[2019] UKFTT 208 (TC)

TC07056

Appeal number: TC/2013/07311

EXCISE DUTY - assessment - penalty - no actual or constructive knowledge - application for stay - refused - appeal upheld - penalties not confirmed

FIRST-TIER TRIBUNAL
TAX CHAMBER

GERALD QUINN **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT

Sitting in public at Belfast on 28 February 2019

Danny McNamee of McNamee McDonnell, Solicitors, for the Appellant

Richard Evans of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

The issue

1. This is an undated appeal which was sent to the Tribunal on 22 October 2013 and acknowledged by the Tribunal on 1 November 2013. It relates to a decision by the respondents ("HMRC") dated 8 July 2013 whereby an assessment in the sum of £39,087 for unpaid excise duty in relation to 15,426 litres of wine ("the Goods") was issued under Schedule 12 (1A) Finance Act 1994 and an Excise Wrongdoing Penalty for £7,817 was issued under Schedule 41 Finance Act 2008. That decision was reviewed, but only in relation to the assessment, and upheld on 24 September 2013.

2. The appellant's liability to pay the excise duty on the Goods arises under Regulation 13 of the Excise Goods (Holding Movement and Duty Point) Regulations 2010 ("the 2010 Regulations").

Decision

3. The key fact that was conceded at the outset of this hearing was that HMRC had accepted that the appellant had had no actual or constructive knowledge as to whether duty had been paid.

4. In those circumstances the appeal is allowed and the penalty is not confirmed.

The facts

5. There is no dispute in relation to the facts.

6. On 13 July 2012, officers of the United Kingdom Border Force ("UKBF") intercepted vehicle 03CN3025, with trailer TD09, at the Eastern Docks, Dover. The vehicle and trailer were carrying the Goods which had been loaded with wine going from MT Manutention, France and destined for Seabrooks Warehousing, Barking, Essex.

7. The appellant was the driver of the vehicle and Officers Ausher and Smith spoke with him.

8. The appellant confirmed that he was employed by a firm called "Quinn Brothers" in Donegal. Despite his surname he had no connection with that firm. He said that he had been working intermittently for that firm for some three or four months. He stated that he had "swapped" trailers near Calais the previous day, ie 12 July 2012.

9. On checking HMRC established that the appellant had previously been intercepted on 12 May 2012 and had stated then that he worked for Quinn Brothers.

10. The appellant furnished the officers with a CMR (International Consignment Note) for the goods. The CMR stated the Administrative Reference Code ("ARC") which is a unique number and was 12FRG0074000036806368.

11. The ARC number is generated by the Electronic Movement Control System ("EMCS") which is used to monitor movements of excise goods under duty suspension in the EU. It is a centralised computer system which allows for real time notification of despatch and receipt of goods between the consignor and the consignee. The consignor must complete and submit a message known as an electronic administration document (e-AD) using the EMCS before a movement of goods take place. Once the information has been validated the EMCS then generates a unique ARC which is valid for one movement of goods only from the exporting bond to the receiving bond.

12. The same ARC number had been presented to UKBF officers earlier that day, ie 13 July 2012, at approximately 3:35 hours where a vehicle 04MN6039 was observed pulling trailer TD09. The e-AD suggested that the goods were going to Seabrook Warehousing Limited, Welbeck Wharf, River Road, Barking, Essex IG11 0JE. The transport was stated as TDS.

13. The officers seized the goods as liable to forfeiture under Regulation 88 of the 2010 Regulations. The vehicle and trailer were also seized as liable for forfeiture. A Seizure Information Notice, a Notice 12A, Warning Letter and Notice 1 were issued to the appellant.

14. The CMR for this seizure and the CMR on record for the previous use of the ARC were compared by a UKBF officer and a number of discrepancies were noted.

15. Seizure Information Notices were issued to six other parties who were believed to have possibly had some involvement with the movement of the Goods.

16. On 18 June 2013, HMRC wrote to the appellant regarding their intention to issue an assessment and penalty and enclosed fact sheets. HMRC requested that any relevant information be furnished to them by 5 July 2013.

17. On 1 July 2013, the appellant telephoned HMRC and agreed to supply information in writing about his employment with a firm he described as Quinn International, being the haulier whom he now claimed had arranged the movement of the goods. He said that he had only worked for them for a month, that he would have been paid in cash and that he had not been paid. He said that despite the name he was not connected with the firm. He agreed to provide written details for Quinn International.

18. The appellant failed to provide any further information. The only information provided in relation to this appeal is in his witness statement (see paragraph 23 below) and in particular that states that in 2012:

> "I worked for a number of different companies including Quinn Brothers International based in Donegal. I received details of my work from Mr Thomas Quinn, one of the owners…".

19. On checking, HMRC noted that he had again been intercepted on 23 October 2012, which was after the seizure, and had stated that he then worked for

Quinn International. HMRC have been wholly unable to trace any one of the three businesses referred to by the appellant.

20. On 8 July 2013, the assessment for the excise duty on the Goods and the penalty were issued to the appellant. The appellant was the only person assessed as HMRC had been unable to locate the haulier and no further information had been forthcoming from the appellant about his employer. Furthermore none of the other parties had responded to the Seizure Notices issued by the UKBF.

21. On 29 July 2013, the appellant's solicitors wrote to HMRC requesting a review. On 24 September 2013, HMRC responded advising them that the decision, in relation to the assessment only, had been upheld and giving the reasons for that.

HMRC's evidence

22. HMRC's evidence was contained within the witness statements of Officer Ausher dated 17 April 2014 and 30 September 2014 and Officer Smith dated 25 April 2014 and 29 September 2014.

The appellant's evidence

23. In his witness statement dated 2 May 2014, being his only evidence before this Tribunal, the appellant stated that during the course of 2012 he worked for a number of different companies including Quinn Brothers International based in Donegal. He received details of his work from Mr Thomas Quinn who was one of the proprietors. He had collected the goods "on the Continent" after having done a trailer change. He received the keys to the vehicle which he was driving at Thorough Services in London from a driver who had been working on the vehicle before him and whose Christian name was Richard. He had intended to return the vehicle to Thorough Services after having delivered the load to Seabrook Bond.

The legislation in relation to excise duty

24. HMRC have the power under Section 1 of the Finance (No 2) Act 1992 to make regulations that fix the time when the requirement to pay a duty owed will come into effect. The time at which a person becomes required to pay such a duty is known as an "excise duty point".

25. Regulation 13 of the 2010 Regulations reads as follows:-

> "(1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excuse 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 required in, and transported to the United Kingdom from, another Member State by P.

(4) For the purposes of determining whether excise goods referred to in the exception in paragraph (3)(b) are for P's own use regard must be taken of –

(a) P's reason for having possession or control of those goods;

(b) whether or not P is a revenue trader;

(c) P's conduct, including P's intended use of those goods or any refusal to disclose the intended use of those goods;

(d) the location of those goods;

(e) the mode of transport used to convey those goods;

(f) any document or other information relating to those goods;

(g) the nature of those goods including the nature or condition of any package or container;

(h) the quantity of those goods and, in particular, whether the quantity exceeds any of the following quantities:

10 litres of spirits,

20 litres or intermediate products (as defined in article 17(1) of Council Directive 92/83/EEC),

90 litres of wine (including a maximum of 60 litres of sparkling wine) …

(i) whether P personally financed the purchase of those goods;

(j) any other circumstance that appears to be relevant.

(5) For the purposes of the exception in paragraph (3)(b) –

(a) 'excise goods' does not include any goods chargeable with excise duty by virtue of any provision of the Hydrocarbon Oil Duties Act 1979 or of any order made under section 10 of the Finance Act 1993;

(b) 'own use' includes use as a personal gift but does not include the transfer of the goods to another person for money or monies worth (including any reimbursement of expenses incurred in connection with obtaining them).

(6) Paragraphs (1) and (2) do not apply –

(a) where the excise duty point and the person liable to pay the duty are prescribed by the Excise Goods (Sales on Board Ships and Aircraft) Regulations 1999, or

(b) in the case of chewing tobacco."

26. Regulation 88 of the 2010 Regulations reads as follows:

"If in relation to any excise goods that are liable to duty that has not been paid there is –

(a) a contravention of any provision of these Regulations, or

(b) a contravention of any condition or restriction imposed by or under these Regulations,

those goods shall be liable to forfeiture".

27. Article 7(2) of Directive 2008/118 states:-

"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."

28. Paragraph 5 of Schedule 3 of the Customs and Excise Management Act 1979 Act ("the 1979 Act") provides as follows:-

"If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of any thing no such notice has been given to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with, the thing in question shall be deemed to have been duly condemned as forfeited."

29. Section 139 of the 1979 Act provides for seizure and detention of things liable to forfeiture.

30. Section 154 of the 1979 Act provides that the burden of proof lies with HMRC.

Overview of the appellant's Skeleton Argument for the First Tribunal in October 2014

31. The appellant does not dispute the factual background. The appellant argues that it is clear that the appellant is neither the owner of the goods nor the lorry and thus is not a person who would have standing in relation to forfeiture proceedings under the 1979 Act.

32. Therefore HMRC's reliance on a failure to mount a challenge to the legality of the seizure is misplaced as the appellant was not the owner of the goods and therefore was unable to challenge the legality of the seizure.

33. The appellant was a mere courier or custodian of the Goods. He had no actual knowledge of any intention to defraud HMRC.

34. No combination of the effect of Schedule 3 of the 1979 Act, or Regulation 13(1) of the 2010 Regulations, when applied to the facts of the case, can impose upon the appellant a liability for excise duty.

35. The appellant relied on numerous authorities to some of which I refer below.

Overview of HMRC's Skeleton Argument for the First Tribunal in October 2014

36. HMRC argued that the seizure of the Goods was not challenged and therefore by virtue of paragraph (5) of Schedule 3 of the 1979 Act, the Goods were condemned as forfeit by operation of law.

37. It was therefore not open to the appellant to contend that the Tribunal should find as fact anything that would render the Goods illegally seized by UKBF. It is not open to the appellant to argue that the Goods did not meet the criteria of Regulation 13(1) of the 2010 Regulations and, in particular, that the Goods were UK duty paid.

38. Where the liability to forfeiture has not been challenged, paragraph (5) of Schedule 3 of the 1979 Act provides that the goods in question shall be deemed to have been duly condemned as forfeited. As that is the conclusive determination on the question of liability to forfeiture of the Goods, HMRC may assess for duty under Section 12 of the 1994 Act and impose penalties under Schedule 41 of the 1994 Act.

39. The appellant is liable to pay the assessment as, in terms of Regulation 13 of the 2010 Regulations, he was holding the Goods intended for delivery.

40. HMRC distinguished *Carlin v HMRC*[1] ("Carlin") relying rather on *Regina v Taylor & Wood*[2] ("Taylor & Wood").

Preliminary and Procedural matters

Background

41. This is a very unusual case in that this appeal was originally heard by the Tribunal on 20 October 2014 in Belfast. Unfortunately, no decision has been released or provided by the Tribunal to the parties. The President of the First-tier Tribunal

[1] [2014] UKFTT 782 (TC)

[2] 2013 EWCA Crim 11 51,

(Tax Chamber) instructed that the appeal be relisted for a new hearing before a new panel. This hearing is precisely that.

Possible late appeal

42. As can be seen the assessment and penalty were issued on 8 July 2013 but the subsequent review referred only to the assessment as did the Notice of Appeal which was received by the Tribunal well outwith the 30 day time limit for the issue of the penalty.

43. I was not addressed on the matter but HMRC's Statement of Case very clearly addressed both the substantive issues and the penalty. HMRC's original Skeleton argument referenced the Statement of Case and also argued that the penalty was not "disproportionate, unfair and unreasonable".

44. Further, if the appellant succeeds in relation to the assessment then the penalty falls.

45. Mr Evans intimated at the outset of the hearing that he was seeking an adjournment of the proceedings based on a technical argument. That being the case I took it as read that if the appeal in relation to the penalty was late then HMRC had consented to any such late appeal and that they considered that the Notice of Appeal covered both the appeal and the penalty.

Application for adjournment

46. The night before the hearing, whilst both I and Mr McNamee were *en route* to Belfast, Mr Evans intimated to the Tribunal that he sought an adjournment of these proceedings. Mr McNamee argued that he had not had an opportunity to consider the matter since he first became aware of it when he arrived at the Court. I agreed. On that basis I issued Directions that both parties should lodge with the Tribunal and each other, written Submissions in relation to the Application and they have done so.

47. Both parties agreed that there should be no further substantive hearing in this matter and that any decision, whether on the Application or the substantive merits of the appeal, should be determined on the relevant papers in the absence of the parties.

48. HMRC's application was predicated on the basis that, on 25 February 2019, Reuters had reported that the Court of Appeal in *HMRC v Perfect* (now cited at 2019 EWCA Civ 465 and released on 19 March 2019) had intimated that they intended to make a reference to the CJEU for a preliminary ruling. The terms of that reference are set out at paragraph 71 in the Judgment and that reads as follows:-

> "71. Accordingly, in these circumstances, we have concluded that the issue is not *acte clair*. We propose, therefore, to refer the following questions (the drafting of which has been agreed between the parties) to the CJEU for a preliminary ruling:
>
> (1) Is a person ('P') who is in physical possession of excise goods at a point when those goods become chargeable to excise duty in Member State B liable for that excise duty pursuant to Article 33(3) of Directive 2008/118/EC ('the Directive') in circumstances where that person

(a) had no legal or beneficial interest in the excise goods;

(b) was transporting the excise goods, for a fee, on behalf of others between Member State A and Member State B; and

(c) knew that the goods he was in possession of were excise goods but did not know and did not have reason to suspect the goods had become chargeable to excise duty in the Member State B at or prior to the time that they became so chargeable?

(2) Is the answer to question (1) different if P did not know that the goods he was in possession of were excise goods?"

49. Mr McNamee vigorously opposed the Application.

50. The Application sought an adjournment of the final determination in this case until the determination of *HMRC v Perfect* described as "currently before the Court of Appeal". I take the view that this is quite simply an application for an indefinite stay of the proceedings in terms of Rule 5(3)(j) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules"). That is a case management decision for the tribunal (see Discussion below).

51. Regrettably neither party referred to any specific authorities on case management decisions albeit Mr McNamee stated that any such decision is not subject to appeal. In that he is wrong as the many cases on the subject demonstrate.

HMRC's Submission

52. In essence, HMRC's argument was that following the original appeal hearing in October 2014 there had been "substantial developments in the case law in relation to the meaning of 'holding' under Regulation 13(2)(b)." In particular they cited *Taylor & Wood, Regina v Tatham*[3] and the Upper Tribunal decision in *HMRC v Perfect* ("Perfect")[4].

53. Given their concession (see paragraph 3 above) the ultimate decision of the Court of Appeal in *Perfect* would be determinative of this appeal.

54. Since the Court of Appeal has found it necessary to make a reference then the Tribunal would have found it necessary to make a reference in any event.

55. It is regrettable that the case could not have been decided in 2014.

56. The appellant would suffer limited prejudice if the case were adjourned since payment of the duty has been postponed.

[3] 2014 EWCA Crim 226

[4] 2017 UKUT 476 (TCC)

My preliminary observations

57. Before turning to the appellant's submissions I point out that HMRC's Submission is misconceived in that both *Taylor & Wood* and *Tatham* were not only decided before the original hearing in this appeal, but paragraph 26 of HMRC's own original Skeleton Argument had relied on *Taylor & Wood*.

58. Furthermore, paragraph 9 of the appellant's original Skeleton Argument explicitly referred to and relied on those two cases, amongst others.

59. In previewing this appeal, being aware of *Perfect,* I had crosschecked the appellant's original Skeleton Argument with it and identified the fact that the Upper Tribunal in *Perfect* reviewed, and approved, not only those cases but also most of the other cases relied upon in that Skeleton Argument.

60. The Upper Tribunal in *Perfect* decided very clearly that, based on those authorities:

> "The exception from liability, established by the case law, for those who are 'innocent agents', extends to those who lack any knowledge (actual or constructive) of the fact that the goods are or will be duty unpaid….Such persons are not 'making the delivery' or 'holding' the goods for the purposes of the 2010 Regulations"

61. The Upper Tribunal did also consider whether there was a need to refer a question to the CEJU in a context where even HMRC had made it clear that they did not invite a reference if the court found against them. The Upper Tribunal did not consider the matter to be *acte clair.* I do not know, and certainly would not attempt to guess, whether the CJEU will agree with the Court of Appeal that it is *acte claire* or prefer the Upper Tribunal view that it is not.

The appellant's Submission

62. At the heart of the appellant's Submission is that this matter had previously been heard in 2014 and, for reasons wholly unconnected with the appellant, judgment had not been handed down by the Tribunal.

63. It is trite law that any trial should be within a reasonable timescale.

64. The appellant is entitled to certainty.

65. There is no overriding public interest concern if the Application were to be refused.

66. HMRC have conceded that if their appeal to the Court of Appeal in *Perfect* is ultimately dismissed then the appellant would succeed in this appeal.

67. Accordingly the Tribunal's obligation is to recognise the overriding duty of fairness to the appellant. It cannot be right to seek an adjournment in the hope that the understanding of the law will be changed at some future date.

My preliminary observations

68. In the same way as I made preliminary observations on HMRC's Submission, I point out that the duty of fairness applies to both parties. As is made clear in *Transport for London v O'Cathail*[5], at paragraph 42, it is appropriate that the overarching fairness factor should be taken into account in assessing the effect of the decision, as to whether or not to adjourn, on *both* sides. *Dhillon v Asiedu*[6] at paragraph 30 confirms that the decision as to whether or not to adjourn is a balancing exercise which must take into account all relevant factors. Both parties are entitled to have a case dealt with fairly and justly. The exercise of judicial discretion must be in accord with the overriding objective.

69. I refer to Rule 2 of the Rules which reads as follows:-

2.—Overriding objective and parties' obligations to co-operate with the Tribunal

(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
(b) avoiding unnecessary formality and seeking flexibility in the proceedings;
(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
(d) using any special expertise of the Tribunal effectively; and
(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or
(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and
(b) co-operate with the Tribunal generally."

70. As far as elapse of time is concerned of course I am well aware of Article 6 of the European Convention on Human Rights and the relevant part provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…"

71. I deal with the Application in more detail below.

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[5] [2013] EWCA Civ 21

[6] [2012] EWCA Civ 1020

Admissible evidence

72. The original Bundles and evidence were produced to the Tribunal. There is no record of that first hearing. Mr McNamee argued that the supplementary witness statements of the two officers had been tabled at the hearing and that he had objected to them being admitted in evidence. He repeated his objection.

73. I did not have the Tribunal file with me and the statements were not in the Bundle. However, I did have copies of them and I was certain that I had extracted them from correspondence with the Tribunal prior to the original hearing. Given the elapse of time, Mr McNamee very fairly indicated that his recollection might have been at fault. I orally intimated that they would be admitted in evidence.

74. When writing this decision, I have checked the file and they were served on the appellant on 2 October 2014 and lodged with the Tribunal on 7 October 2014 which was well in advance of the hearing. No objection was lodged. They are therefore confirmed to be admitted in evidence and the findings in fact reflect that.

Findings in Fact

75. The findings in fact are extensive notwithstanding the concession referred to in paragraph 3 above which, in normal circumstances, would render such findings redundant.

76. The reason for that is simple, as is the reason for setting out the parties arguments before the previous Tribunal. It is the duty of the FTT to make findings in fact and I had a last minute application for adjournment in these proceedings which, if granted, would have meant that the relevant facts might not have been found at this juncture. Having due regard to Rule 2, I decided that the decision should be as complete as possible.

77. I also observe that the Court in *Coast Telecom v HMRC*[7] ("Coast") having considered *HMRC v RBS Deutschland Holdings GmbH*[8] ("RBS") stated at paragraph 22 that:

> "Where issues of law alone remain in dispute it can be seen that the imminent consideration of the position under EU law could justify a stay of the appeal proceedings. But the same does not hold good where the facts remain to be determined. Many of the questions raised in the references are themselves fact-specific. Accordingly, I do not consider that it would be expedient to order a stay in circumstances where the facts remain to be found by the first instance tribunal."

[7] [2012] UKFTT 307

[8] [2007] STC 307 (TC)

Discussion

78. The decision as to whether or not to grant the Application, like other case management decisions, is an exercise of judicial discretion. The principles applicable thereto should be well known but, beyond a reference to fairness and the principles arising in applications for late appeals, I was referred to no relevant authorities and the authorities (and law such as Article 6) that I cite are derived from my own knowledge.

79. As I have indicated above, this involves a balancing exercise. In *Martland v HMRC*[9] ("Martland") at paragraphs 43 to 47 the Court set out the approach to the exercise of judicial discretion with particular reference to late appeals. Like Mr McNamee, I consider that the Application in this instance is not dissimilar to an application for a late appeal in the sense that similar principles should be considered.

80. *Martland* states at paragraph 43 that:

> "…particular importance is to be given to the need for 'litigation to be conducted efficiently and at proportionate cost.' ".

and at 44 that the reasons for delay should be considered and then the FTT should:

> "… move onto its evaluation of 'all of the circumstances of the case'. This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission."

81. Lastly, at paragraph 45 the Court stated "… The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist".

82. At paragraph 33, in a completely different context but yet also dealing with case management decisions, the Court in *Gardner Shaw UK Ltd and others v HMRC*[10] ("Gardner") stated that:

> "The interests of justice include upholding the finality of court and tribunal decisions and not undermining the appeal process."

83. I cite that case because the appeal process in this instance should have concluded many years ago (see paragraph 89 below).

84. There are a number of cases dealing with opposed applications for a stay (or in Scotland a sist) of proceedings pending a decision in another court. Paragraph 22 of *RBS* is often cited and it reads:

> "Furthermore, at page 8 of the decision, the Tribunal made a pronouncement to the effect that it would sist proceedings against the wish of one of the parties pending a decision in another court only where that decision would be determinative of the issues before the Tribunal. We do not recognise that proposition as one reflecting normal practice in relation to the exercise of a discretion to sist. As we would see it, a Tribunal or court might sist proceedings against the

[9] [2018] UKUT 178 (TCC)

[10] [2018] UKUT 419 (TCC)

> wish of a party if it considered that a decision in another court would be of material assistance in resolving the issues before the Tribunal or court in question and that it was expedient to do so."

85. There is in my mind no doubt that if the CJEU chooses to answer the questions posed in the reference then that would be of material assistance. The problem is whether it is expedient.

86. The question of expediency was discussed by Judge Mosedale in the FTT hearing in *Gardner*[11] where, having considered *RBS* and other cases she stated at paragraphs 14 and 15 that:

> "14…Clearly, no stay should be ordered behind the decision in another appeal if it was not expected to be of material assistance in determining the appeal in question. But this is what I think that Court of Appeal meant by requiring there to be 'solid grounds' before a stay could be contemplated.
>
> 15. And whether an appeal should be stayed behind a decision in another appeal which is expected to be of material assistance clearly requires the Tribunal to conduct a balancing exercise between the parties. Once it is established that there is a pending decision likely to be of material assistance in the determination of the appeal before the tribunal, I do not think that either court ruled that there was some kind of presumption against or in favour of a stay: it is simply a question of balancing the risks of injustice to each party. And that is what I take the Court of Session to have meant by the word 'expedient' ".

87. I agree.

88. Therefore I turn to all of the circumstances of this case and look at the balancing exercise. The circumstances in this case are, one would hope, unique.

89. The only reason that I heard this appeal, of new, was because for reasons that are much regretted by the Tribunal and clouded in obscurity, the original decision cannot be found and appears not ever to have been issued.

90. I am clear that if this were the first hearing of this appeal in the normal course of events, even if the factual matrix was some years ago, as is not unusual in some of the cases before this Tribunal, then I may well have decided to stay the appeal as requested.

91. However, even assuming that Brexit does not muddy the waters, and the reference proceeds in the "normal" way it will be some considerable time before the issue reverts to the Court of Appeal. It is not certain that the questions, as posed, will be answered.

92. The duty in this case has been postponed on the grounds of hardship. I accept that the appellant does not have the means to pay it. That is not relevant in terms of the assessment but I say that because he has had to deal with this uncertainty for what is almost six years and in addition there is the question of the penalty.

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[11] [2018] UKFTT 313

93. Had this appeal been reheard even three days earlier then there would have been no Application. The appellant is extremely unlucky on at least two counts and those are the unique circumstances that apply in this appeal and tilt the balance in his favour.

94. Firstly, he could, and should, reasonably have expected a decision in this matter to have been issued before Christmas 2014 since the guidelines are that decisions in cases such as these should usually be issued within a month of the hearing. Article 6 is very clear that he is entitled to a trial within a reasonable timescale. Effectively, although there was a hearing in 2014 it is to all intents and purposes null and void. March 2019 is not a reasonable timescale.

95. No fault can be attributed to him, or indeed HMRC, for the delay in this matter. I accept that he has every right to feel very aggrieved and that as a result of that delay he is now potentially facing a further delay of what might be years.

96. The second fact is that had the appeal been heard even a few days earlier, given that the original Skeleton Argument relied on the law that was canvassed, and approved, in *Perfect* he might reasonably have expected that his appeal would have been successful.

97. In any event if it had been heard, say in 2016, before *Perfect* was decided in the Upper Tribunal the FTT in *Perfect* in 2015 had come to the same decision in relation to duty as the Upper Tribunal did latterly. Furthermore the FTT in *Perfect* considered some of the cases relied upon in the appellant's original Skeleton Argument including *Taylor & Wood.* In my view, as the law stood then he could reasonably have expected that his appeal would have succeeded.

98. I do not accept HMRC's argument that the Tribunal would have made a reference. The Upper Tribunal saw no reason to do so and it did not cross HMRC's collective mind at the time, or if it did, it was dismissed.

99. Whilst I understand that HMRC hope that the Court of Appeal will ultimately allow the appeal in *Perfect*, if this appeal were stayed behind that, it would be a victory in name only since the appellant is not a man of any substance and, in all probability, HMRC would recover no material funds for the public purse.

Decision on Application

100. Looking at all of these factors the greater risk of injustice is undoubtedly to the appellant. In all these circumstances I decide that given the, hopefully, unique circumstances of this appeal, it is not expedient to grant the Application which is refused.

Decisions on substantive matters

101. In all these circumstances, as indicated above, the parties consent to the determination of the appeal on the basis of the papers.

102. Both parties refer to *Carlin v HMRC*[12] with HMRC arguing that it is misconceived. Firstly, I am not bound by it and I find that the facts are not identical and secondly, I do follow, for example *Tatham* which found that someone lacking actual or constructive knowledge could not be considered to be the holder of the goods.

103. As I have indicated, HMRC concede that if their appeal to the Court of Appeal in *Perfect* fails then the appellant succeeds. For the reasons set out above, I find that Mr McNamee advanced many of the same arguments that were accepted by the FTT and then by the Upper Tribunal in *Perfect.*

104. In relation to the assessment, I adopt the reasoning and analysis of the cases referred to by both Tribunals and also cited in the original Skeleton Argument for the appellant in this matter.

105. For all these reasons, and given that HMRC accept that that the decision in *Perfect*, if they lose, is determinative of this matter I allow the appeal in relation to the assessment.

106. If the duty is not levied then there are no penalties and that for the reasons set out at paragraph 74 of *Perfect.* That reads:

> "We conclude that the appellant has demonstrated a reasonable excuse for his act (namely the act of carrying the goods or keeping or otherwise dealing with them). It was that act which triggered the penalty under paragraph 4, Schedule 41. His reasonable excuse was that he was innocent of any wrongdoing and lacked any knowledge, actual or constructive, of the criminal enterprise to smuggle excise goods".

107. Given the concession by HMRC that is precisely the point obtaining here.

108. I therefore discharge the penalty.

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: 26 MARCH 2019

[12] TC/2013/03410