Neutral Citation: [2024] UKFTT 00145 (TC)

Case Number: TC09080

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

Taylor House

Appeal reference: TC/2022/13469

*EXCISE DUTY AND WRONGDOING PENALTY – whether the Appellant was "holding" alcohol at the excise duty point on the basis that it had placed an order on behalf of a customer with a delivery network for the delivery of soft drinks and, unbeknown to it, the pallets contained alcohol instead – no, because the Appellant did not have physical possession or de facto control of the goods at the excise duty point and its rights of legal control of the goods at that point were highly circumscribed – its appeal against the excise duty in respect of the alcohol would therefore be upheld – whether the Appellant was liable to a wrongdoing penalty in respect of the excise duty on the basis that it was "concerned in carrying, removing, depositing, keeping or otherwise dealing" with the alcohol and did not have a reasonable excuse – yes – penalty reduced to the minimum for non-deliberate acts with prompted disclosure because of the quality of the Appellant's disclosure*

**Heard on:** 6 FEBRUARY 2024
**Judgment date:** 20 FEBRUARY 2024

**Before**

**TRIBUNAL JUDGE TONY BEARE**
**MR CHRIS JENKINS**

**Between**

**KENT COURIERS LIMITED**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS**

**Respondents**

**<u>Representation:</u>**

For the Appellant: Mr Sam Glover, of counsel

For the Respondents: Mr Thomas Holt, litigator of HM Revenue and Customs' Solicitor's Office

## DECISION

### INTRODUCTION

1. This decision relates to appeals against:

(1) an excise duty assessment made by the Respondents on 2 June 2021 in the amount of £36,176; and

(2) a penalty assessment made by the Respondents on 2 June 2021 in the amount of £16,460 which was subsequently varied upon review on 1 September 2022 to £15,374 and which, shortly before the hearing of the appeals, on 24 January 2024, the Respondents reduced to £10,852.

2. The material facts are not in dispute and are as follows:

(1) the Appellant is a courier, haulage and storage company based in Mitcham which undertakes work both independently and through a network (the "Network") operated by a company named Palletways (UK) Limited ("Palletways");

(2) the services offered by the Appellant to its customers include both transportation and storage;

(3) the Network involves a number of independent road hauliers and couriers (each, a "Member") providing freight distribution services across Europe;

(4) the manner in which the Network operates in relation to a particular item of freight is as follows:

(a) the freight in question is collected from the consignor by a local Member and taken to the local Member's depot;

(b) the Member then transports the freight to one of the Network's hubs (each a "Hub");

(c) the freight is then transported, sometimes through one or more other Hubs, to another Hub located in the region of the delivery address; and

(d) the freight is then collected from that Hub by a Member who is local to the consignee and taken to that local Member's depot for storage and collection or delivery;

(5) Palletways provides Members with an on-line portal (the "Portal") through which the Members can arrange transport of freight through the Network. (In practice, the Appellant provides some of its customers with their own log-in details so that they are able to access the Portal directly and book a consignment directly without the Appellant's involvement but that is not what happened in the present case);

(6) freight is transported through the network subject to Palletways's terms and conditions and, when transported internationally, subject to conditions governed by the Convention on the Contract for the International Carriage of Goods by Road signed in Geneva on 19 May 1956 (the "CMR");

(7) on 2 July 2020, a vehicle pulling a trailer arrived at the Coquelles freight area seeking to enter the United Kingdom and was selected for inspection by a UK Border Force ("UKBF") officer, a Mr Gwilym Williams;

(8) when opened and inspected by another UKBF officer, a Mr Haydn Powlter, the trailer was found by Officer Powlter to contain six black shrink-wrapped pallets containing 3,356.64 litres of vodka;

(9) on the pallets was a label from Palletways showing the Appellant as the consignee of the pallets;

(10) the vehicle and trailer, along with the vodka, were seized but the vehicle and trailer were restored to the driver on the same day free of charge;

(11) on 19 July 2020, UKBF wrote to the Appellant to inform it of the seizure and to explain the process to be followed in order to challenge the seizure. The Appellant did not receive this letter and did not challenge the seizure;

(12) on 26 March 2021, Officer Christine Henderson of the Respondents issued an enquiry letter to the Appellant in relation to the seizure. Whilst the letter made it clear that it related to excise duty on the seized goods and to an excise wrongdoing penalty, there were a number of things wrong with the letter. For example:

(a) it under-stated the amount of excise duty by some £8,000;

(b) it referred to the Appellant as the "driver responsible for this movement";

(c) the questions raised by Officer Henderson were more appropriate for an employed or self-employed individual than a company such as the Appellant;

(d) it gave the wrong details for:

(i) the driver of the vehicle carrying the seized goods;

(ii) the consignor; and

(iii) the consignee; and

(e) the email address for Officer Henderson set out at the top of the letter was incorrect (although her correct email address was set out in the body of the letter);

(13) on 8 April 2021, Ms Magdalena Kucharczyk of the Appellant sent an email to the incorrect email address for Officer Henderson set out at the top of Officer Henderson's letter of 26 March 2021. In that email, Ms Kucharczyk said that none of the details supplied by Officer Henderson had any connection to the Appellant. Officer Henderson did not receive this email;

(14) on 28 April 2021, Officer Henderson issued a pre-assessment letter to the Appellant saying that she considered the Appellant to be liable for the excise duty and was considering issuing an assessment to the excise duty and an assessment to a wrongdoing penalty. Once again, the wrong email address for Officer Henderson was set out at the top of Officer Henderson's letter;

(15) on 18 May 2021, Ms Kucharczyk sent a further email to the wrong email address for Officer Henderson. In that email, Ms Kucharczyk repeated that this had nothing to do with the Appellant, she had tried to call Officer Henderson but none of the numbers could be reached and she had every reason to believe that the letter from Officer Henderson was a scam. Again, Officer Henderson did not receive this email;

(16) on 2 June 2021, Officer Henderson issued the assessments which are the subject of this decision. At the same time, Officer Henderson advised the Appellant that, if it disagreed with her decision, it could provide further information, request a review or appeal to an independent tribunal. The notice of penalty assessment in the hearing bundle simply stated the amount of the penalty and there was no explanation of the

basis on which the penalty had been calculated. However, it is apparent from the review conclusion letter referred to in paragraph 2(33) below and Officer Henderson's evidence at the hearing that Officer Henderson calculated the wrongdoing penalty on the basis that:

(a) the wrongdoing was deliberate but not concealed;

(b) disclosure was prompted; and

(c) as regards the quality of disclosure – known colloquially as "telling", "helping" and "giving" – a reduction equal to 70% of the difference between the maximum penalty and the minimum penalty should be given, reflecting a maximum 40% for "helping" and a maximum 30% for "giving" but none of the 30% available for "telling";

(17) on 10 June 2021, the Appellant wrote a letter to the Respondents addressed to "To whom this may concern". In that letter, the Appellant said that, as it had already explained in its previous emails (which it enclosed), this case had nothing to do with the Appellant and it assumed that it was a scam. Officer Henderson did not receive this letter;

(18) on 5 April 2022, Mr Keith Phipps, director of the Appellant, sent an email to the Respondents' corporate finance enquiries address. In that email, Mr Phipps summarised the exchanges of correspondence which had occurred and the difficulties which the Appellant had had in contacting the Respondents by telephone and email and reiterated that none of the names detailed in Officer Henderson's letter of 26 March 2021 had any connection to the Appellant. He added that:

(a) the Appellant did not ship goods to and from abroad; and

(b) he had assumed that it was a scam but had now been informed by his financial adviser that the Appellant had been placed on the Respondents' list of deliberate tax defaulters;

(19) on 13 April 2022, Officer Henderson sent to Mr Phipps a copy of her original letter of 26 March 2021 asking for responses to the questions she had raised;

(20) on 28 April 2022, Officer Henderson sent to Mr Phipps copies of the pallet stickers which had been attached to the pallets and which named the Appellant as the consignee of the goods and Mr Anthony Baldock, an employee of the Appellant, sent Officer Henderson an email to say that the labels in question were Palletways labels which were used for goods passing through the Network;

(21) on the same day, Mr Baldock supplied to Officer Henderson the name of a contact at Palletways – a Mr David Spong;

(22) on 5 May 2022, Officer Henderson wrote to Mr Spong to ask for further information;

(23) on 6 May 2022, Mr Spong replied to Officer Henderson to explain that:

(a) Palletways operated the Network but each Member was an independent business;

(b) many different types of goods were shipped through the Network but alcohol was not one of them;

(c) the transaction in question had been booked by the Appellant on "26/2/2020" – by which we believe that Mr Spong meant 26 June 2020 ; and

(d) the goods in question were booked to pass from "IBRAHIM, PAUL – ESCH-STRABE, Duisberg, Nordrhein-Westfalen, 47053, DE, IBRAHIM, +4917641200789, TUESDAY 30/6" to the Appellant at its registered office;

(24) on the same day, Mr Baldock wrote to Officer Henderson to:

(a) explain that the Appellant used Palletways as a third-party carrier to ship through Europe and did not itself hold any European import/export licences; and

(b) provide the contact details for Mr Dilip Patel and Hi Line Cash and Carry, for whom the collection had been booked and the contact details for Ibrahim, the person from whom the goods had been collected;

(25) on 12 May 2022, Officer Henderson wrote to Mr Phipps to ask various questions about the matter and, on 19 May 2022, Mr Baldock replied to the effect that:

(a) the Appellant did not know that the goods in question were vodka and thought that they were soft drinks;

(b) no emails had been exchanged between the Appellant and Mr Patel as Mr Patel had gone to the Appellant's premises and booked the collection in person;

(c) the Appellant had never received any notification of the seizure from UKBF;

(d) the Appellant had been unable to contact Mr Patel after it had informed Mr Patel of the seizure;

(e) the goods had travelled without the correct documentation because the customer was responsible for the documentation and the Appellant did not know that the goods were alcohol;

(f) the Appellant had never transported any other goods for Hi Line Cash and Carry either before or after the seizure; and

(g) the Appellant had not been paid for the transportation as it was only due to be paid on delivery;

(26) on 25 May 2022, Officer Henderson wrote to Mr Phipps enclosing a copy of the UKBF letter of 19 July 2020 and to enquire as to the due diligence which the Appellant carried out in relation to new customers;

(27) on the same day, Mr Baldock replied to Officer Henderson to say that:

(a) the Appellant had never previously seen the UKBF letter of 19 July 2020;

(b) the Appellant did run credit checks on companies wishing to set up an account with it but, as this was a one-off job for which no account was opened, no such checks had been made in this case;

(c) the Appellant had tried and failed to contact Mr Patel following the seizure; and

(d) the goods in question did not belong to the Appellant and it had obviously been defrauded;

(28) on 27 May 2022, Officer Henderson wrote to Mr Spong to ask:

(a) whether Palletways was aware that the goods in question were alcohol;

(b) for any paperwork held by Palletways in relation to the delivery; and

(c) for confirmation as to whether the Appellant had been invoiced for, and paid for, the relevant delivery;

(29) on 31 May 2022, Mr Spong wrote to Officer Henderson attaching a screenshot of the collection and delivery information which the Appellant had entered into the Portal and to say that "the only invoice is from the transport company who collected the shipment which would be an agent of Palletways so when [the Appellant] book the shipment it will automatically connect to the agent to collect the shipment of which there is a charge to collect and process through our hub";

(30) on 17 June 2022, Officer Henderson wrote to the Appellant to say that, following her investigations, she had considered the facts of the case and the assessments to excise duty and the wrongdoing penalty stood;

(31) on 8 July 2022, Mr Phipps wrote to the Respondents on behalf of the Appellant to ask for a review;

(32) on 11 August 2022, Mr Phipps called the reviewing officer, Officer David Noble, to reiterate the grounds for the review and to explain that a trainee had dealt with the order and could not have been expected to know what due diligence to carry out;

(33) on 1 September 2022, Officer Noble wrote to the Appellant to set out the result of the review, which was to confirm the assessment to excise duty and to reduce the assessment to the wrongdoing penalty, as described in paragraph 1(b) above. Officer Noble explained that he was upholding Officer Henderson's conclusion to the effect that the wrongdoing was deliberate but not concealed and that disclosure was prompted. However, he said that, as regards the quality of disclosure, whilst he agreed with Officer Henderson's conclusion to the effect that the full reduction should be given for "helping" and "giving", he thought that a 15% reduction, instead of no reduction, should be given for "telling", with the result that the aggregate reduction would be equal to 85% of the difference between the maximum penalty and the minimum penalty;

(34) on 21 September 2022, the Appellant notified the First-tier Tribunal (the "FTT") that it wished to appeal against the review decision; and

(35) upon receiving the Appellant's witness statements and in preparing for the appeal, the Respondents decided that it wished further to reduce the assessment to the wrongdoing penalty, as described in paragraph 1(b) above. Accordingly, on 24 January 2024, Officer Henderson wrote to the Appellant and its representative to say that she was reducing the penalty. Both the letter to the Appellant and the letter to the Appellant's representative once again contained an incorrect email address for Officer Henderson at the top of the letter even though this had previously been drawn to Officer Henderson's attention and she had apologised for her mistake. In addition, neither letter set out any details of the basis on which the wrongdoing penalty was being revised. The letter to the Appellant simply said that the penalty had been reduced and the letter to the Appellant's representative simply said that the penalty had been reduced because Officer Henderson was now satisfied that the wrongdoing was not deliberate. No mention was made in either letter - or the revised assessment which was sent to the Appellant - of how Officer Henderson had applied the reductions for quality of disclosure and, in fact, no such reductions had been made in calculating the revised penalty, notwithstanding the application of such reductions by Officer Henderson in her original calculation of the penalty and by Officer Noble in the review conclusion letter.

THE EVIDENCE

## Introduction

3. Although the material facts in this case are agreed, as outlined in paragraph 2 above, we were provided with some additional evidence at the hearing.

4. The evidence in question took the form of:

(1) documentation relating to the Network and the relationship of the Members *inter se* and the Members with Palletways; and

(2) witness testimony.

## The documentation

5. We were provided with two documents in relation to the Network, the relationship of the Members *inter se* and the relationship of the Members with Palletways. The first was a draft of a so-called "Member Evaluation Agreement" (the "MEA") pursuant to which the Appellant was given temporary rights to use the Network over a period of evaluation with a view to its becoming a Member in due course whilst the second was the Palletways "Operating Manual and Code of Practice for Operating Standards and Methods" (the "Operating Manual"), to which the MEA made reference and which was stated to govern the activities of, and the rights and obligations of, Members in using the Network.

6. We should observe that we did not find either of these documents to be of much use in relation to the issues in the appeals. Leaving aside the fact that the MEA was in draft form and unsigned by the Appellant, the drafting of both documents can best be described as Delphic. Moreover, although extensive, they do not shed any meaningful light on the rights and obligations of a Member as regards goods which are in transit within the Network, presumably because those are a function of the system itself. We found the evidence of the Appellant's representatives to be much more enlightening in that regard. However, we did note the following provisions:

(1) clauses 10.1 and 10.2 of the MEA specify that:

(a) the relationship of a Member to Palletways is one of independent contractor and no Member or Member's employee is an agent, representative or agent of Palletways; and

(b) no Member is authorised to assume or create any liability of Palletways except as specifically authorised in writing by a director of Palletways;

(2) chapter 1 of the Operating Manual specifies, inter alia, that Palletways:

(a) will police the Network and the performance of Members to ensure that service levels and the financial obligations of Members are being met;

(b) is not responsible for the actions of Members; and

(c) can refuse to handle shipments which it considers, at its own discretion, to be inappropriate;

(3) clause 6.12 of the Operating Manual specifies that a Member does not have a right of lien over goods belonging to the customer of another Member;

(4) clauses 7A.4 and 7B.4 of the Operating Manual specify that a Member will exclude goods carried by the Network from its own goods-in-transit insurance;

(5) clause 7A.9 of the Operating Manual specifies that, in order to find a consignment which might have gone astray within the Network, a Member can initiate a search of the Network;

(6) clause 10.2 of the Operating Manual specifies that, in the interests of Network efficiency, Palletways maintains timed arrival slots for deliveries to Hubs and cannot guarantee that freight arriving late will be processed;

(7) clause 18.2 of the Operating Manual specifies that a "Delivering Member" - defined as a Member collecting goods from the Hub to deliver to a customer - who fails to execute a delivery or collection on its final day must immediately inform the "Collecting Member" - defined as a Member collecting goods from a customer to deliver to the Hub - by phone, to update the Portal in order to reflect the failure and to procure delivery on the following day by the fastest service available;

(8) annex 10 to the Operating Manual specifies that, as regards European services, Palletways is able to resolve any daily volume fluctuations by either routing consignments via alternative Hubs or leaving economy freight in the collecting Hub;

(9) annex Y to the Operating Manual specifies that, as regards European services, Palletways is not responsible for the payment of any duties in relation to the transportation of alcohol and sets out, as regards those services, the procedures to be followed by Members who transport alcohol across international borders; and

(10) appendix 3 to the Operating Manual specifies that each Member is required to take reasonable steps to prevent smuggling and, to that end, to follow different procedures depending on whether its customer is a "Known Shipper" or an "Unknown Shipper". The Member is not entitled to accept collection requests from an "Unknown Shipper" – broadly, a customer previously unknown to the Member in question – and, in relation to delivery requests by such persons, the Member is required, inter alia, to obtain a delivery address and verify it through the Portal before accepting the order on the Palletways' system, to refuse the order if the customer asks for the goods to be delivered to a Member's depot and to be held for collection and to require the customer to allow the goods to be inspected by the driver before loading.

**The witness evidence**

7. We were provided with witness statements from a number of witnesses, most of whom simply testified to the agreed facts and did not need to be cross-examined. All of the witnesses who provided witness statements were present at the hearing. In our view, the hearing could have been conducted more efficiently if the parties had agreed in advance as to which witnesses needed to be present in order to supplement their witness statements with oral testimony and/or in order to be available to be cross-examined. As it was, we considered that only the oral evidence of Mr Phipps and Mr Baldock at the hearing shed additional light on the matters in issue.

8. In relation to their evidence, we would observe that we found both men to be honest and entirely credible witnesses and therefore find the facts which we gleaned from their testimony, as summarised in paragraph 9 below, to be facts for the purposes of the appeals.

9. The witnesses testified that:

(1) the Network is just one of many possible networks which are available to the Appellant. The Appellant keeps the Network as its choice of network under review from time to time but it is the one which the Appellant considers to suit it best in terms of volumes and rates of business;

(2) about 80% of the Appellant's business is through the Network and the rest of its business comprises deliveries that it makes itself;

(3) approximately 99% of the deliveries which the Appellant makes are for customers who are consignors and only approximately 1% of those deliveries are for consignees;

(4) although most of the Appellant's customers use the Portal to place their orders, the Appellant also takes orders by phone and email and there is the occasional walk-in customer, as occurred in this case;

(5) Mr Baldock estimated that, on average, there might be four or five orders by email and phone every month and one walk-in customer every month;

(6) the Appellant is able to refuse orders which are placed with it through email or phone or in person although:

(a) it is not entitled to refuse Palletways work; and

(b) in practice, it would not refuse work unless it had reason to suspect that there was something suspicious about the order;

(7) all of the deliveries which the Appellant makes itself are domestic as the Appellant does not hold international import/export licences;

(8) when orders are made through the Network, the Appellant (or the relevant customer) books the order through the Portal but, subject to the two points made in paragraph 9(9) below, the Appellant has no knowledge of where the goods are from time to time in the course of their journey to the Hub at which the Appellant is due to collect them and the Appellant has no control over the nature of that journey – for example, the route to be followed or the carriers involved. Instead, the details of the route are something which is controlled by Palletways through the Portal;

(9) the above is subject to two caveats, as follows:

(a) first, if the Appellant were to be asked by its customer to cancel a delivery at any point before the goods in question reached the Hub of the delivering Member, then the Appellant would be able to stop the delivery by notifying the Portal to that effect; and

(b) secondly, the Appellant is able to see on the Portal if the goods have passed through any Hub on their journey to the Hub at which the Appellant is to collect them;

(10) the Appellant might communicate directly with another Member from time to time in relation to a particular delivery – for example, where a delivery has been delayed or in order to discuss fees – but, generally, all communications between Members are handled through the Portal. For example, where goods arrive damaged, the Member handling the end-delivery notifies the Portal of the damage and then the Portal sends an alert to the Member who collected the goods from the supplier;

(11) generally, the Appellant does not know the nature of the goods it is delivering. It is just aware of the number of pallets, the weight, the delivery address and the due date for delivery. However, there are exceptions – for example:

(a) in this case the Appellant thought it was arranging the delivery of soft drinks; and

(b) often the identity of the supplier gives an indication of the nature of the goods;

(12) on 26 June 2020, a person identifying himself as a Mr Dilip Patel of Hi Line Cash and Carry came to the Appellant's premises and spoke to a temporary member of staff called Charlotte;

(13) he requested that the Appellant collect six pallets containing a mixture of soft drinks from an address in Germany and then store the pallets for him until he was able to transport the drinks in his van to local shops in the area;

(14) Charlotte passed on the details of Mr Patel's order to Mr Baldock, who was responsible for dealing with the Network and Palletways, and Mr Baldock then entered details of the order onto the Portal;

(15) the price payable by the Appellant to Palletways in respect of the collection was £659.74 and Mr Patel was required to pay £900 for the collection and storage, with the fee to be invoiced upon the arrival of the pallets at the Appellant's depot and to be paid by Mr Patel before collection;

(16) on 30 June 2020, the pallets were collected in Duisburg, Germany by a local Member and taken to the local Member's Hub;

(17) the Appellant was notified through the Portal that the goods had been seized by UKBF. However, it had no knowledge of why the goods had been seized because it was under the impression that the goods were soft drinks; and

(18) taking into account the manner in which the Network operated, as described in general terms in paragraphs 9(8) to 9(11) above:

(a) the Appellant had no knowledge of, or control over, the route which the goods were going to take from the Hub in Germany to the Hub at which it was going to collect them;

(b) if Mr Patel had contacted the Appellant before the goods had reached the Hub in Germany and asked the Appellant to cancel the delivery, then the Appellant would have been able to do so; but

(c) once the goods left the Hub in Germany, the Appellant did not know where the goods were from time to time and had no means of stopping the delivery.

10. Each of Mr Phipps and Mr Baldock pointed out that:

(1) the delivery giving rise to the appeals had taken place during the pandemic, when the level of the Appellant's staffing was not as it usually was; and

(2) the order had been placed with a temporary and inexperienced member of staff,

but candidly accepted that, in retrospect, the Appellant had made a mistake in not carrying out checks on Mr Patel or Hi Line Cash and Carry before accepting the order. In addition, Mr Phipps confirmed that he was aware that there were obligations in the Operating Manual as regards the acceptance of orders from Unknown Shippers although Mr Baldock said that he was not aware of them.

**THE ISSUES**

11. There are two issues in dispute in the appeals and they are as follows:

(1) first, is the Appellant liable to excise duty in respect of the alcohol which was seized by UKBF on 2 July 2020? and

(2) secondly, is the Appellant liable to a wrongdoing penalty in respect of the excise duty?

12. For reasons which will become clear in due course, those two issues are quite distinct. The fact that the Appellant might be liable for the excise duty but not for the wrongdoing penalty is hardly surprising but what is surprising is that the converse is the case as well and the Appellant might be liable for the wrongdoing penalty even if it is not liable for the excise duty itself. Accordingly, we propose to deal with each issue separately in the rest of this decision.

## THE EXCISE DUTY

### Introduction

13. Regulation 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (SI 2010/593) (the "Regulations") provides as follows:

"13. —

(1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.

(2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person—

(a) making the delivery of the goods;

(b) holding the goods intended for delivery; or

(c) to whom the goods are delivered.

(3) For the purposes of paragraph (1) excise goods are held for a commercial purpose if they are held—

(a) by a person other than a private individual; or

(b) by a private individual ("P"), except in a case where the excise goods are for P's own use and were acquired in, and transported to the United Kingdom from, another

Member State by P."

14. Regulation 13 of the Regulations was enacted by Parliament in order to reflect Article 33 of Directive 2008/118/EC (the "Directive"), which lays down common rules within the European Union (the "EU") on the holding, movement and monitoring of goods that are subject to excise duty.

15. Article 33 of the Directive provides as follows:

"1. Without prejudice to Article 36(1), where excise goods which have already been released for consumption in one Member State are held for commercial purposes in another Member State in order to be delivered or used there, they shall be subject to excise duty and excise duty shall become chargeable in that other Member State.

2...

3. The person liable to pay the excise duty which has become chargeable shall be, depending on the cases referred to in paragraph 1, the person making the delivery or holding the goods intended for delivery, or to whom the goods are delivered in the other Member State."

16. It is common ground that the alcohol which was seized by UKBF on 2 July 2020 had already been released for consumption in Germany and was being held for commercial purposes for the first time in the UK when it was seized, with the result that excise duty was chargeable in respect of it. However, the parties are in dispute over whether the Appellant is liable to that excise duty.

17. It may be seen that each of Regulation 13 of the Regulations and Article 33 of the Directive specifies three different categories of person who are liable to the excise duty. Those are:

(1) the person making the delivery of the goods;

(2) the person holding the goods intended for delivery; or

(3) the person to whom the goods are delivered.

18. It is common ground that the Appellant cannot fall within the third of the above categories for the simple reason that the goods were never delivered to it but were instead seized while they were in transit. However, the Respondents submit that the Appellant falls within one or both of the first two categories as the person "making the delivery" of the goods or the person "holding" the goods. The Appellant submits that it is neither.

19. In addressing that dispute, we think that it is helpful for us to consider each of those two categories separately and to start with the question of whether the Appellant was "holding" the goods at the time when the excise duty point arose because authorities in relation to that question are more plentiful.

**"Holding"**

20. The leading decision on the meaning of the word "holding" in this context is the decision of the European Court of Justice (the "CJEU") in *The Commissioners for Her Majesty's Revenue and Customs v WR* (C-279/19) ("*WR*"), a decision which is binding upon us notwithstanding the United Kingdom's withdrawal from the EU. The reasons why it is binding upon us despite that withdrawal were set out at some length by Newey LJ (with whom Baker and Snowden LJJ agreed) in *The Commissioners for Her Majesty's Revenue and Customs v Perfect* [2022] EWCA Civ 330 ("*Perfect CA2*") at paragraphs [13] to [23] and we do not propose to repeat them in this decision.

21. In *WR*, the CJEU was asked to consider whether a lorry driver who, at the excise duty point, was found to be in physical possession of goods in respect of which duty had not been paid was liable under Article 33 of the Directive to pay the duty. In that case, the lorry driver in question had no right to, or interest in, the goods he was transporting and was unaware, and had no reason to believe, that the goods were subject to excise duty.

22. The CJEU held that:

(1) the word "holds" in Article 33 of the Directive has to be given an autonomous and uniform interpretation across the EU and this means that its meaning has to be determined according to the usual meaning of the term in everyday language, taking into account the context in which it is used and the objectives pursued by the legislation of which it forms part;

(2) the concept of a person who "holds" goods refers, in everyday language, to a person who is in physical possession of those goods and, in that regard, the question of

whether the person concerned has a right to, or any interest in, the goods which the person holds is irrelevant;

(3) there is nothing in the wording of Article 33 of the Directive to indicate that the status of the person liable to pay the excise duty, as being "the person holding the goods intended for delivery", depends on ascertaining whether the person is aware, or should reasonably have been aware, that the excise duty is chargeable;

(4) that literal interpretation is borne out by the general scheme of the Directive - for example, the absence of any language requiring the holding of a right or interest or awareness in the provisions of Articles 7(1), 7(2)(b) or 8(1)(b) of the Directive (which impose duty on the person holding goods at the point when they are released for consumption) as compared with the inclusion of language which requires awareness in the provisions of Articles 4(7) and 8(1)(a)(ii) of the Directive (which impose duty on an irregularity during the movement of goods under a duty suspension arrangement). It follows that, where the EU legislature intended an intentional element to be taken into account for the purpose of determining the person liable to pay the excise duty, it had laid down an express provision to that effect in the Directive;

(5) furthermore, limiting the persons who are to be treated as holding the goods for the purposes of Article 33 of the Directive to those persons who are aware, or should reasonably have been aware, that excise duty is chargeable would not be consistent with the objectives of the Directive, which include the prevention of tax evasion, avoidance and abuse. The objective of the Directive is to ensure that the chargeability of excise duty is identical in all Member States and that the duty can be collected and, to that end, a broad definition of the category of persons liable for the duty is appropriate. Limiting the category to persons who are aware, or should reasonably have been aware, that excise duty is chargeable would make it difficult, in practice, to collect the duty from the persons with whom the tax authorities are in direct contact; and

(6) in the light of the foregoing, Article 33 of the Directive has to be interpreted as meaning that a person who transports, on behalf of others, excise goods to another Member State, and who is in physical possession of those goods at the moment when they become chargeable to excise duty, is liable for that excise duty, even if that person has no right to, or interest in, the goods and is not aware that the goods are subject to, or have become chargeable to, that excise duty

– see *WR* at paragraphs [23] to [36].

23. Of course, the Respondents accept that the Appellant did not have physical possession of the alcohol when the excise duty point arose in this case. However, the question which arises following the decision in *WR* is the extent to which something other than physical possession can be sufficient to amount to "holding" for the purposes of Article 33 of the Directive and Regulation 13 of the Regulations.

24. There are a number of decisions of the English domestic courts prior to the decision in *WR* which suggest that *de facto* or legal control of goods, without physical possession of them, can also amount to "holding" for those purposes – see the Court of Appeal, Criminal Division, in *R v Taylor and another* [2013] EWCA Crim 1151 ("*Taylor*") and *R v Tatham* [2014] EWCA Crim 226 and the Upper Tribunal in *Dawson's (Wales) Limited v The Commissioners for Her Majesty's Revenue and Customs* [2019] UKUT 296 (TCC) ("*Dawson's UT*") at paragraphs [131] to [149]. However, these were decisions based on English law whereas it is now clear following the decision in *WR* that the term "holding" must be given an independent EU law meaning. As Asplin LJ put it in *Dawson's (Wales)*

*Limited v The Commissioners for Her Majesty's Revenue and Customs* [2023] EWCA Civ 332 ("*Dawson's CA*"), all decisions preceding *WR* need now to be construed "through the prism of the decision of the CJEU in [*WR*]" (see *Dawson's CA* at paragraph [66]).

25. The question at issue in *Dawson's CA* was whether the appellant, which had been assessed to excise duty on the basis that it had physical possession of the goods, could identify a person who should be regarded as "holding" the goods outside the duty suspension arrangement before it did, because then there would have been an earlier excise duty point. The appellant alleged that its supplier, who had never had physical possession of the goods, had had *de facto* and/or legal control of the goods and was, by virtue of that, "holding" the goods so that the earlier excise duty point arose. It should be observed that the case concerned the application of Articles 7 and 8 of the Directive, as opposed to Article 33 of the Directive. However, both parties in *Dawson's CA* agreed – and the Court of Appeal, in any event, held, at paragraphs [70], [97] and [98] – that:

(1) the word "holding" in Articles 7 and 8 of the Directive must be given the same meaning as in Article 33 of the Directive; and

(2) as the Regulations gave effect to the Directive, they needed to be construed in conformity with the Directive.

26. In answering the question of whether an earlier "holder" of the goods could be identified and hence an earlier excise duty point could be established, the Upper Tribunal in *Dawson's UT* had held, albeit on an obiter basis, that this was a mixed question of fact and law and required the answer to four questions – namely:

(1) who had physical possession of the goods at the time when the alleged earlier excise duty point occurred?

(2) who is the person alleged to have had *de facto* or legal control over the goods who it is said should be assessed rather than the subsequent holder (if it is the case that it is not appropriate to assess the person who was in physical possession of the goods) and how is that person said to have had control and on what basis was it being exercised?

(3) the time at which the excise duty point arose; and

(4) where the goods were being held at the relevant time

- see *Dawson's UT* at paragraph [149].

27. In *Dawson's CA*, Asplin LJ, with whom Arnold and Elisabeth Laing LJJ agreed, agreed that this was a mixed question of fact and law and held that, in each case, the answers to questions (1), (3) and (4) posed by the Upper Tribunal in *Dawson's UT* were crucial to the determination of whether an earlier "holder" of the goods outside the duty suspension arrangement could be identified and, hence, an earlier excise duty point arose. Asplin LJ did not comment on question (2) posed by the Upper Tribunal apart from noting that it was not disputed by the appellant in that case. She went on to say that she expressed no view on the question of whether *de facto* or legal control of goods, without physical possession, could be sufficient to amount to "holding" for the purposes of the Directive and the Regulations, noting that "[that] issue was not directly before us and may need consideration on another occasion" – see *Dawson's CA* at paragraph [72].

28. Such another occasion has in fact recently arisen, in the case of *Agniezska Hartleb T/A Hartleb Transport v The Commissioners for His Majesty's Revenue and Customs* [2024] UKUT 00034 (TCC) ("*Hartleb*"). In *Hartleb*, the Upper Tribunal was considering whether the FTT had erred in concluding that an employer was "holding" goods which, at the excise

duty point, were in the physical possession of her employee acting in the course of his employment. In dismissing the appeal, the Upper Tribunal:

(1) referred to the cases cited above as demonstrating that:

(a) the word "holding" in Regulation 13 of the Regulations and Article 33 of the Directive needs to be interpreted consistently across all Member States in the context of the Directive and its objectives and not from the perspective of UK domestic law;

(b) the word should be defined broadly in order to ensure that, so far as possible, the excise duty is collected;

(c) the determination of "holding" is a mixed question of fact and law; and

(d) the four questions identified by the Upper Tribunal in *Dawson's UT* are "a useful guide in determining who to regard as holder in circumstances where physical possession and *de facto* and/or legal control are separated as they are in our situation, noting in this regard that the second factor must now be seen in the context of *Perfect* and *WR*" – see *Hartleb* at paragraph [78];

(2) said that the four questions posed by the Upper Tribunal in *Dawson's UT* were just as applicable in the circumstances of *Hartleb* - where the appellant was claiming that she should not be liable to duty on the basis that she did not have physical possession and was therefore not "holding" the goods - as it was in *Dawson CA* and *Dawson UT* - where the matter in issue was whether there was an earlier excise duty point against which the assessment should have been made;

(3) went on to say the following:

"Although the initial focus, given the scheme and wording of the legislation together with the case law, is necessarily on the physical location of goods so giving weight to physical possession – that is not the end of the matter and a more detailed consideration of the facts is needed"

\- see *Hartleb* at paragraph [82];

(4) identified the fact that, whereas the appellant's employee had had physical possession of the goods at the excise duty point, the appellant herself had had *de facto* and/or legal control of the goods at that point;

(5) held that, in the circumstances of that case, where the appellant had entered into an arrangement with the manufacturer of the goods for the transportation of the goods by her business and was discharging her obligations under that arrangement by directing her employee to deliver the goods accordingly, it was legally correct and consistent with the operation of the Directive and the Regulations to treat the appellant and not her employee as "holding" the goods. "Put simply, the circumstances in which the Appellant had control outweigh the fact that physical possession of the excise goods was with her employee" – see *Hartleb* at paragraph [90]; and

(6) referred to passages from the Advocate General's opinion in *WR* at paragraphs [37] to [39] which suggested that, in the Advocate General's view, where an employee was making a delivery of goods on behalf of his employer and was therefore in physical possession of the goods, it was the employer - with *de facto* or legal control over the goods - who would be the person liable for the duty and not the employee.

29. We are, of course, bound by the decision in *Hartleb*. It follows that we are bound to hold that *de facto* and/or legal control of goods without physical possession of them can be sufficient to amount to "holding" the goods in an appropriate case. However, that does not

mean that *de facto* and/or legal control of the goods will always be sufficient to amount to "holding" the goods. In each case, it is necessary to consider all of the relevant facts by reference to the four questions set out in *Dawson's UT*.

30. Of critical significance in this regard is that it is implicit in the nature of the four questions – and indeed it is explicit in the decision in *Hartleb* at paragraphs [88] to [90] - that, in a case where physical possession of the goods and *de facto* and/or legal control of the goods are in separate hands at the excise duty point, we are bound to decide which of the relevant persons is to be regarded as "holding" the goods at that point to the exclusion of the other or others. It is not possible to treat more than one of the relevant persons as "holding" the goods at that point. In *Hartleb*, the Upper Tribunal applied the four questions set out in *Dawson's UT* to determine whether it was the appellant or her employee who should be treated as "holding" the goods at that point. It did not suggest that both the appellant and her employee could be treated as "holding" the goods at that point. Similarly, in *Dawson's UT* at paragraph [147], the Upper Tribunal did not suggest that both the person in physical possession and the person with *de facto* or legal control of the goods at the excise duty point could be treated as "holding" the goods at that point. It clearly envisaged that one of the persons would be "holding" the goods at that point to the exclusion of the other. We are bound to adopt a similar approach in this case and therefore to consider whether, on the basis of applying the four questions set out in *Dawson's UT* to the facts in this case, it was the Appellant or someone else – whether Palletways, as the controller of the Network through which the delivery was being made, or the driver of the lorry carrying the goods – who should be treated as "holding" the goods at the excise duty point. A finding that one of those persons was "holding" the goods at the excise duty point necessarily precludes a finding that the other or others was or were doing so and therefore a comparative exercise is required in which the position of each potential candidate must be weighed up against the other or others.

31. We now turn to the question of whether we consider the Appellant to have been "holding" the alcohol at the excise duty point on the facts in the present case, applying the principles set out in the authorities as discussed above and, in particular, those adopted by the Upper Tribunal in *Hartleb*. On that basis, we consider that the Appellant was not "holding" the alcohol at the excise duty point in this case for the following reasons:

(1) the Appellant had legal control of the goods at the excise duty point because:

(a) the goods were being transported under the CMR;

(b) the Appellant was shown as the consignee; and

(c) under the CMR, the consignee has legal control of the goods in transit – see, for example, *Taylor* at paragraph [9] and *Dawson's UT* at paragraph [124];

(2) however, the rights and powers over the goods which that legal ownership conferred on the Appellant were valueless to the Appellant because the Appellant had been instructed to collect the goods as agent for its customer and, as such, it held those rights and powers of legal control of the goods on trust for its customer. In essence, its legal control of the goods was no more than "a mere legal shell" of the kind referred to by Harman LJ in *Wood Preservation Limited v Prior* [1969] 1 WLR 1077 at 1097 (see also the judgment of Lloyd LJ in *J Sainsbury plc v O'Connor* 64 TC 208 at 249). The circumstances are not unlike the example given by the Upper Tribunal in *Dawson's UT* at paragraph [149(2)] of a situation where "the terms of supply to the person alleged to have *de facto* or legal control might mean that in fact that person never had control of the goods and did not direct their delivery";

(3) moreover, it is clear that the Appellant did not have *de facto* control of the goods at the excise duty point. It is true that the Appellant, at the request of its customer, put an order into the Network for the delivery of the goods. However, the placing of that order merely brought the Network into operation, with all that that entailed. Whilst the goods would not have begun their journey without the placing of the order so that the Appellant can be seen to have played a role in the initiation of that journey, that did not confer on the Appellant any *de facto* control over the journey or, more relevantly in this context, the goods themselves. In particular, after logging the order on the Portal, the Appellant had no control over the identity of the Member or Members who would be involved in transporting the goods to the Hub in the UK or the route which would be taken for the goods to get there. Whilst it is true that the Appellant would have been able to stop the delivery if it had been instructed to do so by its customer before the goods reached the Hub in Germany, it had no power to stop the delivery at that stage of its own initiative and it had no power to stop the delivery at all once the goods left that Hub.

In effect, after it placed the order with the Network, the Appellant had no ability to control either the carriers involved or the route which the goods were going to take on their journey to the UK Hub. Indeed, the Appellant had very limited visibility as to where the goods were at any point in time. It was able to discover when the goods passed through any Hub by looking at the Portal but it did not know where the goods were between those times.

In short, the entity which had *de facto* control of the goods in the course of the journey, and hence at the excise duty point, without physical possession of the goods, was Palletways as the controlling mind of the Network. It was not the Appellant, which simply brought the Network into operation in relation to the delivery of the goods;

(4) having concluded that the Appellant had legal control of the goods at the excise duty point, albeit of the very limited nature described in paragraph 31(2) above, and did not have either physical possession or *de facto* control of them at that point, it is then necessary to consider whether the rights of the Appellant in relation to the goods at that point were such that it should be regarded as "holding" the goods at that point. For that purpose, it is necessary to answer the four questions set out in *Dawson's UT* by reference to the facts in the present case;

(5) taking those four questions into account:

> (a) physical possession of the goods at the excise duty point was with the lorry driver who was transporting the goods when they were brought into the UK (question (1));
>
> (b) the Appellant had legal control of the goods by virtue of its rights under the CMR but that control was to be exercised at the direction of its customer and the Appellant did not have *de facto* control of the goods. Indeed, the entity which had *de facto* control of the goods at the excise duty point was Palletways (question (2));
>
> (c) there is no difference in timing between the excise duty points which are relevant to the lorry driver, the Appellant and Palletways because, in each case, the excise duty point was when the goods were brought into the UK (question (3)); and
>
> (d) there is no difference in the location of the goods at that excise duty point – namely, on the relevant lorry (question (4));

(6) it follows that, on the facts in the present case, where there are no differences in the answers to questions (3) and (4) posed by the Upper Tribunal in *Dawson's UT*, we are simply considering whether it is:

(a) the lorry driver, who had physical possession of the goods at the excise duty point; or

(b) the Appellant, who had highly circumscribed legal control of the goods at the excise duty point and no *de facto* control of the goods at that point; or

(c) Palletways, who had *de facto* control of the goods at the excise duty point through the operation of the Network,

who should be regarded as "holding" the goods at that point. In line with the approach adopted in *Dawson's UT* and *Hartleb*, only one of those persons could have been "holding" the goods at that point. It is not possible for more than one of them to be treated as doing so;

(7) we think that that exercise permits of only one answer given:

(a) the significance which the prior cases have attached to physical possession of goods in determining who is "holding" the goods at any time;

(b) the highly circumscribed nature of the Appellant's rights of legal control of the goods at the excise duty point; and

(c) the fact that the Appellant had no *de facto* control of the goods at the excise duty point and that *de facto* control of the goods at the excise duty point was enjoyed by Palletways

and that is that the Appellant was not "holding" the goods at the excise duty point. Instead, the "holder" of the goods at that point was either the lorry driver, who was the person in physical possession of the goods at that point, or Palletways, who was the person with *de facto* control of the goods at that point;

(8) in reaching that conclusion, we should observe that the level of control of the goods which the Appellant was able to exercise at the excise duty point was very much lower than the level of control of the goods which the appellant in *Hartleb* was able to exercise through her employee at the excise duty point in that case. In this case, not only did the Appellant have no *de facto* control of the goods but the rights of legal control of the goods which it enjoyed were effectively valueless. As such, the facts in this case are readily distinguishable from the facts in *Hartleb*; and

(9) finally, we express no concluded view on whether, on the facts in this case, it is the lorry driver or Palletways who should be treated as "holding" the goods at the excise duty point. That is not a question which we need to address. We say only that either the lorry driver or Palletways is more aptly to be described as "holding" the goods at that point than is the Appellant.

**"Making the delivery"**

32. As for the question of whether the Appellant should be regarded as "making the delivery" of the alcohol at the excise duty point, the Upper Tribunal in *Hartleb*:

(1) noted that:

(a) there is no legislative definition of the term "making the delivery" for the purposes of the Directive and the Regulations and there is little authority on the meaning of the term;

(b) in line with the approach which it considered to be correct in relation to the meaning of "holding", the words "making the delivery" should be interpreted in accordance with their normal meaning unless that interpretation is contradicted by the purpose of the provision or by general principles of law and should be interpreted in context; and

(c) to its knowledge, the meaning of the term had not been considered juridically. Although there was a suggestion in the Advocate General's opinion in *WR* at paragraph [43] that physical possession was necessary in order to be "making the delivery", the Advocate General had not elaborated on this and the CJEU's decision in *WR* was focused solely on the question of "holding";

(2) went on to say as follows:

> "111. We would expect the determination of whether someone is "making the delivery" of excise goods to follow a similar approach to the determination of whether a person is "holding" excise goods. Regs. 13(2)(a), (b) and (c) are, in effect, tracking the physical movement of goods from leaving a duty suspension arrangement to being in the possession of the end user and are sequential.
>
> 112. Given the Excise Directive's focus on the physical location of the excise goods we would, therefore, expect physical possession of the excise goods to form an important part of the determination of whether a person is "making delivery of" those goods although, as with "holding", for physical possession to not be definitive."

33. The above suggests that the absence of physical possession, whilst not being definitive, is a significant factor in reaching the conclusion that the person in question is not "making the delivery" in any particular case.

34. Turning to the facts in this case, we think that, for essentially the same reasons as we have set out in paragraph 31 above in relation to the question of "holding", the Appellant, in addition to not "holding" the relevant goods, was also not "making the delivery" of them at the excise duty point. If the goods had reached the Hub in the UK from where the Appellant was obliged to collect them, then the Appellant would no doubt have been "making the delivery" of the goods after it collected them from that Hub and removed them to its warehouse for collection by the customer. However, that moment, which never arrived in this case, would have been well beyond the excise duty point. As at the excise duty point, the goods in question were being carried by a Member who was unknown to the Appellant and whose route to the UK and time of entry into the UK were similarly unknown to the Appellant. We therefore struggle to see how the Appellant could be said to have been "making the delivery" of the goods at the excise duty point.

## Conclusion

35. For the reasons set out above, we have concluded that the Appellant was neither "holding" the alcohol nor "making the delivery" of the alcohol at the time when the alcohol reached the UK and the excise duty point arose. That, taken together with the fact that the alcohol was never delivered to the Appellant, as we have already observed in paragraph 18 above, means that the Appellant does not fall within any of the categories set out in Article 33(3) of the Directive and Regulation 13(2) of the Regulations. Consequently, it is not liable to the excise duty and its appeal in relation to the excise duty is upheld.

#### THE WRONGDOING PENALTY

## Introduction

36. We now turn to the second issue involved in the appeals, namely whether or not the Appellant is liable to the wrongdoing penalty.

37. The legislation relevant to this second issue is set out in Schedule 41 to the Finance Act 2008 ("Schedule 41").

38. Paragraph 4(1) of Schedule 41 provides that a penalty is payable by a person (P) where:

(1) after the excise duty point for any goods which are chargeable with excise duty, P acquires possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods, and

(2) at the time when P acquires possession of the goods or is so concerned, a payment of duty on the goods is outstanding and has not been deferred.

39. It can be seen that liability for the penalty does not depend on whether P falls within any of the three categories of person set out in Article 33(3) of the Directive or Regulation 13(2) of the Regulations. Thus, curiously, it is not necessary for P to be liable to the excise duty in question in order to be liable to the wrongdoing penalty in respect of that duty. Instead, it is merely necessary for P to acquire possession of the goods or be concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods.

40. Paragraphs 5 and 6B of Schedule 41 then specify that the amount of the penalty is to be determined by reference to whether P's acquisition of possession of the goods, or P's being concerned in dealing with the goods, was:

(1) "deliberate and concealed", in which case the penalty is 100% of the duty in question,

(2) "deliberate but not concealed", in which case the penalty is 70% of the duty in question; or

(3) neither of the above, in which case the penalty is 30% of the duty in question.

41. Paragraphs 12 and 13 of Schedule 41 then provide for a reduction in the penalty to be made by reference to:

(1) the type of disclosure which P has made to the Respondents;

(2) whether or not that disclosure was "prompted" or "unprompted"; and

(3) the quality of the disclosure.

42. As regards the types of disclosure, paragraph 12(2) of Schedule 41 refers to three different types of disclosure as follows:

(1) telling the Respondents about the act or failure ("telling");

(2) giving the Respondents reasonable help in quantifying the duty unpaid by reason of it ("helping"); and

(3) allowing the Respondents access to records for the purpose of checking how much duty is so unpaid ("giving").

43. As regards whether or not the disclosure was "prompted" or "unprompted", paragraph 12(3) of Schedule 41 provides that a disclosure of an act or failure is "unprompted" if it is made at a time when the person making it has no reason to believe that the Respondents have discovered or are about to discover the relevant act or failure and, otherwise, is "prompted".

44. As regards the quality of disclosure, paragraph 12(4) of Schedule 41 provides that, in relation to disclosure, "quality" includes timing, nature and extent.

45. Paragraph 13 of Schedule 41 specifies the amount of the reduction which is to be made by reference to the matters described in paragraphs 42 to 44 above. In the case of a

deliberate but not concealed act or failure, where the standard penalty for a prompted disclosure is 70% of the unpaid duty in question, the penalty can be reduced to 35% of the unpaid duty depending on the quality of the disclosure. In the case of a non-deliberate act or failure, where the standard penalty for a prompted disclosure is 30% of the unpaid duty in question, the penalty can be reduced to 20% of the unpaid duty depending on the quality of the disclosure.

46. Although it is not set out in Schedule 41, the Respondents' practice is to calculate the reduction in the penalty for the quality of disclosure by allocating a maximum of 30% of the potential reduction for "telling", a maximum of 40% of the potential reduction for "helping" and a maximum of 30% of the potential reduction for "giving".

47. Paragraph 14 of Schedule 41 provides that the Respondents may reduce the penalty if they consider that "special circumstances" apply.

48. Paragraphs 16 to 19 of Schedule 41 provide that:

(1) an assessment to a wrongdoing penalty is to be treated for procedural purposes in the same way as an assessment to tax;

(2) an appeal against a wrongdoing penalty is to be treated in the same way as an appeal against an assessment to the tax concerned; and

(3) on appeal against the Respondents' decision to assess a wrongdoing penalty, the FTT may affirm or cancel that decision and, on an appeal against the quantum of a wrongdoing penalty, the FTT may affirm the Respondents' decision or substitute for that decision another decision that the Respondents had the power to make.

49. Paragraph 20 of Schedule 41 provides that no liability to a penalty arises in relation to a non-deliberate act or failure if P is able to satisfy the Respondents or, on appeal, the FTT that there is a reasonable excuse for the act or failure.

**Discussion**

***The position of the parties***

50. We now turn to address the assessment to the wrongdoing penalty in the light of the legislation described above.

51. In the present case:

(1) Officer Henderson concluded that:

(a) the Appellant was "concerned in carrying, removing, depositing, keeping or otherwise dealing with the [alcohol]" so that paragraph 4 of Schedule 41 was engaged;

(b) there were no "special circumstances" for the purposes of paragraph 14 of Schedule 41;

(c) the Appellant did not have a reasonable excuse for its act or failure for the purposes of paragraph 20 of Schedule 41; and

(d) the penalty was therefore required to be calculated in accordance with the remaining terms of the schedule.

The Respondents' position as regards each of the above points remains unchanged;

(2) in her original calculation of the penalty, Officer Henderson considered the Appellant's act or failure to be deliberate but not concealed – with a maximum of 70% and a minimum of 35% - and applied a total reduction of 70% of the difference

between the maximum and minimum penalty figures for the quality of the Appellant's disclosure. She awarded the maximum reduction for each of "helping" and "giving" and nothing for "telling". The penalty was therefore 35% plus 30% of 35% - ie 45.5% - of the excise duty;

(3) on review, Officer Noble increased the total reduction for the quality of the Appellant's disclosure to 85% because he considered that the Appellant should be given a reduction of 15% - which is to say half of the reduction available under the Respondents' practice - for "telling". The penalty was therefore reduced to 35% plus 15% of 35% - ie 40.25% - of the excise duty; and

(4) on 24 January 2024, shortly before the hearing, Officer Henderson concluded that the Appellant's act or failure was no longer deliberate but not concealed and was instead non-deliberate – with a maximum of 30% and a minimum of 20%. However, she applied no reduction for the quality of the Appellant's disclosure. The penalty was therefore reduced to 30% of the excise duty. At the hearing, Mr Holt was unable to explain to us why, in reducing the penalty by reference to the change in the basis of the penalty from concealed but not deliberate to non-deliberate, Officer Henderson had removed in its entirety the reduction for the quality of the Appellant's disclosure.

52. The Appellant accepts that paragraph 4 of Schedule 41 is engaged because of the extensive scope of the language used in that paragraph. We agree. Even though the Appellant's involvement with the goods in this case was somewhat peripheral, its role in the transaction was sufficient to mean that it was "otherwise dealing with the goods". The Appellant also accepts that there are no "special circumstances" for the purposes of paragraph 14 of Schedule 41 and we agree with that conclusion as well. "Special circumstances" are not defined in paragraph 14 of Schedule 41 but the House of Lords has determined that, in order for circumstances to be "special", they must be "exceptional, abnormal or unusual" (see *Crabtree v Hinchcliffe* [1971] 3 All ER 967) and we do not think that the circumstances of this case fall within that description. However, the Appellant says that it should be relieved from the wrongdoing penalty pursuant to the application of paragraph 20 of Schedule 41 because its act or failure was not deliberate and it had a reasonable excuse for the act or failure.

***Preliminary point***

53. Before we address that question, we need first to deal with a preliminary matter which is the fact that the Respondents have twice reduced their original assessment to the penalty instead of cancelling the previous penalty and issuing a new assessment. This occurred once as a result of the review and then again shortly before the hearing.

54. We consider that it is clear that the reduction made to the penalty as a result of the review falls within the Respondents' powers under the legislation because:

(1) paragraph 16(3) of Schedule 41 provides that an assessment to a wrongdoing penalty is to be treated for procedural purposes in the same way as an assessment to tax; and

(2) the provisions dealing with assessments to excise duties in the Finance Act 1994 (the "FA 1994") empower the Respondents to vary an assessment on review – see Section 15F(5) of the FA 1994.

55. It is less clear that the Respondents are empowered by the legislation to reduce an assessment to a wrongdoing penalty after the review has been concluded and the Appellant has notified its appeal against the review conclusion to the FTT. The Respondents submit that Section 12(3) of the FA 1994 is authority for that proposition because it stipulates that an

amount assessed as due and notified under Section 12 of the FA 1994 shall, subject to any appeal, be deemed to be the amount of the duty due and may be recovered accordingly "unless, or except to the extent that, the assessment has subsequently been withdrawn or reduced". The Respondents say that the reference in that section to a reduced assessment means that the Respondents may reduce the assessment at any time. That may be so but it is not entirely clear to us that a mere reference in the legislation to a reduced assessment as an exception to the rule that the amount shown in the original assessment is to be deemed to be the amount due is sufficient to empower the Respondents to reduce an assessment at any time without express authority to do so in the legislation. We would have expected a power of that nature to have been set out expressly in the legislation. As it stands, the reference in that section to a reduced assessment seems more likely to us to be referring to the power of the Respondents to reduce the amount assessed on review pursuant to Section 15F(5) of the FA 1994, as mentioned in paragraph 54 above. However, this question is of little moment in the present context because, even if we are confined in this decision to considering the penalty following its reduction on review and not the penalty as subsequently reduced on 24 January 2024, we consider that, for the reasons set out in paragraphs 68 to 71 below, we are entitled by paragraph 19 of Schedule 41 to substitute for the Respondents' decision another decision which the Respondents had the power to make. Accordingly, we can consider the penalty position *ab initio* for ourselves.

***Reasonable excuse***

56. The Appellant submits that it is entitled to be relieved from the wrongdoing penalty because its act or failure was not deliberate and it has a reasonable excuse for the act or failure. The Appellant says that it was innocent of any wrongdoing in accepting the order and lacked any actual or constructive knowledge of the smuggling. It says that it was told by Mr Patel that the pallets in question contained soft drinks and it had no reason to disbelieve him. It accepts that, in retrospect, it should have carried out some due diligence on Mr Patel and Hi Line Cash and Carry before accepting and processing the order but it says that that was an innocent mistake and that there were no grounds for suspecting that the transaction would involve smuggled goods.

57. In making that submission, the Appellant relies on the similarities between the facts in the present case and the facts in *Perfect v The Commissioners for Her Majesty's Revenue and Customs* [2017] UKUT 476 (TCC) ("*Perfect UT*") – see *Perfect UT* at paragraphs [69] to [72]. In that case, Mr Perfect was a self-employed lorry driver who was found to be carrying pallets of beer on which excise duty was due but had not been paid when he arrived at Dover Docks. The FTT in that case - *Perfect v The Commissioners for Her Majesty's Revenue and Customs* [2015] UKFTT 639 (TC) ("*Perfect FTT*") - had made a finding of fact to the effect that Mr Perfect was an innocent agent who lacked actual or constructive knowledge of the fact that the goods that he was carrying were liable to the duty which had not been paid. The FTT's findings of fact in *Perfect FTT* are set out in greater detail in paragraphs [42] to [54] of that decision. Crucially in terms of this decision, the FTT in *Perfect FTT* found that Mr Perfect was in possession of a CMR and delivery note that accurately described the cargo of beer which he was carrying and the destination. What he did not know, and had no means of knowing, was that the unique Administrative Reference Code (or "ARC") number on the CMR related to an earlier consignment of beer and so had been used previously. That meant that the documentation he was carrying was not valid but he had no means of discovering this.

58. The Upper Tribunal's decision in relation to reasonable excuse in *Perfect UT* was upheld by the Court of Appeal in *Perfect v The Commissioners for Her Majesty's Revenue and Customs v Perfect* [2019] EWCA Civ 465 ("*Perfect CA1*") in the following terms:

"[73]… In our view, the decision of the Upper Tribunal was plainly correct. The facts as found by the FtT included:

(1) that Mr Perfect had no interest of his own in the goods, was not part of any conspiracy, and had simply followed instructions;

(2) that the only information that he had was to be found in the documentation he collected when he picked up the goods;

(3) the documentation appeared to be consistent with the movement of goods subject to a valid duty-suspended arrangement; and

(4) Mr Perfect had no means of checking whether the ARC on the documentation had been used or not.

In our judgment, those facts as found by the FtT entitled the Upper Tribunal to conclude that Mr Perfect was an innocent agent. In the light of those findings, the Upper Tribunal was plainly entitled to conclude that his action in bringing into this country goods on which duty had not been paid was plainly not 'deliberate' within the meaning of para 20 of Sch 41 to the 2008 Act and, furthermore, was plainly capable of giving rise to a reasonable excuse under that paragraph.

[74] HMRC's appeal against the Upper Tribunal's decision to set aside the penalty imposed under Sch 41 para 4(1) is therefore refused."

59. Mr Glover invited us to follow the reasoning adopted by the Upper Tribunal in *Perfect UT* and the Court of Appeal in *Perfect CA1* to conclude that the Appellant in this case had a reasonable excuse for its act or failure.

60. In response, Mr Holt accepted that the Appellant's act or failure was not deliberate but said that the Appellant did not have a reasonable excuse for that act or failure. Although the Respondents accepted that the Appellant did not know of the smuggling and had no reason to be suspicious, so that the Appellant lacked actual or constructive knowledge of the smuggling, it had not acted reasonably because it had failed to carry out any investigation into Mr Patel and Hi Line Cash and Carry before accepting and processing the order. In particular, he pointed out that both Mr Phipps and Mr Baldock had conceded that they should have conducted some due diligence before accepting and processing the order and that Mr Phipps had confirmed that he was aware that there were obligations in the Operating Manual as regards the acceptance of orders from Unknown Shippers with which the Appellant had not complied.

61. We agree with both parties that the act or failure by the Appellant in this case was not deliberate.

62. Turning then to the question of whether the Appellant had a reasonable excuse for its act or failure, the case law in relation to reasonable excuse shows that the test to be applied in determining whether or not an excuse is reasonable is an objective one. One must ask oneself whether what the taxpayer did was a reasonable thing for a responsible person, conscious of, and intending to comply with, its obligations under the tax legislation but having the experience and other relevant attributes of the taxpayer and placed in the situation in which the taxpayer found itself at the relevant time, to do – see, for example, *The Clean Car Company Ltd v The Commissioners of Customs & Excise* [1991] VATTR 234.

63. We have given this question considerable thought and, although we are very sympathetic to the Appellant's predicament in this case, we have concluded that it has not met the standard described above. Our starting point is to note that, in the extract from

*Perfect CA1* set out in paragraph 58 above, the Court of Appeal did not rely exclusively on the fact that Mr Perfect had no actual or constructive knowledge that his cargo was subject to excise duty. Instead, in paragraph [73(4)] of its decision, the Court of Appeal also relied on the fact that "Mr Perfect had no means of checking whether the ARC on the documentation had been used or not."

64. The Appellant is not able to surmount the equivalent hurdle in the present appeal. If it had carried out some due diligence into Mr Patel or Hi Line Cash and Carry, it might well have discovered some irregularity which would have alerted it to a problem with the order. The evidence of Mr Baldock was that walk-in customers were a rarity in the business. He said that there was on average about one every month. Mr Patel was such a customer. Moreover, Mr Patel had never placed an order with the Appellant before. In addition, Mr Phipps knew, and Mr Baldock should have known, of the obligations which Palletways had placed upon its Members when it came to Unknown Shippers. All of this should have led a responsible person, conscious of, and intending to comply with, its obligations under the tax legislation but having the experience and other relevant attributes of the Appellant and placed in the situation in which the Appellant found itself at the relevant time to make some further enquiries into Mr Patel and Hi Line Cash and Carry.

65. We accept that the events in question were occurring during the pandemic when staffing levels were low and that the person who took the order from Mr Patel was a temporary member of staff. However, we do not think that these mitigating factors are quite enough to see the Appellant home on this question.

66. We have therefore concluded that the Appellant does not have a reasonable excuse for its act or failure and that a penalty is due. We have reached this conclusion with considerable regret. We think that the Appellant can justifiably consider itself to be extremely unfortunate but both Mr Phipps and Mr Baldock themselves recognised at the hearing that the Appellant had not taken all reasonable steps to avoid the circumstances which arose.

***The amount of the penalty***

67. Whilst that means that the Appellant is not entitled to have the penalty cancelled, we need to address the further question of whether we are therefore obliged simply to affirm the penalty as it stands or whether we have the jurisdiction to substitute for the amount of the penalty a different amount which the Respondents had the power to assess.

68. In that regard, we note that:

(1) in its grounds of appeal, the Appellant confined itself to appealing against the penalty as a whole on the basis of reasonable excuse and did not say expressly that, in the event that its appeal on that basis against the penalty as a whole failed, it also wished to appeal against the quantum of the penalty and

(2) as worded, the way in which paragraphs 17 and 19 of Schedule 41 is laid out appears to envisage that an appellant who has been assessed to a penalty must expressly frame its grounds of appeal in the alternative – appealing first against the penalty itself and then, in the alternative, appealing against the quantum of the penalty in the event that its appeal against the penalty fails.

We have therefore considered whether, in the absence of an express appeal against the quantum of the penalty by the Appellant, we have no option but to affirm the quantum of the penalty as it stands.

69. However, we think that that would be an overly-restrictive approach to the legislation and the facts and would not be in keeping with the overriding objective in paragraph 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules") or

our power to regulate our own procedure in paragraph 5 of the Tribunal Rules. The former paragraph requires that we deal with cases fairly and justly and the latter paragraph gives us wide powers of case management. We think that it is implicit in the grounds of appeal in this case that the Appellant is objecting not just to the penalty itself but also, in the event that we affirm the decision to assess a penalty, to the amount of the penalty.

70. Moreover, there is no unfairness to the Respondents in our adopting this approach and treating the quantum of the penalty as a question which we are required to address because the Respondents clearly understood before the hearing that quantum was a matter which we were going to address. We say that because:

(1) in paragraph [9] of their skeleton argument for the hearing, they invited us to exercise our power under paragraph 19(2) of Schedule 41 to reduce the penalty in the event that we did not think that they were entitled to reduce the penalty shortly before the hearing – as to which, see paragraph 55 above; and

(2) at the hearing, both Officer Henderson and Mr Holt took steps to explain the basis on which Officer Henderson had calculated the amount of the penalty and that would have been unnecessary if they had believed that the quantum of the penalty was not in issue.

71. In short, at no point in these proceedings have the Respondents indicated that, in their view, the quantum of the penalty is not a matter which we can address. We therefore consider that, in accordance with paragraphs 2 and 5 of the Tribunal Rules, we should treat the Appellant's appeal in respect of the penalty in this case as encompassing both an appeal against the penalty itself and an appeal against the quantum of the penalty, with the result that, pursuant to paragraphs 17(2) and 19(2) of Schedule 41, we have the jurisdiction to consider the quantum of the penalty and to substitute for the Respondents' decision another decision that the Respondents had the power to make.

72. In addressing that issue:

(1) we agree with the Respondents that the act or failure in this case was not deliberate and that the Appellant has made a prompted disclosure; and

(2) as for the quality of that disclosure, we believe that, once the Appellant realised that the communications it was receiving from the Respondents were not part of a scam, the Appellant was as co-operative as it could possibly have been in relation to this matter.

### Conclusion

73. As such, we think that the maximum reduction for quality of disclosure should be awarded, with the result that the penalty should be reduced to the legislative minimum of 20% of the excise duty in question, which is £7,235.20.

## DISPOSITION

74. In summary:

(1) the Appellant's appeal against the excise duty is upheld; and

(2) as regards the Appellant's appeal against the penalty, we hereby affirm that a penalty is due but substitute for the penalty assessed by the Respondents a penalty of £7,235.20.

## CONCLUSION

75. Finally, we believe that we would be remiss if we were not to make some observations about the Respondents' conduct in this matter. In our view, from the outset, that has not met

the standards which taxpayers are entitled to expect in relation to dealings with their tax affairs.

76. Officer Henderson's initial enquiry letter of 26 March 2021 contained a number of egregious errors, as outlined in paragraph 2(12) above. One of those errors - the fact that an incorrect email address was set out on the top of the letter - meant that the Appellant's emails to Officer Henderson never arrived. Moreover, that incorrect email address had not been corrected when Officer Henderson wrote to the Appellant on 24 January 2024, even though Officer Henderson had been made aware of the mistake a long time before and had previously apologised for it. We do not understand why that was the case.

77. Equally surprising to us is the manner in which the Respondents have dealt with the reduction in the penalty for the quality of disclosure. Officer Henderson initially determined that the quality of the Appellant's disclosure merited a reduction in the penalty which was equal to 70% of the difference between the maximum and minimum penalty figures. That conclusion was adjudged by Officer Noble on review to be too harsh, with the result that the reduction was increased to 85% of the difference between the maximum and minimum penalty figures. However, when Officer Henderson reduced the penalty on 24 January 2024 to take into account the change in the status of the penalty from deliberate but not concealed to non-deliberate, she awarded no reduction whatsoever for the quality of disclosure. Moreover, there was no way that the Appellant or its representative could have realised from the information that was sent to them by Officer Henderson on that date that that was the case.

78. We do not understand why the conclusions reached by Officer Henderson and Officer Noble in relation to the quality of disclosure at the time when they considered that the Appellant's act or failure was deliberate but not concealed should not have stood when Officer Henderson subsequently concluded that the act or failure was non-deliberate. As we have said in paragraph 51(4) above, Mr Holt was unable to shed any light on this at the hearing. It seems to us that, at the very least, the revised penalty on 24 January 2024 should have reflected that discount and should therefore have been 21.5% and not 30% of the excise duty in question - 20% plus 15% of the 10% difference between the maximum and minimum penalty figures - to take account of the 85% reduction which the Respondents had previously agreed to be due for the quality of disclosure.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

79. 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 Rules. 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.

**TONY BEARE**
**TRIBUNAL JUDGE**

**Release Date: 20th FBRUARY 2024**