Neutral Citation: [2022] UKFTT 00400 (TC)

Case Number: TC08628

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2015/03601

EXCISE DUTY – Appeal against assessment in respect of duty unpaid cigarettes – Whether Appellant is the "holder" of the cigarettes liable to pay the excise duty – Whether earlier duty point could be established

Heard on: 9-10 May 2022
Judgment date: 03 November 2022

Before

TRIBUNAL JUDGE GERAINT WILLIAMS
JANE SHILLAKER

Between

CHARLENE HUGHES

Appellant

and

THE COMMISSIONERS FOR HM REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Michael Forde of counsel, instructed by Tiernans Solicitors

For the Respondents: Joanna Vicary of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

The hearing took place on 9-10 May 2022. With the consent of the parties, the form of the hearing was a remote video hearing on the Tribunal Video Platform. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. The hearing was, therefore, held in public.

DECISION

INTRODUCTION

1. This is an appeal against a decision ("the Decision") of HMRC dated 3 February 2015 to raise an assessment for excise duty in the sum of £213,332 in respect of 953,260 duty unpaid cigarettes seized from the Appellant's property following a search by Officers from the Police Service of Northern Ireland ("PSNI") under the Terrorism Act 2000. The Decision was upheld on review on 5 May 2015.

PRELIMINARY ISSUE

2. On 5 May 2022 at 16.29 the Appellant made an application to adjourn the hearing of the substantive appeal ("the Application") listed to be heard on 9 and 10 May 2022. The Application stated:

> "The Appellant applies to adjourn the hearing that has been fixed for the 9th and 10th May 2022.
>
> The appellant refers to the attached detailed medical report from Dr Colman Byrne dated the 5th May 2022.
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> It is clear that participation in this appeal hearing would be detrimental to the appellant [sic] health and indeed cause injury to her frail mental health.
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> It is clear from her current condition that she is unfit to effectively take part in proceedings.
>
> It would be a breach of the appellant's Article 6 ECHR Rights to proceed on the 9th May 2022 in light of the medical evidence, given that the appellant is entitled to be present and be an active participant in her appeal. Given that the appellant's doctor has deemed that "*she is not currently medically fit to attend court at this point in time*" and further given that "*the challenge of her appearing in court at this point would be very severe on her mental health and would cause a deterioration in her condition*" there is a live concern about the appellant's Article 2 and Article 8 ECHR rights."

3. On 6 May 2022 at 15.50 HMRC e-mailed the Tribunal their response to the Application and confirmed that the Application was opposed. HMRC opposed the Application on the basis that the medical evidence is insufficient, the history of the Appellant's non-compliance, adjourning the hearing would be contrary to the overriding objective and that the Article 6 right to a fair trial is not engaged.

4. The Application was considered as a preliminary issue at the start of the hearing.

5. Mr Forde submitted that his instructing solicitor, Mr McVerry, had seen the Appellant within the last three weeks as he had to go and visit the Appellant at her home as she was not responding to his requests for information and instructions and had cancelled appointments with her solicitor. Mr McVerry was shocked by the Appellant's condition and put in motion the application to adjourn the hearing. Mr Forde accepted that the GP report's conclusion was open-ended but it was rare to see such level of detail in a GP's report. Mr Forde confirmed that, if the Application were granted, the views of a psychiatrist would be sought with a view to requesting that the hearing be conducted by video link and reasonable adjustments made such as frequent breaks.

6. Ms Vicary submitted that the majority of the GP letter focused on historic references to the Appellant's extensive medical history during 2004 to 2020 and there appears to be no specific update on the Appellant's situation during the last two years. The continuing position is asserted to be that the Appellant:

> "still continues to suffer quite prominent mental health symptoms - specifically anxiety and depression. I am of the opinion that because of these symptoms the challenge of her appearing in court at this point would be very severe on her mental health and would cause a deterioration in her condition and undo all good work achieved over the past number of years."

7. Ms Vicary submitted that it is not apparent from the GP letter when she was last seen by the GP nor whether she was seen by the GP prior to the letter being prepared. There is no reference to the Appellant being under the care of a psychiatrist and therefore her condition is capable of being managed by GP without the requirement for specialist intervention. It is not apparent from the GP letter whether the GP was advised that the Appellant would be attending via video-link and not in person nor whether any consideration was given to the ongoing anxiety that may be caused by adjourning the hearing. No explanation has been provided for the delay in making the Application. The Application does not even come close to satisfying the legal principles to be applied on adjournment applications and, in accordance with the Tribunal's overriding objective to deal with cases fairly and justly, should be refused.

8. The Tribunal rose to consider the Application and, following the brief adjournment, the Tribunal gave its oral decision that the Application was refused. The Tribunal confirmed that the Application did not satisfy the legal principles to be applied to applications to adjourn on medical grounds and it would not further the Tribunal's overriding objective to deal with cases fairly and justly to grant the Application. The Tribunal confirmed that written reasons for its decision would be provided and are set out below. Mr Forde applied for the Appellant's witness evidence to be admitted as hearsay evidence and that application was granted by the Tribunal.

9. HMRC in their objection to the Application set out the legal principles to be applied on adjournment applications. The legal principles to be applied on hearing adjournment applications were set out by the High Court in *Michael Decker v Geoffrey William Hopcraft* [2015] EWHC 1170 (HC) ("*Decker*"). That decision was applied by the Tribunal in *Mr Padraig Daly v HMRC* [2020] UKFTT 0281 (TC).

10. The principles set out by Warby J under the heading of "Principles" are as follows:

> **"***Principles*
>
> 21. The decision whether to adjourn a hearing, and the decision whether to proceed with a hearing in the absence of a party, are both case management decisions. The court is required to exercise a discretion, in accordance with the overriding objective, in the light of the particular circumstances of the individual case. The authorities provide valuable guidance, however.
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> 22. A court faced with an application to adjourn on medical grounds made for the first time by a litigant in person should be hesitant to refuse the application (*Fox v Graham Group Ltd*, The Times, 3 August 2001 per Neuberger J, as he then was). This, however, is subject to a number of qualifications. I focus on those which seem to be of particular relevance in the present case.
>
> 23. First, the decision is always one for the court to make, and not one that can be forced upon it. As Norris J observed in *Levy v Ellis-Carr* [2012] EWHC 63 at [32]:
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> > "Registrars, Masters and district judges are daily faced with cases coming on for hearing in which one party either writes to the court asking for an adjournment and then (without waiting for a reply) does not attend the hearing, or writes to the court simply to state that they will not be attending. Not infrequently "medical" grounds are advanced, often connected with the stress of litigation. Parties who think that they thereby compel the Court not to proceed with the hearing or that their non-attendance

somehow strengthens the application for an adjournment are deeply mistaken. The decision whether or not to adjourn remains one for the judge."

24. Secondly, the court must scrutinise carefully the evidence relied on in support of the application. In *Levy v Ellis-Carr* at [36] Norris J said this of the evidence that is required: -

> "Such evidence should identify the medical attendant and give details of his familiarity with the party's medical condition (detailing all recent consultations), should identify with particularity what the patient's medical condition is and the features of that condition which (in the medical attendant's opinion) prevent participation in the trial process, should provide a reasoned prognosis and should give the court some confidence that what is being expressed is an independent opinion after a proper examination. It is being tendered as expert evidence. The court can then consider what weight to attach to that opinion, and what arrangements might be made (short of an adjournment) to accommodate a party's difficulties. No judge is bound to accept expert evidence: even a proper medical report falls to be considered simply as part of the material as a whole (including the previous conduct of the case)."

25. Norris J's approach in *Levy v Ellis-Carr* was expressly approved by Lewison LJ in *Forrester Ketley v Brent* [2012] EWCA Civ 324 [26], upholding a decision of Morgan J to dismiss an application to adjourn on medical grounds. It was followed by Vos J (as he then was) in refusing an application to adjourn the trial in *Governor and Company of the Bank of Ireland v Jaffery* [2012] EWHC 734 (Ch) [49].

26. In the context of what amounts to proper medical evidence it is pertinent to note two points made by Vos J in the *Bank of Ireland* case. At [19], referring to a GP's letter running to some 11 lines which confirmed that the defendant had been signed off work for three weeks, he said this: "It is important to note that a person's inability to work at a particular job is not necessarily an indication of his inability to attend court to deal with legal proceedings. It may be but it may also not be." At [58] Vos J indicated that he took into account the contents of the defendant's litigation correspondence, observing that he "has been communicating with the court and with the claimants over a lengthy period in the most coherent fashion. He is plainly perfectly capable of expressing his point of view, taking decisions and advancing his case".

27. The third main qualification to Neuberger J's observations in *Fox v Graham* is one that is implicit, if not explicit in what Norris J said in *Levy v Ellis-Carr*: the question of whether the litigant can or cannot participate in the hearing effectively does not always have a straightforward yes or no answer. There may be reasonable accommodations that can be made to enable effective participation. The court is familiar with the need to take this approach, in particular with vulnerable witnesses in criminal cases. A similar approach may enable a litigant in poor health to participate adequately in civil litigation. But the court needs evidence in order to assess whether this can be done or not and, if it can, how.

28. Fourthly, the question of whether effective participation is possible depends not only on the medical condition of the applicant for an adjournment but also, and perhaps critically, on the nature of the hearing: the nature of the issues before the court, and what role the party concerned is called on to undertake. If the issues are straightforward and their merits have already been debated in correspondence, or on previous occasions, or both there may be

> little more that can usefully be said. If the issues are more complex but the party concerned is capable, financially and otherwise, of instructing legal representatives in his or her place and of giving them adequate instructions their own ill-health may be of little or no consequence. All depends on the circumstances, as assessed by the court on the evidence put before it.
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> 29. The fifth point that may be of significance here is that, sometimes, it may appear to the court at the outset or after hearing some at least of the rival arguments that in truth the matter before it is one on which one or other side is bound to succeed. The closer the case appears to one or other of these extremes the less likely it is that proceeding will represent an injustice to the litigant. Thus, in *Boyd & Hutchinson (A Firm) v Foenander* [2003] EWCA Civ 1516 the Court of Appeal proceeded with the hearing of an appeal on the basis that it would refuse an adjournment if it concluded, as it did, that the appeal had no real prospect of success. This appears consistent with the conclusions of Neuberger J in *Fox v Graham* that where the court refuses a litigant in person an adjournment it may proceed in his absence if satisfied either (a) that it is right to grant the applicant the relief sought or (b) that the application is plainly hopeless."

11. As identified at [21] in *Decker* above, the decision whether to adjourn a hearing and the decision whether to proceed in the absence of a party are both case management decisions. Under Rule 5(3)(h) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("Tribunal Rules") the Tribunal has power to adjourn or postpone a hearing. Rule 2(1) of the Tribunal Rules provides that "the overriding objective of the Rules is to enable the Tribunal to deal with cases fairly and justly" and Rule 2(3) of the Tribunal Rules provides that "The Tribunal must seek to give effect to the overriding objective when it- (a) exercises any power under these Rules."

Medical evidence

12. With the above principles in mind, the Tribunal carefully scrutinised the medical evidence provided by the Appellant applying the requirements set out at [24] in *Decker*.

13. The medical evidence is a three-page letter dated 5 May 2022 from the Appellant's GP, Dr Byrne. The medical evidence sets out over one and a half pages the Appellant's medical and personal history, this largely consists of a review and recitation of the Appellant's medical records for the period 2004 to 2020. No information is given post-2020 of any consultations with the patient nor is it confirmed if Dr Byrne saw the patient in consultation prior to providing the medical evidence. It was stated that the Appellant "still continues to suffer quite prominent mental health symptoms – specifically anxiety and depression." The "quite prominent mental health symptoms" are not further particularised nor is it confirmed if the symptoms were those presenting in 2020 or are the Appellant's current symptoms. The opinion is expressed that: "I am of the opinion that because of these symptoms the challenge of her appearing in court at this point would be very severe on her mental health and would cause a deterioration in her condition and undo all the good work achieved over the past number of years." The medical evidence does not provide a reasoned prognosis on when or in what circumstances the Appellant may be able to participate in the hearing of the appeal nor does it detail the particular features of the Appellant's medical condition which prevent her participation at the appeal hearing. There is no indication in the medical evidence that Dr Byrne has been made aware that the Appellant would be attending the hearing by remote video link from her legal representative's office and therefore, no consideration was given as to whether this or any other reasonable adjustments would lessen the stress of the Appellant attending the hearing.

11. The Tribunal considered it relevant that the Appellant had on two previous occasions been given the opportunity to provide medical evidence setting out the basis of the Appellant's objection to an in-person hearing. The appeal was set down for hearing on 1 July 2021 as a remote video hearing. HMRC wrote to the Tribunal to request that the hearing be changed to an in-person hearing, the Tribunal on 8 September 2021 (in light of the continuing uncertainty regarding the Covid-19 pandemic) refused the application on the basis that it was premature and should be revisited in March 2022. The application was resubmitted in February 2022 and the Tribunal directed on 21 February 2022 that the Appellant, by no later than 25 March 2022, should provide medical evidence in support of the objection to an in-person hearing. No medical evidence was filed nor indeed a response provided. On 30 March 2022, the Tribunal granted the Appellant an extension of time to 8 April 2022 to provide its medical evidence. No evidence was filed nor, again, no response provided. On 14 April 2022 Judge Geraint Williams directed that the appeal remained listed as a remote video hearing. The correspondence received by the Tribunal from the Appellant on 4 February 2022 and 11 April 2022 regarding HMRC's request for an in-person hearing referred to the Appellant's vulnerability to Covid-19 as the basis for objecting and, relevantly, not to other recent or current health difficulties as the basis to objecting to a hearing per se.

14. On the basis of the correspondence in respect of the in-person hearing request and the medical evidence before the Tribunal, the Tribunal are not satisfied that the Appellant cannot participate in the remote video hearing of this appeal such that an adjournment is required.

Infringement of Article 6

15. The Application states that the Appellant's Article 6 right to a fair trial would be infringed by proceeding with the appeal in the Appellant's absence. The Tribunal agrees with HMRC that that submission overlooks the fact that Article 6 is not engaged by these proceedings. The ECHR in *Ferrazini v Italy* [2001] STC 114 held that a tax dispute between a taxpayer and a tax authority does not involve "determination of … civil rights and obligations" for the purposes of Article 6 of the Convention. In *Jussila v Finland* [2006] ECHR 996, [2009] STC 29 the ECHR followed *Ferrazini*. Reference is made in the Application to Article 2 (right to life) and Article 8 (right to respect for private and family life); however, no explanation was provided as to how Article 2 and Article 8 are relevant to the Application.

Overriding objective

16. HMRC in their Response submit that the overriding objective of Tribunal, as set out in Rule 2 Tribunal Rules, is to deal with cases fairly and justly. That obligation applies to both parties. Rule 2(e) Tribunal Rules provides that this objective is furthered by "avoiding delay, so far as compatible with proper consideration of the issues." The decision under appeal was made on 3 February 2015; however, the appeal has been delayed until the conclusion of the criminal proceedings on 10 September 2018 when the Appellant pleaded guilty to offences contrary to the Proceeds of Crime Act 2002 ("POCA") and Customs and Excise Management Act 1979 ("CEMA"). HMRC submitted that if the hearing were adjourned there is no indication of when or, indeed if, the Appellant would be fit to attend a subsequent hearing. In light of the Tribunal's finding above that the medical evidence was insufficient, granting the adjournment would not further the overriding objective to deal with cases fairly and justly and avoid delay.

EVIDENCE

17. The documents before the Tribunal were an electronic hearing bundle (248 pages) containing the pleadings, correspondence (inter-party and Tribunal), the Appellant's witness statement dated 23 March 2021 admitted as hearsay evidence, witness statement of Ms Mary Cox ("Ms Cox") a retired HMRC Officer and all the documentary evidence from the criminal investigation and prosecution. The documentary evidence for the criminal investigation and

prosecution comprised: the transcript of the interview under caution of the Appellant, Appellant's pre-prepared statement, charges sheet, Certificate of Conviction, Basis of Pleas, Operation Danforth sentencing transcript, witness statements provided by HMRC (six), UK Border Force (one), PSNI Officers (14), Crime Scene Surveyor (one) and one on behalf of the cigarette manufacturer, Gallaher Limited. Included were copies of seven HMRC Officer's Notebooks. The Tribunal may admit evidence per Rule 15(2)(a) of the Tribunal Rules whether or not the evidence would be admissible in a civil trial in the United Kingdom. None of the evidence from the criminal investigation and prosecution was disputed nor was the conviction appealed.

18. The Tribunal heard oral evidence from Ms Mary Cox ("Ms Cox"), a retired HMRC Assurance Officer. Ms Cox's written witness statement stood as her evidence-in-chief and was largely accepted without challenge. Ms Cox answered questions in a straightforward manner and stated what she did not know. We found her to be honest and credible.

FACTS

19. On 20 April 2013, at about 12.35, PSNI Officers arrived at the Appellant's property, 20A Foughillotra Road, Jonesborough, Newry, County Down ("the Property") to conduct a search under the Terrorism Act 2000. The initial search was of a large industrial unit approximately 31m x 19.5m in size located within the grounds of the Property, referred to as "a shed" ("the Shed"), and located approximately 20m from the Appellant's dwelling house at the Property. The Appellant was at home at the time of the search and provided the PSNI Officers with keys to the Shed.

20. The search of the Shed uncovered 953,260 non-duty paid cigarettes comprised:

(1) 79 brown unlabelled cardboard boxes each containing approximately 5,000 "Palace" King Size Filter cigarettes which had no UK duty paid mark;

(2) 18 boxes of cigarettes;

(3) 2,000 "Silk Cut" cigarettes which had no UK duty paid mark and bore a stamp from the Czech Republic;

(4) 57 Boxes of cigarettes;

(5) A "quantity of cigarettes" described as "Approx 36 boxes";

(6) 66 bottles (46.2 litres) of Stolichnaya Vodka (40% proof); and

(7) 50 grams of hand-rolling tobacco.

21. Following the discovery of cigarettes in the Shed, an additional warrant was obtained to search the dwelling house at the Property. This search led to the discovery of cash (£57,927.41), a CS gas canister and "mixed contraband tobacco products". The "mixed contraband tobacco products" were discovered inside a dishwasher and a bin in the bathroom. The majority of the cigarettes found were mixed brands not available in the UK. The items found were:

(1) 3 cartons of "Palace" King Size cigarettes

(2) 1 carton of "Jin Ling" cigarettes

(3) 4 loose packets of 20 "Benson & Hedges" cigarettes

(4) 11 packs of "MG Premium" cigarettes

(5) A 10 pack of "Flandria" loose tobacco.

22. A CCTV system was found at the Property and the Appellant consented to the seizure of CCTV hard drive system containing the CCTV footage. The Appellant was arrested by a PSNI

Officer on suspicion of fraudulent evasion of excise duty contrary to s 170 CEMA and taken to Bandridge PSNI Station where she was interviewed under caution by two HMRC officers in the presence of her solicitor. At the beginning of the interview the Appellant produced a pre-prepared signed statement which was read out by her solicitor. With the exception of the information given in the prepared statement, the Appellant, on the advice of her solicitor, responded "no comment" to all the questions put to her.

23. The pre-prepared statement stated that the Appellant did not know that the cigarettes were in the Shed or who put the cigarettes in the Shed. The Shed had been used by her father until his death in 2006 and most of the things in the Shed were his. After his death, a friend of her father from the market called to the house a few times and about two or three years ago asked if he could use the shed to keep furniture. He was frequently coming and going with the furniture and would sometimes be waiting for her at the house when she returned home from work and the Appellant told him to take a copy of the key to the Shed so he could come and go when it suited him. The Appellant said she was not using the Shed and had no reason not to trust him. The Appellant had never seen cigarettes in the Shed but had left alcohol in the Shed. The Appellant had bought some boxes of vodka a few weeks before Christmas as she was getting married next year and was having a party at Christmas. The Appellant believed that duty had been paid on the vodka. The boxes of vodka were put up on a shelf in the Shed in case there were any rats in the Shed. The Appellant stated that the last time she was in the Shed was when she went in at Christmas to get some vodka for a party, she did not see any cigarettes. The Appellant stated that her father's friend had used the Shed since Christmas and that if she was in the house, he might call in for a cup of tea but other than that she did not have any contact with him nor any contact details. The Appellant confirmed that his name was "Jamsie" and was known as "Jamsie Hatz" and that she had given a description of him to the Police. The Appellant stated that she had immediately provided keys to the Shed to the Police and accompanied them into the Shed. The Appellant confirmed that if she had known that "Jamsie" or anyone else was using the Shed to store cigarettes she would not have let that happen and would not have given them keys. As far as the Appellant knew only "Jamsie" and herself had keys to the Shed but she did not know if "Jamsie" gave them to anyone else.

24. A file was submitted to the Public Prosecution Service of Northern Ireland ("PPSNI") and the decision taken to prosecute the Appellant. On 10 September 2018, the Appellant pleaded guilty to offences contrary to POCA and s 170(1)(a) CEMA. The offence relevant to this appeal was recorded in the Certificate of Conviction as:

> "Count 6: Defendant on the 20th day of April 2013, in the County Court Division of Armagh and South Down, were in any way knowingly concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with such goods as are defined in Section 170(1)(a)(i-iii) CEMA, namely 953,260 cigarettes or thereabouts and that she did so with the intention to defraud Her Majesty of any duty payable on the said goods or to evade any such prohibitions or restriction with respect to the said goods contrary to Section 170(1)(b) of CEMA."

25. In her Basis of Plea, the Appellant pleaded guilty on the following basis. She admitted her liability in relation to the possession of criminal property, the cash, in Count 1 and accepted her liability for items seized in her home and the alcohol found in the Shed. The prosecution could not gainsay that, whilst she allowed the Shed to be used for the storing of contraband cigarettes, that she in any way personally benefited from same. It was accepted from the CCTV footage that another individual, if not more than one, was involved in accessing, storing and removing items from the defendant's shed. The guilty plea in respect of the cigarettes was entered on the basis of "harbouring" on behalf of another with no personal involvement in the purchase, sale, distribution or otherwise of the cigarettes. On 16 October 2018, the Appellant

was sentenced at Newry Crown Court and received a custodial sentence of two years suspended for a period of three years.

26. Following the conclusion of the criminal prosecution, HMRC on 3 February 2015 issued to the Appellant the assessment in the sum of £213,332 for the excise duty on the 950,000 cigarettes. (The total number of cigarettes found in the Shed was 953,260 but the assessment was made on the basis of 950,000 cigarettes. There is no dispute as to the manner in which the assessment is expressed or its calculation) The assessment was upheld on appeal.

27. In her Notice of Appeal dated 20 May 2015, the Grounds of Appeal stated:

> "The review officer has erred in his findings regarding the circumstances surrounding the seizure of cigarettes. The officer has equated 'holding to 'possession'. If the Regulations intended to use the well known concept of 'possession' to trigger liability for duty on excise goods, the word 'possession' would be used. We submit that holding denotes a much more intimate connection between the person and the goods. We don't argue that 'possession' cannot mean 'holding'. Clearly the literal act of holding would be caught by the concept of 'possession'. That does not apply in this case. We contend that 'holding' must denote a specific beneficial relationship to the goods. There is no such relationship in this case. Further the Appellant had no knowledge of the presence of the goods. Others had access to the premises. That HMRC have failed to identify that other person is not proper grounds to fix liability on the Appellant. HMRC have erred in using the concept of possession and taking any element of control of the premises to fix the Appellant with liability. If that were a proper application of the Regulations every landlord would be in a perilous position. The Applicant was not holding any excisable goods, had no knowledge of said goods and there is no evidence that she ever held, possessed, controlled or owned the goods."

28. In her witness statement dated 23 March 2021 ("WS") made in support of this appeal and admitted by this Tribunal as hearsay evidence, the Appellant stated as follows. She had never held the cigarettes, she had no beneficial interest in the cigarettes and had no hand, act or part in their production, importation, transport or distribution. It had been acknowledged by HMRC that she had no beneficial interest in the cigarettes and that other persons were accessing the cigarettes in the Shed. She had told HMRC that in the months prior to the search that she had given a key to the Shed to "Jamsie", a friend of her late father, to store furniture. The Shed is separated from the house by a brick wall. The Appellant said that she did not have control of the cigarettes and the CCTV footage did not cover the Shed. The CCTV analysis conducted by HMRC/PNSI clearly demonstrated that a range of vehicles from cars to vans to box lorries were accessing the Shed without recourse to her and that in terms of identifying the person or persons responsible for any duty on the goods HMRC had multiple lines of enquiry.

29. Ms Cox's in her evidence stated that she had been tasked with conducting an excise audit in relation to the Appellant to consider whether it was appropriate to assess the Appellant in respect of the unpaid excise duty. She was provided with the information relating to the seizure of the cigarettes and alcohol at the Property and Shed on 20 April 2013. Ms Cox had assessed the Appellant as she was holding the cigarettes in her house and the Shed and, in the absence of being able to trace any other individuals, this was the first point at which an excise duty point could be detected. On review, the Review Officer, found that the assessment in relation to the vodka was out of time and the assessment was withdrawn. In oral evidence, Ms Cox confirmed that she had no involvement in the criminal investigation, had only contacted the criminal investigation officers to confirm that the "Palace" cigarettes were counterfeit, she was aware from the documents that the operation was named Operation Danforth but had no knowledge beyond what was stated in the documents. Ms Cox confirmed that a potential new

suspect had been interviewed on 17 September 2014 but did not know any further details. Ms Cox confirmed that she had not seen the Appellant's Basis of Plea dated 10 September 2018 as the assessment was issued prior to the Basis of Plea and she had not been asked to issue a revised statement.

LEGISLATION

30. The relevant legislation provides:

31. Sections 1(1)(a) and 2(1) of the Tobacco Products Duty Act 1979 provide that excise duty shall be charged on tobacco products imported into or manufactured in the United Kingdom.

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

33. Regulation 6(1)(b) of the HMDP Regulations provides that excise goods are released for consumption in the United Kingdom at the time when the goods 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.

34. Regulation 10(1) of the HMDP Regulations 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.

35. Regulation 20(1) of the HMDP Regulations relevantly provides that duty must be paid at or before an excise duty point

36. Section 170(1)(b) CEMA makes it a criminal offence knowingly to be concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with any goods which are chargeable with a duty which has not been paid, with intent to defraud Her Majesty of any duty payable on the goods.

37. Section 12(1) of the Finance Act 1994 empowers HMRC to issue an assessment to a person from whom any amount has become due in respect of any duty of excise.

38. Section 12(4) of the Finance Act 1994 provides that any such assessment must be made by HMRC within 4 years of the time when the liability to the duty arose or within one year from the day on which evidence of facts, sufficient in the opinion of the HMRC to justify the making of the assessment, comes to their knowledge, whichever is the earlier

39. Sections 13A(2)(b) and 16(1B) of the Finance Act 1994 provide for an appeal to this Tribunal against a decision of HMRC to issue an assessment to excise duty under s 12(1) of that Act.

40. Section 16(5) of the Finance Act 1994 Act provides that the power of the Tribunal in such an appeal includes the power to quash or vary any decision and the power to substitute its own decision for any decision quashed on appeal.

41. Section 16(6) of the Finance Act 1994 provides that subject to certain exceptions that are not relevant in these proceedings, in such an appeal to the Tribunal against an assessment, it is for the appellant to show that the grounds on which any such appeal is brought have been established.

42. Section 154(2)(a) CEMA provides that where in any proceedings relating to customs or excise any question arises as to whether or not any duty has been paid or secured in respect of any goods, then, where those proceedings are brought by or against the Commissioners, the burden of proof shall lie upon the other party to the proceedings.

LEGAL PRINCIPLES

43. When a person will be "holding" goods has been considered by the CJEU following the Court of Appeal reference in *Martyn Glen Perfect v HMRC* [2019] EWCA Civ 465 ("*Perfect 2019*"). In Case C-279/19 *Commissioners for HM Revenue & Customs v WR* ECLI:EU:C: 2021:473 ("*WR*") the CJEU considered the following referred questions:

> "1. Is a person … who is in physical possession of excise goods at a point when those goods become chargeable to excise duty in Member State B liable for that excise duty pursuant to Article 33(3) of Directive [2008/118] in circumstances where that person:
>
> (a) had no legal or beneficial interest in the excise goods;
>
> (b) was transporting the excise goods, for a fee, on behalf of others between Member State A and Member State B; and
>
> (c) knew that the goods he was in possession of were excise goods but did not know and did not have reason to suspect that the goods had become chargeable to excise duty in Member State B at or prior to the time that they became so chargeable?
>
> 2. Is the answer to Question 1 different if [the person in question] … did not know that the goods he was in possession of were excise goods?"

44. In answer to the questions referred, the CJEU held that:

> "[24] The concept of a person who 'holds' goods refers, in everyday language, to a person who is in physical possession of those goods. In that regard, the question whether the person concerned has a right to or any interest in the goods which that person holds is irrelevant.
>
> [25] Moreover, there is nothing in the wording of Article 33(3) of Directive 2008/118 to indicate that the status of person liable to pay the excise duty, as being 'the person holding the goods intended for delivery', depends on ascertaining whether that person is aware or should reasonably have been aware that the excise duty is chargeable under that provision.
>
> …
>
> [31] Furthermore, an interpretation limiting the status of person liable to pay the excise duty as being 'the person … holding the goods intended for delivery', within the meaning of Article 33(3) of Directive 2008/118, to those persons who are aware or should reasonably have been aware that excise duty has become chargeable would not be consistent with the objectives pursued by Directive 2008/118, which include the prevention of possible tax evasion, avoidance and abuse (see, to that effect, judgment of 29 June 2017, *Commission v Portugal*, C-126/15, EU:C:2017:504, paragraph 59).
>
> …
>
> [33] …the Advocate General observed in point 29 of his Opinion, the intention of the EU legislature was to lay down a broad definition, in Article 33(3) of Directive 2008/118, of the category of persons liable to pay excise duty in the event of a movement of excise goods already 'released for consumption' in one Member State and held, for commercial purposes, in another Member State in order to be delivered or used there, so as to ensure, so far as possible, that such duty is collected.
>
> [34] However, to impose an additional condition requiring that the 'person … holding the goods intended for delivery', within the meaning of Article 33(3)

> of Directive 2008/118, is aware or should reasonably have been aware that excise duty is chargeable would make it difficult, in practice, to collect that duty from the person with whom the competent national authorities are in direct contact and who, in many situations, is the only person from whom those authorities can, in practice, demand payment of that duty.
>
> [35] That interpretation of Article 33(3) of Directive 2008/118 is without prejudice to the possibility, where provided for by national law, for the person who, under that provision, has paid the excise duty that has become chargeable to bring an action for a contribution or indemnity against another person liable to pay that duty (see, by analogy, judgment of 17 October 2019, *Comida paralela* 12, C-579/18, EU:C:2019:875, paragraph 44).
>
> [36] In the light of the foregoing, the answer to the questions referred is that Article 33(3) of Directive 2008/118 must be interpreted as meaning that a person who transports, on behalf of others, excise goods to another Member State, and who is in physical possession of those goods at the moment when they have become chargeable to the corresponding excise duty, is liable for that excise duty, under that provision, even if that person has no right to or interest in those goods and is not aware that they are subject to excise duty or, if so aware, is not aware that they have become chargeable to the corresponding excise duty."

45. Therefore, and for the purposes of the "holding" requirement contained within Regulation 10(1) of the HMDP Regulations, a person "holds" goods if they are in physical possession of the goods. It is irrelevant whether that person has any right or an interest in the goods and it is also irrelevant whether or not that person is or should be aware that the goods are subject to or have become chargeable to excise duty.

46. The Tribunal (Judge Staker and Gill Hunter) in *Turton v HM Revenue & Customs* [2021] UKFTT 0441 (TC) ("Turton") considered the application of the analysis of the CJEU in *WR* to an appeal concerning the application of Regulation 10 of the HDMP Regulations. The Tribunal helpfully set out a comprehensive analysis of the application of the post-Brexit CJEU decision to UK domestic legislation which we have adopted and set out below:

> 73. In Case C-279/19, *Commissioners for Her Majesty's Revenue and Customs v WR*, ECLI:EU:C:2021:473 ("WR") at [24]-[25], the Court of Justice of the European Union ("CJEU") held that the expressions "holding" and "held" in Article 33(1) of the 2008 Directive have the meaning set out in in paragraph 70 above (*WR* at especially [36]).
>
> 74. In particular, the CJEU held that the meaning and scope of the words "hold", "holding" and "held" in this context are autonomous and uniform throughout the European Union, and are determined according to the usual meaning of those terms in everyday language. The meaning is therefore not to be ascertained by reference to particular legal concepts in the legal system of any one country, such as the concept of possession in English law. (*WR* at [23].)
>
> 75. *WR* is a judgment of the CJEU handed down after the end of the transition period, on a reference for a preliminary ruling made by a United Kingdom court prior to the date on which the United Kingdom left the European Union, and prior to the end of the transition period (the reference having been made by the Court of Appeal in *Revenue and Customs v Perfect* [2019] EWCA Civ 465). Notwithstanding s 6(1)(a) of the European Union (Withdrawal) Act 2018, the judgment of the CJEU in *WR* therefore has binding force in its entirety on and in the United Kingdom, pursuant to Articles 86(2) and 89(1) of the EU-UK Withdrawal Agreement and s 7A of that Act.

> 76. The Tribunal must therefore interpret the expressions "hold", "holding" and "held" in the 2010 Regulations consistently with the judgment in WR, rather than in accordance with earlier case law of United Kingdom courts and tribunals, such as *Dawson's (Wales) Ltd* at [131(3)] (to the effect that an innocent agent having physical possession of goods is not to be regarded as holding those goods).
>
> 77. According to the definition in *WR*, a person can be "holding" duty unpaid cigarettes for purposes of the 2008 Directive and the 2010 Regulations, both in circumstances (1) where the person knows that the goods they are holding are cigarettes or unspecified excise goods but does not know that they have become chargeable to any excise duty or that the excise duty has not been paid, and (2) where the person does not even know that the goods they are holding are cigarettes or unspecified excise goods. This is evident from the questions on which the Court of Appeal of England and Wales requested a preliminary ruling, and the wording of the preliminary ruling given by the CJEU. The Court of Appeal asked whether a person could be liable to excise duty in circumstances where that person "knew that the goods he was in possession of were excise goods but did not know and did not have reason to suspect that the goods had become chargeable to excise duty … at or prior to the time that they became so chargeable". The Court of Appeal then asked whether the answer to this question would be any different if the person did not know "that the goods he was in possession of were excise goods". (See *WR* at [20]). The CJEU answered these questions by stating that the person could be liable to excise duty both (1) where the person was "not aware that [the goods] are subject to excise duty", and (2) where the person was aware that the goods are subject to excise duty but was "not aware that they have become chargeable to the corresponding excise duty".”

47. For the purposes of the above provisions of the HDMP Regulations there can only be one assessment in respect of the same goods, which must be made by reference to a clearly established duty point and there can only be one assessable duty point. However, there cannot be an excise duty point against which an assessment can be made until the facts by which it has occurred can be established. In *Davison and Robinson Ltd v HMRC [*2018] UKUT 0437 (TCC) (“*Davison*”), the UT stated:

> 67. We have already dealt with the first of these propositions. As regards the second proposition, the need to ensure that unpaid excise duty is collected when goods have been released for consumption requires HMRC, as the Upper Tribunal found in *B&M*, to make an assessment once it has established that an excise duty point has occurred. Clearly, HMRC cannot make an assessment until it has the necessary information on which to establish when, how, where and by whose acts the excise duty point occurred. Therefore, in the absence of any relevant information in relation to any prior release for consumption, HMRC must assess the person who it finds to be holding the goods in question, since that is the only excise duty point which HMRC is able to establish.
>
> …
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> 70. In our view the Upper Tribunal was right to say as it did at [104] of its decision, that *van de Water* offers strong support for the proposition that both the 1992 and the 2008 Directives envisage that a person who was found to be holding goods in respect of which excise duty has not been paid can be held liable for the duty in circumstances where it has not been possible to establish when, how, where or by whose agency an earlier release for consumption took place. The 1992 Directive did not include an equivalent of Article 7(2)(b) of

the 2008 Directive: it defined "release for consumption" as meaning (in broad summary) any departure from or manufacture outside a duty suspension scheme and importation of products not placed under a suspension arrangement. Nevertheless, the CJEU concluded that Mr van de Water was rightly assessed on both the pure alcohol that he had acquired from elsewhere and the gin that he had made, even though in the case of the pure alcohol there must have been an earlier release for consumption.

71. We also agree with the Upper Tribunal's view that *BP Europa* was a further example of an excise duty point having been established in circumstances where the national customs authorities were unable to establish with certainty where the irregular departure from the duty suspension arrangement took place. In that case the circumstances were that there had been a short delivery of goods. In *BP Europa* the irregularity was deemed to have occurred at the time when the irregularity was detected.

75. We therefore conclude, as far as the third proposition is concerned, that the Upper Tribunal was right to conclude in *B&M* that it is very difficult to envisage the circumstances in which Regulation 6(1)(b) could apply other than in circumstances where it had not been possible to establish the facts on which an earlier excise duty point could be established. In common with the Upper Tribunal in *B&M*, our view is that the provision was introduced in the 2008 Directive for the purpose of putting the conclusions reached by the CJEU in *van de Water* on a statutory footing.

76. It follows that in our view the Upper Tribunal's reasoning in *B&M* on the central issue which fell for determination was sound. … The reasoning in *B&M* does not support the conclusion that there can be more than one excise duty point in respect of the same goods. It supports the conclusion that there cannot be an excise duty point against which an assessment can be made until the facts by which it has occurred can be established. There can only be one assessment in respect of the same goods, but an assessment cannot be made except by reference to a clearly established excise duty point. HMRC do not contend that there can be more than one assessable excise duty point.

…

79. In this regard, Mr Beal accepted in argument that, as a matter of law and not merely as a matter of HMRC's discretion, HMRC was obliged to assess against the earliest point in time at which they are able to establish, on the evidence before them, that excise goods have been held outside a duty suspension arrangement. In *B&M* the Upper Tribunal appeared to have proceeded on the basis that the question as to who should be assessed where there had been a series of circumstances which could have led to an assessment was purely a matter of HMRC's discretion, which could only be challenged through the medium of judicial review: see [150] to [153] of the decision.

80. We accept that the position is as accepted by Mr Beal. It is consistent with our analysis that the Directive requires an assessment to be made against the first established excise duty point. Accordingly, as regards the example of Mrs Smith given by Mr Jones in his submissions, were Mrs Smith able to satisfy HMRC that she acquired the goods in the manner in which she contended, then it would not be open to HMRC to assess Mrs Smith but they would have to proceed against the wholesaler from whom she purchased the goods, who in turn might provide evidence that established an earlier excise duty point. Therefore, if HMRC pursued Mrs Smith rather than any other person who it was able to establish was a previous holder of the goods, or who caused any

> other prior event which gave rise to an excise duty point, then it would be open to Mrs Smith to challenge any assessment made by HMRC through an appeal to the FTT. That tribunal would have a full merits jurisdiction to consider Mrs Smith's appeal and to decide whether it accepted Mrs Smith's evidence that she had bought the goods in question from the wholesaler. If it did, the assessment against her would have to be discharged."

48. The Court of Appeal in *Munir v Revenue and Customs Commissioners* [2021] EWCA Civ 799 ("*Munir*") considered how the Tribunal should treat a conviction in which an appellant had pleaded guilty to being knowingly concerned in the fraudulent attempt at evasion of any duty chargeable for the purposes of s 170 CEMA.

49. The appellant in *Munir* had pleaded guilty to an offence of being knowingly concerned in the fraudulent evasion of duty chargeable on cigarettes and tobacco under s 170(2) and (3) of CEMA. The Police had found a substantial quantity of excise goods in the back of a van that the appellant was driving when stopped by the Police. The appellant claimed that he did not know what was in the back of the van and did not have the key to access it. HMRC issued the appellant with an assessment to excise duty under Regulation 10(1) of the HDMP Regulations on the basis that he was the person holding the goods at the relevant time. The appellant appealed against the assessment on the basis that he did not know what was in the back of the back of the van and did not have keys to access the rear of the van. HMRC applied to strike out the appeal and the application was refused by the Tribunal. The Tribunal decision was overturned by the Upper Tribunal and that decision was upheld by the Court of Appeal. The Court of Appeal held that the Tribunal had been wrong to refuse to strike out an appeal against an assessment to excise duty under Regulation 10 of the HDMP Regulations where the appellant had been convicted of being knowingly concerned in the fraudulent evasion of excise duty under s 170 CEMA. The Tribunal had erred in its conclusion that the appellant might be able to show that he had not been holding the goods in the sense required by the regulations in circumstances in which he had accepted by his plead that he had knowingly transported goods on which no duty had been paid.

50. The Court of Appeal stated:

> 28. In my judgment, the FTT was clearly wrong to view the conviction in isolation from the other relevant evidence about the facts which gave rise to it. The FTT judge was free to consider all the relevant material before him and that was what was required of him in law. The conviction itself was proved by an extract from the Magistrates' Court record which recorded the offence, the guilty pleas, and the presence of a defence solicitor. The witness statements and interview record were admissible to show what had happened, and what the appellant was accepting by his pleas. He did not dispute any of that evidence. The FTT judge allowed himself to be side-tracked by the undoubted truth that it is possible, in very many ways, for a person to commit the offence of being knowingly involved in the fraudulent evasion of duty chargeable on goods without ever "holding" them in the sense used in the HMDP Regulations. The question, however, is not a theoretical one. It is: what was this appellant convicted of actually doing? He was convicted of being the sole occupant of the van as he drove it on a road with a large quantity of cigarettes and tobacco in the back. By his plea he accepted that he was "knowingly" involved in this "fraudulent evasion", to use the key words in section 170(2). That means he accepted that he knew that the goods were in the back of the van and that no duty had been paid on them.
>
> …

> 31. Spencer J in *CXX v. DXX* [2012] EWHC 1535 (QB) helpfully summarises the law on the weight which should properly be given to a conviction, which, in a court, would be admitted under section 11 of the Civil Evidence Act 1968. He reviews a difference of opinion between Buckley LJ and Lord Denning MR in *Stupple v. Royal Insurance Co Ltd* [1971] 1 QB 50. Lord Denning held that a conviction was a "weighty piece of evidence of itself". Buckley LJ preferred the view that the conviction was simply a trigger which reversed the burden of proof but had no weight of its own. Spencer J followed the view of the editor of *Phipson on Evidence*, now found in the 19th Edition at 43-87 to 43-89. I agree with Spencer J as a matter of principle, but do not regard the question as fundamental to the resolution of this appeal. This conviction was entered by way of a guilty plea, by a person who had the benefit of legal advice and representation throughout the proceedings. The FTT judge had access to the underlying material, which set out the strength of the prosecution case as well as what criminal conduct was alleged. Whether as a matter of the law of evidence a conviction has a weight of its own is not decisive where, as here, the court has all the material necessary to assess its weight. The guilty plea was an admission against interest, and, even now, no aspect of the prosecution case is challenged. This could only rationally be regarded as weighty evidence.
>
> 32. Given that section 11 of the Civil Evidence Act 1968 does not strictly apply, it is open to the FTT to adopt the same approach to evidence of a conviction if it thinks it right. That is what occurred in *Atlantic Electronics Ltd. v. HMRC* [2013] EWCA Civ 651, [23]. It was necessary to enact this common-sense approach to the evidential value of criminal convictions in order to modify the rule in *Hollington v. Hewthorn & Co Ltd* [1943] K.B. 587 in civil proceedings. No equivalent legislation is required where the strict rules of evidence do not apply. Criminal convictions are the result either of a confession by the entering of a guilty plea before a court, or proof to criminal standard. There is a right of appeal, and a person may also apply to vacate a guilty plea to the trial court. On the face of it, a criminal conviction is compelling evidence of guilt in cases where the civil standard of proof is engaged, unless there is some compelling evidence to show that it would be wrong to accept it as such. That is particularly true in this case, for the reasons given in the previous paragraph. The FTT and the Upper Tribunal were not, therefore, wrong to apply the machinery of section 11 of the 1968 Act.
>
> [39] … The only live issue in this case was whether he knew that they were in the back of the van. That was resolved against him by the conviction which he had no reasonable prospect of showing was wrong."

51. In *B&M Retail Limited v HMRC* [2016] UKUT 429 (TCC) ("*B&M*") the UT held that that they agreed as correct HMRC's policy to assess a person against the earliest point in time at which they are able to establish, on the evidence before them that excise goods have been held outside a duty suspension scheme and any challenge to whether HMRC have sufficient evidence to demonstrate objectively that an earlier excise duty point could be established is a matter for judicial review:

> "150. … 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.
>
> 153. … 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."

SUBMISSIONS

52. Mr Forde for the Appellant submitted that three points arose in the appeal. They were: (1) the holding point, (2) an earlier excise duty point and (3) fairness and proportionality. In respect of point (1) the Appellant was not the holder of the goods at the excise chargeable point and, furthermore, the Appellant was never the holder of the goods at any point. The goods were being held by the other persons identified at the Shed in the accepted basis of plea. The accepted basis of plea clearly demonstrates HMRC's acceptance that another person was holding and in control of the goods and that the Appellant had no involvement whatsoever. In respect of point (2), HMRC had not made any effort to look for an earlier duty point. There were clearly other actors involved and the raid on the Appellant's Property was an intelligence lead operation. The position in the Crown Court was that others were involved but HMRC had the guilty plea and conviction and that was the beginning and end of it for HMRC. In respect of point (3), in accordance with the comments of the Court of Appeal in *Perfect 2019*, it is not fair and proportionate to assess the Appellant for the excise duty. It is accepted that the Appellant is not an entirely innocent agent and was aware that the Shed was being used as storage for counterfeit items but she was not aware of the presence of non-duty paid excise items. The Court of Appeal in *Perfect 2019* stated that to impose liability on entirely innocent agents would not promote the objective of the Directive or the Regulations and the same principles of fairness and proportionality apply to the imposition of a substantial liability on someone who was reckless in the granting of access to her late father's Shed to another person shown to be and known to be the holder and controller of the excise goods. It was accepted that the Appellant could have pursued the remedy of judicial review in respect of the earlier duty point

53. Ms Vicary for HMRC submitted that case law made clear that the Tribunal had no jurisdiction to consider the adequacy of HMRC's investigation to establish an earlier duty point and any challenge on that basis was properly a matter for judicial review, *B&M*. The burden is on the Appellant to establish an earlier duty point (*Turton* at [78]-[81]) and the Appellant has failed to do so. HMRC are obliged to assess against the earliest point in time that they are able to establish on the evidence before them, that is what HMRC did. The Appellant pleaded guilty to being "knowingly concerned" in an attempt to fraudulently evade excise duty and cannot now undermine the statutory offence to which she pleaded guilty. The Appellant does not resile from her guilty plea and cannot now say that she did not know. The Court of Appeal decision in *Munir* provides a complete answer to the question that the Tribunal is required to determine. Following the decision of the CJEU in *WR*, the Appellant was at the duty point the "holder" of the cigarettes in the Shed within Regulation 10 of the HDMP Regulations on the basis that she was in physical possession of them within the everyday meaning of that expression as used by

the CJEU. It was immaterial whether the Appellant had any right to or interest in the cigarettes or whether she was or should have been aware that they were subject to or had become chargeable to excise duty.

FINDINGS OF DISPUTED FACTS

The Appellant was in physical possession of the cigarettes in the Shed

54. The Tribunal finds that at the time of the PSNI raid on the Appellant's Property on 20 April 2013, the Appellant had physical possession of the 950,000 cigarettes in the Shed within the usual meaning of "physical possession" as used in everyday language. The Appellant had retained the key to the Shed which she used to unlock the Shed to allow the PSNI officers access. Ownership of the Shed, located on the Appellant's Property, was confirmed by the Appellant.

55. The Tribunal is satisfied that at the time of the PSNI raid, the Appellant had care and control of all of the contents of the Shed which included the 950,000 cigarettes. The Shed is located approximately 20 metres from the dwelling house at the Property. The Appellant in her WS referred to the dwelling house and Shed being separated by a brick wall. The photographs of the Property provided by the PSNI Photography Branch show that the brick wall is five breeze blocks high with brick coping and brick piers, taller than the wall, at regular intervals. The windows of the dwelling house can clearly be seen from the Shed and the brick piers do not obstruct the line of sight from the Shed to the dwelling house and vice versa. The photograph exhibited to the Appellant's WS shows that there is a gap in the wall between two brick pillars which provides ready access from the dwelling house to the Shed. The CCTV system at the Property did not cover the Shed itself but covered an area leading to the Shed which monitored vehicular and pedestrian access to the Shed. The Tribunal is satisfied on the evidence that the Appellant had the immediate physical ability and proximity to touch, move or deal with the cigarettes and was able to monitor and observe activities in and around the Shed such as to limit or prevent access to the Shed.

The Appellant knew that the cigarettes in the Shed were duty unpaid

56. The Tribunal finds that the Appellant knew that the duty unpaid cigarettes were in her Shed. The Tribunal has considered what in fact the Appellant was convicted of actually doing. The conviction is directly relevant to the matters under appeal and must be regarded as proof of those matters unless the contrary is proved. We are satisfied that we should also give weight to the fact that the Appellant pleaded guilty to the offence with which she was charged.

57. The conviction was proved by a certificate of conviction from the Crown Court at Newry which recorded the offence, the basis of plea, the sentencing transcript including the remarks of HHJ Kerr that the discount for the plea has to be limited by the fact that it is a late plea and that the Appellant was in effect caught red-handed and that the Appellant had the benefit of legal representation when interviewed under caution and at sentencing. The Tribunal had before it all the underlying evidence which included the witness statements from the criminal proceedings, a transcript of the interview under caution in the presence of a legal representative and the Appellant's pre-prepared statement. The Appellant pleaded guilty to knowingly having duty unpaid cigarettes in her possession with intent to defraud. By her guilty plea the Appellant accepted that she knew that the duty unpaid cigarettes were in the Shed but that she no personal involvement in the purchase, sale distribution or otherwise of the cigarettes. That was a clear admission against interest. The Crown Court must have been satisfied that the basis of plea represented a clear acknowledgment of guilt to the offence charged. No appeal was made against the conviction and at this appeal the evidence from the criminal prosecution was not challenged nor disputed.

58. The Tribunal is satisfied that the guilty plea was an admission against interest and the criminal conviction must be regarded as weighty evidence. We are satisfied that the criminal conviction is compelling evidence of guilt in cases where the civil standard of proof is engaged, unless there is some compelling evidence to show that it would be wrong to accept it as such. No such compelling evidence has been put before the Tribunal.

No earlier duty point can be established

59. The Tribunal finds that HMRC have carried out investigations to determine whether an earlier duty point than 20 April 2013 could be established. Those investigations proved unsuccessful.

60. The accepted evidence of Ms Cox was that the review concluded that the assessment in respect of the cigarettes in the sum of £213,332.00 should be upheld and the assessment was made in time as, in relation to the one-year evidence of facts rule, HMRC's criminal investigations were not concluded until primary liability had been established following the interview of a potential new suspect on 17 September 2014. Ms Rose confirmed that she was not involved with those enquiries as they were conducted by the team handling the criminal investigations and confirmed in cross-examination that she could not provide any details about the potential new suspect other than to confirm that this was the reason for the delay. Ms Cox's unchallenged evidence was that whilst the CCTV footage showed a number of vehicles and people going in the general area of the Shed on a regular basis it was her understanding that it had not been possible to identify any of those individuals despite attempts having been made to do so. Ms Cox confirmed that she had not made any enquiries about a possible earlier duty point.

61. The Tribunal further finds that the evidence provided by the Appellant to establish the identity of another individual who could be assessed in relation to an earlier duty point was so limited as to be virtually worthless. The Appellant, in her pre-prepared statement read out at the outset of the interview under caution and in her WS confirmed that she had allowed a friend of her late father, referred to in the documents variously as "Jamsie", "Jamesie" or "Jimmy" Hatz", to take a copy of the Shed key to allow him to freely access and store items in the Shed and had provided a description of him to the PSNI Police. The Appellant stated in her pre-prepared statement that if she was in the dwelling house "Jamsie" might call in for a cup of tea but there was no other contact with him and she did not have any contact details for him.

62. The Basis of Plea stated that analysis of the CCTV footage confirmed that on 43 days out of 51 days an unidentified male is shown arriving and waiting in the dwelling house for the arrival of other vehicles and then returning to the dwelling house when the vehicles leave. The Tribunal finds that it improbable that the Appellant would not have any details beyond the name "Jamsie Hatz" for an individual that the Appellant had allowed (on her own evidence) to use the Shed for two to three years, who regularly waited in the Appellant's dwelling house and with whom the Appellant frequently had a cup of tea.

63. The Tribunal does not accept the Appellant's contentions that the fact that the planned raid on the Appellant's Property had an operation name, Operation Danforth, established that there was such a clear line of enquiry to establish an earlier duty point such that HMRC were culpable for their failure to pursue that enquiry. There is no information or evidence before the Tribunal to support such a contention, the information and evidence before the Tribunal was that attempts were made by HMRC to determine if an earlier duty point could be established and those attempts were unsuccessful and not assisted by the paucity of information provided by the Appellant.

DISCUSSION

"Holding" in Regulation 10 HDMP Regulations

64. Mr Forde in oral submissions, accepted that it was fair to say that the legal landscape in respect of "holding" has changed recently but submitted that HMRC's decision that the Appellant was the holder of the goods at the excise duty point was wrong in both fact and law. Ms Vicary submitted that, following the decision of the CJEU in *WR*, HMRC's decision was correct as the Appellant was in physical possession of the cigarettes within the meaning of "physical possession" as used by the CJEU. We agree with HMRC's submissions.

65. As stated at paragraphs 43 to 45 above, the CJEU in *WR* confirmed that for the purposes of the "holding" requirement contained within Regulation 10(1) of the HMDP Regulations, a person "holds" goods if they are in physical possession of the goods. It is irrelevant whether that person has any right or an interest in the goods and it is also irrelevant whether or not that person is or should be aware that the goods are subject to or have become chargeable to excise duty.

66. The Tribunal has found as a finding of fact at paragraphs 54 to 55 above that the Appellant was in physical possession of the 950,000 cigarettes as the concept of "physical possession" is understood in everyday language. Mr Forde pointed to the Appellant's basis of plea where it was accepted that the Appellant was in possession of the cigarettes but was not holding or in control of the cigarettes as they were being held by the other person identified in the basis of plea. However, the second sentence in *WR* at [24] (at paragraph 44 above) confirmed it is irrelevant whether or not the Appellant had any right or interest in the cigarettes when determining the everyday meaning of "physical possession" and "holding". The Court of Appeal in *The Commissioners for HMRC v Martyn Perfect* [2022] EWCA Civ 799 ("*Perfect*") confirmed at [22] that it was "bound by the CJEU's judgment of 10 June 2021", that decision is similarly binding on this Tribunal.

Earlier excise duty point

67. Mr Forde submitted that HMRC had not made any effort to identify an earlier duty point, HMRC had the conviction and that was the beginning and end of it for HMRC. The raid on the Appellant's Property was clearly an intelligence lead operation and, on that basis, it is evident that HMRC/PPSNI had knowledge that establishes an excise duty point before the cigarettes were stored at the Shed. Ms Vicary submitted that the case law was clear: the Tribunal had no jurisdiction to consider the adequacy of HMRC's investigation to identify and establish an earlier duty point. Any challenge to the adequacy of HMRC's investigation was properly a matter for judicial review. The burden of proof is upon the Appellant to establish an earlier excise duty point, she has singularly failed to do so. We agree with HMRC's submissions.

68. The UT in *Davison* at [80] stated that for the purposes of the HDMP Regulations, there can only be one assessment in respect of the same goods which must be made by reference to a clearly established excise duty point and there can only be one assessable duty point. However, there cannot be an excise duty point against which an assessment can be made until the facts by which it has occurred can be established. As further confirmed by the UT in *Davison* at [79] and [80] (paragraph 47 above) HMRC are, as a matter of law and not merely as a matter of HMRC's discretion, required to assess against the earliest duty point that can be established.

69. The burden is on the Appellant to establish by evidence the existence of an earlier duty point and the identity of an individual or individuals who is/are liable to be assessed to duty at that earlier duty point. The Appellant relies upon the fact that as the raid at the Property was planned and was named Operation Danforth it must be inferred that HMRC were aware of an earlier excise duty point. The Tribunal does not accept that such an inference can be made and

has made a finding of fact at paragraph 63 above that HMRC had investigated whether an earlier duty point could be established, those investigations were unable to establish an earlier duty point. It is incumbent on the Appellant to discharge that burden and that burden is not shifted to HMRC by the Appellant merely pointing to possible enquiries that HMRC could have potentially undertaken. The UT in *B & M* at [153] (paragraph 51 above) made clear: any concerns that HMRC have failed to undertake adequate investigations to establish the earliest possible duty point would have to be pursued through the medium of judicial review.

Fairness and proportionality

70. Mr Forde submitted that, in accordance with the comments of the Court of Appeal in *Perfect 2019*, it is not fair and proportionate to impose the duty point on the Appellant when it was accepted that other actors were involved. The Appellant, whilst accepting that she was not an entirely innocent agent, does not have the means to discharge the assessment and upholding the assessment would be financially ruinous. In addition, the Appellant is a cancer survivor, is suffering from depression and is currently unable to work. Mr Forde, in oral submissions relied upon the Tribunal decision in *Paul Murphy v HMRC* [2021] UKFTT 0204 (TC) ("*Murphy*"). At [58] in *Murphy*, the Tribunal held that it would not be fair or proportionate to assess Mr Murphy alone where HMRC had, or could reasonably have obtained upon enquiry, information which could establish an earlier appropriated excise point. No advance notification was given by Mr Forde that he would be relying upon and referring to the Tribunal decision in *Murphy*.

71. Mr Forde confirmed that permission had been granted to appeal the decision in *Murphy* to the UT (his instructing solicitors had acted and continued to act in *Murphy*) and that in the interests of saving time and resources, the hearing should be adjourned pending the UT decision.

72. Ms Vicary considered the decision in *Murphy* during the lunch adjournment. Ms Vicary submitted that the decision in Murphy at [22] refers to the facts of the case being unique. The HMRC Officers in *Murphy* provided NCND ("Neither Confirm Nor Deny") responses in cross-examination which Judge Gething considered stymied the tribunal proceedings. The decision predates the CJEU decision in *WR* and no regard was had to the Court of Appeal decision in *Munir*. The decision takes this Tribunal no further as it is required to follow the binding decisions in *WR*, *Perfect* and *Munir*. Ms Vicary submitted that the decision in Murphy was clearly wrong and would be reversed on appeal.

73. Ms Vicary objected to any adjournment on the basis that it was wholly inappropriate and Mr Forde and his instructing solicitors knew well in advance of this hearing that permission had been granted to appeal *Murphy* to the UT but no reference was made to it in the Appellant's skeleton argument.

74. Mr Forde relied upon *Perfect 2019* in support of the submission that it would not be fair and proportionate to fix the Appellant with liability for the assessment as it was arguable that, had there been any intention to impose strict liability in the 2008 Directive, it would have been expressly stated:

> 70. Given the fundamental importance of proportionality in EU law, it is certainly arguable that, had there been any intention to impose strict liability in the 2008 Directive, it would have been expressly stated.

75. The Court of Appeal continued at [71] and concluded that the issue was not *acte clair* and referred two questions to the CJEU that were considered and answered in *WR*. Whilst the Court of Appeal confirmed that the issue was not *acte clair*, at [67] it had confirmed that there was considerable force in HMRC's argument that "given the policy underlying the Directive, the imposition of strict liability on a driver in these circumstances does not offend the principles of fairness or proportionality". The Court of Appeal in *Perfect*, following receipt of the CJEU

decision in WR, reiterated at [10] its view that the imposition of strict liability did not offend the principles of fairness or proportionality. At [11] it stated:

> "11. The CJEU judgment of 10 June 2021 accords with the views which this Court was inclined to favour in its 2019 judgment."

76. Accordingly, we do not accept that *Perfect 2019* provides any support for Mr Forde's submission; indeed it supports the contrary position that the imposition of strict liability was intended and such imposition did not offend the principles of fairness and proportionality.

77. The Tribunal acknowledges and accepts that the Appellant does not have the means to discharge the assessment and upholding the assessment would be financially ruinous. In addition, the Appellant is a cancer survivor, is suffering from depression and is currently unable to work. Whilst the Tribunal has every sympathy for the Appellant's personal circumstances, her medical conditions and accepts that the assessment may be financially ruinous, none of those matters are grounds for allowing an appeal against an assessment.

Application to adjourn the hearing

78. The Tribunal rose to consider the application by Mr Forde that the appeal be adjourned to await the UT decision in *Murphy*. Having taken time to consider the application, the Tribunal refused the application to adjourn the hearing. The Tribunal's reasons for the refusal are as follows. The decision in *Murphy* was released prior to the CJEU's decision in *WR* and the Tribunal in *Murphy* did not consider the Court of Appeal decision in *Munir*. The decision in *Murphy* is clearly at odds with the Court of Appeal decisions and the decision of the CJEU, decisions that are binding on this Tribunal. This Tribunal has had the benefit of submissions on *Munir*, *Perfect* and *WR* and we are not persuaded that it would assist this Tribunal to adjourn proceedings pending the outcome of the appeal in *Murphy*. In the event that we dismissed the appeal, the costs and time involved in making a permission to appeal application requesting that the appeal to the UT be stayed pending the UT decision in *Murphy* would be minimal.

Conclusion

79. For the reasons set out above, we dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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.

GERAINT WILLIAMS
TRIBUNAL JUDGE

Release date: 03rd NOVEMBER 2022