



**TC04658**

**Appeal number: TC/2014/05196**

*Excise duty penalty - application for permission to appeal out of time - factors to be weighed in exercise of Tribunal's decision - guidance in Data Select considered - whether the Appellant has an arguable case is a primary consideration - permission granted*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**ONE SOURCE (LONDON) LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE MICHAEL CONNELL  
MEMBER: IAN PERRY**

**Sitting in public at Fox Court, Grays Inn Road, London on 31 March 2015**

**Mr Christopher Snell of Counsel for the Appellant**

**Ms Laura Poots of Counsel, for the Respondents**

## DECISION

### **The Appeal**

- 5 1. The Appellant, One Source (London) Limited, applies for permission to appeal out of time against an excise wrongdoing penalty in the sum of £12,405.12.
2. The review decision that gives rise to the Appellant's right to appeal the penalty is dated 11 June 2014. The Appellant had 30 days from that date to appeal against the decision (Section 16(18) Finance Act 1994). However the Notice of Appeal was not lodged until 22 September 2014.
- 10 3. HMRC asked for the Appellant's application to be struck out.

### **Background to the late application**

4. On 6 March 2014 HMRC's review decision upheld a duty assessment against the Appellant in the sum of £22,152.00 pursuant to s 12(1)(a) and 12(1)(b) of the Finance Act 1994 ("FA 1994").
- 15 5. On 17 March 2014, following an explanation letter, HMRC issued an excise duty wrongdoing penalty against the Appellant, in the sum of £12,405.12 pursuant to Schedule 41(4) to the Finance Act 2008.
6. On 18 March 2014 the Appellant requested a review of the penalty.
7. On 31 March 2014 the Appellant lodged a Notice of Appeal (in time) with the  
20 First-tier Tribunal against the assessment, contending, inter alia, that the Appellant was the wrong person in law for the purposes of the assessment. The material background facts and the Appellant's grounds for appeal relating to the assessment (and penalty) are set out below. That appeal is currently stayed pending HMRC's appeal in the case of *B&M Retail Ltd. v HMRC* [2014] UKFTT 902 (TC), which is  
25 due to be heard by the Upper Tribunal in December 2015.
8. On 11 June 2014 HMRC's review decision upheld the wrongdoing penalty. Under s 16(1B) FA 1994, an appeal against an excise wrongdoing penalty is to be made within 30 days of "the date of the document notifying P of the decision to which the appeal relates".
- 30 9. The Appellant's Notice of Appeal was lodged (out of time) with the Tribunal on 22 September 2014, with an application seeking permission for the appeal to be admitted late.
10. Under s 16(1F) FA 1994, an appeal may be made after the end of that period if the appeal Tribunal gives permission to do so.

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## **Material background to the excise duty assessment and penalty**

11. On 10 April 2013 an Officer of HMRC visited the business premises of the Appellant t/a 'Diamond Wines' to carry out stock checks. The Appellant was  
5 subsequently asked for purchase and sales records from the date trading had commenced, 1 January 2013 to the date of the visit.

12. HMRC carried out a reconciliation of the stock seen and the goods purchased and sold or removed from the premises. HMRC found that some items of stock were unaccounted for in the records.

10 13. HMRC explained that when goods are physically held outside a duty-suspension arrangement and UK excise duty on those goods has not been paid, relieved, remitted or deferred, those goods are 'released for consumption' in the UK.

14. A duty point is created under Regulation 5 of the Excise Goods Holding Movement and Duty Point ("2010 Regulations"), in conjunction with Regulation  
15 6(1)(b). The person liable to pay the duty when excise goods are released for consumption is the person physically holding and/or controlling the excise goods at that time. This also applies to goods which are shown to have been held at an earlier time. The Appellant was the person holding the goods, or shown as having held the goods at the premises.

20 15. On 19 September 2013 HMRC wrote to the Appellant with details of the discrepancies and asked that by 20 October 2013 purchase invoices and explanations be provided in respect of the goods, which had not been accounted for.

25 16. On 14 November 2013, having not received a response, HMRC wrote again asking for details of the source of the goods and that they be shown evidence of provenance and duty payment for the goods, failing which an assessment would be issued and a possible excise wrongdoing penalty imposed. Fact sheets relating to penalties were included.

30 17. On 5 December 2013 as the Appellant had still not responded, HMRC issued an excise duty assessment in the amount of £22,152.00 (the assessment decision under appeal).

18. On 2 January 2014 Messrs Rainer Hughes Solicitors wrote to HMRC requesting a review of the decision.

35 19. On 9 January 2014 HMRC provided Messrs Rainer Hughes with copies of the correspondence that had been sent to the Appellant and confirmed that their request for a review had been forwarded to the Appeals and Reviews Team in Glasgow.

20. On 25 February 2014, as the Appellant was considered to have been in breach of Regulation 6(1)(b) 2010 Regulations, and HMRC were satisfied that there had been a

wrongdoing, they informed the Appellant that a Wrongdoing Penalty would be issued under Schedule 41 of the Finance Act 2008.

21. On 17 March 2014 (as referred to in paragraph 5 of above), the Notice of Penalty was issued with a penalty schedule and explanation that the penalty had been calculated as a percentage of the 'Potential Lost Revenue' ('PLR'), being the duty amount of £22,152.00 and based on a number of factors, including whether HMRC believed that the wrongdoing was deliberate or non-deliberate, concealed or non-concealed and whether the disclosure was prompted by HMRC or unprompted by the Appellant. HMRC also took into account the level of co-operation shown by the Appellant during the enquiry.

22. HMRC explained why the wrongdoing was considered to be deliberate with prompted disclosure, which attracts a penalty range from 35% and 70% of the PLR.

23. HMRC also explained that reductions for disclosure had been allowed as follows: Telling - 10%, Helping 0%, Giving access 30% - a total of 40%.

24. The calculations undertaken to arrive at the penalty percentage were also explained. The penalty was calculated at 56% of the PLR, i.e. £22,152.00 x 56 % = £12,405.12. HMRC did not consider that there were any special circumstances which would merit a special reduction in the penalty.

### **Relevant legislation**

25. The relevant legislation for the holding and movement of excise goods is contained within The Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ("HMDP Regulations"). These state at:

#### **PART 2**

#### **EXCISE DUTY POINTS AND PAYMENT OF THE DUTY**

Goods released for consumption in the United Kingdom - excise duty point

5. Subject to regulation 7(2), there is an excise duty point at the time when excise goods are released for consumption in the United Kingdom.

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.

10.(1) The person liable to pay the duty when excise goods are released for consumption by virtue of regulation 6(1)(b) (holding of excise goods outside a duty suspension arrangement) is the person holding the excise goods at that time.

5 Section 154(2) of the Customs and Excise Management Act 1979 provides in so far as is material, as follows:

154 (2) Where in any proceedings relating to customs or excise any question arises as to the place from which any goods have been brought or as to whether or not -

- (a) any duty has been paid or secured in respect of any goods; or
- 10 (b) any goods or other things whatsoever are of the description or nature alleged in the information, writ or other process; or

(c) .....

then, where those proceedings are brought by or against the Respondents, a law officer of the Crown or an officer, or against any other person in respect of anything purporting to have been done in pursuance of any power or duty conferred or imposed on him by or under the customs and excise Acts, the burden of proof shall lie upon the other party

15 to the proceedings.

Section 12(1A) of the Finance Act 1994 :

Subject to subsection (4) below, where it appears to the Commissioners

- 20 (a) that any person is a person from whom any amount has become due in respect of any duty of excise; and
- (b) that the amount due can be ascertained by the Commissioners,

the Commissioners may assess the amount of duty due from that person and notify that amount to that person or his representative.

25 Schedule 41 of the Finance Act 2008 state:

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

- (a) after the excise duty point for any goods which are chargeable with a duty of excise , a person acquires possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods, and
- 30 (b) at the time when the person acquires possession of the goods or is so concerned, a payment of duty on the goods is outstanding and has not *been* deferred.

### **The Grounds of the Application**

35 26. The Appellant's grounds for appeal are set out in the Notice of Appeal, including acknowledgment by Anita Punpher a Solicitor dealing with matters at Rainer Hughes that an 'administrative error' had been made in not filing the Notice of Appeal in time.

27. The explanation given for the late appeal is that the Applicant had appealed against the Assessment and therefore believed that it had not needed to appeal against the penalty. The Applicant believed that if the appeal against the Assessment was successful, the wrongdoing penalty would “fall away”. This was not correct but “only became apparent” when the Appellant showed the penalty decision letter to Messrs Rainer Hughes on or around the middle of September 2014.

28. The Appellant relies on the provisions of Schedule 41(20) to the Finance Act 2008:

‘Reasonable excuse’

(20) (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 failure to act.

29. In short, the Appellant contends that it is capable of falling within the remit of ‘reasonable excuse’; and should therefore not be liable for the penalty charged.

30. Rule 20(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides that:

20(4) If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal may be made or notified after that period with the Permission of the Tribunal –

(a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and

(b) unless the Tribunal gives permission, the Tribunal must not admit the appeal.

31. Mr Snell on behalf of the Appellant said that the Tribunal’s jurisdiction to allow an appeal to proceed out of time is considered to be ‘at large’. That is, consideration must be given to all surrounding circumstances; as opposed to weight being placed on any specific factors (See *Elnagy International Ltd v HMRC* [2012] UKFTT 269 (TC)).

32. The approach to granting permission for late appeals has been refined in recent years. The approach is set out in *Data Select Limited v HMRC* [2012] STC 2195, a case before the Upper Tribunal, which dealt with a late appeal to the FTT. At [37] of his decision, Morgan J held that the correct approach was to consider the overriding objective and all of the circumstances of the case, including the matters listed in CPR rule 3.9. The CPR rule 3.9 referred to by Morgan J was the rule prior to amendment in April 2013, which listed the following circumstances:

- a. The interests of the administration of Justice;
- b. Whether the application for relief has been made promptly;
- c. Whether the failure to comply was intentional;
- d. Whether there is a good explanation for the failure;

- e. The extent to which the party in default has complied with other rules, practice directions, court order and any relevant pre-action protocol;
- f. Whether the failure to comply was caused by the party or his legal representatives;
- 5 g. Whether the trial date or the likely trial date can still be met if relief is granted;
- h. The effect, which the failure to comply had on each party;
- i. The effect, which the granting of relief would have on each party.

10 33. Morgan J identified, at [34], five specific questions that a court of tribunal would generally ask itself:

- a. What is the purpose of the time limit?
- b. How long was the delay?
- c. Is there a good explanation for the delay?
- 15 d. What will be the consequences for the parties of an extension of time?
- e. What will be the consequences for the parties of a refusal to extend time?

20 34. Since the *Data Select* decision, two Upper Tribunal cases have considered the criteria that must be taken into account in deciding whether leave should be granted for a late appeal..

25 35. In *Revenue and Customs Commissioners v McCarthy & Stone (Developments) Ltd* [2014] UKUT 196 (TCC), Judge Sinfield held that the approach in *Data Select* was no longer the correct one and that instead a stricter approach should be adopted in light of the amendments to the Civil Procedure Rules and the Court of Appeal's decision in *Mitchell v News Group* [2013] EWCA Civ 1537.

36. In the more recent decision of *Leeds City Council v HMRC* [2014] UKUT 0350, Judge Bishopp held that Judge Sinfield's reasoning was wrong (at [12]) and that the proper course was to continue to follow the approach set out in *Data Select* (at [19]).

30 37. Mr Snell argued that in addition to the specific question identified by *Data Select*, the following factors must also be given consideration:

- (1) Whether the Appellant has a prima facie case;
- (2) Whether there would be material prejudice to HMRC if the appeal were permitted to be made out of time;
- 35 (3) The extent of delay and explanation for it.

*Whether the Appellant has a prima facie case*

38. Mr. Snell submitted that in order to understand, in part, the Appellant's application in this case, it is also necessary to consider the Appellant's appeal against the decision of HMRC to assess it for unpaid excise duty.

39. The appeal against unpaid excise duty ('the assessment') contends that the Appellant is the incorrect legal person against whom the assessment has been raised, owing to the fact that the relevant excise goods had already been released for consumption prior to those goods coming into the possession of the Appellant. Thus, and on the understanding that there can only be a single duty point (at the time of release), the Appellant was holding the excise goods after the coming into existence of the duty point and cannot therefore be liable for the excise duty.

40. The Appellant's appeal is currently stayed pending HMRC's appeal in the case of *B&M Retail Ltd. v HMRC*. At first instance, the Tribunal decided that the duty point could only arise once; thus lending credence to the Appellant's argument in the related appeal.

41. Mr. Snell said that the decision, to raise an excise wrongdoing penalty against the Appellant, is predicated at least in part (ostensibly) on the decision to raise the excise duty assessment. That much is clear from the decision letter dated 11 June 2014:

15           'As the company had been found to have breached Regulation 6(1)(b) of the Excise Goods (Holding Movement and Duty Point) Regulations 2010, where HMRC are satisfied that there has been a wrongdoing, they are empowered to issue a Wrongdoing Penalty under Schedule 41 of the Finance Act 2008.'

42. The Appellant appreciates that Schedule 41(1) to the Finance Act 2008 allows HMRC to raise a penalty where a person acquires goods, after the excise duty point, if at the time of acquisition, payment of duty is outstanding and has not been deferred (thus arguably remaining unaffected by the incorrect levy of the excise assessment).

43. However, pursuant to Schedule 41(20) of the 2008 Act, liability to the penalty does not arise in circumstances where the act/omission is not deliberate and/or there exists a reasonable excuse.

44. Mr Snell said that the Appellant's actions simply involved a commercial transaction in a normal market. The Appellant had no reason to suspect that the goods were non-duty paid. He can thus raise a defence to the penalty on the basis of 'reasonable excuse' (see *Ringwood Marketing v HMRC* [2014] UKFTT 229 (TC)).

45. In all of the circumstances, the Appellant contends that it has a prima facie case which can be pursued before the Tribunal should it be permitted to do so.

#### *Prejudice to HMRC v Prejudice to the Appellant*

46. Mr. Snell argued that it is also necessary to consider whether or not there is any prejudice caused to HMRC in the appeal being allowed out of time. In this respect it is necessary to discount somewhat the more general prejudice that is caused by appeals being brought out of time (i.e. the need for finality). Putting those matters to one side, there is no demonstrable prejudice to HMRC in allowing this appeal to proceed out of time.

47. The need for finality should be weighed against the more significant prejudice that would be caused to the Appellant should it not be allowed to continue with the appeal out of time. Most notably the Appellant's retained profit for the year 2014 was a mere £4,176. The operating profit was £670. Resultantly, a hardship application by the Appellant was granted.

48. If the Tribunal refuses to allow the Appellant to continue with its appeal, it will have to pay the penalty in the sum of £12,405.12. That is a sum which the Appellant cannot afford to pay; and would place it at risk of winding up.

*Extent of delay and explanation for it*

49. Although it is correct that the delay in submitting this appeal was a little over two months, that is not a delay which should automatically lead to the conclusion that permission to appeal should not be granted. The failure in submitting the appeal on time would appear to be a failing of the Appellant's legal representative and not the Appellant itself. HMRC would have been aware, as a result of the review procedure and the correspondence that had passed between the parties, that the Appellant did not accept the levying of the penalty (or the excise duty assessment).

50. In a scenario where the Appellant's legal representatives caused the failure and in circumstances where the Appellant was justified in taking specialist advice, it would not be in the interests of justice to deny the Appellant a right of appeal.

51. One might take the view that the Appellant's right of recourse in such a scenario lies against its representatives; however that is plainly an inadequate remedy because the only claim that the Appellant may have would be for a loss of chance. The quantum of a claim for a loss of chance would not necessarily equal the amount it has to pay by way of penalty to HMRC.

52. The Appellant's financial situation does not allow it to pay the penalty. It would not therefore be possible for it to pay the penalty and subsequently then sue its legal representatives in order to recover whatever quantum it could. That would be manifestly unfair.

**HMRC's Case**

53. Ms Poots for HMRC said that the Appellant was legally represented by Messrs Rainer Hughes throughout the relevant events. Messrs Rainer Hughes was therefore aware of HMRC's decision to issue a penalty. Indeed they engaged in correspondence with HMRC regarding the penalty.

54. Messrs Rainer Hughes then engaged with the formal procedure for disputing a penalty by requesting a review.

55. That review was carried out and it was clearly stated in the review decision letter that an appeal was to be made within 30 days. A copy of this letter was sent to Messrs Rainer Hughes.

56. Ms Poots submitted that in light of the involvement of Messrs Rainer Hughes throughout, the Appellant’s explanation for the delay is unsatisfactory. Messrs Rainer Hughes were sent copies of the penalty notice and the review decision letter by HMRC. They were aware of the need to ask for a review of the penalty.

5 57. The Appellant claims that “confusion” arose as a result of wording in the review  
decision letter which linked the penalty to the basis of the Assessment. However this  
explanation ignores the involvement of Messrs Rainer Hughes. If, on being shown the  
review decision letter by the Appellant, it was clear to Messrs Rainer Hughes that an  
10 appeal to the Tribunal was needed, there is no reason why this would not also have  
been clear at the time that Messrs Rainer Hughes received their own copy of the letter.  
No explanation has been given as to why Rainer Hughes did not make a timely appeal  
on behalf of the Applicant following the review.

15 58. Accordingly, there appears to be no basis for the statement that the need for an  
appeal only became clear when the Applicant showed the penalty decision letter to its  
legal representatives in September 2014.

59. In the absence of any satisfactory explanation for a delay of over two months and  
in circumstances where legal representatives were fully engaged with the appeal  
process, the Tribunal should not grant permission for a late appeal.

### **Conclusion**

20 60. Mr Justice Morgan in *Data Select Ltd* said:

25 “35. The Court of Appeal has held that, when considering an application for an  
extension of time for an appeal to the Court of Appeal, it will usually be helpful to  
consider the overriding objective in CPR r 1.1 and the checklist of matters set out in  
CPR r 3.9: see *Sayers v Clarke Walker (a firm)* [2002] EWCA Civ 645, [2002] 3 All  
ER 490, [2002] 1 WLR 3095; *Smith v Brough* [2005] EWCA Civ 261. That approach  
has been adopted in relation to an application for an extension of the time to appeal  
from the Value Added Tax and Duties Tribunal to the High Court: see *Revenue and  
Customs Comrs v Church of Scientology Religious Education College Inc* [2007]  
EWHC 1329 (Ch), [2007] STC 1196.

30 36. In my judgment, the approach of considering the overriding objective and all the  
circumstances of the case, including the matters listed in CPR r 3.9, is the correct  
approach to adopt in relation to an application to extend time.....”

35 61. Time limits are generally to be adhered to unless good reason can be shown why  
they should be overridden. However, it is necessary for the Tribunal to take into  
account the overriding objective of the 2009 Rules and actively exercise its discretion  
under Rule 5(3) of those Rules. For that purpose a balancing exercise must be  
conducted, taking into account all relevant circumstances and the factors set out in  
*Data Select*, including the arguable merits of each party’s case.

62. Addressing in turn, each of the factors referred to in *Data Select*:

5 (1) *What is the purpose of the time limit?* Generally the purpose of adherence to time limits is finality and certainty, which is necessary for HMRC to efficiently operate the taxation system. Time limits are also necessary for the efficient organisation of the Tribunal appeals system. With particular reference to the CPR rules, time bar provisions are intended to maintain the interests of the proper administration of justice, although this factor is more generally referable to litigation in order to prevent one party from not observing, to the possible detriment of another, a procedural obligation.

10 (2) *How long was the delay?* The Notice of Appeal was not lodged until over two months after the expiry of the 30 day limit. A significant but not inordinate delay

15 (3) *Is there a good explanation for the delay?* The explanation given for the late appeal is that the Appellant had appealed against the Assessment and therefore believed that it did not need to appeal the penalty. The Appellant believed that if the appeal against the Assessment was successful, the penalty would “fall away”. This was however not correct. The Appellant says that this “only became apparent” when they showed the penalty decision letter to Messrs Rainer Hughes on or around the middle of September 2014. As HMRC say however, Messrs Rainer Hughes received a copy of the letter, but took no action. For an adviser not specifically trained or experienced in tax appeals it is perhaps understandable how the mistake was made. Although that in itself is not a reasonable excuse the Appellant had taken specialist advice and was entitled to rely on Messrs Rainer Hughes submitting an appeal against the penalty timeously. In such circumstances they should not be prejudiced by reason of Messrs Rainer Hughes failure to do so (HMRC v Rowland 2006 STC).

25 (4) *What will be the consequences for the parties of an extension of time?* In the Appellant’s submission, if the applications for leave to appeal out of time are granted there will be no material prejudice to HMRC. HMRC do not indicate any particular prejudice to be suffered if the application is allowed. There may of course be a general prejudice in having to revisit the Appellant’s claim, but that prejudice is not, on its own, so significant as to outweigh the other factors and determine the application in favour of HMRC.

35 (5) *What will be the consequences for the parties of a refusal to extend time?* As the Appellant argues, if the application is refused, then the Appellant may suffer substantial financial loss. The Appellant will have to pay the penalty in the sum of £12,405.12. That is a sum, which as we have seen from its accounts, the Appellant cannot afford to pay thus placing it at risk of winding up.

40 63. Traditionally we must consider the merits of the appeal. As Mr Snell said, the decision, to raise an excise wrongdoing penalty, is predicated at least in part on the decision to raise an excise duty assessment against the Appellant. The provisions of Schedule 41(1) to the Finance Act 2008, in certain circumstances, potentially allows HMRC to raise a penalty irrespective of an incorrect levy of the excise assessment. However, under Schedule 41(20) to the Finance Act, liability to the penalty does not arise in circumstances where the act/omission is not deliberate and/or there exists a reasonable excuse.

64. Whether or not the Appellant had reason to suspect that the goods were non-duty paid is a matter to be determined at the substantive hearing of the assessment appeal.

5 65. Generally, as already stated, an extension of time is the exception rather than the rule. However, having considered the explanation for the delays, having taken into account all the matters set out above, with particular reference to the overriding objective and the potential merits of the appeal, this is a case in which in the interests of justice we should exercise the Tribunal's discretion to permit the appeal to be made after the expiry of the normal time limit.

10 66. The application for permission to appeal out of time is therefore granted and HMRC's application to strike out is refused,

67. Either party may apply for further directions to progress the appeal to a hearing. It is directed that unless and until such an application is made, all proceedings in the appeal are stayed and all time limits are extended generally.

15 68. 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)"  
20 which accompanies and forms part of this decision notice.

**MICHAEL CONNELL**

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**TRIBUNAL JUDGE  
RELEASE DATE: 20 OCTOBER 2015**