellant to ensure that the imports are classified correctly and that the uplift is accounted for. It is not the responsibility of the Appellant's agents or HMRC to ensure that the Appellant is compliant. It is the Appellant's responsibility to ensure that imports are correctly declared.

43. By failing to take action and ignoring the advice given, and by continuing to import goods using incorrect commodity codes and incorrect customs values, the Appellant's conduct was dishonest by the standards of an ordinary, reasonable person.

44. The Appellant is therefore liable to a penalty under s 25(1) Finance Act 2003 of an amount equal to the amount of the tax or duty evaded. HMRC have reduced the penalty under s 29(1) Finance Act 2003 to 80% of the tax or duty evaded, in accordance with Public Notice 300.

THE TRIBUNAL'S FINDINGS

45. For liability to a penalty under s 25(1) of the Finance Act 2003 to arise, two elements must be satisfied.

46. First, the Appellant must have engaged in conduct for the purpose of evading tax or duty.

47. Secondly, the Appellant's conduct must have involved dishonesty.

48. In this appeal, HMRC bears the burden of proving that both elements are satisfied: s 33(7)(a) of the Finance Act 2003. The standard of proof is the balance of probability.

49. The Tribunal considers first the second of these two elements, the requirement of dishonesty, given that this was the focus of the parties' arguments.

50. The Tribunal notes that where an importer submits an incorrect custom declaration leading to an under-declaration of customs duty payable, the importer can be penalised even if the conduct does not involve dishonesty. In cases not involving dishonesty, the penalty would be imposed under s 26 of the Finance Act 2003, rather than s 25.

51. Where an importer submits an inaccurate customs declaration leading to an under-declaration of customs duty payable, that person's mental state would normally by ordinary standards be characterised as dishonest if the person knows that the declaration contains an inaccuracy leading to an under-declaration, and if the person nonetheless submits the declaration in the hope that the inaccuracy will not be detected by HMRC so that payment of part of the duty owing will be avoided.

52. However, even where the importer knows that there is an inaccuracy leading to an under-declaration, that person's mental state would not *necessarily* be characterised as dishonest by ordinary standards if the person genuinely believes that HMRC will be aware of the inaccuracy and that HMRC will issue a demand for the unpaid duty, such that the correct amount of duty will ultimately be paid. In such a situation:

(1) the person's state of might be characterised as dishonest by ordinary standards if for instance the person, although envisaging that the correct amount of duty will ultimately be paid, deliberately submits the inaccurate declaration in order to obtain the cash flow advantage of not having to pay the full amount by the normal due date; and

(2) the person's state of might be characterised as dishonest by ordinary standards if for instance the person, although fully expecting that HMRC will detect the inaccuracy and issue a demand for the unpaid duty, deliberately submits the

inaccurate declaration in the off chance that HMRC might not detect the inaccuracy; but

(3) the person's state of might not be characterised as dishonest by ordinary standards if for instance there are technical or procedural reasons preventing the submission of accurate returns, and the person despite all diligent efforts is incapable of resolving those issues, such that the person decides to rely on receipt of a demand from HMRC to ensure that the correct amount of duty is paid.

53. In the last of these three situations, the person's state of mind might be more difficult to characterise as honest if the person does not make all diligent efforts to resolve the technical barriers to the submission of accurate returns, but nonetheless makes some efforts. Failure to make all reasonable efforts to overcome technical problems preventing compliance with tax obligations may be careless or negligent, but is normally not of itself dishonest by ordinary standards. However, if the lack of motivation to make greater efforts to resolve the problems is due to the realisation that there are cash flow advantages in having the problem, and/or that HMRC might not detect some of the under-declarations, then the situation described in paragraph 52(3) above may shade into the kind of situation referred to in paragraph 52(1) and/or (2).

54. Although the burden of proof is on HMRC to establish dishonesty, it is not necessary that this be established by direct evidence. The Tribunal can draw inferences from the circumstances as a whole, and in reaching its decision in this appeal the Tribunal has considered the circumstances as a whole.

55. Following the 13 September 2011 visit, HMRC accepted that the Appellant had to that point not acted dishonestly in failing to use the correct commodity codes and to apply the 17% uplift in customs declarations. It considered imposing a penalty under s 26 of the Finance Act 2003 (the provision that does not require dishonestly), but then decided to impose no penalty at all: see paragraph 6 above.

56. Subsequently in August 2013, after the Appellant had failed to take effective steps to ensure that the correct commodity codes were used and that the 17% uplift was applied, HMRC did impose a penalty under s 26 of the Finance Act 2003, but in an amount that was only 10% of the maximum penalty that could have been imposed: see paragraph 9 above. Clearly, as at August 2013, HMRC did not consider that the Appellant was acting dishonestly at that point, even though the errors in the customs declarations were still continuing some 2 years after the 13 September 2011 visit, and a year and a half after the 13 February 2012 HMRC letter. (It is however accepted that this did not preclude HMRC from subsequently changing its view in relation to the Appellant's conduct up to that point in the light of the Appellant's subsequent conduct.)

57. Furthermore, the evidence indicates (see paragraphs 4(1) and 15 above) that after the 13 September 2011 visit, the Appellant gave instructions to DHL some time in 2012 to use the correct commodity codes for the car seat covers. This evidence suggests that it was DHL who submitted the customs declarations on behalf of the Appellant, or at least, who determined the commodity codes to be used in the customs declarations.

58. The Tribunal finds that after June 2013, when HMRC notified the Appellant that it had still not corrected the errors in the customs declarations, and certainly after HMRC issued the second C18, the Appellant had every reason to think that HMRC would continue to detect all such errors in its customs declarations in the future. At the very least, the Appellant must at that point have realised that there was an extremely high probability that any such inaccuracies in any future customs declarations would be detected by HMRC, and ultimately they were.

59. The Appellant has provided evidence that it wrote to its suppliers in India and Indonesia in June 2014 and July 2015 advising them to apply the 17% uplift, and that the Indonesian supplier responded in July 2015 that it was unable to do so. The Tribunal accepts the Appellant's evidence that its Indian supplier never responded to the letters it sent about the 17% uplift.

60. The Tribunal takes into account that there is no evidence that the Appellant took any steps earlier than June 2014 to ensure that the 17% uplift was included in the invoices from its suppliers and in the customs declarations. It thus appears that the Appellant did drag its feet in dealing with this issue. However, the Tribunal also takes into account that there were no other significant developments in this case in the period from August 2013 (when the s 26 penalty of £250 was issued) until HMRC again contacted the Appellant on 1 December 2015. It therefore seems that when the Appellant contacted its suppliers in June 2014, it did not do so as a result of pressures of particular events at that specific time.

61. The Tribunal also takes into account that the Appellant did not, each time a customs declaration was submitted, advise HMRC that it contained inaccuracies. However, the Tribunal also takes into account that the evidence indicates that customs declarations were submitted on the Appellant's behalf by DHL or other agent.

62. On its consideration of the evidence and circumstances as a whole, the Tribunal is satisfied of the following. Prior to the 13 September 2011 visit, the Appellant did not know that it was using the incorrect commodity codes or that it was required to apply a 17% uplift. After it became aware that these errors in its customs declarations were leading to an under-declaration of duty, the Appellant knew that it needed to take steps to rectify the situation. Some time in 2012, it advised DHL of the correct commodity codes to be used. The Tribunal does not know exactly when in 2012 this occurred, and it might well have been before or very soon after the 19 March 2012 HMRC letter. By June 2013, the Appellant was aware that HMRC was aware that the Appellant continued to submit incorrect declarations. Despite this, there is no evidence of the Appellant making prompt efforts to engage with DHL or others concerned to ensure that the continuing use of incorrect commodity codes was corrected, and the Appellant took another year, until June 2014, before raising the issue of the 17% uplift with its suppliers. Although there are various communications between the Appellant and HMRC particularly from 2016 in which the Appellant states that it is seeking to deal with the 17% uplift issue but does not know how, and is not receiving clear guidance from HMRC, it appears to the Tribunal that the Appellant could have sought to address this issue much sooner and with greater diligence.

63. The Tribunal is satisfied that there were genuine technical or procedural issues that were leading to inaccuracies in the customs declarations. However, although there is evidence that the Appellant took certain steps to resolve those issues, the Tribunal is not satisfied on the evidence before it that the Appellant took all diligent steps that it could have been expected to take in the circumstances. This is a case of the kind referred to in paragraph 53 above.

64. The Tribunal is not satisfied that the Appellant's lack of motivation to address the issues with greater diligence was due to any desire to obtain a cash flow advantage to which it was not entitled, or to avoid altogether payment part of the duty owing, or to obtain any other advantage to which it was not entitled. The Tribunal notes that Mr Mangat did propose at the 5 August 2016 meeting that HMRC carry out an audit on a quarterly basis and assess the Appellant each quarter for the underpaid duty. HMRC very rightly rejected that proposal, and the Tribunal notes that the proposal would have provided the Appellant with an ongoing cash flow advantage over other importers who paid the full amount of customs duty by the normal due date. However, the Tribunal is not persuaded that the Appellant's failure to find a solution

to the issues more quickly was motivated by a desire to enjoy that cash flow advantage. The Tribunal is not persuaded that there was anything more than a simple lack of diligence.

65. The Tribunal notes that HMRC could have imposed a penalty under s 26 of the Finance Act 2003 in respect of every customs declaration submitted by the Appellant that contained these errors. Such penalties would not have required dishonesty on the part of the Appellant to be established. Such penalties would have been limited to a maximum amount of £2,500. However, if such a penalty had been imposed in respect of each separate customs declaration submitted by the Appellant after the 13 September 2011 visit or 13 February 2012 HMRC letter, such penalties may well have provided a considerable financial incentive to the Appellant to focus on finding a solution to the problem as quickly as possible. That is of course a purpose of such penalties. Had they been imposed, the Appellant could have appealed against such s 26 penalties, arguing that the technical issues it experienced justified a reduction in the penalty either to some reduced amount or to nil (see s 29(1)). However, in any such appeal, the burden would have been on the Appellant to establish on a balance of probabilities the existence of circumstances justifying the reduction. It would have been for the Appellant to prove exactly why it could not reasonably have been expected to submit accurate returns, or to resolve the issues sooner than it did.

66. It seems that after the £250 s 26 penalty was imposed in August 2013, the Appellant continued to submit inaccurate returns until the s 25 penalty was imposed in December 2017. No further penalties were imposed under s 26, despite HMRC being aware in December 2015 that there continued to be inaccuracies in the Appellant's customs declarations, and despite the 3 year time limit for s 26 penalties under s 31(1)(b).

67. It may be that it is administratively more convenient for HMRC to issue one large penalty under s 25 rather than multiple smaller penalties under s 26. However, administrative convenience is not the purpose of the power under s 25. A penalty under s 25 involves a finding of dishonesty, which is a serious matter. In an appeal against a s 25 penalty, the burden of proving dishonesty falls on HMRC. It is not enough for HMRC to prove lack of diligence, or carelessness, or complete lack of any reasonable excuse. HMRC must prove dishonesty. Lack of diligence, or carelessness, or complete lack of any reasonable excuse, may be circumstances that are relevant to the question of whether or not there is dishonesty, but they are not in and of themselves proof of dishonesty.

68. The Tribunal is satisfied that there was a lack of diligence on the part of the Appellant. If the issue before the Tribunal had been whether the Appellant had a reasonable excuse for not resolving the issues earlier, and if the burden of proof had been on the Appellant, the Tribunal would have found on the evidence presently before it that a reasonable excuse had not been established. However, that is not the issue before the Tribunal, and the burden of proof is not on the Appellant.

69. Having regard in particular to the findings in paragraph 64 above, the Tribunal finds that by ordinary standards the Appellant's mental state (that of Mr Mangat, the company's director) would not be characterised as dishonest. HMRC have not discharged the burden of proving dishonesty.

70. For the same reasons, the Tribunal finds that HMRC have not discharged the burden of proving, for purposes of s 25(1)(a) of the Finance Act 2003, that the Appellant acted with the purpose of evading the duty.

CONCLUSION

71. The appeal is allowed, and the penalty under s 25 of the Finance Act 2003 is set aside.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

72. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 14 AUGUST 2019