[2020] UKUT 0211 (TCC)

Appeal number: UT/2019/0035

EXCISE DUTY – failure to provide necessary documentation for movement of tankers containing alcohol under duty suspension rules – wrongdoing penalties raised against person arranging the movement – whether penalties properly imposed –interpretation and scope of relevant regulations - whether reasonable excuse – appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

PALTANK LIMITED **Appellant**

- and -

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

TRIBUNAL: MR JUSTICE MANN
JUDGE THOMAS SCOTT

Sitting in public at The Rolls Building, Fetter Lane, London on 26 February 2020

Hammad Baig, instructed by M&R Tax Advisers, for the Appellant

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

DECISION

Introduction

1. Paltank Limited ("Paltank") appeals against the decision of the First-tier Tribunal (the "FTT") reported at [2018] UKFTT 668 (TC). In that decision, the FTT dismissed Paltank's appeal against wrongdoing penalties imposed by HMRC under Schedule 41 of the Finance Act 2008. Paltank is a company which provides logistical support services to the alcohol industry, including in relation to the bulk movement of alcohol by tanker. Various such movements took place in April 2013 in 9 tankers (the "Tankers") purportedly under a duty suspension arrangement but without the documentation required by the legislation. HMRC imposed penalties on Paltank and its registered consignor, Dartswift International Limited ("Dartswift") for certain of those breaches. Both Paltank and Dartswift appealed to the FTT against the penalties. This appeal relates only to the FTT's decision concerning the penalties imposed on Paltank.

Background

2. As we discuss below, the legislation makes provision (contained in regulations) for a regime under which the liability to excise duty which would otherwise arise on the importation of dutiable goods such as alcohol may be suspended (a "duty suspension arrangement"). An excise duty point then arises and duty becomes payable when the excise goods are "released for consumption" in the UK. Various conditions are imposed on the ability to import goods to the UK under a duty suspension arrangement. A movement of goods can take place under a duty suspension arrangement only if it takes place "under cover of an electronic administrative document". Once the necessary electronic administrative document is raised, the goods must be entered into a system called the Electronic Movement Control System or EMCS in order to benefit from a duty suspension arrangement. Where an excise duty point arises and duty is outstanding, a penalty (called a "wrongdoing penalty") is payable by any person who acquires possession of the dutiable goods "or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods".

3. The following is a brief summary of the facts found by the FTT relevant to this appeal:

(1) In April 2013 Dartswift was instructed by Paltank to deal with the procedures and formalities involved in importing the Tankers into the UK and placing them under a duty suspension arrangement so that Paltank could deliver them under duty suspense to a bonded warehouse.

(2) Dartswift did not enter the Tankers onto ECMS as required and hence no electronic administrative documents were issued as required.

(3) Paltank moved the Tankers to their respective destinations where the relevant warehouse-keepers realised that the Tankers were not in fact in duty suspense, and arranged for the necessary duty to be paid.

(4) HMRC determined that each of Paltank and Dartswift was liable to a wrongdoing penalty. The penalties were raised and upheld by HMRC following an internal review. The penalty against Paltank was reduced on the grounds that Paltank's conduct was non-deliberate.

The FTT decision

4. The originally listed hearing before the FTT was adjourned in order to enable both appellants to amend their grounds of appeal. While the FTT appears to have allowed Paltank to raise other arguments during the hearing (including that the penalties were out of time), Paltank's amended grounds of appeal were as follows:

(1) HMRC's decision to raise the penalty was unreasonable and disproportionate. As an aspect of this ground, the relevant HMRC officer gave an assurance that she would not charge any penalty and HMRC should be estopped from resiling from that assurance.

(2) Paltank had a reasonable excuse for the relevant act or failure.

(3) Any wrongdoing on the part of Paltank was committed not by a director of Paltank but by an employee acting beyond the control of management.

(4) Paltank acted promptly and informed HMRC after the error was discovered.

(5) Paltank took reasonable care in instructing Dartswift and ought not to be penalised for errors or omissions of Dartswift. Paltank relied on certain emails between itself and Dartswift in this respect and in relation to ground (3).

5. We return below to the FTT's detailed findings in so far as they are relevant to this appeal, but in short the FTT rejected each of Paltank's grounds of appeal and upheld the penalties.

The appeal

6. The Upper Tribunal granted Paltank permission to appeal against the FTT decision on six grounds. One ground was withdrawn at the start of the hearing leaving five remaining grounds as follows:

(1) **Ground 1** The FTT erred in interpreting the relevant regulations as requiring that the necessary documentation must accompany the goods from the start of the movement of those goods.

(2) **Ground 2** Alternatively, if the FTT correctly interpreted the regulations it erred in not concluding that under the penalty provisions the responsibility for providing the necessary documentation lay not with Paltank but with Dartswift or the hauliers.

(3) **Ground 3** In relation to the emails exchanged between Dartswift and Paltank, the FTT reached a conclusion that no reasonable tribunal could have reached and thus erred in law.

(4) **Ground 4** The FTT erred in law in concluding that the penalty decisions were not out of time.

(5) **Ground 5** The FTT erred in concluding that Paltank did not have a reasonable excuse for the relevant act or failure.

7. HMRC rightly identified in their respondents' notice and skeleton argument that Grounds 1 and 2 appeared to be new arguments which were not pursued before the FTT. The fact that permission to appeal has been granted in respect of a ground does not mean that it is necessarily appropriate for this tribunal to consider it in reaching its decision, particularly where it may raise mixed questions of law and fact. However, at the start of the hearing Mr Charles (in our view generously) withdrew HMRC's objections on this issue, and confirmed that HMRC no longer took this point in relation to Grounds 1 and 2, which we have therefore considered in full.

Relevant legislation

8. The Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (the "Regulations") make provision for a regime under which the normal liability for excise duty may be suspended. Regulation 5 states that there is an excise duty point (with the result that excise duty becomes payable) "when excise goods are released for consumption in the United Kingdom". Regulation 6 specifies as follows:

> 6(1) Excise goods are released for consumption in the United Kingdom at the time when the goods —
>
> (a) leave a duty suspension arrangement;
>
> (b) are held outside a duty suspension arrangement and UK excise duty on those goods has not been paid, relieved, remitted or deferred under a duty deferment arrangement;
>
> (c) are produced outside a duty suspension arrangement; or
>
> (d) are charged with duty at importation unless they are placed, immediately upon importation, under a duty suspension arrangement

9. Regulation 7(1) states that:

> 7(1) For the purposes of regulation 6(1)(a), excise goods leave a duty suspension arrangement at the earlier of the time when —
>
> … (g) they leave a place of importation in the United Kingdom unless—
>
> (i) they are dispatched to one of the destinations referred to in regulation 35(1)(a)…

10. Regulation 35(1)(a) provides that:

> Excise goods of a certain class or description may only be imported into or exported from the United Kingdom under duty suspension arrangements if they are—
>
> (a) dispatched from a tax warehouse to—

(i) another tax warehouse approved in relation to excise goods of that class or description;

(ii) a registered consignee who has been registered in relation to excise goods of that class or description;

(iii) a place from where they will leave the territory of the EU;

(iv) an exempt consignee where the goods are dispatched from the United Kingdom to another Member State or are dispatched from another Member State to the United Kingdom.

11. Regulation 57, which is the subject of Ground 1 of this appeal, provides that a movement of excise goods takes place under a duty suspension arrangement only if it takes place under cover of an electronic administrative document (defined in Regulation 3(1) as the document referred to in Article 21(2) of Council Directive 2008/118/EC) :

57(1) Subject to regulation 60, a movement of excise goods to which this Part applies must take place under cover of an electronic administrative document.

(2) Before the excise goods are dispatched, the consignor must complete a draft electronic administrative document that complies with the EU requirements and send it to the Commissioners using the computerised system.

(3) The Commissioners must carry out an electronic verification of the data in the draft electronic administrative document.

(4) Where the data in the document are invalid, the Commissioners must, using the computerised system, inform the consignor of that fact without delay.

(5) Where the data in the document are valid, the Commissioners must assign to the document a unique administrative reference code and, using the computerised system, inform the consignor of that code.

(6) If the excise goods are dispatched to a tax warehouse the Commissioners must, using the computerised system, send the electronic administrative document to the authorised warehousekeeper of that warehouse.

(7) The consignor of the excise goods must provide the person accompanying the goods during the course of the movement with —

(a) a printed version of the electronic administrative document; or

(b) any other commercial document on which the unique administrative reference code is clearly stated.

(8) Whilst the goods remain in the custody or under the control of the person accompanying the goods, that person must, upon request, produce or cause to be produced to the Commissioners one of the documents referred to in paragraph (7)

12. The remaining grounds of appeal primarily concern the penalty provisions. Penalties in respect of "certain VAT and excise wrongdoing" are imposed by

Schedule 41 of the Finance Act 2008 ("Schedule 41"). Paragraph 4(1) of Schedule 41 states:

> (1) A penalty is payable by a person (P) where—
>
> (a) after the excise duty point for any goods which are chargeable with a duty of excise, P acquires possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods, and
>
> (b) 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.

13. Paragraphs 5 to 6 provide for different percentages of penalty charge depending on whether the act or failure penalised is "deliberate and concealed", "deliberate but not concealed", or neither. The penalty is a percentage of the "potential lost revenue", which in the situation of this appeal is defined by paragraph 7(10) as "the amount of any tax which is unpaid by reason of the failure". Paragraphs 12 and 13 set out a mechanism by which the quantum of a penalty is reduced by reference to the conduct of the person liable. Paragraph 16(1) provides that where a person becomes liable for a penalty, HMRC "shall assess the penalty".

14. The time limits for assessing a penalty are set out in paragraph 16(4) as follows:

> (4) An assessment of a penalty under any of paragraphs 1 to 4 must be made before the end of the period of 12 months beginning with—
>
> (a) the end of the appeal period for the assessment of tax unpaid by reason of the relevant act or failure in respect of which the penalty is imposed, or
>
> (b) if there is no such assessment, the date on which the amount of tax unpaid by reason of the relevant act or failure is ascertained.

15. The defence of reasonable excuse for a non-deliberate act or failure is set out in paragraph 20 as follows:

> (1) Liability to a penalty under any of paragraphs 1, 2, 3(1) and 4 does not arise in relation to an act or failure which is not deliberate if P satisfies HMRC or (on an appeal notified to the tribunal) the tribunal that there is a reasonable excuse for the act or failure.
>
> (2) For the purposes of sub-paragraph (1)—
>
> (a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,
>
> (b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the relevant act or failure, and
>
> (c) where P had a reasonable excuse for the relevant act or failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the relevant act or failure is remedied without unreasonable delay after the excuse ceased.

Ground 1

16. Regulation 57(1) stipulates that a relevant movement of excise goods must take place "under cover" of an electronic administrative document ("EAD"). Regulation 57(7) provides that the consignor of the excise goods (in this case Dartswift) must provide the person accompanying the goods during the course of the movement (Paltank) with either a copy of the EAD or another commercial document on which the Unique Administrative Reference Code ("ARC") is clearly stated.

17. At [195] of the decision, the FTT set out its view in relation to the application of these provisions as follows:

> PalTank's involvement related to the physical movement of the goods. We accepted that the goods were shown as cleared on Destin8 [a database which shares information between users of a port] which was accessed by the hauliers. However we found that PalTank was well aware that the goods should not be moved until an e-AD or ARC was raised. The evidence we heard indicated that PalTank were content to allow goods to be moved without an ARC or e-AD as they had, in the past, received the relevant document at some point during the course of the movement. In the circumstances of this appeal we were wholly satisfied that PalTank had arranged for the goods to be moved and allowed movement of the goods at a time in respect of each consignment when it knew it had not received an e-AD or ARC. The goods were therefore moved at a point where on any view an excise duty point had arisen. The lack of any system in place to ensure that goods were not moved until the relevant documents were produced rested with PalTank and not the hauliers. We considered Mr Baig's submission that there was a genuine belief that an ARC would be generated during the course of the movement which, he contended, would satisfy the legislation. We did not accept this submission…

18. Ground 1 of Paltank's appeal asserts that the FTT erred in law in determining that Regulation 57 requires that the specified documentation must accompany the movement of the goods from the start of the movement. It submits that "while it is agreed that the movement must always take place under the shadow of the requisite documents the physical act of providing those documents to one who will accompany the goods can take place at any point during the course of the movement". The legislature had in mind in the words "during the course of the movement" in Regulation 57(7) the realities of international trade and the fast paced environment of modern ports, and intended that that those words should mean "at any point between the start and end of the movement".

19. The FTT specifically rejected this interpretation at [196], stating that on their reading of the Regulation, the relevant documents must accompany the entire movement, "and we did not accept that the movement could be viewed in parts to the extent that the required documents need only be generated at some point in the movement".

20. If it were necessary for our decision, as a matter of statutory construction we would agree with the FTT's interpretation. A movement has to take place "under

cover" of a document, so there has to be one. As a matter of language, a movement does not necessarily "take place" under cover of a document when that document is only available after the movement has begun; rather, it is completed under such cover. The wording "during the course of the movement" in Regulation 57(7), given its location in that subsection, in fact reads most naturally as relating not to the obligation to provide the document but to the person accompanying the goods. In any event, it does not say "before completion of the movement". So, we agree with the FTT's interpretation. That reading is also supported by a purposive construction since the intention of the code is to reduce the risk of loss of tax on moving duty unpaid goods.

21. However, the point is moot in this appeal. Paltank conceded before the FTT that it had breached Regulation 57. The FTT recorded at [188]:

> It was common ground that to be moved under duty suspension there was a requirement for the goods to have been entered into the EMCS and for a movement guarantee to be in place for the goods to be guaranteed from the port of entry to the tax warehouse. It was accepted by the parties and we find that neither requirement was fulfilled.

22. It is not relevant for the purposes of Ground 1 whether, contrary to our view, Paltank is correct in its interpretation of Regulation 57(7), because, as Mr Baig confirmed to us, the documents required by Regulation 57(7) were not in fact provided either at the start of the movement or during it. Doubtless that is why it was common ground before the FTT that the movement of the Tankers did not take place under duty suspense.

23. In support of its argument, Paltank argued that the FTT failed to take account of evidence that historically Dartswift had provided Paltank with an EAD only after the movement of goods in duty suspense had started. We agree with HMRC that that is irrelevant to the proper construction of the Regulation.

24. Paltank also argued in relation to Ground 1 (we assume in the alternative) that it was not a person responsible, or at least primarily responsible, for the breach of Regulation 57. While that argument may be relevant to its grounds of appeal relating to the penalty provisions, it has no relevance to Regulation 57.

25. The appeal on Ground 1 is dismissed.

Ground 2

26. Ground 2 asserts that the FTT erred in finding that the penalty provisions could apply to Paltank at all, because it was not a person who "acquires possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods" within paragraph 4(1) of Schedule 41.

27. Mr Baig argued in support of this ground that Schedule 41 must be interpreted through the lens of Regulation 57, and that since Paltank was neither the consignor nor the person accompanying the goods within Regulation 57(7), it should not be caught by paragraph 4(1) of Schedule 41. Paragraph 4(1) "read along with"

Regulation 57(7) is confined to persons who *physically* accompany the goods or physically move them. The penalty ought to have been levied against the hauliers and Dartswift and not Paltank.

28. Before the FTT, Paltank's submissions concentrated on the argument that, because others were solely or mainly responsible for any breach, Paltank's penalty should be reduced to zero: [169]. In fact, HMRC had heavily discounted the penalty so that it was only 10% of the potential lost revenue: [7]. Ground 2 is a submission that, on a correct interpretation of Schedule 41, Paltank could not have been liable for any penalty, however heavily it was discounted.

29. We reject Paltank's arguments. Schedule 41 applies to the classes of person described in paragraph 4(1), once there has been a breach of Regulation 57. As we set out above, there was such a breach, in which event the only question is the scope of the language used in paragraph 4(1).

30. So, was Paltank a person concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods in this case? It is absolutely clear from the FTT's findings that it was. Paltank provided global logistical support services to the alcohol industry, in this case by enabling bulk liquid to be moved in the Tankers: [1]. It was Paltank which instructed Dartswift to complete customs clearance for the Tankers: [2]. It was Paltank which arranged the movement of the Tankers: [5]. It was Paltank which was contractually liable to its importers for customs clearance of the goods: [70]. Paltank's involvement "related to the physical movement of the goods": [195]. We can see no basis on the facts for concluding that Paltank was not concerned in carrying or otherwise dealing with the goods. As such, it fell squarely within paragraph 4(1) of Schedule 41.

31. In oral submissions, Mr Baig suggested, somewhat tentatively, that paragraph 4(1) should not apply to Paltank because it was akin to the "innocent agent" in *HMRC v Martyn Glen Perfect* [2019] EWCA Civ 465. We discuss below in relation to Ground 5 the submission that Paltank was in such a position, but the concept has no bearing in our view on the construction of paragraph 4(1).

32. The appeal on Ground 2 is dismissed.

Ground 3

33. By Ground 3, Paltank argues that the FTT's conclusions in relation to certain emails exchanged between Dartswift and Paltank were perverse and therefore an error of law. It was not reasonable to conclude, as the FTT did, that the emails should have alerted Paltank to a problem with the excise duty documentation. In particular, the email of 9 April 2013 was clear that Dartswift had no issues with its ability to produce the necessary documents.

34. We take this ground to be a challenge to the FTT's findings of fact falling within the scope of *Edwards v Bairstow* [1956] AC 14 as amounting to an error of law.

35. We encountered some difficulty in pinning down Mr Baig as to which aspect of the FTT's reasoning any such error would vitiate. He told us that it was relevant both to whether Paltank had a reasonable excuse (which we take to be a reference to Ground 5) and to the scope of Paragraph 4 of Schedule 41.

36. The context is that Paltank presented to the FTT numerous emails passing between Dartswift and Paltank between 2011 and 2013 as evidence demonstrating that Dartswift had either failed to alert Paltank to any problem with the documentation, or had misled it: [160]. This was one aspect of what Mr Charles described as the "cut-throat defence" put forward by each of Paltank and Dartswift, namely that the other person was 100% to blame. Paltank relies heavily in relation to Ground 3 on an email of 9 April 2013 from Dartswift to Paltank which included the statement "we have looked at the work we've been doing and we've been doing it all correctly, including having a movement guarantee of our own".

37. The FTT's conclusions in relation to the various emails were as follows, at [198]:

> We considered the emails between the parties carefully. We accepted that the emails were at best unclear and at worst misleading. However we were satisfied that even if the emails did not set out in explicit terms what the problem was, the fact remained that there clearly was a problem.

38. The numerous emails exchanged between Dartswift and Paltank relating to the provision of the necessary documentation are set out at [48] to [50] and [64] of the FTT's decision, and discussed by the FTT or commented on by witnesses at [51] to [57], [69] and [111]. Paltank's submissions in relation to the emails are set out at [160].

39. The weight to be attached to the email exchange has no relevance to the correct construction of paragraph 4(1) of Schedule 41. The email exchange is, however, capable of being of relevance to both the FTT decision to uphold the amount of the penalty, because the FTT had a full appellate jurisdiction in respect of the appeal (under paragraph 19 of Schedule 41), and to the FTT's decision that Paltank did not have a reasonable excuse for non-payment of the penalty.

40. Despite that, we consider that the decision reached by the FTT in relation to the email exchange, construed in its entirety, was comfortably within the range of decisions reasonably open to the tribunal. It would have been wrong to have considered only one sentence (from the email of 9 April 2013) from several pages of email correspondence in considering whether, as Paltank suggested, the exchange demonstrated that Paltank should not have been charged with any penalty at all because Dartswift had led it to believe that there were no problems with the excise duty documentation. The exchange of emails was only one of many factors in the FTT's decision to uphold the penalty, and its conclusions at [198] gave rise to no error of law.

41. The appeal on Ground 3 is dismissed.

Ground 4

42. By Ground 4, Paltank asserts that the penalty notifications were assessed out of time and were therefore invalid.

43. The applicable time limit is contained in paragraph 16(4) of Schedule 41, set out at paragraph [14] above. In this case, the relevant time limit is that in paragraph 16(4)(b), so that the assessment must be made within 12 months of "the date on which the amount of tax unpaid by reason of the relevant act or failure is ascertained".

44. The penalty was, as we have discussed, based on the "potential lost revenue" as a result of Paltank's breach, which in this case is defined (in paragraph 7(10) of Schedule 41) as "the amount of tax which is unpaid by reason of the failure". The failure in this case occurred in mid-April 2013, and the penalty letter was issued on 2 June 2014. Paltank argue that the start date within paragraph 16(4)(b) was mid-April 2013, with the result that the assessment was made after the 12 month limit.

45. The FTT rejected this argument at [229] to [231]. The FTT did not accept Paltank's submission that within 3 days of the wrongdoing HMRC had all the information which it needed to ascertain the amount of tax unpaid. It determined that, although HMRC had at that time been alerted to the fact that duty had gone unpaid, the details relating to the act or failure remained unknown until HMRC's fact-finding visits to Dartswift and Paltank in November 2013. The FTT found as a fact that it was only after those visits that HMRC could then "ascertain" the amount of tax unpaid. The assessments made in June 2014 were therefore in time.

46. We consider that the determination of the date specified in paragraph 16(4)(b) is a question of fact. The FTT's finding in that respect was clearly one which was reasonably open to it, so that it gave rise to no error of law, unless the FTT had misdirected itself as to the law.

47. The FTT referred to the Oxford dictionary (sic) definition of "ascertained" as "find (something) out for certain; make sure of". We take this to be drawing a contrast with something which is either in the process of being ascertained or capable of being ascertained. We do not consider that the FTT misdirected itself in law, and we agree that the 12 month time limit does not start running from the date when the tax unpaid is capable of ascertainment but from when it is ascertained. This is consistent with the interpretation of the Upper Tribunal in *General Transport SPA v HMRC* [2019] UKUT 4[1], where it stated, at paragraph 121:

> The short answer to this submission is that paragraph 16(4)(b) of Schedule 41 does not ask when the amount of duty became ascertainable. Nor does paragraph 16(4)(b) (unlike s12(4) of Finance Act 1994) set a time limit by reference to the date on which specified

[1] This issue was not dealt with in the decision of the Court of Appeal [2020] EWCA Civ 405 which upheld the Upper Tribunal decision

> facts come to HMRC's knowledge. Rather, the relevant question is when that tax became "ascertained".

48. The appeal on Ground 4 is dismissed.

Ground 5

49. Ground 5 is that Paltank had two reasonable excuses, and the FTT's failure to allow the appeal on this basis was an error of law. The first reasonable excuse was that Paltank lacked any actual or constructive knowledge that Dartswift could not issue the necessary documentation, and this put it in a similar situation to the "innocent agent" in *Martyn Glen Perfect*. The second was that the wife of Paltank's director Mr Rice was ill at all material times, and HMRC's established policy is that family illness constitutes a reasonable excuse.

50. The correct approach to determining whether a taxpayer has a reasonable excuse is set out in *Christine Perrin v HMRC* [2018] UKUT 156 (TCC). In summary, the FTT should first establish the facts which the taxpayer asserts amount to a reasonable excuse, determine which of those facts are proven, and then decide whether, viewed objectively, those facts do amount to an objectively reasonable excuse for the failure. The objective evaluation should take into account all the facts and circumstances relevant to the particular taxpayer.

51. At paragraph 17 above, we have set out the FTT's findings (at [195] of the FTT decision), not only in relation to the interpretation of the legislative requirements, but also in relation to Paltank's level of awareness and degree of responsibility in respect of those requirements. The FTT was "wholly satisfied that Paltank had arranged for the goods to be moved and allowed movement of the goods at a time in respect of each consignment when it knew it had not received an e-AD or ARC". Further, the lack of any system to ensure compliance "rested with Paltank and not the hauliers". Any belief on the part of Paltank's employees that the relevant documents were needed only at some stage during the movement of the goods was not established on the evidence and in any event could not amount to a reasonable excuse: the FTT stated at [196]:

> Even if there was such a belief we do not accept that this could amount to a reasonable excuse; if PalTank chose to run the risk of moving documents which were not under cover of the required documents it also had to accept the consequences if those documents were never produced. We accepted that some of the documents from PalTank to Dartswift highlighted that an ARC was required; we found that this did not assist PalTank as it demonstrates an awareness of the documents required but PalTank then failed to wait for those documents before it moved the goods.

52. The FTT considered and firmly rejected Paltank's argument that someone else was responsible for the breach, stating at [199]:

> Whether or not the employees did not understand the requirements, they nevertheless failed to make enquiries to clarify the issue in

> circumstances where we were satisfied that PalTank was aware that there was a problem and that no e-AD or ARC had been received. In those circumstances PalTank should not have allowed the goods to be moved. We did not accept that PalTank could absolve itself of this responsibility by the fact that it used hauliers; we found as a fact from the evidence that PalTank had ultimate control and responsibility for authorising its agents to move the goods and despite being aware that it did not have an e-AD PalTank failed to take steps to ensure that the goods were not moved.

53. The FTT also took into account the illness of Mr Rice's wife, and all other relevant circumstances, concluding as follows:

> 200. We accepted that Mr Rice was caring for his wife at the relevant time and that the wrongdoing was carried out by PalTank's employees. However we were satisfied that this had been taken into account by HMRC and we concluded that the level of mitigation given was appropriately reflected in the reduction applied.
>
> 201. We did not accept that the penalty was unreasonable or disproportionate; the penalty was calculated in accordance with the criteria set by statute. Furthermore, bearing in mind that the maximum possible reduction was applied by HMRC we do not accept that the penalty imposed was unreasonable.
>
> 202. As to the issue of reasonable excuse, it is clear that HMRC took into account all of the circumstances relied on by PalTank in support of its reasonable excuse. As set out above we accept that the matter was dealt with by an employee rather than at senior level. We also accepted that Dartswift's emails to PalTank were unclear and that PalTank reported the matter to HMRC, although we noted that this was not until 24 April 2013, some time after the goods had been moved, and that PalTank did not explain the situation accurately to HMRC.
>
> 203. We were satisfied in all of the circumstances that the penalty was generously but not incorrectly categorised as non-deliberate and that the reduction given reflected the circumstances to an appropriate degree for its co-operation in "telling, helping and giving". We took the view that the reasons relied on by PalTank must also be balanced against the fact that PalTank is an experienced haulier specialising in the movement of alcohol and therefore can be reasonably expected to be aware of its obligations and have procedures in place to ensure compliance with those obligations. Again, the fact that it instructed agents and the matter was dealt with by its employees does not, in our view, absolve it from liability where it failed to comply with its obligations or its employees were ignorant as to the company's legal duties.

54. We consider that these were clearly reasonable conclusions for the FTT to reach. The approach was consistent with that endorsed in *Christine Perrin*, and it discloses no error of law.

55. The FTT's findings of fact also lead to the conclusion that the analogy which Mr Baig sought to draw between Paltank and the lorry driver with limited knowledge

in *Martyn Glen Perfect* was wholly unjustified. The facts in that case were quite different. In particular, we agree with Mr Charles that the lorry driver in *Perfect* and Paltank were "at opposite ends of the food chain" in terms of both knowledge and responsibility.

56. In relation to the illness of Mr Rice's wife, there is no "settled HMRC policy that family illness is a reasonable excuse". It depends on all the circumstances, as *Perrin* makes clear, and in this case we find no error in the FTT's reasoning as to whether it justified a further reduction of the penalty to zero.

57. The appeal on Ground 5 is dismissed.

Disposition

58. Paltank's appeal is dismissed.

MR JUSTICE MANN
JUDGE THOMAS SCOTT

RELEASE DATE: 3 July 2020