



Neutral Citation: [2023] UKFTT 25 (TC)

Case Number: TC08684

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2020/04235

EXCISE DUTY and PENALTY – beer found on premises during unannounced HMRC visit – absent witnesses and adverse inferences – whether Appellant liable to excise duty – whether invoice provided by Appellant genuine – whether Appellant liable to wrongdoing penalty on basis that acted deliberately – assessment and penalty upheld

Heard on: 4 and 5 October 2022
Judgment date: 03 January 2023

Before

TRIBUNAL JUDGE ANNE REDSTON

Between

HARE WINES LIMITED

Appellant

and

**THE COMMISSIONERS FOR HIS MAJESTY'S
REVENUE AND CUSTOMS**

Respondents

Representation:

For the Appellant: Mr David Bedenham of Counsel, instructed by Rainer Hughes Solicitors

For the Respondents: Mr Joseph Millington of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The Appellant, Hare Wines Limited (“HWL”) operates an alcohol warehouse. On 7 December 2019, HMRC made an unannounced visit to HWL and conducted a stock check, during which a quantity of OJ Beer was found (“the OJ Beer” or “the Beer”).
2. It was HWL’s case that the Beer had been purchased from another UK supplier, LGVA Solutions Ltd, trading as Shakthi Cash & Carry (“Shakthi”). HWL relied on an invoice (“the Disputed Invoice”) in support.
3. HMRC did not accept that Disputed Invoice was genuine, and issued HWL with an excise duty assessment of £1,126 (“the Assessment”) on the basis that HWL had not shown that duty had been paid on the Beer. HMRC also issued HWL with a wrongdoing penalty of £957 (“the Penalty”), on the basis that its behaviour had been deliberate and concealed.
4. For the reasons explained in the main body of this decision, I found as a fact that the Disputed Invoice was not genuine. As HWL had not shown that duty had been paid on the Beer, HWL was liable for the excise duty charged by the Assessment.
5. I also found as a fact that HWL knew the Disputed Invoice was not genuine. I went on to decide that the Penalty had been correctly charged, because HWL’s behaviour had been deliberate and concealed. Its appeal was therefore dismissed.
6. This is not the first dispute between the parties, see *Smart Price and Hare Wines v HMRC* [2019] EWCA Civ 841 and *Hare Wines v HMRC* [2022] UKFTT 176 (TC). The former related to disclosure in the context of an appeal against HMRC’s refusal to approve HWL under the Alcohol Wholesaler Registration Scheme (“AWRS”); the second concerned a subsequent AWRS refusal decision. Although both parties referred to these earlier disputes, they were not relevant to the issues I had to decide, namely whether to uphold or set aside the Assessment and the Penalty.

THE EVIDENCE

7. The evidence consisted of documents and witness evidence.

Documents

8. On behalf of HWL, Rainer Hughes provided a Bundle of almost 1,100 pages, which included:
 - (1) correspondence between the parties, and between the parties and the Tribunal;
 - (2) various reports prepared by Mr Dariusz Idziak, the HMRC Excise Officer assigned to HWL;
 - (3) various stock count sheets;
 - (4) in relation to Shakthi:
 - (a) a due diligence report carried out by HWL on 22 August 2019;
 - (b) various invoices issued by Shakthi to HWL;
 - (c) the Report for Creditors, prepared by Shakthi’s liquidator; and
 - (d) a list of Shakthi’s employees.

Witness evidence

9. Officer Dariusz Idziak provided a witness statement and was cross-examined by Mr Bedenham. I found him to be a straightforward and honest witness.

10. Officer Grahame Hitchins is a civil investigator in HMRC's Fraud Investigation Service ("FIS"); he was the FIS investigator allocated to HWL. He provided a witness statement and was cross-examined by Mr Bedenham. He too was a straightforward and honest witness.

11. Mr Jasdip Singh Hare ("Mr Hare") is a director of HWL. He provided a witness statement and was cross-examined by Mr Millington. I found much of his evidence to be unreliable and to lack credibility, for example:

(1) A key issue in dispute was whether HWL believed the Disputed Invoice to be genuine. For the reasons explained at §79ff I found none of Mr Hare's evidence on that issue to be credible.

(2) Included in that evidence was an email sent by Mr Hare to HMRC on 13 January 2020, which said the Beer had been supplied pursuant to an oral agreement between Mr Jeff Street on behalf of HWL and an employee of Shakthi called Mr Salim; Mr Hare later confirmed this in his witness statement. After that witness statement had been served, HMRC filed evidence from Shakthi's payroll records which showed that none of its employees was called "Salim". Mr Hare changed his evidence in the witness box, saying that "Salim" was a mistake, and the Shakthi employee instead had the nickname "Slim". I agreed with Mr Millington that Mr Hare had changed his evidence because he knew that there was documentary evidence to disprove his earlier statements about "Mr Salim".

(3) It was common ground that his father Mr Kulwant Hare had made a statement to HMRC about the supply of OJ Beer. Mr Hare sought to discredit that evidence from the witness box by saying his father was an alcoholic whose statements could not be relied upon. I reject that evidence for the reasons given at §107.

Absent witnesses

12. Mr Hare was HWL's only witness. Three other persons had knowledge of the matters with which this appeal was concerned, but none was called to give evidence. These were:

(1) *Mr Jeff Street*. It was a key part of HWL's case that the Beer had been supplied pursuant to an oral agreement between Mr Street and an employee of Shakthi, and Mr Street was thus the only HWL employee who could give direct evidence about that alleged agreement. At the time of the hearing, Mr Street was still working for HWL, and there was no good reason why he had not been called to give evidence.

(2) *Mr Kulwant Hare*. He was present at both of HMRC's visits, on 7 and 19 December 2019, and could therefore give first-hand evidence as to what had happened. No reason was given for his absence, and although one could be implied from Mr Hare's evidence that his father was an alcoholic, I rejected that evidence, see §107.

(3) *Mr Tulwar Patel*. Mr Patel was present in the hearing room throughout the first day of the hearing, when the other witnesses were giving evidence, so was plainly available; he could also be expected to give relevant evidence, because:

(a) a key issue was whether the Disputed Invoice was genuine. Mr Patel was HWL's accountant, and as such responsible for accounting and record-keeping, including the filing of invoices;

(b) he sent the Disputed Invoice to HMRC;

(c) he was present at the meeting with HMRC on 19 December 2019, and HMRC placed some reliance on what he had said to Officer Idziak; and

(d) Mr Hare said during his oral evidence that one of Mr Patel's statements to the Officers was factually incorrect.

13. Mr Millington placed some weight on the fact that none of these individuals had been called to give evidence. Mr Bedenham responded by saying that it was not permissible to draw an adverse inference from their absence; he relied on *Imam-Sadeque v Bluebay Asset Management (Services) Ltd* [2012] EWHC 3511 (QB) (“*Imam-Sadeque*”), in which Popplewell J (as he then was) said at [11]:

“This point [on adverse inferences] was taken on behalf of BlueBay for the first time in closing submissions. There was nothing in BlueBay's opening submissions to alert Mr Imam-Sadeque that such a point would be taken, and he was not cross examined about the current status, health or availability of these potential witnesses. Mr Goulding QC submitted that it was for Mr Imam-Sadeque to proffer an explanation for the absence of all these witnesses, irrespective of any warning that the point would be made. That would be to impose a burden which offends principles of fairness and would be contrary to the overriding objective in CPR r 1. It is incumbent upon a party who wishes to invite the court to draw adverse inferences from the opposing party's failure to call witnesses, to give notice that he intends to do so, in a manner which affords the opposing party an opportunity of explaining the witnesses' absence. Unless otherwise agreed, such an explanation can only properly be received by the court by evidence, not submission. Questions of waiver of privilege may arise, and associated waiver [sic], upon which legal advice may well be required. It would be unfair to allow a party to rely upon there being no such explanation in evidence when the other party, who would have to adduce such evidence, has had no notice that the witnesses' absence is to be relied on against him. If he has no notice, he will not know, for example, the identity of any individual whose absence is to be relied on so as to call for an explanation.”

14. Mr Millington pointed out that in *Imam-Sadeque*, the adverse inference issue had been raised for the first time in counsel's closing submissions, whereas in this case his skeleton argument had specifically identified HWL's failure to call Mr Street, and he had asked Mr Hare in cross-examination why HWL had not called any of the three individuals listed above. Moreover, it was only in the course of that cross-examination that Mr Hare had contradicted statements recorded in Officer Idziak's witness statement as having been made by Mr Patel and by Mr Kulwant Hare.

15. Mr Millington also clarified that he was not asking the Tribunal to infer that Mr Street, Mr Patel and/or Mr Kulwant Hare would give evidence which was necessarily adverse to HWL's case. Instead, he was asking the Tribunal to find that, as a result of their absence, HWL was dependent only on Mr Hare's evidence, some of which was hearsay and which in his submission was unreliable in relation to the key issues in dispute.

Discussion

16. Shortly after the hearing of this appeal, Davies HHJ published his judgment in *Barnes v Blackburn with Darwen BC* [2022] EWHC 2598 (TCC); this includes a helpful analysis of the approach to be taken by a court or tribunal when considering whether to make an adverse inference. Davies HHJ said at [32] that it was “important to distinguish between three commonly encountered situations”, and continued:

“32. At one end of the spectrum is where a party has been unable to call a witness (or one who would give an open and honest account) for reasons outside its control, where it would plainly be wrong for the court to hold that against the party....

33. The intermediate position is where, for reasons which have not been sufficiently explained or justified, a party has not called a witness who was

involved in the events in question on that party's side. If the absence of such a witness means that the party is unable to adduce oral evidence in relation to one or more of the factual issues in the case, whereas the other party has adduced such evidence, then it seems to me that the court must make its decision only on the basis of the evidence before it, even if that means there is no evidence from that witness to take into account when deciding the factual issues in dispute, and can take into account the absence of evidence from any witness from that party.

34. At the other end of the spectrum is where the court is being invited to draw a positive adverse inference against that party in relation to a specific issue from its insufficiently explained or unjustified failure to call a crucial witness to give evidence on that issue..."

17. From Mr Millington's submissions, I have taken HMRC's position to be that HWL's failure to call Mr Street, Mr Patel and Mr Kulwant Hare falls within the second of those three categories. In relation to that type of inference, Hodge J said in *Ahuja Investments v Victorygame* [2021] EWHC 2382 (Ch) at [33]:

"...the failure to call a witness who might have been able to give evidence on a material issue may mean that the court is left with no direct evidence at all on that issue. In that situation, the party who might be expected to have called that witness cannot complain if the court rejects that party's case on that issue and either makes a finding based on the inherent probabilities presented by the limited evidence that is before the court, or simply concludes that it is unable to make any finding of fact at all on that issue."

18. HWL's failure to call Mr Street meant that there was no direct evidence of any agreement between HWL and Shakthi, but only Mr Hare's hearsay evidence. I have therefore made my findings of fact on the basis of the inherent probabilities presented by that evidence, see §82ff. The absence of Mr Patel and Mr Kulwant Hare was less fundamental, but nonetheless significant, and I consider it at §85(2) and §107 below.

Evidence as basis for findings of fact

19. On the basis of the evidence summarised above, including my findings on credibility, and taking due account of the absence of the three witnesses. I make the findings of fact set out in the next following sections of this decision.

20. I begin with the facts which were not in dispute, followed by findings about the Disputed Invoice. I later make findings of fact as to whether HWL knew the Disputed Invoice was not genuine, see §79ff. There are other findings of fact later in the decision; where this is the case, these are identified as such.

FINDINGS OF FACT NOT IN DISPUTE

21. HWL was incorporated in 2014 and Mr Kulwant Hare was the only shareholder. Mr Hare was appointed a director in 2017. It was not in dispute that he was HWL's "controlling mind".

22. Mr Patel was HWL's book keeper; he was responsible for accounting and record-keeping, including the filing of invoices. Mr Hare's own evidence was that Mr Patel was a long-standing employee who had "a wealth of experience and knowledge of the business" and dealt with "everyday housekeeping issues such as bills, services, banking and accounts".

Shakthi

23. Shakthi was incorporated in July 2008 as an alcohol wholesaler; its director was Mr Harpreet Singh Kahlon. It traded from two locations, Unit 1, Chelsea Field West, 278 Western

Road, London SW19 (“Unit 1”) and Unit 8, Thornton Industrial Estate 190-200 Thornton Road, Croydon CR0 3EU (“Unit 8”).

24. In 2018, Shakthi approached HWL with a view to the two companies doing business together, and provided HWL with due diligence documents. HWL decided not to trade with Shakthi at that time. No reason was provided for that decision.

25. On 7 August 2019, Shakthi stopped trading from Unit 8, but continued to operate at Unit 1. During the closure of Unit 8, the computer which printed sales invoices from that site was damaged. On 4 October 2019, Mr Khalon informed HMRC that the computer remained broken.

26. Meanwhile, on 21 August 2019, Mr Khalon had visited HWL. On the same day, Mr Patel carried out a credit check on Shakthi, and annotated the resulting report with the following note, which he signed and dated “Y/e A/c 31/1/18 showing loss, Credit score very low. Going forward need to be careful. Do limited trading”.

27. On the following day, 22 August 2019, Mr Patel visited Shakthi and completed a due diligence form which included Shakthi’s Unit 1 address, and under “goods insured” said “supplier’s responsibility until unloade[d] at our place”. Transport was also recorded as being Shakthi’s responsibility.

28. Between 22 August 2019 and 26 September 2019, Shakthi issued 15 invoices to HWL. Each had the Unit 1 address and bore a badge saying “11th anniversary”, as it was 11 years since that company had begun operations.

29. On 9 September 2019, on the advice of its accountant, Shakthi instructed DCA Business Recovery LLP (“DCA”), a firm of liquidators, to provide assistance in relation to the preparation of a Statement of Affairs, convening a meeting of members and seeking a decision from creditors on the appointment of a liquidator. On 11 October 2019, Shakthi ceased trading; HWL became aware a few days later that Shakthi had closed down. On 25 October 2019, DCA were appointed as Shakthi’s liquidators.

HMRC visits to HWL between March and October 2019

30. HWL became part of an HMRC Fraud Investigation Service (“FIS”) programme in June 2015. That programme has two purposes: to trace supply chains back to an authorised distributor and forward to an “end user”, and to provide education and support to traders to minimise the risk of fraud.

31. On 24 August 2018, Officer Hitchins was allocated as HWL’s FIS investigator, and in January 2019, HMRC appointed Officer Idziak as HWL’s Excise Officer. Officers Hitchins and Idziak visited HWL in March and June 2019; Officer Idziak subsequently visited with another officer on 17 September 2019.

32. On 8 October 2019, Officer Idziak and five other Officers made an unannounced visit to compare HWL’s stock with its stock control reports. Mr Patel told the Officers that the stock control system was “still broken”; that HWL were expecting that a new system would be fully operational by January 2020; and that a new employee, Mr Subramaniam Geneshamurugan, known as Mr Murgan, would carry out regular stocktakes on 15th of every month.

33. On 30 October, Officer Idziak sent HWL an “Excise Warning Letter”, which included the following points:

- (1) HWL had no effective stock controls in place and had failed to keep any supplementary records to mitigate the lack of controls;

(2) as an approved wholesaler, HWL was legally obliged to comply with Annex A of *Excise Notice 2002: AWRS*, which includes the requirement that an “auditable stock control system” be maintained; and

(3) failing to comply with that requirement had consequences which might include restrictions on excise approvals, or their revocation.

34. On 11 November 2019, Officers Idziak and Hitchins made another visit to HWL and asked for the stock control record; this was produced for the month to 30 October 2019. It was agreed that future stock checks would similarly take place at the end of each month rather than in the middle of the month.

The visit on 7 December 2019

35. On Saturday 7 December 2019, Officer Idziak and four other Officers made an unannounced visit to HWL’s premises. Mr Hare and Mr Patel were not present. Officer Idziak asked Mr Kulwant Hare for a copy of the November stock count. Mr Kulwant Hare did not know where it was, but called Mr Murgan; he said the count was 60% finished.

36. The Officers carried out a stock take. Officer Idziak worked with Officer Strauss counting the stock, while Officer Hands completed the related record sheets; on completing each sheet she signed it and added the date and time. The format of the sheets included columns headed “product”, “number of cases”, “strength” and “BBD or LOT code”. The abbreviation BBD stands for “best before date”.

37. The production dates and best before dates were printed on the bottom of each can and were read out to Officer Hands by Officers Idziak and Strauss. Officer Hands completed her first record sheet at 10.15am and her second at 10.30am. Included on the second record sheet were two lines with the following information:

(1) 20 cases of “OJ” with a strength of 8.5%; it was common ground (from the combination of the initials and the strength) that this was a reference to “OJ Strong Beer”.

(2) 20 cases of “OJ” with a strength of 5%; it was again common ground that this was a reference to “OJ Premium Beer”.

38. The cases relating to one of those lines were counted by Officer Idziak, and the cases relating to the other line were counted by Officer Strauss; the Officers did not check each other’s count. The sheet also recorded that:

(1) the OJ Strong Beer had a production date of 26 September 2019 and a best before date of 27 December 2020;

(2) the OJ Premium Beer had a production date of 13 August 2019 and a best before date of 13 November 2020; and

(3) each case held 24 cans containing 0.5 litres of beer.

39. The fourth record sheet was completed at 11.25, and included two further lines for 11 cases of OJ Strong and 10 cases of OJ Premium, with the same production dates and best before dates. As before, the cases for one of these lines was counted by Officer Idziak and one by Officer Strauss, and they did not check each other’s count. In total the Officers therefore recorded 61 cases of the Beer: 31 of OJ Strong and 30 of OJ Premium; this is just over half a pallet of beer.

40. It was common ground that the OJ Beer had been manufactured in Belgium. Officer Idziak asked Mr Kulwant Hare where HWL had obtained the OJ Beer from, and Mr Kulwant Hare identified the supplier as Kingswood Trading Ltd (“Kingswood”), and produced an

invoice. This included 71 cases of OJ Strong and 70 cases of OJ Premium, and was dated 30 April 2019.

41. Officer Idziak realised this invoice could not be for the OJ Beer identified at the stocktake, which had been manufactured in August and September 2019. He asked Mr Kulwant Hare if there had been subsequent supplies of OJ Beer; Mr Kulwant Hare said he was not sure, and advised him to speak with Mr Patel.

The visit on 19 December 2019 and subsequent correspondence

42. On 19 December 2019, Officers Idziak and Hitchins made an announced visit to HWL. Mr Hare was not available, but Mr Kulwant Hare and Mr Patel were both present. Officer Idziak asked Mr Patel where the OJ Beer had been purchased from; Mr Patel said it had only been bought once, and that was from Kingswood. Officer Idziak asked if there had been any subsequent purchases, and Mr Patel agreed to check and get back to him by 31 December 2019.

43. Mr Patel also told Officer Idziak that stock was ordered by Mr Chatha, Mr Jeff Street, Mr Jhunji and Mr Kulwant Hare, but that Mr Street only ordered soft drinks. The Officers then looked for the OJ Beer that had been counted on the earlier visit, but it was no longer on the shop floor.

44. Mr Patel did not provide the information about the OJ Beer by 31 December 2019 as agreed. On 2 January 2020, Officer Idziak emailed him, and Mr Patel responded later that day, saying:

“With reference to your visit on 19/12/19 you mentioned about OJ Stock and I briefly mentioned that it was bought from Kingswood...Only other OJ Stock we had was from Shakthi Cash & carry on a ‘Sale or Return’ basis as it is not a regular fast selling line. For your reference please find attached invoice number 6203 dated 5/10/19 from Shakthi Cash and Carry.”

45. Mr Hare accepted in cross-examination that Mr Patel had been right to say in this email that OJ Beer was a “very slow selling line”.

46. Attached to Mr Patel’s email was the Disputed Invoice. It was dated 5 October 2019, and was for 30 cases of OJ Strong and 30 cases of OJ Premium. It had the number 6203; Shakthi’s address was given as Unit 8 and the anniversary badge said “10th anniversary”. Handwritten in blue biro on the face of the document were the words “Sale or Return stock”. The total cost of the cases was £1,727.28; net of VAT the amount was £1,439.40. The “delivery charges” were shown as zero. I make further findings about the Disputed Invoice at §61ff.

47. On 3 January 2020, Officer Idziak emailed Mr Patel asking a number of questions about Sale or Return (“SoR”) transactions carried out by HWL, including requesting copies of purchase orders. On Friday 6 January 2020, Mr Patel responded, saying:

“As far as suppliers are concerned, there are no specific suppliers who can be identified as ‘sale or return suppliers’. But any existing supplier may offer any new product on SoR basis to promote his company’s product. Sometimes slow selling items can also be offered on SoR basis...we hardly ever or occasionally buy stock on SoR basis but it is only to facilitate and support supplier to sell product and keep good relation with them but also making sure it is in the interest of our company...I am sending the purchase orders in separate email in few minutes.”

48. On Monday 6 January 2020, Officer Idziak emailed Mr Patel to say he had not received the purchase orders, and asking who at HWL had agreed the SoR arrangement with Shakthi. Mr Patel then emailed him a purchase order relating to the Disputed Invoice, together with three other purchase orders.

49. Later the same day, Mr Hare emailed Officer Idziak, saying that SoR transactions were “negligible” and there were no standard procedures in place for such transactions. Officer Idziak replied the following day, specifying that he required:

- (1) information about who at HWL arranged the SoR transactions;
- (2) the name of the person at the suppliers who had agreed the transactions;
- (3) the return date if there was no sale;
- (4) payment and delivery details; and
- (5) other information including emails evidencing the transactions.

50. On 13 January 2020, Mr Hare responded. In relation to the OJ Beer, he said:

“The 60 cases of OJ were taken by Jeff Street. They were purchased from Shakthi Cash and Carry. Their contact was Mr Salim. Jeff took the SoR terms as he has previously worked for Mr Salim and has known him for over a decade. They have a good relationship. The terms were that the goods would be uplifted in 4 months if it did not sell. The goods however did sell. We have not paid the invoice as Shakthi closed down...”

HWL’s other records

51. As part of HMRC’s FIS monitoring, HWL was required to provide a list of purchases every month. On 19 November 2019, HWL provided its supplier listing for October 2019; that listing did not include any invoice from Shakthi.

Shakthi documents and information

52. Officer Idziak liaised with Officers Murugappan and Toynbee, who had been monitoring Shakthi. They provided him with copies of that company’s invoices. On 23 January 2020, Officers Idziak and Murugappan made an announced visit to DCA, Shakthi’s liquidator. Officer Idziak checked the invoices Shakthi had issued between 1 January 2019 and the cessation of its business.

53. On 27 October 2021, after the issuance of the Assessment and the Penalty to HWL (see below), Officer Idziak and two colleagues visited DCA’s offices for a second time, and went through every one of the 34 boxes which held Shakthi’s records.

54. Officer Idziak made the following findings during those visits. none of which was challenged:

- (1) Shakthi had retained copies of invoices it had issued, and these had been passed to the liquidator;
- (2) no copy of the Disputed Invoice (numbered 6203, dated 5 October 2019 from Unit 8 with the 10th anniversary badge) was present in the records held by the liquidator;
- (3) HWL had previously provided HMRC with a list of other invoices it had received from Shakthi; copies of all those other invoices were located in the liquidator’s records;
- (4) the records held by the liquidator *did* contain an invoice with the same number as the Disputed Invoice; that invoice also had the 10th anniversary badge and had been issued from Unit 8. However, the purchaser was not HWL, but a company called Queens Park Food and Wine, and it was dated 13 December 2018, almost a year before the date on the Disputed Invoice;
- (5) all the Shakthi invoices except one had been issued in numerical order; the one exception being in February 2019;

- (6) the last invoice issued from Unit 8 was numbered 10117 and was dated 27 July 2019;
- (7) the last invoice before Shakthi entered liquidation was issued from Unit 1; it was numbered 6052 and was dated 12 October 2019;
- (8) none of the invoices issued from Unit 1 displayed the 10th anniversary badge; and
- (9) Shakthi's list of assets recorded by the liquidator did not include beer, and HWL was not shown as a debtor.

55. Officer Idziak identified other differences between the Disputed Invoice and the invoices held by the liquidator, but these were challenged by Mr Bedenham and I consider them at §63.

56. Officer Idziak also obtained a list of Shakthi's employees from DCA. Although Mr Hare had said in his email of 13 January 2020 that the SoR agreement for the Beer had been arranged between Mr Street of HWL and Mr Salim of Shakthi, there was no Mr Salim on the list of Shakthi's employees. Mr Hare provided further evidence on this point to which I return later in this decision, see §84(1) and §85(1).

The Assessment and the Penalty

57. On 5 May 2020, Officer Idziak issued HWL with a pre-assessment letter on the basis that the Disputed Invoice was not genuine, and that as a result there was no evidence that duty had been paid on the OJ Beer. He invited HWL to provide more information, but received none.

58. On 29 May 2020, Officer Idziak issued the Assessment. This was followed on 30 September 2020 by a penalty explanation letter on the basis that HWL's disclosure had been prompted and its behaviour "deliberate and concealed". Mitigation of 30% was given for "giving access to records" but there was no reduction for "telling us about it" or for "helping us understand it"; the maximum penalty of 100% was therefore reduced to 85%. A penalty of £1,042 was issued on 15 October 2020.

59. HWL asked for a statutory review of the Assessment and the penalty. On 4 November 2020, Officer Elliott upheld the Assessment. In relation to the penalty, he reduced the full discount for "giving" and increased that for "helping", but as these two adjustments cancelled each other out, the penalty percentage remained unchanged at 85%. Officer Elliott also identified a calculation error, and reduced the penalty to £957.10. He issued his review decision on 5 March 2021. On 25 May 2021, HMRC issued an amended assessment for the Penalty.

60. HWL appealed the Assessment to the Tribunal on 30 November 2020, and appealed the Penalty on 15 March 2020; the two appeals were consolidated on 28 April 2021.

FINDINGS OF FACT ABOUT THE DISPUTED INVOICE

61. I next make findings of fact about the Disputed Invoice. It was HWL's case that it was genuine, but HMRC did not agree.

Mr Millington's submissions on behalf of HMRC

62. Mr Millington relied on the following points, none of which was in dispute and all of which are set out as findings of fact in the previous part of this decision:

- (1) The Disputed Invoice contained the following information:
 - (a) the invoice number 6203;
 - (b) an issue date of 5 October 2019;
 - (c) Shakthi's Unit 8 address; and
 - (d) an "anniversary badge" reading "10th anniversary".

(2) Shakthi had issued an invoice numbered 6203 from Unit 8 to an entirely different company, Queens Park Food and Wine, on 13 December 2018.

(3) On 7 August 2019, almost two months before the date on the Disputed Invoices, Shakthi had stopped trading from Unit 8; the computer used to issue invoices at that site had broken, and it was still out of action on 4 October 2019.

(4) All but one of Shakthi's invoices had been issued on a sequential basis, and

(a) its records showed that the last invoice had been issued from Unit 8 on 27 July 2019; this was numbered 10117, much higher than the 6203 on the Disputed Invoice; and

(b) the last Shakthi invoice issued before it stopped trading was issued from Unit 1 on 12 October 2019. That invoice was numbered 6052, considerably lower than that on the Disputed Invoice.

(5) The date of the Disputed Invoice fell within Shakthi's eleventh year, not its tenth year, but it included a "10th anniversary" badge.

(6) The documents held by the liquidator did not include a copy of the Disputed Invoice, but copies of all other invoices issued to HWL by Shakthi were present.

(7) The Disputed Invoice did not say that it was being supplied on an SoR basis; instead those words were handwritten onto the face of that document.

63. In addition to those unchallenged findings of fact, Mr Millington submitted that there were a number of other differences between the Disputed Invoice and genuine Shakthi invoices, including typeface, spacing, font, watermarking and various words which were present on the genuine invoices but not on the Disputed Invoice.

64. Mr Millington added that, in addition, the Disputed Invoice was for 60 cases, but during the stocktake the HMRC Officers had counted 61 cases.

Mr Bedenham's submissions

65. In relation to the final two points set out above, Mr Bedenham submitted that:

(1) The differences on the face of the Disputed Invoice might be explained by the "poor quality pdf" of that document which had been emailed to Officer Idziak and subsequently relied on by HMRC.

(2) The stocktake had been carried out by three officers working together, only one of whom (Officer Idziak) had given evidence in these proceedings. In particular, Officer Hands, who had completed the record sheets, did not give evidence. In Mr Bedenham's submission, Officer Idziak was not in a position to confirm that the stocktake record was correct, and thus the Tribunal was left only with the evidence of the stocktake record itself, which Mr Bedenham said was "just a document".

The Tribunal's findings

66. In relation to the first of the two points challenged by Mr Bedenham, I agree with Mr Millington that there are significant differences between genuine Shakthi invoices and the Disputed Invoices. I reject Mr Bedenham's submission that any of those differences could be accounted for by the quality of the pdf, because:

(1) most of the differences (such as the type of font, the address, the anniversary logo and the absence of words) could not be explained in that way, and

(2) Mr Patel had supplied the pdf to HMRC, and HWL had subsequently provided neither the original nor a further copy of the Disputed Invoice. In other words, the

documents on which Mr Bedenham’s submission depended were held by HWL, but were not put into evidence. The only reasonable inference is that the original Disputed Invoice contains the same details in the same format as the pdf which was emailed to HMRC by Mr Patel on 2 January 2021

67. It is abundantly clear from the facts found earlier in this decision and summarised at §62, together with the further differences identified on the face of the Disputed Invoice at §63, that it was not a genuine invoice issued by Shakthi for the supply of the OJ Beer to HWL, and I find that to be a fact.

68. In relation to the second point challenged by Mr Bedenham, I find as a fact that the stocktake record was correct, and there were 61 cases of OJ Beer on HWL’s premises on 7 December 2019. I come to that finding because:

- (1) it was common ground that HWL had OJ Beer in stock on that date;
- (2) I accept Officer Idziak’s evidence in relation to the processes and counting the Officers had carried out, and I also accept his evidence that Officer Hands completed the record sheets contemporaneously; moreover, they were signed and include completion times; and
- (3) the Disputed Invoice for 60 cases was not genuine, and there was no other documentary or witness evidence that the stocktake figure was incorrect.

THE ASSESSMENT

69. Regulation 5 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 provides that “there is an excise duty point at the time when excise goods are released for consumption in the United Kingdom.”

70. Reg 6(1) provides that:

“Excise goods are released for consumption in the United Kingdom at the time when the goods...

(b) are held outside a duty suspension arrangement and...excise duty on those goods has not been paid, relieved, remitted or deferred under a duty deferment arrangement;...”

71. Reg 10 provides that “the person liable to pay the duty when excise goods are released for consumption by virtue of regulation 6(1)(b)...is the person holding the excise goods at that time”.

Whether HWL was liable to the duty

72. Mr Millington submitted that HWL was holding the Beer on its premises; there was no evidence that duty had been paid on the Beer, and HWL was thus the person liable to pay the duty. Mr Bedenham’s submissions relied on the Disputed Invoice; he accepted that if that were found by the Tribunal not to be genuine, HWL had no defence to the duty assessment.

73. I have found as a fact that the Disputed Invoice was not genuine. I uphold the Assessment and refuse HWL’s appeal against it.

THE PENALTY

74. I first set out the legislation under which the Penalty was charged, followed by findings of fact about HWL’s knowledge in relation to the Disputed Invoice; I then consider the other disputed factual matters raised by the parties.

LEGISLATION

75. The penalty was charged under Schedule 41 Finance Act 2008 (“Sch 41”). Para 4(1) of Sch 41 provides:

“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.”

76. Under the heading “degrees of culpability”, para 5(4) reads:

“P’s acquiring possession of, or being concerned in dealing with, goods on which a payment of duty is outstanding and has not been deferred...is –

‘deliberate and concealed’ if it is done deliberately and P makes arrangements to conceal it, and

‘deliberate but not concealed’ if it is done deliberately but P does not make arrangements to conceal it.”

77. Sch 41, para 12 is headed “Reductions for disclosure” and subpara 1 provides that, in a case such as this which relates to a “domestic matter”, the possible reductions are set out at subpara 13. Para 12(3) then reads:

“Disclosure of a relevant act or failure

(a) 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, and

(b) otherwise, is prompted.”

78. Sch 41, para 13 then sets out the mitigation available for the “quality of the disclosure”, namely for “telling, helping and giving” in the context of different types of penalty. As mitigation was not in dispute, I decided it was not necessary to set out the provisions here.

FINDINGS OF FACT ABOUT HWL’S KNOWLEDGE

79. HWL’s case was that it did not know the Disputed Invoice was not genuine because:

(1) an agreement for the supply of the Beer on a SoR basis had been made between Mr Street of HWL and an employee of Shakthi;

(2) the Beer was delivered to HWL without charge by Shakthi in a vehicle driven by Shakthi’s employee; and

(3) the Disputed Invoice accompanied that delivery.

80. HMRC’s position was that none of the above was true: there was no agreement between HWL and Shakthi; there was no delivery by Shakthi, and the Disputed Invoice did not travel with the Beer; it therefore followed that HWL knew the Disputed Invoice was not genuine but had deliberately put it forward to hide the fact that no duty had been paid on the Beer.

81. I consider each of the above points in turn.

Agreement with Mr Street?

82. As is clear from the findings of fact made earlier in this decision, Mr Hare stated in his email of 13 January 2020 that the supply of OJ Beer had been verbally agreed on an SoR basis

between Mr Street of HWL and Mr Salim of Shakthi. Mr Hare confirmed in his witness statement that Mr Street had “dealt verbally with Mr Salim at Shakthi”.

83. HMRC’s case was that there was no such agreement. Mr Millington relied on the following:

- (1) there was no Mr Salim on Shakthi’s payroll;
- (2) Mr Patel had told Officers Idziak and Hitchins that Mr Street only ordered soft drinks; and
- (3) HWL had not called either Mr Street or Mr Patel as witnesses.

84. Under cross-examination, Mr Hare said:

- (1) the references to Mr Salim had been incorrect; instead, Shakthi’s employee had the nickname “Slim” because of his build;
- (2) Mr Patel’s statement that Mr Street only ordered soft drinks was factually incorrect; and
- (3) Mr Street had not attended to give witness evidence because both he and Mr Patel were present at the hearing, and Mr Street needed to remain on the premises to operate the business.

85. Mr Millington responded to those points as follows:

- (1) His evidence that “Salim” was a mistake for the nickname “Slim” was entirely unreliable. Mr Hare had used the name “Mr Salim” both in his email to HMRC of 13 January 2020 and in his witness statement dated 8 January 2021. In Mr Millington’s submission, Mr Hare changed his evidence in the witness box because he had belatedly realised that HMRC had subsequently accessed Shakthi’s employee records, and these proved there was no employee of that name.
- (2) The Tribunal should accept Mr Patel’s statement that Mr Street only ordered soft drinks because:
 - (a) Mr Patel had made that statement to Officers Idziak and Hitchins on 19 December 2019, at a time when HWL were still seeking to rely on the Kingswood invoice, and thus before HWL had said there was an arrangement between Mr Street and an employee of Shakthi to supply the Beer;
 - (b) Mr Patel was a long-standing HWL employee who had “a wealth of experience and knowledge of the business”;
 - (c) if Mr Patel had given incorrect information to the Officers, there was no good reason why he had not provided witness evidence to that effect; and
 - (d) Mr Patel had been present in the Tribunal hearing room for the first day of the hearing when witness evidence was being given, so was clearly able to attend the proceedings.
- (3) There was similarly no good reason why HWL had not called Mr Street as a witness, given that the alleged agreement between him and Shakthi was a key element of HWL’s case. Since he was still working for HWL on the date of the hearing, it would have been easy for HWL to arrange for him to give evidence.

86. Mr Millington summarised HMRC’s position by saying that the only evidence about the alleged arrangement between Shakthi and HWL was that of Mr Hare. This was not only hearsay, but Mr Hare had both changed his evidence in the witness box and contradicted an

earlier statement made by Mr Patel. In Mr Millington's submission, Mr Hare's evidence as to the existence of an agreement with Shakthi was entirely unreliable.

The Tribunal's findings

87. For the reasons given by Mr Millington, I find as fact that there was no agreement between an employee of Shakthi and HWL for the sale of the Beer.

88. I further find as a fact that Mr Street did not place orders for beer because:

- (1) Mr Patel's evidence that Mr Street only ordered soft drinks was given at a time when HWL were relying on the Kingswood invoice;
- (2) Mr Patel was a long-standing employee who had "a wealth of experience and knowledge of the business" and I make the reasonable inference and find as a fact that he knew which employees placed which type of order;
- (3) HWL did not call Mr Patel as a witness despite the fact that he had highly relevant evidence, as set out at §12(3); and
- (4) Mr Hare's new evidence given for the first time in the witness box was inconsistent with Mr Patel's earlier statement and I find it to be unreliable.

Supply from Shakthi?

89. Mr Millington submitted that the only evidence that the Beer had been supplied by Shakthi was:

- (1) the Disputed Invoice, which was not genuine;
- (2) Mr Hare's hearsay evidence, which was entirely unreliable; and
- (3) a purchase order, which had been created by HWL.

90. Mr Millington said it was not credible that Shakthi would have transported and supplied the Beer to HWL on 5 October 2019, given the following facts, which were not in dispute:

- (1) Shakthi had instructed DCA on 9 September 2019 to assist with preparing a Statement of Affairs, convening a meeting of members and seeking a decision from creditors on the appointment of a liquidator.
- (2) The Beer had been produced in Belgium on 13 August and 26 September 2019.
- (3) It was a slow-moving brand of beer.
- (4) Shakthi ceased trading on 11 October 2019, a few days after the alleged transaction with HWL.
- (5) The Beer consisted of just over half a pallet.
- (6) There were no written terms and conditions relating to the alleged SoR arrangement.
- (7) HWL did not pay Shakthi for the Beer.
- (8) There was no reference to the alleged transaction in Shakthi's books and records; in particular:
 - (a) there was no copy of the Disputed Invoice;
 - (b) there was no beer among Shakthi's assets; and
 - (c) HWL was not shown as a debtor of that company.

91. In Mr Millington's submission, it was not credible that a company on the brink of closure would have purchased a small quantity of a slow-moving line of beer from Belgium after it had already begun the process of preparing for liquidation, and then transported that beer, at its own cost and in its own vehicle, on a sale or return basis to HWL without any written terms and conditions as to what would happen if the beer was not sold, or as to which party was liable if the beer was lost, damaged or stolen, and without there being any record of that transaction in Shakthi's books. Had the Beer been on sale or return, it would either :

- (1) have remained unsold, in which case it would have been shown as an asset of that company, or
- (2) have been sold, in which case HWL would be listed as a debtor, because it had not paid Shakthi for the Beer.

92. Mr Millington added that it was also not credible that beer produced on 26 September 2019 would have been delivered to a UK company (Shakthi) and then on-supplied to a second UK company (HWL) so that it arrived on 5 October 2019, only nine days after it had supposedly come off the production line. He relied on Officer Idziak's evidence that "such imports typically take weeks".

93. In response to that last point, Mr Bedenham said that HMRC were relying on the experience of a single officer, and submitted that it was possible for the goods to have arrived at HWL within that time.

The Tribunal's view

94. In relation to the point challenged by Mr Bedenham, it is true that Officer Idziak's evidence was based on his general experience rather than specific knowledge of the OJ Beer in issue here. I nevertheless accept that it would be inconsistent with those normal transportation, shipment and delivery times for the OJ Beer to have arrived at HWL only nine days after it had been manufactured in Belgium.

95. One of the points relied on by Mr Millington was the lack of written terms. I considered for myself the agreement between Shakthi and HWL recorded by Mr Patel when he carried out his due diligence visit in August 2019, see §27. Under the terms of that agreement Shakthi was responsible for insurance until the goods arrived at HWL's premises, and was also responsible for transporting the goods. However, that standard arrangement applied to goods purchased by HWL in the normal way, not to goods supplied on an SoR basis, and it was Mr Hare's own evidence (see §49) that there were no standard procedures in place for SoR arrangements. As a result, I agreed with Mr Millington that there were no written terms in place governing this alleged agreement with Shakthi..

96. Having considered both the above points, I also agreed with Mr Millington and find as a fact for the reasons set out at §90 to §92 that Shakthi did not supply the Beer to HWL.

The invoice travelling with the Beer?

97. HWL's third point was that the Disputed Invoice had accompanied the delivery from Shakthi. As I have found as a fact that Shakthi did not supply the Beer, I also find that the Disputed Invoice was not delivered to HWL at the same time as the Beer.

98. That finding is also consistent with the facts that:

- (1) on 19 November 2019, HWL provided its supplier listing for October, and that listing did not include any invoice from Shakthi, see §51; and
- (2) Shakthi also had no record of the Disputed Invoice.

OTHER FINDINGS OF FACT RELATING TO THE PENALTY

99. I next considered three other disputed factual points relating to the Penalty. These concern the disposal/sale of the Beer; the Kingswood invoice, and whether the Beer was “too small” in quantity for HWL to have gone to the trouble of deceiving HMRC.

The disposal/sale of the Beer

100. There was no dispute that (a) the Beer was on HWL’s premises on 7 December 2019 but was no longer present on 19 December 2019, and (b) Shakthi had not been paid for the Beer.

101. Mr Hare’s evidence was that the Beer had been sold, but that Shakthi had not been paid because it was in liquidation.

102. Mr Millington said that HWL’s case included the following elements:

- (1) it had purchased 60 cases of the Beer on 5 October 2019;
- (2) it was a slow selling line of beer;
- (3) that explains why not a single can had been sold between 5 October 2019 and HMRC’s first visit on 7 December 2019, when the Officers carried out the count; but
- (4) twelve days later, on 19 December 2019, every single can had been sold.

103. Mr Millington submitted that the only credible explanation for the sudden disappearance of the Beer was that it had been moved off HWL’s premises to prevent HMRC examining it in more detail. I agree, and find that to be a fact.

104. HWL did not put forward any explanation as to why Shakthi’s liquidation prevented it from paying for the Beer. I find as a fact, consistently with the findings made earlier in this decision, that Shakthi was not paid because it had not supplied the Beer to HWL.

The Kingswood invoice

105. Both Mr Kulwant Hare and Mr Patel initially told HMRC that the Beer had been supplied by Kingswood. Mr Millington submitted that:

- (1) HWL only produced the Disputed Invoice when it was realised that the OJ Beer had not been manufactured by the date on the Kingswood invoice; and
- (2) this was to conceal the fact that HWL had intentionally acquired the Beer without having paid excise duty.

106. Mr Millington cross-examined Mr Hare about the statements previously made by his father and by Mr Patel about the Kingswood invoice; he then made related submissions.

Mr Kulwant Hare

107. It was not in dispute, and I have already found as a fact (see §40), that after the Officers located the Beer Officer Idziak asked Mr Kulwant Hare where HWL had obtained the OJ Beer from; Mr Kulwant Hare identified Kingswood as the supplier, and then produced an related invoice. When cross-examined about that statement, Mr Hare said it should be disregarded because his father was an alcoholic who was “drunk most of the time”; who “has two cans of Stella for breakfast” and “sometimes says lots of crazy things”.

108. Mr Millington challenged that evidence, and went on to submit that it should be rejected as not credible because:

- (1) it was not in Mr Hare’s witness statement;
- (2) HWL had produced no other evidence that Mr Kulwant Hare was an alcoholic; and

(3) Mr Kulwant Hare had been on the premises not only when the Officers arrived for the unannounced visit on 7 December 2019, but also (with Mr Patel) on the date of the announced visit on 19 December 2019, and it was not credible that HWL's alcohol warehouse would be left under Mr Kulwant Hare's control if he was an alcoholic who was "drunk most of the time".

109. I agree with Mr Millington for the reasons he gave. I reject Mr Hare's evidence that Mr Kulwant Hare's statement to the Officers is to be disregarded on the basis that he is an alcoholic; instead, I found Mr Hare's evidence to be unreliable.

Mr Patel

110. Mr Hare was also cross-examined about Mr Patel's statement on 19 December 2019 that OJ beer had only been purchased once, from Kingswood. Mr Hare's response was to emphasise that Mr Patel had gone on to say that he was not sure and would check.

111. Mr Millington made the following submissions:

- (1) it was not in dispute that HWL rarely did SoR transactions;
- (2) it was HWL's case that the Beer had been supplied on an SoR basis;
- (3) Mr Patel was responsible for accounting and record-keeping, including the filing of invoices. Had there been an invoice for an unusual SoR transaction relating to the supply of the Beer, Mr Patel would have known about it and been able to locate it when asked by the Officers; instead he knew nothing about it;
- (4) if (as Mr Hare said was the case) the Beer had all been sold by the time of the Officers' visit on 19 December 2019, HWL would have been holding the proceeds from those sales, and would have owed Shakthi the £1,439.40 which according to the Disputed Invoice was the price payable for the Beer. Since Mr Patel was the person responsible for billing and accounting, he would have been aware of this, especially as it was an unusual transaction. Instead, when asked by the Officers he again knew nothing about it; and
- (5) Mr Patel could have been called to give evidence to explain all of the above, but HWL had not tendered him as a witness.

112. I agree with Mr Millington and find as facts that:

- (1) had the Disputed Invoice been genuine, and had the Beer been supplied under an SoR arrangement with Shakthi, Mr Patel would have known about it before 19 December 2019, and would have told the Officers when asked;
- (2) instead, on 19 December 2019 Mr Patel knew nothing about the Disputed Invoice or the alleged SoR arrangement; and
- (3) HWL sent HMRC the Disputed Invoice in January 2020 after realising that the date on the Kingswood invoice predated the production date for the Beer.

Too small?

113. In the course of his oral evidence, Mr Hare said that the amount in question was "too small" for HWL to have gone to the trouble of deceiving HMRC. Mr Millington responded by saying that HMRC did not know how much beer had been imported without excise duty having been paid and thus whether that amount was "small"; HMRC only knew how much had been discovered during the unannounced visit, and the Assessment and the Penalty had been based on that amount. I agree with Mr Millington.

FINDINGS OF FACT AS WHETHER HWL KNEW THE DISPUTED INVOICE WAS NOT GENUINE

114. HWL's case was that, even if the Disputed Invoice was not genuine, they did not know this was the case and believed it to be authentic for the three reasons set out at §79. I have now found as facts that:

- (1) no agreement was made between Mr Street of HWL and an employee of Shakthi for the supply of the Beer;
- (2) the Beer was not delivered or otherwise supplied to HWL by Shakthi;
- (3) the Beer was moved off HWL's premises between 7 and 19 December 2019 to prevent HMRC examining it in more detail;
- (4) the reason Shakthi was not paid was because it had not supplied the Beer to HWL; and
- (5) HWL sent HMRC the Disputed Invoice in January 2020 after realising that the date on the Kingswood invoice predated the production date for the Beer.

115. On the basis of those findings, I make the reasonable inferences and the further findings of fact that:

- (1) HWL did not have an invoice from a UK supplier, and thus had no document to support its claim that it had purchased the Beer duty paid from a UK supplier;
- (2) this was because no duty had been paid on the Beer; and
- (3) HWL knew this was the case.

116. In making those findings I have not overlooked another point made by Mr Hare from the witness box. He said that if HWL had decided to rely on a falsified invoice, they would have done a better job; in particular, they would have used the Shakthi template from Unit 1 rather than from Unit 8.

117. Mr Millington described this as an "unattractive" argument, and said it did not assist HWL because on the facts the Disputed Invoice was clearly fake for multiple reasons. I agree. The Tribunal's task is to make findings of fact based on the evidence, not to hypothesise as to why HWL decided to give this particular falsified document to HMRC.

Whether sufficient to prove deliberate behaviour

118. Mr Bedenham submitted that even if HWL had been aware that the Disputed Invoice was not genuine, and even if HWL had given it to HMRC with the intention that HMRC should rely upon it as a genuine document, that was insufficient to show that HWL had acted deliberately.

119. In his submission, for HMRC to succeed in showing that HWL had acted deliberately, Mr Millington had to put to Mr Hare in cross-examination that (a) HWL had themselves falsified the Disputed Invoice, and/or (b) had arranged for a third party to falsify the Invoice. As neither of those points had been put to Mr Hare, in Mr Bedenham's submission, HMRC's case on the Penalty must fall.

120. Mr Millington strongly disagreed, saying it was not necessary for HMRC to prove that HWL had either falsified the Disputed Invoice, or that they arranged for a third party to do so. It was instead necessary to show that HWL had acquired the Beer knowing duty had not been paid on it. In making that submission, Mr Millington relied in particular on *Tooth* as applied to the facts of this case.

The Tribunal's view

121. I agree with Mr Millington that the starting point is *Tooth*. That case concerned the meaning of the word “deliberate” as used in the TMA s 118(7), which reads:

“In this Act references to a loss of tax or a situation brought about deliberately by a person include a loss of tax or a situation that arises as a result of a deliberate inaccuracy in a document given to Her Majesty’s Revenue and Customs by or on behalf of that person.”

122. The Court said at [43] that the word “deliberate” was “an adjective which attaches a requirement of intentionality to the whole of that which it describes”. In the context of the requirement that a taxpayer provide a document to HMRC, the Court then said at [47]:

“for there to be a deliberate inaccuracy in a document within the meaning of section 118(7) there will have to be demonstrated an intention to mislead the Revenue on the part of the taxpayer as to the truth of the relevant statement.”

123. The word “deliberate” is also used in TMA s 29, the section which gives HMRC the power to issue “discovery” assessments, and in TMA s 36, the section which sets out the time limit provisions for assessments. The Court also noted that prior to 1 April 2010, the word “fraudulent” had been used instead of “deliberate” in TMA s 29 and s 36, and that TMA s 118(7) was introduced contemporaneously with that change of wording.

124. At [27], the Court referred to FA 2007, Sch 24 (“Sch 24”), which provides for penalties where a person gives HMRC a document which contains an error; higher penalties apply where behaviour is “deliberate”. The Court said at [33]:

“The change from ‘fraudulent’ to ‘deliberate’ in section 29(4) was accompanied by the introduction of what is now section 118(7), with effect from the same date. There is some indication in the Explanatory Notes to the 2008 Act that the changes in language from negligence and fraud to carelessness and deliberate conduct were designed to align section 29 with the language of the penalty regime in Schedule 24 of the 2007 Act, or that the new terminology was at least borrowed from it.”

125. At [45], the Court again linked the term “deliberate” in the Sch 24 penalty provisions with the same word in the TMA.

126. It is thus clear from *Tooth* that “deliberate” in the TMA is to be interpreted consistently with its usage in Sch 24. As the Court said, this is also indicated by the Explanatory Notes to FA 2008, which say:

“Paragraph 3 amends section 29(4) of TMA, which makes provision for discovery assessments. It replaces the term ‘is attributable to fraudulent or negligent conduct on the part of’ with ‘was brought about carelessly or deliberately by’. This corresponds with the terms used in paragraph 3 of Schedule 24 to FA 2007.”

127. The Penalty at issue in this appeal was imposed under FA 2008, Sch 41, not FA 2007, Sch 24. However, both Schedules categorise types of behaviour in the same way, and both impose penalties according to the same categories. In particular, Sch 24, para 3 almost exactly mirrors Sch 41, para 5(4), the only difference being that Sch 24 adds an example of behaviour which would be both deliberate and concealed, namely “submitting false evidence in support of an inaccurate figure”. The Explanatory Notes for Sch 41 confirm it was modelled on Sch 24, saying:

“the purpose of this...Schedule is to introduce an aligned penalty regime for failing to notify chargeability to tax, liability to register for tax etc., across all

relevant taxes and duties, based on the same principles used for penalising incorrect returns contained in Schedule 24 to Finance Act 2007.”

128. Those Notes continue:

“The Schedule provides that a penalty would be payable if a person fails to comply with an obligation to notify HMRC that they are liable to tax, and tax has been lost as a result. The framework takes into account the behaviour of the taxpayer by having three categories of failure. The two more serious ones are modelled on those for inaccurate returns – ‘deliberate and concealed’ and ‘deliberate without concealment’.”

129. Given that the statutory context of the word “deliberate” as used in Sch 41 and Sch 24 is identical, I find that it has essentially the same meaning in both Schedules; the Explanatory Notes provide further support for that conclusion.

130. The Supreme Court has already found that the meaning of “deliberate” in Sch 24 is consistent with the usage of the same word in the TMA. It follows that the meaning of “deliberate” in Sch 41 must also be interpreted consistently with the TMA, and therefore with the Court’s judgment in *Tooth*.

131. A person is liable to a penalty under Sch 41 if he “acquired possession of...goods on which a payment of duty is outstanding and has not been deferred”, with higher penalties charged if that person acted “deliberately”. Applying the meaning of “deliberate” as established in *Tooth* to that statutory context, I find that a person has acted “deliberately” if he intentionally acquires possession of goods knowing that the payment of duty is outstanding, and intentionally does not pay that duty.

132. I next considered whether HWL acted “deliberately” in relation to the Beer. I have already found as facts that HWL:

- (1) had the Beer on its premises and was offering it for sale;
- (2) had no document to support its claim that the Beer had been purchased from a UK supplier who had paid the excise duty on the Beer;
- (3) had not itself paid excise duty on the Beer;
- (4) when asked by HMRC about the Beer, first relied on the Kingswood invoice, and subsequently (because the Beer had been produced after the date of that invoice) relied on the Disputed Invoice;
- (5) relied on the Disputed Invoice, despite knowing that document to have been falsified;
- (6) told HMRC the Beer had been purchased from Shakthi on an SoR basis, when that information was known to be false; and
- (7) provided further fictitious information as to the making of a purported SoR agreement with Shakthi, including as to the purported delivery of the Beer to HWL.

133. The only conclusion which can be drawn from those facts is that HWL acquired the Beer knowing that that excise duty was outstanding; intentionally did not pay that duty, and offered the Beer for sale without any duty having been paid. It thus acted with the necessary “intentionality”, as that term is used in *Tooth*.

134. It follows that I agree with Mr Millington that HMRC do not need to prove that HWL either (a) falsified the Disputed Invoice, or (b) arranged for a third party to do so. Instead, HMRC has to prove that HWL intentionally acquired possession of the Beer knowing that the

payment of duty was outstanding, and intentionally did not pay that duty. For the reasons set out above, those facts are proved.

Concealed

135. As set out earlier in this decision, but repeated here for ease of reference, Sch 41, para 5(4) is headed “degrees of culpability” and provides:

“P’s acquiring possession of, or being concerned in dealing with, goods on which a payment of duty is outstanding and has not been deferred...is –

‘deliberate and concealed’ if it is done deliberately and P makes arrangements to conceal it, and

‘deliberate but not concealed’ if it is done deliberately but P does not make arrangements to conceal it.”

136. HMRC issued the penalty on the basis that HWL’s behaviour had been “concealed” as well as deliberate. Mr Millington said this was correct, because HWL knew that duty had not been paid on the Beer, but nevertheless sought to conceal that fact by providing inconsistent accounts of the source of the Beer, ultimately relying upon an invoice that it knew did not relate to its acquisition.

137. Mr Bedenham did not put forward any contrary submissions. In other words, he did not seek to argue that knowingly providing a false invoice to hide the fact duty had not been paid on the Beer, was anything other than “concealed”, and he was right not to do so.

138. I find that HWL sought to conceal its wrongdoing by:

- (1) initially relying on the Kingswood invoice;
- (2) subsequently relying on the Disputed Invoice, which it knew to be false; and
- (3) also relying on other evidence about the provenance of the Beer. which it also knew to be false.

Disclosure, methodology and mitigation

139. The Penalty was issued on the basis that disclosure was “prompted”. Sch 41, para 12(3) classifies a disclosure as “prompted” unless it was “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”, see §77 above. Mr Bedenham rightly did not seek to argue that HWL’s disclosure was “unprompted” and I agree.

140. Mr Bedenham also confirmed that no submissions were being made in relation to either the calculation methodology or the mitigation given for the “quality of the disclosure”. I confirm the calculation and the mitigation.

CONCLUSION ON THE PENALTY

141. On the basis of the findings of fact and the relevant law, HWL is liable to the Penalty of £957 because it acquired possession of the Beer knowing that excise duty had not been paid on it, and without paying that duty and in so doing acted with the required “intentionality”; it then sought to conceal its wrongdoing.

OVERALL CONCLUSION AND RIGHT TO APPLY FOR PERMISSION TO APPEAL

142. For the reasons set out above, the Assessment and the Penalty are upheld and HWL’s appeal refused.

143. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this preliminary 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.

**ANNE REDSTON
TRIBUNAL JUDGE**

Release Date: 03rd JANUARY 2023