TC03379

Appeal number: TC/2013/00202

EXCISE DUTY – appellant convicted of "knowingly …. harbouring…. excise goods with intent to defraud HMRC" –whether conviction precluded an assessment for excise duty arising out of same events – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

TERRANCE NOLAN **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE
MR NICHOLAS DEE

Sitting in public at Bedford Square, London on 12 February 2014

Mr A Young, Counsel, instructed by Lexlaw Ltd, for the Appellant

Mr R Chapman, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The appellant appeals against an assessment dated 21 June 2012 for excise duty of £75,569 on cigarettes and hand rolling tobacco. The assessment was later reduced to £40,688.

The facts

2. The original un-amended assessment related to 179,600 Richman brand cigarettes ("the Richmans"), 100,000 Hatamen brand cigarettes ("the Hatamens") and 140kg of hand rolling tobacco ("HRT"). The basis for the Assessment was that the Richmans, the Hatamens and the HRT were duty unpaid and Mr Nolan was the person physically holding and controlling them.

3. The assessment was upheld on review by Officer Allan Donnachie on 27 November 2012.

4. On 19 June 2013, the assessment was reduced to £40,688 because an earlier duty point was identified by the review officer Mrs Quaterman for the Richmans. As such, the assessment was amended so that it was limited to the Hatamens and the HRT.

5. We find that the background to Mr Nolan being found holding the Richmans, Hatamens and the HRT was that HMRC were carrying out an on-going criminal investigation into excise duty fraud. As part of that investigation they discovered that on 27 October 2011 a consignment of non duty paid cigarettes were due to arrive at Heathrow. This consignment was examined on arrival and found to contain "Richman" cigarettes. This is a brand which is not available in the UK legitimately.

6. It seems more likely than not that HMRC must have followed the van carrying the cigarettes from Heathrow and that this led them to Mr Nolan's home in Market Weighton the following day. The officers found cigarettes and HRT in laundry bags at Mr Nolan's home.

7. Officer Heather Matthews, who was one of the officers conducting the search, wrote the following in her pocket book in respect of the discussion with Mr Nolan following the seizure [C/99-100]:

> 17.02 Advised Terence + Vera that HMRC take this very seriously but on this occasion I will restrict action to seizure only with a warning letter – This advises that if HMRC find further offences they reserve right to take this seizure into consideration. Inspected house for any damage caused. None caused. Totals advised 100,000 Hatamens 50,000 Richmans 100kg hand rolling tobacco. C156 based on the above completed.
>
> 17.17 Advised to hold back on warning letter. C156 only + 12a issued.

> 17.21 Advised that search is fully completed.
>
> 17.27 Discussion with S Potter. No warning letter to be issued today. However the matter is not closed, I will report the full circumstances + it is likely that Mr Nolan will be called in for an interview/further questions at a later date.
>
> Explained above to Terence, witnessed by [ILLEGIBLE]

8. The next day, HMRC officers returned to the Mr Nolan's home and found more excise dutiable goods concealed inside the back fence of the garden. And two days later, on 31 October 2011, HMRC officers again returned to his home and found the remainder of the excise goods the subject of the original assessment in a concealed compartment in the garden shed, behind a false internal back wall to the shed.

9. HMRC took the view that Mr Nolan was knowingly storing duty unpaid goods. Mr Nolan was arrested and charged with being "knowingly concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any way dealing with a quantity of excise goods with intent to defraud Her Majesty's Revenue and Customs contrary to section 170 of the Customs and Excise Management Act 1979."

10. Mr Nolan pleaded guilty at Hull Crown Court. His basis of plea was as follows:

> I plead guilty to harbouring cigarettes and tobacco on the following basis
>
> 1. I accept in relation to the cigarettes and tobacco seized, I agreed for a person I am afraid to name to store the items at my home.
>
> 2. That person brought the cigarettes and tobacco to my home and would have taken them away again.
>
> 3. I played no part in the importation of the cigarettes and the tobacco, nor did I cause them to be imported.
>
> 4. I was to be paid £500 for storing the cigarettes and tobacco and given a few sleeves of cigarettes.
>
> 5. This is the only occasion I have acted in this way.

11. Mr Nolan received a five months suspended prison sentence and a curfew. He did not seek to retract his admission of guilt in the Tribunal hearing.

12. It was accepted in the Tribunal hearing that when Mr Nolan first attended at the police station, HMRC considered the "value" of the tax evaded was £97,000 and this figure was revised upwards when he first appeared in front of the magistrates to £97,785. At his second appearance, the figure given by HMRC to the bench increased to £102,192.67. The calculation of this figure was set out in a statement from a Mr Carter. It showed he had calculated it on the same number of cigarettes and same weight of HRT as used in the later unamended assessment of £75,569, but in addition he had added on customs duty and VAT.

13. There were some facts in issue.

14. Firstly: did Officer Matthews represent to Mr Nolan there would be no civil assessment? The appellant did not accept that Mrs Matthews' notebook (set out above) properly reflected the conversation which took place between them on the day his home was searched by HMRC. The notebook records that Mrs Matthews indicated that HMRC would deal with the matter by way of warning letter but that (a) she withdraw this indication half an hour later and (b) had said in any event it was conditional on there being no further offences discovered. The appellant did not accept this was accurate.

15. However, we are unable to accept this challenge to the notebook entries on the evidence we heard and saw. Mrs Matthews' notebook is a contemporaneous record of what was said, and although she was not present to give evidence, some weight should be given to it. We also listened to Mr and Mrs Nolan's oral evidence.

16. We were unable to find Mr Nolan's evidence on what Mrs Matthews actually said reliable. This is because he was inconsistent in his oral evidence: at first he said that Mrs Matthews did verbally withdraw her offer to deal with the matter by warning letter, but then he indicated she hadn't said this. He was also vague on whether or not Mrs Matthews had said it was conditional on there being no further offences.

17. Mrs Nolan's evidence was that Mrs Matthews' had retracted her decision to issue a warning letter that day, and that bore out the notebook. Although Mrs Nolan went on to say that she hadn't understood that that meant HMRC wouldn't send a warning letter at a later date, her evidence supports the accuracy of the notebook and we therefore prefer the evidence of the officer's notebook over Mr Nolan's vague and contradictory evidence.

18. In any event, it was clear that the appellant was never shown a draft warning letter and did not know what it would say. He appeared to *assume* that being let off with a warning letter meant that HMRC would take no further action at all. Indeed, while it appears from the HMRC officer's notes that *she* only had in mind criminal matters (as she refers to 'further offences') she did not explicitly explain to Mr and Mrs Nolan that the civil side of HMRC might later raise an assessment in any event.

19. There is no need to consider whether it was reasonable for Mr Nolan to assume that there would be no assessment, when neither side of the conversation made it clear whether the conversation was limited to criminal matters or emcompassed both civil and criminal matters. This is because, even if it would have been reasonable to assume a 'warning letter' would have related to both, there was no unequivocal representation that there would only be a warning letter.

20. Firstly, Mrs Matthews' offer of a warning letter was, we find, always caveated with notice it would be withdrawn if there were further offences. HMRC discovered further offences in the next 3 days (the goods in the back fence and shed). Secondly, Mr Nolan also cannot rely on it because it was withdrawn and Mr Nolan knew that. Thirdly, Mr Nolan cannot rely on it because he cannot show he took any actions in response to it: there was no detrimental reliance.

21. In any event, at the hearing, Mr Young no longer advanced a case based on Mr Nolan having a legitimate expectation that there would be no civil assessment. While we do not necessarily agree that the law would preclude an appellant in this tribunal relying on legitimate expectations in these circumstances (see *Oxfam* [2009] EWHC 2078 cf *Noor* [2013] UKUT 71 (TCC)) it is clear that on these facts there was no expectation, legitimate or otherwise, which could be relied upon.

22. Representation that guilty plea would settle all matters? Secondly, Mr Nolan considered that he had been induced to plead guilty on the understanding that that would be the end to all matters arising out of the seizure. We find from Mr Nolan's evidence that, following conversations between his legal team and HMRC's at which he was not present, his lawyers put to him a deal that amounted to him pleading guilty to the charge (as he did) and HMRC agreeing that they would take no further action in relation to seizure of assets.

23. Mr Nolan did suggest in his evidence that HMRC agreed simply to "take no further action" but we do not find this to be a reliable recollection of what was said as (a) his next answer indicated that what he was actually told was that they would not further action with respect to 'seizure of assets'; (b) it was clear Mr Nolan did not appreciate the distinction between seizure of assets in criminal proceedings and an assessment in civil proceedings and so he mistakenly has conflated the two; (c) the evidence was vague and (d) it is most unlikely that HMRC officers dealing with a criminal matter would offer to give up an assessment in return for a guilty plea, as the civil assessment would be outside their remit and such an offer improper in any event.

24. HMRC did indeed take no further action with regard to seizure of assets. It seems to us the confusion arises because Mr Nolan equates a civil assessment with a seizure of assets ordered by a criminal court. We find HMRC never represented to Mr Nolan that they would not raise a civil assessment.

25. HMRC acted improperly? Thirdly, it was part of the appellant's case that HMRC had acted improperly in the criminal proceedings. We do not find this relevant (see §63) below. Apart from Mr Young's case that HMRC overinflated the figure of tax evaded, this allegation appears to rest on Mr Nolan's evidence that the judge at the criminal trial had indicated he was unhappy with HMRC because he had not received the full paperwork in advance of the hearing. There was no attempt by Mr Young to suggest how this latter matter might be relevant to the tax assessment, and we do not mention it again.

26. And in so far as the alleged inflation of figures in the criminal proceedings is concerned, this is not only irrelevant to the civil assessment, but not made out in any event. In other words, Mr Young did not satisfy us that the VAT and customs duty, which accounted for the higher figure, were not also evaded.

27. As a matter of fact, could HMRC have identified an earlier duty point for the remaining goods assessed on Mr Nolan? One of the appellant's complaints seemed to be about the apparent capriciousness of the reduction in the assessment on him from £75,569 to £40,688. However, on what little evidence was in front of the Tribunal,

factually it would seem impossible for the appellant to make out a case that HMRC could have found an earlier duty point on all the assessed goods. Mr Young suggests HMRC should have intercepted the van followed from Heathrow before it reached the appellant's house (see §6)

28. However, the cigarettes which appear to have led HMRC to the appellant's house were the Richmans (see §5). Interception of the van carrying these goods as suggested by Mr Young would presumably only have led to an earlier duty point for the Richmans: but HMRC have already identified an earlier duty point for the Richmans. Mrs Quarterman's evidence was that papers passed to her relating to other criminal proceedings arising out of the same operation showed, in relation to the Richmans, evidence that there was an earlier release for consumption of these goods, which she assessed against other persons. Therefore, she amended her earlier assessment of Mr Nolan to remove the Richmans from it (§4).

29. These cigarettes no longer form part of the assessment. There is absolutely no evidence of the source of the HRT or Hatemans: the appellant has refused to disclose from where he obtained them. It therefore seems impossible for the appellant to make out a case that HMRC *could* have identified an earlier duty point on these, irrespective of the question of whether HMRC should have done so if they could.

The law

30. Regulation 3 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ("the HMDP Regulations") provides for excise duty levied on consumption to be payable on manufactured tobacco.

31. Regulation 5 of the HMDP Regulations provides for an excise duty point, "at the time when excise goods are released for consumption in the United Kingdom."

32. Regulation 6(1) of the HMDP Regulations provides as follows:

> Excise goods are released for consumption in the United Kingdom at the time when the goods
>
> (a) leave a duty suspension arrangement;
>
> (b)are held outside a duty suspension arrangement and UK excise duty on those goods has not been paid, relieved, remitted or deferred under a duty deferment arrangement;
>
> (c) are produced outside a duty suspension arrangement; or
>
> (d)are charged with duty at importation unless they are placed, immediately upon importation, under a duty suspension arrangement.

33. In this case, there was no suggestion that the goods the subject of the assessment had ever paid excise duty. Far from it, Mr Nolan had pleaded guilty to harbouring goods on which duty had not been paid. Therefore, if no earlier duty point had arisen, the goods were subject to duty under (b) above as, when present in Mr Nolan's home they were "outside a duty suspension arrangement" and duty had not been paid.

34. Regulation 10 of the HMDP Regulations provides for liability to pay that duty as follows:

> (1)The person liable to pay the duty when excise goods are released for consumption by virtue of regulation 6(1)(b) (holding of excise goods outside a duty suspension arrangement) is the person holding the excise goods at that time.
>
> (2)Any other person involved in the holding of the excise goods is jointly and severally liable to pay the duty with the person specified in paragraph (1).

35. There is no definition of "holding" within the HMDP Regulations. In *R v Taylor and Wood* [2013] EWCA Crim 1151, Kenneth Parker J defined "holding" as requiring either legal control or physical possession of the relevant goods, together with knowledge of what those goods were. He stated as follows at paragraphs 29 and 30:

> "[29] [Holding] denotes some concept of possession of the goods. …. it can broadly be described as control, directly or through another, of the asset, with the intention of asserting such control against others, whether temporarily or permanently… In a case of bailment, the bailee has actual, or physical, possession and the bailor constructive possession. In other words, if the bailee holds possession not for any interest of his own but exclusively as bailee at will, legal possession will be shared by bailor and bailee.
>
> [30] If [the bailee] had known, or perhaps even ought to have known, that it had physical possession of the cigarettes at the excise duty point, its possession might have been sufficient to constitute a "holding" of the cigarettes at that point.…."

36. In the present case, no issue was taken with whether Mr Nolan was holding the goods. The point seems to us to be beyond argument: Mr Nolan clearly had physical possession of the goods as he was storing them at his house and, from his guilty plea, he was well aware of what they were. (Mr Nolan is blind but he does not suggest that that is relevant and in particular does not retract his guilty plea).

37. The rates of duty for tobacco products are provided for in Schedule 1 of the Tobacco Products Duty Act 1979 as substituted by section 16 of the Finance Act 2011 (itself now substituted by s185(1) of the Finance Act 2012 but not in force at the date of the Assessment). There was no challenge to the rate of duty applied by HMRC in arriving at the assessment.

Does the criminal conviction preclude a civil assessment?

38. The appellant's case is that it is unlawful for HMRC to raise an assessment for unpaid excise duty on the same dutiable goods on which he has been criminally convicted for, in effect, harbouring goods with intend to defraud HMRC of the same tax for which he is now being assessed.

39. Mr Young put this case a number of ways:

- There was an assessment in the criminal proceedings so HMRC is assessing the appellant twice for the same tax;

- The assessment is penal in nature and therefore Mr Nolan is being punished twice for the same offence.

Penal in nature?

40. Mrs Quarterman was the assessing officer. It was not suggested to her that she raised the assessment to punish or deter and the general tenor of her evidence was that she raised the assessment because it appeared to her that the tax was due. Mr Donnachie was the reviewing officer. Again the tenor of his evidence was that he upheld Mrs Quarterman's decision because he considered it legally and arithmetically correct. Later, in response to a question from counsel, however, he said that it was HMRC's policy to assess in circumstances where the goods were destroyed as deterrence.

41. However, since the law provides for tax liability in these circumstances, HMRC is doing no more than enforcing the law by assessing. To say that the policy to apply the law is penal requires Mr Young to show that the law is penal. Yet it is clearly not. The purpose of Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ("the HMDP Regulations") is to provide a comprehensive code of duty points on excise goods which come into the UK, so that whether they come into UK and are held lawfully or unlawfully excise duty is payable. A code which failed to provide for excise duty on *unlawfully* held goods would be giving an *advantage* to criminal over lawful behaviour. The UK law does not do this. That does not make it penal. Mr Donnachie, we find, was mistaken in what he says: even if it is his personal opinion that assessments in such cases are penal, we find that assessments in such cases merely apply the law and the law is not penal.

42. Mr Young relied on the case of *Engel v The Netherlands* 5100/71 [1976] ECHR 3 in which disciplinary proceedings were found, where the penalty was sufficiently severe, to be criminal in nature. He appeared to rely on it for the quite extraordinary proposition that a tax assessment is necessarily penal in nature when it is of a sufficiently large amount. We do not agree that that is right in principle or a proposition that can be derived from that case. The significant difference is that disciplinary proceedings are intended to punish and deter: tax assessments merely collect tax. However large the assessment, it is not criminal in nature.

43. Mr Young also relied on *Han & Yau* [2001] EWCA Civ 1048 for the same proposition. But the assessments in that case were to *penalties* which are clearly penal, as their name suggests. There are no assessments to penalties in this case. We would agree that no civil penalties could be assessed in a case where criminal proceedings had been successfully prosecuted. But here the assessment is to tax and not penalties.

44. By its very nature, liability to pay tax is not penal. It is just an incident of living in a country with a tax regime. There was nothing penal in raising an assessment.

That this is so is indicated in part by the fact that HMRC have reduced the assessment where they have discovered an earlier duty point. Mr Nolan's culpability remains the same but his civil liability is reduced.

45. We reject the appellant's case that the civil assessment is penal.

Criminal proceedings included an assessment?

46. Mr Young's case was that the legislation does not prescribe any particular form for an assessment and therefore the pleadings and/or other documents in the criminal proceedings must be seen as an assessment to the tax.

47. S 12 Finance Act 1994 deals with assessments to excise duty. This assessment was made under s 12(1A) which provides as follows:

> "(1A) …where it appears to the Commissioners –
>
> (a) that any person is a person from whom any amount has become due in respect of any duty of excise; and
>
> (b) that the amount due can be ascertained by the Commissioners,
>
> the commissioners may assess the amount of duty due from that person and notify that amount to that person or his representative

48. While we agree that this section does not prescribe formalities for making an assessment, nevertheless it is clear that there must be an *assessment.* An assessment by its nature is a statement to a taxpayer from HMRC that HMRC consider that a specified sum of money is owed in tax and that the taxpayer should pay it. It is key that the document requires the taxpayer to pay the assessed amount.

49. The criminal proceedings were about HMRC's allegation that the appellant had harboured goods with intent to defraud HMRC of the tax now in issue under s 170 CEMA. They necessarily involved the claim by HMRC that the tax was due from someone. If the tax was not due, it could not be fraudulently evaded. Nevertheless, there is a clear distinction with the civil proceedings. Mr Young did not point to anything in the criminal proceedings which amounted to a statement that HMRC required the appellant to pay the excise duty.

50. Any assessment would be expected to refer to the legislative provision under which it was made, but in law there does not appear to be any requirement that the assessment actually state that it is made under s 12 FA 94; nevertheless to be such an assessment it must be made under that provision. The criminal proceedings on the contrary were conducted in respect of s 170 CEMA 1979. The preconditions for liability under s 170 CEMA are not even the same as those under s 12(1A) FA 94.

51. We find that the assessment under consideration in this appeal has been the only assessment on the appellant for the excise duty at stake.

52. In any event, if Mr Young were right, and he is not, it would not help the appellant. While this assessment would fall if there was an earlier one for the same

amount, that earlier one would still be outstanding and due for payment. The time limit for appeal would have expired. It would be due and payable and (if it existed) would have been for about £75,000 rather than merely £40,688.

Is the assessment correct?

53. Both counsel were agreed that there was no requirement for a s 12(1A) assessment to be to the officer's best judgment. This might seem odd but is perhaps explained by a comparison between assessments under s 12(1) and s 12(1A) FA 94. Section 12(1) assessments are where tax is unpaid but the HMRC officer is unable to ascertain the exact amount and is necessarily required to make an estimated assessment. Such assessments must be to best judgment. S 12(1A) relates to assessments where the officer is able to determine the exact amount of tax due. Such assessments are not required to be to best judgment. This is because they are not estimated.

54. Mr Chapman nevertheless did not dispute the proposition that all assessments were required to be a proper exercise of his discretion by an HMRC officer as a matter of public law. This was referred to as *Wednesbury* reasonableness: the assessment must take account of all relevant factors, must not take account of irrelevant factors and must not be something no reasonable HMRC officer could have done

55. While this is true, an allegation that an assessment involves a breach of public law is something not within the jurisdiction of the Tribunal. While HMRC may not rely on their own unlawful act to found liability to an assessment, once liability is incurred the legality of the decision to issue an assessment which crystallises that liability is beyond our jurisdiction. See *Hok Ltd* and compare *Pawlowski v Dunnington* [1999] STC 550, and the analysis in *LH Bishop* at §63-86 and §139.

56. In any event, for the reasons stated below, we do not consider that the appellant has even begun to make out a case that the assessment was unlawful in a public law sense.

57. Firstly, to the extent that the complaint is that the assessment is in effect capricious because an earlier duty point might have been identified for the Hatemans and HRT, we reject this factually for the reasons given in §§27-29. Mr Nolan knew from whom he obtained them and has refused to say. HMRC's inability to identify an earlier duty point is caused by Mr Nolan's refusal to name names.

58. Secondly, to the extent that the complaint is that the appellant does not know how the figure was calculated, we find that this is clearly set out in a schedule to the assessment. There has been no challenge to the mathematics of the calculation nor to the rate of duty (see §37) nor the amounts subjected to tax. We find that it is arithmetically right.

59. Thirdly, to the extent the complaint is that the criminal court had made a binding ruling that the outstanding tax was £102,000 and this precluded an assessment

in a lower amount we say (a) the £102,000 included customs duty and VAT while the assessment did not; (b) there was no binding ruling as there was a guilty plea and (c) in any event, if there had been such a finding, it would not preclude an assessment in a lower amount.

60. Fourthly, to the extent the complaint is that the assessment as originally made must have been wrong because HMRC later reduced it, we do not consider that public law issues are engaged. We accept the unchallenged evidence of the officer that at the time she raised the original assessment she had not identified the earlier duty point on the Richmans. Including the Richmans in the assessment at the time it was made was therefore a proper thing to do. Reducing it later when an earlier duty point was discovered was also the proper thing to do.

61. Fifthly, to the extent it is a complaint that initially the appellant was led to believe that criminal proceedings would not be brought but only a warning letter issued, we reject this for a number of reasons. For the reasons stated above at §§14-21 we do not accept that the appellants had any legitimate expectations on which they could rely.

62. Sixthly, to the extent that it is a claim that HMRC misled the appellant into pleading guilty by representing to him that there would no civil assessment for the tax, we find that this is not made out on the facts, for the reasons given at §§ 22-24 above.

63. Seventhly, to the extent that it is a claim that HMRC wrongly stated in the criminal proceedings the amount of duty defrauded (see §§ 26) and thereby (says the appellant) caused the magistrates to refuse jurisdiction and leading (says the appellant) to a potentially heavier sentence from the Crown Court and higher costs, we find this (even if it could be proved on the facts, which we doubt) is not relevant to the civil assessment. Even if HMRC acted improperly in the criminal proceedings, that would be a matter for appeal (to the extent there could be an appeal from a guilty plea) or for judicial review. Any improper behaviour by HMRC in the criminal proceedings could not have led to the assessment on the appellant. The appellant is liable to the assessment irrespective of whether HMRC instituted criminal proceedings.

64. Therefore, even were there a requirement for s 12(1A) assessments to be to best judgement, for the reasons given above we would find that the assessment on Mr Nolan was to best judgment and lawful.

Breach of appellant's human rights?

65. Mr Young argued that the assessment was a breach of Mr Nolan's rights under the European Convention on Human Rights ("the Convention") as, he said, it involved being tried twice for the same offence (article 6) and a deprivation of property (Article 1 Protocol 1 or "A1P1").

66. So far as Article 6 is concerned, case law such as *Jussila v Finland* 73053/01 [2006] ECHR 996 and *Ferrazzini v Italy* [2001] STC 1314 indicate that taxpayers only have the protection of it in criminal or penal civil matters. We have already said that the assessment was not penal so Article 6 can not be engaged. Even if Article 6 was engaged, because the assessment was not penal, there is no question of Mr Nolan being tried or punished twice for the same offence.

67. So far as A1P1 is concerned, a tax assessment obviously does involve a deprivation of property. However, as Mr Young recognised, A1P1 permits states to deprive its citizens of property in certain circumstances. In particular the Convention permits a deprivation of property "to secure the payment of taxes". In other words, the Government is permitted to tax Mr Nolan. There is no breach of the Convention here.

Have HMRC acted disproportionately?

68. It was Mr Young's case that HMRC had to act proportionately in excise matters and in criminal matters. Mr Chapman's response was that HMRC had acted proportionately.

69. We do not agree that the assessment was a criminal matter. Tax penalties are (normally) criminal matters, see, for instance, *Jusilla*. However, at issue in this case was a tax assessment and assessments are not criminal matters (see §§40-45).

70. Nevertheless, there is, as Mr Chapman accepted, a requirement under EU law (and excise duty is matter of EU law) for UK taxing authorities to act proportionately and for the legislation to be proportional when implementing excise duties. See, for instance, *Butlers Ships Stores* [2013] UKUT 564 (TCC) at §38.

71. In that case the judge found that the national legislation was in accordance with EU law. The allegation of lack of proportionality was therefore levied at the European Directive which UK law implemented. While the Judge had no jurisdiction to decide that issue, he was required to refer it to the Court of Justice of the European Union unless he could with certainty decide the allegation of lack of proportionately was groundless. So he had to consider it. He decided he was entirely satisfied that there was no lack of proportionality in the directive.

72. In this case Mr Young specifically stated he makes no allegation that the legislation lacked proportionality. His allegation was that HMRC's implementation of it lacked proportionality. What he really meant was that in the circumstances HMRC should not have imposed the assessment. While we have said Mr Young can not advance a public law attack on the decision to issue the assessment (see §55), he can attack it for lack of proportionality (for an example, in the VAT sphere, see *Enersys Holdings UK Ltd* [2010] UKFTT 20 (TC) where a VAT default surcharge was struck down as disproportionate).

73. However, the grounds for attack on the basis of alleged lack of proportionality are not those of public law. To be proportionate, and therefore lawful, the measure, or its application must:

(a) Have a legitimate aim;

(b) be appropriate to that legitimate aim;

(c) go no further than necessary and, where there is a choice, has recourse to the least onerous measure; and

(d) Its disadvantages are not disproportionate to its aim.

74. In this case, HMRC chose to apply the law and assess Mr Nolan. In reality, therefore, Mr Young, although he denied he was attacking the legal regime, was so doing. His case was that HMRC should not have assessed for tax, although the law entitled it to do so, because:

- The goods had been destroyed; and/or
- Mr Nolan had been prosecuted.

75. Confiscation and destruction of the goods is punitive. The law permits this where the goods were subject to duty but the duty has not been paid. (In this case of course the goods did not belong to Mr Nolan so the destruction of them can scarcely be said to have punished him.) Successful criminal prosecution is also clearly punitive and occurs because of fraudulent evasion of duty.

76. Mr Young's submissions therefore amounts to no more than saying that the law and/or HMRC's actions lacked proportionality because a person who has been punished for evading tax by confiscation and/or prosecution should not then be made to pay the tax. This is obviously wrong. The tax remains due despite the criminal attempt to evade payment of it. It is entirely legitimate for a state to require tax lawfully due to be paid, and quite legitimate for a state to refuse to exempt from liability a person who is nevertheless also punished for evading it, even if that punishment included destruction of the goods.

77. The highest we can put Mr Nolan's case is that this is not quite like an ordinary case of evasion of tax liability where the evasion arises quite separately to the tax liability, such as when someone deliberately fails to declare income to HMRC. In such a case earning the income was a quite separate act to the decision not to tell HMRC about it. Mr Nolan's liability to the tax, however, arose because of his decision, in effect, to act illegally as an unauthorised warehousekeeper (which meant that the legislation treated him as putting the goods into circulation). It might be said that it was that very act which also gave rise to his criminal liability under s 170 CEMA 79 for harbouring goods with intent to evade duty. But, in reality the liability to the assessment is separate to the criminal liability. Criminal liability requires the criminal intent to defraud: the civil assessment does not. By his act, Mr Nolan exposed himself to civil liability to tax: by his intent not to inform the authorities and pay this tax, he also exposed himself to criminal liability for fraud. They are two

different matters and there is nothing disproportionate in seeking the underlying tax in a case where a civil or criminal sanction is imposed for fraud.

78. Nor do we consider any of the matters discussed at §§ 57-63 reveal any lack of proportionality in the legislation or the application of it for the reasons given above. In particular we reject Mr Young's case that the assessment is penal in nature and therefore disproportionate: it is not penal in nature. The law is proportionate in that it treats goods both held lawfully and unlawfully as equally subject to excise duty.

79. In conclusion, we dismiss the appeal and uphold the assessment for £40,688.

80. 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.

81.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 3 March 2014