



**TC03369**

**Appeal number: TC/2012/09497 & TC/2012/10307**

*CUSTOMS DUTY- Ringwood two wrongdoing penalties - £58,716.10 and £12,086.90 and Wilkinson one wrongdoing penalty of £65,934.35 – supply and delivery of wine - duty unpaid – Ringwood’s second penalties arise from a prompted and deliberate supply – second penalty up held - Wilkinson reasonable excuse for its penalties -cases allowed in part*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**RINGWOOD MARKETING**

**- and -**

**AUSTIN WILKINSON AND SONS LIMITED**

**Appellants**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY’S  
REVENUE & CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE DAVID S PORTER  
MISS SUSAN STOTT**

**Sitting in public at Alexandra House, Manchester on 8 and 9 January 2014**

**Mr Christopher McNall, of Counsel, for the Appellant**

**Mr David Griffiths, of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.**

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## DECISION

1. By a direction dated 8 October 2013 the two cases were directed to be heard  
5 together.

2. Mr Alan Woods (Mr Woods), a partner, appealed on behalf of Ringwood  
Marketing (Ringwood) against two wrongdoing penalties one of £58,716.10 notified  
on 20 April 2012 and the other of £12,086.90 notified on 20 August 2012. Mr Woods  
said that Ringwood had no reason to enquire whether the alcohol supplied by The  
10 Trade Beverage Company Limited (TBC) had paid customs duty or not and that it had  
carried out all the due diligence it needed to. Mr James Wilkinson (Mr Wilkinson),  
Managing Director, appealed on behalf of James Wilkinson and Sons Limited  
(Wilkinson) against a wrongdoing penalty of £65,934.35 notified on 20 August 2012.  
15 Mr Wilkinson said that he had made all the normal enquires he would have expected  
to make for the delivery of the alcohol. HMRC said that Ringwood and Wilkinson  
should have enquired where the alcohol came from and whether duty had been paid  
on it.

3. Mr Christopher McNall, of counsel, appeared on behalf of Ringwood and  
Wilkinson and called Mr Woods and Mr Wilkinson, who gave evidence under oath.  
20 Mr David Griffiths, of counsel, appeared for HMRC and called Mr Kevin Daghish  
(Mr Daghish), an officer of HMRC, who also gave evidence under oath. Both parties  
provided bundles for the Tribunal. Mr John Cannon (Mr Cannon) provided a witness  
statement which had been challenged by HMRC. Mr Cannon had chosen not to attend  
the hearing.

### 25 **The Cases**

4. We were referred to the following case:-

- *David Collis v The Commissioners for Her Majesty's Revenue and Customs*  
TC01431.
- 30 • *The Commissioners for Her Majesty's Revenue and Customs v Total*  
*Technology (Engineering) Limited* [2012] UKUT 418 (TCC).
- *Mobilx (in Administration) –and- The Commissioners for Her Majesty's*  
*Revenue and Customs* [2010] EWCA Civ 517.
- *Mrs A M Rowland –and- The Commissioners for Her Majesty's Revenue and*  
*Customs* SPC 00548

### 35 **The Law**

5. Mr Griffiths helpfully took us through the relevant legislation.

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

So far as is material, paragraph 4 thereof deals with penalties in respect of the 'handling of goods subject to unpaid excise duty' and states:

4 (1) A penalty is payable by a person (P) where-

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

10 (3) In sub-paragraph (1)-

'excise duty point' has the meaning given to it by section 1 of Finance (No2) Act 1992 and 'goods' has the meaning given it by section 1 of the Customs and Excise Management Act 1979,

15 Paragraph 5 of the Act provides for the 'degrees of culpability', and so far as material paragraph 5 (4) as follows:-

(4) P's acquiring possession of, or being concerned in dealing with goods on which a payment of duty is outstanding and has not been deferred is-

20 (a) 'deliberate and concealed' if it is done deliberately but P makes arrangements to conceal it, and

(b) 'deliberate but not concealed' if it is done deliberately but P does not make arrangements to conceal it.

25 Paragraph 6 of Schedule 41 provides for the 'standard amount' of any penalty which is calculated by reference to a percentage of the 'potential lost revenue' and a person's behaviour associated with the same. So far as material, as regards a penalty under, inter alia, paragraph 4 aforesaid, paragraph 6 B provides.

6. (B) The penalty payable under any of paragraphs 2, 3(1) and 4 is

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

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

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

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

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

(a) telling HMRC about it

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

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

(3) Disclosure of a relevant act or failure –

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

(b) otherwise it is “prompted”.

(4) .....

15 13. (1) If a person who would otherwise be liable to a penalty of a percentage shown in column 1 of the Table (a “standard percentage”) has made a

disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure.

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

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

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

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

1. the Case A minimum applies if –

25 a. the penalty is under paragraph 1, and

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

(b) otherwise, the Case B minimum applies.

30

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

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

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

- 5
- (a) ability to pay, or
  - (b) the fact that the potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

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

- 10
- (a) staying a penalty, and
  - (b) agreeing a compromise in relation to proceedings for a penalty

15 **20.** (1) Liability to a penalty under any paragraphs 1, 2, 3 (1) and 4 does not arise in relation to an act or failure which is not deliberate if P satisfies HMRC or (on an appeal notified to the tribunal) that there is a reasonable excuse for the act or failure.

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

- (a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P’s control,
- 20 (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.
- 25 (c) where P had a reasonable excuse for the relevant act or failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the relevant act or failure is remedied without unreasonable delay after the excuse ceased.

## The Facts

6. Mr Woods told us that he had been in the meat trade for almost 50 years having worked for national meat companies. In the last 35 years he had run his own wholesale meat company and purchased meat products from all over the world. He understood that when goods come into the country they passed through the docks where a tariff or duty would have to be paid before their release. He understood that it was the importers responsibility to deal with the appropriate payments.

7. He told us that in 1995/96 he had been approached by a large Turkish Brewery, "Ephesus Brewery", to market and distribute lager into the United Kingdom. The lager was delivered directly to the docks in Britain. As the goods arrived at the docks, Customs took five cases of the lager to be analysed in order to establish the gravity of the product. The alcohol strength varied from 3% to 10% and the average duty amounted to 6%. In a case of 24 bottles the duty equated to 18 pence per bottle.

8. As the importer of the lager, Ringwood had opened an account with Customs at the docks. Prior to collecting the lager the duty and VAT had to be paid and the money had to be transferred to "cleared funds". Mr Woods understood that this was standard procedure when importing goods. In the entire time he was importing the lager he was never asked by a wholesaler about the duty or to provide any paperwork to demonstrate that the duty had been paid.

9. Mr Woods had been approached by Mr Cannon some 12 months earlier to ascertain whether Ringwood needed to buy any alcohol. Mr Woods said that he was a meat trader and had no cause to buy any alcohol. Mr Cannon had asked about refrigeration but Mr Woods was not interested.

10. Ringwood had been supplying meat to the Britannia Hotels Group (Britannia) and was asked by the Group if Ringwood could provide any alcohol. Mr Woods contacted Mr Cannon, having remembered that he had enquired as to Ringwood needing a supplier for alcohol. Mr Cannon confirmed that he could supply wine to Ringwood. Mr Woods understood that as the wine was on large articulated trucks, which could not gain access to the various Hotels and Public Houses operated by Britannia, it would be necessary to break the delivery down onto smaller pallets to accommodate the delivery. He therefore recommended Mr Cannon should use Wilkinson to make the deliveries. He met with Mr Cannon and Mr Wilkinson and it was agreed that Wilkinson would handle the deliveries.

11. Mr Woods understood that TBC operated out of a large distribution centre in Leigh, that it was a reputable wholesaler and that it would be able to deal with the quantity of wine that the Britannia required. He suggested that if Ringwood had purchased its wine from Aldi, Costco or Makro it would not have expected to check whether duty had been paid either.

12. Ringwood's first order was on 31 January 2010 and amounted to £8,000 with VAT of £1,400. TBC, owned by Mr Cannon, had provided the alcohol and Mr

Cannon had produced a confirmation in January 2010 to Ringwood in the following terms:

THE  
TRADE BEVERAGE  
5 COMPANY  
JAN 2010

Dear Sir/ Madam

We can confirm that all wine products/supplied & delivered to The Britannia Hotels on behalf of Ringwood Marketing include Duty & Vat

10 Yours faithfully

Sir John Cannon

Director for Trade Beverage

Yew Tree Court, Knutsford  
Road.

Cheshire. WA16 &BG

15

T 01565 889 330 F 01565 889  
331

E  
[info@thetradebeverageco.co.uk](mailto:info@thetradebeverageco.co.uk)

20

[www.thetradebeverageco.co.uk](http://www.thetradebeverageco.co.uk)

company reg .no.06832974

vat reg no 946 6391 84

13. Mr Woods told us that he had made further enquiries into TBC having checked that its VAT was correct. The copy in the bundle revealed that Mr Cannon was the  
25 managing director and that its accountant was Mr Peter Ainley of Corporate Capital  
Consultants. The fax number was 0161 439 5615 (not 889 331 as above) and the VAT  
number was 946 635184 (not 91 as above). The address for the registered office was  
19 Marian Drive Mobberley Cheshire WA7 1QF. Mr Griffiths referred Mr Woods to  
30 TBC's invoice dated 24 October 2011, which identified the VAT number as  
946 6391 64, and pointed out that the 6 should have been an 8. Mr Woods said that he  
had not noticed that error.. By 10 June 2010 Ringwood had provided Britannia with  
wine with a duty value of £293,580.53. We were not advised as to the total value of  
the sales by Ringwood to Britannia.

14. Mr Woods did not know from where TBC was sourcing the wine. He would not have expected TBC to tell him in any event as there would have been the danger that Ringwood would source the supplies directly from TBC's supplier. Mr Woods had made enquiries subsequent to the visit by HMRC and produced a letter dated 16 April  
5 2012 from Vineyard Wholesalers Limited, the company he believed had provided the wine on which the duty had been paid. He admitted at the Tribunal that he was not altogether sure that Vineyard had been the suppliers.

15. We were told that as the wine was shrink-wrapped and delivered by Wilkinson's on pallets it was understood that the duty paid certificates were inside the pack. There  
10 would have been no way for either Ringwood or Wilkinson to have seen the certificates other than having them sent from Britannia after the deliveries. No attempt had been made to assure themselves in this way.

16. Mr Daghish told us that he had received a telephone call from Steven Hough, a fellow HMRC Officer, regarding information Mr Hough had received on a visit  
15 undertaken regarding purchases by Ringwood from TBC. As a result Mr Daghish visited Ringwood on 6 July 2011 and explained that the reason for the visit was concerning Ringwood's purchases of wine from TBC.

17. Mr McNall cross-examined Mr Daghish regarding the basis upon which the visit on 6 July 2011 had been made. He suggested to Mr Daghish that as Mr Cannon had  
20 been "named and shamed" in the newspapers by HMRC, Mr Daghish was anxious to find out as much as possible about Mr Cannon. The note of the meeting indicated that Mr Daghish issued Mr Woods with HMRC's pamphlets FS1 relating to Compliance checks and the new penalty regime; F59 its Human Rights; and Notice 726 explaining how Ringwood could be made jointly and severally liable for unpaid VAT of another  
25 business.

18. Mr Daghish had asked Mr Woods if he knew the duty rates on the wine. Mr Woods said he did not. Mr Daghish indicated that the current duty rate was £10.85 per case of 6. Mr Woods indicated to the Tribunal that it was possible to buy wine at a  
30 supermarket for £2.80. Given the wine he was purchasing from TBC was £1.50 a bottle, and in 1996 the duty on the lager from the Turkish company had been 18p, he did not think that £1.50 a bottle was suspicious. 18 cases of Italian Wine had been detained on the grounds that HMRC believed that excise duty had not been paid. Mr Woods had been told that the cases should not be moved and he had replied "Oh yes I won't move them or sell them". Mr Woods signed the note book as an accurate record  
35 of the interview.

19. Mr Woods had been concerned about the meeting with Mr Daghish and immediately contacted Mr Cannon and Mr Cannon's accountant. Mr Woods was assured that they had the relevant paperwork to show that the duty had been paid. As  
40 a result, Mr Woods believed that HMRC could be provided with the appropriate details. On 8 July 2011 Mr Woods faxed Mr Daghish confirming that conversation and indicating that Mr Daghish should contact Mr Cannon and his accountant for confirmation of the position. (In his witness statement Mr Woods indicated at paragraph 21 that he notified Mr Daghish on 8 August 2011, but the copy fax in the

bundle is dated 8 July 2011 so we have treated that as the date it was sent). Mr Woods indicated that he had asked Mr Cannon and the accountant to contact Mr Daglish directly with all the information. Mr Cannon had also indicated that TBC had been accepted by a very large factoring company which would help TBC expand its business. There is a letter in the bundle from Bibby Factors Manchester Ltd dated 11 October 2011 advising that TBC had entered into a factoring arrangement with it and all future payments and remittances should be made to them.

20. Mr Woods had received a letter dated 12 August 2011, addressed to Ringwood from Mr Cannon, undertaking that all future deliveries would be duty and VAT paid and that as a result a deposit would have to be paid with each order. The letter also purported to guarantee Ringwood against any liability to HMRC. In spite of this assurance, on 22 August 2011 Ringwood received a notice of seizure from HRMC advising that, as proof of duty payment had not been received, the 18 cases of wine referred to above were being seized.

21. Further confirmation was received from Mr Cannon on 1 October 2011 that the duty would be paid in full and certified documentation would be forwarded to Ringwood. On 17 October 2011 Mr Woods wrote to Peter Ainsley, of Corporate Capital Consultants, enclosing the signed declaration from Mr Cannon and requesting confirmation from Mr Ainsley that the information was correct in order that Mr Woods could advise HMRC accordingly. Mr Woods faxed Mr Daglish again on 7 November 2011 advising that Mr Cannon and Mr Ainsley would fax copies of the duty paid documentation. The fax also indicated that the VAT number was incorrect due to a simple error He attached a copy of the fax to Mr Ainsley of the previous day. It appears that neither Mr Cannon nor Mr Ainsley contacted HMRC.

22. On 19 July 2011 Mr Daglesh had interviewed Mr Cannon. Mr Cannon has produced a witness statement for the Tribunal, but has not appeared. Mr Griffiths had asked for Mr Cannon to attend because HMRC were not satisfied with his witness statement. We have read the statement and note that Mr Cannon indicated that TBC has been found liable for the evasion of duty totalling almost £500,000. Mr Daglish advised the Tribunal that it had been £1,000,000. We have also been told that Mr Cannon cannot be traced. He had told Mr Daglish, at an interview on 18 October 2011, that he had purchased 7 of 9 loads of wine from a person known to him as Aziz and that he had paid cash for it in a hotel lobby in London. He had received no paper work and no evidence that duty had been paid. The other 2 loads had come from AMR Logistics and Jadeson Cash and Carry. We are satisfied that Mr Daglish was justified in believing that Mr Cannon was dishonest.

23. Ringwood purchased further wine through TBC from 26 September 2011 to 1 November 2011. On 4 November 2011 Mr Daglish visited Ringwood's premises and Mr Woods confirmed that Ringwood had purchased a further 30 pallets of wine. Ringwood had made no enquiries as to whether the duty had been paid on the wines and it appears to have relied on Mr Cannon's and the Accountant's confirmation that the appropriate certificates and documentation would be made available to Mr Daglish.

24. Mr Daghish issued Ringwood with a Notice of Penalty assessment on 20 April 2012 in respect of the first penalty and on 20 August 2012 in respect of the second penalty. The notices explained that Ringwood had 30 days in which to submit further evidence for HMRC to consider. No such evidence was forth coming. Mr Steven C Mayerhoff, of Blackhouse Jones, Solicitors in Clithero (the Solicitors) wrote to Mr Daghish on 30 August 2012 querying the penalty amounts and they asked for time to consider the matter which Mr Daghish granted.

25. As a result of both sets of purchases Mr Daghish notified Ringwood on 20 April 2012 that a wrongdoing penalty of £58,716.10 had been raised against it in relation to the transactions between 1 April 2010 and 10 June 2010. On 20 August 2012 Mr Daghish notified Ringwood that a further wrongdoing penalty amounting to £12,086.90 had been raised against Ringwood in relation to the period 26 September 2011 to 1 October 2011. The penalty had been increased to 35% because by the time of the second transaction Ringwood had been visited by HMRC and should have taken greater care. The Solicitor asked for the decision to be reviewed. By a letter dated 11 October 2012, HMRC's Local Compliance Authorising Officer having reviewed the matter upheld the decision to impose the penalties.

26. Mr Daghish raised an overall penalty of 20% for the first penalties on the basis that the wrongdoing was not deliberate but that Ringwood had been 'prompted' to disclose the transactions. The minimum penalty in the circumstances was 20% (see paragraph 5 above). In assessing the overall penalty Mr Daghish had allowed 100% reduction in relation to Ringwood's assistance to HMRC on the basis that Ringwood had:

- told HMRC about it 30%
  - helped HMRC to understand it 40%
  - Given HMRC access to records 30%
- Total reduction 100%

In relation to the second penalty the 35% had been calculated on the basis that the trade was deliberate and its disclosure to HMRC was 'prompted' as HMRC had attended in relation to the earlier wrongdoing and advised Ringwood of the problem. As a result the penalty range was from 35% to 70%.

Mr Daghish did not however consider that there were any special circumstances.

27. Mr Wilkinson gave evidence under oath as to Wilkinson's dealings. Wilkinson is a small family business and he has been Managing Director for the past 35 years. The company is mainly involved in the palletised transport sector and delivers a wide variety of palleted goods throughout the United Kingdom. In February 2011 Mr Woods of Ringwood contacted him explaining that he had been in discussion with a supplier, Mr Cannon of TBC, and asked Mr Wilkinson to deliver consignments of wine to various retail outlets.

28. Following the initial telephone call, Mr Cannon went to Wilkinson's premises and met with two members of its sales team. During the meeting, it was explained that he required Wilkinson's vehicles to transport goods in small deliveries to various hotels in the United Kingdom. The goods would be brought to Wilkinson's premises on United Kingdom registered articulated units as full loads to then be separated, according to the relevant orders, and forwarded on to the hotels in small consignments.

29. Wilkinson have vehicles available to transport palletted goods to local destinations with a rear end tail lift unloading mechanism. Mr Wilkinson discussed the initial operation and agreed a price. On the day of the first delivery Mr Cannon was present and he gave directions as to where the goods were to be delivered. The same arrangement took place over the months that followed each time Mr Cannon passing on the delivery instructions in a normal fashion.

30. On 6 July 2011 HMRC arrived at Wilkinson's premises and detained the mixed Italian wine cases that were in the transit shed/trailer as it was believed that duty had not been paid on the goods. There were only six and a half pallets of wine on the premises as Wilkinson were waiting for final delivery instructions from TCB. The goods had been delivered on United Kingdom registered vehicles; there had never been a delivery from foreign vehicles or accompanied by CMRs. Mr Wilkinson had confirmed that he was not a bonded warehouse. Mr Daghish had suggested that Mr Wilkinson must therefore have been conversant with regard to the bonded warehouse system. We do not accept that that could properly be implied from Mr Wilkinson's answer. It may well be that he was aware that unpaid duty goods needed to be held in a bonded warehouse. Wilkinson's warehouse was not bonded.

31. Mr Wilkinson had not considered where the goods had come from as that was no business of his. He had no suspicions that there was anything wrong with the goods. He had carried out a credit rating check on TBC, as he did with all his customers. This had given details of the company and its VAT details. Its credit rating had not been very good and he had insisted that Wilkinson should be paid by Mr Cannon before each delivery was made. The goods were to be delivered to Britannia, which has a large number of Hotels.

32. Mr Daghish attended at Wilkinson's premises on 11 July 2011 to collect the documentation relating to the movement of the goods and the appropriate ledgers. These were produced to the Tribunal and clearly identified all the appropriate movements and payments. The ledgers indicated that in some cases the goods had been stored at the warehouse for two days and on some occasions for 5 weeks. Mr McNall suggested that as the goods were being held either on pallets for immediate dispatch or within the warehouse awaiting delivery they were not 'stored' at the premises. We cannot accept that. We accept that the goods were being held to Britannia's order but Ringwood had clearly asked Wilkinson to keep the goods until delivery could be made. The goods were stored whatever the reason for their retention.

33. HMRC had attended at his premises a third time on 19 August 2011 and it confirmed that it believed that tax was payable on the mixed Italian wine that had been seized on 6 July. In cross-examination Mr McNall suggested to Mr Daghish that he had not alerted Mr Wilkinson that Wilkinson's might be liable to a wrongdoing penalty. Mr Daghish said that he had not thought that Wilkinson's had done anything wrong at the time of the visits because he had insufficient evidence to decide either way. Mr Daghish considered that it had not been necessary to give Mr Wilkinson and his employee, Mr Burns, a warning that there might be a wrongdoing penalty.

34. Mr Daghish said that when he visited Wilkinson on 6 July he had provided Mr Wilkinson with the "HRA Face to Face message" which clearly indicates that a penalty might be raised. He also said that he had provided all the other relevant documentation. In spite of that, he accepted, under cross-examination that it was an error on his part not to have alerted Mr Wilkinson to the possibility of a wrongdoing penalty. It was unclear as to when Mr Wilkinson had been supplied with the necessary documentation so that Wilkinson might have known whether there was a likelihood that Wilkinson's would be served with a wrongdoing penalty.

35. On 20 April 2012, HMRC served a notice of a liability to a wrongdoing penalty under section 41 of the Act in the sum of £65,934.35 relating to the wine delivered between the period 7 February 2011 and 29 June 2011 and giving Wilkinson 30 days to provide further evidence as to why the penalty should not be paid. The Solicitors were instructed by Wilkinson and they were in correspondence with HMRC. During that correspondence, Mr Daghish responded to the Solicitors on 15 June 2012 and indicated that he could find no good reason as to why he should change his original decisions. The Solicitors asked for a review from an independent officer but were told that that could not be provided in view of Mr Daghish's letter of 15 June 2012. As a result, the Solicitors served a Notice of Appeal on 9 November 2012.

36. Mr Daghish explained that the Wilkinson penalty arose from storing and handling the goods, which were considered to be non-duty paid. The maximum reduction within the legislation was given, because Wilkinson had answered HMRC questions promptly and accurately and had been helpful in giving all the necessary information for the penalty to be assessed. The penalty had been fixed at 20% of the duty unpaid.

### **Summing up**

37. Mr Griffiths submitted that neither party is disputing any of the facts and agree both that the alcohol in question was not duty paid and that the calculations of the penalties are correct. Both parties are 'persons' who were handling the goods under paragraph 4 of Schedule 41 of the Act. In both cases the maximum discount has been applied.

38. Ringwood has made several attempts to obtain the appropriate paper work after the original deals. They should have made appropriate enquires both as to whether duty had been paid on the wine and where it had come from. Mr Woods has made no attempt to do that. He made no physical check of the wine when it was first delivered and only appears to have enquired about TBC as to its existence and VAT

registration. Instead, Mr Woods has relied on worthless information provided by a fraudster. He should have been put on notice because the wine was so cheap. The duty on the wine was greater than the price he was paying for it.

5 39. Mr Woods had sent details of the duty position to TBC's accountant, but significantly had not received a reply from either the accountants or Mr Cannon. The reality of the situation is that Ringwood was purchasing relative large quantities of alcohol from a source of which it had little knowledge and at no time had checked whether duty had been paid or not. Mr Griffiths further submitted that Ringwood's conduct, which led to the second penalty, was indicative of its flagrant disregard of its  
10 responsibilities in ensuring that any alcohol which it sold was duty paid. Mr Woods advised Mr Daghish that after HMRC had seized the wine and informed Ringwood as to the due diligence that they should take Ringwood had purchased a further 30 pallets of wine from TCB. As a result, HMRC does not accept that Ringwood had a reasonable excuse for failing to check where the wine came from and confirming that  
15 the duty had been paid on it. Special Commissioner Adrian Shipwright in *Mrs Rowlands* decided that whether there was a reasonable excuse "is a matter to be considered in the light of a particular case".

40. Mr Griffiths submitted that there can be no reasonable excuse for the first transaction as Mr Woods had relied on information provided by Mr Cannon. Section  
20 20 (2) (b) of the Act indicates that there can be no reasonable excuse if one is relying unreasonably on a third party (ie) Mr Cannon. As far as the second penalty is concerned, as the purchase of the wine was made against a background of advice given to Ringwood by HMRC that due diligence should be taken and those enquiries made. The potential lost revenue amounted to £34,534.

25 41. He also submitted that there were no special circumstances which would relieve either appellant from liability. In *David Collis* Judge Roger Berner stated at paragraph 34:

30 "However, a further reduction can be made by HMRC under paragraph 11 if HMRC think it right because of special circumstances... As HMRC has this power, however, the jurisdiction of the Tribunal to substitute its own decision for that of HMRC may include a reduction on account of special reasons. The extent to which the Tribunal may rely on paragraph 11 is provided for in section 24 paragraph 17 (3) ,(6):

35 If the Tribunal substitutes its decision for HMRC's, the Tribunal may on paragraph 11-

- (a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point),or
- (b) to a different extent, but only if the Tribunal thinks that HMRC's decision in respect of the application of paragraph 11 was flawed.

(6) In sub-paragraph (3) M(b), (4) (a) and (5)(b) “flawed” means flawed when considered in the light of the principles applicable in proceedings for judicial review.

5 36 Judicial review may be pursued in relation to decisions of public bodies on a number of grounds. Included amongst these are the grounds of illegality and fairness. In the context of a decision by HMRC as to whether a reduction in a penalty should be made on account of special circumstances, the general test will be whether the decision is so demonstrably unreasonable as to be irrational or perverse, such that no reasonable authority could ever have come to it (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 HL).

In the circumstances the decision reached by HMRC was one that it could reasonably have so reached and there are no special circumstances which would give rise to the appeal being allowed.

15 42. It had been submitted by the Solicitors that the amount of Ringwood’s penalties were disproportionate to the profit it was likely to have made. Mr Griffiths submitted that the penalty had been raised at a discounted amount; that the revenue that had been lost was considerable and that the legislation had been drafted to ensure that businesses would take care. He did not consider that the legislation was flawed nor  
20 that HMRC’s actions contravened Article 1 of the First Protocol and that the appeals by Ringwood should be dismissed.

43. Mr Griffiths submitted that the position was the same for Wilkinson. Mr Wilkinson had been very candid when he gave evidence. The only checks he had carried out with regard to TBC were as to its status as a company, whether it was  
25 registered for VAT and its credit rating. Wilkinson had dealt with 250 pallets and Mr Wilkinson agreed at the Tribunal that he had left his staff to carry out the appropriate processes. As no proper due diligence had been taken the penalty had been correctly raised by Mr Daghish.

44. At the hearing, Mr McNall had suggested that the wine had not been stored at the warehouse. Mr Griffiths submitted that if pallets were left on the premises for any  
30 length of time they were stored there. If he was wrong about that all the wine had, in any event, been handled by Wilkinson. In the circumstances, Wilkinson’s appeal should be dismissed.

45. Mr McNall submitted that Ringwood had a reasonable excuse when dealing with  
35 TCB. It checked as to its corporate existence and its VAT status. It had also received assurances from Mr Cannon that the duty had been paid on the wine. It was not unreasonable for Mr Woods to rely on the information he received from his enquires and the assurance from Mr Cannon that the duty had been paid. Reasonable excuse is not defined in the legislation, but it is certainly wider and more flexible than suggested by HMRC. Due Diligence is not mentioned in the Schedule at all. Notice  
40 726 is not a statute and does not have legislative force. Ringwood’s actions need to

be considered subjectively (i.e.) from the stand point of the reasonable person in Ringwood's position rather than objectively.

5 46. The transactions were not on the face of them suspicious. TBC was a registered limited company and, as far as Ringwood were concerned, was bone fide. Ringwood relied on Mr Cannon's assurances on behalf of TBC. Payments were being made against properly drawn invoices. Mr Daghish had spoken with Mr Cannon and had come to the conclusion, rightly as it turned out, that Mr Cannon was fraudulent. This has coloured his attitude to both Ringwood and Wilkinson as he appears to believe that they should have known of Mr Cannon's dishonesty.

10 47. This is not a Missing Trader case and Ringwood acted in good faith. It was not obliged (in the sense of being subject to some positive duty articulated in the legislation) to undertake any checks on TCB to establish the integrity of the supply chain (and, in particular, whether any of TCB's suppliers, or ultimate suppliers, were missing). Ringwood did not therefore fail to show such diligence as was appropriate.  
15 The lists of checks in Notice 726 does not have legislative force and is a counsel of perfection. It is simply not realistic to expect companies in the position of Ringwood, dealing with an ostensibly reputable supplier such as TBC in transactions of this nature, to undertake detail checks on TBC.

20 48. Mr McNall submitted that the situation is strongly analogous to VAT 'Missing Trader' fraud, and the judicial articulation of what is meant by a taxable person knowing, or being held to know, that there was a fraud so as to make him liable to penalty (See *Mobilx*). Unless HMRC can show that Ringwood should have known from the circumstances surrounding its transactions, that the transactions were connected to fraudulent evasion, the appeals should be allowed.

25 49. Moreover, the Tribunal should take the following into account, in assessing (a) whether the penalties are properly imposed and (b) if properly imposed, were, in any event, proportionate. Ringwood's liability is accessorial in nature, and the liability of the primary wrongdoers cannot be ignored. Mr Woods has always been open, honest and co-operative with HMRC. Ringwood did not have a great deal of experience.  
30 had only been trading in alcohol for 18 months, as part of its wider 'meat' business, and dealt with one supplier TBC and one customer Britannia. The wine was delivered directly to the customer and did not pass through Ringwood's hands so that it could physically check if the duty had been paid. The Tribunal can consider the proportionality of the penalties as applied, without needing to consider the  
35 proportionality of the penalty regime as a whole.

40 50. As to the second penalty, Ringwood was carrying out due diligence checks to the best of its ability and was pursuing TCB for the appropriate evidence. There is no doubt that Mr Daghish when imposing the penalties took into account that he knew that Mr Cannon was fraudulent. He has found that out because of the resource that HMRC had. This was not something that Mr Woods could have achieved from his own enquiry. It was not inappropriate for Mr Woods to rely on the information he had obtained with regard to TCB and the written confirmation that duty had been paid on the wine.

51. Mr McNall also submitted that there were special circumstances, which HMRC should have taken into account. Ringwood, which is a legitimate long established partnership, was duped by a fraudulent and accomplished liar. Mr Daghish has taken into account matters which did not relate to Ringwood, namely information provided by the cash and carry business; the results of his interviews with Mr Cannon and the circumstances in which Mr Cannon purchased the wine. As a result' both penalties should be dismissed and Ringwood's appeal allowed.

56. As to Wilkinson, it was a carrier not a warehouse. Mr Wilkinson had made appropriate enquires as to TCB's standing. Wilkinson had imposed credit restrictions and the terms had been complied with. Whatever checks Mr Wilkinson could have made, being four down the chain, would not have provided additional information. Mr Daghish had not alerted Mr Wilkinson to the facts surrounding Mr Cannon nor had he given Wilkinson timely advice regarding the matters that it ought to consider. The pallets of wine were delivered by registered United Kingdom articulated vehicles. There was no need for Wilkinson to concern itself as to whether the duty had been paid on the wine or not. Proof of delivery notes had been provided by the drivers in the usual way. As far as Wilkinson was concerned, these were normal deliveries from a legitimate United Kingdom source. Wilkinson had also been forthcoming and helpful to HMRC and without its assistance HMRC could not have pursued the matter.

58. HMRC accept that a penalty of £65,934.35 is 'admittedly large in relation to the potential profit earned'. In fact Wilkinson has made no profit at all as it is still owed money by TCB. It would be wrong to impose a penalty at this level when it is clearly not proportionate. Wilkinson's appeal should be allowed in any event.

## 25 **The decision**

59. We have considered the law and the facts and we have decided that Ringwood has reasonable excuse in relying on the information it received from Mr Cannon with regard to the first penalty but did not have such an excuse with regard to the second penalty. We have also decided that Wilkinson has a reasonable excuse for its transactions and we allow its appeal. These are not missing trader cases. They are cases relating to commercial transactions in a normal market place.

60. Mr Woods was asked by Britannia if Ringwood could supply its hotels with wine. He recalled having spoken to Mr Cannon and contacted him again. Mr Cannon confirmed that he could supply the wine, but that he could not deliver it to the hotels, because deliveries would be by articulated vehicles. It turned out that those articulated vehicles all carried United Kingdom number plates. As a result Mr Woods have no reason to suppose that the wine had come from other than TBC's warehouse in Leigh. He would have expected that duty would have been paid on the wine before it was sold to TBC.

61. Mr Woods had dealt with Wilkinson in the past and not surprisingly contacted the company and it was agreed that the loads could be broken down and palletised for delivery to the various hotels. The wine was certainly cheap, but must have been

adequate for Britannia's purposes as they took further deliveries. We note from the bundles that Ringwood appeared to have sold the wine at £10.70 a case of six, which amounts to £1.78 a bottle not a substantial profit. There was nothing in the transaction which would have alerted Ringwood that there could be something untoward.

5 62. Ringwood had been assured in writing that the duty had been paid and it had not been put on enquiry during the period up to 10 June 2011 that there was a difficulty (the last day of the transaction in the first penalty). It was only when HMRC visited Ringwood on 6 July 2011 that Mr Woods was alerted to the fact there might be a problem. Section 20 (2) (b) provides

10                   “(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

We have decided that Mr Woods was entitled, in the ordinary course of business, to rely on the assurances given to him by Mr Cannon and that Ringwood has a  
15 reasonable excuse for its actions in relation to the first penalty.

63. The position with regard to the second penalty is different. We accept that Mr Woods was attempting to provide HMRC with the documentation he believed was available to satisfy HMRC that duty had been paid and that the source of the wine was credible. The fact of the matter is that he knew that there could be a problem but  
20 chose to rely on the advice coming from Mr Woods and his professional advisers. Given that HMRC were concerned about the matter and the appropriate information was not forthcoming Mr Woods was ill-advised to allow Ringwood to continue with the trade. Ringwood should have suspended its trading until the duty certificates had been produced.

25 64. We consider the second penalty to be proportionate. The purpose of the penalties is to discourage traders from ignoring their obligations. The penalty is proportionate to the duty lost. The duty is at the level it is at because of the value of the trading being carried out by Ringwood. The legislation allows discounts to be applied and HMRC have reduced the liability from 100% to 35% for the second penalty.  
30 Ringwood have assisted with the investigation but it acted deliberately when it continued to trade. As a result of participating in the transactions it enable Mr Cannon through TBC to defraud HMRC of, we understand, £1,000,000. That is the measure of the transaction. A penalty of £12,086.90 against that background is not excessive and it is confirmed. Ringwood's appeal with regard to the second penalty is dismissed.

35 65. We have decided that Wilkinson have a reasonable excuse and its appeal is allowed. There was nothing in its transactions with Mr Cannon and TCB which was any different from any other haulage business it conducts. Commercial enterprises cannot be expected to make unnecessary enquiries into every deal that they conduct. Mr Cannon met with Mr Wilkinson. There was nothing untoward in Mr Cannon's  
40 request. Deliveries of wine were being made from TCB. Mr Wilkinson checked TCB's creditworthiness and Wilkinson was not put on enquiry as a result of those

checks. Wilkinson was entitled to assume that there was nothing wrong with the wine not least because the deliveries were to go to a substantial Hotel Group.

5 66. It was unclear from Mr Daglish's evidence at what stage Wilkinson were specifically alerted to Mr Cannon's dishonesty. Even if it had been advised earlier that a wrongdoing penalty was something that HMRC could raise, we believe that Mr Wilkinson would not, as a result of the documentation supplied, have necessarily believed that Wilkinson could be involved. The wrongdoing penalty was raised for the period 7 February 2011 to 29 June 2011. The last date being before any visit from HMRC or any advice with regard to wrongdoing. We therefore allow Wilkinson's  
10 appeal and dismiss the penalty.

15 67. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

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**DAVID S PORTER  
TRIBUNAL JUDGE**

**RELEASE DATE: 25 February 2014**

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