[2018] UKFTT 668 (TC)

TC06816

Appeal number: TC/2014/05592
TC/2014/05516

EXCISE DUTY –requirement for goods to be placed under a duty suspension arrangement immediately on importation – circumstances in which duty point arose - liability to penalty – whether conduct deliberate – reasonable excuse – special circumstances

FIRST-TIER TRIBUNAL
TAX CHAMBER

DARTSWIFT INTERNATIONAL LIMITED **Appellants**
And
PALTANK LIMITED

- and -

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

TRIBUNAL: JUDGE JENNIFER DEAN
MR DEREK ROBERTSON

Sitting in public at Manchester on 13 – 16 November 2017

Mr Michael Clarke, Counsel for Dartswift International Ltd

Mr Hammad Mirza Baig, Counsel for PalTank Ltd

Mr Simon Charles, Counsel instructed by HM Revenue and Customs, for the Respondents

DECISION

Background

1. This is an appeal in relation to Wrongdoing Penalties ("the penalties") raised against each appellant pursuant to Schedule 41 of the Finance Act 2008 ("FA 2008"). The appellant Dartswift International Ltd ("Dartswift") a customs clearance agent with status to act as a Registered Consignor. The appellant PalTank Ltd ("PalTank") is a company which provides global logistical support services to the alcohol industry, for instance in this case by enabling bulk liquid to be moved in tanks.

2. The penalties arise out of events which took place in April 2013 in respect of which Dartswift acted on behalf of PalTank as their Registered Consignor. On 8 and 9 April 2013 PalTank instructed Dartswift to complete customs clearance for 9 tankers of alcohol ("the tankers") to be imported into the UK from Australia and South Africa under duty suspension. On 8 April 2013 Dartswift submitted import entries for 6 of the 9 tankers onto CHIEF under Customs Procedure Code 07 00 000 (the code used for goods travelling under duty suspension to an approved warehouse). The entries were signed by Sam Davenport, an employee of Dartswift.

3. On 9 April 2013 HMRC officers visited Dartswift's offices to provide information about the use of the Electronic Movement Control System ("EMCS"). To be moved under a duty suspension arrangement, goods must be entered into the EMCS. In order for goods to be entered in the EMCS and moved under the duty suspension regime, electronic administrative documents (e-ADs) must be raised and the goods moved under cover of this document. It was explained to Dartswift at the meeting that it did not have the appropriate movement guarantee in place to move duty suspended excise goods from the UK port of entry nor did they have authority to use that of a third party. Dartswift was warned that moving goods without a movement guarantee would result in a liability to duty on Dartswift and any others concerned in the movement of the goods. Dartswift was sent written confirmation of this warning on 16 April 2013.

4. On 10 April 2013 Dartswift submitted import entries for the 3 remaining tankers onto CHIEF using the same Customs Procedure Code. Dartswift did not enter any of the tankers onto EMCS and consequently no ARCs nor e-ADs were issued.

5. PalTank arranged the movement the tankers which hauliers transported to their respective destinations whereupon the relevant warehouse-keepers realised that the tankers were not in duty suspense and arranged for the duty to be paid from their deferment accounts.

6. Following its investigation HMRC concluded that both Appellants were liable to pay a penalty under Schedule 41 FA 2008. On 2 June 2014 Penalty Assessments were raised against both Appellants in the sum of £125,989.90. Following review HMRC upheld the penalty against Dartswift and reduced the penalty against PalTank to £62,994.90.

The penalties and calculations

7. The penalty against Dartswift in the sum of £125,989.80 was calculated as follows:

- Potential Lost Revenue ("PLR"): £629,949
- Classification of conduct: Deliberate (hence penalty bracket of 20 – 70% PLR)
- Conduct Reduction: Maximum reduction given
- Penalty percentage: 20% (taking account of disclosure reduction)
- 20% of PLR: £125,989.80

8. The penalty against PalTank is in the sum of £62,994.90. Initially the penalty was calculated in the same manner as the penalty against Dartswift. However following review HMRC classified PalTank's conduct as "non-deliberate" and consequently the penalty was reduced to 10% of the PLR.

Grounds of Appeal and Issues

9. The initial hearing was adjourned to allow both Appellants to amend their Grounds of Appeal. At the hearing in November 2017 Dartswift's Amended Grounds of Appeal set out the following issues:

(a) Dartswift's actions fell outside of the provisions of paragraph 4 Schedule 41 FA 2008;

(b) The penalty is out of time;

(c) Dartswift has a reasonable excuse and the reviewing officer's decision was unreasonable and/or wrong in law;

(d) HMRC are estopped from raising the penalty assessment.

10. Dartswift's skeleton argument raised the additional matter that there was no deliberate wrongdoing and therefore the penalty is unlawful; HMRC did not object to this argument being raised. It was noted by HMRC that the basis of Dartswift's arguments in relation to the out of time issue and estoppel issue differed in the skeleton argument from those in the pleadings. However we were satisfied that Mr Charles was able to deal with all matters and therefore no prejudice arose.

11. PalTank's Amended Grounds of Appeal identified two issues:

(a) An estoppel based argument that the Assessment was raised "in contravention of [an] assurance" given by HMRC; and

(b) That PalTank took "all reasonable care in instructing Dartswift, as an expert Customs Clearance Agent, who also held the Registered Consignor status."

Legal Framework and Customs and Excise Procedures

12. *The Excise Goods (Holding, Movement and Duty Point) Regulations 2010* ("the Regulations") make provision for a regime under which the liability for excise duty may be suspended. Regulation 5 provides that an excise duty point arises at the time excise goods are released for consumption in the UK at which stage duty becomes payable. Regulation 6 provides that excise goods are released for consumption in the UK 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

13. Regulation 7(1) identifies the time at which goods are said to leave a duty suspension arrangement in various circumstances:

> " 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)…

14. Regulation 35 of the Regulations 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.

15. EU Council Directive 2008/118/EC, Article 21(1) states that a movement of excise goods shall be considered to take place under a duty suspension arrangement only if it takes place under cover of an electronic administrative document.

16. Regulation 57 of the 2010 Regulations provides as follows:

"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)"

17. Schedule 41 Finance Act 2008 at paragraph 4 provides that in relation to the handling of goods subject to unpaid excise duty:

(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.

(2) In [this paragraph]—

"excise duty point" has the meaning given by section 1 of F(No 2)A 1992, and

"goods" has the meaning given by section 1(1) of CEMA 1979,

Degrees of culpability

5(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 [or (as the case may be) chargeable soft drinks in respect of which a payment of soft drinks industry levy is due and payable and has not been paid] is—

(a) "deliberate and concealed" if it is done deliberately and 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.

Penalty

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

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

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

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

18. Paragraph 7(10) to Schedule 41 FA 2008 defines the potential lost revenue in the case of acquiring possession of, or being concerned in dealing with, goods the payment of duty on which is outstanding and has not been deferred as an amount equal to the amount of duty due on the goods.

19. Paragraphs 12 - 13 to Schedule 41 FA 2008 allows for reductions in penalties for disclosure made to HMRC by "telling", "giving…help in quantifying" and "allowing…access to records". Disclosure is unprompted if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the relevant act or failure; otherwise the disclosure is deemed prompted. Paragraphs 14 to Schedule 41 FA 2008 provides for HMRC to make "special reductions" in certain circumstances".

20. The FTT's powers are found in Paragraph 19:

(1) On an appeal under paragraph 17(1) the [tribunal] may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 17(2) the [tribunal] may—

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the [tribunal] substitutes its decision for HMRC's, the [tribunal] may rely on paragraph 14—

(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 14 was flawed.

Evidence

Dartswift

21. Ms Green was allocated the appellant's case on 10 October 2013. She checked the movement of the goods on the customs systems to get a background of the actual movement of the goods and produced the MSS reports which linked the import documents to the CHIEF system (Customs Handling of Import and Export Freight) which is a customs data entry system used to record details of imports into the UK; it monitors goods that have arrived at and leave customs. The C88 import documents had been generated for the goods showing that goods had been entered under customs procedure code CPC 07 00 000 which indicates goods, otherwise liable to excise duty on importation into the UK, being declared for warehousing in an Excise Warehouse under duty suspension.

22. The CPC code 07 00 000 may only be used for goods liable to excise duty and which are being moved from the place of importation to the excise warehouse under duty suspension. A movement guarantee is required to cover the movement from the place of release to the tax warehouse. Following the release from Customs control the goods may only be removed to the warehouse under the movement guarantee of an approved Registered Consignor.

23. Ms Green explained that on 24 April 2013 the EMCS helpdesk was contacted by PalTank to seek advice because e-ADs had not been raised in relation to 9 tankers of alcohol and guidance was sought as to whether e-ADs could be raised respectively. PalTank was informed by the helpdesk that they could not do so.

24. Ms Green explained that the EMCS is a tool provided by HMRC to monitor any duty suspended movements in the UK. It is mandatory for goods to be entered onto the EMCS immediately to monitor movements in the UK. If the goods arrive from

outside the EU a Registered Consignor (in this case Dartswift) is the only authorised person that can enter these details onto the EMCS system.

25. Ms Green concluded that a duty point had arisen when the goods were released for consumption in the UK having not been properly entered onto the EMCS system under the duty suspension arrangement as required and the necessary e-AD had not been raised by Dartswift under cover of which excise goods must be moved.

26. Ms Green arranged a meeting with Dartswift on 14 November 2013. In preparation Ms Green reviewed the company and noted that Dartswift had been visited by HMRC officer Shirley Gunn on 9 April 2013 when Dartswift had been advised that it did not have a movement guarantee in place and therefore could not raise e-ADs as a Registered Consignor until the guarantee was in place.

27. On 14 November 2013 Ms Green accompanied by officer Thorpe attended Dartswift's premises and met Mr Lowry, the Managing Director of Dartswift. Mr Thorpe took handwritten contemporaneous notes which were subsequently typed; both were exhibited in the bundle. Ms Green's account of the meeting recorded that Mr Lowry was asked about the movement of the goods. Mr Lowry stated that Dartswift acted as customs clearance agents and Registered Consignors involved in entering goods travelling under duty suspension onto the EMCS. Dartswift would create the e-ADs which would generate the unique Administrative Reference Code ("ARC"); documents accompanying a legitimate movement of duty suspended goods would always have an ARC number attached to them. Mr Lowry confirmed that in this case this had not happened. Mr Lowry confirmed that Dartswift now held a movement guarantee but had not had one at the time the goods were moved. He advised that PalTank had been informed of the situation but PalTank had already moved the goods. Mr Lowry stated that Dartswift had not contacted the EMCS helpdesk at the time but realised that he should have. He knew that to move goods without an e-AD was wrong. Mr Lowry was advised that a wrongdoing penalty may be issued and provided with HMRC literature explaining penalties and procedure. Ms Green stated that she subsequently decided not to issue an assessment as the excise duty was paid at the receiving warehouses and therefore the duty owed to the Crown was not at risk. However she decided to issue a penalty for the wrongdoing on the following basis:

- Dartswift failed to enter goods onto the EMCS immediately as it was unable to do so without a movement guarantee being in place (breach of Regulation 57 of the 2010 Regulations);

- The goods were deemed as released for consumption in the UK and a duty point created under Regulation 6(1)(d) of the 2010 Regulations;

- Dartswift had previously been warned at a visit on 9 April 2013 about the consequences of importing goods under duty suspension without a movement guarantee by HMRC officer Gunn;

- Dartswift should have been aware of Customs Information Paper (11) 31 which set out clearly its liability in such circumstances.

28. Ms Green concluded that the behaviour was deliberate as Dartswift had been warned about the duties and obligations of being a Registered Consignor and Mr Lowry admitted on 14 November 2013 that he knew it was wrong for the goods to have moved without an e-AD but as there was pressure on the Company the goods were moved without a movement guarantee in place. Ms Green was satisfied that Dartswift had fully cooperated and gave full reductions for telling, helping and giving.

29. Mr Thorpe gave evidence regarding his attendance at the meeting with Mr Lowry on 14 November 2013. He confirmed the account given by Ms Green and explained that when Mr Lowry had stated that PalTank had been advised that there was no movement guarantee in place he (Mr Thorpe) had assumed that it was Mr Lowry who had given that advice. Mr Thorpe had recorded Ms Green's explanation that as the goods had travelled without ARCs a duty point had been created and because of this breach a penalty may be due however Ms Green would speak to the other party before making a decision as to the imposition of a penalty. He explained that although no issue was raised relating to importation at that point, the first visit was fact finding as HMRC did not have full details.

30. Mr Richard Lowry provided two witness statements and gave evidence. Mr Lowry confirmed that Dartswift acted as a Registered Consignor and customs clearance agent on behalf of PalTank; the Appellants have worked together since 2010.

31. Mr Lowry explained that software called Infotech links to port systems such as Destin8 and it interfaces with CHIEF. At the time access to EMCS was a separate add on system purchased from Infotech. The first thing to happen is that the shipping line put the information into the system. Then a request for clearance is made by PalTank following which Dartswift would access Destin8 and claim the consignment as a customs declarant which generates a consignment number. Code 07 00 000 tells HMRC that the goods are moving under duty suspension. Destin8 would then interface with CHIEF and the information would pass onto CHIEF and the goods would be shown as cleared. If Destin8 showed the goods as clear a PIN could be obtained by which PalTank in this case was able have the goods released. Mr Lowry considered that his role in customs clearance is completed at this point, all information was based on what Dartswift was told by PalTank and the consignments were under PalTank's control.

32. Mr Lowry explained that he was aware of PalTank's expertise in the wine, spirits and drinks industry from its website, particularly in relation to importation into the UK. In early 2013 Dartswift was instructed by PalTank to clear 9 containers of wine. As customs clearance agent, Dartswift lodged a customs entry online via HMRC's CHIEF system to allow the containers into port. The CHIEF system enables the clearance agent to input entries online prior to the arrival of shipments into port as the agent is not always aware of the precise date that a shipment will arrive.

33. Mr Lowry accepted that Dartswift was contracted by PalTank to make entries onto CHIEF using a CPC code where necessary and to input information onto the EMCS which generates an ARC number. He agreed that Dartswift did this so that PalTank could move the goods and meet their delivery dates. Dartswift did not move the goods itself but assigned them to the correct route and applied the correct status in order that they could be moved. Mr Lowry agreed that PalTank dealt with the logistics of movement and Dartswift dealt with the status of the movement. However Mr Lowry did not accept in cross-examination that there was any formal contract between the Appellants or that PalTank could have sought legal redress if Dartswift did not complete its task; he stated that Dartswift just filled in forms on the information provided by PalTank on an agent to agent basis. Mr Lowry did not go as far as to say that PalTank could have double checked and verified the work carried out by Dartswift but stated that PalTank simply should not have moved goods without an ARC.

34. Mr Lowry agreed that the visit of Ms Gunn on 9 April 2013 had stopped the chain of events between Dartwift declaring some of the goods on CHIEF and then inputting the declaration onto the EMCS to generate an ARC number/e-AD.

35. In this case Dartswift was not given a delivery date by PalTank who had been advised that Dartswift could not raise an ARC without a movement guarantee in place. A C88 is sent to PalTank which is evidence required by their customer that customs clearance is completed, however the goods still cannot move without an e-AD/ARC. In the past Dartswift had always sent Paltank an e-AD which generates an ARC number, but in respect of these goods no e-ADs were sent, there were no ARCs and PalTank should not have booked movement of the goods until an e-AD/ARC was received.

36. Mr Lowry was shown customs tariff volume 3 with which he stated he was familiar:

> "A movement guarantee is required to cover the movement from the place of release to free circulation to the tax warehouse of receipt. This guarantee is detailed in the appropriate field on the e-AD prepared by the Registered Consignor."

37. Mr Lowry accepted that at the meeting with HMRC officer Ms Gunn on 9 April 2013 he was informed that the Dartswift did not at that time have a movement guarantee in place nor did it, at that time, have authority from a third party to use that party's guarantee. However Mr Lowry explained that he was explicitly told by Ms Gunn that provided Dartswift had authority from a third party it could use that movement guarantee and could continue to use the EMCS and raise e-ADs. Mr Lowry accepted that it was Dartswift's duty to make sure a guarantee was in place and stated that he had instructed Ms Davenport to tell PalTank that Dartswift was unable to issue e-ADs. Mr Lowry could not recall his exact instructions but the gist was that Dartswift had not acted correctly in relation to previous consignments, although he conceded that the message was not explicitly conveyed at the time and was "poorly

worded…and could possibly be misinterpreted". Mr Lowry also clarified that Ms Davenport was not authorised to tell PalTank:

> "I've looked at the work we've been doing and we've been doing it all correctly, including having a movement guarantee of our own"

(email dated 9 April 2013 at 16:47). Mr Lowry could not offer an explanation as to why Ms Davenport had written this message when his instructions had made clear that Dartswift had no guarantee of its own. Mr Lowry accepted that Mr Linstead's response to that email at 16:48 indicated that he was unclear as to what was needed. However Mr Lowry reiterated the point that PalTank knew an ARC was required yet they moved the goods without it.

38. Dartswift submitted import entries for 6 of the tankers onto CHIEF on 8 April 2013 and for the final 3 on 10 April 2013. The first entries were therefore made prior to the meeting with Ms Gunn and prior to Dartswift being made aware that it did not have the appropriate movement guarantee.

39. The Customs Procedure Code (CPC) 07 00 000 was used as usual by Dartswift's staff who at that time had not been informed that it would not subsequently be able to raise e-ADs on the EMCS. The staff believed that the tankers would travel under duty suspension to an approved warehouse following clearance into port. Mr Lowry stated that when using the CPC 07 00 000 code for the final 3 tankers Dartswift was working on the understanding that it would obtain the use of a third party's movement guarantee which would enable it to enter the tankers onto the EMCS and raise e-ADs in accordance with the advice received from Ms Gunn. If PalTank had obtained this authorisation the use the code 07 00 000 to make import entries would not have caused any issues.

40. HMRC officer Shirley Gunn provided a witness statement in relation to her visit to Dartswift on 9 April 2013. Dartswift had applied for Registered Consignor approval on 18 January 2011 and was approved on 7 February 2011. Ms Gunn explained that following her request on 3 April 2013 the National Registration Unit in Glasgow confirmed that Dartswift did not hold a movement guarantee. At the meeting Ms Gunn met Mr Ian Bridge, the accounts manager responsible for submitting the Registered Consignor application and who was responsible for completion of EMCS. Mr Lowry and Mrs Lowry were aware of the visit and were on the premises should they be required.

41. Ms Gunn agreed in oral evidence that a Registered Consignor does no more that put information onto the EMCS and obtain and e-AD. However she added that those actions facilitate and commence the movement of duty suspended goods in the UK. She explained that the Registered Consignor is approved to enter the movement onto EMCS and if this is not done the goods should not move; goods must be put onto the EMCS to trigger duty suspension. Ms Gunn clarified that there are separate teams within HMRC for imports/exports and excise duty; she had no dealings with CHIEF as her remit related to excise duty after goods are customs cleared. Ms Gunn

explained that her understanding was that when a CPC code is entered it is a declaration that goods are in duty suspension and will remain there.

42. Ms Gunn stated that her visit was concerned with 547 previous movements on EMCS in respect of which Dartswift did not have a movement guarantee. Mr Bridge was asked to explain Dartswift's processes when acting as Registered Consignor. He confirmed that only he and Samantha Davenport completed EMCS via Impatex and that they had checked the movement guarantee field as Consignor when they first created e-ADs. As a result Impatex, which would default to inputters previous option, defaulted to these which then fed through to EMCS and perpetuated the error. Mr Bridge advised that neither he nor Ms Davenport had realised the impact of the movement guarantee field on the actual movement.

43. Mr Bridge confirmed that Dartswift did not hold a movement guarantee as he had been advised by the EMCS Helpdesk in early 2011 that one was not required. Ms Gunn advised that with immediate effect no further e-ADs were to be created and that for Dartswift to facilitate movement of duty suspended goods as a Registered Consignor it must approach agents and establish if they hold the required movement guarantee and, if so, obtain written authority from the third party to use that movement guarantee. Mr Bridge and Mr Lowry confirmed their understanding that no further e-ADs were to be completed until a valid movement guarantee was in place. Mr Bridge then advised that there was a consignment of duty suspended alcohol in transit which was due to arrive at a UK port on 10 April 2013. Ms Gunn did not request details of the movement but did discuss whether there would be sufficient time for Dartswift to obtain the authority to use a 3rd party movement guarantee. After discussing the options with Mr Lowry and Mr Bridge, Ms Gunn gave her final decision that no more irregularities would be allowed and that with immediate effect and including the consignment due on 10 April 2013 Dartswift was not permitted to create inaccurate e-ADs; authority to use a 3rd party movement guarantee must be obtained until Dartswift had their own guarantee in place. Mr Lowry and Mr Bridge confirmed that no further e-ADs would be completed on EMCS, they would attempt to obtain a 3rd party movement guarantee for the consignment due and they reiterated that they had relied on advice given by the EMCS helpdesk and at no time did they realise that what they were doing was incorrect. Mr Bridge confirmed again the following day that no e-ADs had or would be created. He stated that Dartswift had contacted its agents advising that it did not have a movement guarantee and that it required authority to use a 3rd party movement guarantee. Mr Bridge confirmed that one haulier would allow the use of its movement guarantee. Ms Gunn explained that she had accepted this at face value as she had no reason to doubt it and her visit was not concerned with clearance of the goods but movement before a movement guarantee was in place but she was assured that it would be dealt with.

44. Ms Gunn explained Mr Bridge that a movement guarantee is required as per Notice 196 (at section 6.4) and that Dartswift had created inaccurate e-ADs by declaring that it was the provider of the movement guarantee, thereby causing an irregularity in a movement and creating the duty point on all applicable movements. Ms Gunn issued information relating to penalties and explained that as between 7 February 2011 and 3 April 2013 Dartswift had handled goods on which excise duty

had not been paid or deferred a wrongdoing penalty may apply. Ms Gunn stated that she would need to ensure her understanding was correct and take further advice before advising further.

45. Both Mr Bridge and Mr Lowry stated they were not aware of Notices 196 and 197 which provide information on Registered Consignors and their requirements. Both also confirmed that they had not realised that Dartswift would be liable as Registered Consignor if goods had gone missing.

46. The decision was taken by HMRC on 15 April 2013 to issue a warning letter only for movements between 7 February 2011 and 3 April 2013 as Dartswift had possible grounds for misdirection by HMRC's EMCS helpdesk and there had been no loss to the revenue. The decision letter was issued on 16 April 2013. It made no reference to consignments due at the time of the visit as Ms Gunn had no details of the consignments.

47. Mr Lowry's written evidence explained that after the meeting with HMRC on 9 April 2013 a member of Dartswift's staff, Samantha Davenport, contacted PalTank by email to notify it that ARCs could not be produced unless a third party's movement guarantee was used. Ms Davenport requested movement guarantees for various warehouses to be provided by PalTank to enable e-ADs to be raised and input onto the EMCS. Dartswift explained to PalTank that express authorisation was needed from each warehouse authorising Dartswift to use their movement guarantee numbers.

48. The emails between Ms Davenport and PalTank were as follows:

> 9 April 2013 at 15:48:
>
> From Dartswift to PalTank
>
> Good Afternoon
>
> HMRC have informed us this morning that as we can produce the ARC number/documentation but have no movement guarantee number ourselves – in order to produce an ARC for an excise warehouse we need their warehouse guarantee number to put on the e-AD documents to ensure they can continue to be produced for them.
>
> Can you possibly forward me warehouse guarantee number for the following warehouses:
>
> Greencroft Bottling
>
> Broadlands
>
> Kingsland
>
> Quinn Glass
>
> Samuel Smith

Thanks, Sam

9 April 2013 at 16:47:

From Dartswift to PalTank

Hi

Further to the below – yes I have all the details to complete an eAD correctly for each of the warehouses I listed below including the relevant warehouse keeper details – what I need is a fax/email saying they have a movement guarantee and they authorise Dartswift to complete the eAD documentation for a movement to their warehouse. That's all I need, it's record keeping simply because HMRC were here today and we couldn't prove we had this permission. I've looked at the work we've been doing and we've been doing it all correctly, including having a movement guarantee of our own.

Sorry for this

Sam

9 April 2013 at 16:48:

From PalTank to Dartswift

Ooook, so you do you still want the warehouse guarantee numbers? Or just an email authorising Dartswift? Cheers

9 April 2013 at 16:51:

From Dartswift to PalTank

I know I've confused you, I know.

An email from each warehouse authorising Dartswift to use the guarantee numbers – if they could put the number on there that would also be handy but I definitely need the authorisation…

49. Mr Lowry stated that PalTank was fully aware that it was not permitted to move the tankers unless and until Dartswift had obtained a movement guarantee from a third party to enable it to raise e-ADs and enter the tankers onto the EMCS.

50. Further email were sent by Dartswift to PalTank on 12 and 15 April 2013 stating:

12 April 2013 at 15:52

From Dartswift to PalTank

I haven't heard anything from you so I assume you haven't had any tanks called in?

15 April 2013 at 14:16

From PalTank to Dartswift

So time is finally on my side. Not much going on! Could you please hit me up with a list of ARC's you need delivery dates for and I'll sort it for you.

Thanks

15 April 2013 at 14:34

From Dartswift to PalTank

Hey

This is the list of tanks I still have here…

51. Mr Lowry accepted that the content of some of the emails was incorrect and that the impression given was that there was a minor issue but not of Dartswift's making. He conceded that Ms Davenport had not been truthful, for instance by indicating that the issue related to "another customer's tank" which was then resolved and by stating that the movement guarantee had been suspended when in fact there was no movement guarantee. However he did not accept that Dartswift could have done more to communicate the issue with PalTank, stating that PalTank was aware of the significance of an ARC and the fact that no ARCs were issued should have told Paltank everything it needed to know.

52. Ms Green clarified that she had seen the emails after her visit and before the penalty was issued. She found the emails ambiguous but noted that the issue relating to ARCs was mentioned. Ms Green stated she would have expected the parties to have spoken to each other regarding the matter. Ms Green's reading of the emails was that there was a problem with the movement guarantee. She agreed that without an ARC the goods simply should not have been moved by Paltank but stated that Dartswift's actions prior to that related to the lack of a movement guarantee and the EMCS. Ms Green noted that the CPC code could have been changed. She stated that the principal role of a Registered Consignor was to ensure that goods going into duty suspension are entered onto the EMCS and that an e-AD and an ARC are generated. She noted that Dartswift entered the CPC code but explained it did not complete its

task. Ms Green clarified that entering the CPC code 07 00 000 indicates that goods are about to enter duty suspension; the code is entered into CHIEF and then the EMCS; goods enter duty suspension in between the CHIEF and the EMCS. Dartswift's error was its failure to raise an ARC or complete its full task thereby causing a duty point, PalTank's error was in moving the goods without an ARC/e-AD.

53. Mr Lowry clarified that both he and Dartswift were aware that the tankers could not leave the port until another party's movement guarantee could be used but stated that Dartswift was not notified by PalTank that the goods were moved. He discovered this on 24 April 2013 and immediately instructed Ms Davenport to tell PalTank to advise HMRC's EMCS Helpdesk that e-ADs had not been raised and the goods had been removed from port without being input onto the EMCS.

54. Mr Lowry stated that Dartswift was at no point in control of the tankers at the port and had no way to prevent PalTank from moving the goods which the shipping line had released to PalTank. Mr Lowry questioned what action Dartswift could have taken to prevent PalTank from moving the goods. Dartswift's options were to cancel the import entries which would have taken several days or obtain use of a third party's movement guarantee; it opted to ask PalTank to obtain the latter and it could not have been foreseen that PalTank would move the goods before the movement guarantee was obtained.

55. Mr Lowry disputed that he had stated at the meeting with Ms Green on 14 November 2013 that either he or Dartswift felt under pressure from the warehouse to release the goods from the port without e-ADs because neither he nor Dartswift had any contact with the warehouses. Dartswift's customer was PalTank and it only had contact with its customer. Ms Green explained in evidence that it was the impression she had formed that both PalTank and Dartswift were under pressure regarding the movement of goods although these had not been the exact words of Mr Lowry.

56. Mr Lowry accepted that it is wrong to move excise goods without a guarantee or ARC number as recorded in Ms Green's note of the meeting, but stated that Dartswift did not knowingly do so at the time.

57. Mr Lowry stated that, in his opinion, the duty point was created as a result of PalTank moving the goods from the port in the knowledge that no movement guarantee was in place and that e-ADs had not been raised. Dartswift did not have any dealings with the goods other than entering them onto the CHIEF system and subsequently seeking use of a third party movement guarantee.

PalTank

58. HMRC officer Ms Gunn agreed that Dartswift played a necessary role in permitting the goods to be moved as they acted as the agent between HMRC and PalTank. Mr Baig referred Ms Gunn to Public Notice 197 at 7.2.1 which places a duty on the Registered Consignor to correctly process and then despatch goods. Ms Gunn confirmed that Dartswift had been taken aback at the fact they had not been processing goods correctly and added that the day after her visit to Dartswift she had

been assured by Mr Bridge that the goods in transit had been covered by a movement guarantee; she had not verified this information but had taken Mr Bridge at his word.

59. Ms Gunn confirmed that she had taken the view that all parties had a reasonable excuse for earlier movements of goods without a movement guarantee up to the date of her visit to Dartswift on 9 April 2013. However she stated that she did not decide whether any penalties would be due at that point as she had to consider all of the facts and consult with her line manager. She stated that the penalty could not be calculated until the fact finding task was completed and the behaviours of the parties established. Ms Green agreed that on the Appellant's explanation that the ships were not cleared until 9 April 2013 HMRC had assessed using the wrong dates but she stated that some of the documents had contained the date of 8 April 2013 and also that the containers assessed were identified correctly.

60. HMRC officer Carol Green reiterated her role in investigating the both Appellants as set out at [21] – [25] above. Ms Green concluded that a duty point had arisen when the goods were released for consumption in the UK having not been properly entered onto the EMCS system under the duty suspension requirement as required. The necessary e-AD had not been raised by the Registered Consignor. Consequently Ms Green contacted PalTank and arranged an interview with Mr Rice on 14 November 2013 in order to establish the facts. At the interview Mr Rice explained that Dartswift was instructed as the Registered Consignor and was responsible for raising the e-AD on the EMCS system which would automatically generate the ARC number. He explained PalTank was only made aware that there was a problem with Dartswift's movement guarantee after the goods had been moved. Ms Green advised Mr Rice that a duty point had been created when the goods were moved outside of duty suspension as they should have been entered onto EMCS and had e-ADs raised immediately. Mr Rice was provided with information relating to penalties and Public Notices 196 and 197 which provide education about registrations and movement of goods.

61. Ms Green took the decision to issue a penalty on the basis that mandatory paperwork and a guarantee was not in place, goods left in the port and entered the UK outside of duty suspension and a duty point had been created. Given the high value of the goods and vehicles (which could have been seized) a multi-national company should have had a mechanism in place to check the correct procedures had been followed by their Registered Consignors and an audit trail should have been established. Ms Green concluded that the Appellant's behaviour was deliberate but that full co-operation had been given and so all reductions were given in that regard.

62. On behalf of PalTank Mr Michael Rice, the commercial manager, provided a witness statement and gave evidence. Mr Rice explained that PalTank instructed Dartswift to deal with clearing goods through UK customs on its behalf. He described a typical case where a customs entry import duty-paid was required as follows: PalTank would notify Dartswift of when the tanks were going to arrive at the port. Dartswift would enter the necessary information onto the EMCS, HMRC's accounting and software system used for clearing import entries. Imports from outside the EU must be declared to HMRC; this is usually done using the Single

Administrative Document (SAD) also known as a form C88. SADs can be submitted electronically using the CHIEF system. Dartswift would then complete and provide PalTank with a copy of the C88 and related documentation confirming clearance of the goods. Mr Rice's understanding was that Dartswift would arrange for an ARC number to be generated by EMCS which would enable the goods to be transported excise duty suspended. PalTank would pass the ARC number on to the relevant bonded warehouse to enable them to match it up on the EMCS. Mr Rice confirmed that as soon as goods were shown as cleared on Destin8 there was nothing to prevent those goods from being moved.

63. After receiving confirmation of clearance and an ARC number from Dartswift, PalTank would then inform the haulier that the tank was ready for collection and provide a tank number and PIN number which would enable its release. This was all done via Destin8, a system used by all parties involved which showed what had been cleared or not cleared. Mr Rice explained that in real life movement of goods is money and there is limited free time in which the goods can be moved. Therefore often when goods arrive movement is pre-booked as to wait until everything is sorted out can be too late. Freightliners may have space prior to the pre-booked time and will check that the goods are cleared; if they show as cleared the goods may be moved earlier as the freightliners did not wait for an ARC. PalTank would generally wait for an ARC number but not always for an e-AD. The booking is authorisation for the freightliners. Mr Rice accepted with hindsight that the freightliners could have been told not to move the goods until expressly authorised that there was an e-AD but denied that in failing to do so PalTank caused the movement of the goods and stated that on previous occasions an e-AD had always been produced.

64. Mr Rice highlighted emails between the Appellants, highlighting in particular one received from Mr Bridge on 22 February 2011 in which Dartswift advised that their HMRC clearance procedures were up and running in response to Mr Rice's query following an issue raised by a bonded warehouse regarding whether or not PalTank was authorised under EMCS:

10 February 2011 at 11:39

From Ian Bridge to Mike Rice cc Richard Lowry

Mike

We have received verbal confirmation that our application for Registered Consignor status has been accepted. Written confirmation and our approval number should be with us within 7 days.

We have spoken to our software suppliers concerning the financial impact of accessing the EMCS system and also looked at the man-hours costs related to producing an eAD/ARC number…The information that has to be presented to EMCS system is equivalent to that of a Customs Entry and we have to produce one of these for *every tank* that you require and eAD/ARC number for…

All we ask is that it is identified on every import clearance request whether an ARC number is required, then you or the warehouse will be required to confirm receipt of the tank so we can do the Report of Receipt and issue the ARC number.

We hope the above is ok.

17 February 2011 at 08:41

From Jayne Hamilton to Jackie Richards (Kingsland Wines)

Jackie

Third country goods cleared into Free Circulation at port immediately become liable to Excise regulations.

Therefore they must also be cleared via the (EMCS) before they are released.

…it is my understanding that goods cleared on behalf of PalTank by their agents are not adhering to this.

There is clearly an issue in that this has not been picked up by HMRC but I am concerned as our Officer has indicated she will be looking at EMCS at her visit next week.

18 February 2011 at 09:52

From Jackie Richards (Kingsland Wines) to Ken Pomford (PalTank) and Mike Rice

Ken/Mike,

I believe there has already been some correspondence on the matter detailed below, however, Jayne Hamilton, our Bond Manager, has informed me that the issue has still not been resolved.

Can you please look into this as a matter of urgency…

18 February 2011 at 09:52

From Ken Pomford (PalTank) to Jackie Richards (Kingsland Wines)

Jaackie

Actual problem lies between HMRC and their incapacity to authorise and issue paper-work which was applied for months ago…anyhow am assured this will all be in place within days and we will be all legal…

Ken

22 February 2011 at 09:51

From Ian Bridge to Mike Rice cc Richard Lowry

We are in testing now to ensure all works OK….

We will need from you a departure date and time for each tank moving off the quay – this is to obtain the ARC.

I did have a conversation with Broadland yesterday and we appear to be on the right track…

15 April 2013 at 15:36

From Samantha Davenport to Peter Linstead

Hello

At the moment our system for completing ARCS under our guarantee has been suspended due to a separate issue with another customers tank.

Could someone please advise if Paltank has a movement guarantee to complete the ARCS under, or if your customers who we complete ARCS for have a movement guarantee that can be used so that I can complete the below ARCS for you.

Kind rgds, Sam

18 April 2013 at 12:22

From Helen Byrne to Samantha Davenport cc Peter Linstead

Hi Sam

Just wondering if you are now able to provide ARCS foe the below…

18 April 2013 at 15:24

From Samantha Davenport to Helen Byrne cc Peter Linstead

Hi Helen

Unfortunately not as our system to produce the ARCS was suspended (due to a problem with another customers tank). The issue with the other tank has been resolved but we're waiting on HMRC to allow us to start producing the ARCS again, and at the moment we have no time limit as to when this will be.

65. The consignments which form the subject of this appeal arrived at the UK ports on 8 and 9 April 2013. The nine consignments were handled by two ex-employees of PalTank; Mr Peter Linstead and Ms Helen Byrne. Mr Rice explained the intention that after being cleared through Customs they would be transported in duty suspension. In order to effect clearance of consignments on a duty suspended basis Mr Rice was aware that it was necessary for Dartswift to have in place a movement guarantee approved by HMRC for EMCS purposes. Mr Rice believed that Dartswift had a movement guarantee in place as otherwise it would have been unable to clear any of PalTank's consignments on an excise duty suspended basis.

66. Mr Rice explained that the employees were not aware that if the consignments were cleared without an e-AD or ARC the excise duty and VAT would be immediately payable. PalTank's employees did not consider it of any significant importance even to bring the matter to Mr Rice's attention as Dartswift had given the impression that they were working with HMRC to restore its movement guarantee as soon as possible. The two employees found themselves in the situation whereby the consignments have had been customs cleared, slots booked for their collection and delivery to bottling plants and times booked at those plants. Mr Rice explained that this was all part of the customers' logistics process and they were aware that any delay would be a big problem. In those circumstances, because it appeared from Destin8 that the consignments had been cleared and were available for collection as planned the employees advised the hauliers accordingly. Mr Rice noted that Destin8's own guidance states:

> "Destin8 is a Port Community System which enables all esctions of the Marine Industry to facilitate the movement of cargo through a Destin8 enabled port. A typical import container would be manifested by the Shipping Line, the Forwarding Agent would nominate the contained for clearance and submit the entry to CHIEF, the Port would arrive the vessel and discharge the container, CHIEF would return the routing for the entry and send clearance if and when applicable, the Shipping Line would release the container to the nominated

> Haulier who would then update the container with Vehicle or PIN details…All involved parties can use the Destin8 enquiry functions to view cargo information in real time. This includes checking…Customs Clearance Status…"

67. Mr Rice explained that PalTank's employees believed that the issue of ARC numbers/e-ADs were mere administrative requirements that could be resolved at a later date.

68. Mr Rice explained that PalTank had no dealings with CHIEF but it understood the position to be that Dartswift needed a delivery date to produce an e-AD or ARC and that once PalTank received an ARC number it could authorise hauliers to move the goods. The understanding PalTank had from Dartswift was that goods could not be moved until an e-AD was raised and an ARC produced. In relation to the goods in this appeal Mr Rice accepted that hauliers had been booked when it knew that Dartswift could not raise an ARC. Mr Rice stated that PalTank employees had asked questions but were given confusing and misleading answers by Dartswift; as a result PalTank was unsure if there was an e-AD and believed Dartswift would sort out the problem. Mr Rice explained that at the time the goods were moved he was away looking after his wife but having carried out a review it appeared that his staff were under the honest impression that the issue would be resolved by Dartswift. The employees kept asking if Dartswift had ARC numbers; they had never been faced with this sort of situation and believed it was just record keeping. Consequently the employees believed if the ARC numbers were received a day or two late there would be no problem. Mr Rice denied that his evidence was contradictory when he subsequently stated that he did not in fact know if his employees has understood the significance of an ARC as that was not their job but that of the clearing agent. He stated that he had given his employees instructions but kept it simple and relied on the expertise of Dartswift; it was difficult to say but it appeared that the employees had not understood. Mr Rice did not accept that PalTank's employees were incapable of carrying out their job of acting on behalf of the company to deal with Dartswift and hauliers stating that it had relied on Dartswift as the expert and even Dartswift had acted incorrectly. However Mr Rice accepted that it was wrong to have instructed the hauliers when there was no ARC number.

69. In relation to the emails between Dartswift and Paltank, in particular the following extract from 9 April 2013 at 16:47:

> "…what I need is a fax/email saying they have a movement guarantee and they authorise Dartswift to complete the eAD documentation for a movement to their warehouse."

Mr Rice did not believe the messages were clear in stating that Dartswift could not produce e-ADs and that Mr Linstead at PalTank was a junior employee and not an expert in customs clearance whereas Dartswift was. Mr Rice stated that he was unaware that VAT was due on goods which moved out of duty suspension; he stated that he believed everything was in order as the goods were moving to a bonded warehouse. It was put to Mr Rice that in 2011 it was set out in clear terms in an email that it is a legal requirement that ARC numbers are produced before goods can be released; Mr Rice stated that all he knew was that PalTank had to advise Dartswift

that they had to input information onto a system. Mr Rice said he had asked about the "fallback routine" but received no answer. He did not accept that in 2011 PalTank's staff at a senior level were aware of the EMCS system and that goods must be cleared before release; he stated that PalTank had been alerted to the procedure which was not being carried out correctly and they alerted Dartswift to this fact. Mr Rice said he didn't fully understand the procedure, only that something was not correct although he agreed that he had been told that a visit was due by HMRC and that the matter should be looked into as procedures were not being carried out correctly. Mr Rice explained that Dartswift had been instructed and that although there was no written contract he believed that there was a verbal contract. The scope of the agreement with Dartswift was that the latter would raise an ARC number for a charge of £5 and provide PalTank with it; it was an administrative task which did not involve the provision of advice. Mr Rice subsequently accepted that had he been told in 2013 that Dartswift did not have a movement guarantee alarm bells would have rung and he would have called Mr Lowry to find out what the position was. Mr Rice also accepted that he knew that with no movement guarantee there was no Registered Consignor and therefore no ARC meaning that goods could not be moved. He stated that Mr Linstead and Ms Byrne may or may not have known this as Dartswift had confused matters. Mr Rice accepted that PalTank's role involved significant operational risk in terms of liability but reiterated that he believed that if goods were delivered to a bonded warehouse and that he had not been aware that without an ARC duty suspense was broken. Mr Rice added that he had mitigated that risk by using Dartswift as a specialist clearance agent as he could not be expected to know the rules and regulations of every country.

70. Mr Rice confirmed that PalTank was contractually liable to its importers for customs clearance of the goods and entry onto the EMCS. He agreed that the responsibility lay with PalTank but disagreed that PalTank had tried to delegate responsibility to Dartswift or absolve PalTank of responsibility in circumstances where Dartswift was not paid for expert advice.

71. Mr Rice confirmed that after the email exchange on 9 April 2013 when a problem was identified, no e-AD was received and no delivery dates had been supplied by PalTank there was then a further exchange on 12 April 2013 which was the first time delivery dates were raised and by which time 6 of the consignments had already been moved. Mr Rice stated for the first time that the goods were moved on 10 April 2013, a couple of days earlier than arranged as the goods were shown as cleared on Destin8 and the haulier had space free to move them. Mr Rice initially accepted that on 10 April when Mr Linstead and Ms Davenport exchanged emails it was known to PalTank that Dartswift had not raised ARCs and that it had been suspended from doing so yet at that point goods had already been moved. However he later resiled from this position stating that it was only on 15 April that Paltank was aware of the situation and he therefore denied that it had been untrue to tell Ms Green that PalTank was only aware after the event. He added that Ms Green may have misunderstood what he was saying and it was debatable whether he had spoken the words attributed to him by Ms Green.

72. Further consignments were moved on 16 April 2013 without any further exchanges between the Appellants and when, Mr Rice agreed, it was known to junior staff at PalTank that no ARCs or e-ADs would be received. When the tanks arrived at the bottling plants PalTank was asked for ARC numbers; it was only then that PalTank's staff realised that there was a problem and the matter was reported to Mr Rice. At that point, on 24 April 2013, Mr Linstead contacted the HMRC helpline to explain the position. Mr Rice accepted that the following statement given by Mr Linstead to HMRC was confused and worded poorly but denied it was deliberately misleading:

> "Last week we had some containers arrive into the UK and clear as per usual, however we didn't get a chance to pass on the quay-removal and delivery to warehouse date, required for ARC creation, to our Customs Clearing Agent (Dartswift)."

73. On 25 April 2013 HMRC advised by email that "under no circumstances should a retrospective EMCS e-AD entry be made." Mr Rice informed the bottling plants and explained the situation. When the goods reached the UK tax warehouse the warehouse keeper took the correct action and paid the duty liability under their deferment account. There was therefore no loss to the revenue.

74. Mr Rice was subsequently advised by Mr Lowry that Dartswift never had a movement guarantee. Mr Rice has since taken action to remedy PalTank's processes to ensure the situation does not arise again. Mr Rice accepted that PalTank was under pressure to meet delivery dates in respect of these and every other consignment. Mr Rice challenged the accuracy of the notes taken by Mr Thorpe at the meeting on 14 November 2013 which indicated that he was aware that the consignments were moved without ARC numbers; a fact which he disputes.

75. The statement provided by Mr Thorpe stated:

> "MR explained to CG that the Appellant was aware that 9 tankers had moved without Administrative Reference Code (ARC) Numbers having been generated from the goods being properly entered onto the EMCS system. MR confirmed that they knew this should not have happened…MR advised CG that the Appellant only became aware that there was a problem with Dartswift International's movement guarantee after the tankers had travelled and said they reported this to the EMCS Helpline as soon as they became aware."

76. Mr Thorpe clarified in evidence that the interview was to establish the facts. He could not answer as to Mr Rice's knowledge at a particular time.

77. Following receipt of the penalty notice Mr Rice requested a review. The review upheld the decision to issue a wrongdoing penalty but reduced the penalty from £125,989.80 to £62,994.90.

78. Ms Green confirmed in evidence that a letter of warning had been sent in relation to goods up to 3 April 2013 as it was possible that Dartswift had been misdirected by HMRC's EMCS helpline and she had taken the view that the lack of

education was no deliberate; the common practice tends to be that a warning letter is issued first followed by the imposition of a penalty if it happens again. Ms Green only looked at imports up to 3 April 2013 at her visit; she made it clear that no more EADs were to be produced. When Ms Green was informed that goods were in transit she was told there would be no issue as Dartswift understood the seriousness of the situation and confirmed that a movement guarantee would be in place the next day which it transpired did not happen.

79. Mr Rice highlighted the document 'Import File Cover' which appeared to be from an internal Dartswift file and which stated in handwriting dated 18 April 2013:

> "Tanks have been delivered to the warehouse 17/04/13 & 18/04/13. Dartswift suspended from producing AE. 10/04/13 No ARCS have been produced for this file as instructed."

80. Mr Rice noted that by this time Dartswift had already entered the wine for clearance and C88s had been produced. PalTank meanwhile was still attempting to ascertain the position with Dartswift regarding the issue of e-Ads.

81. The HMRC reviewing officer Mr Donnachie retired from HMRC prior to the hearing. In those circumstances HMRC applied on 10 November 2017 for his evidence served on 31 March 2015 to be adopted by HMRC officer Gallacher. Mr Clarke objected to Ms Gallacher giving evidence, however Mr Baig wished to cross-examine the officer. We decided to admit Ms Gallacher's evidence and we bore in mind in reaching our decision that she was not the reviewing officer.

82. Ms Gallacher examined the information available and agreed with Mr Donnachie's decision to uphold and reduce the penalty imposed against PalTank. Ms Gallacher agreed that PalTank's actions were not deliberate nor was their disclosure of the wrongdoing prompted.

83. Ms Gallacher considered Mr Donnachie's conclusion that PalTank's actions were in breach of Regulation 57(1) of the 2010 Regulations and that as a result the 9 consignments were not moved in duty suspension and were deemed as released for consumption creating a duty point under Regulation 6(1)(d). Ms Gallacher was satisfied that as the goods moved without e-ADs they were therefore moved outside a duty suspension arrangement.

84. Ms Gallacher noted Mr Donnachie's conclusion that although the breaches were notified to HMRC's helpdesk voluntarily, at the time the goods were moved PalTank was aware at an operational level that the goods were moved from Customs Control without the relevant e-ADs, thereby rendering PalTank liable to a wrongdoing penalty.

85. Officer Donnachie also concluded that there was operational knowledge within PalTank of the failure to produce the necessary e-ADs to ensure the goods were properly entered onto EMCS and therefore moved under duty suspension. Evidence reviewed by Mr Donnachie from both Appellants showed that PalTank was informed that Dartswift did not have a movement guarantee. However Mr Donnachie was not

satisfied that an officer of PalTank was aware of this failure prior to the goods being moved. Furthermore there was no evidence that PalTank's employees had been instructed to deliberately ignore their legal responsibilities in order to evade duty. Ms Gallacher agreed with these conclusions.

86. In cross examination Ms Gallacher clarified that she had reached her conclusion that Mr Linstead was aware that goods were moved without an e-AD having considered the emails provided to her and notes from Dartswift to PalTank. In relation to those emails, Ms Gallacher noted that some confusion arose as a result of the use of the term "warehouse guarantee" rather than "movement guarantee" but stated that she had read the emails as referring to a movement guarantee. She accepted that it was not clear who had written the note but stated that she considered the picture as a whole. Ms Gallacher reiterated her conclusion that the penalty should remain stating that although she agreed Dartswift should have explicitly told PalTank about the situation as the emails were confusing and unclear, PalTank had a duty to have had systems in place to check that the correct procedures had been followed before the goods were moved, particularly given the volume and value of the goods, and therefore there was no reasonable excuse or special circumstances to justify removing the penalty. There needed to be checks undertaken by PalTank more recently than 2011 and the checks should be continuous.

87. Ms Gallacher agreed with the conclusion that PalTank did not have a reasonable excuse; HMRC expected PalTank's employees to have some awareness of the requirements for e-Ads to be raised prior to the movement of the goods taking place. Alternatively it was expected that measures would be in place for a senior member of staff to validate such high value movements or where potential issues were identified. As the goods were moved despite employees being unsure if retrospective action could be taken, Ms Gallacher concluded that PalTank's actions were not inadvertent. Ms Gallacher also agreed with Mr Donnachie that there were no special circumstances which would merit staying the appeal or agreeing a compromise.

88. Ms Gallacher clarified that she had focussed her enquiries on PalTank and had no knowledge of Dartswift.

Submissions

HMRC

89. Mr Charles submitted that there was common ground between the parties that a duty point arose immediately upon importation of the tankers because they were not "placed, immediately upon importation, under a duty suspension arrangement." By virtue of paragraphs 35 and 57 of the 2010 Regulations the failure to enter the tankers onto EMCS and thereby obtain both an ARC and an e-AD meant that the movement of the tankers did not take place under a duty suspension arrangement.

90. In relation to both Appellants Mr Charles contended that they have effectively put forward "cut throat" defences; each seeks to put 100% of the blame on the other. In order to satisfy the Tribunal they must prove that the other is wrong and that

HMRC was wrong in that it was "too harsh" or "not harsh enough" on the respective Appellants.

91. Mr Charles submitted that the Tribunal can consider the issue as to when an EDP arose. However it is not necessary for the Tribunal to decide the point because paragraph 4 Schedule 41 is the relevant provision, therefore the Tribunal only need be satisfied that there was an excise duty point (which is not in dispute) AND that the parties' respective conduct after that point satisfies the provisions of paragraph 4 Schedule 41.

92. In relation to PalTank, its actions came after the EDP on any view and no argument was raised that its liability turns on the point of the EDP. In relation to Dartswift, if the EDP arose under Regulation 6(1)(d) as HMRC argue, then paragraph 4 of Schedule 41 is satisfied as it was "concerned" with the goods after the EDP. If the Tribunal finds that Regulation 6(1)(a) is engaged as Dartswift argue, then Dartswift's case starts with the movement of the goods; the scope of paragraph 4 Schedule 41 is sufficiently wide to conclude that Dartswift was "concerned" in the movement of the goods even if the EDP arose at the later point for example by the confusing emails which added to the movement and by its attempts to guarantee or find a guarantor for the goods.

93. Regulation 6(1)(d) creates a two stage process:

- Importation which indicates that duty is to be paid (CHIEF);
- When goods are placed into a duty suspense regime (EMCS).

94. CHIEF deals with importation; it does not place the goods into duty suspension. In theory anyone could use CHIEF but only a Registered Consignor or relevant office holder can access the EMCS. To find otherwise would defy logic as a Registered Consignor must be accepted for such a position and it follows that only a person with that special status would be allowed to use EMCS and put goods into duty suspension given the obvious risk to the Revenue if such actions are not regulated. The arguments put forward by Dartswift fall outside this logic.

95. Dartswift question when importation occurs and the fact that it is unclear when goods must be entered onto the EMCS. HMRC submit in response that the Regulations and Council Directive must be construed in a purposeful manner on the basis of what they seek to achieve. Dartswift's argument that importation occurs when goods are in the water causes obvious problems and clear loopholes. The correct approach is to conclude that goods imported are declared on CHIEF and then entry onto EMCS is required "immediately" which means as soon as practicable.

96. As to whether the assessments are out of time the starting point of paragraph 16(4) Schedule 41 is when the "tax is ascertained". The limitation period therefore runs from when the calculation is made. HMRC needed to establish the act/failure of the parties and the tax unpaid; only then is the amount ascertained. The actions and failures of the Appellants were not ascertained until the officers had carried out

investigations as to what had happened, who did what, when and who was at fault. Ms Green's visit to the Appellants took place on 14 November 2013 and that was therefore the earliest date from which the tax could be ascertained.

97. The dates contained on the penalty notices depend upon when the EDP arose and importation took place. If the date is taken from CHIEF then HMRC accept that the dates are incorrect. However HMRC submit that there is clearly no prejudice to the Appellants who were fully aware of the goods to which the assessments related. Mr Charles highlighted *Denton & Ors v TH White Ltd & Ors* [2014] EWCA Civ 906.in which the Court noted the principle that the law is not concerned with triviality.

98. Mr Charles submitted that the point made in *Denton* applies to the submissions made by the Appellants; it is simply not sensible to conclude that the penalties are invalidated. Had HMRC applied a broad brush approach to the assessments the position may have been unclear; the fact is that all parties knew what the assessments related to. If the Tribunal deems it necessary it has full jurisdiction and can therefore amend the dates of the assessments but HMRC submit that it amounts to no more than a clerical error and requires no amendment.

Response to Dartswift:

99. Dartswift contends that the Excise Duty Point ("EDP") arose pursuant to paragraph 6(1)(a) of the 2010 Regulations and not, as HMRC contends, under paragraph 6(1)(d). It appears that Dartswift seek to argue that the EDP arose when PalTank removed the goods from the dock and therefore it follows that Dartswift had no dealings with the goods after the EDP. Dartswift's argument only has merit if the Tribunal is satisfied that the EDP arose pursuant to paragraph 6(1)(a) when PalTank removed the goods and that only PalTank had dealings with the goods after the EDP.

100. HMRC contends that paragraph 6(1)(d) makes clear that there will be a release for consumption unless the goods are "placed immediately upon importation under a duty suspension arrangement". This requires entry of the relevant goods onto EMCS.

101. HMRC submit that the issue as to when an importation takes place and what is required by the phrase "placed immediately" do not arise in this appeal; it is clear that the goods were imported and thereafter not entered onto the EMCS and hence an EDP arose pursuant to paragraph 6(1)(d). In those circumstances arguments as to exactly when the importation occurred and by when the goods should have been entered onto EMCS are sterile.

102. Even if the Dartswift's contention that an EDP did not arise until after PalTank moved the goods is accepted, HMRC submit that it is clear that Dartswift falls within the scope of paragraph 4 of Schedule 41. Dartswift acted as the clearing agent/Registered Consignor of the goods; it is difficult to understand the basis upon which it can contend that after the EDP it was not "concerned in the carrying, removing, depositing, keeping or otherwise dealing with the goods".

103. Dartswift's argument can only succeed if paragraph 4 of Schedule 41 is read very narrowly. At all material times Dartswift acted, and was paid to act, as the registered consignee for the tankers; in those circumstances it cannot be realistically asserted that it did not or could not exercise any control over the tankers. Dartswift's attempts to absolve itself of all liability for the failure to follow relevant procedures is hollow given that its sole purpose within the importation process was to ensure that the relevant procedures were followed. All parties agree that Dartswift was involved in the removal of the goods from the port by reason of the entry which it entered onto Destin8. Dartswift was also seeking to deal with the goods by placing them into a legitimate duty suspension arrangement.

104. Dartswift's attempts to argue that it did not act as Registered Consignor as it did no put the goods onto the EMCS must fail on the facts of the case. Dartswift's very function in this case was to act as Registered Consignor to deal with dispatch of the goods; it entered a contract to do so (albeit not written), obtained approval from HMRC to act in this role and held itself out as such. Furthermore, by virtue of being a Registered Consignor they are guaranteeing the movement of goods and it took active steps to obtain a movement guarantee in order to fulfil its role as Registered Consignor. Dartswift was responsible for entering the CPC code which signified the goods were to enter duty suspension which required a Registered Consignor. The fact that there was no movement guarantee caused irregularities for which Dartswift is liable and therefore must be deemed to be concerned in the movement of the goods. Once Dartswift realised there was no movement guarantee it sent emails to PalTank when as a matter of practice in the industry PalTank would have been under pressure to collect the goods. The unclear nature of the emails allowed a confusing situation to arise in which it was entirely foreseeable that the goods may be moved. The fact that Dartswift submit that the emails were an attempt to prevent the goods being moved again demonstrates the fact that they were concerned with the goods. In addition to being concerned with the goods, HMRC submit that as Registered Consignor Dartswift "otherwise dealt with" the goods as part of its role; it controlled release of the goods and bore financial liability for the irregularity. It is clear from the facts that Dartswift falls within paragraph 4 Schedule 41 and the exact point at which the EDP arose is irrelevant.

105. The events which form the subject of this appeal took place despite the fact that on 9 April 2013 HMRC informed Dartswift that it did not have the necessary movement guarantee; in spite of this Dartswift continued to make declarations (and made no attempt to amend previously made declarations) which identified that the goods were moved under a duty suspension arrangement.

106. The evidence shows that rather than informing PalTank that the goods could not be moved under a duty suspension arrangement Dartswift suggested to PalTank that the tankers could be moved under a third party's movement guarantee.

107. Dartswift asserts that the email it sent (from Samantha Davenport) on 9 April 2013 gave PalTank "the clearest of warnings…that the consignments were not covered by an eAD." HMRC submit that this misrepresents the position given that the email (when read both in isolation and in the context of other emails/communications

between the Appellants) is, at best, ambiguous about whether the goods are or would be covered by an eAD.

108. HMRC submits that Dartswift held itself out as having the skill/ability to deal with all aspects of placing goods into a valid duty suspension arrangement. It also represented that it had complied with and obtained all necessary "certifications" to allow it to place goods into a legitimate duty suspension arrangement. Dartswift represented that, in return for payment of the relevant fees PalTank could depend on Dartswift to ensure that the goods which it moved were being moved within a legitimate duty suspension arrangement. In those circumstances it cannot be argued that Dartswift was not concerned in the "carrying" or "removing" of the goods or that it was not "otherwise dealing with the goods".

109. HMRC's conclusion that Dartswift's actions were deliberate were correct; Ms Gunn had told Dartswift in no uncertain terms not to continue to allow goods to move into duty suspense. Ms Gunn's evidence was clear that she was told by Dartswift that it understood the position and that no further action would be taken until a movement guarantee was in place which happen the following day. Ms Gunn was entitles to take this at face value and therefore had no reason to advise Dartswift that if the goods were entered onto CHIEF and not EMCS an EDP would arise. Dartwsift may have acted with a genuine belief but there can be no criticism of Ms Gunn's failure to warn them in light of what she was told.

110. It must be taken into account that even if Dartswift had been misdirected by HMRC previously, they held themselves out as a sophisticated agent yet failed to tell the full truth to both PalTank and HMRC.

111. Under Regulation 57(7) of the Regulations, as a Registered Consignor Dartswift was required to provide and e-AD/ARC; the lack of any proper procedure in place is a failing in itself. Dartswift's submission that it simply filled in forms is unsustainable; it acted as the failsafe for goods entering duty suspension and it cannot wash its hands of responsibility. HMRC do not accept that Dartswift did all it reasonably could to prevent movement of the goods:

- The emails sent gloss over the issue, were misleading and untrue;
- The issue was dealt with by junior employees even after Mr Lowry had stated he would deal with it;
- It was open to Dartswift not to use the CPC 07 code on CHIEF or to amend the code.

112. Dartswift pleaded a limitation defence in the statement of Mr Lowry by which it contended that time started to run against HMRC on 1 May 2013. In its skeleton argument Dartswift changed its argument, contending that time started to run on 15 April 2013. HMRC submit that Dartswift should not be permitted to alter its pleaded case, having raised for the first time the new issue in its skeleton argument.

113. HMRC submitted that Dartswift's argument is based upon a misreading of paragraph 16(4)(b) of Schedule 41. It is not disputed that HMRC have 12 months to raise a penalty from the date on which the tax unpaid is "ascertained". Dartswift's argument fails to focus on when the tax unpaid was actually ascertained and instead focuses upon the date when it contends that HMRC first had the information required to enable it to calculate the tax unpaid.

114. The two stage test contended by Dartswift, namely that limitation relies on:

- The date that HMRC had the information required to work out the duty payable; and
- The date that HMRC knew of the wrongdoing

This misstates the law by referring to the ability to calculate the unpaid duty rather than the date the unpaid duty is actually ascertained. Even if the test is applied to the facts of this case it is clear that neither stage was established until, at the very earliest, Carole Green's meeting with Dartswift on 14 November 2013. Ms Green's evidence demonstrated that it was not until after the conclusion of HMRC's investigations which followed the meeting that HMRC ascertained that Dartswift had engaged in wrongdoing and the amount of duty unpaid as a result.

115. As to whether the penalty is unfair because HMRC did not give proper consideration to the role which PalTank had in the irregular movements, HMRC contend that it clearly did give consideration to PalTank's role in the movements. A wrongdoing penalty was raised against PalTank which was subsequently subject to a review. At all stages HMRC was aware of and fully investigated PalTank's involvement. The penalty was raised against Dartswift as it fell within the category of person identified within Schedule 41 and against whom a penalty shall be raised.

116. In respect of Dartswift's contention that the penalty is unfair because HMRC failed to take account/give proper weight to the fact that Mr Lowry did not admit any wrongdoing at the meeting on 14 November 2013 and it was a "rubber stamping" exercise HMRC submit that although there is a factual dispute between the parties as to what was said at the meeting it is unclear how this gives rise to a ground of appeal. The decision to impose the penalty was taken in light of the facts and was not in any way based upon a concession or admission made by Mr Lowry in the 14 November 2013 meeting.

117. Furthermore, the review decision demonstrates that this was not a "rubber stamping" exercise; the review officer took account of all available information and the representations made by Dartswift.

118. HMRC submit that it cannot be argued that improper weight was given to Dartswift's cooperation with HMRC when the maximum possible reduction for conduct was given.

119. Dartswift's contention that it had a reasonable excuse or that there were special circumstances relies on the advice given by Ms Gunn on 9 April 2013. HMRC

highlighted that Ms Gunn made it clear that without a movement guarantee Dartswift was not permitted to enter goods onto EMCS. She also made it clear that Dartswift had not been following the correct procedures and that this must stop with immediate effect. HMRC accept that Ms Gunn identified that goods could be moved in duty suspense if a third party agreed to guarantee the movement but contend that this cannot be relied upon by Dartswift as a reasonable excuse. Dartswift knew that its means of operating was incorrect and, HMRC submit, the emails it sent to PalTank following the meeting with Ms Gunn did little more than pay lip service to her warning. The emails are ambiguous and no further steps were taken to ensure that PalTank's hauliers (rather than its management) were not misled by the fact that the goods showed as "cleared" on Destin8. In those circumstances Dartswift had no reasonable excuse. It should have had the mechanisms in place to ensure an e-AD accompanied the goods as mandated by legislation; its response fell woefully short of that.

120. Dartswift raised the issue of estoppel in its pleadings on the basis that as the letter sent on 16 April 2013 refers to conduct "in the future" this amounted to a representation by HMRC that all conduct before 16 April 2013 would be dealt with by way of "warning" and hence no penalty assessment would be raised. HMRC noted that the argument was not pursued in Dartswift's skeleton argument and it is therefore to be assumed that it is no longer pursued. Instead the skeleton argument focuses on what Dartswift contends was a difference in approach between Carole Green and Alan Donnachie. HMRC submit that it is unclear how this could give rise to an estoppel argument. It is clear that the letter of 16 April 2013 minuted the meeting on 9 April 2013 and did not give carte blanche for actions in respect of goods about which Ms Gunn was unaware.

Response to PalTank

121. In response to PalTank's argument that the penalty is unreasonable and/or disproportionate and/or draconian HMRC submits that the penalty was calculated with reference to the criteria set out in Schedule 41 of the Finance Act 2008 and therefore it cannot be said that the penalty was unreasonable, disproportionate or draconian. Furthermore it must be borne in mind that PalTank was given the maximum possible discount based upon its conduct and therefore the argument that the penalty is unreasonable does not withstand scrutiny.

122. As regards the issue of reasonable excuse, HMRC both recognised and considered the account given by PalTank; this was reflected in the reduction applied when calculating the quantum of the penalty. However, although PalTank offered an excuse for its conduct, it is an undeniable fact that it moved the tankers without the cover of an e-AD. Furthermore PalTank knew that Dartswift did not have the relevant movement guarantee an, at best, simply assumed that it would be possible to raise a retrospective ARC with reference to a third party's movement guarantee.

123. The fact that the wrongdoing was committed by an employee of PalTank and not its Director and that the employee was under pressure from PalTank's customer

were factors taken into account by HMRC and reflected in the reduction applied to the penalty.

124. The fact that PalTank reported the matter to HMRC was acknowledged by HMRC and reflected in the discount allowed when the penalty was calculated.

125. In essence PalTank seek to place full responsibility for the "wrongdoing" onto Dartswift and the assessment against PalTank as a result should be reduced to nil. HMRC submits that it accepted the "thrust" of PalTank's argument and, having done so, concluded that its wrongdoing was "non-deliberate" which resulted in a penalty reduction. HMRC submit that the dispute between PalTank and HMRC is therefore one of degree rather than substance.

126. HMRC contend that PalTank's argument is unsustainable on the basis of the following facts:

(a) PalTank moved the goods without an eAD. This is a fundamental requirement and although there is an explanation as to how this happened the fact remains that correct procedures were not followed.

(b) The situation is made more serious by the fact that PalTank held itself out as being a haulier which specialised in the movement of alcohol and therefore should have had procedures in place to ensure that a load which was supposed to be in duty suspense was not moved without an eAD.

(c) Despite its ambiguous terms, the email sent to PalTank from Dartswift concerning its "prohibition" from entering goods onto EMCS should have alerted PalTank to the need to take extra care to ensure that the correct procedures were being followed.

127. The Tribunal should consider the discount already given to PalTank for its cooperation, disclosure and its actions not being deliberate; it cannot have the reduction again for factors already taken into account. PalTank's reliance on Dartswift is accepted but must be viewed in the context that PalTank was in the business of moving excise goods internationally and its use of agents cannot absolve it from liability in circumstances where it has not complied with its obligations or argues that it was ignorant of the law. The penalty has already been reduced on the basis that PalTank's actions were not deliberate.

128. It is accepted that the emails from Dartswift were poorly worded. However they did highlight that there was a problem even if the remedy was unclear. PalTank's response did not question what the problem was or what was needed to resolve it, instead it went ahead and moved the goods. PalTank failed to engage with Dartswift and continued in their usual manner. The evidence showed that PalTank rarely moved goods under an ARC or e-AD; its procedures did not follow the rules and there was no system in place to ensure that goods moved with an e-AD.

129. In response to PalTank's reliance on the principle of estoppel HMRC submit that the letter dated 16 April 2013 was not sent to PalTank and it is therefore difficult

to understand the basis upon which PalTank can rely on that letter as giving rise to an assurance or expectation that HMRC would act in a particular manner. Furthermore the letter clearly summarises matters discussed at the meeting on 9 April 2013; it is therefore disingenuous and contrary to the plain meaning of the letter to assert that it represented to Dartswift that all wrongdoing prior to 16 April 2013 would be dealt with by way of a warning only. The warning letter responded to Dartswift's failure to have a movement guarantee in place. PalTank moving the goods without an e-AD is entirely separate and there is no cogent link between the two such that the warning could apply to PalTank.

130. In relation to special circumstances the Tribunal would have to conclude that HMRC's decision was flawed in the Judicial Review sense. HMRC found no special circumstances; the basis of PalTank's submission is unclear and there are no reasons relied upon. The ill health of Mr Rice's wife has already been taken into consideration by Mr Donnachie who concluded that the operational failure was outside of management's knowledge as Mr Rice had not been present during the incident.

Dartswift

131. On behalf of Dartswift Mr Clarke submitted that the Appellant's position can be summarised as follows:

(a) The consignments were in a duty suspension arrangement immediately upon importation and remained so until moved by hauliers acting on behalf of PalTank. Accordingly the EDP arose in respect of each consignment upon removal from the respective dock by the hauliers which caused each consignment to be withdrawn from a duty suspension arrangement.

(b) The Appellant was not concerned in carrying, removing, depositing, keeping or otherwise dealing with the consignments after the EDP. It did not cause the consignments to be moved. On the contrary it informed PalTank that it was unable to raise the ARC/e-Ads which would have permitted PalTank to move the goods under duty suspension. Dartswift's role was limited and has been overestimated by HMRC. Dartswift was the agent of PalTank and it was PalTank's responsibility to ensure the correct clearance procedures and movement arrangements were followed. Dartswift is not to blame for the lack of education on the part of PalTank's employees or pressure felt by them to move the goods which caused the EDP to arise.

(c) Dartswift had a reasonable excuse as the goods were in duty suspension and it had no involvement in the movement after the EDP arose.

(d) Given the circumstances there was no wrongdoing, let alone deliberate wrongdoing by Dartswift and so the penalty was unlawful.

(e) The penalty was unreasonable and unjust.

(f) The penalty was out of time.

(g) The penalty notice is manifestly wrong, in particular assessing goods "imported" on 8 April 2013 when there was no such import.

(h) If Regulation 6(1)(d) is engaged HMRC is estopped from raising the penalty because Ms Gunn had indicated that only onward movement was prohibited by the absence of an e-AD, not customs clearance. The Appellant contends that Regulation 6(1)(a) is applicable to this appeal.

132. Mr Clarke contended that the key to this appeal is to identify if the consignments entered a duty suspension arrangement or procedure and if so the point at which that happened. This requires an analysis of what is a duty suspension arrangement and what is the gateway to such an arrangement together with an analysis of how and when an EDP arises. Mr Clarke submitted that the scope of the Regulations should be construed narrowly and that the Tribunal should find that the movement took place over a limited period.

133. Dartswift contends that the duty suspension arrangement is entered upon Dartswift inputting on Impatex the information which populates the C88 and in particular the declaration code 07 000 00 which is transmitted onto CHIEF. This happens when the vessels are still at sea and before importation. HMRC consider that duty suspension is entered by the raising of an ARC or e-AD on EMCS. If HMRC are correct then the goods were released for consumption under Regulation 6(1)(d) upon importation rather than under Regulation 6(1)(a) when PalTank moved the goods as Dartswift contend.

134. Mr Clarke highlighted the evidence of the witnesses on behalf of HMRC, Ms Gunn and Ms Green, who accepted that the EDP occurs after the CPC declaration is made.

135. Mr Clarke noted that under Regulation 6(1)(d) goods are released for consumption if not placed "immediately" under a duty suspension arrangement; the Regulation does not state "promptly" or "as soon as possible"; if therefore HMRC are correct that it is the raising of an ARC or e-AD which signals entry to the arrangement there is a natural lacuna as the raising of an ARC/e-AD follows importation when the goods have already arrived at the dock. Regulation 6(1)(d) can only be given a sensible meaning if Dartswift is correct and entry to the duty suspension arrangement is as the vessel is at sea upon the declaration under CPC 070 so that the goods are in the arrangement immediately upon importation. Mr Clarke gave the example of goods arriving at a port at 2am but which cannot be entered onto the EMCS until the relevant person arrives at work at 8am; although Ms Green stated that a reasonable approach is needed, due to the time gap it cannot be said that the goods are placed "immediately" under duty suspension. A taxpayer in those circumstances would have to rely on HMRC's discretion and it cannot be right that the whole system depends on the reasonableness of HMRC; if this was correct the legislation would make provision for it. However if entry into duty suspension is the result of a CPC declaration then HMRC officers Green and Gunn were concerned with the movement rather than the importation of the goods; the goods were therefore released for consumption under Regulation 6(1)(a) when they were moved without an ARC number. HMRC's case

has changed from the initial position that the irregularity was movement without an ARC to the existence of an EDP at import.

136. It appears that initially HMRC considered the "mischief" was a release for consumption pursuant to Regulation 6(1)(a) so that the movement of the goods by PalTank's hauliers was an occasion of the goods leaving a duty suspension arrangement; therefore the goods must have been in, immediately before that movement and despite the absence of an ARC/e-AD, duty suspension. The penalty explanation indicates that the behaviour of moving the goods under duty suspension was the error. Mr Donnachie subsequently changed his position.

137. HMRC's own guidance appears to indicate that the CPC code is the entry into duty suspension. This is the only guidance on the matter and which appears to accord with Ms Gunn's understanding. It is therefore unreasonable to expect a person to understand that entry onto the EMCS indicates duty suspension when HMRC's own guidance is not clear.

138. Despite reference to Regulation 6(1)(d) in Ms Green's witness statement, at the time of the officer's visit to Dartswift on 14 November 2013 up until the issue of the penalty on 1 May 2014 HMRC seem to have been operating under the belief that the EDP arose under Regulation 6(1)(a). In support of this Mr Clarke highlighted references in Ms Green's witness statement as follows (at [88/4], [88/5] and [90/14]:

> "EMCS is the tool provided by HMRC to monitor any duty suspended movements in the UK where excise goods are moving into the UK under duty suspension. In order to remain in duty suspension goods have to be entered onto the EMCS system immediately to monitor movements in the UK…
>
> The C88 import documents had been generated for the goods showing that the goods had been entered under customs procedure code (CPC) 07 00 000 which indicates goods, otherwise liable to excise duty…being declared for warehousing…under duty suspension…
>
> I explained to RL because there had been a breach of regulations and the goods had travelled without an ARC/e-AD a wrongdoing penalty may be issued…"

139. Mr Thorpe stated:

> "CG explained to RL that as the loads had travelled without ARCs a duty point had been created and because of this breach a penalty may be due."

140. The visit report to Dartswift of 14 November 2013 reiterated the comment at paragraph [39] above. The penalty explanation issued by Ms Green dated 1 May 2014 stated:

> "…During interview you stated that you knew it was wrong to move goods under duty suspension…without e-Ads…"

141. In the review decision HMRC appear to have taken a different view as to the time and mechanism by which the EDP arose. It is not alleged in the review letter that

Dartswift was responsible for the movement of the goods by PalTank's hauliers. However the review letter stated:

> "At the time of the offences, your ability to raise an e-AD which would enter details of the duty suspended movement into the EMCS system and identify the guarantee used for that movement had been suspended by HMRC. Knowing this, you continued to make import entry under CPC 07 00 000 indicating clearance to a Tax warehouse. This is a breach of EU Council Directive 2008/118/EC, Article 21 and HMDP regulation 57 which clearly explains the requirement for Electronic administrative documents for movement of excise goods under duty suspension arrangements wholly within the UK….
>
> The C88 Import entries showed CPC 07 00 000 which advises that the goods were to be sent to a UK Tax warehouse under duty suspension but a duty point was created at the point of entry when they were cleared by you, as EMCS entries have not been completed for these 9 containers and as a result, the goods were not moved under duty suspension…As a result the goods were deemed as released for consumption in the UK and a duty point was created under HDMP regulation 6(1)(d)…"

142. Mr Donnachie considered it an offence for Dartswift to have cleared the consignments without an e-AD in place and that the excise duty point was created upon importation. Mr Clarke contended that this is incorrect as a matter of law; there is no requirement for an e-AD in order to undertake customs clearance.

143. Mr Clarke submits that an arrangement or procedure can only be a process that commences when the goods are first declared on CHIEF as being goods, otherwise liable to excise duty on importation into the UK, being declared for warehousing in an Excise Warehouse under duty suspension.

144. It follows that the goods were in a duty suspension arrangement upon declaration under CPC 070 and were not released for consumption until moved by PalTank's hauliers without an ARC/e-AD; it was upon that movement that an EDP arose. HMRC's Customs Information Paper clearly states:

> "Excise goods are released for consumption when they are charged with duty on importation unless they are placed immediately into a duty suspension regime (ie declared to a CPC code within 07 series)."

145. Furthermore Excise Notice 197 at paragraph 7.2.1. advises Registered Consignors that goods cannot be moved unless an e-AD is submitted and an ARC allocated. However it does not advise that it is necessary to do the same to prevent an EDP arising on importation.

146. Mr Clarke contends that Dartswift was not concerned in the carrying, removing, depositing, keeping or otherwise dealing with the goods given its employee Samantha Davenport sent the email of 9 April 2013 to Peter Linstead in which PalTank was told that Dartswift would not have any involvement in the movement etc of the goods until it had a third party movement guarantee in place. The email is a clear warning to PalTank that the goods were not covered by an e-AD.

147. In light of the circumstances it is submitted that there was no wrongdoing or no deliberate wrongdoing. At its highest the statement by Mr Lowry that it was wrong to move the goods without a movement guarantee amounts to confirmation that he knew that Dartswift should not do something which it did not do. Dartswift had tried by the email to prevent the movement of the goods. Furthermore Dartswift did not deliberately fail to raise an e-AD; it was prevented from doing so by the prohibition placed on using EMCS by HMRC. The fact that Mr Lowry knew that there should be no movement without an e-AD is irrelevant.

148. In relation to the emails Mr Clarke submitted that they are, to a degree, irrelevant as the rule is that if there is no ARC there should be no movement of goods. Therefore, irrespective of what the emails stated PalTank should not have moved the goods. The fact that PalTank's staff were ignorant of the rules is not the fault of Dartswift; the Appellant is the entity against which the penalty is imposed and it was known to PalTank as an entity that there was no ARC. Dartswift was entitled to assume that it was dealing with competent people; PalTank is a sophisticated outfit and the Appellants have worked together since 2011. Dartswift believed that PalTank waited for ARC numbers before goods were moved. In any event the emails were clear in telling PalTank that a movement guarantee was needed and no ARC number was provided. There was no written contract with PalTank, no defining terms of their relationship and Dartswift was not engaged as an expert to provide advice.

149. To the extent that the C88 declarations using CPC 070 is part of the wrongdoing, which is not accepted, in respect of the first consignment those entries were made on 8 April 2013 before HMRC's visit and advice. In respect of the remaining consignments the entries were made on 10 April 2013 Ms Gunn did not indicate that a movement guarantee was needed for customs clearance instead she was concerned with movement from a port without a movement guarantee.

150. It is submitted on behalf of Dartswift that it had no contractual or other relationship with the hauliers and that PalTank acted on a frolic of its own. Dartswift did all that could reasonably be expected to do in the circumstances in which it found itself following Ms Gunn's visit. The test of "being concerned" relates to the physical movement of the goods which did not involve Dartswift whose general role was limited to putting numbers into the EMCS; it did not carry out its role in relation to the goods in this appeal nor did it raise an e-AD or ARC therefore Dartswift cannot be deemed to have been concerned or involved in the carrying etc of the goods as the movement only takes place after the documents are produced; passive inaction is not sufficient, there must be active involvement. Even if it had carried out its role, Dartswift's actions took place prior to the EDP arising.

151. Mr Clarke highlighted that the appeal is against a wrongdoing penalty. It should be borne in mind that the duty was paid at the warehouse and therefore the conduct giving rise to the penalty took place within a very small timeframe.

152. Furthermore Mr Clarke submits that the penalty was out of time as all of the information required for HMRC to ascertain the amount of tax unpaid was contained on the respective VI1 forms which were sent to HMRC's National Clearance Hub by

Dartswift within 3 working days from the date and time of clearance. Therefore by 15 April 2013 at the latest HMRC had available to it all the information required to work out the amount of duty payable. On Dartswift's case that the EDP arose upon PalTank's hauliers moving the goods HMRC were aware of the wrongdoing on 24 April 2013 when PalTank sent an email regarding the movement to HMRC's EMCS helpdesk and that is the date from which the 12 month period runs. On HMRC's case that the EDP arose upon importation the 12 month period runs from the later date of when the VI1s were received by HMRC, that being 15 April 2013. On either case the penalty assessment which was issued on 2 June 2014 was out of time.

153. The penalty notice assesses the period 8 – 9 April 2013; if Dartswift is correct that the EDP arose when the goods were moved by PalTank then the periods when EDPs arose are 10, 15, 16 and 17 April 2013 respectively. Even on HMRC's case the EDP arose on 9 and 10 April 2013. The assessments are therefore wrong. HMRC's reliance on *Mitchell* is manifestly wrong; the timing point is not trivial and HMRC should be precise. If the Tribunal amends the dates it would in effect replace a void notice with a fresh one which would be out of time. Furthermore to do so would go beyond the scope of the Tribunal's jurisdiction.

154. The assessments are also out of time as there was no need to look at behaviours of the Appellants which relate to the penalty; the assessments relate to ascertaining the tax unpaid which could have been calculated immediately.

155. As regards the issue of estoppel Ms Gunn's visit of 9 April 2013 and subsequent letter of 16 April 2013 were concerned with onward movements; at no time did she convey a problem with being concerned with the goods in respect of clearance and Dartswift continued the clearance procedure in the belief it was doing nothing wrong. If the EDP arose by Dartswift's involvement in the clearance process it was entitled to rely on the advice given on 9April 2013 and subsequent letter. Six consignments had already been cleared and were covered by the letter of 16 April 2013, the remaining 3 were at that time en route; Ms Gunn did not advise that an EDP would arise if the goods were cleared as Ms Gunn had indicated that the EDP arose when PalTank moved the goods.

PalTank

156. The grounds of appeal can be summarised as follows:

(a) The decision is unreasonable and disproportionate.

(b) The Appellant has a reasonable excuse.

(c) The possible wrongdoing was done by an employee.

(d) The Appellant acted promptly to inform HMRC.

(e) HMRC is estopped from raising a penalty against PalTank.

157. Mr Baig submitted that no penalty ought to be levied against PalTank which is a logistics expert and which outsources all of its customs clearance work to agents around the globe such as Dartswift. Since early 2010 Dartswift acted as PalTank's

"Registered Consignor"; save for the 9 tankers which form the subject of this appeal Dartswift has always provided ARC numbers for goods cleared.

158. Dartswift has always maintained that it had a movement guarantee and has charged PalTank for e-AD entries and for generating ARC numbers. PalTank was charged for the 9 tankers in this appeal which were processed by Dartswift on 8 April 2013 (6 tankers) and 10 April 2013 (3 tankers). PalTank submits that it was not informed by Dartswift that it was unable to raise e-ADs and continued to lead PalTank to believe that it had a movement guarantee. Dartswift maintained from the start of their commercial relationship with PalTank that it has the necessary skills, ability and requisite movement guarantee to perform the task of a customs clearance agent/Registered Consignor and produce ARCs.

159. Under Regulation 57(7) Dartswift was obliged to provide documents to the freightliner/haulier during the course of movement of the goods. If the goods were in transit and PalTank had no reason to believe it would not receive an ARC it was reasonable for PalTank to expect that Dartswift would discharge its duty. Dartswift contravened Regulation 57 by allowing the movement to take place and failing to provide an ARC number during the course of the movement. PalTank's system included on its documents that an ARC was required.

160. The emails received from Dartswift on or about 9 April 2013 and earlier did not alert PalTank to the fact that Dartswift did not have a movement guarantee, on occasion PalTank was deceived by Dartswift. The emails were confusing and unclear, a fact which was accepted by Ms Gallacher on behalf of HMRC. Furthermore the emails were deliberately drafted to give PalTank the impression that the only problem related to a different client. Mr Baig highlighted the following emails in support of this contention:

- 18 March 2010 Dartswift provided PalTank with its charge sheet and confirmed it "would be responsible for handling the Customs work."
- 10 February 2011 Dartswift confirmed that "our application for Registered Consignor status has been accepted…£5 per eAD/ARC would be what we will charge…all we ask is that it is identified on every import clearance request whether an ARC number is required."
- 9 April 2013 Dartswift stated: "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."
- 15 April 2013 Dartswift wrote to PalTank as follows: "at the moment our system of completing ARCs under our guarantee has been suspended…could someone please advise if PalTank has a movement guarantee."
- 18 April 2013"…our system to produce ARC numbers was suspended (due to a problem with another customers tank)".

161. PalTank's employees did not deliver tanks knowing that no ARC numbers were in place; the tankers were placed on cargo trains once PalTank received confirmation on Destin8 that the tankers had customs clearance. PalTank's employees were not aware that Dartswift could not produce e-ADs or that it did not have a movement guarantee.

162. There was no loss of revenue as the warehouse keepers paid the duty as soon as the error was realised. The penalty cannot be levied as the Statement of Case does not quote the correct wording of s7(10) of Schedule 41.

163. In considering whether there was a reasonable excuse, Mr Baig noted that the movement took place over a relatively short period at which time PalTank's director, Mr Rice was on leave to care for his wife who was ill which is a factor HMRC failed to take into account. Furthermore if Dartswift had made the situation clear a solution would have been found by Mr Rice. Mr Baig highlighted that PalTank had contacted HMRC's helpdesk to seek advice and added that there is no bar to PalTank seeking an ARC retrospectively.

164. PalTank falls within s20(2)(b) in its reliance on Dartswift. This has a wide scope and the HMRC officer failed to consider when PalTank's reasonable excuse ended which, Mr Baig submitted, would have been if and when PalTank were told that no ARC would be provided.

165. In the letter to Dartswift from HMRC dated 16 April 2013 it was confirmed that a penalty would not be raised against Dartswift. Mr Baig accepted that the point is more applicable to Dartswift to whom the letter was sent but contends that as the appeals are joined the point is also relevant to PalTank. Furthermore it is logical for PalTank to expect that it can rely on its relationship with Dartswift, particularly when PalTank was unaware of the full situation. In those circumstances HMRC is estopped from raising a penalty against either Appellant for any goods processed prior to 16 April 2013.

166. Mr Baig contended that there should be a finding of special circumstances on the basis that had the emails been read correctly the starting point would have been entirely different and the appropriate penalty would have been to stay any penalty or reach a compromise.

167. In relation to the submission that the assessments were out of time as the notices contained the wrong dates Mr Baig adopted the submissions made on behalf of Dartswift.

168. The penalty is out of time; Ms Gunn was in a position to issue the penalties earlier. Having indicated that she wished to consider the matter she was clearly conscious of it and therefore could have raised the assessments earlier. The legislation is clear; the test is when the unpaid tax could be ascertained which was known at the time of Ms Gunn's visit.

169. It is submitted that PalTank has a reasonable excuse such that the penalty should be reduced to nil. Furthermore the penalty should be reduced to 0% as the disclosure

was unprompted and Dartswift had the responsibility to ensure that it had a movement guarantee. PalTank is not liable to a penalty in respect of any action taken by its agent which had been misguided by HMRC. Furthermore PalTank took reasonable care to avoid any problems that may arise and instructed a specialist customs agent which misrepresented the situation regarding its movement guarantee. HMRC's contention that PalTank's staff should have been trained places an onerous burden on a trader. Furthermore Mr Donnechie failed to consider reasonable excuse in his review decision**.** The Tribunal is invited to reduce the penalty to nil by way of special reduction as PalTank did not act deliberately, it has a reasonable excuse and HMRC ought to have reduced the penalty to 0% by exercising its powers of special reduction.

Discussion and Decision

170. We will set out our approach to this decision in the following order:

(i) By identifying the decisions under appeal;

(ii) Setting out the scope of the FTT's jurisdiction and powers;

(iii) Identifying the issues in relation to each Appellant;

(iv) Our findings of fact on the chronology;

(v) Our findings of fact on the Appellants' respective grounds of appeal;

(vi) Conclusions.

The appealed decisions

171. The Appellants have appealed against penalties imposed under Schedule 41 of the Finance Act 2008; Dartswift in the sum of £125,989.80 and PalTank in the sum of £62,994.90. Our reason for setting this out is that Dartswift also appealed against an assessment to excise duty which, as we understand it, arose in circumstances involving irregularities in the movement of goods. That appeal was heard by a separately constituted Tribunal panel and other than the fact that the assessment had been appealed we heard no evidence in relation to that matter; it therefore forms no part of this Decision.

172. Paragraph 4 of Schedule 41 Finance Act 2008 provides that in relation to the handling of goods subject to unpaid excise duty a penalty is payable 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.

173. Paragraphs 5 – 7 contain provision for categorising the conduct of a person liable to a penalty and how the categorisation impacts on the quantum of the penalty. The provisions set out degrees of culpability according to whether it is deemed "deliberate and concealed" or "deliberate but not concealed." Paragraphs 12 and 13 allow for the reduction of a penalty by reference to the person's conduct in 'telling, helping and giving.' Paragraph 14 to Schedule 41 FA 2008 provides for HMRC to make "special reductions" in certain circumstances.

174. The penalty imposed against Dartswift was calculated on the basis that its acts were deliberate but not concealed. The maximum reduction to the penalty was given for Dartswift's disclosure and co-operation leaving a penalty of 20% of the Potential Lost Revenue.

175. The penalty against PalTank was deemed non-deliberate. The maximum reduction to the penalty was given for PalTank's disclosure and co-operation and the penalty assessed at 10% of the Potential Lost Revenue.

Scope of the FTT's powers

176. The FTT's powers are found in Paragraph 19 of Schedule 41. The FTT has full jurisdiction and can affirm or substitute HMRC's decision. If the FTT substitutes its decision for HMRC's it may rely on paragraph 14 (special circumstances) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point) or to a different extent, but only if it thinks that HMRC's decision in respect of special circumstances was flawed.

177. We bore in mind the objections to Ms Gallacher's evidence although they were not vigorously pursued by the Appellants in closing. We note that this appeal is not concerned with a review of HMRC's decision or the reasonableness of it. The Tribunal has full appellate jurisdiction and therefore whilst we took into account the fact that Mr Donnechie was not available for cross-examination and Ms Gallacher was not the original reviewing officer, the focus of our Decision is whether the penalties were correctly imposed and whether the Appellants had a reasonable excuse or whether special circumstances existed which could lead us to conclude that HMRC's decision in this regard was flawed.

Findings of fact: chronology

178. Before we turn to the Appellants' respective grounds of appeal and our findings thereon we intend to set out a chronology of events which, in the main, were not in dispute. In relation to those matters which were in dispute we set out the evidence upon which we have made our finding or the reason why no conclusion is necessary.

179. On 8 and 9 April 2013 PalTank instructed Dartswift as Registered Consignor to complete customs clearance for 9 tankers. On 8 April 2013 Dartswift submitted import entries for 6 of those 9 tankers onto CHIEF using CPC 07 000 00.

180. The Customs Entry Advice (SAD) shows the goods arrived on 8 April 2013. The MSS report shows that the goods arrived, were accepted and cleared on 9 April

2013 at 07:43, 07:43 and 07:53 respectively. Dartswift's invoice to PalTank for its services, which included "eAD production" was dated 9 April 2013. Destin8 records the arrival of the goods at 07:38 on 9 April 2013 and the estimated departure as 10 April 2013.

181. In respect of these goods an "Import File Cover" completed by Sam Davenport on 8 April 2013 contained handwritten notes (the author of whom was unknown) dated 18 April 2013 which stated:

"Tanks have been delivered to the warehouse 17/4 & 18/4/13.

Dartswift suspended from producing ARCS 10/4/13 – No ARCS have been produced for this file as instructed."

182. On 9 April 2013 Ms Gunn visited Dartswift. Dartswift was advised that it had no movement guarantee in place to allow it to move duty suspended goods. HMRC suspended Dartswift from entering duty suspended movements onto the EMCS.

183. On 10 April Dartswift submitted import entries for the remaining 3 tankers onto CHIEF using CPC 07 000 00.

184. CHIEF shows the 2 of the tankers as arriving on 10 April 2013. The MSS report shows that the goods arrived, were accepted and cleared on 10 and 11 April 2013 at 19:02, 19:02 (on 10 April) and 11:15 (on 11 April) respectively. Destin8 records the arrival of the goods at 19:00 on 10 April 2013 and the estimated departure as 12:00 on 11 April 2013.

185. In respect of these goods an "Import File Cover" completed by Sam Davenport on 8 April 2013 contained handwritten notes (the author of whom was unknown) dated 18 April 2013 which stated:

"2 x tanks delivered to the warehouse 15/4 & 17/4/ respectively.

Dartswift suspended from producing ARCS 10/4/13 – No ARCS have been produced for this file as instructed."

186. In respect of the final tank CHIEF shows the tanker as arriving at 19:02 on 10 April 2013. The MSS report shows that the goods arrived, were accepted and cleared on 10 April 2013 at 19:02, 19:02 and 19:12 respectively. Destin8 records the arrival of the goods at 19:00 on 10 April 2013 and the estimated departure as 12:00 on 11 April 2013.

187. In respect of these goods an "Import File Cover" completed by Sam Davenport on 9 April 2013 contained handwritten notes (the author of whom was unknown) dated 18 April 2013 which stated:

"Delivered to warehouse 16/4/13.

Dartswift suspended from producing ARCS 10/4/13 – No ARCS have been produced for this file as instructed."

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 the parties and we find that neither requirement was fulfilled. Although we found the evidence was unclear as to exactly what time it occurred, we were satisfied that PalTank's sub-contracted hauliers moved the goods from the port when excise duty procedures had not been completed. Although the goods had been declared by means of a customs entry using CHIEF which deals with customs duty and clearance, the system referred to in Regulation 57 is the EMCS which, as we understood the evidence, tracks the movement of excise goods in duty suspension, generates the e-AD required by Regulation 57 of the Regulations and assigns them a unique reference code (ARC). We were satisfied that in this situation PalTank expected Dartswift to enter the goods onto the EMCS and generate the requisite documents, which it was unable to do due to the lack of a movement guarantee.

189. As we understand the position CHIEF is linked to Destin8. The latter is a database which can be accessed by port authorities, hauliers and others. Dartswift entered the CPC 07 000 00 which indicated that the goods were duty suspended excise goods. Destin8 showed the goods as cleared which enabled their release to the hauliers. There was evidence as to codes which the hauliers could use to have the goods released but we did not find that this assisted us in determining the issues in the Appellants' respective appeals.

190. Employees at Dartswift contacted PalTank to advise that there was a problem. We will say more about the emails in due course. However suffice it to say that the goods were moved without e-ADs as Dartswift had been suspended from entering goods onto the EMCS on 9 April 2013 due to their lack of a movement guarantee. We accepted that Mr Rice was not aware of the issue until after the goods had been moved and that PalTank's staff had wrongly assumed that e-ADs could be issued retrospectively. We also accepted that Dartswift was not informed when the goods were moved.

191. Between 15 and 18 April 2013 the goods arrived at their respective destinations. The warehouse keepers identified that the movements had not taken place under duty suspension and paid the duty liability.

192. On 24 April 2013 an employee of PalTank contacted the HMRC EMCS helpdesk and advised that the 9 tanks had been moved without e-ADs. We found that the explanation was not entirely accurate, stating:

> "Last week we had some containers arrive into the UK and clear as per usual, however we didn't get a chance to pass on the quay removal and deliver to warehouse date, required for ARC creation, to our Customs Clearing Agent."

193. The employee failed to mention that, certainly by 18 April 2013, PalTank had been aware that Dartswift's movement guarantee had been suspended nor did the employee explain that PalTank had not been in receipt of an ARC or e-AD when the goods were moved.

Findings in relation to PalTank

194. In this section we will address the grounds of appeal specific to PalTank; our findings on the grounds of appeal relied upon by both Appellants will be set out later in this Decision.

195. PalTank's involvement related to the physical movement of the goods. We accepted that the goods were shown as cleared on Destin8 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; Regulation 57 provides:

> "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.
>
> (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)"

(emphasis added).

196. Our reading of the Regulation led us to conclude that the relevant documents must accompany the whole movement as a whole 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 during that movement. In any event, we found that there was no evidence of the employees' beliefs; we did not hear from the employees of PalTank and could therefore not be satisfied that any such belief was held. 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.

197. We inferred from PalTank's contact with HMRC on 24 and 25 April 2013 which raised the question of documents being generated retrospectively that the employees were not aware of the requirements relating to the relevant documentation.

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.

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.

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.

204. Mr Baig contended that PalTank falls within para 20 (2)(b) of Schedule 41, namely that there is a reasonable excuse due to PalTank's reliance on Dartswift:

> "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."

205. Whilst we accepted that there was reliance by PalTank on Dartswift we have concluded that PalTank failed to have systems and procedures in place to ensure compliance with its obligations. It was clear from the evidence that PalTank was unaware of HMRC's Notices 196 and 197 and that Mr Rice had failed to educate himself or the employees as to the legal requirements for moving goods. Even accepting that the emails from Dartswift were unclear no action was taken to clarify the situation in circumstances where PalTank was aware that there was no e-AD or ARC covering movement of the goods. In those circumstances we were not satisfied that PalTank took any reasonable care to avoid the goods being moved despite its knowledge that there was no e-AD.

206. We considered Mr Baig's submission that PalTank's appeal should be allowed on the basis that there was no loss to the Revenue yet HMRC's Statement of Case relies on paragraph 7 to Schedule 41 which defines "potential lost revenue" in respect of a failure to comply with relevant obligations as:

> "7(10) In the case of acquiring possession of, or being concerned in dealing with, goods the payment of duty on which is outstanding and has not been deferred, the potential lost revenue is an amount equal to the amount of duty due on the goods."

We found Mr Baig's submission misconceived; the inclusion of the word "potential" makes clear in our view that the legislation does not require an actual loss to the Revenue and the calculation of the penalty is made by reference to the potential lost revenue. Moreover we have found that PalTank quite clearly acquired possession of or was concerned in dealing with goods which were not under duty suspension and upon which duty was due, irrespective of however short a time period passed until, in this case, the warehouse keepers paid the duty.

207. As to the issue of special circumstances we were unclear as to what factors beyond those already considered by HMRC were relied upon. We were satisfied that HMRC had considered special circumstances and found none. We concluded that HMRC's decision in this respect was not flawed in the Judicial Review sense and we therefore found no grounds upon which to interfere with it.

Findings in relation to Dartswift

208. We began by considering the respective positions of the parties. Mr Charles contended that an EDP arose under Regulation 6 (1)(d):

> Excise goods are released for consumption in the United Kingdom at the time when the goods —
>
> (d) are charged with duty at importation unless they are placed, immediately upon importation, under a duty suspension arrangement

209. Mr Clarke submitted that the EDP arose under Regulation 6(1)(a):

> Excise goods are released for consumption in the United Kingdom at the time when the goods —
>
> (a) leave a duty suspension arrangement;

210. The question the parties posed was whether the goods were in duty suspension until moved by Paltank's hauliers or whether the goods never entered a duty suspension regime at all.

211. We noted the Appellant's submission that HMRC had relied on Regulation 6(1)(d) as creating an excise duty point. However we noted that the Appellant's original grounds of appeal did not raise the argument that Regulation 6(1)(d) did not apply and we were content for HMRC to respond to the Appellant's submissions regarding Regulation 6(1)(a).

212. The Regulations clearly refer to two stages; the goods being imported which is followed by entry into duty suspension. The process or act of importation gives rise to customs obligations which are separate to excise obligations. CHIEF, which can be accessed by anyone, deals with importation. The EMCS is the system by which duty suspension procedures are set. We accepted the evidence that the use of the EMCS is restricted and we found that in this case that Dartswift acting in its role as Registered Consignor was responsible for completing the EMCS which would have, if the task had been completed, resulted in the goods reaching duty suspended status.

213. On any view the goods were imported. The reasonableness or otherwise of HMRC's practices in seeking to give effect to the Regulations as intended does not, in our view, assist us in determining the issues in this appeal. The question we considered was whether, once the goods were imported, they entered duty suspension. By entering the CPC code 07 000 00 Dartswift indicated the intention that the goods

would enter duty suspension. However we accepted the evidence of Ms Green and found as a fact that in order to indicate entry into duty suspension and remain in that duty suspension during movement the whole process of declaring the CPC code and completing the EMCS had to be carried out. As Dartswift was suspended from entering the goods onto the EMCS the goods did not complete entry into a duty suspension regime and an EDP arose under Regulation 6(1)(d).

214. It is fair to say that none of the witnesses professed expertise in when the exact moment of importation occurs. We found the evidence of the witnesses for HMRC to be honest and we accepted the evidence as to how HMRC apply the Regulations in practice. In our view HMRC's approach was reasonable in allowing importers a degree of flexibility as to when goods are placed into a duty suspension arrangement recognising that although the Regulations require immediate action this may not be possible in reality. In our view we do not need to reach a conclusion as to what "immediate" requires or the exact point of "importation"; the fact is that goods were imported and not entered onto the EMCS.

215. We did not accept that the HMRC officers had relied on different Regulations in reaching their conclusions; we agreed with the evidence of officer Green that they "were saying the same thing, just in a different way." We noted the witness statement of Mr Donnachie which stated that "the goods were not moved in duty suspension". We accept as arguable that this suggests that the goods were in duty suspension and it was the movement from the quay which caused the excise duty point. However Mr Donnachie also refers to a duty point being created "at the point of clearance." We did not hear from Mr Donnachie and therefore his comments in his review were not clarified. We also took into account the evidence of the officers from whom we did hear. However we noted that we the Tribunal has full appellate jurisdiction in this type of appeal and we therefore did not simply accept the opinions of the officers but rather we have made our findings on the basis of our understanding of the evidence as to how the processes of customs clearance and duty suspension are carried out. We concluded that the processes are inextricably linked; the CPC code is entered in relation to customs clearance but it also starts the process of entering goods into duty suspension which is only completed when the EMCS has been entered and an e-AD produced for the goods. For that reason we were satisfied that an excise duty point arose under Regulation 6(1)(d).

216. If, however, we are wrong in our view as to a duty point arising under Regulation 6(1)(d), we considered that the Dartswift fell within the scope of the paragraph 4 of Schedule 41 Finance Act 2008 and is liable to a penalty for the following reasons.

217. Irrespective of whether or not an excise duty point arose upon importation, it was agreed by all parties that an excise duty point arose when the goods were moved. Taking as the excise duty point we went on to consider the scope of the Regulations. The penalty was imposed under paragraph 4 of Schedule 41 which requires that after an excise duty point has arisen, the Appellant:

> "acquires possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods, and 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."

There was no dispute that payment of duty was outstanding. The question is therefore whether Dartswift was concerned in the carrying, moving, depositing, keeping or otherwise dealing with the goods.

218. In our view the scope of the provisions is wide, hence the wide drafting of the terms, and Dartswift fell squarely within that scope. We rejected the submission that Dartswift did not act as Registered Consignor as it did not complete the EMCS. The evidence was clear and we found as a fact that Dartswift held itself out as a Registered Consignor, it was engaged to act in that role and indeed began to carry out its role by declaring the import and indicating on CHIEF that the goods would enter duty suspension by its use of the CPC 07 000 00 code. A movement guarantee is fundamental to the role of a Registered Consignor and in our view the difficulties began when, on 9 April 2013, Dartswift became aware that it did not hold a movement guarantee. The fact that there was no movement guarantee did not mean that Dartswift was not the Registered Consignor; it continued to act in that role by seeking to put a movement guarantee in place by other means which would allow it to fulfil its obligation to complete the EMCS and generate an e-AD which would allow the goods to move. During the period over which the goods were moved Dartswift continued to act in its role as Registered Consignor by contacting PalTank and seeking a movement guarantee with the intention of completing its task.

219. We did not accept Mr Lowry's evidence that Dartswift's role was simply "form filling" and ceased once the customs declaration had been made; for the reasons set out above we were satisfied that Dartswift's obligations as Registered Consignor for the goods covered both customs clearance and excise obligations and went beyond simply entering data into the various systems such as the EMCS. We concluded that whilst PalTank was responsible for the logistics of moving the goods, Dartswift was responsible for the status of the goods for the purpose of that movement. We found that although Dartswift did not control the hauliers who moved the goods it was nevertheless Dartswift who assigned the goods to the correct route, for example by entering the CPC 07 000 00 code and in doing so was responsible for applying the correct status to the goods so that they could be moved in accordance with the Regulations. By entering CPC 07 000 00 Dartswift indicated that the goods were intended to enter a duty suspension regime. We considered the fact Dartswift had already made this declaration in respect of some of the goods prior to being advised that it could not fulfil its role as Registered Consignor due to the lack of a movement guarantee. However in relation to those goods we found that Dartswift failed to take any action to alter the code in the knowledge it could not complete its task, nor did it contact HMRC to seek assistance. We accepted the evidence of Ms Gunn that she had advised in no uncertain terms that Dartswift must not make an entry onto the EMCS in relation to those goods. We accepted the evidence that Dartswift had advised that no entry would be made until a movement guarantee was in place. Having failed to obtain a movement guarantee we found as a fact that Dartswift not only took no

action to cancel or alter the declaration previously made, it did not alert PalTank expressly as to the situation. In relation to the remainder of the goods which were declared for customs entry on 10 April 2013, Dartswift was fully aware of the situation and made the decision to continue to try to fulfil its role as Registered Consignor.

220. We also noted that as long ago as 2011 Dartswift had engaged in correspondence with PalTank regarding the requirements as shown in the email exchanges above and we therefore did not accept that the lack of efficient systems in place could amount to a reasonable excuse.

221. For the reasons set out we concluded that if we are wrong in our finding that an excise duty point arose under Regulation 6(1)(d) we are nevertheless satisfied that a duty point arose under Regulation 6(1)(a) and that Dartswift falls within the scope of that provision. We therefore do not accept the Appellant's submission that the penalty is unreasonable or unjust; we were satisfied that it was imposed in accordance with the legislation and that irrespective of the short period in which Dartswift was involved and payment of duty was not made the Appellant is liable to a penalty.

222. However we did not agree with HMRC's view that Dartswift's conduct was deliberate. The question of deliberateness is a matter of context. If the excise duty point arose under Regulation 6(1)(d), Dartswift's actions at that point were limited to entering the CPC codes and failing to take steps to alter or cancel this entry. Thereafter Dartswift made attempts to find a 3rd party movement guarantee. If the excise duty point arose under Regulation 6(1)(a), Dartswift had failed to take any action to remedy the situation and had confused the situation by sending emails which were at best unclear, at worst misleading, and which led to movement of the goods (or certainly failed to prevent movement of the goods).

223. In summary, the goods arrived and CPC codes entered, however that action was taken either without the knowledge that there was no movement guarantee in place or at a time when Dartswift was seeking a 3rd party guarantee. Whilst the emails sent by Dartswift to PalTank were unclear we have nevertheless concluded that Dartswift was seeking to resolve the situation. In our view it is arguable that the actions of PalTank could be considered to be more deliberate in the sense that movement was authorised without an e-AD. However we have accepted the evidence that the goods appeared to the hauliers to be cleared and therefore movement could occur. However we take the view that at that point Dartswift was still seeking a remedy in the form of a 3rd party guarantee and therefore the handling and movement of the duty unpaid goods was not deliberate. For those reasons we take the view that HMRC's starting point was incorrect and we substitute a starting point of not deliberate. We noted that Dartswift was given the maximum possible reductions for "telling, helping and giving" and we agreed that the reductions were appropriate given Dartswift's co-operative conduct.

224. The issue of reasonable excuse is distinct from the question of deliberateness. Given the advice provided by Ms Gunn which we accepted was clear and unequivocal, the confusing nature of the emails and the failure by Dartswift to prevent movement of the goods we are not satisfied that there was a reasonable excuse.

Dartswift could have sought assistance from HMRC as to how to remedy the CPC code entered and could have made it explicitly clear to PalTank that the goods should not be moved. We did not accept that Ms Gunn should have provided any advice beyond that which she did; Dartswift was a professional company with experience as a customs clearance agent and Registered Consignor; any lack of knowledge or understanding on its part does not amount to a reasonable excuse and the onus rested with Dartswift to seek advice if needed.

225. In relation to the issue of special circumstances we were satisfied that this had been considered by HMRC and we concluded that HMRC's decision in respect of there being no special circumstances was not flawed in the judicial review sense.

Estoppel

226. Both parties relied on the letter from HMRC dated 16 April 2013 in which Dartswift was warned that in the future releasing goods from duty suspension without a movement guarantee would result in a liability to duty on Dartswift and any others concerned in the movement of the goods.

227. We were wholly satisfied that the letter clearly reflected the information gathered at the meeting on 9 April 2013, at which time Ms Gunn had no detailed knowledge of the consignments which form the subject of this appeal nor was the visit concerned with those consignments. As set out above, we accepted Ms Gunn's evidence that at that meeting it was made abundantly clear that Dartswift was suspended from entering goods onto the EMCS until a movement guarantee was in place. We found that the Appellants' reliance on this letter as grounds for an estoppel argument was misconceived in circumstances where it was clear that the letter only excused behaviour relating to excise goods previously moved without a movement guarantee in place. In relation to PalTank, which was not the recipient of the letter and had no knowledge of it until the original appeal hearing, we took the view that the fact that the two appeals were joined is irrelevant and we were satisfied that the letter had no bearing at all on PalTank.

Out of time

228. Both Appellants submitted that the penalties were out of time. Paragraph 16 (4) of Schedule 41 FA 2008 states that:

> "An assessment of a penalty…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."

229. On behalf of Dartswift it was submitted that all of the information required for HMRC to ascertain the amount of unpaid tax was contained in documents available to HMRC within 3 days of clearance of the goods, therefore HMRC could ascertain the

amount of tax unpaid by 15 April 2013 and the starting point should run from that date. The Appellants highlighted that HMRC were aware of the wrongdoing on 24 April 2013 when notified by Paltank of the movement of the goods. As the penalty letter was not issued until 2 June 2014, the penalty was notified out of time using either date as a starting point.

230. We did not accept the Appellants' interpretation of the provision set out above. The Oxford dictionary defines "ascertained" as:

> "Find (something) out for certain; make sure of.
>
> 'an attempt to ascertain the cause of the accident'"

231. On an ordinary reading the provision clearly refers to the point at which the amount of tax is calculated with reference to the relevant act or failure which the tax to go unpaid. We rejected the Appellants' submissions that HMRC held the necessary information in April 2013. In our view, although HMRC at that point had been alerted to the fact that duty had gone unpaid, the details relating to the relevant act or failure remained unknown to HMRC until the visits to both Appellants in November 2013. We accepted the evidence of Ms Green that the visits on 14 November 2013 were undertaken as fact finding exercises following which the information gathered was considered. In our view it was only when HMRC found out that information that the relevant act/failure was known from which HMRC could then ascertain the amount of tax unpaid. We are therefore satisfied that the penalties were in time.

Wrong in law

232. The penalty notice assesses the period 8 to 9 April 2013. Dartswift contended, on the basis that the duty point arose at the time the goods were moved by Paltank, that the notice was incorrect and therefore wrong in law; the dates upon which Dartswift contended that duty points arose are 10, 15, 16 and 17 April 2013. Both parties submitted that on HMRC's case the duty points arose on 9 and 10 April 2013 and not 8 and 9 April 2013; there was therefore no potential lost revenue on the periods assessed.

233. We did not accept the submissions made by Dartswift in relation to 10, 15, 16 and 17 April 2013, For the reasons set out above we were satisfied that the excise duty point arose upon importation. We accept that the dates used by HMRC were based on documents available at the time of making the penalty assessment. We also accept that the dates may not be accurate given the issue as to when the excise duty points arose.

234. We noted that the issue in relation to when importation occurred and when the excise duty points arose was not a point initially disputed by the Appellants. In assessing the effect, if any, on the penalty notices following the issue relating to excise duty points being disputed, we found *Denton & Ors v TH White Ltd & Ors* [2014] EWCA Civ 906 provided helpful and clear guidance. Whilst we acknowledge that the context of that case was the consideration of non-compliance and relief from

sanctions, we concluded that the principle highlighted by the Court is one of general application (emphasis added):

> "It will usually be appropriate to start by considering the nature of the non-compliance with the relevant rule, practice direction or court order. If this can properly be regarded as trivial, the court will usually grant relief provided that an application is made promptly. The principle "*de minimis non curat lex*" (the law is not concerned with trivial things) applies here as it applies in most areas of the law. Thus, the court will usually grant relief if there has been no more than an insignificant failure to comply with an order: for example, where there has been a failure of form rather than substance; or where the party has narrowly missed the deadline imposed by the order, but has otherwise fully complied with its terms."
>
> (emphasis added)

235. We considered whether, if the dates on the penalty notices were incorrect, it followed that the penalties were wrong in law or invalidated. In our view the penalty explanation clearly identified the goods upon which duty was unpaid and in respect of which the penalties were imposed. It cannot be said that either of the Appellants were in any doubt nor was any prejudice caused. We concluded that the dates contained on the penalty notices, to the extent they may be wrong, amounted to a failure of form rather than substance and we rejected the Appellants' submission that they should cease to have effect.

Conclusion

236. In relation to the appeal of PalTank we uphold HMRC's decision and dismiss the appeal.

237. In relation to the appeal of Dartswift we substitute a finding that its conduct was not deliberate and we reduce the penalty to £62,994.90.

238. 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.

JENNIFER DEAN
TRIBUNAL JUDGE

RELEASE DATE: 14 NOVEMBER 2018