[2015] UKFTT 331 (TC)

TC04517

Appeal number: TC/2014/01941

EXCISE DUTY – penalty – Sch 41 FA 2008 – handling of goods subject to unpaid duty – human rights – Article 6 ECHR – whether criminal charge – maximum penalty rate 30 per cent – held, no – equality of arms – burden of proof – s 154 CEMA 1979 – no basis for Tribunal to disregard legislation – whether penalty decision ultra vires – held, conditions for penalty fulfilled – whether reasonable excuse – no – absence of reduction for special circumstances – whether power to interfere – no – whether penalty an unlawful interference with property rights under Article 1 Protocol 1 ECHR – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

EURO WINES (C&C) LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN CLARK
GILL HUNTER

Sitting in public at The Royal Courts of Justice on 12 May 2015

Oliver Powell of Counsel, instructed by TT Tax, for the Appellant

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

DECISION

1. The Appellant ("Euro Wines") appeals against a decision of the Respondents ("HMRC") to impose a penalty on Euro Wines in the sum of £31,864.40. The basis for the penalty is set out below.

The background facts

2. The evidence consisted of a single bundle of documents. This included witness statements given by Balbir Singh Ghuman for Euro Wines, and by Santaram Gowrea for HMRC. Both Mr Ghuman and Mr Gowrea also gave oral evidence.

3. From the evidence we find the following background facts. We deal with other factual issues at a later point in this decision.

4. On various dates from March 2012 to January 2013 inclusive, Euro Wines purchased various excise goods from Galaxy Cash & Carry Ltd (Galaxy").

5. On 5 March 2013, two HMRC officers, Mr H.A. Beg and Mr Gowrea, visited the premises of Euro Wine and met Mr Ghuman. After providing him with certain information (see below), they interviewed him.

6. HMRC subsequently established that the goods had been supplied to Galaxy by Vanguard Breweries. HMRC visited the latter's premises and discovered that Vanguard Breweries did not exist. HMRC therefore concluded that excise duty had not been paid on the goods supplied to Galaxy and supplied by the latter to Euro Wines.

7. On 20 May 2013 HMRC assessed Euro Wines in respect of excise duty in the sum of £353,453.

8. Euro Wines appealed against that decision on 19 June 2013. In addition to challenging the decision on legal grounds, Euro Wines confirmed that the goods had been delivered by Galaxy, and gave HMRC the registration numbers of the vehicles used to deliver the goods. Officer Beg requested a witness statement together with pictures of the delivery vehicles. This witness statement was supplied to HMRC in early July 2013.

9. On 22 July 2013, HMRC wrote to Euro Wines to indicate that the excise duty assessment had been withdrawn. In his witness statement for the present appeal, Mr Gowrea explained the reason for the withdrawal of the assessment; this was that the evidence provided by Euro Wines confirmed that it had not been the first person to have physically held and controlled the goods in question.

10. On 7 February 2014, Mr Gowrea wrote to Euro Wines. He referred to the witness statement and photographs supplied to Mr Beg, which had confirmed that the goods purchased by Euro Wines from Galaxy had been hauled by Galaxy and

delivered to the premises of Euro Wines. Mr Gowrea attached a schedule outlining all the purchases made by Euro Wines from Galaxy in the period 11 July 2012 to 25 January 2013. He continued:

> "Excise duty must be paid on these goods at the excise duty point unless the duty has been deferred.
>
> Our enquiries have concluded that duty has not been paid on these goods."

11. He set out relevant extracts from the legislation and explained that HMRC intended to charge a penalty in the sum of £31,864.40. He attached a further schedule showing how the penalty had been calculated. The behaviour was considered to be "non-deliberate", and the disclosure was regarded as "prompted". We consider this below; the "potential lost revenue" in the penalty table of the Penalty Explanation Schedule was £159,322.00, rather than the figure of £353,453 contained in the withdrawn assessment.

12. He indicated that Euro Wines needed to provide HMRC with any relevant information by 6 March 2014.

13. In a letter dated 5 March 2014, Euro Wines' advisers Litigaid Law gave further information on behalf of their client. According to Mr Gowrea's subsequent reply, this letter was emailed to him on 6 March 2014 at 18.23, and therefore did not reach him before he left the office on that day.

14. On 6 March 2014, HMRC issued the Notice of Penalty Assessment. This showed the penalty payable as £31,864.41, ie 20 per cent of the "potential lost revenue".

15. As a result of discussions between the parties, Mr Gowrea agreed to suspend any enforcement action and consider the contents of the letter from Litigaid Law, with the date of his reply being the date of any decision for appeal purposes.

16. On 10 March 2014 Mr Gowrea replied to Litigaid Law, commenting on the various matters raised in their letter dated 5 March. He concluded:

> "I have read the contents of your letter and there is nothing in the letter that allows me to change my mind as regards to [*sic*] the excise wrongdoing penalty. The actions I have taken are based on the legislation and guidance available to me as regards to [*sic*] Excise matters.
>
> Therefore, please see enclosed with this letter a copy of the notice of penalty, NPPS2, issued to your client."

17. Mr Gowrea also enclosed a copy of a document entitled "FWD Advisory Note"; we consider this in a later section of this decision.

18. On 9 April 2014, Litigaid Law gave Notice of Appeal to HM Courts & Tribunals Service.

Legislation

19. Article 6 of the European Convention on Human Rights ("ECHR"), incorporated into English law by the Human Rights Act 1998, provides:

> "(1) 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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> (2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> (3) Everyone charged with a criminal offence has the following minimum rights—
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

20. Article 1 of Protocol 1 ECHR ("Art 1, P1") provides:

> "(1) 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.
>
> (2) 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."

21. As the relevant UK penalty legislation is extensive, we set out limited extracts from that legislation at appropriate points later in this decision. The penalty is imposed under paragraph 4(1) of Schedule 41 ("Sch 41") to the Finance Act 2008, ("FA 2008") which states:

"**Handling goods subject to unpaid excise duty**

4(1) A penalty is payable by a person (P) where—

(a) after the excise duty point for any goods which are chargeable with a duty of excise, P acquires possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods, and

(b) at the time when P acquires possession of the goods or is so concerned, a payment of duty on the goods is outstanding and has not been deferred."

22. Section 154 Customs and Excise Management Act 1979 ("CEMA 1979") provides:

"**Proof of certain other matters**

(1) An averment in any process in proceedings under the customs and excise Acts— . . .

(d) that the Commissioners have or have not been satisfied as to any matter as to which they are required by any provision of those Acts to be satisfied;

. . .

shall, until the contrary is proved, be sufficient evidence of the matter in question.

(2) Where in any proceedings relating to customs or excise any question arises as to the place from which any goods have been brought or as to whether or not—

(a) any duty has been paid or secured in respect of any goods; or

. . .

then, where those proceedings are brought by or against the Commissioners, a law officer of the Crown or an officer, or against any other person in respect of anything purporting to have been done in pursuance of any power or duty conferred or imposed on him by or under the customs and excise Acts, the burden of proof shall lie upon the other party to the proceedings."

Arguments for Euro Wines

23. We set out in summary the points raised by Mr Powell on behalf of Euro Wines; we review these in detail, together with those put by Mr Evans on behalf of HMRC, in a later section of this decision:

(1) The imposition of a penalty in the present case was a criminal charge within the meaning of Article 6 ECHR. Mr Powell referred to *Han and Another v Commissioners of Customs and Excise* [2001] EWCA Civ 1040, [2001] STC 1188. Accordingly, the penalty should be cancelled as being an unlawful interference with the Article 6 rights of Euro Wines, and should be cancelled.

(2) The decision of HMRC was ultra vires, as both para 4(1)(a) and para 4(1)(b) Sch 41 needed to be satisfied; the penalty should therefore be cancelled.

(3) HMRC should not impose a penalty in a case where the taxpayer was considered to have a reasonable excuse. For a series of detailed reasons, Euro Wines submitted that it had a reasonable excuse, and that the penalty should be cancelled on those grounds.

(4) Paragraph 14 (1) Sch 41 made provision for the reduction of a penalty where there were "special circumstances". Mr Powell submitted that HMRC's decision in respect of special circumstances was flawed, so that under para 19 Sch 41 the Tribunal was able to reduce or cancel the penalty due to special circumstances. For various reasons, the circumstances relating to Euro Wines were special, and the Tribunal was invited to exercise its power under para 19(3)(b) Sch 41, and reduce the penalty to zero.

(5) Art 1, P1 provided for peaceful enjoyment of a person's possessions. Euro Wines submitted that the application of a penalty in its case was not a lawful interference with its property rights, because it was neither in the "public interest" (Art 1, P1), nor did it "genuinely meet objectives of general interest" (Article 17 of the Charter of Fundamental Rights of the European Union ("CFREU")). In the alternative, even if the penalty amounted to a lawful interference in the present circumstances, such an interference was disproportionate. On these grounds also, the penalty should be reduced to zero.

Arguments for HMRC

24. In summary, Mr Evans made the following points, based on the matters raised in the Grounds of Appeal set out in Euro Wines' Notice of Appeal:

(1) Euro Wines argued that there was a lack of protection for innocent victims. On the facts of the case (considered later below) HMRC submitted that there were no special circumstances which would lead them to reduce the penalty.

(2) Euro Wines' next ground was that the burden on it could not reasonably be borne. Mr Evans submitted that the burden of proof in respect of the question whether or not excise duty had been paid was placed on Euro Wines. He made related factual submissions.

(3) The following ground was that the penalty went further than was required. Mr Evans argued that the penalty had been calculated in accordance with powers under Sch 41; it had therefore been imposed in accordance with the law, and did not go further than was required.

(4) The next ground was that the penalty was based on a false premise. The basis of this argument was unclear. HMRC published sufficient guidance as to the checks which reasonably prudent traders ought to take in order to satisfy themselves that excise duty had been paid.

(5) In relation to the final ground, based on Article 6 ECHR and Art 1, P1, Mr Evans submitted that the penalty imposed on Euro Wines was not "criminal" for

the purposes of Article 6. Rights pursuant to that Article applied to penalties that were punitive. The present penalty did not fall into that category. In any event, on the facts, there had been no infringement of Euro Wines' rights. Further, the penalty was lawfully due, proportionate, and necessary in the circumstances. There had been no disproportionate interference with the rights of Euro Wines under Art 1, P1, because the penalty had been imposed in accordance with the law, and the penalty was proportionate and necessary in the circumstances.

(6) In respect of reasonable excuse, Mr Evans submitted that on the facts of its case, Euro Wines did not have a reasonable excuse.

25. Mr Evans invited the Tribunal to dismiss the appeal.

Discussion and conclusions

26. As our conclusions on the law dictate the approach to be taken in evaluating the evidence, we deal first with questions of law, and then consider the questions of fact in the light of the legal issues.

Questions of law

(a) Article 6 ECHR

27. Following the decisions of the European Court of Human Rights ("ECtHR") in *Ferrazini v Italy* [2001] STC 1314 and later cases, the provisions of Article 6(1) of the Convention relating to "civil rights and obligations" do not apply to tax disputes other than in certain limited categories of case. Mr Powell's arguments were based on the reference in Article 6 to "any criminal charge".

28. He submitted that the domestic UK classification of the penalty as a civil penalty was not determinative. He referred to *Öztürk v Germany* (1984) 6 EHRR 409, [1984] ECHR 8544/79 at [50], in which the ECtHR relied on the criteria adopted in *Engel* [1976] ECHR 5100/71 (8 June 1976) at [82]; these were the classification of the penalty in domestic law; the nature of the offence; and the nature and degree of severity of the penalty that the person concerned risked incurring. In *Han* at [26] Potter LJ referred to these three criteria, labelling them respectively as (a), (b) and (c), and continued:

> "The Strasbourg court does not in practice treat these three requirements as analytically distinct or as a 'three-stage test', but as factors together to be weighed in seeking to decide as 'criminal'. When coming to such decision in the course of the court's 'autonomous' approach, factors (b) and (c) carry more weight than factor (a)."

29. Mr Powell referred to *Janosevic v Sweden* [2002] ECHR 34619/97 at [65]-[71]. At [67] the ECtHR had emphasised that the second and third criteria were alternative and not cumulative.

30. In their Compliance Handbook Manual at CH300200, HMRC stated that they accepted or treated that penalties were "criminal" for Article 6 purposes where the maximum potential penalty was 70 per cent or more of the amount used to calculate the penalty. Mr Powell understood Mr Evans' argument to be that while HMRC started on the assumption that a penalty was a criminal charge, it would not necessarily end up as a criminal charge. Mr Powell questioned why HMRC considered a penalty of 70 per cent or more to be "criminal", and not one of a lesser percentage such as 60 per cent.

31. The nature of the offence was that it was non-deliberate; HMRC accepted this. Mr Powell submitted that the purpose of the penalty was to deter and to punish; unlike the assessment on Galaxy in respect of the duty, it was not restitutionary.

32. In the context of criterion (c), Mr Powell argued that by "branding" the party in question with the wrongdoing penalty, the process was designed to punish and educate traders in the future.

33. In his submission, it followed that Euro Wines was entitled to the protection of Article 6, including the presumption of innocence and the equality of arms (as referred to in *Bulut v Austria* [1996] ECHR 17358/90).

34. In that context, Mr Powell commented that Euro Wines was not in a position to challenge the allegation of HMRC that excise duty was outstanding; to all intents and purposes, there was no documentary evidence of why HMRC said that the duty had not been paid. To establish whether a penalty was payable under para 4 Sch 41, it was necessary for both para 4(1)(a) and 4(1)(b) to be satisfied. The concern for Euro Wines was that it did not have the resources that were available to HMRC to investigate whether duty had been paid, whether by Galaxy or some more remote supplier. The position was not evident. To allow HMRC to impose a penalty in respect of non-deliberate conduct without them being required to prove the absence of payment of duty was against the presumption of innocence, and was disproportionate. Mr Powell relied on *Janosevic v Sweden* in support of this submission.

35. He therefore invited the Tribunal to find that the reverse burden of proof provision contained within s 154 CEMA 1979 was not compatible with Euro Wines' Article 6 rights in circumstances where—

> (1) HMRC relied on a fundamental finding of fact for which they had provided no evidence (subject to matters mentioned by Mr Gowrea in his oral evidence);
>
> (2) rebuttal of that finding fell to Euro Wines;
>
> (3) the finding of fact related to an act or failure for which Euro Wines was not directly responsible; and
>
> (4) Euro Wines was unable to obtain evidence to rebut it.

36. If these submissions were correct, the imposition of a penalty in these circumstances represented an irremediable and unlawful interference with Euro

Wines' Article 6 rights. The penalty ought therefore to be cancelled pursuant to para 19(2) Sch 41.

37. Mr Evans submitted that the penalty was not criminal for the purposes of Article 6. Article 6 rights applied to penalties that were punitive. This penalty did not fall into that category. In any event, for the following reasons there had been no infringement of Euro Wines' rights under Article 6:

(1) it had been issued with HMRC's Information Sheet "Penalty Explanation – schedule 1";

(2) Mr Ghuman had been advised of his right not to answer questions when interviewed by HMRC officers. He had also been issued with HMRC's Factsheet CC/FS9, which explained his rights under the Human Rights Act 1998 in relation to the penalty imposed;

(3) Euro Wines had recourse to the Tribunal to challenge the penalty, and had exercised its right of appeal.

38. Further, the penalty was lawfully due and proportionate and necessary in the circumstances.

39. On the question of burden of proof, Mr Evans commented that there had been no case which challenged s 154 CEMA 1979 on Article 6 grounds.

40. We review the parties' submissions on Article 6. Mr Powell based his argument that Article 6 was engaged on two separate grounds. The first was that the penalty was criminal in nature because it was both deterrent and punitive, as in *Janosevic v Sweden*.

41. Under para 4 Sch 41, a penalty may be imposed where excise goods are handled by the person in question at a time when a payment of duty is outstanding on the goods and has not been deferred. For this purpose, handling includes acquiring possession of the goods. Unlike the position in *Janosevic*, no surcharge is involved; the "handler" may be made liable to the penalty without being liable to the duty. The purpose of the penalty is to encourage compliance by ensuring that duty has been paid before possession is acquired or some other activity is undertaken in relation to the goods.

42. We are not convinced that a penalty imposed in such circumstances can be described as deterrent in the manner referred to in *Janosevic*. At [68] the ECtHR stated:

> "Furthermore, the present tax surcharges are not intended as pecuniary compensation for any costs that may have been incurred as a result of the taxpayer's conduct. Rather, the main purpose of the relevant provisions on surcharges is to exert pressure on taxpayers to comply with their legal obligations and to punish breaches of those obligations. The penalties are thus both deterrent and punitive."

43. The effect of the penalty is not to deter persons from handling excise goods; instead, it provides a means of encouraging a person involved in doing so to take appropriate steps to establish that duty has been paid on those goods. No specific form of compliance with legal obligations is involved.

44. In any event, the words in *Janosevic* at [68] following the passage cited above make clear that it is not sufficient for a penalty to be deterrent:

> "The latter character is the customary feature of a criminal penalty (see *Öztürk v Germany* [1984] ECHR 8544/79 at para 53). In the Court's opinion, the general character of the legal provisions on tax surcharges and the purpose of the penalties, which are both deterrent and punitive, suffice to show that for the purposes of Art 6 of the Convention the applicant was charged with a criminal offence."

It is thus necessary for a penalty to be "punitive" in order to engage Article 6.

45. In relation to criterion (c) in *Han*, the ECtHR referred to this in its later judgment in *Janosevic* at [65] as:

> ". . . the nature and degree of severity of the possible penalty . . ."

The taxpayer in *Janosevic* had been made liable to surcharges in respect of a series of different taxation liabilities. These were at rates of 20 per cent or 40 per cent of the tax avoided.

46. Both Mr Powell and Mr Evans referred to HMRC's Compliance Handbook Manual at CH300200. In that section, quoted below, HMRC indicate that they accept or treat penalties as "criminal" for Article 6 purposes where the maximum potential penalty is 70 per cent or more of the amount used to calculate the penalty (ie 70 per cent of the "potential lost revenue", which in a case such as the present one is the amount of the duty unpaid).

47. In its Grounds of Appeal, Euro Wines argued that there was one penalty charged under the Sch 41 regime. It referred to para 4 Sch 41, and expressed the view that the penalty was then broken down into sub-categories in para 6. For ease of reference, we set out para 6B Sch 41, the version of the legislation applying from 6 April 2011:

> "**6B**.—
>
> The penalty payable under any of paragraphs 2, 3(1) and 4 is—
>
> (a) for a deliberate and concealed act or failure, 100% of the potential lost revenue,
>
> (b) for a deliberate but not concealed act or failure, 70% of the potential lost revenue, and
>
> (c) for any other case, 30% of the potential lost revenue."

48. In the present case, HMRC considered Euro Wines' wrongdoing to have been "non-deliberate".

49. Euro Wines' argument is that the words "The penalty" at the beginning of para 6B Sch 41 mean that there is a single penalty, which is then broken down into three categories, namely: (a) deliberate and concealed; (b) deliberate but not concealed; and (c) any other case.

50. We do not accept this argument. In our view, the introductory words of para 6B Sch 41 are referring to the amount of any penalty payable under any of paras 2, 3(1) and 4. The percentage amount is dictated by the nature of the conduct involved. Thus the percentage used as a starting point for a deliberate and concealed act or failure is 100 per cent. For the separate category of a deliberate but not concealed act or failure, the starting percentage is 70 per cent. For the remaining category comprising any other cases, the initial percentage is 30 per cent.

51. It follows that for cases falling with para 6B(c), the maximum percentage of any penalty is 30 per cent. The existence of penalties at higher percentages for other categories of conduct has no relevance to penalties within para 6B(c).

52. Thus in considering the penalty imposed on Euro Wines by reference to decisions of the ECtHR, the only yardstick for comparison must be the penalty under para 6B(c).

53. In HMRC's Compliance Handbook Manual at CH300200, they state:

> "We accept that penalties are 'criminal' for Article 6 purposes where the **maximum potential penalty** is 70% or more of the amount we use to calculate the penalty . . .
>
> In practice the final penalty may be based on a maximum penalty of less than 70% but you are unlikely to know this when you start to discuss penalties or the reason for the inaccuracy, failure, wrongdoing or reason for withholding information. The potential penalty must therefore be treated as if it is 'criminal' for Article 6 purposes, even though the final penalty percentage charged may not be.
>
> . . ."

54. Thus HMRC's view is that penalties within para 6B(a) and (b) Sch 41 are accepted as "criminal" for Article 6 purposes. This view therefore does not extend to penalties within para 6B(c), for which the maximum potential penalty is 30 per cent.

55. CH300200 takes the form of instructions to HMRC officers in relation to enquiries leading to the imposition of penalties. These instructions emphasise that, as the outcome of the enquiries is unlikely to be predictable, such enquiries must be pursued on the assumption that the penalty will be "criminal", whether or not this ultimately proves to be the case. We regard this approach as entirely appropriate in dealing with enquiries. Further, as the instructions make clear, there will be cases in which ultimately the level of the penalty will fall below the maximum 70 per cent bracket and so such penalties do not fall within the "criminal" category.

56. As we have already mentioned, in the *Janosevic* case, the tax surcharges related to different tax liabilities. The rate of surcharge differed depending on the liability in question. The higher of the two rates, which applied to a proportion of the tax liabilities, was 40 per cent; the balance was subject to surcharge at the rate of 20 per cent.

57. As the matters being considered by the ECtHR comprised an amalgam of surcharges, we do not consider that its judgment in *Janosevic* can be construed as determining that the 20 per cent surcharges, if considered alone, could be regarded as involving "criminal charges".

58. We are not aware of any case in which the ECtHR has specifically determined that a penalty of 30 per cent or less involved a criminal charge. Our provisional conclusion in relation to the penalty imposed on Euro Wines is that, in terms of its level, it is not "criminal" for Article 6 purposes.

59. In addition to the rate of the penalty, we also need to consider its nature. It does not appear to be a compensatory amount, as a person handling excise goods would not normally have reason to make payment to HMRC other than by way of a wrongdoing penalty. However, as we have already concluded, a penalty in these circumstances is intended to encourage compliance with the legislation applying to those handling excise goods, rather than deterring persons from handling such goods.

60. Our conclusion is that the penalty does not amount to a criminal charge, and therefore that Article 6 is therefore not engaged.

61. In case for any reason the latter conclusion is found not to be correct, we go on to consider the implications of Mr Powell's argument that Euro Wines should be subject to the protection of Article 6.

62. As his second ground for the application of Article 6 ECHR, Mr Powell referred to the presumption of innocence and the equality of arms. In particular, he referred to the absence of proof by HMRC that excise duty was outstanding. He asked the Tribunal to find that the reverse burden of proof contained within s 154 CEMA 1979 was not compatible with Euro Wines' Article 6 rights.

63. As statutory bodies, these Tribunals are bound by the terms of the legislation applying to matters within the jurisdiction conferred on them. We cannot disregard s 154(2) CEMA 1979 (see the "Legislation" section above). This places the burden of proof as to the question whether or not excise duty has been paid on Euro Wines, as the person who has brought these proceedings against HMRC.

64. If we had concluded that Euro Wines' Article 6 rights were engaged, we could only deal with the question of the burden of proof under s 154 CEMA 1979 by declaring it to be incompatible with those rights. The question of jurisdiction to make a declaration of incompatibility is a statutory one. Section 4 of the Human Rights Act 1998 ("HRA 1998") provides:

"**4 Declaration of incompatibility**

> (1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.
>
> (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.
>
> . . ."

The definition of "court" in s 4(5) HRA 1998 does not include these Tribunals or the Upper Tribunal. As a result, we have no jurisdiction to make any declaration of incompatibility in respect of s 154 CEMA 1979. Further, s 4(6) provides that such a declaration made by any court mentioned in s 4(5) does not affect the validity of the provision in respect of which it is given.

65. The present appeal must therefore be determined on the basis that the burden of proof in respect of the question whether or not duty has been paid falls on Euro Wines, and not on HMRC.

(b) Whether HMRC's decision ultra vires

66. Mr Powell submitted that, as HMRC had failed to produce any evidence to satisfy para 4(1)(b) Sch 41, they had exceeded their powers to impose a penalty, because it was necessary for both para 4(1)(a) and para 4(1)(b) to be satisfied.

67. We agree that both limbs of para 4(1) Sch 41 need to be satisfied in order for a penalty to be imposed. However, for the reasons we have already given, the burden of proof in relation to the question whether or not duty has been paid on the goods acquired by Euro Wines is imposed by s 154 CEMA 1979 on Euro Wines as the party bringing the proceedings against HRMC. Unless Euro Wines can produce evidence to show that the duty has been paid, there is no basis for us to conclude that HMRC have imposed a penalty in circumstances where para 4(1)(b) Sch 41 is not satisfied.

(c) Other legal arguments; Article 1, Protocol 1

68. Mr Powell's arguments on the grounds of reasonable excuse and special circumstances involve questions both of law and fact, and therefore we deal with those below in the context of the facts of Euro Wines' case. His remaining ground was Art 1, P1 (for text, see above).

69. He referred also to Articles 17(1) and 52(1) CFREU:

> "17 **Right to property**
>
> (1) Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest."

> "52 **Scope of guaranteed rights**
>
> (1) Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

70. Mr Powell submitted that the application of a penalty in this case was not a lawful interference with Euro Wines' property rights, because it was neither in the "public interest" nor did it "genuinely meet objectives of general interest". In the alternative, if the penalty did amount to a lawful interference in the circumstances, that interference was disproportionate. Euro Wines was not seeking to argue that the penalty regime could never amount to a lawful interference with a taxpayer's property rights, but simply that it did not so amount on the facts of Euro Wines' case.

71. Euro Wines' submission was that the strict application of paras 12 and 13 Sch 41 in circumstances in which it could never be possible for a taxpayer to make an unprompted disclosure punished innocent third parties.

72. The imposition of substantial penalties on an innocent party in such circumstances was unlikely to have a deterrent effect, and might have a counter-productive effect of deterring taxpayers who suspected excise duty avoidance from informing HMRC. Euro Wines submitted that the public interest could not be served by a penalty that had such an effect. It followed that this specific element of the penalty regime was an unlawful interference with the rights of Euro Wines.

73. In respect of proportionality, Euro Wines argued that the size of the penalty imposed on it had to be balanced with the nature of the conduct concerned and the legitimate aim that the penalty was intended to achieve.

74. Mr Evans submitted that the penalty had been imposed in accordance with the law, and that it was proportionate and necessary in the circumstances. There had been no challenge in case law to Sch 41 in the context of Art 1, P1. Further, any penalty imposed in accordance with the law would almost certainly be proportionate and necessary.

75. In our view, Mr Powell's argument on Art 1, P1 gives insufficient consideration to Art 1(2). The purpose of a penalty in circumstances such as these appears to us to be designed

> ". . . to secure the payment of taxes or other contributions or penalties".

76. Art 1(2) makes clear that a State is entitled without impairment to enforce laws intended to achieve such a purpose. We therefore conclude that the imposition of the penalty on Euro Wines was not an unlawful interference with its property rights.

77. On the question of proportionality, we find Mr Evans' submission persuasive. However, this needs to be considered in the context of the facts, which we address below.

Issues of fact

(a) Whether duty outstanding

78. In oral evidence, Mr Gowrea explained the reasons why HMRC had reached the conclusion that excise duty on the goods supplied by Galaxy to Euro Wines had not been paid. HMRC was aware that Galaxy had been dealing with "missing traders". Some of HMRC's Excise officers had made visits to the premises of the relevant suppliers. One had been in liquidation, one had been deregistered, and the address of one, Vanguard Breweries, turned out to be a wasteland. There had been a pub at that address, but it had burned down.

79. Galaxy had not been able to produce evidence of duty payment. As Euro Wines had then handled the goods, it had become liable to a penalty.

80. We accept Mr Gowrea's evidence. As s 154 CEMA 1979 places the burden of proof in relation to the question whether or not duty has been paid on Euro Wines as the party bringing the present proceedings, and as there is no evidence to suggest that excise duty was paid on the goods, we find that the excise duty was not paid. As indicated in paragraph [11] above, the investigations carried out by HMRC resulted in a reduction of the amount of the duty from that originally assessed on Euro Wines. We are satisfied that HMRC have based the amount of the duty on appropriately detailed investigations.

(b) Reasonable excuse

81. Mr Powell submitted under para 20 Sch 41 that Euro Wines had a reasonable excuse for handling the goods in circumstances where the duty remained unpaid. HMRC had used the definition of reasonable excuse in its Compliance Handbook Manual at CH92100. However, the First-tier Tribunal had taken a broader approach; he referred to *Rowland v Revenue and Customs Commissioners* [2006] STC (SCD) 536 at 19, which indicated that all the circumstances needed to be considered. Euro Wines argued that it had taken reasonable steps to ensure that Galaxy was a bona fide trader.

82. In correspondence, HMRC had referred to the Advisory Note issued by the Federation of Wholesale Dealers. In Euro Wines' submission, it had taken reasonable steps which accorded with that note.

83. Mr Evans submitted that Euro Wines did not have a reasonable excuse, because

(1) The goods were received from a new supplier and Euro Wines did not conduct sufficient due diligence to determine whether the excise duty had been paid;

(2) The prices charged for the goods in the present case were lower than the price of them as sold by the producer.

84. In his oral evidence, Mr Ghuman stated that he had satisfied himself that excise duty had been paid. In his witness statement, he referred to the due diligence file

which he held in relation to Galaxy. This contained a certificate of registration for VAT effective from 1 February 2012, a copy of Galaxy's Certificate of Incorporation dated 10 October 2011, and a copy of the director's driving licence. Following the letter from HMRC to Euro Wines in May 2013, Euro Wines had made additional checks, and obtained various documents.

85. In cross-examination, he stated that as Galaxy's invoices to Euro Wines showed that VAT had been paid, he had assumed that excise duty had been paid.

86. On the basis of Mr Ghuman's evidence, we find that, in his capacity as Euro Wines' director, he did not make any specific enquiry of Galaxy in relation to excise duty; he simply assumed that if Galaxy had accounted for VAT, this was sufficient to establish that it had also paid the excise duty.

87. We further find that there was no reasonable excuse for the failure to ask whether the duty had been paid. If Euro Wines had made proper enquiries, it would not subsequently have found itself in the position of having handled excise goods on which the duty remained unpaid.

88. That failure was so fundamental that we do not consider any other of the surrounding circumstances to be relevant to the question of reasonable excuse. We do not need to consider the other circumstances; in particular, despite the time taken at the hearing in respect of it, we do not consider it necessary to look in detail at the question whether the prices charged to Euro Wines by Galaxy were or were not unduly low.

89. We therefore find that Euro Wines did not have any reasonable excuse for handling the goods in circumstances in which the excise duty on those goods remained unpaid.

(c) Special circumstances

90. Mr Powell acknowledged that under para 19 Sch 41 the Tribunal could only reduce or cancel the penalty if it thought that HMRC's decision was flawed, ie flawed when considered in the light of the principles applicable in proceedings for judicial review. He submitted that HMRC had failed to address properly, or at all, the question of special circumstances, and that as a result their decision was flawed on public law grounds.

91. No guidance was given in FA 2008 as to the meaning of "special circumstances". Case law indicated that "special" meant something "exceptional, abnormal or unusual (*Crabtree v Hinchcliffe* [1971] 3 All ER 967) or "something out of the ordinary run of events" (*Clarks of Hove Ltd v Barkers' Union* [1979] 1 All ER 152). HMRC's Compliance Handbook at CH170600 stated that special circumstances were either—

> "uncommon or exceptional, or where the strict application of the penalty law produces a result that is contrary to the clear compliance intention of that penalty law."

92. Euro Wines acknowledged that consideration of "special circumstances" was included in the calculation set out in the schedule to the Penalty Explanation. However, it submitted that this was a cursory "tick box" exercise and was of no real substance, for the following reasons:

(1) The above test was not set out in the schedule;

(2) The facts relevant to the issue of special circumstances were not summarised;

(3) There were no findings of fact;

(4) There was no meaningful analysis or discussion of the connection between the test and the facts;

(5) There was no reasoned conclusion.

93. As a result, the Tribunal was unable to ascertain whether HMRC had properly applied their minds to the question of special circumstances, and whether if they had, the decision which they had arrived at was a rational one. Euro Wines therefore submitted that the decision was flawed and that it was open to the Tribunal to exercise its powers under para 19 Sch 41.

94. Euro Wines submitted that it was exceptional or unusual for a wholesaler to trade in goods on which excise duty had not been paid.

95. It further submitted that the result of the discount mechanism in relation to prompted or unprompted disclosure in the circumstances created a perverse result which could not be reconciled with the compliance intention of Sch 41.

96. On a strict reading, para 12(3) Sch 41 meant that all disclosure which was not "unprompted" was "prompted" by default. In Euro Wines' submission, a person could only provide unprompted disclosure at a point in time when:

(1) The person had committed a relevant act or failure;

(2) The person was aware of having done so; and

(3) The person had no reason to believe that HMRC had discovered or were about to discover it.

97. A strict application of para 12(3) treated those who only admitted their wrongdoing after they had been caught out in the same way as those who first became aware of their inadvertent wrongdoing when they were contacted about it by HMRC.

98. Thus for someone in the latter circumstances it could never be possible for a taxpayer to make an unprompted disclosure, as the relevant point in time would never have occurred. As a result, a strict application of para 12(3) Sch 41 produced a result which was both absurd and fundamentally at odds with the clear compliance intention.

99. For these reasons, Euro Wines submitted that the circumstances fell within the description in HMRC's Compliance Handbook at CH170600 and that it ought to have a reduction on that basis.

100. For HMRC, Mr Evans referred to the language in the Penalty Explanation, which invited Euro Wines to provide any information which HMRC had not taken into account but which might affect their view on any circumstances that might lead them to reduce the penalty further. Euro Wines had not provided any further information in response to that invitation.

101. He submitted that it was not exceptional for a trader to acquire goods from a wholesale trader in circumstances where duty had not been paid.

102. As he understood Euro Wines' argument, it would not be aware that it needed to make a disclosure. In a case where proper due diligence had been carried out, this would be a reasonable excuse. However, because of Euro Wines' inadequate due diligence, it could not be argued that its disclosure was unprompted. "Unprompted" implied an element of good faith. Here, the disclosure could be nothing other than prompted.

103. We agree with Mr Evans' submissions. Euro Wines acquired goods from Galaxy without checking whether excise duty had been paid; checking Galaxy's VAT status was not a sufficient means of establishing the excise duty position. We do not agree that it would be exceptional for a trader to purchase excise goods from a wholesaler who has not accounted for duty; the purpose of imposing penalties on persons handling excise goods is to counteract non-payment of duty, and the very existence of such a penalty provision is an acknowledgment that such circumstances do occur.

104. Further, Mr Powell's arguments on prompted and unprompted disclosure do not take account of the failure by Euro Wines to check whether excise duty had been paid on the goods. It would not have been impossible for Euro Wines to have made an unprompted disclosure if it had realised that it had purchased the goods without checking the excise duty position and had then approached HMRC to inform them of this before the start of HMRC's enquiries into the relevant transactions. As this did not happen, the disclosure by Euro Wines was inevitably a prompted disclosure.

105. Mr Powell's submissions on special circumstances did not, in our view, take sufficient account of Mr Gowrea's oral evidence. He explained that it had been his decision to impose the penalty. He had summarised the facts in the schedule to the Penalty Explanation, and passed the draft on to others within HMRC. He had sought advice from the relevant HMRC officers, and had asked whether there could be a special reduction. No reduction had been given, as there was no evidence concerning the payment of duty.

106. We accept Mr Gowrea's evidence, and conclude that consideration was given by HMRC to the question of special circumstances.

107. The next question raised for Euro Wines is whether HMRC's decision was flawed. Did HMRC take account of irrelevant matters, or did they fail to take account of relevant matters?

108. It is clear from Mr Gowrea's evidence that the major factor in considering the question of special circumstances was the omission by Euro Wines to establish that excise duty had been paid on the goods purchased from Galaxy. This falls within the category of relevant matters. We can find no evidence of HMRC having taken into account irrelevant matters, and we are satisfied that they took all relevant matters into account. We therefore conclude that HMRC's decision to impose the penalty was not flawed, and that under para 19(3)(b) Sch 41 we have no power to interfere with HMRC's decision not to reduce the penalty because of special circumstances.

(d) Proportionality

109. In the light of our above findings, we further find that the penalty was imposed in accordance with the law, and that it was proportionate and necessary in the circumstances. We are therefore satisfied that there was no unlawful interference with Euro Wines' property rights.

Outcome of the appeal

110. For the reasons set out above, we dismiss Euro Wines' appeal.

Right to apply for permission to appeal

111. 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.

JOHN CLARK
TRIBUNAL JUDGE

RELEASE DATE: 9 July 2015