[2019] UKUT 4 (TCC)

Appeal number: UT/2018/0025

EXCISE DUTY – penalty - goods released for consumption in Italy and held for commercial purposes in the UK – Goods seized and destroyed – whether goods still chargeable with excise duty for purposes of Schedule 41 of Finance Act 2008 – yes – HMRC v Jones and Jones considered – whether specific knowledge required for penalty to be chargeable – no – whether penalty issued in time – yes – appeal dismissed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

GENERAL TRANSPORT SPA

Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: JUDGE JONATHAN RICHARDS
JUDGE GUY BRANNAN

Sitting in public at The Royal Courts of Justice, Strand, London on 1-2 November 2018 and having reviewed written submissions subsequent to the hearing dated 4 December 2018

Tristan Thornton, of TT Tax, for the Appellant

Daniel Sternberg, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. With the permission of Judge Roger Berner, the appellant company (the "Company") appeals against the decision (the "Decision") of the First-tier Tribunal ("FTT") dated 3 November 2017 reported at [2017] UKFTT 0790 (TC). In the Decision, the FTT determined that the Company was liable to a penalty of £9,000 that HMRC had imposed pursuant to paragraph 4(1) of Schedule 41 of Finance Act 2008 ("Schedule 41").

The Decision

Relevant facts

2. There was no challenge to the FTT's findings of primary fact although, as noted further below, the Company argues that the FTT should have found additional facts, going to the extent of its knowledge of the smuggling of goods. The FTT did not set out all of its factual findings in a single section of the Decision, but rather included some factual findings together with a discussion of the issues and therefore the summary below is drawn from all sections of the Decision.

3. The Company is incorporated in Italy. It provides containers and logistics services across Europe. As part of its business, it contracts with customers to transport goods from the loading point to the goods' destination. The Company then determines the means by which the goods are to be transported and sub-contracts the actual transportation to third party hauliers. While the Company does not effect the transportation itself, it does own a substantial number of containers and makes those available when arranging the transport of goods for its customers.

4. On five occasions between 13 December 2013 and 19 February 2014, the UK Border Force seized goods and containers in connection with transports of goods that the Company had arranged for its customer, Giesse Bev Trade ("GBT"), a Romanian company. The proceedings before the FTT and before us are concerned with the fifth such seizure that took place on 19 February 2014. The CMR for that shipment detailed the load as consisting of 30 pallets of foodstuffs. However, the load also contained a quantity of wine[1] on which UK duty had not been paid. It was common ground before the FTT and before us that this wine had been released for consumption in Italy before reaching the UK and that, when it arrived in the UK, it was not in the course of a duty suspended movement.

5. Since the Company does not itself transport the goods, but rather arranges the transportation of goods by others in containers that the Company provides, none of the Company's agents or employees was present when the goods referred to above were loaded or unloaded. The FTT made no express finding that the Company was unaware

[1] The FTT did not make a specific finding as to the precise quantity of wine seized, but contemporaneous documentation suggests that it was 168.725 hectolitres, although as noted below the figure of 168.75 hectolitres appeared in some early penalty and assessment calculations.

that its container contained excise goods (although it seems implicit from [147] and [148] of the Decision that the FTT accepted that the Company was not aware of this fact). However, the FTT concluded at [162], that the Company failed to check the pick-up location of the goods and, if it had done so, would have realised that it was a winery. Therefore, the FTT concluded that the Company failed to undertake reasonable checks which, if undertaken, would have indicated that the load it was arranging to transport was likely to contain excise goods.

6. The Border Force issued notices of seizure to the Company, the consignor, the consignee and the haulier. No challenge to the seizure of the goods was made within applicable time limits. Therefore, the goods were duly condemned as forfeit pursuant to paragraph 5 of Schedule 3 of the Customs and Excise Management Act 1979 ("CEMA"). Paragraphs [118] and [144] of the Decision record the uncontroversial fact that the UK authorities destroyed the wine at some point after seizing it. However, the FTT did not make express findings of fact as to precisely when the wine was destroyed.

7. On 21 November 2014, HMRC wrote to the Company explaining that they were proposing to issue the Company with an assessment to excise duty and a penalty in respect of the seized goods. The Decision does not record the actual figures, but we did not understand there to be any dispute that HMRC proposed an assessment of £46,121.06 (which they calculated by applying an excise duty rate of £273.31 per hectolitre to 168.75 hectolitres of wine). HMRC also categorised the Company's wrongdoing as "deliberate", used that to calculate a penalty percentage after mitigation of 57.5% and applied that percentage to the "potential lost revenue" of £46,121 to produce a proposed penalty of £26,519.57. HMRC gave the Company until 21 December 2014 to make representations as to the amount of the assessment and penalty and provide any relevant further information.

8. The Company made no representations by 21 December 2014 and did not provide any additional relevant information. Therefore, on 23 December 2014, HMRC issued the Company with an assessment to excise duty and a penalty under Schedule 41. The amount of the assessment was different from that proposed in HMRC's letter of 21 November 2014. The Decision does not contain figures, but we did not understand there to be any dispute that the assessment issued on 23 December 2014 was for £45,009 (a lower amount than HMRC had proposed on 21 November 2014) which was calculated by applying an excise duty rate of £266.72 to 168.75 hectolitres of wine. The penalty charged was of £25,880 (calculated by applying the penalty percentage of 57.5% to "potential lost revenue" of £45,009).

9. There was then further correspondence between the Company and HMRC which caused HMRC to conclude that the Company's customer, GBT, should be assessed for the excise duty instead of the Company. HMRC also came to accept that the Company's wrongdoing was not "deliberate". On 13 February 2015, while reserving their right to take further action against the Company, HMRC withdrew the assessment and the penalty they had made on the Company.

10. On 12 May 2015, HMRC issued an assessment to excise duty in respect of the seized alcohol to GBT. The FTT concluded at [129(8)] of the Decision, on a balance of

probabilities, that the amount of this assessment had been established on 22 December 2014 (i.e. the day before HMRC issued the assessment to the Company which they subsequently withdrew).

11. On 23 October 2015, HMRC told the Company that they intended to issue an "excise wrongdoing" penalty under paragraph 4(1) of Schedule 41 of Finance Act 2008. The FTT did not record figures, but contemporaneous correspondence indicates that, having accepted that the Company's wrongdoing was not "deliberate", HMRC applied a penalty percentage of 20% to "potential lost revenue" of £45,002[2].

12. On 17 December 2015, HMRC issued the penalty assessment that was the subject of the appeal to the FTT.

The FTT's key conclusions

13. The FTT's key conclusions, insofar as relevant for the purposes of this appeal, can be summarised as follows.

14. The FTT concluded that an excise duty point was established (under Article 33 of the Excise Duty Directive and Regulation 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (the "HMDP Regulations") when the goods (having been released for consumption in Italy) arrived in the UK and so were held for commercial purposes in the UK. The goods were not destroyed until after this excise duty point had arisen and this subsequent destruction of the goods did not prevent the basic preconditions for charging a penalty set out in paragraph 4(1) of Schedule 41 from being met. In reaching that conclusion, the FTT expressed agreement with the FTT's decision in *HMRC v Staniszewski* [2016] UKFTT 128 (TC) which had considered a similar issue.

15. The FTT rejected the Company's argument that, since it was an "innocent agent", it could not be liable for the penalty charged. The FTT reached that conclusion not because they decided that the Company was involved in the smuggling of goods (see [5] above) but rather because they concluded (at [147] of the Decision) that, for a penalty under paragraph 4 of Schedule 41 to be due, there was no requirement that the Company knew it was arranging the transport of excise goods. The FTT also concluded that the authority of *R v Taylor and Wood* [2013] EWCA (Crim) 1151 on which the Company relied related to criminal proceedings and therefore shed no light on the requirements of paragraph 4 of Schedule 41.

16. Since it found that the Company did not perform reasonable checks, the FTT concluded that the Company did not have a "reasonable excuse" that provided a defence against the penalty charged.

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[2] This figure was slightly less than the calculation of £45,009 that HMRC had used in earlier penalty calculations. It appears that the difference is attributable to the fact that HMRC were now proceeding on the basis that 168.725 hectolitres of wine was subject to duty whereas in earlier calculations they had been using a figure of 168.75 hectolitres.

17. At [130] to [138] of the Decision, the FTT decided that the penalty was issued in time. Its principal reason, set out at [132] and [133], was that HMRC had issued the Company with an assessment on 23 December 2014 and, even though that assessment was withdrawn, it still "counted" for the purposes of the time limit set out in paragraph 16(4)(a) of Schedule 41. Accordingly, the 12-month time limit started to run at the end of the "appeal period" for that assessment, i.e. 30 days after 23 December 2014. The penalty was issued on 17 December 2015 and therefore was in-time by reference to that time limit.

18. Alternatively, the FTT concluded that HMRC had issued GBT with an assessment on 12 May 2015. The penalty was issued less than 12 months after the appeal period for that assessment ended and so was in-time.

19. By way of a further alternative, the FTT concluded, given the changes in HMRC's calculation of the amount of excise duty due, that the relevant amount of excise duty was not ascertained until 22 December 2014. Even if the 12-month time limit started to run from this date, the penalty issued on 17 December 2015 was still in-time.

The Company's Grounds of Appeal

20. The Company appeals against the Decision on three grounds.

21. The first ground ("Ground 1") is that there was no excise duty point by reference to which HMRC were entitled to issue an assessment because Border Force had seized the excise goods and destroyed them. In the absence of an excise duty point, HMRC were not entitled to issue any assessment to excise duty on those goods. It follows, in the Company's submission, that the fundamental requirement of paragraph 4(1) of Schedule 41 (holding non-duty paid goods) was not present. Alternatively, the "potential lost revenue" for the purposes of that penalty was nil, so any penalty was also necessarily nil.

22. The second ground ("Ground 2") is that the Company had insufficient knowledge of the fact that there were non-duty paid goods in their container to be liable to a penalty under Schedule 41.

23. The third ground ("Ground 3") is that the penalty was out of time.

Relevant provisions of UK and EU law

Provisions relating to the penalty

24. Paragraph 4(1) of Schedule 41 provides as follows:

> **4 Handling goods subject to unpaid excise duty etc**
>
> (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.

25. Therefore, a penalty can be due only after an "excise duty point". Moreover, for a penalty to arise under paragraph 4, the relevant goods must be "chargeable with a duty of excise". Paragraph 4(2) of Schedule 41 defines the concept of an "excise duty point" by reference to s1 of the Finance (No. 2) Act 1992 ("F (No. 2) A 1992"). That provision contains a regulation-making power in s1(2) which provides:

> **1 Power to fix excise duty point**
>
> (1) Subject to the following provisions of this section, the Commissioners may by regulations make provision, in relation to any duties of excise, for fixing the time when the requirement to pay any duty with which the goods become chargeable is to take effect.

26. Therefore, s1 of F (No. 2) A 1992 does not itself set out a definition of "excise duty point". Nevertheless, it was common ground that the definition of "excise duty point" set out in HMDP Regulations, which were made in part under the authority set out in s1 of F (No. 2) A 1992, applies for the purposes of paragraph 4 of Schedule 41, although Mr Thornton submitted that the concept of such an excise duty point had to be understood in the light of relevant provisions of EU law.

27. Paragraph 6 of Schedule 41 provides for a penalty under paragraph 4 to be a percentage of "potential lost revenue". By virtue of paragraph 10 of Schedule 41, the "potential lost revenue" relevant to a penalty under paragraph 4 is "the amount of duty due on the goods".

28. The time limits within which a penalty under paragraph 4 of Schedule 41 can be assessed are set out in paragraph 16 of Schedule 41 as follows:

> **16 Assessment**
>
> …
>
> (4) An assessment of a penalty under any of paragraphs 1 to 4 must be made before the end of the period of 12 months beginning with—
>
> (a) the end of the appeal period for the assessment of tax unpaid by reason of the relevant act or failure in respect of which the penalty is imposed, or
>
> (b) if there is no such assessment, the date on which the amount of tax unpaid by reason of the relevant act or failure is ascertained.
>
> (5) In sub-paragraph (4)(a) "appeal period" means the period during which—
>
> (a) an appeal could be brought, or

(b) an appeal that has been brought has not been determined or withdrawn.

(6) Subject to sub-paragraph (4), a supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of potential lost revenue.

29. The defence of "reasonable excuse" is set out in paragraph 20 of Schedule 41 as follows:

20 Reasonable excuse

(1) Liability to a penalty under any of paragraphs 1, 2, 3(1) and 4 does not arise in relation to an act or failure which is not deliberate if P satisfies HMRC or (on an appeal notified to the tribunal) the tribunal that there is a reasonable excuse for the act or failure.

(2) For the purposes of sub-paragraph (1)—

(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the relevant act or failure, and

(c) where P had a reasonable excuse for the relevant act or failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the relevant act or failure is remedied without unreasonable delay after the excuse ceased.

Chargeability of excise duty

30. Article 33 of Directive 2008/118/EC (the "Excise Duties Directive") deals with the situation where goods released for consumption in one member state are transported to another member state and provides, so far as relevant, as follows:

Article 33

1. Without prejudice to Article 36(1), where excise goods which have already been released for consumption in one Member State are held for commercial purposes in another Member State in order to be delivered or used there, they shall be subject to excise duty and excise duty shall become chargeable in that other Member State.

For the purposes of this Article, 'holding for commercial purposes' shall mean the holding of excise goods by a person other than a private individual or by a private individual for reasons other than his own use and transported by him, in accordance with Article 32.

2. The chargeability conditions and rate of excise duty to be applied shall be those in force on the date on which duty becomes chargeable in that other Member State.

3. The person liable to pay the excise duty which has become chargeable shall be, depending on the cases referred to in paragraph 1, the person making the delivery or holding the goods intended for delivery, or to whom the goods are delivered in the other Member State.

…

6. The excise duty shall, upon request, be reimbursed or remitted in the Member State where the release for consumption took place where the competent authorities of the other Member State find that excise duty has become chargeable and has been collected in that Member State.

31. The charge under Article 33 is not, however, absolute and it is disapplied by Article 37 of the Excise Duty Directive in certain circumstances as follows:

Article 37

1. In the situations referred to in Article 33(1) and Article 36(1), in the event of the total destruction or irretrievable loss of the excise goods during their transport in a Member State other than the Member State in which they were released for consumption, as a result of the actual nature of the goods, or unforeseeable circumstances, or force majeure, or as a consequence of authorisation by the competent authorities of that Member State, the excise duty shall not be chargeable in that Member State.

The total destruction or irretrievable loss of the excise goods in question shall be proven to the satisfaction of the competent authorities of the Member State where the total destruction or irretrievable loss occurred or, when it is not possible to determine where the loss occurred, where it was detected.

The guarantee lodged pursuant to Article 34(2)(a) or Article 36(4)(a) shall be released.

2. Each Member State shall lay down its own rules and conditions under which the losses referred to in paragraph 1 are determined.

32. The provisions of the Excise Duties Directive referred to above have been implemented in UK law (the Company says imperfectly) in the following provisions of the HMDP Regulations:

13

(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 excise duty point is the time when those goods are first so held.

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

(a) making the delivery of the goods;

(b) holding the goods intended for delivery; or

(c) to whom the goods are delivered.

33. Destruction and loss of excise goods are dealt with in Regulation 21 of the HMDP Regulations which provides relevantly as follows:

21

(1) This regulation applies where—

(a) there is a relevant event that—

(i) occurs in the United Kingdom; or

(ii) where it is not possible to determine where the event occurred, is detected in the United Kingdom; and

(b) the occurrence of the relevant event is proven to the satisfaction of the Commissioners.

(2) A "relevant event" means the total destruction or irretrievable loss of excise goods as a result of—

(a) the nature of the goods;

(b) unforeseeable circumstances;

(c) force majeure; or

(d) authorisation by the competent authorities of a Member State.

(3) If, at the time of the relevant event, —

…

(b) the excise goods had already been released for consumption in another Member State, the occurrence of the event shall not give rise to an excise duty point under regulation 16(1) or 17(1).

(4) For the purposes of this regulation goods are considered totally destroyed or irretrievably lost when they are rendered unusable as excise goods.

Forfeiture of goods

34. Section 49 of CEMA provides for goods to be forfeit. Section 49 provides, so far as relevant, as follows:

49 Forfeiture of goods improperly imported

(1) Where—

(a) except as provided by or under the Customs and Excise Acts 1979, any imported goods, being goods chargeable on their importation with customs or excise duty, are, without payment of that duty—

(i) unshipped in any port,

(ii) unloaded from any aircraft in the United Kingdom,

(iii) unloaded from any vehicle in, or otherwise brought across the boundary into, Northern Ireland, or

(iv) removed from their place of importation or from any approved wharf, examination station or transit shed; or

(b) any goods are imported, landed or unloaded contrary to any prohibition or restriction for the time being in force with respect thereto under or by virtue of any enactment; or

(c) any goods, being goods chargeable with any duty or goods the importation of which is for the time being prohibited or restricted by or under any enactment, are found, whether before or after the unloading thereof, to have been concealed in any manner on board any ship or aircraft or, while in Northern Ireland, in any vehicle; or

(d) any goods are imported concealed in a container holding goods of a different description; or

(e) any imported goods are found, whether before or after delivery, not to correspond with the entry made thereof; or

(f) any imported goods are concealed or packed in any manner appearing to be intended to deceive an officer,

those goods shall, subject to subsection (2) below, be liable to forfeiture.

(2) Where any goods, the importation of which is for the time being prohibited or restricted by or under any enactment, are on their importation either—

(a) reported as intended for exportation in the same ship, aircraft or vehicle; or

(b) entered for transit or transhipment; or

(c) entered to be warehoused for exportation or for use as stores,

the Commissioners may, if they see fit, permit the goods to be dealt with accordingly.

35. Regulation 88 of the HMDP Regulations also provides for goods to be forfeit in certain circumstances as follows:

88

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.

36. Regulation 88 of the HMDP Regulations and s49 of CEMA therefore both provide that goods imported into the UK in breach of requirements and obligations are liable to forfeiture. In connection with goods released for consumption in another member state, Mr Thornton referred us to the requirement of Regulation 69 of the HMDP Regulations which provides as follows (in relation to goods released for consumption in another member state and imported into the UK):

69

(1) The person delivering the excise goods, holding the excise goods intended for delivery or receiving the excise goods must—

(a) before the excise goods are dispatched—

(i) inform the Commissioners of the expected dispatch;

(ii) provide a guarantee satisfactory to the Commissioners securing payment of the duty or, subject to regulation 73, pay the UK excise duty chargeable on the goods;

(b) subject to regulation 73, on or before the excise duty point, pay any duty that has not been paid in such manner as the Commissioners may direct;

(c) consent to any check enabling the Commissioners to satisfy themselves that the goods have been received and that the duty has been paid.

Article 6 European Convention on Human Rights

37. Article 6 ECHR 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 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 proven 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 the 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.

ANALYSIS OF GROUND 1

The respective positions of the parties

38. Mr Thornton submitted that the conditions of Article 37 of the Excise Duties Directive were satisfied. The wine was totally destroyed as a consequence of the lawful actions of the UK competent authorities and so that destruction was as a consequence of "authorisation by the competent authorities". Even though the wine was destroyed some time after it was removed from the lorries transporting them, it was still destroyed "during [its] transport" for the purposes of Article 37 because the "transport" of the wine continued up until the point at which the wine could duly be delivered to its intended destination and destruction of the goods marked the first point at which the wine could no longer duly be delivered. He criticised the FTT's conclusion that Article 37 could not apply because there had been an earlier duty point under Article 33 as inconsistent with the wording of the Excise Duties Directive which provides for Article 37 to apply "in the situation[s] set out in Article 33(1)".

39. Article 37 of the Excise Duties Directive did not simply provide that no duty point could arise after the destruction of the wine. Rather, the effect of Article 37 was that, once the wine was destroyed any duty point that might previously have arisen became void as if it had never occurred or, alternatively, that there never was any duty point.

40. It therefore followed, in Mr Thornton's submission, that, because Article 37 applied, no duty point ever arose. Accordingly, the Company cannot have engaged in the conduct set out in paragraph 4 of Schedule 41 "after the excise duty point" for the wine and the basic precondition for charging a penalty was not met. Alternatively, since Article 37 prevented the goods being chargeable to excise duty, the "potential lost revenue" was nil and therefore, the amount of penalty could only ever be nil.

41. Mr Thornton denied that, in putting forward these arguments, the Company was making a submission that was proscribed by the line of authorities beginning with the decision of the Court of Appeal in *HMRC v Jones and another* [2011] EWCA Civ 824. Properly understood, that decision only precluded taxpayers from pursuing arguments, whether in proceedings seeking the restoration of goods, or in appeals against penalties or assessments, that were inconsistent with the "deemed fact" that, where the lawfulness of seizure is not contested in condemnation proceedings, the goods are lawfully seized. In this appeal, the Company accepts that the wine was lawfully seized even if no excise duty point arose because the requirements of Regulation 69 of the HMDP Regulations had not been complied with. Breach of that requirement made it lawful for the UK competent authorities to seize the wine under either Regulation 88 of the HMDP Regulations or under s49(1)(b) of CEMA. Since the UK authorities could lawfully seize the wine even if no excise duty point had arisen, it followed that the Company's argument, in its appeal against the penalty, that there was no excise duty point was not inconsistent with the "deemed fact" that the goods were lawfully seized.

42. Mr Sternberg broadly submitted that, in relation to Ground 1, the Decision was correct for the reasons that the FTT gave. He also argued that the Company was precluded, by the line of authority starting with *HMRC v Jones and another* from arguing that no excise duty point had arisen. He criticised the Company's approach to

Article 37 as being unsupported by any authority and argued that it produced paradoxical results that could not have been intended.

Ground 1 – Discussion

The jurisdiction point based on HMRC v Jones and another

43. We will start with an analysis of *HMRC v Jones and another* and subsequent authorities since, if those authorities prevent the Company from arguing that no excise duty point ever arose, that disposes of Ground 1.

44. In that case, HMRC seized substantial quantities of tobacco from the taxpayers together with the taxpayers' car that had been used to transport the tobacco. The taxpayers served a notice of claim (in the magistrates' court) under paragraph 3 of Schedule 3 of CEMA challenging the legality of the seizure on the grounds that the tobacco was for their personal use. However, they later withdrew that claim with the result that, under paragraph 5 of Schedule 3 of CEMA, the car and goods were "deemed to have been duly condemned and forfeited". Subsequently, they asked HMRC to exercise their discretionary power under s152(b) of CEMA to restore their car. When HMRC refused, they appealed to the Tribunal on the basis that HMRC's refusal to restore was unreasonable in circumstances where the tobacco had been for the taxpayers' own use. Eventually, the matter came before the Court of Appeal who considered the extent to which the taxpayers, having decided not to challenge the legality of the seizure in the magistrates' court, could make arguments in restoration proceedings to the effect that the goods were for personal use. On that issue, Mummery LJ said, at [71]:

> "(4) The stipulated statutory effect of the respondents' withdrawal of their notice of claim under paragraph 3 of Schedule 3 [of CEMA] was that the goods were deemed by the express language of paragraph 5 to have been condemned and to have been "duly" condemned as forfeited as illegally imported goods. The tribunal must give effect to the clear deeming provisions in [CEMA]: it is impossible to read them in any other way than as requiring the goods to be taken as "duly condemned" if the owner does not challenge the legality of the seizure in the allocated court by invoking and pursuing the appropriate procedure.
>
> (5) The deeming process limited the scope of the issues that the respondents were entitled to ventilate in the FTT on their restoration appeal. The FTT had to take it that the goods had been "duly" condemned as illegal imports. It was not open to it to conclude that the goods were legal imports illegally seized by HMRC by finding as a fact that they were being imported for own use. The role of the tribunal, as defined in the 1979 Act, does not extend to deciding as a fact that the goods were, as the respondents argued in the tribunal, being imported legally for personal use. That issue could only be decided by the court. The FTT's jurisdiction is limited to hearing an appeal against a discretionary decision by HMRC not to restore the seized goods to the respondents. In brief, the deemed effect of the respondents' failure to

> contest condemnation of the goods by the court was that the goods were being illegally imported by the respondents for commercial use.
>
> …
>
> (7) … The key to the understanding of the scheme of deeming is that in the legal world created by legislation the deeming of a fact or of a state of affairs is not contrary to "reality"; it is a commonly used and legitimate legislative device for spelling out a legal state of affairs consequent on the occurrence of a specified act or omission. Deeming something to be the case carries with it any fact that forms part of the conclusion."

45. The Upper Tribunal followed a similar approach to paragraph 5 of Schedule 3 of CEMA in the context of assessments to duty in *Nicholas Race v HMRC* [2014] UKUT 331, where Warren J said at [31]:

> "Applying these statutory provisions, it is clear that Mr Race could be free from liability (and from assessment) for excise duty in relation to the goods only if they were acquired in another Member State either (i) by Mr Race himself or (ii) by his son as a present for Mr Race. However, in the light of the decisions in *Jones* and *EBT*, the clear conclusion, in my judgment, is that Mr Race is unable, even in those cases, to go behind the deeming provision of paragraph 5 Schedule 3 [of CEMA]. It is not open to him to attempt to establish that he held the goods for his own personal use and not for a commercial purpose and at the same time maintain that the goods were acquired in another Member State. In my judgment, but subject to one point to which I will come[3], there is no room for further fact-finding on the question of whether seized goods were duty paid or not once the Schedule 3 procedure had determined that point."

46. In *European Brand Trading Limited v HMRC* [2016] EWCA Civ 90, the Court of Appeal provided further commentary on the scope of the "deeming" analysed in *HMRC v Jones*. Lewison LJ said, at [34] and [35]:

> "34. Mummery LJ was doing no more than giving effect to the deeming provision in accordance with well-established principles. To take one well-known example, in *East End Dwellings Co Ltd v Finsbury BC* [1952] AC 109, 132 Lord Asquith said:
>
> > "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it."
>
> 35.It is a necessarily corollary of a condemnation (whether actual or deemed) that the excise duty has not been paid."

[3] Which is not relevant in the context of this appeal.

47. The Upper Tribunal has also, in *HMRC v Jacobson* [2018] UKUT 18 (TCC) applied the same principle in the context of an appeal against a penalty under paragraph 4 of Schedule 41 saying, at [24]:

> "We respectfully agree with Warren J in *Race* that the reasoning and analysis in *Jones* applies to an appeal against a penalty in exactly the same way as it applies to an appeal against an assessment for excise duty. The deemed effect of Ms Jacobson's failure to contest the seizure of the HRT was that it was duly condemned as forfeited as, in the terms of regulation 88 of the 2010 Regulations, goods liable to excise duty which had not been paid in contravention of the Regulations."

48. The Company is, in this appeal against the penalty, seeking to establish that no excise duty point ever arose in the UK in relation to the wine that was seized. Since excise duty becomes chargeable in the UK only if a duty point arises, an inevitable consequence of the Company's argument is that no excise duty was ever due on that wine. Despite paragraph 35 of Lewison LJ's judgment in *European Brand Trading Ltd v HMRC* (referred to at [46] above) Mr Thornton submits that the Company's argument that no excise duty was due is consistent with the wine being lawfully seized. He relies on the following chain of reasoning as demonstrating that the goods were lawfully seized even if no excise duty point ever arose:

> (1) He accepts that, since no condemnation proceedings were brought in the magistrates' court challenging the lawfulness of the seizure, paragraph 5 of Schedule 3 of CEMA deems the goods to have been lawfully seized. He accepts that in principle certain other "deemed facts" also follow from that conclusion but submits that, in the circumstances of this appeal, it is not a "deemed fact" that the goods are chargeable with excise duty or that an excise duty point arose.
>
> (2) Regulation 69 of the HMDP Regulations was engaged since the wine was being brought into the UK having been released for consumption in Italy. Since neither of the mandatory steps specified in Regulation 69 were taken, there was a breach of the HMDP Regulations.
>
> (3) Regulation 88 of the HMDP Regulations was therefore engaged. It does not matter that Regulation 88 is expressed to apply to "any excise goods that are liable to duty that has not been paid". Read in context, this phrase should be read as referring to goods that are "subject to duty" in the sense set out in Article 2 of the Excise Duties Directive (i.e. if they are excise goods produced in the EU or are imported in the EU).
>
> (4) Therefore, even if the goods were not subject to duty, and even if no excise duty point ever arose on those goods, they were still lawfully seized under Regulation 88. It follows that, by arguing that the goods were not subject to duty, the Company is not raising any argument inconsistent with the "deemed facts" produced by paragraph 5 of Schedule 3 of CEMA.
>
> (5) Even if Regulation 88 of the HMDP Regulations was not engaged, s49(1)(b) of CEMA applied because the goods were imported into the UK contrary to the restriction imposed by Regulation 69 (which required certain

> steps to be taken before the wine was even sent to the UK). Whatever the correct interpretation of Regulation 88 of the HMDP Regulations, seizure and forfeiture under s49(1)(b) of CEMA did not require an excise duty point to have arisen or the goods to be subject to excise duty. That was a further reason why, in arguing that the goods are not subject to excise duty and that no duty point arose, the Company is not raising an argument inconsistent with the "deemed facts".

49. We agree with Mr Thornton that in *European Brand Trading Limited* Lewison LJ was not saying that a taxpayer who has not challenged the legality of a seizure in condemnation proceedings is prevented from arguing that goods are not subject to duty in any circumstances whatsoever. Rather, it is clear from Lewison LJ's judgment that he was applying well-established principles on the effect of deeming provisions stating that deeming a fact to be true necessarily involves deeming other facts which inevitably must flow from the deemed fact to be true as well. In many cases, it must follow from the fact that goods are lawfully seized that excise duty was due on them but was not paid. However, that will not always be the case. For example, the UK authorities are permitted to seize unauthorised shipments of ivory, but there is no question of ivory being subject to excise duty. Therefore, if a taxpayer's ivory was seized and the taxpayer did not challenge the legality of that seizure, we see no reason why the taxpayer should be precluded from arguing in Tribunal proceedings (in the unlikely event that it was relevant) that the ivory was not subject to excise duty as that would not be inconsistent with the conclusion that the ivory was lawfully seized.

50. We will start by establishing the "deemed facts" that apply by virtue of paragraph 5 of Schedule 3 of CEMA and then consider whether Mr Thornton's arguments are inconsistent with those deemed facts. The logical starting point is the notice of seizure that Border Force officers gave when they seized the goods. That read, so far as material, as follows:

> "… the Commissioners of Customs and Excise hereby give notice that by virtue of the powers contained in the Customs and Excise Acts, certain goods namely 16872.75 litres of wine have been seized as liable to forfeiture by force of the following provisions, namely:
>
> Regulation 88 of The Excise Goods (Holding, Movement and Duty Point) Regulations 2010 and s170B of the Customs & Excise Management Act 1979."

51. Mr Thornton submitted, by reference to *R (on the application of Blackside Ltd) v The Secretary of State for the Home Department* [2013] EWHC 2087 (Admin) that the Border Force was not necessarily obliged to provide any notice setting out their reasons for the seizure and that, if the lawfulness of seizure was challenged in condemnation proceedings, the Border Force would not be limited to defending the reasons set out in any notice they did issue. They would be free, subject no doubt to the requirements of fair case management, to assert that the seizure was lawful for other reasons. We do not need to decide whether that is correct. In the circumstances of this appeal, Border Force did explain the provisions under which they had seized the goods. Moreover, condemnation proceedings were not brought, so we see no reason to establish the scope of the "deemed facts" consequent on the absence of condemnation proceedings by

reference to arguments that the Border Force could, hypothetically, have made in condemnation proceedings. We therefore consider that the "deemed facts" that arise are as follows:

> (1) the goods seized were wine (a class of goods that is in principle subject to excise duty); and
>
> (2) the requirements of either or both of Regulation 88 of the HMDP Regulations or s170B of CEMA were met so as to make that seizure lawful.

52. Following the hearing, we asked both parties for further written submissions on the scope of the power of seizure under Regulation 88 of the HMDP Regulations and s170B of CEMA. In those submissions, Mr Sternberg accepted that goods could be lawfully seized under both Regulation 88 and s170B of CEMA even if no charge to excise duty had arisen. Having made those points, Mr Sternberg expressed the scope of the "deemed facts" in the following terms:

> These cases [i.e. the line of authority starting with *Jones and Jones*] require the Tribunal to accept by virtue of the deeming provision that the goods were lawfully seized, but also that the facts necessary for such seizure were established. In the case of regulation 88 of the HMDP regulations, that is that the goods were mislabelled and unaccompanied by an ARC. In the case of s.170B of CEMA, that is that there was fraudulent mislabelling to avoid excise duty.

53. Therefore, HMRC are not arguing that, in the specific circumstances of this appeal, the existence of a duty point is a precondition to lawful seizure of the wine under Regulation 88 of the HMDP Regulations or s170B of CEMA. It follows that the Company's argument (that there was no such duty point) cannot be inconsistent with such lawful seizure and so cannot be inconsistent with the deemed facts set out at [51]. For that reason, we consider that we have the power to address the Company's arguments under Ground 1. That conclusion makes it unnecessary for us to consider Mr Thornton's alternative argument (that the goods were lawfully seized under s49(1)(b) of CEMA).

54. We are reinforced in our conclusion by the harshness that would result if the Company were precluded from arguing, in the circumstances of this appeal, that the goods were not chargeable with excise duty. If there had been a challenge to the legality of the seizure, there would be an obvious difficulty in arguing that Article 37 of the Excise Duties Directive prevented a duty point arising and so prevented the goods from being lawfully seized since the wine would not have been destroyed by the time of the condemnation proceedings. Indeed, whether the wine was destroyed at all would depend on the outcome of the condemnation proceedings. Therefore, in the circumstances of this appeal, if the Company were precluded from making its points on Article 37 in these proceedings, the result would be that it had no opportunity whatsoever to make those points.

55. We are therefore basing our conclusion on this issue on what we regard as a concession that Mr Sternberg made in his written submissions (that the wine could have been lawfully seized under either or both Regulation 88 or s170B of CEMA even if no

duty point had arisen). We do not regard that conclusion as inconsistent with the undoubted rule of law that individuals who buy excise goods in other EU countries, bring them into the UK and have them seized in the UK are precluded, if they do not challenge the legality of the seizure in the magistrates' court, from arguing in proceedings before the Tribunal that the goods were imported for personal use. If goods are for personal use, Regulation 13 of the HMDP Regulations prevents a charge to excise duty arising. Moreover, the requirements set out in Regulation 69 of the HMDP Regulations do not apply to goods brought into the UK for personal use (see Regulation 67) and therefore Regulation 88 of the HMDP Regulations could not permit goods imported for personal use to be seized because of a failure to satisfy Regulation 69. Therefore, a taxpayer arguing before the Tribunal that goods imported from another Member State are for personal use is necessarily arguing that any seizure of the goods under Regulation 88 was not lawful and it follows from *Jones and Jones* and the other cases referred to above that such an argument is proscribed where the taxpayer has not challenged the legality of a seizure under Regulation 88 in the magistrates' court. Given Mr Sternberg's concession, for reasons we have given, the Company's arguments in this appeal are not inconsistent with the goods being lawfully seized.

The Company's arguments on Article 37 of the Excise Duties Directive

56. We agree with Mr Thornton that Article 37 of the Excise Duties Directive has been imperfectly implemented in UK domestic law. Article 37 clearly provides that certain "destruction" or "irretrievable loss" of goods can mean that duty is not chargeable on goods brought into the UK having been released for consumption in another member state (which is the province of Article 33). However, Regulation 21 of the HMDP Regulations, insofar as it relates to goods released for consumption, in Regulation 21(3)(b), provides only for duty not to be chargeable on distance sales of those goods (under Regulation 16) or on irregularities in the course of movements of goods (under Regulation 17). It does not exclude a charge under Regulation 13 of the HMDP Regulations (which implements Article 33 of the Excise Duties Directive). We respectfully agree with the comments of Judge John Walters QC and Amanda Darley to this effect at paragraph [113] of their decision in *Jeffrey Williams v HMRC* [2015] UKFTT 330 (TC).

57. We also agree with Mr Thornton that the Company is entitled to rely on the provisions of Article 37 of the Excise Duties Directive against the UK authorities under the principle of "vertical direct effect" set out in the decision of the European Court of Justice in *Van Duyn v Home Office* (Case 41/74). It is therefore necessary to consider whether Article 37 applies and, if it does, what effect it has.

58. Article 37(1) of the Excise Duties Directive is written in a single long sentence which sets out both the conditions for it to apply and the consequences where it applies. We think it is useful to break down these aspects of Article 37 into their constituent parts.

59. In order for Article 37 to apply, all of the following conditions must apply:

(1) There must be a "total destruction" or "irretrievable loss" of the goods.

(2) That "total destruction" or "irretrievable loss" must occur during the transport of the goods in a Member State (Member State A) other than the Member State in which they were released for consumption (Member State B).

(3) The "total destruction" or "irretrievable loss" must occur:

(a) as a result of the actual nature of the goods;

(b) as a result of unforeseeable circumstances;

(c) as a result of force majeure; or

(d) "as a consequence of authorisation by the competent authorities" of Member State A.

60. Where Article 37 applies, no duty is chargeable in Member State A**.**

61. We do not accept Mr Sternberg's submission that Article 37 does not apply where there has been a prior duty point established under Regulation 13 of the HMDP Regulations (that implements Article 33). We therefore respectfully consider that the FTT was in error at [144] of the Decision. Article 37 is expressed to apply "in the situations referred to in Article 33(1)". Therefore, Article 37 applies where Article 33 would otherwise apply and sets out exceptions to the chargeability of excise duty established in Article 33. It is therefore not correct to say that the prior application of Article 33 prevents Article 37 from applying.

62. As we have noted, the FTT did not make a finding as to precisely when the wine was "irretrievably lost" or destroyed. It cannot have been "irretrievably lost" until, at the earliest, one month after it was seized since that was when the deadline for challenging the legality of the seizure expired (see paragraph 3 of Schedule 3 of CEMA). It is reasonable to infer that the wine was not destroyed until after that point. Therefore, by the time of "irretrievable loss" or destruction, having been seized, the wine was no longer being "transported" anywhere, at least in the ordinary sense of that word, so the requirement set out at [59(2)] is not obviously satisfied.

63. Mr Thornton, however, argued that "transport" should not be given an ordinary colloquial meaning in Article 37 of the Excise Duties Directive. Rather, he argued that a "transport" of goods in Article 37 should be regarded as synonymous with a "movement" of goods in Article 38. Moreover, he submitted that the definition of an "irregularity" in Article 38 demonstrated that a "movement" of goods (and so a "transport" of goods) was in progress right up until the point at which it could be duly ended. Up until the very point at which the wine was destroyed or irretrievably lost, there was still the possibility that it might be restored and continue to its destination with the result that, in Mr Thornton's submission, the destruction or irretrievable loss of the wine took place "during [its] transport".

64. Despite the ingenuity of this submission, we reject it. Article 38 of the Excise Duties Directive is concerned with "irregularities" in cross-border movements of excise goods. In those circumstances, it is natural for Article 38 to consider whether movements of goods have ended "duly" or not. However, Article 37 is concerned with

the natural hazards of the transportation of goods: for example bottles may be broken in transit and their contents lost or goods may be stolen. Given the risks with which Article 37 is concerned, we consider that the term "transport" should be given its ordinary and natural meaning and not the legalistic meaning for which Mr Thornton argues. Moreover, the obvious difficulty with Mr Thornton's argument is that Article 37 does not use the concept of a "movement" that appears in Article 38 which points against the conclusion that "transport" and "movement" are synonymous concepts. We therefore consider that the requirement summarised at [59(2)] is not met with the result that Article 37 does not apply.

65. There is a further reason why Article 37 does not apply. The Company is relying on the condition at [59(3)(d)] being met on the basis that the destruction of the wine took place "as a consequence of the authorisation of the [UK Border Force]" because, in seizing and destroying the wine, the Border Force was acting within the scope of its authority. However, we consider that this involves a misreading of Article 37.

66. Article 37 deals with two situations.

> (1) In the first situation, there will be a "total destruction" or "irretrievable loss" of the kind set out in [59(3)(a)] to [59(3)(c)] above. In that case, as of right, the goods are not chargeable with excise duty (provided the proof required by Article 37 is given). No permission of the authorities is required for this aspect of Article 37 to apply.
>
> (2) However, Article 37 recognises that there may be other situations, connected with the natural hazards of the transport of goods, in which a taxpayer may want the authorities to agree that, provided goods are destroyed, no excise duty will be chargeable. Article 37 therefore gives flexibility to authorities and taxpayers to agree such arrangements on a case by case basis.

67. The "authorisation of the competent authorities" referred to in Article 37 is a reference to the second situation set out at [66(2)]. Like the first situation (set out at [66(1)]), this is concerned with the natural hazards of transportation of goods. So, for example, excise goods might be so badly damaged during transport that, while they could technically still be used as excise goods, they are unsaleable in practical terms. Even though such goods would not be "totally destroyed" or "irretrievably lost" (and so the first situation is not applicable), the competent authorities are allowed to permit the goods to be destroyed on terms that no excise duty is payable. We see no justification for the broad reading of Article 37 which Mr Thornton advanced under which <u>any</u> lawful destruction of goods by a member state's competent authorities prevents excise duty being chargeable. In particular, since Article 37 is concerned with the natural hazards of transporting goods, we see no reason why it should be read as giving rise to the extraordinary result that smuggled goods cease to be chargeable with excise duty simply because the vigilance of the competent authorities results in the smuggling attempt being foiled and the goods seized and destroyed.

68. In arguing that Article 37 applies, Mr Thornton drew attention to the central importance of "consumption" in the Excise Duties Directive. He argued, referring to

recital (9) of the Excise Duties Directive that all provisions relating to the chargeability and liability of excise duty relate to goods that may still be consumed and referred to the decision of the CJEU in *Polihim* (Case C-355/14) in this regard. We agree that "consumption" is a central concept in EU law relating to excise duty. Recital (9) of the Excise Duties Directive provides:

> Since excise duty is a tax on the consumption of certain goods, duty should not be charged in respect of excise goods which, under certain circumstances, have been destroyed or irretrievably lost.

69. However, Recital (9) of the Excise Duties Directive clearly does not establish that in all cases in which goods are destroyed or irretrievably lost, excise duty should not be charged. Moreover, the Excise Duties Directive cannot be intended to produce distortions in the single market. If the Company's interpretation of Article 37 is correct, the consequence would be that, if the UK authorities seize and destroy smuggled intra-EU goods, they would lose any right to assess those involved in the smuggling[4]. Such an interpretation might mean that those involved in smuggling face a limited "downside". That might serve to increase distortions in the single market with economic operators in member states that levy comparatively low rates of excise duty having an incentive to try to smuggle excise goods into the UK.

70. Therefore, we consider that the short answer to Mr Thornton's point on "consumption" is that this is one of the situations in which destruction or irretrievable loss of the excise goods does not prevent a charge to duty from arising.

71. For all those reasons, we do not consider that Article 37 of the Excise Duties Directive applies in the circumstances of this appeal so as to prevent a duty point arising on the wine.

ANALYSIS OF GROUND 2

The respective positions of the parties

72. Mr Thornton submitted that the FTT failed to acknowledge that the framework of the Schedule 41 penalty regime was such that penalties imposed thereunder constituted a criminal charge for the purposes of Article 6 of the European Convention on Human Rights ("ECHR"). Mr Thornton relied on the decision of the Upper Tribunal in *Euro Wines (C&C) Ltd v HMRC* [2012] UKUT 0359 (TCC) (Birss J and Judge Berner). Consequently, Mr Thornton argued that the FTT erred in finding that the penalty was lawfully imposed and/or that the Company did not have a reasonable excuse.

73. The first part of the Company's argument under Ground 2 was that the FTT erred in law by determining that the Schedule 41 penalty regime did not require specific knowledge on the part of the person carrying goods (i.e. the Company) in circumstances

[4] In addition, the Company's interpretation means that no penalty could be levied under Schedule 41 but, since penalty provisions are within the competence of member states, we do not consider this necessarily sheds a light on how the Excise Duties Directive should be construed.

where there had been a deliberate attempt to evade duty by a third party. Mr Thornton relied on the decision of the Upper Tribunal in *HMRC v Perfect* [2017] UKUT 476 (TCC) (Whipple J and Judge Greenbank) ("*Perfect*"), particularly at [57]-[58]. Moreover, the Upper Tribunal noted at [68] their surprise that person who was not liable for the excise duty (e.g. because that person was an "innocent agent") could nevertheless be subject to a penalty under Schedule 41. Although the Upper Tribunal did not consider it necessary to explore this point further, Mr Thornton submitted that the Upper Tribunal's disquiet was well-founded and that a person without guilty knowledge should be excluded from the class of persons to whom a penalty could be charged under paragraph 4(1)(a) of Schedule 41. Furthermore, any suggestions to the contrary by the Court of Appeal in *Euro Wines* [2018] EWCA Civ 46 (Gloster VP, Patten and David Richards LJJ) were *obiter* and made without the benefit of full argument.

74. Secondly, Mr Thornton argued that the FTT erred in law in failing to make a finding as to the innocence of the Company. This was, said Mr Thornton, the key feature because:

(1) an innocent person should always be treated as having a reasonable excuse; and/or

(2) an innocent person was not holding goods for the purposes of paragraph 4(1)(a) Schedule 41.

75. Thirdly, Mr Thornton argued that the FTT had erred in law in stating at [122] that the burden for establishing a reasonable excuse was on the Company. The FTT had failed to consider that the burden of establishing that the Company was not an innocent agent was for HMRC to discharge.

76. Mr Sternberg accepted that in the case of a wrongdoing penalty under Schedule 41, the legal burden of proof lay upon HMRC to demonstrate that the requirements in paragraphs 4, 5 and 7 had been satisfied. However, there was a clear reverse burden of proof on the Company under paragraph 20 to "satisfy" HMRC or the Tribunal that a penalty did not arise because the Company had a reasonable excuse for the act or failure.

77. As regards the decision of the Upper Tribunal in *Euro Wines* Mr Sternberg argued that it was found (at [13] to [29]) that a penalty under paragraph 4 *could be* a criminal charge but was not necessarily a criminal charge for the purposes of Article 6.

78. In any event, the decision of the Court of Appeal in *Euro Wines* made it clear at [34] that the penalty under paragraph 4(1) Schedule 41 did not depend on any fault on the part of the trader. It was clear that non-deliberate actions could result in penalties.

79. In relation to the second part of Ground 2, Mr Sternberg submitted that there was no requirement for the Company or HMRC to establish the company's factual innocence before the FTT. Instead it was for the Company to show that it had a reasonable excuse in accordance with the clear wording of paragraph 20. Whilst the assertion of factual innocence could be relevant in considering whether a "reasonable excuse" existed, the FTT found that that defence had not been established. Those

findings by the FTT, made after hearing the evidence, could not be challenged on appeal.

80. As to the third part of Ground 2, Mr Sternberg argued that the FTT was correct in its approach to the burden falling on the Company to show that it had a reasonable excuse. This point was effectively determined by the Court of Appeal in *Euro Wines.*

Ground 2 – Discussion

81. In our view the penalty imposed by paragraph 4(1) Schedule 41 is a criminal charge for the purposes of Article 6 of the ECHR. This point was decided by the Upper Tribunal in *Euro Wines*. At [29] the Tribunal, referring to a penalty imposed under paragraph 4(1) Schedule 41 said:

> "We conclude therefore that, notwithstanding its classification under UK law as a civil penalty, the nature of the offence and the nature and severity of the penalty in this case render it criminal in nature for the purposes of Article 6 of the Convention."

82. The Upper Tribunal's conclusion that a penalty under paragraph 4(1) Schedule 41 was a criminal charge for the purposes of Article 6 was not appealed and we see no reason to doubt it. Nonetheless, the Court of Appeal (per David Richards LJ) at [34] endorsed the Upper Tribunal's conclusion on this point:

> "Although the penalty is treated as criminal for the purposes of article 6(2), it is essentially a regulatory penalty which is not dependant on proof of any fault on the part of the trader."

83. Accordingly, we reject Mr Sternberg's submission that the Upper Tribunal in *Euro Wines* merely held that a penalty under paragraph 4(1) Schedule 41 *could* be a criminal charge for the purposes of Article 6 – the Tribunal held at such a penalty *was* a criminal charge for those purposes.

84. We reject Mr Thornton's first submission set out at [73].

85. First, the wording of paragraph 4(1) Schedule 41 is clear: it contains no requirement that the taxpayer should have knowledge (actual or constructive) of the fact that a third party had deliberately evaded the payment of duty. Instead, paragraph 20 Schedule 41 provides for a "reasonable excuse" defence provided that the taxpayer can satisfy either HMRC or the Tribunal that the defence has been made out. Therefore, reading the two provisions together, a taxpayer who falls within paragraph 4(1) is only liable to a penalty if there is no "reasonable excuse". A taxpayer who did not know and could not reasonably be expected to know that a third party had deliberately evaded duty may well be able to establish the "reasonable excuse" defence. However, that does not mean that the HMRC must prove the presence of knowledge in order to charge a penalty under paragraph 4(1).

86. Secondly, it is clear from paragraph [34] of David Richards LJ's judgment in *Euro Wines* that a penalty can be charged under paragraph 4(1) Schedule 41 even though the trader did not have specific knowledge of the evasion of excise duty. In that

case the taxpayer company had purchased various excise goods from a company called Galaxy (a "cash and carry" business). HMRC subsequently established that the goods had been supplied to Galaxy by Vanguard Breweries, although on a visit to the latter's premises HMRC discovered that the address was wasteland. There had at one time been a pub at that address, but it had burned down. HMRC concluded that excise duty had not been paid on the goods and assessed the taxpayer to excise duty. The taxpayer appealed against that assessment and provided evidence of the delivery of the goods to it by Galaxy. The excise duty assessment on the taxpayer was withdrawn on the basis that the taxpayer had not been the first person to have physically held and controlled the goods in question. Subsequently, HMRC issued a notice of penalty assessment under paragraph 4(1) Schedule 41. Section 154 of the Customs and Excise Management Act 1979 ("CEMA") (which is not applicable in the present appeal) provided that the burden of proof fell upon the taxpayer. The taxpayer appealed against the penalty, arguing that the penalty imposed on it amounted to a criminal charge for the purposes of Article 6 of the European Convention on Human Rights (Article 6), thereby engaging that Article, and that section 154 infringed the presumption of innocence.

87. The Upper Tribunal, reversing the FTT on this point, held that the penalty imposed under paragraph 4(1) Schedule 41 was a criminal charge for the purposes of Article 6. In reaching that conclusion, the Upper Tribunal observed at [24]:

> "In our judgment, [the penalty] clearly was [punitive]. It sought both to deter taxpayers from acquiring excise goods in respect of which duty was unpaid, and to punish them if they found themselves in possession of such goods, *even through no fault of their own (subject only to defences of reasonable excuse and special circumstances)*." (Emphasis added)

88. It is clear from these comments that the Upper Tribunal considered that a penalty under paragraph 4(1) Schedule 41 could be a "no fault" penalty, subject to a defence of "reasonable excuse". It seems to us that this is incompatible with Mr Thornton's argument that, to charge a penalty, HMRC must show that the Company had knowledge or means of knowledge that duty had not been paid. We note that the Upper Tribunal's conclusion on this issue was not appealed.

89. The Upper Tribunal then proceeded to find that section 154 CEMA was compatible with Article 6:

> "43. Parliament has determined that in all cases the burden should be on the relevant person and not on HMRC. It has done so whilst at the same time enabling the relevant person to rebut the presumption of non-payment of duty, and to raise defences of reasonable excuse, in particular, and special circumstances. This, we consider, strikes an appropriate balance in the circumstances. In our judgment, the penalty provisions as a whole represent a proportionate scheme and accordingly the imposition in that context of the burden of proof on the relevant person as to payment of duty does not go beyond what is necessary for the protection of the revenue. We find accordingly that the reverse burden of proof in s 154 CEMA is not incompatible with Article 6 of the

> Convention. There is accordingly no need for a conforming construction of s 154."

The decision of the Upper Tribunal on this issue was appealed to the Court of Appeal.

90. We should also note that in *Jussila v. Finland* - 73053/01 [2006] ECHR 996 ("*Jussila*"), a decision of the Grand Chamber of the ECHR ("the Court") and the leading authority on the application of Article 6 in the context of small tax penalties, the Court observed [at 43]:

> "Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency."

91. It seems to us that this distinction is the same as the one referred to by David Richards LJ in *Euro Wines* when he observed at [34] that penalties under paragraph 4(1) Schedule 41 were essentially regulatory because they did not depend on any fault of the taxpayer concerned. Mr Thornton suggested that this aspect of the judgment of David Richards LJ was *obiter*, but we do not agree. David Richards LJ prefaced his remarks on the nature of the penalty by noting that the "context is important". His conclusions as to the nature of the penalty were central to his analysis and led to the conclusion that the protections afforded by Article 6 in relation to criminal charges did not "apply with their full stringency" and, in turn, that the reverse burden of proof was compatible with Article 6.

92. Our conclusion is not affected by the *obiter* comments of the Court of Appeal in *Taylor & Anor v R* [2013] EWCA Crim 1151. In that case the Court of Appeal held that the term "holding" in Regulation 13 of the Tobacco Products Regulations 2001 and Council Directive 92/12/EEC could not apply to impose a liability to duty on "innocent agents" i.e. persons who did not know and who could not reasonably have known that duty was being evaded. More recently, the Upper Tribunal has applied this principle in *Perfect* holding that an "innocent agent" could not be assessed to excise duty under regulation 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010. Mr Thornton submitted that by analogy the same principle should apply to the requirements for a penalty under paragraph 4(1) Schedule 41.

93. We reject Mr Thornton's submission. We consider that that argument, based on different statutory provisions, is inconsistent with the with the statutory language and the basis on which both the Upper Tribunal and the Court of Appeal approached paragraph 4(1) of Schedule 41 in *Euro Wines*.

94. It will be noted that in *Euro Wines* the appellant company was subjected to a penalty even though the assessment to duty made on the company had been withdrawn, as is the case in the present appeal. Although the fact that a penalty could be imposed without a substantive liability to duty may have been the cause of the Upper Tribunal's "surprise" in *Perfect* (to which we have referred at [73]), we consider it to be clear that the penalty provisions in paragraph 4(1) Schedule 41 are independent from the substantive liability to duty. At [3] of his judgment in *Euro Wines*, David Richards LJ noted specifically that a penalty could be imposed on someone who had no liability to pay the underlying excise duty.

95. In conclusion, therefore, Article 6 cannot impose a substantive requirement to the effect that, in order to impose a penalty under paragraph 4(1) Schedule 41, HMRC must establish that the Company had knowledge that excise duty had not been paid for the following reasons:

> (1) The wording of the penalty provision in paragraph 4(1) of Schedule 41 is clear and does not, on its terms, require an examination of the state of knowledge of the person being penalised. The fact that certain knowledge or constructive knowledge is necessary for a person to be assessed to duty under different statutory provisions does not make the possession of such knowledge a pre-requisite of a penalty under paragraph 4(1) of Schedule 41 given the Court of Appeal's decision in *Euro Wines*.
>
> (2) While the penalty amounts to a "criminal charge", it is essentially only a "regulatory penalty" that is not dependant on proof of any fault. In those circumstances, Article 6 of the ECHR does not apply with its "full stringency". Given the availability of the defence of "reasonable excuse" the penalty in paragraph 4(1) of Schedule 41 is compatible with Article 6 of the ECHR.
>
> (3) Since the natural meaning of paragraph 4(1) of Schedule 41 is compatible with Article 6 of the ECHR, there is no need to give it a construction that is different from its ordinary or natural meaning (by, for example, "reading in" a requirement that the person subject to the penalty should have a certain state of knowledge).

96. We therefore dismiss the first part of the Company's arguments under Ground 2.

97. Our conclusion in relation to the first part of Ground 2 also deals with the second part. The FTT was not obliged to make a finding as to the innocence of the Company since absence of "innocence" is not a requirement contained in paragraph 4(1) of Schedule 41. Rather, it was for the Company to establish whatever facts it considered relevant to its defence of "reasonable excuse". We therefore dismiss this element of the second part of Ground 2.

98. Nonetheless, Mr Thornton went on to argue that because the Company was "innocent" it must necessarily be regarded as having a "reasonable excuse" for the purposes of paragraph 20 Schedule 41.

99. We see no basis for this argument in the wording of the statute. The statutory words clearly provide that the burden falls on the taxpayer to establish the "reasonable excuse" defence. It is not for HMRC to disprove the Company's "innocence" – a word which does not appear in the statute. Still less is it necessary for the FTT to make a finding about the company's "innocence".

100. It is true that matters which concern the "innocence" of a taxpayer in carrying out the acts referred to in paragraph 4(1) will often have a bearing on whether the taxpayer has a "reasonable excuse" for the purposes of paragraph 20 and will often establish that defence. But it is not in accordance with the statutory scheme to conclude that an

"innocent" taxpayer necessarily automatically has a reasonable excuse. It is for the taxpayer to establish the "reasonable excuse" defence.

101. The FTT concluded:

> "159. We have considered the evidence put to us and we find that the appellant knew of the first four seizures in December and January 2014, as shown by email correspondence between Border Force and the employees of the appellant, before the order for the load subject to the fifth seizure was accepted. The fact that the seizure notices were sent by second class post and may have been delayed is, therefore, not relevant to whether the appellant had a reasonable excuse.
>
> 160. The appellant's evidence is that they were concerned only with the return of their containers and that they accepted their customer's assertion that the four seizures were a clerical error without further checks.
>
> 161. We agree that it would be impractical to carry out substantial checks in respect of every order but we find that a reasonable taxpayer, knowing that the previous four shipments for a particular customer had all been seized and had proved to contain excise goods and not the goods which had been stated on the order for transport, would have undertaken additional checks before accepting a fifth order for shipment.
>
> 162. We find that a simple check of the pickup location would have shown that it was a winery. We find that a reasonable taxpayer in these circumstances would have concluded that this shipment was likely to again contain wine rather than the non-excise goods on the order and would have taken action to ensure that they were not again involved in transporting excise goods in breach of relevant legislation.
>
> …
>
> 166. We therefore find that the appellant did not, applying the objective test of reasonableness, have a reasonable excuse for its involvement with the load that was the subject of the fifth seizure and this penalty assessment."

102. We are satisfied that the FTT applied the correct legal test in relation to "reasonable excuse" i.e. an objective standard. We see no reason to interfere with the FTT's finding that the Company did not have a "reasonable excuse", an evaluative decision which it was entitled to reach on the evidence before it.

103. Finally, under the third part of Ground 2, Mr Thornton submitted that the FTT erred in law by holding that the burden of establishing a "reasonable excuse" for the purposes of paragraph 20 lay upon the Company.

104. We can deal with this issue relatively briefly because, in our view, it is without merit.

105. We see no reason why this reverse burden of proof is unreasonable or disproportionate. In *Euro Wines* the Court of Appeal held that the reverse burden of proof imposed by s154 of CEMA in respect of the substantive ingredients of the penalty

did not infringe Article 6 of the ECHR. If anything, the analysis of the reverse burden of proof in paragraph 20 of Schedule 41 is clearer than that of the reverse burden set out in s154 of CEMA since, while a taxpayer may find it difficult to establish whether duty has been paid at the start of a chain of sales of dutiable goods, there will be much less difficulty in establishing a defence of reasonable excuse since, in most cases it will be the taxpayer that is best placed to establish facts or events which make good the "reasonable excuse" defence. Therefore, by parity of reasoning with the Court of Appeal's decision in *Euro Wines*, the reverse burden of proof in paragraph 20 of Schedule 41 is compatible with Article 6 of ECHR.

106. Therefore, the ordinary and natural meaning of paragraph 20 of Schedule 41 is that the taxpayer has the burden of establishing a reasonable excuse. That requirement is not incompatible with Article 6 of the ECHR. Accordingly, we see no reason why we should disturb the FTT's conclusion that the Company did not have a "reasonable excuse" within paragraph 20 Schedule 41. We therefore reject the third part of the Company's arguments under Ground 2.

ANALYSIS OF GROUND 3

107.The FTT's first reason for concluding that the penalty was in time was that, even though HMRC withdrew the assessment that they had, on 23 December 2014, made on the Company, that still "counted" as an assessment for the purposes of the time limit set out in paragraph 16(4)(a) of Schedule 41. The penalty assessment under appeal was issued on 17 December 2015 and it followed, in the FTT's judgment, that it was in time by reference to that assessment.

108.It seems to us that paragraph 16(4) of Schedule 41 sets out two cases. In the first case, where an assessment is made, the time limit is to be ascertained under paragraph 16(4)(a). In the second case, where no assessment is made, the time limit must be found under paragraph 16(4)(b). That is emphasised by the use of the words "… if there is no such assessment" in paragraph 16(4)(b).

109.Moreover, there is a clear reason why the two cases are considered differently. The amount of a penalty pursuant to paragraph 4 of Schedule 41 is calculated by reference to the "potential lost revenue" which, for the purposes of paragraph 4 means the amount of duty on the goods (see paragraph 10 of Schedule 41). If there is an assessment, the amount of duty payable (and so the "potential lost revenue" for the purposes of the penalty) will depend on whether there is an appeal against the assessment and, if so, the outcome of the appeal. Since the penalty cannot be determined until the amount of "potential lost revenue" is known, it makes sense for the time limit for issuing the penalty not to start until either (i) it is known that no appeal against the assessment has been made or (ii) any appeal is determined.

110. If HMRC withdraw an assessment, there can never be an appeal against that assessment (and so there can be no "appeal period") for the purposes of paragraph 16(4)(a). Moreover, having been withdrawn, the assessment cannot provide HMRC or the Tribunal with any useful information as to the amount of duty due on the goods. In those circumstances, we do not consider that Parliament can have intended that the

withdrawn assessment should still drive the determination of a time limit under paragraph 16(4)(a). We therefore respectfully consider that the FTT erred in paragraph [133] of the Decision.

111.In the alternative, at [135] and [136] of the Decision, the FTT concluded that the assessment that HMRC made on GBT on 12 May 2015 was an "assessment" for the purposes of paragraph 16(4)(a) of Schedule 41 and so the penalty that HMRC issued on the Company on 17 December 2015 was in-time by reference to that assessment. Mr Thornton criticised this conclusion, arguing that only an assessment to excise duty which the Company caused to be due by reason of its holding of the goods could be relevant for the purposes of paragraph 16(4)(a). GBT could only be assessed, under the HMDP Regulations in respect of its own holding of the goods. Therefore, Mr Thornton argued that the penalty assessment on the Company could not be in-time by reference to the excise duty assessment made on GBT.

112.The question, therefore, is whether the assessment on GBT was an "assessment of tax unpaid by reason of the relevant act or failure in respect of which the penalty is imposed [on the Company]". We think that the focus in paragraph 16(4)(a) is on the reason the tax is unpaid, not the reason why HMRC chose to make the assessment. Therefore, the relevant question is whether the tax (for which HMRC decided to assess GBT) was unpaid by reason of the "relevant act or failure".

113.We agree with Mr Thornton that, given the definition of "relevant act or failure" in paragraph 11(2) of Schedule 41, the focus is on the Company's act or failure. It follows that the "relevant act or failure" is the Company's act (or failure) in acquiring possession of the wine, or being concerned in carrying, removing, depositing, keeping or otherwise dealing with that wine at a time when payment of duty is outstanding (the requirements for a penalty under paragraph 4 of Schedule 41)

114.In asking whether the tax is unpaid "by reason of the relevant act or failure", we do not consider that paragraph 16(4)(a) is inviting any consideration of blameworthiness. Paragraph 16(4)(a) is concerned with time limits and questions of blame that are relevant to the penalty are the province of the defence of "reasonable excuse". Therefore, paragraph 16(4)(a) is simply asking whether the Company's act or failure caused the tax which was assessed on GBT to be unpaid. We consider that it did. Even though the Company was not aware that there was wine in its container, its acts in arranging the transport of the wine caused it to come into the UK in circumstances where UK excise duty was not paid. That conclusion follows whether or not the Company was to blame or was at fault. It also follows even though there were others whose acts also caused UK excise duty to go unpaid (for example the acts of GBT and the smugglers themselves). Therefore, we consider that the causal connection prescribed by paragraph 16(4)(a) is present even though HMRC made their excise duty assessment on GBT and not the Company.

115.We agree with Mr Thornton that this interpretation is capable of producing results that might be thought surprising. For example, if HMRC consider that someone has been fraudulently arranging the smuggling of excise goods through an innocent haulier, the smuggler could be assessed for duty up to 21 years after the act of smuggling with

the result that an innocent haulier might face a penalty up to 22 years after transporting the goods. However, this result arises because Parliament has, with clear words, linked the time limit for imposing a penalty with the expiry of the "appeal period" relating to an assessment for the understandable reasons set out at [109]. The mere fact that some consequences of that approach might seem surprising does not alter the effect of the words that Parliament has used.

116.In the same vein, we reject Mr Thornton's argument that assessments against third parties responsible for the fraudulent evasion of excise duty should not extend the time by which HMRC can assess the Company in respect of a penalty relating to the Company's own conduct. Paragraph 16(4)(a) does not provide that only assessments made on the person who is said to be liable for the penalty are relevant. Mr Thornton submitted that this interpretation of paragraph 16(4)(a) results in the Company becoming liable to a criminal charge for the purposes of Article 6 of the ECHR by reference to the acts of another person, but we do not accept that. The Company is being penalised for its own conduct in "handling" (to use the word that appears in the heading to paragraph 4 of Schedule 41) excise goods on which duty is unpaid without a reasonable excuse.

117.Mr Thornton argued that, if assessments on third parties are relevant for the purposes of paragraph 16(4)(a) of Schedule 41, HMRC could act capriciously, for example by continually altering assessments on third parties by small amounts in order to keep open the period for charging a penalty on a haulier. Whenever a public authority is given power there is the theoretical risk of that power being abused and the remedy of judicial review provides citizens with protection against that risk. However, the mere fact that the theoretical risk exists does not alter the effect of paragraph 16(4)(a) of Schedule 41.

118.For the reasons above, we consider that there was no error of law in the FTT's conclusions at [135] and [136] of the Decision and the penalty was therefore issued in time for the reasons that the FTT gave.

119.The FTT also concluded, at [138] of the Decision, that even if the assessment on GBT was not relevant (so that paragraph 16(4)(b) of Schedule 41 determined the time limit rather than paragraph 16(4)(a)), the amount of tax unpaid by reason of the relevant act or failure was ascertained on 22 December 2014 (see [129(8)] of the Decision) and, since the penalty was issued less than 12 months after this date, it would be in time under paragraph 16(4)(b) of Schedule 41.

120.Mr Thornton criticised this conclusion. He submitted that it amounts to HMRC being allowed to benefit from their own mistake since, on 21 November 2014, when they wrote the letter referred to at [7], they had all the information they needed to determine the correct amount of duty. Therefore, the fact that they belatedly realised that they had made a mistake in their calculations should not allow them to benefit from an extended time limit for charging a penalty.

121.The short answer to this submission is that paragraph 16(4)(b) of Schedule 41 does not ask when the amount of duty became ascertainable. Nor does paragraph 16(4)(b)

(unlike s12(4) of Finance Act 1994) set a time limit by reference to the date on which specified facts come to HMRC's knowledge. Rather, the relevant question is when that tax became "ascertained".

122.The FTT has made a finding of fact that the tax was not ascertained until 22 December 2014. Given what we have said at [121], we do not consider that its conclusion involved any error of law as to the meaning of "ascertained". Mr Thornton did not suggest, nor could he, that the FTT made an error in their fact-finding process of the kind set out in *Edwards v Bairstow* [1956] AC 14. Therefore, even if we (and the FTT) are wrong in concluding that the assessment on GBT was relevant to the time limit set out in paragraph 16(4)(a) of Schedule 41 so that the time limit in paragraph 16(4)(b) is relevant, we see no error of law in the FTT's conclusion that the relevant tax was "ascertained" on 22 December 2014 so that the penalty issued on 17 December 2015 was in time.

DISPOSITION

123.The appeal is dismissed.

COSTS

124. Any application for costs in relation to this appeal must be made in writing within one month after the date of release of this decision and be accompanied by a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

JUDGE RICHARDS
JUDGE BRANNAN
UPPER TRIBUNAL JUDGES

RELEASE DATE: 22 January 2019