[2018] UKFTT 515 (TC)

TC06684

Appeal number: TC/2015/04815

EXCISE DUTY - Excise Goods (Holding, Movement and Duty Point) Regulations 2010, regs 6(1)(b)and 10 - assessment in respect of duty unpaid goods - whether the Appellant was a person liable for the assessment – jurisdiction of the Tribunal

FIRST-TIER TRIBUNAL
TAX CHAMBER

JOHN MACKIN **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER

Sitting in public at Belfast on 1 March 2018

Mr D McNamee of McNamee McDonnell Duffy, solicitors, for the Appellant

Miss J Vicary, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

© CROWN COPYRIGHT 2018

DECISION

Introduction

1. The Appellant appeals against a decision of HMRC dated 23 July 2015 to raise an assessment under s 12(1A) of the Finance Act 1994 for excise duty in the sum of £12,239.

Factual background

2. On 6 August 2014, the HMRC Fraud Investigation Service conducted a search under warrant of the Appellant's home in Newry. There they discovered 67.8 kilograms of hand-rolling tobacco and 1 packet of cigarettes upon which UK duty had not been paid. These goods (referred to below as the "tobacco" or the "goods") were seized by HMRC. The officers conducting the search had obtained two separate search warrants, one for the Appellant's home, and one for a car of which the Appellant's wife was the registered keeper.

3. On 12 September 2014, the Appellant was interviewed under caution by the HMRC Fraud Investigation Service. His solicitor was present. At the interview, he read out a pre-prepared statement, and then answered "no comment" to subsequent questions.

4. On 23 July 2015 the Respondents issued the decision that is the subject of this appeal, for an assessment for excise duty in the sum of £12,239. That decision also notified the Appellant of HMRC's intention to raise an excise wrongdoing penalty pursuant to Schedule 41 to the Finance Act 2008.

5. By a notice of appeal dated 12 August 2015, the Appellant brought the present Tribunal appeal against the assessment to excise duty.

6. On 15 August 2015, HMRC applied for the appeal to be struck out.

7. By a direction dated 27 November 2015, the Tribunal of its own motion stayed the appeal for a period of 6 months pending the decision in the *Staniszewski* case.

8. On 18 January 2016, the Appellant pleaded guilty before a magistrates' court to a charge under s 107(2)(a) of the Customs and Excise Management Act 1979 ("**CEMA**"). The terms of the charge were that:

> Defendant on the 6th day of August 2014, in the County Court Division of Armagh and South Down, were, (sic) in relation to certain goods namely rolling tobacco, knowingly concerned in the fraudulent evasion or attempted evasion of any duty payable on those goods, contrary to section 170(2)(a) of [CEMA].

9. Following this conviction, HMRC withdrew the proposed excise wrongdoing penalty, pursuant to paragraph 23 of Schedule 41 to the Finance Act 2008.

10. On 12 February 2016, the Tribunal gave its decision in *Staniszewski v Revenue and Customs* [2016] UKFTT 128 ("***Staniszewski***"). The Appellant thereafter confirmed that he wished to proceed with this appeal.

11. At a hearing on 12 May 2017, the Tribunal refused the HMRC application for the appeal to be struck out.

12. Following receipt of the HMRC statement of case, the Appellant made an application for witness summons requiring HMRC Officer Cormican to give evidence. Officer Cormican was the officer who provided information on oath to the magistrate who granted the search warrants. HMRC objected to this application. In a letter dated 2 October 2017, the parties were advised that the Tribunal (Judge Sinfield) considered that the Appellant's application was premature given that witness statements had not been yet served, but that the Appellant could renew the application after exchange of witness statements if he still considered it necessary to do so.

Applicable legislation

13. Regulation 5 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (the "**2010 Regulations**") provides:

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

14. Regulation 6(1) of the 2010 Regulations provides:

> (1) Excise goods are released for consumption in the United Kingdom at the time when the goods—
>
> (a) leave a duty suspension arrangement;
>
> (b) are held outside a duty suspension arrangement and UK excise duty on those goods has not been paid, relieved, remitted or deferred under a duty deferment arrangement;
>
> (c) are produced outside a duty suspension arrangement; or
>
> (d) are charged with duty at importation unless they are placed, immediately upon importation, under a duty suspension arrangement.

15. Regulation 10 of the 2010 Regulations provides:

> (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).

16. Section 170(2) CEMA provides:

(2) Without prejudice to any other provision of the Customs and Excise Acts 1979, if any person is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion—

(a) of any duty chargeable on the goods;

(b) of any prohibition or restriction for the time being in force with respect to the goods under or by virtue of any enactment; or

(c) of any provision of the Customs and Excise Acts 1979 applicable to the goods,

he shall be guilty of an offence under this section and may be arrested.

17. Section 12(1A) of the Finance Act 1994 relevantly provides:

(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 there has been a default falling within subsection (2) below;

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

The hearing

18. Witness evidence was given by the Appellant, and by HMRC Officers Mulholland and Creaney.

19. The hearing bundle also included witness statements of HMRC Officers Watson, Rafferty and Lindsay, who did not attend the hearing to give evidence. HMRC placed no particular reliance on these statements in its arguments.

20. At the conclusion of the hearing, the Tribunal issued a direction for the parties to file further post-hearing written submissions, in relation to the question whether a failure by HMRC to act in accordance with a publicly stated policy can give rise to a valid ground of appeal to the Tribunal. The Appellant initially responded with an objection that post-hearing submissions were irregular and should not be considered, or that they should be followed by a further oral hearing at the cost of HMRC. The Tribunal does not accept this argument, noting that it is not uncommon for the Tribunal to direct post-hearing submissions (for another recent example see *Crawford v Revenue & Customs* [2018] UKFTT 392(TC) at [9]-[10]), and that this is consistent with rules 5(1), 5(2)(g) and 15(1)(e)(ii) of the Tribunal's Rules. HMRC subsequently filed written submissions, to which the Appellant filed written submissions in response. The Tribunal has taken these into consideration.

The Appellant's evidence

21. The Appellant's witness statement states as follows.

22. On 5 August 2014, while he was away from home playing golf, the Appellant received a telephone call from an acquaintance who asked if he could leave some goods at the Appellant's house. The Appellant agreed because he had had previous business dealing with the caller, who he anticipated would collect the goods the following day. After the HMRC search on 6 August 2014, the Appellant spoke to his acquaintance who said that he had wanted to leave the goods at the Appellant's house because he believed he was being followed. The Appellant considers that this is supported by the fact that the search warrant was obtained shortly after the tobacco was brought to his house, and the fact that the search warrant mentions his wife's vehicle that would have been parked outside his house at the time that the tobacco was delivered.

23. The acquaintance who left the tobacco at the Appellant's home obtained it from a tobacco factory in County Armagh that was subsequently raided by HMRC. The Appellant believes that HMRC was aware of the existence of this factory, and had followed his acquaintance's vehicle from the factory to the Appellant's home. This means that HMRC were aware that a duty point in relation to the manufacture of the tobacco took place at the factory. The Appellant was not holding the goods at the time that that duty point arose.

24. The Appellant had no financial or other interest in the goods, was not paid for allowing the goods to be left in his house, and had no other involvement in the matter.

25. In cross-examination, the Appellant said amongst other matters as follows. His acquaintance's vehicle had broken down. The Appellant did not ask him what goods he wanted to store. The Appellant did not know what the goods were, but presumed them to be electronic cigarettes and was surprised when he later found out that they were tobacco. The Appellant's wife let the acquaintance into the house, and the acquaintance took the goods up to the bedroom. The Appellant did not give the name of his acquaintance because it was "not in my DNA". He pleaded guilty to the criminal offence because the goods were found in his house at the time. Various inconsistencies between the Appellant's witness statements were put to him, and he maintained that he was telling the truth.

26. In re-examination the Appellant said that he was 69 years old, and had never previously or since been in trouble.

The evidence of HMRC Officer Mulholland

27. Officer Mulholland's witness statement stated as follows. He was involved in the search of the Appellant's home on 6 August 2014. Upstairs in one bedroom, a large quantity of e-cigarette products was found. In the living room he found two boxes, each containing five 50 gram packets of hand rolling tobacco with the health warning on these in foreign writing.

28. In examination in chief he said as follows. There is no duty on e-cigarette products and these are not relevant to the case.

29. In cross-examination he said as follows. He agreed that he did not find at the Appellant's premises any books or paperwork that would be expected if an illegal business was being run there. Other people were not present there at the time. The Appellant was not named in the search warrant. Officer Mulholland was not aware of case law to the effect that the form of wording used in the search warrant meant that it was not a lawful warrant. He accepted that a valid search warrant was required to search premises. He knew the procedure for obtaining a search warrant. He did not know what information had been placed before the magistrate to obtain the search warrants in this case. Before the search was executed he received a briefing, but cannot recall whether or not he was briefed to expect to find tobacco products at the premises. Officer Mulholland was not the officer in charge on the day. There were two search warrants because it is necessary to get a separate warrant to search a car that is not on the premises but related to the premises. No search warrant was obtained for the Appellant's vehicle. Officer Mulholland was not aware of any suggestion that the Appellant's own vehicle was associated with an offence. Normally the information relied upon to obtain a warrant is written.

The evidence of HMRC Officer Creaney

30. Officer Creaney's witness statement stated as follows. He was involved in the search of the Appellant's home on 6 August 2014. A few minutes after he arrived at the property, the Appellant said to him: "I suppose someone touted on me? But I suppose you can't say". The Appellant added "I am not a big time dealer or anything". Officer Creaney subsequently conducted the interview under caution with the Appellant on 12 September 2014, of which the transcript was produced.

31. In cross-examination, Officer Creaney accepted that the 12 September 2014 interview under caution related to a suspected criminal offence and was not concerned with possible civil liability to pay duty.

The Appellant's submissions

32. The Appellant denies liability to excise duty on the following grounds.

33. Liability of any individual to pay excise duty can arise only under the 2010 Regulations. A criminal conviction under s 170 CEMA, or any other provision, does not of itself establish liability for that particular defendant to pay excise on the goods (reference was made to *R v Mackle* [2014] AC 678, [2014] UKSC 5; *R v White* [2010] EWCA Crim 978, [2010] STC 1965, *R v Taylor and Wood* [2013] EWCA Crim 1151; and *Revenue and Customs v Perfect* [2017] UKUT 476 (TCC)).

34. Nor does the forfeiture of excise goods pursuant to CEMA. *HMRC v Jones* [2012] Ch 414, [2011] EWCA Civ 824 ("***Jones***"), and *Revenue & Customs v Race* [2014] UKUT 331 (TCC) ("***Race***") establish that where no condemnation proceedings are brought, or are brought unsuccessfully, the goods are deemed to be liable to excise

duty. However, that principle operates *in rem*, and does not establish that any particular individual is liable to pay the duty.

35. HMRC can only issue an assessment to a person holding excise goods if it is not possible to establish that there is another person who held the goods after a duty point at an earlier point in time. That is so as a matter of law, not just as a matter of HMRC policy. *B & M Retail Ltd v Revenue & Customs* [2016] UKUT 429 (TCC) ("***B&M***") dealt with this situation, and was not a licence for HMRC to issue assessments to all persons holding the same dutiable goods on which duty has not been paid.

36. The Appellant believes that the goods were manufactured at a factory in County Armagh, that this factory was under surveillance by HMRC, and that HMRC followed the goods from this factory to the Appellant's home. The Appellant believes that the identities of those responsible for the manufacture and transport of the goods are known to HMRC. Those others were holding the goods at an earlier point in time and were liable to the duty. This is not a case like *B&M* where an earlier duty point *could* not be identified. It is an abuse of process for HMRC to defend this assessment when they are aware of persons who held the goods after a duty point at an earlier time.

37. The burden of proof is not on the Appellant. This is not a best judgment case. HMRC must establish that the assessment was lawfully raised and that the Appellant is the person liable to an assessment of duty. There is no burden on the Appellant, other than to establish by evidence any specific averment that he makes. The Appellant has stated a positive case and given evidence that HMRC are aware of the identities of others who held the goods in the factory and transported them to the Appellant's house. It is obvious that it may have unwelcome consequences for the Appellant if he were to identify the person who brought the goods to his house, and it is understandable that he does not do so. Unless HMRC present evidence to establish that they do not have such knowledge, the evidence of the Appellant on this point must be accepted. The Appellant is 69 years old and has otherwise never been in trouble. It is unlikely that he would get into contraband businesses at his age. It is more likely than not that his account is true.

38. The Appellant earlier applied for a witness summons addressed to the HMRC Officer who applied for the search warrant. HMRC opposed the witness summons and refused to produce the Officer to give evidence at the hearing. HMRC could have called the officer, but did not. Nor did HMRC present any other evidence in relation to this matter. It is therefore perverse of HMRC to state that there is no evidence other than that of the Appellant as to persons who previously held the goods. The Tribunal should draw inferences from this.

39. Furthermore, the search warrant was unlawful. It was established as a matter of law in *Re O'Neill's Application for Judicial Review* [2017] NIQB 37 ("***O'Neill***") that a search warrant worded in the manner of the warrant in the present case is unlawful. As a result, HMRC is unable to plead that the goods were properly seized or forfeited, and cannot rely on the principles in *Jones* and *Race*. To raise an excise assessment based on the unlawful seizure of goods would be an abuse of process.

40. The Tribunal has jurisdiction to deal with these issues, and is bound by the decision in *O'Neill*. The Appellant is not asking the Tribunal to exercise powers of judicial review. *Foulser v HMRC* [2013] UKUT 38 (TCC) ("***Foulser***") establishes that HMRC can be disbarred from defending an appeal in circumstances where HMRC has acted unlawfully and uplifted material unlawfully. *Staniszewski* dealt with issues of proportionality and has no bearing on this appeal.

41. It is nonsense that every person served with such a warrant would themselves have to apply for judicial review in their individual cases. HMRC have offered no information as to what policy is being applied in this situation or the facts within their knowledge of those persons previously holding the excise goods. It would be impossible for the Appellant successfully to mount a judicial review challenge without this information. It is not in the interests of justice that HMRC be allowed to deliberately withhold evidence from the Tribunal.

42. For HMRC to withhold evidence this was is a breach of the Appellant's right to a fair trial. Reliance is placed on *OAO Neftyanaya Kompaniya Yukos v Russia* (2012) 54 EHRR 19.

43. The Appellant's rights under Article 1 of the First Protocol to the European Convention on Human Rights have also been breached in that he has not been provided with the material which would assist him to establish a breach of proportionality.

44. The 23 July 2015 HMRC decision stated that "On this occasion, HM Revenue & Customs has decided not to institute criminal proceedings against you". In breach of this undertaking, a prosecution was brought after that date. Had the Crown Prosecution Service been aware of this undertaking, it would have withdrawn the prosecution.

The HMRC submissions

45. The burden of proof is on the Appellant (Finance Act 1994, s 16(6)). The standard of proof is on the balance of probabilities.

46. The allegations made by the Appellant in relation to HMRC's knowledge of an earlier duly point are specifically denied. In this case it was not possible to identify an earlier duty point not least because the Appellant refused to give any information as to where he got the goods from. When questioned about this at the 12 September 2014 interview, he consistently gave no comment answers.

47. In any event, the fact that there may have been an earlier unidentified excise duty point does not prevent the proper application of regulation 6(1)(b) (reliance is placed on *B&M*). At the time of the 6 August 2014 search, the Appellant was "holding" the goods for purposes of regulation 13 of the 2010 Regulations (reliance is placed on *McKeown, Duggan and McPolin v HMRC* [2016] UKUT 0479 ("***McKeown***") at [39], [65]-[66]). The Appellant pleaded guilty to being "knowingly concerned in the fraudulent evasion or attempted evasion of any duty payable on [the]

goods". It follows that it has been established that he knew that the goods were located at the property, that excise duty had not been paid on them, and that he intended to defraud HMRC of the duty payable. The Appellant's reliance on the general proposition that the fact of a criminal conviction does not give rise to a civil liability to pay the duty is of very limited assistance to the Appellant (reliance was placed on *McKeown* at [37]). The Tribunal has no jurisdiction to go behind the question of liability to forfeiture (reliance is placed on *Jones* and *Race*).

48. The Tribunal has no jurisdiction to deal with the claim that the entry and search of the Appellant's property pursuant to the warrant was unlawful, as the goods have already been deemed to be lawfully condemned as forfeit by virtue of the principles in *Jones* and *Race*. Reliance is placed on *Staniszewski* and *Foulser*. The Tribunal has no jurisdiction to grant orders of certiorari quashing the HMRC decision to enter and search and the warrant, or a declaration that these were unlawful (reliance is placed on *HMRC v Hok* [2012] UKUT 363 ("***Hok***")). The decision in *O'Neill* was specific to the facts of that case. The Appellant is out of time to bring proceedings for judicial review.

49. There is a distinction between policies (such as certain VAT notices) which have the force of law, and "general" HMRC policies which do not. The policy relied on by the Appellant in this case is not one that is set out within a public notice, but a "general" policy of the latter type. Failure by HMRC to apply such a policy could only give rise to a ground of appeal before the Tribunal if it could also be said that the same failure also amounted to a failure to act in accordance with the law. Any other rights asserted by an appellant in this context would have to be heard by way of a judicial review. (Reference is made to *B&M* at [69]-[70], [150]-[153].) The Tribunal has no judicial review jurisdiction (reference is made to *Hok* and *HMRC v Noor* [2013] UKUT 71). *Foulser* is not authority to the contrary.

50. Article 9 of Council Directive 2008/118/EC ('the 2008 Directive') gives a wide discretion to Member States as to the procedure that is to be followed for the collection, reimbursement or remission of duty. Reliance is placed on *B&M* and *Dawson's (Wales) Ltd v Revenue and Customs* [2018] UKFTT 0066 ("***Dawson's (Wales)***").

51. Parliament intended the Tribunal to have full appellate jurisdiction over the assessment in this case, but not to exercise supervision of HMRC's decision whether or not to make an assessment otherwise correct in law (reliance is placed on *Dawson's (Wales)* at [141]).

52. There is no duty of candour or other burden upon HMRC in a case such as the present. All that HMRC needs to show is that a duty point has arisen in accordance with Regulations 5 and 6 of the 2010 Regulations. There would be no purpose in HMRC being burdened with a duty to address an assertion of an earlier duty point in circumstances where this entire consideration is outwith the jurisdiction of the Tribunal. Any such burden would be contrary to the fact that the appellant bears the burden of proving their appeal, contrary to the overriding objective, and in some cases may be detrimental to the sensitive nature of HMRC investigations. This does not

render the legislation disproportionate or otherwise "unfair" (reliance is placed on *Dawson's (Wales)* at [96]-[106.)

53. No evidence whatsoever has been produced to show that an earlier duty point could, or should, have been established by the Respondents. The "evidence" is an asserted but unsubstantiated belief held by the Appellant.

The Tribunal's findings

54. At the hearing, Mr McNamee confirmed that the Appellant did not dispute the amount of tobacco that had been seized (67.8 kilograms), and that he did not dispute that the amount of excise to which the Appellant had been assessed was the correct amount of UK duty payable on those goods.

55. The Appellant has not disputed that he pleaded guilty to an offence under s 170(2)(a) CEMA of being knowingly concerned in a fraudulent evasion or attempt at evasion of the duty on the goods. The Appellant said that he pleaded guilty because the goods were found at his house. However, the Tribunal the Tribunal does not consider that of itself to be a plausible reason why the Appellant would plead guilty if he thought that he was not guilty of any offence. On the basis of this guilty plea, and the fact that the goods were found in his home, the Tribunal is satisfied on a balance of probability that the Appellant knew that there were duty unpaid excise goods in his home and that he was involved in the fraudulent evasion of the duty on those goods.

56. Mr McNamee points out that a conviction for that offence does not mean that the Appellant himself was actually holding the goods. The Tribunal accepts that this is correct. However, under regulation 10(2) of the 2010 Regulations, "Any other person involved in the holding of the excise goods is jointly and severally liable to pay the duty". The Tribunal is satisfied on the basis of the Appellant's guilty plea to the offence under s 170(2)(a) CEMA and the fact that the goods were found in his home that he was at the very least "involved in" the holding of the goods. On that basis, subject to the remaining issues discussed below, the Tribunal is satisfied that the Appellant was liable to be assessed for the duty on the goods.

57. The first of these remaining issues is the Appellant's contention that the search warrants were unlawful. The Appellant contends that because of the unlawfulness of the search warrants, HMRC should be debarred from defending this appeal.

58. The contention that the search warrants were unlawful is based on the *O'Neill* decision. However, it is noted that the *O'Neill* case was a judicial review claim. The Appellant in the present case could similarly have brought judicial review proceedings to challenge the lawfulness of the search warrants. Had he wished to do so, he should have acted quickly after the 6 August 2014 search was conducted. Order 53 rule 4(1) of the Rules of Judicature (NI) 1980 provides that "An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the

Court considers that there is good reason for extending the period within which the application shall be made".

59. No reason has been given why the Appellant could not have brought judicial review proceedings within the normal time limit. By the time that the Appellant brought the present Tribunal appeal in August 2015, a year had elapsed since the search of his home, and the normal time limit for bringing judicial review proceedings had well and truly passed. Furthermore, some 5 months later, in January 2016, the Appellant pleaded guilty to the criminal offence under s 170(2)(a) CEMA. There is no suggestion that he ever sought to challenge the lawfulness of the search warrant in the criminal proceedings before doing so. Additionally, even in this Tribunal appeal his original grounds of appeal in his notice of appeal made no mention of a claim that the search warrant was unlawful.

60. The Appellant appears only to have raised the issue of the lawfulness of the search warrants after the High Court gave its judgment in *O'Neill* in March 2017, some 2 and a half years after the search warrants were issued.

61. As was stated by the Upper Tribunal in *Foulser* at [24]-[27], and as is in any event quite clear, the First-tier Tribunal has no judicial review jurisdiction: "if a taxpayer wishes to contend that HMRC has acted unlawfully in public law so that the taxpayer is entitled to judicial review and that the appropriate relief is a prohibiting order preventing HMRC from a particular course of conduct, such a claim is within the jurisdiction of the Upper Tribunal and within the jurisdiction of the High Court". If the Tribunal has no judicial review jurisdiction in respect of actions of HMRC, for even greater reasons it can have no judicial review jurisdiction in respect of actions of a district judge or lay magistrate issuing a search warrant under criminal justice powers. It is simply not possible for the lawfulness of the search warrants to be challenged in this Tribunal.

62. However, the Upper Tribunal went on in *Foulser* at [35] to say that where an alleged abuse of process directly affects the fairness of the hearing before the First-tier Tribunal, the Tribunal will have power to determine any dispute as to the existence of the claimed abuse of process and can exercise its powers to make orders designed to eliminate any unfairness attributable to the abuse of process.

63. It would seem to follow from this that if the Tribunal found that the conduct of HMRC in obtaining evidence amounted to an abuse of process that directly affected the fairness of the Tribunal hearing (whether or not that conduct amounted to a breach of public law), then the Tribunal could, for instance, if it considered it necessary to eliminate any unfairness, exercise its powers under rule 15(2)(b)(iii) of the Tribunal's Rules to exclude that evidence. This would not require the Tribunal to make any finding that there had been any public law unlawfulness on the part of HMRC; it would only require a finding that there had been conduct which directly affected the fairness of the hearing (as explained in *Foulser* at [35]).

64. The question then is whether in the present case the fairness of the hearing is directly affected in any relevant way by the way that the search warrant was obtained,

or the way in which the search warrant was worded, or the way in which the search was conducted. The Tribunal is not persuaded that it is. As has been stated above, the place for challenging the lawfulness of the search warrant is the High Court. No reason has been given why the Appellant could not have, or did not, bring a challenge in the High Court within the time limit for doing so. The Appellant was content to plead guilty to a criminal charge consequential upon the search conducted pursuant to the search warrant, apparently without ever questioning the lawfulness of the search warrant. The fact that subsequent case law identified a ground on which the Appellant might have, but did not, challenge the lawfulness of the search warrant in the High Court does not mean that fairness requires this Tribunal to exclude all evidence of the search warrant and everything that occurred in consequence of it. Theoretically, the Appellant could, even now, make an application to the High Court for permission to bring a very late application for permission to apply for judicial review of the search warrants. He has not done so. It might be argued that the High Court, at the date of the hearing of this appeal, would have been very unlikely to grant such an application after such a long passage of time. If that were so, that would be all the more reason why fairness does not require this Tribunal to exclude evidence of the warrants and the search conducted pursuant to them.

65. The arguments based on the claimed unlawfulness of the search warrants are accordingly rejected.

66. The second of the remaining issues is the Appellant's claim that there were other persons who were known to HMRC, or at least whose identities HMRC was capable of identifying, who held the goods at a point earlier in time when the goods were dutiable. The Appellant claims that in the circumstances HMRC have no lawful power to assess him to the duty, or alternatively that it would be an abuse of process for HMRC to assess him.

67. In relation to this argument, both parties rely on the decision of the Upper Tribunal in *B&M*. In the decision in that case, it is recorded at [69] that the following submission was made on behalf of HMRC in that case:

> HMRC's general policy is to assess against the earliest point in time at which they are able to establish, on the evidence before them, that excise duty goods were held at a static location outside a duty suspension arrangement, in circumstances where the duty has not been paid, relieved, remitted or deferred, and where they do not have sufficient evidence before them to assess any other person as liable for excise duty by virtue of any earlier excise duty point that may have occurred. Such an assessment would be made on the basis that the holding of the goods in such circumstances amounted to a "release for consumption" thus triggering an excise duty point. That phrase is a term of art and should not be interpreted by reference solely to its natural and everyday meaning.

68. In the course of its discussion of the issues in that case,the Upper Tribunal said:

> 150. We accept that, if the correct interpretation of the 2008 Directive is that there can be more than one release for consumption in respect of

> the same goods, then which of the various persons who may have had some involvement with the goods is to be assessed for duty in respect of those goods will in many cases depend on the exercise of discretion on the part of HMRC. In relation to their policy in this regard, as Mr Beal explained it to us, HMRC appear to exercise their power to assess on the basis that only one assessment can be made in respect of the same goods. That in our view is consistent with our interpretation of the 2008 Directive and the policy behind it. As we record at [69] above, HMRC's general policy is to assess against the earliest point in time at which they are able to establish, on the evidence before them, that excise duty goods were held at a static location outside a duty suspension arrangement, in circumstances where the duty has not been paid, relieved, remitted or deferred, and where they do not have sufficient evidence before them to assess any other person who is liable for the excise duty by virtue of any earlier excise duty point that may have occurred.
>
> …
>
> 152. ... The lawfulness of that policy, and the manner in which individual decisions are taken pursuant to it, would of course be subject to supervision through the medium of judicial review. Because of this element of supervision, and because it is inherent in the framework laid down by the 2008 Directive that Member States are given a wide discretion as regards collection and reimbursement, we do not consider that the discretion given to HMRC in the present context infringes the constitutional principle enunciated by Lord Wilberforce in *Vestey*. As a consequence, any lingering concerns that a member of the public in possession of a quantity of wine purchased from a retailer, but in respect of which excise duty had not been paid, might find himself assessed with the unpaid duty should in practice be allayed, provided that HMRC follow their stated policy.
>
> 153. B & M are, it appears, troubled in this case that HMRC are not following their own stated policy in certain respects: ... B & M wish to be satisfied that there are not in fact earlier points in the supply chain where an excise duty point could clearly be established on the evidence, or might be if such an investigation were in their view more vigorously pursued. We would be inclined to agree that it would not be in the interests of justice that HMRC should simply be able to sit back and say that the burden is on the taxpayer to provide the evidence to displace its liability, when the evidence that HMRC do actually have is in fact sufficient to demonstrate, objectively, that an earlier excise duty point could be established. We are in no position, however, to say whether that is the position in the present case, and any concerns of that nature would anyway have to be pursued through the medium of judicial review.

69. The last paragraph of this quote reflects an argument being made by the Appellant in this case, to the effect that HMRC should not simply be able to sit back and say that the burden is on the taxpayer to provide the evidence to displace his liability. However, that paragraph also contains the response of the Upper Tribunal to that argument: if the Appellant considers that an individual decision has not been

lawfully taken in accordance with the HMRC policy, then the avenue for challenging the decision is by way of judicial review proceedings. This Tribunal has no judicial review jurisdiction. Proceedings to challenge HMRC's claimed failure to apply their policy correctly and lawfully fall to be brought in the High Court.

70. In *Dawson's (Wales)*, the First-tier Tribunal held at [126]-[128] that what was said by the Upper Tribunal in *B&M* at [152]-[153], to the effect that any claims that HMRC has failed to apply its policy must be dealt with by way of judicial review proceedings, was obiter. The First-tier Tribunal in *Dawson's (Wales)* therefore went on to consider the matter afresh. The First-tier Tribunal then found at [141] that "Parliament intended the Tribunal to have full appellate jurisdiction over 'other decisions' such as the assessment in this case, but did not intend it to exercise supervision of HMRC's decision whether or not to make (or discharge) an assessment otherwise correct in law".

71. On my own consideration of the matter, and having considered the decisions in *B&M* and *Dawson's (Wales)*, I find as a matter of law that (as stated in the latter decision at [79]) "HMRC are not bound by legislation to assess the earliest identified duty point: to the extent that it is their current policy to do so that is an exercise of discretion conferred on them by the legislation, and is not required of them by the legislation". The Tribunal therefore finds that a failure of HMRC to apply its policy correctly and lawfully would not of itself mean that there has been a failure to meet the statutory requirements for a valid assessment.

72. The Tribunal furthermore find as a matter of law that any claims that HMRC have not correctly and lawfully applied their policy are not within the jurisdiction of this Tribunal, and must be advanced instead in judicial review proceedings. It is established that this Tribunal has only such jurisdiction as has been conferred upon it by statute. There is no statutory provision conferring jurisdiction on the Tribunal to determine whether the Tribunal has correctly and lawfully applied the policy referred to in *B&M* at [69].

73. The Tribunal would add that in any event, even if it had such a jurisdiction, it would find that it has not been established in this case that HMRC could have identified an earlier duty point. HMRC has expressly denied that this is the case. The Appellant has said in his evidence that he believes that HMRC could have established an earlier duty point, but has provided only vague details for the basis of this belief. He states his belief that the tobacco was manufactured at a factory in Northern Ireland which was subsequently raided by HMRC. However, he does not give details of the factory or of the basis for the belief that it was raised by HMRC. He states that he believes that HMRC followed his acquaintance's vehicle to his house, based on the fact that his acquaintance said that he believed he was being followed and the fact that his home was searched the day after his acquaintance dropped off the goods. However, that belief does not appear to be borne out by the wording of the warrants themselves, which indicate that HMRC in fact suspected that business records would be found at the Appellant's premises.

74. At an earlier stage of these proceedings, the Appellant made an application for witness summons requiring HMRC Officer Cormican to give evidence (see paragraph 12 above). The Appellant was advised that he could renew the application after exchange of witness statements if he still considered it necessary to do so. There is no suggestion that the Appellant subsequently renewed that application. The Appellant's argument is that the burden falls on HMRC to establish that there was no earlier duty point at which the excise duty could have been assessed, and that as HMRC have not adduced evidence to show that this was not the case, the Appellant should succeed in his claim that there was. The Tribunal does not accept this argument. This Tribunal must make findings of fact based on the evidence before it, on a balance of probability. Even if the Tribunal had the jurisdiction to determine whether HMRC has correctly and lawfully applied their policy, the Appellant would have at the very least a burden of persuasion in showing how HMRC had acted incorrectly or unlawfully. If the Appellant considered that there was material that the Tribunal needed to have before it in order to decide this question that was unavailable to the Appellant, it was for the Appellant to pursue this matter at the pre-hearing stage. The Appellant had been advised that he could renew his application for a witness summons and did not do so. The Tribunal is not satisfied on the material that is now before it that HMRC applied any of its policies incorrectly or unlawfully.

75. The third of the remaining issues is the Appellant's argument that it was an abuse for criminal proceedings to be brought against him, when the 23 July 2015 decision stated expressly that "On this occasion HM Revenue & Customs has decided not to institute criminal proceedings against you". In relation to this argument, the Tribunal notes that pursuant to paragraph 23 of Schedule 41 to the Finance Act 2008, the Appellant should not be subject to both a criminal and a civil penalty in respect of the same conduct. However, regardless of whether a civil or a criminal penalty is imposed, HMRC are not precluded from making an assessment. If the Appellant considered that it was abusive to bring criminal proceedings against him despite the statement in the 23 July 2015 letter that this would not happen, then the place to raise that concern would have been in the criminal proceedings. There is no suggestion that the Appellant did so. Indeed, he pleaded guilty in the criminal proceedings. Nothing in the 23 July 2015 decision suggested that the Appellant would not be subjected to an assessment to excise. On the contrary, the purpose of the letter was to inform him of his liability to excise duty. The Tribunal therefore rejects the Appellant's argument.

76. In the light of these findings, the Tribunal finds that no breach of the European Convention on Human Rights has been established.

Conclusion

77. For the reasons above, the appeal is dismissed.

78. 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.

5

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 24 AUGUST 2018

10