TC04259

Appeal number: TC/2012/00685

INCOME TAX – discovery assessment – effect of Confiscation Order – Confiscation Order assessed on a gross basis –included a proportion of tax liability – discovery assessment not disputed – assessment reduced to prevent double recovery in relation to tax included in Confiscation Order - additional liability not disproportionate - appeal allowed in part.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MALACHY HIGGINS **Appellant**

- and -

THE NATIONAL CRIME AGENCY **Respondents**

TRIBUNAL: JUDGE DAVID S PORTER
MR JOHN B ADRAIN

Sitting in public at Bedford House, Belfast on 28 October 2013

Mr Arthur Harvey, of counsel, for the Appellant

Mr Craig Dunford of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.

DECISION

1. Mr Malachy Higgins (Mr Higgins) appeals against the income tax/NIC assessments for the years 1998/9 to 2003/4 in the sum of £71562.10 plus interest of £35,100.33 and a penalty of £42,937.26 on the basis that he paid £400,000 to the Serious Organised Crime Agency (SOCA) under a Confiscation Order on the occasion of his prosecution on 13 February 2008in respect of illegal waste disposal and the imposition of the assessment, interest and penalties would amount to a double recovery as he had already accounted for the same in the Confiscation Order. The Respondents [The National Crime Agency (NCA)] but at the time of the offence SOCA) say that the Criminal Court and the Confiscation Order did not deal with any income tax arising from Mr Higgins transactions in trading as Higgin's Waste as no returns had been made of the income and expenses arising in those periods.

2. Mr Craig Dunford (Mr Dunford), of counsel, represented the Respondents (NCA) and produced a series of agreed bundles. Mr Arthur Harvey (Mr Harvey), of counsel, appeared for Mr Higgins. The parties had agreed the assessments were to best judgment and argued the point as to whether the payment under the Confiscation Order included Mr Higgins' entire tax liabilities. Mr Harvey after the hearing provided a written submission with regard to the penalty.

The cases

3. We were referred to the following cases:

- *John Martin v The Commissioners for Her Majesty's Revenue and Customs* TC01990.
- *R v Waya* [2013] AC 294.
- *Maxine Ellen Peries and Anselm Peries v The Serious Organised Crime Agency* TC01516
- *Mr Swallow v The Commissioners for Her Majesty's Revenue and Customs* [2010] UKFTT 481.
- *R v May* [2008] UKHL 28.
- *The Crown v David Edwin Allingham and Freda Elizabeth Allingham* [2007] NICC53.
- *Khan v Director of the Assets Recovery Agency* [2006] STC 154.
- *Glyn Edwards v The Crown* [2004] EWCA Crim 2923.
- *R v Foggon* [2003] EWCA Crim 270.

- *Attorney General's reference no 25 of 2001. (Frank Adam)* [2001] EWCA Crim 1770.

- *R v Dimsey* [2001] UKHL 46.

- *R v Ellen* [2001] UKHL 45.

- *CIR v Alexander Von Glehn* [1920] 2KB.

- *McKnight v Sheppard* [1999] HL

The law

4. Mr Higgins had been prosecuted for the illegal depositing of waste and had been subjected to a Confiscation Order under section 156 of the Proceeds of Crime Act 2002 (POCA) in the sum of £400,000. SOCA served two notices on him under section 317 (2) of POCA informing him that it was taking over the general revenue functions of HMRC in respect of his tax returns for the years 1996/7 to 2002/3 and 2003/4. As a result, it assessed him to Income tax under section 29 of the Taxes Management Act 1970 and penalties under Schedule 56 of the Finance Act 2009. The terms of the assessment were not contested, but the penalty has been contested.

5. We were also referred to the Attorney General's Guidance with regard to the circumstances that apply when a conviction had been secured for a criminal offence, but no Confiscation Order had been made. The relevant authorities should consider using the non-conviction based powers available under POCA. An example as to when that might be appropriate, would be the circumstances in this appeal.

> "6. Civil recovery represents a better deployment of resources to target someone with significant property, which cannot be explained by legitimate income."

6. The penalty in relation to the year 1997/8 had been overlooked, but NCA did not intend to pursue it. The final penalty was calculated in relation to:

- the quality of the disclosure, which represents 20% of the penalty. NCA have given Mr Higgins mitigation of 5%:

- Co-operation represents a further 40% and NCA have given mitigation of 10%:

- size and gravity represents the balance of 40%. NCA have given mitigation of 10%.

- As a result a penalty of 75% has been levied. It was reduced to 60% on a review.

7. Article 1 of the First Protocol to the European Convention (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 a 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."

The Facts

8. It is necessary to consider the effect of the Confiscation Order arising from Mr Higgins' conviction as it is submitted that the payment under the Order effectively included any tax, which might be due from Mr Higgins as a result of his criminal behaviour. On 17 March 2007, Mr Higgins pleaded guilty at Antrim Crown Court to the following charges

(1) that he did keep, treat or dispose of controlled waste in a manner causing pollution of the environment or harm to human health contrary to Article (1) (c) and Article 6 (4) of the Waste and Contaminated land (Northern Ireland) Order 1997; and

(2) that he did breach the terms and conditions of a Discharge Consent numbered 817/96 issued by the Department of the Environment on 20 May 1996 under the Water Act (Northern Ireland) 1972, contrary to Article 9 (4) of the Water (Northern Ireland) Order 1999

(3) On 13 February 2008 Mr Higgins was ordered to pay £400,000 on or before 13 August 2008 and if he failed to do so, he would be sent to prison for 3 years. Mr Higgins made the payment.

9. There was considerable confusion between the parties as to the terms on which the £400,000 had been calculated. It was, however, agreed by the parties that the initial calculation of the benefit to Mr Higgins was based on the notional cost of removing the material from the Craigmore Landfill site. Mr Higgins has indicated in his statement of 11 September 2014 that the court incorrectly assessed the value of the waste material that he had illegally placed on the site. Mr Higgins was represented by counsel at the proceedings, as was SOCA, and all the parties accepted that the methodology used to calculate the benefit was the best that could be achieved because Mr Higgins had no details of the value of the actual amounts deposited on the site. It was accepted that the resulting value did not necessarily represent the monies that Mr Higgins had actually derived from his criminal activity. Mrs Dee Traynor (Mrs Traynor), on the instructions of the Judge in the Crown Court, had provided 3 separate bases for the calculation and we and both parties accepted that the Court adopted Option 1.

10. Option 1 was based on the period from 30 September 1996, when the licence was granted, until 30 May 2003 the date on which the Environmental & Heritage Service (EHS) completed their full inspection. The calculations were as follows:-

- At a tonnage of 45,500 to 70,000 tonnes the financial benefit from the Category B & C waste was a minimum of £1,137,500 and a maximum of £2,100,000.

- At a tonnage of 157,000 to 165,000 the financial benefit from Category A waste was a minimum of £472,000 to £495,000.

- Taken together the total benefit from Category A plus B plus C was £1,609,500 to £2,595,000

- Over the period Mr Higgins had paid £273,246 in landfill tax. We have been shown an extract from the court record, which shows that Judge Grant took the view that the net benefit (after the payment of the Landfill Tax) was between £1,336,254 and £2,321,754 on the prosecution's case and between £1.298,750 and £1,696,754 on the defence's case.

11. Mrs Traynor also identified for the Court assets which Mr Higgins had available to him at the beginning of 2008 the following amounts:

"Properties at:

65 Portrush Road,Coleraine	£165,000.
12.1 hectares At Townland of Mayboy	£8000.
This site was sold to Coleraine Skip Hire	
which subsequently sold the Skip Business	
to Mr Laverty for	£600,000
of which £403,000,of the £600,000, was used to buy	
three properties. It is unclear what happened to the balance	
of £197,000.	

Jaguar XK8 2001	£ 18,045
Bank accounts:	
Northern Bank t/a Coleraine Skip Hire	£ 80,000
Sabadell Atlantic, Marbella	£ 30,000

Investments in name of deceased father M A Higgins

Norwich Union Maxi ISA	£ 7,000
Norwich Union Portfolio Bond	£ 60,000
Axa Investment Bond ISA	£ 89,000
Premium bonds	£30,000.
Sterling Investment account	£80,000
Skandia Multi Fund Plan	£64,000

Mr Higgins stated that all the accounts in his father's name were for administrative purposes only. Mr Higgins looked after his father's affairs until his father died on 24 January 2007. He did not indicate whether he had inherited any property from his father. Mrs Traynor concluded that Mr Higgins had available to him £1,238,545.

12. John Kearney BL and John Larkin QC, for Mr Higgins, in their skeleton argument in relation to the proposed Confiscation Order submitted:

> " … the Court's focus must be narrowly restricted to the benefit accruing to the defendant from the offence at 30 May 2003, it is also submitted that the court cannot, in any event, look back beyond the 24 March 2003 when the relevant provisions of the 2002 act came into force…"

The prosecution argued:-

> "The basis of plea accepted by both parties on 12 March 2007 and in respect of which the accused was sentenced on 15 March 2007 clearly entitled the sentencing Judge to have regard to the full circumstances including the quantity of waste estimated to be present at the Defendant's site of 30 May 2003 (as a result of having been deposited there in the period since his operation began) and the amount of benefit obtained by him in arriving at that situation.

13. We note that the period from 1996 to 2003 was the period agreed in the "Agreed Basis of Plea" accepted by Mr Higgins. We also accept that as a result those agreed two sets of figures must have been gross figures net of Landfill Tax (See Option 1 above). The basis of the calculation of the Confiscation Order would have been clear if the figure used had been one of the two sets of figures identifying the benefit. However, POCA restricts the amount of a Confiscation Order to what Mr Higgins could reasonably provide.

14. Mr Dunford submitted that Judge Grant had not addressed the issue of income tax at all, nor had it been addressed in the final negotiations leading to the Confiscation Order. He stated that Mrs Traynor made reference to the failure to raise any returns with regard to the Higgins Waste Business;

> "4.17. I have made enquiries of HM Revenue and Customs (Inland Revenue) to ascertain if separate returns were made by the defendant in respect of the "Higgins Waste" partnership".

No such details have been provided in any of the returns made by Mr Higgins and

> "… The fact that his returns do not include any income for the Higgins Waste partnership, is indicative of no such returns having been made.."

15. Mr Danford believed that Judge Grant, a judge in the criminal court, was never asked to consider income tax. With the consent of the parties, he finally assessed the amount of the Confiscation Order at £400,000 based on the balance of probabilities of Mr Higgins' ability to pay.

16. Section 157 of POCA provides that Mr Higgins has to pay an amount equal to the benefit he has received as set out in Option 1. Section 157 (2) states that if the available amount is less than the benefit, then the payment has to be the available amount based, on the balance of probabilities, as to Mr Higgin's actual means. Helpfully Mr Dunford referred us to the negotiations between the parties giving rise to the eventual sum of £400,000. It is clear from those negotiations that the figure of £400,000 was agreed to by all the parties as it was the best figure either side believed could be achieved.

17. We have been provided with a transcript of a hearing on 13 February 2008 before Judge Grant and argued by John Larkin QC (JL) and John Kearney BL, appearing for Mr Higgins and Peter Mateer QC appearing for the Prosecution with Maria O'Loan (MOL), Mr Higgins' solicitor in attendance.

Paraphrasing the note:

> "JL advised that the Prosecution suggested a figure of £1,000,000 to settle the case. JL advised the Prosecution that that figure could not be considered as Mr Higgins' assets totalled £1,200,000 and that any proposals would have to be below £400,000. When the parties had retired, JL advised Mr Higgins that if the court could be persuaded that the benefit should only be either the amount of waste on the site at 30 May 2003 or in relation to waste deposited between 24 March 2003 and 30 May 2003 and the order was made on that basis, then the Prosecution might appeal the Confiscation Order so made to the Court of Appeal.
>
> Mr Higgins stated that he wanted to keep the assets and money he had and did JL think the Prosecution would settle for less. JL said that it was unlikely. Mr Higgins said that he could only afford £100,000. JL said that Mr Higgins would have to accept £400,000 as that was the least the Prosecution were likely to accept. Discussion took place between JL MOL and Mr Higgins as to the basis of the proposed offer of £400,000 and that it would be based on option 1 the "Agreed Basis".

JL had been asked by Mr Higgins what the prospects would be for the Judge to accept that the period of benefit could be either the value on the site on 30 May 2003, or the value of the quantities of waste delivered to the site between 24 March 2003 and 30 May 2003. JL had said that if the Court were to agree 12,250 tonnes a £30 per tonne the order would be £367,000 and that it was his view that that they could not confiscate before 24 March 2003, but that might not be the Judge's view.

Mr Higgins insisted that all the figures and calculations, as to the waste and benefit to him, were incorrect, but that he would settle for the £400,000 and that he would not dispute the "Agreed Basis".

18. The Prosecution invited the Court to make an order in the sum of £400,000. The Judge asked if Mr Higgins accepted that a benefit had accrued to him from his criminal conduct. JL confirmed that although Mr Higgins did not, as a lay person, understand the legal argument as to the benefit JL accepted, on Mr Higgins behalf, that within the meaning of section 224 (5) of the Proceeds of Crime Act 2002 Mr Higgins had obtained a benefit and the benefit amounted to £400,000."

Section 224 (5) reads:

"If a person obtains a pecuniary advantage as a result of or in connection with conduct, he is to be taken to obtain as a result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage."

Mr Higgins has subsequently objected to the basis on which the Confiscation Order was made. As, however, his counsel and solicitor have both explained the position to him and Mr Higgins confirmed that he had agreed the methodology, we are bound to consider the Confiscation Order in light of that agreement.

19. A Confiscation Order was consequently made on 13 February 2008 in the sum of £400,000 and is silent as to whether the £400,000 was meant to represent a gross payment, less the landfill tax. It appears that Judge Grant understood that the figure, which Mr Higgins could afford namely the £400,000, had been assessed on the basis of Option 1 which was a gross calculation. It also appears from the note of the negotiations that Mr Larkin had calculated the offer of £400,000 on the basis that POCA was not retrospective and that the benefit should therefore be of the order of £376,000, for either, the period to 30 May 2003, or for the period 24 March 2003 to 30 May 2003 In those circumstances an offer of £400,000 was of the right order.

20. We have decided, however, that if Mr Higgins had paid the full figure of £2,595,000 assessed by the NCA or the lower figure of £1,298,750 assessed by the defence, he would have paid back everything he had illegal obtained, which would have included any income tax due on the entire amount. As a result, even though we accept that Judge Grant did not consider any income tax, if the Confiscation Order of £400,000 was based on a proportion of the gross figures of either £2,595,000 or £1,298,750 as agreed by the parties under Option 1 then income tax at the appropriate

level must have been included in the figure of £400,000 based on a gross methodology.

21. Mr Lesage from SOCA wrote to Mr Higgins on 28 October 2009 advising that SOCA had decided to adopt the general revenue functions of H M Revenue & Customs (HMRC) in respect of his income and capital gains tax liabilities and class 4 National Insurance contributions in relation to the years 1995/6 to 2002/03. SOCA had on 1 September 2009 served notice under section 317 (2) of POCA on HMRC advising that they were taking over HMRC's function in relation to Mr Higgins' tax affairs for the period mentioned above. A further notice was served on 22 June 2011 in relation to the year 2003/4.

22. SOCA corresponded with Mr Higgins accountants, Paul Taylor of Paul A Taylor & Company, Chartered Accountants, Coleraine. Although Mr Taylor had produced accounts for Higgins Waste for the period 23 June 1997 to 21 August 2001 he accepted that the figures did not include any receipts from criminal activity. As a result of the enquiries, it was established that there were three bank accounts belonging to Mr. Higgins in relation to his business activities. One numbered ****6332 was the account for Coleraine Skip Hire, Mr Higgins' other business for which accounts had been provided to HMRC. Account number ****6316 in the name of Mr Higgins and his brother, Mr John Higgins, trading in partnership as Higgins Waste and account number ****6324 in the names of Mr Higgins and his brother. On 8 June 2011, Mr Taylor wrote to SOCA to confirm that the deposits into account****6324 included understated sales from Mr Higgins' business activities.

23. We do not propose to go through the correspondence in detail, which gave risegiving rise to the assessments raised by SOCA under section 29 of the Taxes Management Act 1970 and the penalties. Mr Taylor had asked for a review of those in two letters dated 7 September 2011. Mr Gibson, in the review letter dated 29 November 2011, reduced the assessments as follows:

Tax Year	**Profits Assessable**	**Income Tax payable**	**Class 4 NIC**
1998/9	£5,571	£2,228.40	0
1999/00	£20,212	£8,084	0
2000/01	£25,789	£8,796.76	£159.11
2001/02	£45,684	£15,909.30	£553
2002/03	£65,886	£26,354.40	0
2003/04	£23,113	£9,245.20	231.13

Totals	**£186,255**	**£70,618.86**	**£943.24**

24. The original penalty was £78,417 after an allowance of 25%. (See paragraph 6 above). On review, Mr Gibson considered that a further allowance of 5% should be allowed for the size and gravity of the default default and to take account of Mr Higgins' cooperation, thereby reducing the liability to £42,937.26. The overall revised assessments and penalties amounted to:

Income Tax	£70,618.86
Class 4 NIC	£943.24
Interest	£35,100.l3
Penalties	£42,937.26
Total	£149,599.69
Less paid	£8,950.00
Balance	£140,649.69

We were advised at the hearing that these figures were not contested because Mr Higgins took the view that as he had paid £400,000 by way of the Confiscation Order, no further payments were due. As a result, the penalty was not due either.

Submissions.

Mr Dunford's submissions

25. Mr Dunford submitted that on 1 April 2008 the Assets Recovery Agency was merged with SOCA and was now constituted as part of the National Crime Agency which is the Respondent in this case. As a result of the notices served, section 317 of POCA empowered the NCA to adopt the general revenue functions of Her Majesty's Revenue and Customs. The vital element triggering the section 317 power was that the income was linked directly or indirectly to, and either wholly or partly, to Mr Higgins' criminal conduct.

26. Assessments were raised to which Mr Higgins objected. He lodged appeals on 29 June 2011, but withdrew them on 5 July 2011. An internal review was requested by Mr Higgins' representative, Mr Paul Taylor, which was concluded on 29 November 2011. Mr Higgins submitted that the assessments duplicated the confiscation proceedings and that the penalties were incorrect because of the level of the taxed geared penalty imposed. Those penalties were reduced on review to 60% although the assessments remained the same.

27. Mr Higgins appealed the assessment by a notice of appeal dated 19 December 2011. The sole ground for the appeal was:

> "These assessments have been raised by SOCA, having adopted the powers of HMRC under POCA 2002. With the exception of those amounts referred to as partnership income… those powers have been inappropriately invoked as their application results in a double recovery as in this case successful criminal proceedings were brought and a confiscation order applied to recover the criminal benefit.
>
> The application of penalties is inappropriate as the double jeopardy provision within the taxes acts precludes the charging of penalties in a wide range of circumstances. I refer you to HMRC's enquiry manual ECP 5600 which states that taxpayers must not be made liable for more than one (sic) sanction for the same conduct reflecting the legislative position including FA 2009 Sch 36 para 17".

He submitted, that the net issue was whether the raising of the assessments and the penalties amounted to a double recovery

28. Mr Dunford submitted that the Respondent did not consider that the confiscation proceedings precluded the adoption of the general revenue functions having considered the Statutory Guidance provided by the Secretary of State and the Attorney General. The issue of double recovery would only be relevant to a qualifying condition for the adoption of general revenue functions if its consequence was that no tax was due and it was unreasonable to suspect that any tax was due.

29. Mr Higgins had accepted that a loss of tax occurred in the tax years 1998/99 to 2000/1. Mr Higgins provided no evidence to suggest that it was unreasonable to suspect that a loss of tax had occurred in the tax years 2001/2 to 2003/4. Mr Dunford submitted that a loss of tax occurred in every year. Mr Peter Andrew, the investigating officer seconded to NCA, confirmed in his witness statement that NCA would only treat the Confiscation Order as having included income tax if the order explicitly stated:

a. The person whose tax this represents;

b. The particular tax to which it applies;

c. The basis periods (for Income tax, Corporation Tax, VAT etc) or the specific transactions, for transaction based taxes;

d.. The breakdown of the total amount of the confiscation (or that part of the confiscation which is supposed to represent tax) into each of the above.

30. . He further stated that where the amounts specified in the Confiscation Order fully satisfy the liability for a specific period including the tax liability, then there will be no further tax to pay (but there may be interest and penalties). Where the amount of the Confiscation Order was inadequate then NCA could pursue any further tax

liabilities. However, where the amount specified in the Confiscation Order exceeds the actual tax for a period, then NCA will not refund any difference, or allow excess amounts to be offset against other periods or taxes.

31. Mr Dunford submitted that the question of double jeopardy was examined in relation to concurrent civil recovery proceedings in *Peries & anr v SOCA*. The case was heard by Judge John Clarke in the First-tier Tax Tribunal. The appellant in that case argued that the tax recovery proceedings under section 317 of the 2002 Act should be stayed because of (*inter alia*) the alleged overlap with concurrent civil recovery proceedings. Judge Clarke said (at paragraph 48) that:

> "The nature of the proceedings in this Tribunal is that they are appeals against the assessments (and the associated penalty determination). As confirmed by the Special Commissioners in *Khan v Director of Assets Recovery Agency* the question which can be considered by the Tribunal under section 50(6) of the Taxes Management Act 1970 … on an appeal against an assessment fall under two categories. The first is whether ".. the appellant is overcharge, by an assessment other than a self- assessment". Under that sub-section, if on appeal the Tribunal decides that the appellant is not so overcharged, the assessment is to stand good. The burden of proof on that issue is therefore on the appellant in such an appeal. The other category of question, which *Khan* shows to be within the Tribunal's jurisdiction, is any issue concerning the validity of the assessment: see *Khan* at paragraphs 15 to 17. Again, these are matters on which the appellant in such proceedings must satisfy the Tribunal."

Thus, Mr Dunford submitted, the Tribunal is restricted on such an appeal to looking at the appropriateness of assessments, their validity, and their quantum.

32. At paragraphs 51 and 52 of his judgment Judge Clarke looked at the appellant's second ground of appeal. He concluded that the issues in the proceedings before him and those arising in the civil recovery proceedings were different. Accordingly, he held that any similarity of evidence which might be considered by, respectively, the High Court, and the Tax Tribunal would not justify a stay of the tax and penalty appeals before him. Judge Clarke distinguished the decision in *Swallow v Revenue and Customs Commissioners*, which was a case where HMRC had sought a stay of proceedings for six months to permit them to continue a criminal investigation into circumstances surrounding the marketing of a tax avoidance scheme. Judge Clarke held (at paragraph 52) that:

> "The present appeals are not in my view affected by the state of progress of the civil recovery proceedings, as the latter concern the separate question whether the property subject to the civil recovery claim is, or represents, the proceeds of crime".

Mr Dunford submitted that this is a judicial recognition that asset recovery and tax assessment are separate operations, even if evidential overlap occurs.

33. He further submitted that since the legislation under which the NCA acted is clear on its face (both as to meaning and intent) the resort by the Appellant to the guidance issued by HMRC in its Debt Management and Banking Manual is unnecessary, inappropriate and irrelevant. Mr Higgins relies on Judge Ian Huddleston's decision in *Martin v HMRC* but Mr Dunford considers that case to be supportive of the NCA's position in this appeal particularly paragraphs 41 to 48:-

> "41. The original confiscation order was ….for an amount reduced to £35,116.The Court's finding …..was limited to the assessment of the benefit derived by Mr Martin and the amount available to discharge it. In the view of this Tribunal that 'benefit' does not equate ….with the concept of 'liability'. By its nature, the concept of a liability- particularly one which is assessed to best judgment such as in the case of discovery assessments – is one which is of a much wider and more general application.
>
> 42. To the Tribunal's mind, that particular concept was not in the mind of the Crown Court, or indeed the Court of Appeal when assessing what benefit the appellant had derived from his criminal conduct. The two are separate jurisdictions and the approaches adopted are different even if they arise out of the same or similar facts.
>
> 43, 44…….
>
> 45. Subsequent to the settlement of what tax is properly due and payable, it then is logical that one looks at the terms of any confiscation order which may be in existence (and any payment made under it) to see to what extent that tax liability may already have been met by the payments made to the Crown to ensure that there is no double recovery.
>
> 46. That, to this Tribunal's mind, relates, however, to the question of enforcement rather than to the calculation of tax. It is clear that the question of enforcement falls outside the jurisdiction of this Tribunal, but it is accepted by HMRC that in no circumstances can there be double recovery for the same amount….."

34. Mr Dunford submitted that Mr Higgins also relies on the case of *R v Foggon.* In that case a chairman of a company used money paid into the company's account for his own private purpose and was successfully prosecuted for cheating the public revenue. The appellant appealed on the basis that the benefit was the unpaid corporation tax due from the company on the funds deposited in the bank account.

35. It was held that where a person misappropriates money from a company he would be liable to a confiscation order in the amount which he had misappropriated on the ground that the money was property obtained as a result of or in connection with the fraud. Section 71 (5) of the Criminal Justice Act 1988 did not apply as the corporation tax was due from the Company, not the appellant, so there was no

pecuniary advantage derived by him as a result or in connection with the commission of the offence. Mr Dunford submitted that this decision has no relevance to this Appeal.

36. Mr Dunford submitted that the Crown Court had only been concerned with landfill tax and had given no consideration to income or corporation tax. There is no evidence from the judgment relating to the Confiscation Order that any consideration was given to taxation at all, other than the Land Fill Tax. For double recovery to occur the Confiscation Order needed to be specific with regard to the income tax unpaid and the periods the tax covered. The Confiscation Order did not include such information nor does the tax position appear to have been discussed in the meetings between the parties to reach agreement. In the circumstances, the appeal should be dismissed and the assessment and penalty upheld.

Mr Harvey's submissions

37. Mr Harvey confirmed that the tax liability under the assessments was not dispute so that no evidence has been produced with regard there to. Mr Higgins had run Colraine Skip Hire as a legitimate business and paid the appropriate landfill and income taxes. 80% of the waste taken to the landfill site came from Colraine Skip Hire. The money paid for the waste was paid into two separate bank accounts. After the successful prosecution, the criminal benefit had been decided by agreement between the parties. Mr Higgins 'counsel had conceded that the benefit had accrued from 1998/9.

38. The Confiscation Order was designed to deprive Mr Higgins of the benefits of his criminal activity. Mr Harvey referred to *R v Waya* and the reference by Lord Walker at paragraph 2 to *R v Rezvi* :-

> "…The provisions of the 1998 Act are aimed at depriving such offenders of the proceeds of their criminal conduct. Its purpose is to punish convicted offenders, to deter the commission of further offences and to reduce the profits available to fund further criminal enterprises...."

Mr Harvey suggested that this was not a penalty, but a removal of the benefit arising from the criminal activity.

39. Mr Harvey submitted that the appeal had been incorrectly processed. The Attorney General's office had issued guidance in November 2009 to preclude the application of the non-conviction based powers (civil recovery/criminal taxation) subsequent to the successful implementation of criminal prosecution and confiscation in respect of the same matter. That is a view shared by HMRC and can be found in HMRC's debt management and banking manual at paragraph 900110, which states that SOCA assume responsibility for taxation functions in instances ;

> "where SOCA has considered criminal confiscation and civil recovery action and found neither is appropriate"***

40. He submitted that, in this case criminal investigation and proceedings were instigated and a conviction obtained. Subsequently, the then Assets Recovery Agency commenced confiscation proceedings in accordance with section 156 POCA. The outcome of the process was a Confiscation Order in February 2008 in the sum of £400,000. As the criminal conviction procedure had been successfully implemented the adoption of taxation powers is contrary to the Attorney General's guidance.

41. He submitted that this approach is logical because allowing proceedings under all heads would result in double or multiple recoveries to the Crown. The confiscation process and the Order applied by the Crown Court followed an extensive financial investigation and financial repor,t which encompassed the entire operation of the landfill site and Mr Higgins' only business interest in waste management. The correct procedure in this appeal under the Attorney General's Guidance was for SOCA to apply to the Crown Court again to amend the Confiscation Order on the basis that the amount was incomplete because the taxation matters had not been considered.

42. There is a skeleton argument in bundle D prepared by Mr Paul Taylor on behalf of Mr Higgins to which we refer. Mr Taylor states that in Mrs Traynor's report to the Crown Court she stated:-

> "The defendant constantly breached the fundamental licence conditions and consent conditions, and as a result was operating illegally throughout the seven year plus period when he operated Craigmore landfill site and his entire proceeds from the operation of the site are the proceeds of his crime."

43. The indictment on which Mr Higgins was found guilty was that:

> "On 39th May 2003…..*that he* did **keep** treat or dispose of controlled waste in a manner likely to cause pollution of the environment or harm to human health."

The keeping of waste on the site caused the criminal offence to have an enduring and retrospective aspect. The tax assessments, which have been raised, are for the years 1998/99 to 2003/4. The amounts assessed are based on the transactions appearing in the Bank account ****6316 and ****6324 which were disclosed during the confiscation process. The confiscation process considered these years and the tax casework undertaken by SOCA prior to raising these assessments did not result in any new or additional information.

44. Mr Taylor suggests that under the confiscation proceedings in section 156 POCA the court **must** take into account the conduct occurring up to the time it makes its decision and of the property obtained thereby. The benefit to the person is the value of the property obtained. He submitted that Mr Higgins behavior and property were properly considered, and the evasion of his tax liabilities were factored into the deliberations. The evasion of tax liabilities, as a pecuniary advantage, was a criminal benefit and as such had been recovered in the Confiscation Order.Mr Taylor submitted that the consideration of tax evasion, as a pecuniary advantage in the

confiscation process was recorded in Mrs Traynor's report at paragraphs 3.25, 3.26 and 4.10 to 4.17 inclusive.

45. We do not accept that the report related to Mr Higgins tax affairs in Higgins Waste. The enquiries she made were to ascertain a turnover figure from accounts, which had been lodged with HMRC. The accounts which were so lodged and which revealed that the correct amount of tax had been paid related to Colraine Skip Hire, are not disputed nor relevant to the Confiscation Order. At paragraph 4.14 she stated:

> " 4.14. I have made enquires with H M Revenue and Customs to establish the defendant's declared income in order to give an historical overview of the defendant's normal legitimate income. She then set out the details from Colraine Skip Hire.

At paragraph 4.16 she stated:

> "4.16 …the defendant details how from 1997 to 2001 in partnership with his brother 'John Higgins', he operated Craigmore Landfill Site as a disposal business known as 'Higgins Waste', that his accounts as produced do not include income from the landfill site during those years" and

> "4.17….the fact that his returns do not include any income from the Higgins Waste partnership, is indicative of no such returns being made. The Court may feel it is fair to question why, if the defendant was employing accountants to certify and submit returns to the Inland Revenue in respect of the accounts for Colraine Skip Hire during these years, he is unable to produce any similar certified accounts in respect of Higgins Waste."

46. We consider it was precisely because Mrs Traynor was unable to produce meaningful turnover figures that the totally artificial method of arriving at the 'benefit' was based on the cost of removing the waste material from the site. In none of the options she proposed to the court was there any mention of an income tax amount or a period to which it related.

47. Mr Harvey submitted that SOCA, in their statement of case' noted that Mr Higgin's counsel had taken the view that any tax due for the period 2003/4 would have fallen within the £400,000 and that SOCA ".. did not want to be side tracked by the potential issue of double recovery". Mr Higgins' counsel had taken the view that the court could not go back earlier than the date that POCA came into existence and as a result only the period from 24 March 2003, which was why Mr Higgins' offer was restricted to £400,000.

46. Mr Taylor also argued that the application of criminal taxation further to a confiscation order in respect of that criminality and prosecuted by the same agency, is disproportionate and as such a breach of AIPI and an abuse of process. See paragraphs 24 and 25 of *R v Edwards*;

> "24…..In response to an enquiry from the court, counsel for the respondent stated that where a confiscation order has been made, based upon a benefit

calculated by reference to the unpaid duty, the Customs and Excise authorities do not, as a matter of practice, seek recovery of the unpaid duty by way of civil proceedings. That both civil and criminal remedies are available is not in doubt. Should the Customs and Excise Authorities pursue a civil remedy where a confiscation order has been met, it is clear there would, in effect, be double recovery of the duty.

25. …. Mr Khokhar representing Customs and Excise confirmed in answer to the court's question that Customs and Excise do not intend to, and will not, institute civil proceedings against the appellant in respect of the duty…".

48. Mr Harvey submitted that if the amount payable under the Confiscation Order was not sufficient then NCA should have applied to the Court to have the matter re-considered rather than pursue the matter under the Taxes Management Act 1970. There is no evidence in this appeal that the NCA complied with its statutory obligation. In agreeing to the Confiscation Order, the court had looked at all the evidence and Mr Higgins' ability to pay and made a gross order accordingly. If a gross payment was ordered and the methodology for arriving at the criminal benefit was gross then tax was paid under the gross order.

49. The Confiscation Order was agreed on the basis that the criminal activity covered the whole period from 1996 to 2003 and was calculated as the total amount that Mr Higgins had gained from his criminal activity. In the circumstances of SOCA not having put the matter before the original court and that the period of the confiscation order was from 1996 to 2003 the appeal should be allowed and the assessment and penalty cancelled.

Additional submission by Mr Harvey.

50. Subsequent to the hearing, Mr Harvey submitted a written submission with regard to the appropriateness of the penalty. He submitted, reciting from paragraph 12 of *R v Waya* that:

"It is clear law, and was common ground between the parties, that this imports (A1PI), via the rule of fair balance, the requirement that there must be a reasonable relationship of proportionality between the means employed by the state in, inter alia, the deprivation of property as a form of penalty, and the legitimate aim which is sought to be realised by the deprivation".

51. The Convention requires that a measure, which interferes with peaceful enjoyment of property, should be proportionate to the object for which it is imposed. The purpose of the tax assessment and the related penalties assessments raised under the auspices of POCA is to remove from criminals the pecuniary proceeds of their crimes. These penalties assessments cannot be viewed in isolation. They arise directly from the criminal behaviour for which Mr Higgins has been prosecuted. They are further to the criminal penalties and confiscation applied against Mr Higgins duplicating the punishment and as such they are disproportional and in convention of A1PI.

52. The penalties have been calculated as 75% of the tax lost. This was on the basis that the mitigation given for the disclosure was restricted to 5% on the basis that the disclosure was not made at the very outset. Mr Higgins had indicated that no records had been kept nor returns made to HMRC at the time of Mrs Traynor's report in January/February 2007. The mitigation increased in relation to co-operation but was restricted to 20%. From the outset Mr Higgins fully co-operated with SOCA. The mitigation was increased for the size and gravity of the matter but restricted to 15%.

53. Referring to the National Audit office document 'Managing Civil Tax Investigations' page 29 figure 9 shows that 74% of cases had penalties of less than 30% applied and only 6% had penalties in excess of 50% applied. In view of the above Mr Harvey submitted that the penalties sought in this appeal are excessive and should be reduced to a figure in the region of 10-20%.

54. In a letter dated 7th November 2014 NCA objected to these submissions as it had been agreed that the case would be heard in one day and it would be decided on the basis of double recovery. However, he relied on the evidence provided to the tribunal (see paragraph 6 above). The reviewing officer in his letter of 29 November 20121 to Mr Higgins did in fact increase the mitigation and lowered the level of the tax geared penalties to 60%. The NCA saw no reason why the penalty should be reduced further.

The decision

55. We have considered the law and the evidence and we partially allow the appeal. We think it would be helpful to suggest a figure for the maximum amount that Mr Higgins had obtained from his criminal activity. The court had been given two sets of figures namely:

- Those of the prosecution between £1,336,254 to £2,321,754. The average in that range is £1,829,004. (£1,336,254 + £2,321,754 = £3,658,008 divided by 2).

- The defence figures were in the range £1,298,750 to £1,696.754. The average in that range was £1,497,752. (£1,298,750 + £1,696,754 = £2,995,504 divide by 2).

- If we take the average of both ranges together, the maximum figure would have been £1,663,378. (£1,497,552 +£1,829.004 = £3,326,756 divided by 2)

- We shall use the figure of £1,663,378 as the maximum amount that Mr Higgins could have to pay under the Confiscation Order. That figure never needed to be agreed as an absolute figure as Mr Higgins' offer, which was accepted, was £400,000. There is no doubt in our minds that if Mr Higgins had paid £1,663,378 he would have paid back all the benefit that he had received from his criminal activity. As such, that sum would have included any income tax due and penalties because it represents the totality of his liability as it was a gross figure, albeit net of Landfill Tax.

- It is accepted that the court considered that the payment of £400,000 was the best that Mr Higgins could afford. A confiscation order is assessed under two criteria. The first as to the monetary value of the criminal act. The second as to what defendant can reasonably afford. On any showing, however, Mr Higgins has only paid a quarter of his criminal gain.

- We have decided that it is open to the NCA to consider assessments under the Taxes Management Act 1970. We have decided that whether Mr Higgins should have to pay more than the £400,000 will depend on whether any additional payments are proportionate.

We have needed to arrive at a maximum figure to be able to assess the tax and penalties, which we consider are due, as appears later in this decision.

Can the NCA raise a tax assessment?

56. It has been argued that SOCA has used the incorrect mechanism in arriving at the tax liability. It ought to have followed the Attorney General's Guidance and referred the matter back to the court which fixed the Confiscation Order. We do not agree. That Court order was made in the criminal court in 2008 and, in our view, did not specifically deal with income tax in terms which showed the amount of tax and the periods in dispute. We share Judge Clarke's view in *Peries* when he concluded that the issues in the proceedings before him and those arising in the civil recovery proceedings were different. Accordingly, he held that any similarity of evidence which might be considered by, respectively, the High Court, and the Tax Tribunal would not justify a stay of the tax and penalty appeals before him.

57. Having prosecuted the Criminal offence successfully, SOCA was able to take a view with regard to the income tax liabilities of Mr Higgins. Section 317 anticipates that SOCA could elect to act as HMRC, which it did. If that was not anticipated as an option to SOCA, then presumably the legislation would not have been so drafted. As can be seen from this decision, having arrived at assessments, which in this appeal are not disputed, it is open to SOCA, now NCA, to look to Mr Higgins to pay the amount outstanding and a penalty.

58. We have decided in this appeal the total monetary value of Mr Higgins criminal activity would have been £1,663,378. The court, in assessing the Confiscation Order, then had to decide how much Mr Higgins could reasonably be expected to pay. We were surprised that the Court settled at £400,000. We believe that that was because Mr Higgins' counsel had assessed his liability from 2003 and counsel for the prosecution could follow that logically and presumably felt that if the amount was increased it might well give rise to further proceedings. We accept that is conjecture on our part, but we note that Mr Higgins had £1,200,000 of assets in 2008 and an order of one quarter appears generous, but as it has been decided at that level we are not in a position to dispute it.

59. Having achieved a figure of £400,000 Mr Higgins was prepared to accept that the matter had been settled on Mrs Traynor's model at Option 1, which included the full

period from 1996 to 2003. SOCA also agreed that basis so that the payment of £400,000 must have been gross as it was carved out of the gross figure of £1,663,378. (See paragraph 55 above)

> "It appears that Judge Grant understood that the figure, which Mr Higgins could afford namely the £400,000, had been assessed on the basis of Option 1 which was a gross calculation."

To the extent that it was gross it must have included an appropriate amount of income tax in the payment. It matters not that no full details were given as to the tax and the periods. The position would have been different if the payment had been net. But both parties agreed the Judge's assessment under option 1.

60. The assessments have not been disputed and we therefore find that they are to best Judgment subject to the argument as to double recovery. The penalty has also been assessed and we consider that the basis on which it has been assessed is correct. It is accepted that Mr Higgins committed a substantial criminal offence and that he deliberately failed to declare any profits from the Higgins Waste Business. The NCA have considered the original penalty and have themselves decided to reduce it from 75% to 60%. We consider their agreement to be reasonable. We note from Mr Harvey's comments that 6% of the penalties were at the higher figure. We suspect those also dealt with substantial offences.

61. Having established, in this appeal, that the Confiscation Order was of a gross amount, we have decided that if Mr Higgins had paid the full gross sum of £1,663,378 any income tax liability he might have had would have been included in that payment. As the £400,000 represented the most he could reasonably pay it must have included such tax as was due on it. To avoid any double recovery of income tax it is necessary to assess the amount of tax, which has been included in the payment of £400,000, and deduct it from the assessments.

62. The full assessment to tax/ NIC has been agreed at £71,562.10. The amount of tax included in the gross payment of £400,000 under the confiscation order is therefore £17,208.86 (£400,000/ 1,663,378 x 71,512.10 = £17,208.86). To avoid a double recovery, the assessment needs to be reduced by that amount. We therefore assess the tax at £54,353.24 (£71,562.10 less £17,208.86 = £54,353.24). The interest assessed of £35,100.13 consequently requires to be reduced to £26,659.44 (£54,353.24 / 71,562.10 x £35,100.13 = £26,659.44. Tax and interest therefore total £81,012.68. The penalties are also consequently reduced to the tax/ NIC of £54,353.24 at 60% which results in a penalty of £32,611.94. We allow the appeal in part.

A1P1

63. The Court had to consider whether a Confiscation Order of £400,000 was disproportionate within the terms of Protocol 1 (A1P1) and decided that it was not. A consequence of our decision to confirm a tax liability of £81,012 and a penalty of

£32,612, making a total liability of £117,624, effectively increases the Confiscation Order by that amount. We need therefor to consider whether a total liability of £517,624 is disproportionate. Mr Higgins had in excess of £1,200,000 in 2008 when the Confiscation Order was made. It is now some 6 years since that order was made. Mr Higgins had sold the business for £600,000 and we cannot think that a Confiscation Order equivalent to less than half his assets can be disproportionate and we so decide.

64. We refer to the judgment in R *v Waya* . Lord Walker stated at paragraph 27:

> "27. Similarly, it can be accepted that the scheme of the Act (POCA) and of previous confiscation legislation, is to focus on the value of the defendant's obtained proceeds of crime, whether retained or not. It is an important part of the scheme that even if the proceeds have been spent, a confiscation order up to the value of the proceeds will follow against legitimately acquired assets to the extent that they are available for realisation."

There appears to be no question that Mr Higgins had assets available for realisation of an amount substantially greater than either £400,000 or £517,624.

65. We have not heard argument from either party on this point although Mr Harvey has addressed us generally with regard to the penalty. It might be argued that the penalty applied in relation to the assessment is designed to ensure that a taxpayer does not avoid his tax liabilities again. In that context the Confiscation Order is designed to do the same and that there is a double recovery. In ***R v May*** Lord Bingham and the Committee stated in the end note at paragraph 48 (1) and (2):

> "48 (1). The legislation (POCA) is intended to deprive defendants of the benefit they have gained from relevant criminal conduct, whether or not they have retained such benefit, within the limits of their available means. It does not provide for confiscation in the sense understood by school children and others, nor does it operate by way of fine. The benefit gained is the total value of the property or advantage obtained, not the defendant's net profit after deduction of expenses or any amounts payable to co-conspirators.
>
> (2). The court should proceed by asking the three questions …: (i) Has the defendant (D) benefited from relevant criminal conduct? (ii) If so, what is the benefit D has obtained? (iii) What sum is recoverable from D? ….These are separate questions calling for separate answers, and the questions and answers must not be elided."

66. We have decide that the court did not specifically consider any income tax liability when reaching its Confiscation Order, but as the parties accepted that Option 1 was the basis for the entire criminal value then, had Mr Higgins paid the entire £1,663,378, he would also have discharged his tax liabilities as the methodology was based on a gross liability. The Confiscation Order was made specifically so that he would have an opportunity to pay the agreed sum and thereby avoid going to jail. The payment was not therefore a 'fine' but to avoid a jail sentence. As Mr Higgins has

agreed that he had not paid the appropriate amount of tax, it was proportionate for the NCA to raise a penalty, as this was specifically designed to ensure that Mr Higgins observed his responsibilities with regard to his tax affairs in the future. The penalty is a 'fine' and different in concept to the payment under the Confiscation Order. In the circumstances we do not think the imposition of the reduced penalty is either disproportionate under A1P1 or a double payment.

67. 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.

DAVID S PORTER
TRIBUNAL JUDGE

RELEASE DATE: 29 January 2015