Neutral Citation: [2023] UKFTT 356 (TC)

Case Number: TC08780

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video

Appeal reference: TC/2019/05101

EXCISE DUTY - whether HMRC have discretion to decide not to issue an excise duty assessment where liability is not in dispute – no - whether proportionality can be considered in relation to section 12 Finance Act 1994? - yes but the section is proportionate - whether combined with other factors it is proportionate – yes - whether an assessment for excise duty where goods are forfeit is a penalty – no - appeal dismissed

Heard on: 8 & 9 June 2022
Judgment date: 3 April 2023

Before

TRIBUNAL JUDGE ANNE SCOTT

Between

PAUL DAVID EVELEIGH

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

HELD IN PRIVATE

Representation:

For the Appellant: Harriet Brown, of counsel acting pro bono

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

DECISION

INTRODUCTION

1. This is an appeal against the respondent's ("HMRC") decision to issue an excise duty assessment in the sum of £121,666 arising from an importation of 1,160 kg of tobacco from France into the UK.

2. HMRC applied to strike out this appeal. The appellant was unrepresented at the hearing in relation to that application and on 29 July 2021, Judge Redston issued a summary decision finding that the appeal was not struck out. Having referred to sections 12(1) and 16(5) of the Finance Act 1994 ("FA94"), Judge Redston went on to state at paragraphs 14 to 16:-

> "14. I asked Mr Davies whether in his view (i) HMRC had a discretion as to whether or not to issue an assessment to excise duty, and if so (ii) whether the Tribunal had the power to vary or quash that decision if it was disproportionate.
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> 15. In relation to (i), I drew Mr Davies' attention to the submission of Ms Simor, on behalf of HMRC, in *HMRC v Perfect* [2017] UKUT 0476 (TCC) at [58] that 'any unfairness or lack of proportionality in the application of the [excise duty assessment] regime could be mitigated by HMRC, as the taxing authority, exercising discretion in individual cases'. I added that this was not a question of liability, as that issue was clear from the recent CJEU judgment in relation to Mr Perfect's case, but as to HMRC's discretion whether or not to assess the liability.
>
> 16. Mr Davies accepted it was arguable that HMRC has the discretion whether or not to assess, and that it was also arguable that the tribunal had the jurisdiction to vary or quash an assessment if it was disproportionate. I agreed…".

3. The parties were agreed that the issues now for decision were as described in Judge Redston's Directions, namely:-

> (1) Whether HMRC have the discretion to decide not to issue an excise duty assessment to a person, such as the appellant, who was liable to the duty; and, if so
>
> (2) Whether the Tribunal has the jurisdiction to quash or vary an assessment on the basis that it was disproportionate; and, if so
>
> (3) Whether the assessment issued to the appellant should be so quashed or varied.

4. Ms Brown divided the issue of proportionality into three sub-issues namely:-

> (i) Whether the principle of proportionality can apply to excise duty in any event;
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> (ii) Whether the duty amounts to a penalty (if the principle of proportionality does not apply to excise duty generally), and
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> (iii) Whether or not the regime in question is proportionate.

5. Lastly, in that context she argued that there are two principles of proportionality that are relevant namely:-

> (i) The principle in European law ("EU Proportionality"), and
>
> (ii) The principle in the European Convention on Human Rights ("EHCR") in Article 1 Protocol 1 ("A1P1").

6. The facts are not in dispute and I heard evidence only very briefly from the appellant in relation to his means. The witness statements of all of the witnesses, including the appellant, were unchallenged and stood as their evidence.

7. I had two hearing bundles extending in total to 321 pages, a bundle of authorities extending to 282 pages together with a further five authorities which were lodged thereafter. I also had Skeleton Arguments for both parties. I am grateful to Ms Brown who was acting *pro bono* assisted by Rebecca Sheldon and Shane O'Driscoll, both of counsel, who also acted *pro bono*. I am also grateful to Mr Davies who gracefully did not object to the very late lodgement of the detailed Skeleton Argument for the appellant which left him almost no time to prepare arguments in rebuttal.

8. The hearing was held in private but, by agreement with the parties, on 20 June 2022, I then issued, on an embargoed basis, my proposed Findings in Fact so that it could be ascertained if the decision could be published in the usual way. Both parties have agreed the Findings in Fact so therefore there is no longer any requirement for privacy.

9. When issuing the embargoed Findings in Fact, I drew parties attention to Lord Dunedin in *Whitney v Commissioners of Inland Revenue* [1926] AC 37 ("Whitney") where he stated:-

> "Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, *ex hypothesi*, has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay."

I pointed out that although dealing with different legislation, Lord Carnwath referenced that at paragraph 31 *et* seq in *R (on the application of Derry) v HMRC* [2019] 4 All ER 127 ("Derry").

10. I had Submissions in response from both parties.

The relevant agreed facts

11. This is an appeal against a decision of HMRC to uphold, on review, the issuance of an excise duty assessment in the sum of £121,666 on 4 June 2018 ("the Assessment") in accordance with section 12(1A) FA94 ("section 12").

12. On 9 June 2017, the appellant was stopped at the UK Zone Coquelles, whilst returning to the UK. He was driving a large goods vehicle and was accompanied by a passenger.

13. The UK Border Force officer asked whether he had any tobacco or cigarettes to which he answered "no".

14. The vehicle was scanned and searched and 1,160kg of Turner hand rolling tobacco was found in the load, wrapped in black plastic.

15. The duty on that tobacco was £243,333.

16. He has been assessed to only half of the duty because the passenger was assessed to be liable for the other half.

17. The tobacco was seized under section 139 of the Customs and Excise Management Act 1979 ("CEMA") as the officer formed the view that it was held for a commercial purpose. The vehicle was seized under section 141 CEMA as it was used to carry the tobacco.

18. The appellant was not carrying the tobacco for his own purposes but had undertaken to transport the tobacco in return for a payment of £4,000. He never received that payment.

19. The appellant was arrested and charged with being knowingly concerned in the fraudulent evasion of excise duty. He pleaded guilty to that charge and on 24 April 2018, he

was sentenced to 18 months imprisonment, suspended for two years, and 240 hours of community service and a fine of £390. He was ordered to pay £250 costs. He lost his job.

20. The appellant is employed as a Class 1 HGV driver and earns approximately £450 to £600 per week. His wife works part-time as she looks after their child. The family home was purchased in 2020 at a cost of £225,000. It is held in joint names and the mortgage is of the order of £220,000. The appellant's outgoings apart from the mortgage include the finance costs for his vehicle which replaced the van which was seized. He has no savings.

Further Finding in Fact

21. It is acknowledged that it is no excuse but, at the time of the offence, for reasons that do not have to be articulated here, the appellant was vulnerable and was "used" by the owner of the tobacco.

The Authorities

22. I have listed at Appendix 1 the Authorities relied on by the parties since they were numerous. They are referenced in this decision in short form. There are other Authorities to which I was not referred and, where appropriate, I give their citation.

The Law

23. Insofar as relevant, I have set out the full text of the domestic legislation to which I was referred at Appendix 2.

24. The domestic legislation has its origin in the Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty ("the Directive"). The Articles relied upon by the parties were Articles 1, 2, 7, 9, 11 and 12, the relevant text of which, insofar as material, is set out at Appendix 3. Of course, the Directive should be read as a whole.

25. There is a very useful analysis of the Directive by the Upper Tribunal in *B&M*. In summary the Upper Tribunal states at paragraphs 15 to 17 that Article 7 "makes provision for the time and place of chargeability of excise duty", "Article 8 prescribes who shall be liable to pay excise duty that has become chargeable", "Article 9 prescribes the chargeability conditions and procedures for collection" and at paragraph 19 the Upper Tribunal states that:-

> "Article 12 makes provision for a limited number of exemptions from payment of excise duty, for example where the goods are intended to be used in the context of diplomatic or consular relations. Article 12 (2) provides that exemptions shall be subject to conditions and limitations laid down by the host Member State and that Member States may grant the exemption by means of a refund of excise duty."

26. Paragraphs 24 to 26 are particularly helpful and read:

> "24. First, Article 1 makes it clear that excise duty is a tax to be levied on the *consumption* of excise goods, although Article 2 provides that those goods become *subject to* excise duty at the time of their production within, or importation into, the EU.
>
> 25. Secondly, Article 7 provides that excise duty becomes *chargeable* at the time of the 'release for consumption' of the goods in the Member State in which they are so released, and the person who then becomes liable to pay the excise duty at that point is determined by the application of Article 8, the identity of that person depending on the event concerned which causes the release for consumption.

26. Thirdly, there is a distinction to be drawn between the concept of chargeability to excise duty and the levy and collection of that duty, Article 9 providing that the latter is to be determined according to the procedure laid down by the Member State in which the goods have become chargeable with excise duty."

27. Section 12 gives power to HMRC to assess for duty and the crucial wording is:-

"(1A) Subject to subsection (4) below, where it appears to the Commissioners –

(a) that any person is a person from whom any amount has become due in respect of any duty of excise; and

(b) that the amount due can be ascertained by the Commissioners,

the Commissioners may assess the amount of duty due from that person and notify that amount to that person or his representative …". (emphasis added)

28. The power to issue an assessment to a penalty is included in section 13 FA94. Such an assessment to a penalty can be combined with an excise duty assessment provided that it is identified separately. In this instance HMRC exercised their discretion not to issue a penalty assessment.

29. Relevant decisions can be appealed to the Tribunal in terms of section 16 FA94. Section 13A(2)(b) FA94 defines relevant decisions as being:-

"(b) so much of any decision by HMRC that a person is liable to any duty of excise, or as to the amount of his liability, as is contained in any assessment under section 12 above;"

30. It is not disputed that the Tribunal's powers and jurisdiction in this appeal are derived from section 16(5) FA94 which reads:-

"…the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal."

31. As indicated above, the seizure of the tobacco was in terms of section 139 CEMA and the confiscation of the vehicle was in terms of section 141 CEMA.

32. There is no requirement to set out in this decision the criminal sanctions.

33. A1P1 provides:-

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of the state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Summary of HMRC's arguments

34. HMRC argued that:

(a) The Tribunal does not have jurisdiction to vary or quash an excise duty assessment on the grounds of proportionality. Relevant decisions which carry a right of appeal in terms of section 16 are limited in scope to decisions regarding liability to duty (section 13A(2)(b) FA94). In cases such as these the liability is a deemed fact on the basis of

Jones, Race and *Stanizewski*. There is no dispute about quantum or on whom the assessment should fall.

(b) Judge Popplewell and Mrs Bridge in *Lane* at paragraph 66 correctly articulated the proposition that:-

> "The doctrine of proportionality is relevant to the penalties but not to the duty itself".

(c) Mr Davies relied on, and adopted, the reasoning of Judge Brooks in *Staniszewski* at paragraphs 42 to 52 where Judge Brooks reviewed at some length the relevant authorities and approved *Lane*. He pointed out that Judge Brooks' reasoning has been adopted and approved by the Tribunal in a number of appeals since 2016 including *Hughes*, *Michalska* and my own decision in *Fleming*.

(d) The scheme for assessing duty under section 12 is proportionate and the case law demonstrates that.

(e) HMRC argue that the quotation from Lord Dunedin in *Whitney* supports their analysis that the assessment particularises the amount of a liability that has already been fixed and the only discretion is in regard to the method of recovery. The Tribunal has no jurisdiction in relation to recovery.

(f) HMRC have exceptionally limited discretion not to issue an excise duty assessment to a person who is liable to duty; the Directive confers a strict liability for that duty on the person holding the goods and therefore there is an imperative on the Member State to assess that duty.

(g) Articles 2 and 7 of the Directive are expressed in mandatory terms. The case law, such as *B&M, Davison* and *Perfect 2019,* supports that position. Where there is strict liability and an obligation to charge the duty HMRC must assess in a situation where the scheme for assessing the duty is itself proportionate.

(h) An assessment of duty is not a punishment; its purpose is as a revenue raising device.

(i) The collection of duty, whereby the assessment is enforced may be subject to proportionality considerations under judicial review principles but it is trite law that the Tribunal has no such jurisdiction.

(j) The relevance of punishment for evasion of duty and inability to pay an assessment was considered by the Court of Appeal in *Munir* and found to be irrelevant to an assessment for duty.

(k) The argument by Ms Simor, to which Judge Redston referred in her decision (see paragraph 2 above, (but the paragraph reference should have been to paragraph 57)), related to the discretion to assess different people and is not relevant to whether there should not be an assessment at all.

(l) HMRC also suggest that, arguably, *Hok,* at paragraphs 36 and 37 provides authority for the proposition that the Tribunal lacks jurisdiction to (re) consider the exercise of any discretion HMRC might enjoy, but it is distinguishable regarding the wider question of the jurisdiction to consider the overall proportionality of the assessment scheme.

Summary of the appellant's arguments

35. It is argued for the appellant that:-

(a) Chargeability is mandated by the Directive but the manner of levy and collection is left to the discretion of the Member State and therefore domestic law. It is quite clear from both the wording of section 12 and Article 9 of the Directive that HMRC do have a discretion not least because of the use of the word "may" in section 12. The discretion in section 12 flows from Article 9 and not Articles 2 and 7.

(b) Section 12 is but one of a raft of measures, both civil and criminal, which, taken together, are all essentially penal in nature because of the extensive nature of the "punishment". When considering assessment to excise duty these factors should be considered together to be the "Scheme". Even if HMRC has no discretion, proportionality of the regime in relation to both the Scheme as a whole and on the individual facts is relevant.

(c) Parliament's choice of the word "may" rather than "shall" in section 12 meant that it was not mandatory for HMRC to assess where there was liability and that it allowed HMRC to take into account all of the factors in the Scheme. It enabled HMRC to waive collection where collection would create disproportionality.

(d) Article 1 of the Directive defines the purpose of the Directive. The other Articles such as Articles 7 and 8 simply explain how that is achieved.

(e) Where the principles of proportionality and neutrality are paramount, goods should not be forfeit and yet duty charged where goods do not enter circulation.

(f) The UK implementation of levy and collection involving seizure of the goods and the transportation vehicle and then the imposition of duty is not a proportionate manner of achieving the aim of the Directive which is the levy of duty on the consumption of goods. The purpose of the Directive is not levy and collection.

(g) Section 12 should be considered to be a penalty, and indeed is "likely" a criminal penalty, for the purposes of A1P1. The fact that section 13 of FA94 provides for penalties does not detract from that, as the fact that there are penalty provisions in section 13 is largely irrelevant. A1P1 applies to both penalties and taxes.

(h) The assessment means that the appellant bears an "individual and excessive" burden. What the appellant stood to gain is inconsequential in comparison to the duty levied and sought to be collected. That infringes the appellant's rights in terms of A1P1 and therefore the assessment cannot be upheld.

(i) Even if the Scheme itself is not disproportionate, the assessment is irrational, disproportionate and therefore invalid. To be valid, looking at *Tooth* and *Anderson* an assessment must have been reasonably made. The assessment in this case was irrational because:

(i) the tobacco was in the hands of the State,

(ii) the State benefitted from the confiscation of the van,

(iii) the appellant had been punished by the criminal law,

(iv) all of these factors had served a punitive and deterrent function, and

(v) the appellant would never have had the means to pay the assessment,

Therefore, the decision was invalid.

36. In relation to *Whitney* and *Derry,* the appellant accepts that the distinction between chargeability, assessment and collection is relevant but "the wider comments" in those cases cannot be applied to the appellant's situation.

Discussion

37. The issues in this appeal were not all straightforward but some were. I was very fortunate to have guidance from both the Upper Tribunal and the Court of Appeal, albeit I was not referred to everything that I narrate here by the parties. There is also an overlap between the various issues identified by the parties.

Jurisdiction

38. I agree with Mr Davies that, quite apart from the fact that the appellant acknowledges that he is liable for the duty, Judge Redston has already decided that he is liable for it so that issue is *res judicata*.

39. Before I turn to the issues as they have been articulated, I address Mr Davies' argument that the Tribunal has no jurisdiction in regard to the assessment. He argues that because section 16 gives the Tribunal power to consider appeals only of "relevant decisions", which is correct, then because section 13A(2)(b) defines those decisions as being restricted to liability or the amount of the liability, then the power not to assess, if available, falls outside that definition.

40. I do not agree. Section 13A(2) refers to "the amount of his liability, as is contained in any assessment". As Lord Dunedin stated in *Whitney* an "assessment particularises the exact sum…". It is feasible that that sum could be nil or minimal.

41. Accordingly, I find that this Tribunal does have jurisdiction to address the issues.

42. Lastly, I do not propose to address it in any detail but I am not persuaded by HMRC's argument based on paragraphs 36 and 37 of *Hok.* The Upper Tribunal in *Hok* said that the concept of proportionality did not arise because the issue with which they were dealing was a product only of UK law. In this instance the national legislation is firmly embedded in the Directive.

Does HMRC have the discretion to decide not to issue an excise duty assessment to a person, such as the appellant, who was liable to the duty?

43. I heard lengthy argument about the use of the word "may" in section 12 and statutory interpretation. I do not propose to address those since, for the reasons set out below, I consider the case law to be clear.

44. As I have indicated, the issues that I must decide overlap and as Ms Brown indicated in her Skeleton Argument she accepts that even if HMRC has no discretion then proportionality remains relevant. Since the cases I am about to refer to cover both discretion and proportionality I do not intend to artificially divide the quotations under different headings. Once I have decided the issue of discretion then I will consider proportionality in more detail.

45. As Judge Redston pointed out, the starting point is Ms Simor's submission in *Perfect UT*. Unlike in this instance, Mr Perfect had not only been assessed to excise duty but a penalty had also been imposed even although it was accepted that he was an innocent carrier of the goods. However, as Mr Davies pointed out, her argument about the exercise of discretion had been in relation to the meaning of "innocence" in the context of the words "delivery" and "holding" in Regulation 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ("the 2010 Regulations").

46. Furthermore, if one reads the rest of the paragraph to which Judge Redston referred, the Upper Tribunal had said that Ms Simor's submission:-

> "…does not meet the point; the exercise of discretion in individual cases is not to be confused with the need for the system to be fair and proportionate in its application to all."

47. Although HMRC lost in the Upper Tribunal they were ultimately successful in *Perfect 2022*. In *Perfect 2019,* the Court of Appeal had stated at paragraph 70 that "Given the fundamental importance of proportionality in EU law" they adjourned the appeal pending determination of a reference by the Court of Justice of the European Union ("CJEU"). Having received that determination in Case C-279/19, in *Perfect 2022,* the Court of Appeal narrated the Court's views in 2019 in the following terms:-

> "10. In its 2019 judgment, this Court saw considerable force in HMRC's submissions. It said in paragraphs 66-68:
>
> > '66. We agree that the underlying policy of the 2008 Directive is, as identified by the Upper Tribunal in [*B&M Retail Ltd v Revenue and Customs Commissioners* [2016] UKUT 429 (TCC)], that it is the obligation of every Member State to ensure that duty is paid on goods that are found to have been released for consumption. It would be a distortion of the internal market were Member States not to take steps to ensure that goods in respect of which excise duty should have been paid cannot circulate freely within the single market alongside goods on which duty has been paid. As the Upper Tribunal further observed in [*Davison and Robinson Ltd v Revenue and Customs Commissioners* [2018] UKUT 437 (TCC)], in the absence of any relevant information relating to any prior release for consumption, **HMRC must assess the person** who it finds to be holding the goods in question, if that is the only excise duty point which can be established. We note HMRC's submission that where, as here, a driver is unable to identify the consignor, or the importer, or his employer, the only person who can be assessed for the duty is the driver himself. If he cannot be assessed in circumstances where HMRC or a Tribunal concludes that he was unaware that the goods were liable to duty, the opportunities for smuggling and fraud are manifestly greater. Accordingly, strict liability appears to have been an accepted feature of the regime under successive Directives, as explained initially by Lord Hoffmann in [*Greenalls Management Ltd v Customs and Excise Commissioners* [2005] UKHL 34, [2005] 1 WLR 1754].
> >
> > 67. This policy is, to our eyes, reflected in the terms of the Directive and the Regulations. We agree with Ms Simor's submission that the natural meaning of the words 'holding' or 'making delivery' of goods does not impute any requirement that the person is aware of the tax status of the goods. Although fairness and proportionality are, of course, cornerstones of EU law, as they are of the common law, they do not invariably exclude the imposition of strict liability. **We consider that there is very considerable force in the 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.**
> >
> > 68. One view is that the scheme of the legislative provisions, considered as a whole, may draw a distinction between liability for payment of duty and liability for criminal sanctions. Taxing statues, unlike statues creating criminal offences, do not usually impose a liability to tax by reference to the state of mind of the

> taxpayer – what is taxed are usually objective events or transactions without regard to the state of mind of the taxpayer. **The public interest in ensuring that excise duty is paid may require that anyone holding the goods is strictly liable for the duty.** He or she may have a remedy against the consignors or the importers, provided their identities are known. The imposition of liability on mere couriers would act as a deterrent against a driver getting involved in such a venture without reliable information as to the identity of the person who engages his services. On the other hand, a criminal prosecution for an offence of dishonesty and, arguably, the imposition of a penalty under the tax laws, should require that the driver knew that duty had not been paid on the goods he was carrying. The fact that paragraph 20 of Schedule 41 to the Finance Act 2008 provides a defence to a penalty under paragraph 4(1) where the taxpayer establishes a reasonable excuse, whereas the provisions imposing liability under the 2008 Directive and the 2010 Regulations do not include any such exception, is consistent with this interpretation of the overall scheme."

48. At paragraph 22, it then concluded that because the Court was bound by the CJEU's judgment, they held "…as was anyway this Court's inclination in 2019, that article 33 of the 2008 Directive and, hence, also Regulation 13 of the 2010 Regulations" imposed a strict liability.

49. It is not disputed that the appellant was "holding" the tobacco in terms of Regulation 13. I do not accept the argument that was advanced that the assessment "creates" the liability. It is Regulation 13 that does so. That is the first stage in *Whitney*.

50. I have added emphasis to the quotations from *Perfect 2019* because I consider them to be very important. At paragraph 66, the Court unequivocally states that HMRC must assess the person holding the goods. That supports Mr Davies' argument that HMRC have no discretion and that the use of the word "may" in section 12 is because, as in this case, HMRC can assess more than one individual for parts of the total duty due, such that the whole amount of duty is ultimately assessed. It contradicts Ms Brown's argument that HMRC have a discretion not to assess or to assess in a smaller sum.

51. The sentences that I have highlighted in paragraphs 67 and 68 should be read together. The public policy is articulated in the latter and the Court finds in the former that strict liability does not offend the principles of fairness or proportionality. It is also clear from the first sentence of paragraph 68 that the Court was considering the scheme of legislative provisions including the potential liability for criminal sanctions.

52. Ms Brown relied on paragraph 69 of *Perfect 2019* for the proposition that "the principle of proportionality in EU law was a relevant consideration to the interpretation of the duty Directive". Firstly, the argument in paragraph 69 was rejected by the Court in favour of the argument in paragraph 68. Secondly, of course proportionality is a relevant consideration because of the preceding paragraphs.

53. At paragraphs 25 and 26 above, I have referred to a number of paragraphs of *B&M*. There are other paragraphs that I could quote but crucially for this issue, I rely on paragraph 155, upon which Mr Davies relied in his Skeleton Argument, and which reads:-

> "Our analysis of the wording of the 2008 Directive, and of the policy considerations which are evident from its recitals and the observations in the authorities about the need to ensure that unpaid excise duty is collected when goods have been released for consumption within the EU, leads us to conclude that the correct interpretation of the 2008 Directive, and consequently the Regulations, is that once any one of the four

events mentioned in Article 7 of the 2008 Directive has occurred then it is incumbent on the Member State in question to ensure that the duty is paid. (emphasis added)

54. For completeness, in paragraph 156, the Upper Tribunal reiterated that the objective of the Directive is "to ensure that duties properly chargeable are collected".

55. The Court of Appeal in *Perfect 2019* endorsed the decision in *B&M* at paragraph 38 quoting a number of paragraphs including paragraphs 155 and 156.

56. The Court went on to say at paragraph 39 that:-

"39. The decision in *B & M* was followed by the Upper Tribunal in *Davison and Robinson Ltd v HMRC* [2018] UKUT 437 (TCC) (Fancourt J and Judge Herrington). Having cited the judgment in *B & M* at some length, the Upper Tribunal added this observation (at paragraph 67):

"… the need to ensure that unpaid excise duty is collected when goods have been released for consumption requires HMRC, as the UT 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."

57. I was not referred to the case but Mr Justice Newey and Judge Bishopp considered what they described as the "Proportionality Point" at paragraphs 61 to 74 in *Kevan Denley v HMRC* [2017] UKUT 340 (TCC) ("Denley"). They summarised their reasoning at paragraph 74 which reads:-

"74. We agree with Mr Beal that this ground of appeal must fail. Our reasons are these:

(a) As Mr Chacko correctly accepted, an assessment to excise duty which has become due is not a matter of discretion. We also do not see it in any way as a penalty: it is due because, for the reasons we have given, a duty point has occurred regardless of any wrongdoing;

(b) Although a forfeiture of goods, accompanied by a refusal of restoration, has an adverse effect on their owner, we do not consider forfeiture and non-restoration to be a penal measure. Rather, it is the consequence of the detection of an unlawful importation: the goods become liable, for that reason alone, to seizure and subsequent condemnation as forfeit. Although it is likely that an unlawful importation will involve culpability, that is not necessarily the case. The deterrent effect of seizure would be undermined if restoration were routine rather than exception;

(c) While the cumulative effect on a person of forfeiture without restoration, assessment and penalty might be a relevant factor in an exceptional case, we do not see it as a material consideration in an ordinary case, as this is. Mr Denley lost his goods because they were liable to forfeiture and there was no good reason, as Mr Chacko accepted, why they should be restored to him. He has been

assessed to duty because he made himself liable to pay it. He has suffered a penalty because of his wrongdoing. Those are all the consequences prescribed by law of what he did;

(d) In any event we do not consider that the cumulative effect on Mr Denley of what he has suffered can realistically be described as disproportionate. His importation was, as HMRC's policy puts it, aggravated. He had a very large quantity of goods in his possession, much more than the threshold quantity, and this was not the first occasion on which he had made an importation of this kind. When one balances the policy aims to which Mr Beal referred, aims which Mr Chacko did not challenge, against the potential loss of revenue occasioned by Mr Denley's conduct it is, in our view, plain that what he has suffered is not 'devoid of reasonable foundation', as the court put it in *Gasus Dosier*."

58. The first sentence in paragraph 74(a) is an unequivocal statement and not only am I bound by it, as I am by *Perfect 2019* and *2022,* but I agree. It also makes it clear that there is a liability for the duty prior to the assessment.

59. I therefore find that HMRC has no discretion and must assess the duty unless, as Mr Davies concedes, in terms of their care and management powers it is *de minimis.*

Does the Tribunal have the jurisdiction to quash or vary an assessment on the basis that it was disproportionate?

The second sub-issue

60. Turning to proportionality, this would be an appropriate juncture to answer Ms Brown's second sub-issue, namely whether the duty amounts to a penalty. Obviously there is no duty payable unless there is an assessment, so the question should more properly be phrased as "Is an assessment to duty a penalty?" That question can be answered regardless of whether proportionality applies to excise duty generally.

61. In the second sentence in paragraph 74(a) of *Denley*, the Upper Tribunal is unequivocal in stating that an assessment to excise duty is not a penalty. Although *Denley* ante-dated *Perfect 2019* and *2022* that finding is entirely consistent with the decision that there is strict liability.

62. In my view, an assessment is a purely conventional procedure enabling HMRC to quantify the amount of taxpayer's liability to excise duty. The effect of an assessment is to impose the obligation to pay the duty for which the taxpayer is already liable.

63. As the Upper Tribunal pointed out it could arise where there is no wrongdoing. It is what happened to Mr Perfect. In this case, of course there was admitted wrongdoing but that cannot change the inherent nature of the assessment or the legislative intention.

64. Lastly, when considering the question of an assessment under section 12, I have had regard to paragraph 29 in *R (oao) O (a minor) v Secretary of State for the Home Department* [2022] UKSC 3 where Lord Hodge said that:-

> "Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained."

65. It is no accident that section 12 is followed by section 13 FA94 which not only provides for assessments to penalties but specifically provides that any assessment to a penalty shall be separately identified. Clearly Parliament's intention was that assessments under section 12 were not to be considered penalties. I therefore disagree with Ms Brown and reject the argument that section 13 is largely irrelevant.

66. The assessment neither creates liability to duty, that is the function of Regulation 13 of the 2010 Regulations, and nor does it collect duty, albeit I recognise that collection cannot be achieved without an assessment. In itself, an assessment is a neutral measure.

67. The answer to the second sub-issue is that I do not accept that the assessment to excise duty is a penalty and it most certainly is not criminal in nature.

The first sub-issue

68. As Mr Davies pointed out, the primary thrust of Ms Brown's argument was that the Scheme as a whole was disproportionate and she had not addressed the question of whether the duty itself was proportionate. However, her first sub-issue was whether the principle of proportionality can apply to excise duties and that question falls to be answered.

69. Judge Brooks pointed out at paragraph 48 of *Staniszewski* that section 12 was "not immune to challenge on the grounds of proportionality" and set out in detail why it was not. It is not.

70. Although Ms Brown argued that *Staniszewski* was "plainly wrongly decided", could be distinguished on the facts and was not a precedent I agree with Judge Brooks. His straightforward view, having reviewed a number of authorities, including a number to which I too have been referred, was that section 12 did "not extend beyond its objective of a revenue raising mechanism and cannot, on any basis be said to be devoid of reasonable foundation".

71. Judge Brooks agreed with Judge Popplewell and Mrs Bridge in *Lane,* as do I, that proportionality is relevant to the penalties but not to the duty itself.

72. The answer to the first sub-issue is therefore that proportionality is not relevant to the excise duty.

The third sub-issue

73. In reviewing the authorities in *Staniszewski,* Judge Brooks had quoted from paragraph 24 of *Lumsdon* to the effect that EU Proportionality, as Ms Brown described it, is neither expressed nor applied in the same way as A1P1. Ms Brown referred to the same quotation. I have considered both principles but start with EU Proportionality.

74. Ms Brown asked the Tribunal to decide whether the Scheme was a proportionate way of achieving the aim of the Directive. She argued that whilst it was accepted that Parliament had a wide margin of appreciation as to the level of protection of the public the issue of the assessment far exceeded that and was therefore disproportionate.

75. The Upper Tribunal in *Denley* considered that issue and stated at paragraph 69 that Mr Beal had emphasised "The scale of the well documented, indeed notorious, problem which tobacco smuggling presents, and the consequent legitimacy of the harshness of HMRC's policy". They stated that they accepted that smuggling is a serious problem and that:-

> "…punitive deterrent measures are justified. Further support for that proposition may be found in another case to which Mr Beal referred us, *Ali v Secretary of State for the Home Department* [2016] UKSC 60, in which Lord Reed remarked at paragraph 46, that "Where the Secretary of State has adopted a policy based on a general assessment of proportionality, as in the present case, [the Tribunal] should attach considerable weight to that assessment."

76. They pointed out that the European Court of Human Rights ("EHCR") had made it clear

> "in *Gasus Dosier-und Fördertechnik GmbH v Netherlands* (Application 15375/89) (1995) 20 EHRR 403, in enacting laws for the purpose of securing the payment of taxes a state has a wide margin of appreciation, which is to be respected unless the measure adopted '**is devoid of reasonable foundation'**".
>
> I have added emphasis since those are the words used by Judge Brooks in *Staniszewski.*

77. They approved the decision of the First-tier Tribunal in *Pilats v Director of Border Revenue* [2016] UKFTT 193 (TC) at paragraph 59 to the effect that:-

> "*Smith* and *Waya* [[2001] UKHL 68 and [2012] UK SC 51 respectively] are therefore authority for the proposition that the imposition of a penalty, seizure of goods and the vehicle in which they were conveyed and the making of an assessment for the unpaid excise duty would not, depending on the circumstances, be a disproportionate response to a deliberate smuggling attempt."

78. It is clear that the legislation encompassing the penalty, the seizure of the vehicle (and the goods) and the criminal sanctions was enacted to meet the specific public interest purpose of deterring criminal activity.

79. I accept that Ms Brown is correct in saying that the issue of an assessment is the levying of the duty. I have already stated that I do not agree with the argument advanced in Closing Submissions that an assessment creates the liability. However, as Lord Dunedin pointed out, an assessment follows on from liability and it is not the collection of the duty. I agree with Mr Davies that the Tribunal has no jurisdiction in relation to the collection of the duty. I observe that I am aware that HMRC do have discretion in relation to the collection of the duty.

80. The seizure and the criminal sanctions do not change the purpose of section 12 which is not a deterrent but, as Judge Brooks stated, a simple revenue raising mechanism. It is, indeed, the method whereby the duty is levied.

81. There was no penalty in this instance. The circumstances in this case are that this was a deliberate smuggling attempt and the quantity of tobacco was large; hence the total excise duty bill of just short of a quarter of a million pounds. Furthermore although the tobacco was indeed seized, that did not belong to the appellant and never would have belonged to him. He, personally, did not suffer that seizure; the criminal mind behind the smuggling bore that consequence.

82. The appellant's vehicle was seized but, like Mr Denley, that was because it was liable to forfeiture. Further there was no good reason why it should be restored to him since he was knowingly involved in a criminal endeavour for which he had sought payment albeit ultimately he was not paid. That was an inherent, and reasonably foreseeable, risk in the venture as were the other adverse consequences for him including the criminal prosecution.

83. Ms Brown argues that it is the cumulative effect of the civil and criminal legislation which leads to the Scheme being disproportionate.

84. The Court of Appeal in *Perfect 2022* decided that strict liability for duty in the case of an innocent carrier was proportionate and, as I have pointed out, the Court took cognisance of the existence of criminal sanctions.

85. It is very difficult to see how the assessment in this instance could be disproportionate where the only material difference is the fact that the appellant was most certainly not an innocent carrier. It cannot be right that the appellant should benefit from his own criminal activity. In the words used in *Denley,* the appellant has been assessed to duty because he made himself liable to pay it. He has faced criminal proceedings because of his wrongdoing. Those are all consequences prescribed by law of what he did.

86. Is this an exceptional case? No. Regrettably, criminals smuggling goods, and indeed people, for financial gain is a thriving, widespread and continuing activity. The appellant smuggled the dutiable goods for financial gain and the law exists to deter that.

87. Ms Brown advanced an argument that it could not be proportionate to achieve the aim of taxing consumption of excise goods by collecting duty on goods that could not be consumed because they had been forfeited. She argued that the deemed consumption falls to be ignored.

88. I am clear that Article 7 provides for chargeability on release for consumption. Actual consumption is not a prerequisite.

89. Furthermore, although I was not referred to it, a variation on that argument arose in *General Transport Service SPA v HMRC* [2020] EWCA Civ 405 ("General") where the "overarching point advanced on behalf of the appellant was that excise duty is a tax on consumption so that, where goods are destroyed before consumption, no liability to duty arises" [39]. The Court of Appeal robustly rejected that argument at paragraph 61 and endorsed the decision of the Upper Tribunal in *Denley* stating:-

> "Finally, while I accept that excise duty is a tax on consumption, it does not follow that it is only payable when goods are consumed. Article 33 of the Excise Duties Directive is crystal clear about when goods become chargeable to duty. There is to my mind nothing unfair about an outcome in which goods are liable to forfeiture in circumstances where a liability for duty and a penalty also arise. As the Upper Tribunal observed in *Kevan Denley v HMRC* [2017] UKUT 340 (TC) at paragraph 74, these are all consequences prescribed by law."

I have added emphasis because in this case there is not even a penalty.

90. Lastly, in this context, although, not relating to a discussion on proportionality, HMRC rightly pointed to paragraphs 9 and 10 in *Munir* where the Court found as fact that previous criminal sanctions and an inability to pay an excise duty assessment were irrelevant in an appeal of that assessment. The Court also found as fact that "the Assessment is not a civil penalty, only an assessment of the amount of duty payable in respect of the tobacco and cigarettes."

91. Like others before me I find that, in terms of EU Proportionality, the Scheme, even if it included the criminal sanctions in addition to the civil provisions, is not disproportionate.

92. I have set out the provisions of AIPI at paragraph 32 above. A1P1 does, as it states clearly, permit the state to enforce laws to secure the payment of taxes. The first and obvious point to me, is that section 12 exists for the purpose of securing the payment of taxes. It does not collect taxes.

93. In *Jones* the Court of Appeal explicitly found at paragraph 71 that the deeming provisions in CEMA and the restoration procedure in relation to seizures are compatible with A1P1 (and with Article 6 of ECHR). I was not persuaded by Ms Brown's argument that I should give little weight to *Jones (*or *Race* and *Lane).* Shortly put, in a case such as this those decisions would always be a relevant consideration, whether or not cited to me.

94. Judge Brooks in *Staniszewski* included at paragraph 48 a quotation from a decision in the ECHR which stated that the object and purpose of A1P1 is primarily to guard against the arbitrary confiscation of property. The only property seized from the appellant was his vehicle and the value is small compared with the duty that he sought to evade. Given that that is encompassed by J*ones* there can be no argument about the vehicle.

95. The only other "property" is the money that would be required to pay the excise duty, ie the amount of the assessment. I do not accept that the assessment could be described as confiscation or in any sense arbitrary or random.

96. Ms Brown argues A1P1 is relevant because section 12, although not couched as a penalty, is penal particularly when taken together with the provisions in CEMA and the criminal sanctions. However, I have found that an assessment under section 12 is not a penalty.

97. The corollary of that is that Article 6 of the Directive is not engaged. As the ECHR stated at paragraph 29 in *Ferrazzini*, when looking at both Article 6 and A1P1:-

> "…tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer."

98. For the reasons given I find that the Scheme is proportionate in the circumstances of this case.

Should the assessment be quashed or varied?

99. At the heart of the arguments for the appellant was the proposition that to issue an assessment for excise duty in circumstances where significant punishment, both criminal and civil, had already been imposed was disproportionate and in those circumstances no assessment could be valid.

100. I fail to see why the fact that smuggled tobacco had been seized could render an assessment invalid in any respect. Smuggled tobacco is chargeable to duty and is liable to seizure; those legislative provisions are entirely rational as are the provisions of the criminal legislation.

101. I have no difficulty is dismissing the argument for the appellant that the assessment is invalid since it could never have been rational for HMRC to make an assessment that could never be paid. In very many appeals before the Tribunal it is argued that, for example, if a penalty is upheld, the appellant will face bankruptcy. In that context, of course, the legislation makes it explicit that insufficiency of funds cannot amount to a reasonable excuse. Other appellants argue that they are on benefits and cannot pay the excise duty let alone any penalty. In this case there are no penalties. It cannot be the case that an inability to pay means an assessment is not valid.

102. I noted the arguments based on *Tooth* and *Anderson* but those did not advance the appellant's case. In this instance HMRC have correctly identified that duty is chargeable, because in terms of the relevant legislation goods had been released for consumption, and it is the appellant who is liable. HMRC have rationally decided to make him liable for only half the duty and that too is a rational decision.

103. Therefore, in terms of Regulation 13, the appellant was liable at the excise point which was when he was chargeable. That ante-dated the assessment.

104. The assessment was reasonably made and is valid.

105. There is no challenge to the quantum or timing of the assessment.

106. As I have said, I do not accept HMRC's argument that the Tribunal does not have jurisdiction to vary or quash an assessment on the grounds of proportionality because it is restricted to considering only liability and that for the reasons set out at paragraphs 40 to 42 above.

107. Accordingly, the assessment should be confirmed.

Decision

108. For all these reason I find that the appeal is dismissed since the assessment is valid, HMRC do not have a discretion to not assess, the quantum is correct and both the Scheme and the assessment are proportionate.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

109. 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.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 03rd APRIL 2023

Appendix 1

Authorities

Appellant's authorities

1. The appellant relied on the following authorities:-

HMRC v Perfect [2019] EWCA Civ 465 ("Perfect 2019")

Revenue & Customs v Tooth [2021] UKSC 17 ("Tooth")

Anderson v HMRC [2018] UKUT 159 (TCC) ("Anderson")

R (Lumsdon & Others) v Legal Services Board [2015] UKSC 41 ("Lumsdon")

Edwards v HMRC [2019] UKUT 131 (TCC) ("Edwards")

Ferrazzini v Italy 44759/98 [2001] ECHR 464 ("Ferrazzini")

*G van de Water v Staatssecretaris van Financiën C325/99 ("*Water*")*

Han & Others v Commissioners of Customs and Excise [2001] EWCA Civ 1040 ("Han")

HMRC v Trinity Mirror plc [2015] UKUT 421 (TCC) ("Trinity")

HMRC v Total Technology (Engineering) Ltd [2012] UKUT 418 (TCC) ("Total")

Bennion on Statutory Interpretation

Practice Direction (citation of authorities) (SUP CT)

Respondent's authorities

2. The respondent relied on the following authorities:-

Water

Staniszewski v HMRC [2016] UKFTT 0128 ("Stanieszewski")

Hughes v HMRC [2019] UKFTT 700 (TC) ("Hughes")

Michalska v HMRC [2019] UKFTT 173 (TC) ("Michalska")

Fleming v HMRC [2016] UKFTT 849 (TC) ("Fleming")

Lane v HMRC [2015] UKFTT 423 (TC) ("Lane")

HMRC v Perfect [2017] UKUT 0476 ("Perfect UT")

HMRC v B & M Retail [2016] UKUT 0429 (TCC) ("B & M")

Davison & Robinson [2018] UKUT 437 (TCC) ("Davison")

Perfect 2019

HMRC v Perfect [2022] EWCA Civ 330 ("Perfect 2022")

Munir v HMRC [2021] EWCA Civ 799 ("Munir")

Julius v Oxford 1880 HL

HMRC v Jones & Jones [2011] EWCA Civ 824 ("Jones")

HMRC v Race [2014] UKUT 0331 ("Race")

Hok v HMRC [2012] UKUT 363 (TCC) ("Hok")

Appendix 2

Domestic Law

Excise Goods (Holding, Movement and Duty Point) Regulations 2010

Goods already released for consumption in another Member State – excise duty point and persons liable to pay

13

(1) Where excise goods already released for consumption in another Member State are held for a commercial purposes in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.

(2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person-

(a) making the delivery of the goods;

(b) holding the goods intended for delivery; or

(c) to whom the goods are delivered.

(3) For the purposes of paragraph (1) excise goods are held for a commercial purpose if they are held-

(a) by a person other than a private individual; or

(b) by a private individual ("P"), except in a case where the excise goods are for P's own use and were acquired in, and transported to the United Kingdom from, another Member State by P.

Finance Act 1994 (1994 c 9)

12 Assessments to excise duty

(1) Subject to subsection (4) below, 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 judgement and notify that amount to that person or his representative.

(1A) Subject to subsection (4) below, 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) At the amount due can be ascertained by the Commissioners,

the Commissioners <u>may</u> assess the amount of duty due from that person and notify that amount to that person or his representative …". (emphasis added)

…

(3) Where an amount has been assessed as due from any person and notified in accordance with this section, it shall, subject to any appeal under section 16 below, be deemed to be an

amount of the duty in question due from that person and may be recovered accordingly, unless, or except to the extent that, the assessment has subsequently withdrawn or reduced

…

(5A)The cases are –

(a) A case involving a loss of duty of excise brought about deliberately by the person assessed (P) or by any other person acting on P's behalf, and

(b) A case in which P has participated in a transaction knowing that it was part of arrangements of any kind (whether or not legally enforceable) intended to bring about a loss of duty of excise. …".

13 Assessments to penalties

(1) Where any person is liable to a penalty under this Chapter, the Commissioners may assess the amount due by way of penalty and notify that person, or his representative, accordingly.

(2) An assessment under this section may be combined with an assessment under section 12 above, but any notification for the purposes of any such combined assessment shall separately identify any amount assessed by way of a penalty.

(3) In the case of any amount due from any person by way of a penalty under section 9 above for conduct consisting in a contravention which attracts daily penalties-

(a) a notification of an assessment under this section shall specify a date, being a date no later than the date of the notification, to which the penalty as assessed is to be calculated; and

(b) if the contravention continues after that date, a further assessment, or (subject to this subsection) further assessments, may be made under this section in respect of any continuation of the contravention after that date.

(4) If-

(a) a person is assessed to a penalty in accordance with paragraph (a) of subsection (3) above, and

(b) the contravention to which that penalty relates is remedied within such period after the date specified for the purposes of that subsection in the notification of assessment as may for the purposes of this subsection be notified to that person by the Commissioners.

that contravention shall be treated for the purposes of this Chapter as having been remedied, and accordingly the conduct shall be deemed to have ceased, immediately before that date.

(5) If an amount has been assessed as due from any person and notified in accordance with this section, then unless, or except to the extent that, the assessment has subsequently been withdrawn or reduced, that amount shall, subject to any appeal under section 16 below, be recoverable as if it were an amount due from that person as an amount of the appropriate duty.

(6) In subsection (5) above "the appropriate duty" means-

(a) the [relevant duty] (if any) by reference to an amount of which the penalty in question is calculated; or

(b) where there is no such duty, the [relevant duty] the provisions relating to which are contravened by the conduct giving rise to the penalty or, if those provisions relate to

more than one duty, such of the duties as appear to the Commissioners and are certified by them to be relevant in the case in question.

(7) In this section 'representative', in relation to a person liable to a penalty under this Chapter, means his personal representative [,trustee in bankruptcy or interim or permanent trustee,] any receiver or liquidator appointed in relation to that person or any of his property or any other person acting in a representative capacity in relation to that person.

13A Meaning of "relevant decision"

(1) This section applies for the purposes of the following provisions of this Chapter.

(2) A reference to a relevant decision is a reference to any of the following decisions-

(a) any decision by HMRC, in relation to any customs duty or to any agricultural levy of the [European Union), as to-

(i) whether or not, and at what time, anything is charged in any case with any such duty or levy;

(ii) the rate at which any such duty or levy is charged in any case, or the amount charged;

(iii) the person liable in any case to pay any amount charged, or the amount of his liability; or

(iv) whether or not any person is entitled in any case to relief or to any repayment, remission or drawback of any such duty or levy, or the amount of the relief, repayment, remission or drawback to which any person is entitled;

(b) so much of any decision by HMRC that a person is liable to any duty of excise, or as to the amount of his liability, as is contained in any assessment under section 12 above;

(c) any decision by HMRC to assess any person to excise duty under section 12A(2) above, section 61, 94, 96 or 167 of the Management Act, section 8, 10, 11 or 36G of the Alcoholic Liquor Duties Act 1979, section 10, 13, 13ZB, 13AB, 13AD, 14, 14F, 23 or 24 of the Hydrocarbon Oil Duties Act 1979, section 8 of the Tobacco Products Duty Act 1979, section 2 of the Finance (No 2) Act 1992 or as to the amount of duty to which a person is to be assessed under any of those provisions;

(d) any decision by HMRC on a claim under section 137A of the Management Act for repayment of excise duty;

(e) any decision by HMRC as to whether or not any person is entitled to any drawback of excise duty by virtue of regulations under section 2 of the Finance (No 2) Act 1992, or the amount of the drawback to which any person is so entitled;

[any decision by HMRC that a person is liable to a penalty, or as to the amount of the person's liability under-

(i) regulations under section 88E of the Alcoholic Liquor Duties Act 1979; or

(ii) Schedule 2B to that Act;]

(f) any decision by HMRC as to whether or not any person is entitled to any repayment or credit by virtue of regulations under paragraph 4(2)(h) of Schedule 2A to the Alcoholic Liquor Duties Act 1979 (duty stamps), or the amount of the repayment or credit to which any person is so entitled;

(g) any decision by HMRC made by virtue of regulations under paragraph 4(2)(i) of that Schedule that some or all of a payment made, or security provided, is forfeit, or the amount which is so forfeit;

(ga) …

(gb) [any decision by HMRC that a person is liable to a penalty, or as to the amount of the person's liability, under section 80 of the Tobacco Products Duty Act 1979;]

(gc) [any decision by HMRC that a person is liable to a penalty, or as to the amount of a person's liability, under-

(i) regulations under section 55 of the Finance (No. 2) Act 2017, or

(ii) Schedule 13 to that Act;]

(h) So much of any decision by HMRC that a person is liable to any penalty under any of the provisions of this Chapter, or as to the amount of his liability, as is contained in any assessment under section 13 above;

(i) Any decision as to whether or not-

(i) an amount due in respect of customs duty or agricultural levy, or

(ii) any repayment by HMRC of an amount paid by way of customs duty or agricultural levy,

is to carry interest, or as to the rate at which, or period for which, any such amount is to carry interest;

(j) any decision by HMRC which is of a description specified in Schedule 5 to this Act, except for any decision under section 152(b) of the Management Act as to whether or not anything forfeited or seized under the customs and excise Acts is to be restored to any person or as to the conditions subject to which any such thing is so restored.]

Forfeiture

139 Provisions as to detention, seizure and condemnation of goods etc,

(1) Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard.

[(1A) A person mentioned in subsection (1) who reasonably suspects that any thing may be liable to forfeiture under the customs and excise Acts may detain that thing.

(1B) References in this section and Schedule 2A to a thing detained as liable to forfeiture under the customs and excise Acts including a thing detained under subsection (1A).]

(2) Where any thing is seized or detained as liable to forfeiture under the customns and excise Acts by a person other than an officer, that person shall, subject to subsection (3) below, [deliver that thing to an officer].

(3) Where the person seizing or detaining any thing as liable to forfeiture under the customs and excise Acts is a constable and that thing is or may be required for use in connection with any proceedings to be brought otherwise than under those Acts it may, subject to subsection (4) below, be retained in the custody of the police until either those proceedings are completed or it is decided that no such proceedings shall be brought.

(4) The following provisions apply in relation to things retained in the custody of the police by virtue of subsection (3) above, that is to say-

(a) Notice in writing of the seizure or detention and of the intention to retain the thing in question in the custody of the police, together with full particulars as to that thing, shall be given to [an officer];

(b) Any officer shall be permitted to examine that thing and take account thereof at any time while it remains in the custody of the police;

(c) Nothing in the *Police (Property) Act 1897* [section 31 of the Police (Northern Ireland) Act 1998] shall apply in relation to that thing.

(5) Subject to subsections (3) and (4) above and to [Schedules 2A and 3] to this Act, any thing seized or detained under the customs and excise Acts shall, pending the determination as to its forfeiture or disposal, be dealt with, and, if condemned or deemed to have been condemned or forfeited, shall be disposed of in such manner as the Commissioners may direct.

[(5A) Schedule 2A contains supplementary provisions relating to the detention of things as liable to forfeiture under the customs and excise Acts.]

(6) Schedule 3 to this Act shall have effect for the purpose of forfeitures, and of proceedings for the condemnation of any thing as being forfeited, under the customs and excise Acts.

(7) If any person, not being an officer, by whom any thing is seized or detained or who has custody thereof after its seizure or detention, fails to comply with any requirement of this section or with any direction of the Commissioners given thereunder, he shall be liable on summary conviction to a penalty of [level 2 on the standard scale].

(8) Subsections (2) to (7) above shall apply in relation to any dutiable goods seized or detained by any person other than an officer notwithstanding that they were not so seized as liable to forfeiture under the customs and excise Acts.

141 Forfeiture of ships, etc used in connection with goods liable to forfeiture

(1) Without prejudice to any other provision of the Customs and Excise Acts 1979, where any thing has become liable to forfeiture under the customs and excise Acts-

(a) any ship, aircraft, vehicle, animal, container (including any article of passengers' baggage) or other thing whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture, either at a time when it was so liable or for the purposes of the commission of the offence for which it later became so liable; and

(b) any other thing mixed, packed or found with the thing so liable.

shall also be liable to forfeiture.

(2) Where any ship, aircraft, vehicle or animal has become liable to forfeiture under the customs and excise Acts, whether by virtue of subsection (1) above or otherwise, all tackle, apparel or furniture thereof shall also be liable to forfeiture.

(3) Where any of the following, that is to say-

(a) any ship not exceeding 100 tons register,

(b) any aircraft; or

(c) any hovercraft,

become liable to forfeiture under this section by reason of having been used in the importation, exportation or carriage of goods contrary to or for the purpose of contravening any prohibition or restriction for the time being in force with respect to those goods, or

without payment having been made of, or security given for, any duty payable thereon, the owner and the master or commander shall each be liable on summary conviction to a penalty equal to the value of the ship, aircraft or hovercraft or *[level 5 on the standard scale]* [£20,000], whichever is the less.

Appendix 3

The Directive

1. Article 1 of the Directive reads:-

   "1. This Directive lays down general arrangements in relation to excise duty which is levied directly or indirectly on the consumption of the following goods (hereinafter 'excise goods'): …".

2. Article 2 of the Directive reads:-

   "Excise goods shall be subject to excise duty at the time of:

   (a) their production, including, where applicable, their extraction, within the territory of the Community;

   (b) their importation into the territory of the Community."

3. Article 7 of the Directive reads:-

   "1. Excise duty shall become chargeable at the time, and in the Member State, of release for consumption.

   2. For the purposes of this Directive, 'release for consumption' shall mean any of the following:

   (a) the departure of excise goods, including irregular departure, from a duty suspension arrangement;

   (b) the holding of excise goods outside a duty suspension arrangement where excise duty has not been levied pursuant to the applicable provisions of Community law and national legislation;

   (c) the production of excise goods, including irregular production, outside a duty suspension arrangement;

   (d) the importation of excise goods, including irregular importation, unless the excise goods are placed, immediately upon importation, under a duty suspension arrangement."

Article 7(3) prescribes the time of release for consumption.

4. Article 8 of the Directive reads:-

   "The person liable to pay the excise duty that has become chargeable shall be:

   ….

   oo) In relation to the importation of excise goods as referred to in Article 7(2)(d): …and in the case of irregular importation, any other person involved in the importation."

5. Article 9 of the Directive reads:-

   "The chargeability conditions and rate of excise duty to be applied shall be those in force on the date on which duty becomes chargeable in the Member State where release for consumption takes place.

   Excise duty shall be levied and collected and, where appropriate, reimbursed or remitted according to the procedure laid down by each Member State. Member States

shall apply the same procedures to national goods and to those from other Member States."

6. Article 11 of the Directive reads:-

"In addition to the cases referred to in Article 33(6), Article 36(5), and Article 38(3), as well as those provided for by the Directives referred to in Article 1, excise duty on excise goods which have been released for consumption may, at the request of a person concerned, be reimbursed or remitted by the competent authorities of the Member State where those goods were released for consumption in the situations fixed by the Member States and in accordance with the conditions that Member States shall lay down for the purpose of preventing any possible evasion or abuse.

Such reimbursement or remission may not give rise to exemptions other than those provided for in Article 12 or by one of the Directives referred to in Article 1."

7. Article 12 of the Directive reads:-

"1. Excise goods shall be exempted from payment of excise duty where they are intended to be used:

(a) in the context of diplomatic or consular relations;

(b) by international organisations recognised as such by the public authorities of the host Member State, and by members of such organisations, within the limits and under the conditions laid down by the international conventions establishing such organisations or by headquarters agreements;

(c) by the armed forces of any State party to the North Atlantic Treaty other than the Member State within which the excise duty is chargeable, for the use of those forces, for the civilian staff accompanying them or for supplying their messes or canteens;

(d) by the armed forces of the United Kingdom stationed in Cyprus pursuant to the Treaty of Establishment concerning the Republic of Cyprus dated 16 August 1960, for the use of those forces, for the civilian staff accompanying them or for supplying their messes or canteens;

(e) for consumption under an agreement concluded with third countries or international organisations provided that such an agreement is allowed or authorised with regard to exemption from value added tax.

2. Exemptions shall be subject to conditions and limitations laid down by the host Member State. Member States may grant the exemption by means of a refund of excise duty."