TC01770

Appeal number: TC/10/06576

Simplified Import VAT Accounting Scheme (SIVA); Excise Payment Security System Scheme(EPSS); Refusal to waive need to provide security to defer import VAT and excise duty; statutory discretion; whether refusal unreasonable having regard to HMRC published criteria; Value Added Tax Act 1994 s16(1)(4)&(8); Customs Excise & Management Act 1979 ss45 &127A, The Customs Duties (Deferred Payment) Regulations 1976 SI 1976/1223, regulation 4 Value Added Tax Regulations 1995, regulations 121A, 121B, SI 1995/2518, Value Added Tax (Amendment) (No 5) Regulation 2003, SI 2003/2318 Council Regulation 2913/92/EEC (Community Customs Code), Article 225, The Excise Duty (Deferred Payment) Regulations 1992 SI no 1092/3152 regulations 8 & 9; Notice 101 (Deferring Duty, VAT and other charges), Notice SIVA 1 (Simplified VAT Accounting); appeal allowed.

FIRST-TIER TRIBUNAL

TAX

FORTH WINES LIMITED
(Formerly DOLLAR TRADE LTD) **Appellant**

- and -

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

TRIBUNAL JUDGE: **J. GORDON REID Q.C., F.C.I.Arb.**
Member(s): **I SHEARER**

Sitting in public at George House, 126 George Street, Edinburgh on Tuesday 13 and Wednesday 14 December 2011

Ewen Cameron, Forth Wines Ltd, for the Appellant

Ian Mowat, solicitor, Office of the Advocate General for Scotland, for the Respondents

DECISION

Introduction

1. Forth Wines Ltd ("FW"), who carry on business as distributors of wines, spirits and other alcoholic beverages, and who have a bonded warehouse at Milnathort, appeal against two decisions of the Respondents ("Customs"), which relate to the requirement to guarantee payment of deferred liability for import VAT and excise duty. Customs have refused to waive the need to provide security in order to defer such liability and have thus refused to approve FW's proposed participation in the Single Import VAT Accounting Scheme (SIVA) and the Excise Payment Security Scheme (EPSS).

2. A Hearing took place at Edinburgh on 13 and 14 December 2011. The Appellants were represented by Ewen Cameron, FW's chairman, who gave evidence and also led the evidence of Alan Cramond C.A., FW's finance director. Witness statements by Mr Cameron, Mr Cramond, Allan Marnoch, FW operations manager, David Mitchell, FW's warehouse manager, Jacqueline Russell, FW's financial accountant, and George Thomson managing director of FW were produced. An email from Mr Thomson to Mr Cameron dated 13 December 2011 was added to Mr Thomson's statement without objection towards the end of proceedings. Customs were represented by Ian Mowat, solicitor, Office of the Advocate General for Scotland. He led the evidence of Marilyn Seago, Francis Manley, both Customs Review Officers and Keith Berwick, assistant assurance officer with Customs. Witness statements by Mrs Seago, Miss Manley, and Keith Berwick, were also produced. Towards the conclusion of proceedings a short witness statement by Frederick McLean-Brown, a policy officer in Customs' SIVA policy team, was lodged by Customs, without objection. An agreed bundle of documents, and a Joint Minute of Admissions (reproduced below) were also produced. There was no dispute about the evidence contained in the statements of the witnesses who were not led in evidence. Finally, we record that Mrs Seago's evidence was taken via video link, a facility which worked well.

Facts

3. FW was formerly known as Dollar Trade Ltd ("Dollar"). Dollar was established in January 2010 to acquire the business and assets of a company, then known as Forth Wines Limited ("Old FW"). Old FW was a wine distribution company established in 1963. It was a subsidiary of Matthew Clark Holdings Ltd. Old FW had Simplified Import VAT Accounting Scheme (SIVA) and Excise Payment Security Scheme (EPSS) approvals. Accordingly, it was not required to provide security in order to defer payment of import VAT or excise duty.

4. On or about 4 August 2010, Dollar acquired the assets of Old FW. Thereafter, Dollar changed its name to FW. The shareholders of FW are Scottish Enterprise (29.9%), Sir David Murray (41.1%) and the management team (30%).

5. On or about 20 May 2010, Dollar submitted SIVA and EPSS applications in anticipation of acquiring the business of Old FW.

6. By letters dated 25 May 2010, Customs refused to grant these applications for SIVA and EPSS approval. By letter dated 4 June 2010, Dollar requested a departmental review. By letters dated 14 July 2010, Customs confirmed their earlier decisions to refuse to grant approval.

7. David Mitchell has been employed by Old FW and FW since 1983, Allan Marnoch since 1998 and Jacqueline Russell since 2004. Alan Cramond (financial director) Ewen Cameron (chairman of the board) and George Thomson (managing) have all been directors of FW since its inception.

8. The Joint Minute of Admissions is in the following terms:-

The Appellant and the Respondents concur in stating to the Tribunal that for the purpose of this appeal the parties are agreed as follows:

1. That the Appellant was incorporated in Scotland on 28 January 2010 with company number SC371918 as Dollar Trade Ltd. Its registered office is 22 Bridge Street, Dollar, Clackmannanshire FK14 7DE. The appellant was registered for VAT on 27 February 2010 under number VRN 984 7612 73.

2. The appellant was set up to acquire the trade and assets of Forth Wines Ltd, which was until its acquisition by the appellant a subsidiary of Matthew Clark (Holdings) Ltd and part of the Matthew Clark (Holdings) Ltd VAT Group.

3. On 4 August 2010 the appellant acquired the assets of Forth Wine Ltd and a few days afterwards changed its name to Forth Wines Ltd.

4. On 20 May 2010 the appellant submitted applications to the respondents made under the appellant's former name Dollar Trade Ltd, for (one) Simplified Import VAT Accounting (SIVA), and (two) for admission to the Excise Payment Security Scheme (EPSS). Both applications were signed by Ewen Cameron, one of the appellant's directors.

5. Forth Wines Ltd was approved for SIVA on 16/07/07 under the Matthew Clark (Holdings) Ltd Group Registration with deferment account 8133051. Forth Wines Ltd was approved for EPSS on 03/01/07 under the Constellation (Europe) Group Registration with deferment account 8133051. Forth Wines Ltd left that Group registration on 16/04/07 to join the Matthew Clark (Holdings) Ltd Group Registration. The VAT registration for Matthew Clark/Forth Wines (891 5576 80) was compliant with the SIVA/EPSS Approval Criteria at the time of the applications by the appellant on 20 May 2011. Matthew Clark Wholesale Ltd now operates the deferment account 8133051 under the Matthew Clark (Holdings) Ltd. Group Reg. with both SIVA and EPSS approvals.

6. Since the appellant's incorporation its directors have been Alan Cramond, Ewen Cameron and George Thomson. None of them have ever been directors of Matthew Clark (Holdings) Ltd but Ewen Cameron and George Thomson have a long history of directorships and involvement in the drinks industry.

7. During a conversation on 21 May between Phil Keenlyside and the Appellant's advisor Fiona Miles of Grant Thornton UK LLP, Mr Keenlyside told Miss Miles that the applications were being considered but given the issues she had raised with him regarding the company's particular circumstances it was always open to the company to seek a review or appeal. He said that if the previous VAT number of Forth Wines Ltd could be transferred as part of the TOGC, the EPSS and SIVA authorisations held by the previous company could be transferred as well.

8. On 25 May 2010 Phil Keenlyside of the respondents, wrote to the appellants advising that their applications for SIVA and EPSS had failed for the following reasons.

> **Length of time VAT registered** – Dollar Trade Ltd had been VAT registered for less than three years or more (VAT Registration from 27/02/10). Dollar Trade Ltd had wished to rely on a previous VAT registration i.e. Forth Wines Ltd (VAT No. 891 5576 80) to satisfy the three year requirement but, as there was no continuity at director level from that entity's VAT registration to the new entity and VAT registration, their compliance history could not be used.
>
> **Transfer of going concern** – The transfer of the going concern had not occurred more than three years prior to the date of application for SIVA/EPSS. The date of transfer of the going concern would occur when Dollar Trade Ltd finally acquires the trade and assets of Forth Wines Ltd.

9. The Appellant requested a review of both decisions in their letter of 4 June 2010 form Grant Thornton. The Respondent's review decisions are contained in their letters of 14 July 2010, in respect of SIVA from Marilyn Seago of the Customs Reviews and Appeals Team, and in respect of EPSS from Frances Manley of Local Compliance - Appeal and Reviews. Both review officers upheld the respondents' initial decision. The Appellant appealed both decisions timeously.

10. SIVA is a scheme that was introduced on 1 December 2003 to ease the financial impact of Import VAT on importers by reducing the level of financial security required to guarantee the payment of Import VAT through the Duty Deferment System.

11. Formerly, under Article 225 of the Community Customs Code all traders were required to provide security (i.e. a Guarantee) for all deferred import duties. However, Regulation 121B(4) of the Value Added Tax Regulations 1995 (SI 1995/2518) as amended by the Value Added Tax(Amendment) (No 5) Regulations 2003 introduced a relaxation to that requirement and now allows the customs authorities to waive this condition at their discretion, if there is no risk to the payment.

12. When introducing SIVA, HMRC (formerly Customs and Excise) had to strike a balance between ensuring that the trade received the maximum benefit from this scheme, whilst protecting the revenue. The risk to revenue by traders operating SIVA is potentially very large as the delay between the tax being deferred and tax being collected by the Department may allow a trader the

opportunity to fail to pay. Traders can only be authorised to use SIVA if they are able to satisfy HMRC that they present no risk with regard to the payment of the deferred VAT.

13. The SIVA approval criteria is published in HMRC Public Notice 101 (Deferring Duty, VAT and other charges) and Notice SIVA 1 (Simplified Import VAT Accounting) which can be found on the HMRC website at www.hmrc.gov.uk, along with further guidance. For SIVA approval, paragraph 5.10 of Public Notice 101 and guidance found on the HMRC website requires *inter alia* a trader to have been VAT registered for three years and, in the case of the transfer of a going concern, for a business to have been transferred three years or more prior to the application for SIVA. HMRC Notice SIVA 1, states at 3.1:

> "If you rely on a previous VAT registration to satisfy the three year requirement we will also assess the compliance of the previous company to ensure the authorisation criteria is met (unless ownership has changed in which case the new controlling company must also meet the criteria.)"

14. The Excise Payment Security Scheme (EPSS) is a scheme introduced on 1 February 2007 in respect of excise duty deferment modelled on the SIVA scheme. Normally, excise traders must guarantee excise duty when goods are removed from a warehouse using the duty deferment system, but under the EPSS scheme HM Revenue and Customs may waive this requirement to guarantee the excise duty. This reduces costs to the trade but does present risks to the revenue. Following consultation with the trade, the qualifying criteria by which the requirement to give a guarantee may be waived were based on the SIVA scheme. These qualifying criteria are published on the HMRC website under the title FAQ: Excise Payment Security System (EPSS). As with SIVA, the criteria require a trader to have been VAT registered for three years and, in the case of the transfer of a going concern, for a business to have been transferred three years or more prior to the application for EPSS. EPSS HMRC online guidance in relation to the EPSS Criteria (FAQ: Excise Payment Security System (EPSS) – the authorisation criteria) states:

> "If you have re-registered as a result of a company restructure and do not therefore quality under the three year rule you may be required to provide additional information to assess eligibility.
>
> - If you rely on a previous VAT registration to satisfy the three year requirement we will also assess the compliance of the previous company to ensure the authorisation criteria is met.

The Excise Duties (Deferred Payments) Regulations 1992 state:

> *8 Security*
>
> *A person who is approved for the purpose of applying for deferment of excise duty shall provide security for that duty in such form and manner and in such amount as the Commissioners may require.*

9 Conditions

The Commissioner may make any approval of a person or any grant of deferment of duty subject to any condition or requirement and conditions or requirements may be added to or varied at any time by the Commissioners".

15 It is a common feature of both schemes that they are only approved for those applicants that can satisfy the Commissioners that they present no risk with regard to payment of deferred VAT or Excise duty.

16. All copy documents produced to the Tribunal are true and accurate copies and are held as equivalent to principals.

17. All letters and other correspondence between the Appellant and the Respondents which have been produced to the Tribunal are what they bear to be, were sent by the persons by whom they bear to have been sent on the dates upon which they bear to have been sent and were received by the persons to whom they were addressed.

9. In Grant Thornton's letter dated 20 May 2010, accompanying Dollar's SIVA and EPSS applications, Customs' attention was drawn to the fact that Dollar had not been registered for VAT for three years, and that the current directors of Old FW were not involved in the day-to-day VAT or excise duty compliance but that the new directors of FW would be local and had many years of experience working with drinks distribution companies. Customs were asked to take into account Old FW's good compliance history and that existing Old FW managers would continue to be employed. The letter also noted that due to the size of business and the level of excise operations, any guarantee would be very high; it explained that no application for duty deferment had yet been made as a guarantor was required and a guarantor could not be found until the amount of the guarantee had been set.

10. Customs' letter dated 25 May 2010 refusing the SIVA application makes it clear that the basis of refusal is (i) the fact that Dollar had not been registered for VAT for three years and there was no continuity at director level, and (ii) the transfer of the trade and assets of Old FW to FW did not occur more than three years prior to the application for approval. There is no consideration at all of whether either basis had any bearing on the question whether approving the SIVA application would or would not create a risk to the payment of deferred duty liability. There was no consideration of the particular facts and circumstances drawn to Customs' attention in Grant Thornton's letter dated 20 May 2010, and in particular whether those facts created such a risk either at all or whether they created a risk which did not previously exist in the arrangements made with Old FW which had been considered by Customs to be sufficient to justify SIVA approval and thus to dispense with the need for a guarantee of payment of deferred liability for import VAT.

11. Customs letter also dated 25 May 2010 and written by the same officer, refusing the EPSS application, makes it clear that the basis of refusal is the same as the SIVA refusal. The material parts of the two letters dated 25 May 2010 are identical. The paragraph dealing with the transfer of a going concern erroneously refers to SIVA instead of EPSS. There is no consideration at all of whether either basis had any

bearing on the question whether approving the EPSS application would or would not create a risk to the payment of deferred duty liability. There was no consideration of the particular facts and circumstances drawn to Customs' attention in Grant Thornton's letter dated 20 May 2010, and in particular whether those facts created such a risk either at all or whether they created a risk which did not previously exist in the arrangements made with Old FW which had been considered by Customs to be sufficient to justify EPSS approval and thus to dispense with the need for a guarantee of payment of deferred liability for excise duty.

12. In their letter to Customs dated 4 June 2010, requesting a review of these decisions, Grant Thornton pointed out (i) the exemplary compliance history of Old FW over the previous 6-7 years, (ii) that the day-to-day business operations would not change, (iii) the financial accountant responsible for VAT compliance at Old FW would continue to be responsible, (iv) responsibility for excise matters would remain as before, namely in the hands of managers with 20 years' experience at Old FW, (v) that the new directors of FW unlike the directors of Old FW would be local, have direct involvement in the business and have many years experience in the drinks distribution industry and (vi) that the business, its procedures, systems, products, customers and competitors would remain unchanged.. The letter also pointed out that private investment of £2.2m was being secured along with a bank loan facility of £2.5m all of which followed considerable due diligence processes. Grant Thornton submitted that all these features constituted exceptional circumstances which should be taken into account in reviewing the decisions.

13. Miss Manley discussed the appeal with Mrs Seago before their decision letters were sent out. The detail of that discussion is unknown.

14. At no stage, did Customs give FW the impression that they were likely to be admitted to the SIVA or EPSS schemes. Mr Mowat specifically asked us to make this finding, which is not disputed. At one stage, it was thought that an argument might be presented on the basis of misrepresentation by a Customs official at a meeting held on 31 March 2010. The argument was not made and the evidence would not, in any event, have supported it.

15. As a matter of practice, if a VAT registration number is transferred from one entity to another, any SIVA or EPSS approval does not automatically transfer to the recipient of that VAT registration. Accordingly, even if Old FW had not been part of a group registration, but had its own VAT registered number, any transfer of that registration to FW would not have automatically led to SIVA and/or EPSS approval. We again make this finding at the request of Mr Mowat. It is based on Mrs Seago's unchallenged evidence on this point which we accept.

16. As a matter of practice, according to the evidence of Mrs Seago, which we accepted, even if the published criteria are met, there may be other relevant facts and circumstances which would cause Customs to refuse an application for approval under either or both schemes.

17. According to the evidence of Mr McLean-Brown, which we accept, section 3.1 of Public Notice SIVA 1 was introduced to ensure that company accounts of applicants presented a true trading picture and to counter potential criminal attacks on the taxation system in the United Kingdom such as missing trader fraud.

18. FW has been trading along similar lines to Old FW. FW is trading profitably. Old FW traded at a small loss. The warehouse at Milnathort is well run. A turnover of about £20m is anticipated for their trading year from February 2011 to February 2012, with sales of about 230,000 cases of wine and about 50,000 cases of spirits. FW collects and accounts for about £7m each year in duty. The operating profit will be in the order of £450,000.

19. As SIVA and EPSS approval has not been granted, FW do not currently operate a system of deferred payment of import VAT or excise duty. They account for about £125,000 of import VAT each month and about £500,000 to £600,000 of excise duty. This places FW at a commercial disadvantage compared with some of their competitors who have the benefit of SIVA and EPSS approval. Additional borrowing costs of about £50,000 per annum are incurred. Less cash is available generally. Margins are reduced. Paying duty on a daily basis is administratively more complex and time consuming. Stock management and movements (from the bonded area to the duty paid area) have to be more precise to reduce the daily duty exposure. This involves more smaller manual movements rather than palletised truck movements. All this is less efficient as regards the deployment of labour.

20. Most of the import VAT paid by FW is effectively recovered by FW in their quarterly VAT returns.

Statutory and Regulatory Framework

21. The statutory and regulatory background has been foreshadowed in the Joint Statement of Admissions. It is set out in Customs' Skeleton Argument. What follows is a brief summary.

22. Our jurisdiction to hear this appeal is derived from s16(4)&(8) of and paragraphs 1(m) and 2(4) of Schedule 5 to the Finance Act 1994. The decision to refuse to admit the SIVA scheme falls within paragraph 1(m) and the decision to refuse to admit to the EPSS scheme falls within paragraph 2(4) being a decision made for the purposes of regulations made under s127A of the Customs & Excise Management Act 1979 (CEMA). In order to exercise our powers (as set out in s16(a)-(c)), we have to be satisfied (in relation to each decision) that it was one at which Customs could not reasonably have arrived.

23. SIVA is a scheme introduced by Customs on 1 December 2003 to ease the financial impact on approved importers by reducing (sometimes to nil) the level of financial security required to guarantee payment of Import VAT through the Duty Deferment Scheme. That scheme enables liability for payment of Import VAT to be deferred for a short period.

24. Regulation 4 of the Customs Duties (Deferred Payment) Regulations 1976 (deemed to have been made under s45 of CEMA - see CEMA s177(5); Schd 6 part 1 and Interpretation Act 1978 s 17(2)(b)) enables a person to apply for approval to defer payment of customs duty subject to the provision of security. Articles 224-227 of the Community Customs Code 1992 provide that customs duty may be deferred for up to 30 days subject to the provision of security. S.16 of the VATA provides that domestic and Community legislation relating to customs duties applies (subject to exceptions and adaptations) to VAT chargeable on the importation into the United Kingdom of goods from places outwith the Member States.

25. SIVA was permitted by regulation 121A of the Value Added Tax Regulations 1995 (as amended by the VAT (Amendment) (No 5) Regulations 2003), and allowed deferment of payment of import VAT for up to 30 days whilst reducing the security for such deferral to at best, nil. Regulation 4 of the 1976 Regulations (as adapted and applied to import VAT) provides as follows:-

> In regulation 4(1) (application for approval) regard "security" as being "appropriate security (which may be nil if there is no risk to the payment)".

26. The requirement for security in the Community Customs Code is similarly *adapted* by Regulation 121B of the 1995 Regulations, as amended, and thus may be waived if there is no risk to the payment.

27. By Notice 101 (Deferring Duty, VAT and other charges) (March 2009), Customs published at paragraph 5.10, the following statement about SIVA:

> 5.10 **What are the SIVA approval criteria?**
>
> Traders must
>
> - have been registered for 3 years
> - have a good compliance history for VAT
> - have a good payment history with the department
> - have sufficient financial means to meet any amount deferred under SIVA
> - have a good HMRC offence record (Serious offences will result in automatic expulsion)
> - have a 12-month record if (sic) international trade operations
> - have a good Compliance record for International Trade

28. HMRC Notice SIVA 1 Simplified Import VAT Accounting (April 2010) provides *inter alia* as follows:-

> 3.1 Length of time VAT registered
>
> You must have been VAT registered (and continuously trading) for three years or more.
>
> If you have re-registered as the result of a company restructure or change of ownership and do not therefore qualify under the three-year rule you will be required to provide additional information in order to assess eligibility (that is, proof of new owners previous three year tax compliance, etc.).
>
> If you rely on a previous VAT registration to satisfy the three-year requirement, we will also assess the compliance of your previous company to ensure the approval criteria is met (unless ownership has changed in which case the new controlling company must also meet the criteria).
>
> 3.7 Transfer of a going concern
>
> A transfer of a going concern must have occurred more than three years prior to the date of application for SIVA.
>
> **Note:** We will consider those transfers that are less than three years and are the result of a change of legal entity where a change of management structure and responsibility for VAT payments has not taken place. For example, partnership to limited company (where a change or ownership has taken place see also point 3.1 – Length of time VAT Registered).

29. The Excise Payment Security Scheme (EPSS) was introduced on 1 February 2007 following public consultation. It relates to the deferment of excise duty and is modelled on SIVA, which the majority of consultees preferred.

30. The statutory basis of the EPSS is s127A of CEMA which enables Customs to provide by regulation for deferment of payment of excise duty subject to such conditions or requirements as may be imposed by regulations or by Customs if the regulations so provide. Regulation 8 of the Excise Duty (Deferred Payment) Regulations 1992 provides that where deferment of excise duty is approved, security is to be provided for that duty:

> in such form and manner and in such amount as the Commissioners may require.

31. Regulation 9 provides that the Commissioners

> may make any approval of a person or any grant of deferent of duty subject to any condition or requirement and conditions or requirements may be added to or varied at any time by the Commissioners.

32. In 2010, Customs published on their website a notice, entitled *FAQ: Excise Payment Security System (EPSS),* containing *inter alia* the following:-

What are the criteria that I will be assessed against?

The criteria include the following:-

> **Length of time VAT registered**
> You must have been **VAT registered** for **three years** or more.
> If you have re-registered as the result of a company restructure and do not therefore qualify under the three year rule you may be required to provide additional information to assess eligibility.
> • If you rely on a previous VAT registration to satisfy the three year requirement we will also assess the compliance of the previous company to ensure the authorisation criteria is met.
> • If you have previously operated in another member state and are extending/moving to the UK, you will be required to provide evidence of your VAT compliance in the other Member State.
> **Note:** If you have been registered for more than three years you must have been continually operating during that period.

> **Transfer of a Going Concern (TOGC)**
> A transfer of a going concern must have occurred more than three years prior to the date of application for EPSS.
> **Note:** We will consider those transfers that are less than three years and are the result of a change of legal entity, for example partnership to a limited company.

33. Customs produced a further document entitled *Accounting: Simplified duty deferment guarantee arrangements (EPSS).* It notes on page one that:

> …traders may become authorised to defer or make payments without a guarantee, providing that they meet the eligibility and authorisation criteria. This will mirror the existing **Simplified Import VAT Accounting (SIVA)** criteria, with an additional check on excise debt history and offence history.

34. Finally we asked Mr Mowat to provide a short submission on the procedure where there is a default in payment of excise duty or import VAT. In a post-hearing written submission he has informed us that in relation to excise duty, under regulation 16(4) of the Excise Warehousing etc. Regulations 1988 SI 1988/809 an authorised warehouse keeper may only remove excise goods from his warehouse if the duty has been paid or accounted for under an arrangement allowing the deferment of the duty. Default normally only arises where duty deferment is permitted. An authorised

warehouse keeper completes and submits the appropriate accounting document (Form W5D) in accordance with the timescales specified in section 11 of HMRC Notice 197 (January 2011). Only when the warehouse keeper holds proof that the duty has been debited to the deferment account, may the goods be removed from his warehouse. If, on payment date, an amount due remains unpaid, HMRC may prevent future deferment requests being added to the account by placing an *inhibit* on the deferment account. If payment is not made following a demand for recovery, proceedings are begun which may include an application for a summary warrant. Consideration may also be given to requiring a new premises guarantee or increasing the existing premises guarantee together with additional conditions to the warehouse approval. The warehouse approval could also be revoked.

35. According to the written submission seizure of goods may occur only if the goods are liable to forfeiture. Under s140 of CEMA spirits only become liable to forfeiture if an offence has been committed by a revenue trader. Removal of goods under an approved deferment arrangement would not be an offence. Non-payment is not an offence, so there would be no power to seize the goods removed or an equivalent quantity in the warehouse. Similar considerations apply in relation to import VAT.

36. We also note that under regulation 88 of the Excise Goods (Holding Movement and Duty Point) Regulations 2010 SI 2010/593 excise goods liable to duty that has not been paid in contravention of the Regulations are liable to forfeiture.

The SIVA Decision

37. The reasons upholding on review the refusal to approve Dollar's application for SIVA are set out in Marilyn Seago's letter dated 14 July 2010. They proceed upon the premise that to obtain SIVA approval FW's business had to meet certain conditions including (i) registration of the business for VAT for at least three years and (ii) any transfer of a going concern had to have occurred more than three years before the application for approval. She noted that neither of these conditions was met. She noted that *it is not possible to take into account their (sc the directors of old FW) VAT compliance history* as there would be no continuity of directors following transfer.

38. She also noted that *you will see from the guidance (above) that the TOGC needs to have taken place at least three years prior to the application for SIVA.* She states that she *must uphold the decision to reject your client's application for SIVA approval due to not meeting the qualifying criteria.* At an earlier stage in her letter she notes that qualifying criteria which she describes as rules *are based on a wide experience of various risk factors and are used as an indication of a trader's relationship with HM Revenue & Customs.*

39. She concludes by stating that the published criteria for SIVA approval were not met and consequently *as authorisation for SIVA would create a risk to the revenue* approval was not given.

40. In evidence, Mrs Seago acknowledged that even if the published criteria were met there could be other factors which would lead to refusal of approval.

The EPSS Decision

41. This is contained in Miss Manley's review letter dated 14 July 2010. The essential basis of the decision is that Customs consider that *a three year time period to demonstrate compliance is required before EPSS authorisation is allowed* and that Dollar did not meet Customs' published conditions. She then states that she considered whether the decision not to grant EPSS approval was *fair* and concluded that it was. However, she simply repeats the fact that the published criteria have not been met. She notes that waiving the requirement that the deferred payment of excise duty must be guaranteed presents risks to the revenue; and that private funding did not provide the necessary safeguard. Previous compliance history could not be used as there was no continuity of directors who must be required to establish their own compliance history.

Grounds of Appeal

42. FW rely on the exemplary compliance record of Old FW, achieved by those responsible for the day-to-day management of Old FW who are now employed by FW. The directors of Old FW were based in the USA and Australia, and were not *hands-on.* Moreover, FW contend that the new directors have many years experience in the drinks distribution industry, and are locally based. Private investment and banking facilities were obtained for the acquisition of Old FW; this demonstrates that FW will be able to meet its fiscal obligations.

43. It is said that Customs have unreasonably refused to take into account these matters and have therefore acted unreasonably in the exercise of their discretion.

Customs Response

44. Essentially, Customs say that as FW has not been registered for more than three years and as the transfer of the business as a going concern occurred within the three preceding years, FW did not meet Customs' published criteria for granting approval and dispensing with the need to provide security for payment of deferred liability for import VAT and excise duty. Customs were entitled to lay down these policy criteria and to apply them. There was no continuity at director level where ultimate responsibility for compliance lay.

Submissions

45. Mr Cameron, for FW, produced a written submission. In summary, he submitted that due weight was not given to all relevant factors. Relevant factors had not been taken into account; the management, staff, systems and business were fundamentally unchanged within a business that had operated from the same site for a very long time; the current directors were better qualified to oversee the excise duty and VAT regimes than the old ones and were more hands-on; they represented a well-respected group of investors including Scottish Enterprise. He referred to *Associated Provincial Picture Houses Ltd v Wednesbury Corporation 1948 1 KB 223.*

46. With reference to the published criteria, he submitted that the requirement for FW to re-register was as a result of a *restructure*, the restructure of Matthew Clark (Holdings) Ltd; that was sufficient. There were differences in the wording of the SIVA scheme and the EPSS scheme which supported this argument. In light of the evidence of Mrs Seago and Miss Manley it was no longer clear whether Customs were treating the situation as a transfer of a going concern. On the question of continuity of directors, the reliance on this aspect was irrational and confused, and the evidence of Mrs Seago and Miss Manley confirmed that confusion and showed that they had placed too much weight on the *rules* of the schemes. It was not even clear that the decision was made by Miss Manley as she consulted Mrs Seago and an official from *Policy* (i.e. a division of Customs having responsibility for excise policy).

47. There was no real risk of loss to the revenue. Reference was made to *United Distillers Ltd MAN/99/8008, 24/3/00 Chairman E Gilliland (Decision No E00132).* The reality is, Mr Cameron submitted, that the refusal to grant approvals diminishes the financial stability of FW which in turn creates a risk to the revenue.

48. Mr Mowat, for Customs, argued that it was reasonable to refuse approval on the ground that it can only be authorised if the published criteria are met as this ensures that the guarantee can be waived only when there is no risk to the revenue. The minimum periods of three years allows traders to benefit from the scheme and minimises the risk to Customs. Bodies such as Customs were entitled to formulate policy criteria to guide the exercise of their discretion. The guidelines were legitimate and reasonable. He referred to *Martin Yaffe International Ltd v HMRC 14/7/05 C00197 Manchester, Chairman Colin Bishopp, British Oxygen Co Ltd v Minister of Technology 1970 3 AER 165, I C Blue Ltd v HMRC 2009 UKFTT 40 (TC), 8/4/09, Chairman David Porter, Melrose Drover Ltd E00115 5/5/99 Chairman Gretta Pritchard, and Cargo Gateway Ltd v HMRC 30/5/08 C00257, Chairman Richard Barlow.*

Discussion

49. The structure of the statutory provisions, regulations and published policy in relation to SIVA and EPSS is similar but not identical. In relation to SIVA, the statutory provisions, and in particular regulation 4 of the 1976 Regulations (as applied and adapted to import VAT) make it clear that the test to be applied is whether there is no risk to the payment of deferred liability to meet import VAT. This is reflected in paragraph 15 of the Joint Minute of Admissions; the parties are agreed that the approach extends to both schemes. We are prepared to proceed on that basis.

50. In relation to EPSS, regulations 8 and 9 of the 1992 Regulations give Customs power make any approval of a person (for the purposes of applying for deferment of excise duty) or any grant of deferment of excise duty subject to any condition or requirement. This might suggest that an approval of a person or grant of deferment if it is to be subject to conditions or requirements must be subject to conditions which are at least capable of being met such as the provision of a guarantee of a specified sum. The focus is on the risk to Customs for approving the deferment of payment of excise duty. The regulations do not automatically exclude a trader in a position

identical to FW but the application of the published criteria do so if they are treated as conditions or requirements which must be met in all cases.

51. Mr Mowat explained that the EPSS approval system was produced following consultation with trade interests and was largely modelled on the SIVA scheme. In the proceedings before us, neither party sought to distinguish the approach to approval in each scheme although Mr Cameron highlighted some differences in the language. Mr Mowat described the EPSS as more open-textured which, while that may be true, does not take us very far.

52. It is reasonably clear, particularly in relation to SIVA, that Customs regard their published notices and guidelines as general rules or principles of policy to provide guidance as to the manner of exercising their discretion in individual cases. It is well established that a public body, given a statutory discretion, may legitimately adopt such general rules or policy to do so, provided that such rules or principles of policy are legally relevant to the exercise of its powers, consistent with the purpose of the enabling legislation and are not arbitrary, capricious or unjust. A policy may be devised in order to exercise discretion with proper consistency and certainty, it being a cardinal principle of good public administration that all persons in a similar position should be treated similarly. This is particularly so where the public authority has a multitude of similar applications with which to deal (see *British Oxygen per Lord Reid at 170-171*). However, it must not disable itself from exercising a genuine discretion in a particular case directly involving individual interests. The public body must be prepared to consider making an exception to the general rule if the circumstances of the case warrant special treatment. It must not shut its ears to the application and must listen to anyone with something new to say (*per Lord Reid at 171*).

53. These general principles were affirmed in *Oxfam v HMRC 2010 STC 686* a case about the apportionment of expenditure between business and non-business for the purposes of determining the deductible portion of input tax on mixed supplies. The court held that HMRC were not contractually bound by an approved formula, and proceeded to consider whether HMRC were bound by reason of the doctrine of substantive legitimate expectation in public law. What emerges from the judgment of Sales J in *Oxfam* on this point is that (i) where many cases fall to be the subject of a statutory discretion it is often sensible for a public authority to promulgate a policy indicating how it will deal with individual cases, (ii) as a public authority is not entitled to fetter its discretion, it must keep open the possibility of not applying its policy in any particular case if the specific circumstances warrant the disapplication of the policy to that case, (iii) in doing so the public authority should act fairly and rationally.

54. We have been informed that there are relatively few applications for SIVA or EPSS approval. Mr Mowat provided statistics over the twelve month period between 1/12/10 and 30/11/11. These disclose that there were 940 SIVA applications, of which there were 725 approvals, 218 refusals, and 36 applications withdrawn (the figures do not quite add up). There were 132 EPSS Applications of which there were 78 approvals, 52 refusals, and 2 applications withdrawn. Our attention has been

drawn to only three decisions on this topic (*Yaffe, Cargo* and *IC Blue*). Plainly the statistics are sufficient to justify the formulation of a general policy.

55. Another point of some significance may be the manner in which the Tribunal interprets the language of the published guidelines or criteria. We consider that it would be wrong to construe the published Notices and guidelines in the same manner as a statutory enactment. The language is generally loose and imprecise. The format is variable and often informal (including the provision of information on the Frequently Asked Questions format which appears on many websites). The application of the guidance should be with a view to identifying any significant risk to the revenue, here the risk of non-payment of deferred liability to pay import VAT and excise duty.

56. *Yaffe* related to SIVA but was concerned with the reasonableness of the revocation of the Appellant's SIVA approval because of the VAT compliance history. The Tribunal emphasised at paragraph 16 that the statutory test laid down was *risk to the revenue*. That had to be the focus of officers making the decisions (paragraph 16). The Tribunal examined the Appellant's compliance history and concluded that the late payments relied on by the Respondents were innocent mistakes leading to late payments of a few days on several occasions. The mere fact of default was not enough to justify revocation. It was necessary to look beyond the mere fact of default and to consider whether the default together with any other material information could properly lead to the conclusion that the trader's continuing use of a SIVA approval represented a risk to the revenue. That was not done by the reviewing officer; her decision was therefore not one at which she could reasonably arrive (paragraph 18). The appeal was allowed and a further review directed.

57. We agree with the emphasis and approach in *Yaffe* which was followed in *IC Blue Ltd*. There, the appeal was against the refusal to allow the Appellant to operate the SIVA Scheme. Although the Appellant was principally a repayment trader the evidence disclosed that the Appellant had insufficient net assets to secure its VAT liability and on that basis approval was refused.

58. *Cargo Gateway Ltd* was an appeal against the refusal of a SIVA application. The only ground of refusal which was maintained before the tribunal was insufficient liquidity. The decision was based on an insufficiency of tangible fixed assets as disclosed in the Appellant's accounts. Although the Tribunal observed that the Respondents were taking a fairly cautious view, they were entitled to do so; the appeal was therefore refused. In that case, it is easy to see how the application of the criterion used by the Respondents demonstrated what they reasonably regarded as a risk that the Appellant would not be able to meet its obligations to pay the deferred VAT when payment became due. The application of policy to the facts led to the reasonable conclusion that the Appellant's request for SIVA approval should be refused. That can be contrasted with the application of the three year rules in the present appeal in relation to VAT registration and the transfer of a going concern to the Appellant's circumstances. The application of those rules does not logically lead to the conclusion that there is always a risk that FW would be unable to meet its deferred obligations.

59. *United Distillers* concerned an appeal against a decision to withdraw approval of a duty deferment facility to calculate excise losses within a tax warehouse. The Commissioners were entitled to do so for *reasonable cause*. The Commissioners relied upon the terms of a Public Notice (paragraph 24); the real reason for revocation was that the Commissioners thought that the Appellant had been treated unduly favourably (paragraph 29). There was, however, no evidence, to justify the conclusion that any duty was likely to be lost if the approval continued (paragraph 31); nor was there likely to be a real risk of loss of revenue (paragraph 33). The case is simply an example of the Tribunal's examination of the exercise of the Commissioners' discretion under a different set of regulations relating to excise duty.

60. *Melrose Drover Ltd* was an appeal against a decision to refuse to approve the Appellant's premises as a tax warehouse (warehouse authorisation). There was a public notice setting out various criteria which related *inter alia* to throughput of excise goods. The quantities had been introduced to create a level playing field for all excise goods dealers who sought approval in order to obtain excise duty suspension for their goods. If the limits were lowered, greater inspection by Customs officers would be required and the opportunities for fraud would be increased. There had to be a balance of the benefit to the trade with the risk inherent in the storage of excise goods without the duty being paid and the cost of such a regime to the revenue. The levels set were held not to be arbitrary. The stipulated limits and the number of tax warehouses were set to a level considered by the Respondents to be commensurate with the risk to the revenue. This case seems to be an example of adherence to policy without exception, perhaps for cogent reasons, being sanctioned by the Tribunal. We note that there was no discussion of the general principles of law applicable to the making and application of policy by statutory decision makers referred to above. Assuming the decision in *Melrose* is correct, it does not of itself justify a rigid adherence to policy in relation to a somewhat different statutory background and a different set of policy criteria.

61. *Yaffe* and *IC Blue* at least, are consistent with the principles of administrative law set out above. With all these considerations in mind, we turn to the two decisions in issue.

The SIVA Decision

62. It is notable that Mrs Seago does not consider the effect on the risk to payment which the corporate arrangements or the VAT history could have made. She appears to assume that failure to meet the published criteria must mean that there is a risk to the payment of the deferred liability. The true test is *risk to the payment* of the deferred liability, not whether published criteria are met, which are truly a guide to ascertaining the existence and extent of such risk. These published criteria are but guidelines as a means of reaching a decision in each particular application for approval. Mrs Seago stated in her letter dated 14 July 2010 that the guidance is used *as an indication of a trader's relationship with HM Revenue and Customs.* However, she does not apply that approach. She goes on to state that she *must uphold the*

decision to reject your client's application for SIVA approval due to not meeting the qualifying criteria.

63. It is reasonably clear from the terms of Mrs Seago's letter (and it was abundantly plain from the terms of her evidence) that the mere fact that Dollar had not been VAT registered for three years and the fact that the transfer of Old FW's business to FW occurred within the preceding three years (prior to the application) each meant that as the criteria had not been met the application for SIVA had to be refused. This mechanical tick box method of dealing with the application is not the correct approach as the Tribunal in *Yaffe* pointed out. Even if the three year rule was not met and this created some sort of presumption of risk to the revenue or risk that fraudulent or illegal activity might occur, it is still necessary to consider the particular circumstances of FW to determine whether such presumption might be overcome. Mrs Seago did not do so or did not adequately do so. She did not address herself to the correct question which was whether in the light of the criteria and the particular facts and circumstances relating to the applicant, there was a risk to the payment of deferred liability to meet import VAT obligations. Having asked herself the wrong question and failed properly to consider and take account of the relevant facts and circumstances pertaining to FW, its business, structure and management, her decision cannot be one at which the Commissioners could reasonably have arrived. It appears to us that the Commissioners have, in effect, shut their ears to the application and instead focussed their attention exclusively or almost exclusively on the published criteria.

64. We have already noted that even if the published criteria are met, there may be other relevant facts and circumstances which would cause Customs to refuse an application for approval under either or both schemes. This plainly constitutes the proper exercise of discretion. By contrast, where the published criteria are not met, the approach taken in relation to the SIVA decision appears to leave no room for the exercise of a genuine discretion in a particular case where the circumstances warrant or may warrant special treatment.

65. In the foregoing circumstances the decision cannot stand and the appeal must be allowed in relation to the SIVA application. A further review of the original decision to refuse the application for SIVA approval will be required.

The EPSS Decision

66. The reasons are a mechanical application of the published criteria without any consideration or any adequate consideration of the qualifications stated in those criteria and whether the failure to meet the criteria in the circumstances of FW created a risk to payment of the deferred liability.

67. The terms of the letter make it reasonably clear and the terms of Miss Manley's oral evidence made it abundantly plain that she had not truly considered whether the application of the published criteria enabled her to conclude whether there would or would not be a risk to the payment if approval was given and the need to provide a guarantee for payment of the deferred liability waived. In her letter, she states that she is *satisfied that you did not meet these published criteria.* She then purports to

consider whether the decision was fair but as we have already noted the letter simply repeats the fact that the published criteria have not been met. She does not consider or adequately consider the effect on the risk to payment which the corporate arrangements or the VAT history could have made. The letter appears to assume that failure to meet the published criteria must mean that there is a risk to the payment of the deferred liability.

68. We take essentially the same view of the EPSS as we have taken of the SIVA decision. The EPSS decision cannot stand and the appeal must be allowed in relation to it. For what it may be worth, Miss Manley acknowledged in her witness statement that she appreciated that her decision might seem *very unfair*. If that is so, it arises because of the rigid adherence to guidelines which did not fit well the circumstances underlying the applications. This is particularly apt in relation to the three year rule. As Mr McLean-Brown pointed out, the purpose of that rule (and we understood this to apply to both schemes) was to ensure a true picture of the applicant's trading was available, and to guard against fraud. There has been no suggestion that the trading activities would be other than substantially the same trading activities of Old FW. Moreover, there is no suggestion that, in spite of being a newly registered company, there is some perceived risk of fraudulent activity and consequent risk to the payment of deferred fiscal liabilities. That could hardly be the case given the trading and compliance history of the business being transferred to FW, the financial structures underlying the company's funding, and the undisputed competence and experience of the management team both at the *coal face* and at director level.

69. A further review of the original decision to refuse the application for EPSS approval will be required.

70. We should record that both Mrs Seago and Miss Manley gave their evidence in a fair and straightforward manner. We accept they acted in good faith throughout. There was no specific criticism by either party of the general credibility and reliability of the witnesses. We also have no such criticism.

Result

71. We are satisfied that the decision in relation to the SIVA Application and the decision in relation to the EPSS application are decisions which the Commissioners could not reasonably have arrived at and therefore must cease to have effect.

72. We direct that the Commissioners conduct a further review of the original decisions each review to be carried out by an official or officials not previously involved in the processing of the underlying applications or in any stage of the decision making process. It may be convenient for the same official to carry out both reviews but we do not direct that this must be done.

73. The official or officials carrying out the further review should take into account the terms of our decision. In particular, consideration should be given to the actual risk to the payment of deferred liability for import VAT and excise duty, in the light of FW's financial circumstances, the fact that the business being carried on is managed on a day-to-day basis by the same management team which carried on the

day-to-day operations of Old FW, the fact that Old FW's compliance record was good; and the compliance record of FW since August 2010.

74. We direct that FW should be given the opportunity to provide Customs with any further relevant information within four weeks from the date of release of this decision. We do so because FW may, at any stage, whatever the outcome of this appeal, make a further application for SIVA and EPSS approval. In order to make reasonable progress, we direct that Customs issue their decision or decisions within eight weeks of the date of release of our Decision.

75. 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.

J GORDON REID, QC., F.C.I.Arb.,
TRIBUNAL JUDGE

RELEASE DATE: 23 JANUARY 2012