Neutral Citation: **[2024] UKUT 00108 (TCC)**

Case Number: UT/2023/000019

UPPER TRIBUNAL
(Tax and Chancery Chamber)

By remote video hearing

EXCISE DUTY – assessment in respect of duty unpaid cigarettes – whether earlier duty point could be established – whether the Appellant was "holding" the cigarettes when duty point arose – appeal dismissed

Heard on: 16 January 2024
Judgment date: 29 April 2024

Before

JUDGE THOMAS SCOTT
JUDGE ASHLEY GREENBANK

Between

CHARLENE HUGHES

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Michael Forde, Counsel, instructed by Tiernans Solicitors

For the Respondents: Joanna Vicary, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. By a decision dated 3 February 2015 (upheld on 5 May 2015 following an internal review) the Respondents ("HMRC") issued an assessment to Ms Hughes (the "Appellant") for excise duty of £213,332. The assessment related to unpaid duty in respect of cigarettes which had been seized from the Appellant's property by Officers from the Police Service of Northern Ireland ("PSNI").

2. The Appellant appealed against the assessment, and her appeal was dismissed by the First-tier Tribunal (Tax Chamber) (the "FTT") in a decision released on 3 November 2022 (the "Decision"). The Appellant now appeals against the Decision.

3. We are grateful to Mr Forde and Ms Vicary for their clear and focussed written and oral submissions.

THE FTT HEARING

4. The appeal to the FTT was delayed until the conclusion of criminal proceedings against the Appellant on 10 September 2018. The Appellant pleaded guilty to offences contrary to the Proceeds of Crime Act 2002 ("POCA") and Customs and Excise Management Act 1979 ("CEMA").

5. The FTT refused an application by the Appellant to adjourn the remote hearing of the appeal. The Appellant did not attend the hearing.

6. The written evidence before the FTT included the Appellant's witness statement, admitted as hearsay evidence; the witness statement of Ms Mary Cox, a retired HMRC Officer who raised the assessment against the Appellant, and extensive documentary evidence from the criminal investigation and prosecution. Ms Cox also gave oral evidence.

THE FTT'S FINDINGS OF FACT

7. References below in the form FTT[x] are to paragraphs of the Decision.

8. In summary, the facts found by the FTT included the following:

   (1) On 20 April 2013, PSNI Officers arrived at the Appellant's property in County Down (the "Property") to conduct a search under the Terrorism Act 2000. The initial search was of a large industrial unit located within the grounds of the Property (the "Shed") located 20 metres from the Appellant's dwelling house at the Property. The Appellant was at home during the search and provided the Officers with keys to the Shed.

   (2) The search uncovered 953,260 non-duty paid cigarettes.

   (3) An additional warrant was then obtained to search the dwelling house. This search led to the discovery of cash (£57,927), a CS gas cannister and mixed contraband cigarettes. The cigarettes were concealed, and mostly comprised brands not available in the UK.

   (4) The Appellant was arrested on suspicion of fraudulent evasion of excise duty. She was interviewed under caution in the presence of her solicitor. She produced a pre-prepared signed statement and, on the advice of her solicitor, gave a "no comment" interview.

   (5) A file was submitted to the Public Prosecution Service of Northern Ireland, and a decision was taken to prosecute the Appellant. On 10 September 2018, the Appellant pleaded guilty to offences contrary to POCA and section 170(1)(a) CEMA. The offence relevant to this appeal was recorded in the Certificate of Conviction as follows:

> "Count 6: Defendant on the 20th day of April 2013, in the County Court Division of Armagh and South Down, were in any way knowingly concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with such goods as are defined in Section 170(1)(a)(i-iii) CEMA, namely 953,260 cigarettes or thereabouts and that she did so with the intention to defraud Her Majesty of any duty payable on the said goods or to evade any such prohibitions or restriction with respect to the said goods contrary to Section 170(1)(b) of CEMA."

9. The Appellant's basis of plea was described at FTT[25]:

> In her Basis of Plea, the Appellant pleaded guilty on the following basis. She admitted her liability in relation to the possession of criminal property, the cash, in Count 1 and accepted her liability for items seized in her home and the alcohol found in the Shed. The prosecution could not gainsay that, whilst she allowed the Shed to be used for the storing of contraband cigarettes, that she in any way personally benefited from same. It was accepted from the CCTV footage that another individual, if not more than one, was involved in accessing, storing and removing items from the defendant's shed. The guilty plea in respect of the cigarettes was entered on the basis of "harbouring" on behalf of another with no personal involvement in the purchase, sale, distribution or otherwise of the cigarettes.

10. On 16 October 2018 the Appellant was sentenced at Newry Crown Court to a custodial sentence of two years, suspended for three years.

11. On 3 February 2015 HMRC issued to the Appellant an assessment for excise duty of £213,332 in respect of the cigarettes found in the Shed.

12. At FTT[54]-[63], the FTT made findings of disputed facts. In summary, these were as follows:

(1) The Appellant was in physical possession of the cigarettes in the Shed.

(2) The Appellant knew that the cigarettes in the Shed were duty unpaid.

(3) No earlier duty point than 20 April 2013 could be established in respect of the cigarettes in the Shed.

RELEVANT LEGISLATION

13. Sections 1(1)(a) and 2(1) of the Tobacco Products Duty Act 1979 provide that excise duty shall be charged on tobacco products imported into or manufactured in the UK.

14. Regulation 5 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ("HMDP Regulations") relevantly provides that there is an excise duty point at the time when excise goods are released for consumption in the UK.

15. Regulation 6(1)(b) of the HMDP Regulations provides that excise goods are released for consumption in the UK at the time when the goods are held outside a duty suspension arrangement and UK excise duty on those goods has not been paid, relieved, remitted or deferred under a duty deferment arrangement.

16. Regulation 10(1) of the HMDP Regulations provides that the person liable to pay the duty when excise goods are released for consumption by virtue of regulation 6(1)(b) is the person holding the excise goods at that time.

17. Regulation 20(1) of the HMDP Regulations has the effect that duty must be paid at or before an excise duty point.

18. Section 170(1)(b) CEMA makes it a criminal offence knowingly to be concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with any goods which are chargeable with a duty which has not been paid, with intent to defraud His Majesty of any duty payable on the goods.

19. Section 12(1) of the Finance Act 1994 ("FA 1994") empowers HMRC to issue an assessment to a person from whom any amount has become due in respect of any excise duty. Under section 12(4) any such assessment must be made by HMRC within 4 years of the time when the liability to the duty arose or within one year from the day on which evidence of facts, sufficient in the opinion of the HMRC to justify the making of the assessment, comes to their knowledge, whichever is the earlier.

20. Sections 13A(2)(b) and 16(1B) FA 1994 provide for an appeal to the FTT against a decision of HMRC to issue an assessment to excise duty under s 12(1) FA 1994.

21. Section 16(5) FA 1994 provides that the power of the FTT in such an appeal includes the power to quash or vary any decision and the power to substitute its own decision for any decision quashed on appeal.

22. Section 16(6) FA 1994 provides that in such an appeal to the FTT against an assessment, with certain limited exceptions, it is for the appellant to show that the grounds on which any such appeal is brought have been established.

23. Section 154(2)(a) CEMA provides that where in any proceedings relating to customs or excise any question arises as to whether or not any duty has been paid or secured in respect of any goods, then, where those proceedings are brought by or against HMRC, the burden of proof shall lie upon the other party to the proceedings.

THE FTT'S DECISION

24. Before the FTT, the Appellant's grounds of appeal stated as follows:

> "The review officer has erred in his findings regarding the circumstances surrounding the seizure of cigarettes. The officer has equated 'holding to 'possession'. If the Regulations intended to use the well known concept of 'possession' to trigger liability for duty on excise goods, the word 'possession' would be used. We submit that holding denotes a much more intimate connection between the person and the goods. We don't argue that 'possession' cannot mean 'holding'. Clearly the literal act of holding would be caught by the concept of 'possession'. That does not apply in this case. We contend that 'holding' must denote a specific beneficial relationship to the goods. There is no such relationship in this case. Further the Appellant had no knowledge of the presence of the goods. Others had access to the premises. That HMRC have failed to identify that other person is not proper grounds to fix liability on the Appellant. HMRC have erred in using the concept of possession and taking any element of control of the premises to fix the Appellant with liability. If that were a proper application of the Regulations every landlord would be in a perilous position. The Applicant was not holding any excisable goods, had no knowledge of said goods and there is no evidence that she ever held, possessed, controlled or owned the goods."

25. Mr Forde and Ms Vicary also appeared for the Appellant and HMRC respectively before the FTT. Mr Forde submitted to the FTT that three points arose in the appeal, namely:

(1) Was the Appellant the person "holding" the goods within Regulation 10 of the HDMP Regulations at the point when duty became chargeable?

(2) Was there an earlier excise duty point, which HMRC should have assessed?

(3) Did the assessment breach the EU principles of fairness and proportionality?

26. In relation to the "holding" issue, the FTT discussed the relevant legal principles to be drawn from the following cases:

(1) *Martyn Glen Perfect v HMRC* [2019] EWCA Civ 465 ("*Perfect*").

(2) The CJEU's decision in *HMRC v WR* (Case C-279/19) ("*WR*").

(3) *Turton v HMRC* [2021] UKFTT 0441 (TC) ("*Turton*").

(4) *Davison and Robinson Ltd v HMRC* [2018] UKUT 0437 (TCC) ("*Davison*").

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

(6) *B&M Retail Ltd v HMRC* [2016] UKUT 429 (TCC) ("*B&M*").

27. The FTT accepted HMRC's submission that because the FTT had found as a fact that the Appellant was in physical possession of the cigarettes in the Shed, it followed from *WR* that she was the holder. It was irrelevant, said the FTT, whether the Appellant had any right or interest in the goods and whether or not she was or should have been aware that the goods were chargeable to excise duty. The FTT pointed out that, following the CJEU reference, the Court of Appeal had confirmed that it was bound by *WR*, in *HMRC v Martyn Perfect* [2022] EWCA Civ 799 ("*Perfect 2022*"): FTT [64]-[66].

28. In relation to the earlier excise duty point, the FTT held that the Appellant had failed to discharge the burden of proof which rested on her to establish an earlier duty point. We deal in detail with the FTT's reasoning below.

29. In relation to fairness and proportionality, Mr Forde argued that, in accordance with comments in *Perfect*, it was not fair or proportionate to impose the duty point on the Appellant when it was accepted that other actors were involved. In addition, Mr Forde said, the Appellant had health issues and did not have the means to discharge the assessment. Mr Forde referred in support to the FTT decision in *Paul Murphy v HMRC* [2021] UKFTT 0204 (TC) ("*Murphy*"). The FTT rejected the argument that the assessment breached the principles of fairness and proportionality.

30. The FTT dismissed the appeal.

GROUNDS OF APPEAL

31. The Appellant applied to the FTT for permission to appeal on nine grounds. Permission was refused for four grounds, and granted for the following five grounds:

(1) The FTT erred in finding that the Appellant held the goods.

(2) The FTT erred in not distinguishing the Appellant's case from *Munir*.

(3) The FTT erred in not accepting that there was an earlier duty point.

(4) The FTT erred in holding that it was for the Appellant to identify the person assessable for the earlier duty point.

(5) The FTT erred in holding that the principles of fairness and proportionality did not apply.

32. The Upper Tribunal (Judge Jones) also refused permission on the four grounds for which the FTT had refused permission.

33. Mr Forde's skeleton argument dealt with all five of the grounds on which the Appellant had permission to appeal. However, in the hearing before us Mr Forde began by saying that the "essential focus" of his submissions would be on various arguments relating to the existence

of an earlier duty point. We have, therefore, concentrated on those submissions in this decision, and discuss relatively briefly the Appellant's other grounds of appeal insofar as they are not covered by the discussion of the earlier duty point.

EARLIER DUTY POINT

The position in law

34. The obligation on HMRC to assess by reference to the earliest duty point which they can establish is not set out explicitly in the Directive or the domestic legislation. Section 12(1A) FA 1994 provides as follows:

> (1A) Subject to subsection (4) below, where it appears to the Commissioners—
>
> (a) that any person is a person from whom any amount has become due in respect of any duty of excise; and
>
> (b) that the amount due can be ascertained by the Commissioners,
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> the Commissioners may assess the amount of duty due from that person and notify that amount to that person or his representative.

35. Although section 12 states that in the relevant circumstances HMRC "may" assess a person, it is clear that in view of the policy objective underlying the Directive, which is that excise duty must be collected where due, HMRC must assess the person who they find to be holding the relevant goods if that is the only duty point which can be established[1].

36. As we have mentioned above, a duty point arises when excise goods are released for consumption in the UK. Because a "release for consumption" arises from the holding outside a suspension arrangement of goods which are liable to duty without the duty having been paid, it follows that there can be more than one such release in respect of the same goods. However, there can only be one assessable duty point.

37. What if HMRC seek to assess a holder of duty unpaid goods in a situation where a prior event must have occurred which would entitle HMRC to assess another person, but either the identity of that person or the circumstances of the earlier event cannot be established? In *Davison*, the Upper Tribunal said this about such a situation (at [79]-[80]):

> 79. In this regard, Mr Beal [counsel for HMRC] accepted in argument that, as a matter of law and not merely as a matter of HMRC's discretion, HMRC was obliged to assess against the earliest point in time at which they are able to establish, on the evidence before them, that excise goods have been held outside a duty suspension arrangement. In *B & M* the Upper Tribunal appeared to have proceeded on the basis that the question as to who should be assessed where there had been a series of circumstances which could have led to an assessment was purely a matter of HMRC's discretion, which could only be challenged through the medium of judicial review: see [150] to [153] of the decision.
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> 80. We accept that the position is as accepted by Mr Beal. It is consistent with our analysis that the Directive requires an assessment to be made against the first established excise duty point.

38. In *Dawson's (Wales) Ltd v HMRC* [2023] EWCA Civ 332 ("*Dawson's CA*"), Asplin LJ stated as follows, at [3]:

> It is now common ground that the Respondents, the Commissioners for His Majesty's Revenue and Customs ("HMRC"), are required, as a matter of law,

[1] See, for example, *Dawson's (Wales) Ltd v HMRC* [2023] EWCA Civ 332 at [28].

> to assess the first "holder" of the excise goods, within the meaning the Excise Directive and the HMDP Regulations, whose identity it can establish.

39. As to the information necessary for HMRC to make an assessment, at [67] the Upper Tribunal in *Davison* commented as follows:

> …the need to ensure that unpaid excise duty is collected when goods have been released for consumption requires HMRC, as the Upper Tribunal found in *B &M*, to make an assessment once it has established that an excise duty point has occurred. Clearly, HMRC cannot make an assessment until it has the necessary information on which to establish when, how, where and by whose acts the excise duty point occurred. Therefore, in the absence of any relevant information in relation to any prior release for consumption, HMRC must assess the person who it finds to be holding the goods in question, since that is the only excise duty point which HMRC is able to establish.

40. In *Dawson's CA*, the Court of Appeal referred to this passage and endorsed it: [84]. At [84]-[94] the Court accepted the Upper Tribunal's observations in *Dawson's*[2] that where an assessment is challenged on the basis that an earlier duty point arose, it will be necessary to establish the following four factors (in summary):

(1) Who had physical possession at the time the alleged earlier duty point arose.

(2) Who is the person alleged to have *de facto* or legal control over the goods, how did control exist and on what basis was it being exercised[3].

(3) The time when the excise duty point arose.

(4) Where the goods were being held at the relevant time.

41. The burden of proving that an earlier duty point can be established lies on the person seeking to resist the assessment (in this case the Appellant). Of course, it is possible that HMRC are better placed to look into evidence regarding the four factors. The Upper Tribunal recognised the concern to which this could give rise in *B&M*, at [153]:

> B & M are, it appears, troubled in this case that HMRC are not following their own stated policy in certain respects:…B & M wish to be satisfied that there are not in fact earlier points in the supply chain where an excise duty point could clearly be established on the evidence, or might be if such an investigation were in their view more vigorously pursued. We would be inclined to agree that it would not be in the interests of justice that HMRC should simply be able to sit back and say that the burden is on the taxpayer to provide the evidence to displace its liability, when the evidence that HMRC do actually have is in fact sufficient to demonstrate, objectively, that an earlier excise duty point could be established. We are in no position, however, to say whether that is the position in the present case, and any concerns of that nature would anyway have to be pursued through the medium of judicial review.

The FTT's decision on the issue of an earlier duty point

42. The FTT's discussion of this issue is at FTT[59]-[63] and FTT[67]-[69].

43. The FTT made the following findings of fact:

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[2] *Dawson's (Wales) Ltd v HMRC* [2019] UKUT 296 (TCC) at [149].

[3] The second factor was not in dispute in the appeal, and the Court of Appeal did not comment on it. It must now be seen in the context of *WR* and *Perfect 2022*. See also *Agniezska Hartleb T/A Hartleb Transport v HMRC* [2024] UKUT 00034 (TCC).

(1) HMRC had carried out investigations to determine whether an earlier duty point could be established. Those investigations had proved unsuccessful.

(2) HMRC's criminal investigations team had interviewed a "potential new suspect" on 17 September 2014, following which the liability of the Appellant to duty was determined.

(3) HMRC's witness, Ms Cox, had not been involved with the criminal investigation, and could not provide any details about the potential new suspect.

(4) Ms Cox had not made any enquiries about a possible earlier duty point.

(5) The evidence provided by the Appellant to establish the identity of another individual who could be assessed in relation to an earlier duty point was "so limited as to be virtually worthless". The Appellant had referred to a friend of her late father, Jamsie Hatz, who had access to the Shed and had visited the Appellant, but she said she had no contact details for him.

(6) CCTV footage showed an unidentified male in the dwelling house on 43 out of 51 days. It was improbable that the Appellant would have no details other than a name of an individual who had used the Shed for two to three years, who regularly waited in the Appellant's dwelling house, and with whom the Appellant frequently had a cup of tea.

(7) The FTT did not accept the Appellant's contention that the fact that the planned raid had a name established that there was a clear line of enquiry to establish an earlier duty point such that HMRC were culpable for their failure to pursue that enquiry.

(8) The information and evidence before the FTT was that attempts were made by HMRC to determine if an earlier duty point could be established and those attempts were unsuccessful and not assisted by the paucity of information provided by the Appellant.

44. Having made these findings, the FTT's conclusions were as follows, at FTT[67]-[69]:

> 67. Mr Forde submitted that HMRC had not made any effort to identify an earlier duty point, HMRC had the conviction and that was the beginning and end of it for HMRC. The raid on the Appellant's Property was clearly an intelligence led operation and, on that basis, it is evident that HMRC/PSNI had knowledge that establishes an excise duty point before the cigarettes were stored at the Shed. Ms Vicary submitted that the case law was clear: the Tribunal had no jurisdiction to consider the adequacy of HMRC's investigation to identify and establish an earlier duty point. Any challenge to the adequacy of HMRC's investigation was properly a matter for judicial review. The burden of proof is upon the Appellant to establish an earlier excise duty point, she has singularly failed to do so. We agree with HMRC's submissions.
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> 68. The UT in *Davison* at [80] stated that for the purposes of the HDMP Regulations, there can only be one assessment in respect of the same goods which must be made by reference to a clearly established excise duty point and there can only be one assessable duty point. However, there cannot be an excise duty point against which an assessment can be made until the facts by which it has occurred can be established. As further confirmed by the UT in *Davison* at [79] and [80] (paragraph 47 above) HMRC are, as a matter of law and not merely as a matter of HMRC's discretion, required to assess against the earliest duty point that can be established.
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> 69. The burden is on the Appellant to establish by evidence the existence of an earlier duty point and the identity of an individual or individuals who is/are liable to be assessed to duty at that earlier duty point. The Appellant relies

> upon the fact that as the raid at the Property was planned and was named Operation Danforth it must be inferred that HMRC were aware of an earlier excise duty point. The Tribunal does not accept that such an inference can be made and has made a finding of fact at paragraph 63 above that HMRC had investigated whether an earlier duty point could be established, those investigations were unable to establish an earlier duty point. It is incumbent on the Appellant to discharge that burden and that burden is not shifted to HMRC by the Appellant merely pointing to possible enquiries that HMRC could have potentially undertaken. The UT in *B & M* at [153] (paragraph 51 above) made clear: any concerns that HMRC have failed to undertake adequate investigations to establish the earliest possible duty point would have to be pursued through the medium of judicial review.

The Appellant's submissions

45. Mr Forde made the following points in his written and oral submissions:

(1) The only witness called by HMRC was Ms Cox, who confirmed that she had made no enquiries about a possible earlier duty point. Ms Cox had also said that she was not aware of the Appellant's basis of plea in the criminal prosecution. Those were damning admissions by HMRC's only witness.

(2) In *B&M*, the Upper Tribunal had highlighted the unfairness which could arise if HMRC simply sat back and pointed to the burden being on the taxpayer of establishing an earlier duty point when HMRC, rather than the Appellant, had evidence sufficient to establish that an earlier duty point could be established. That was precisely the position here.

(3) The facts showed that there must have been a number of earlier duty points.

(4) The FTT's finding that HMRC had attempted to determine if an earlier duty point could be established could not be reconciled with Ms Cox's evidence.

(5) HMRC's presentation of their case had unfairly limited the Appellant's ability to draw out information relevant to the four factors, because they had chosen not to put forward any witness who could speak to HMRC's investigations into an earlier duty point. The effect of that was to prevent a full merits hearing.

(6) The obligation to assess the earliest duty point is an obligation on HMRC as a body, not just the individual decision-maker in relation to the duty assessment. In practice, that means some interaction between the decision-maker and the criminal team is required, and that did not happen here.

(7) It is not the case that HMRC's actions in relation to the establishment of an earlier duty point can only be challenged by judicial review, as the FTT has a full merits jurisdiction on an appeal.

(8) The FTT was wrong to have decided that *Murphy* was not relevant.

Discussion

46. While Mr Forde argued this ground eloquently and with conviction, we do not consider that the FTT made any error of law in relation to this issue.

47. We agree with Mr Forde that in this case it is logical to assume that a release for consumption must have occurred at some stage in the chain of supply before the cigarettes arrived in the Shed, where they came to be held by the Appellant. However, one or more potential earlier duty points only support this ground of appeal if HMRC have established the necessary facts relevant to the assessment of that earlier duty point. In *Dawson's CA*, Asplin

LJ addressed the opposing views put forward by the parties as to the relevance in this context of the four factors identified by the Upper Tribunal in *Dawson's*. She stated as follows (at [74]-[76]):

> 76. What of the factors set out in [149] of the UT decision? The UT stated at [149] that where an assessment is challenged on the basis that an earlier excise duty point can be established against which assessment should be made, it would be "necessary" to establish the matters at (1) – (4) for the challenge to be successful. Mr Firth [counsel for Dawson's] accepted that in those circumstances, the burden of proof is on the party seeking to challenge the assessment. He also submitted, however, if the factors are relevant, they would also apply to HMRC were it to seek to assess a person further up a supply chain from the person in physical possession of the excise goods upon which duty had not been paid. Mr Beal accepted that to be the case.
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> 75. Mr Firth submits that the appropriate test is set out in *R v Tatham* at [23(d)] and there is no basis for the prescriptive requirements set out at [149] of the UT decision. He says that such an approach is consistent with the purpose of the Excise Directive which, as the Advocate General and the CJEU in the *Perfect* case explained, is, amongst other things, to ensure that duty is collected.
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> 76. I prefer Mr Beal's [counsel for HMRC] approach in this regard. If Mr Firth were correct, it seems to me it would lead to the opposite effect from the one which he advocates. Rather than cast a wide net which would encourage the collection of duty, the reverse would be the case. Anyone in physical possession of excise goods who was assessed for excise duty would immediately point to the chain of supply and contend that there must have been an earlier release for consumption and a person in de facto or legal control of the goods before them and, accordingly, that they were not liable. HMRC, in all likelihood, however, would be unable to identify a person to assess.

48. It is unfortunate that HMRC's only witness could not provide evidence in relation to the individual who may have been a holder of the cigarettes before the Appellant and who was a subject of the criminal investigation. However, we do not accept that this, or any other aspect of the manner in which HMRC chose to present its case before the FTT, gave rise to any error of law in the FTT's reasoning or decision on this issue, or prevented the FTT from exercising its "full merits" jurisdiction.

49. We have reached this conclusion for four reasons.

50. First, the Appellant appealed to the FTT against the assessment under section 16 FA 1994, and section 16(6) FA 1994 provides that in such an appeal (with certain exceptions which are not relevant here) "it shall…be for the appellant to show that the grounds on which any such appeal is brought have been established". Therefore, it is clear as a matter of law that if, as in this case, one ground on which the appeal is brought is that there was an earlier duty point which could have been assessed, the burden of proof in relation to that ground is on the appellant, not on HMRC.

51. Second, a complaint by the Appellant that HMRC possessed or might have possessed information which would have been sufficient to identify the four factors relevant to an earlier duty point could have been dealt with by an application for disclosure before the FTT hearing. The FTT has power under Rule 5(3)(d) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules to make a direction requiring a person to provide documents, information or submissions, and under Rule 16(1) to require a person to attend as a witness or to answer

questions or produce documents. If the Appellant believed that HMRC was failing to disclose relevant information, an application to the tribunal could have been made under these Rules.

52. Third, the assertion that what really prevented the Appellant from identifying another individual giving rise to an earlier duty point was HMRC's conduct is not consistent with the FTT's findings of fact. These included that the evidence volunteered by the Appellant as to the identity of such an individual was "so limited as to be virtually worthless"; that it was improbable that the Appellant would have no information other than a name in all the circumstances, and that HMRC's investigation was not assisted by the paucity of information given by the Appellant.

53. Fourth, as Mr Forde himself pointed out, the obligation to assess the first duty point for which sufficient information is available is an obligation on HMRC as a body, not on the HMRC officer who issues the duty assessment. It follows that what mattered was not what Ms Cox knew personally about the investigations into a potential suspect, but what HMRC as a body knew.

54. The point set out in the preceding paragraph is also material to Mr Forde's assertion that the FTT's finding that HMRC had attempted to determine if an earlier duty point could be established could not be reconciled with Ms Cox's evidence. This is an *Edwards v Bairstow*[4] challenge. While there cannot be an appeal on a pure question of fact which is decided by the FTT, the FTT may arrive at a finding of fact in a way which discloses an error of law. That is clear from *Edwards v Bairstow*, in which Viscount Simonds referred to making a finding without any evidence or upon a view of the facts which could not be reasonably entertained, and Lord Radcliffe described as errors of law cases where there was no evidence to support a finding, or where the evidence contradicted the finding or where the only reasonable conclusion contradicted the finding. Lord Diplock has described this ground of challenge as "irrationality"[5].

55. The FTT found as fact that HMRC had carried out investigations to determine whether an earlier duty point could be established, but without success. That finding was not irrational, or a finding which was not reasonably available to the FTT. That is because the FTT had much more relevant evidence available to it than Ms Cox's evidence. In particular, the FTT recorded as follows, at FTT[17]:

> …The documentary evidence for the criminal investigation and prosecution comprised: the transcript of the interview under caution of the Appellant, Appellant's pre-prepared statement, charges sheet, Certificate of Conviction, Basis of Pleas, Operation Danforth sentencing transcript, witness statements provided by HMRC (six), UK Border Force (one), PSNI Officers (14), Crime Scene Surveyor (one) and one on behalf of the cigarette manufacturer, Gallaher Limited. Included were copies of seven HMRC Officer's Notebooks. The Tribunal may admit evidence per Rule 15(2)(a) of the Tribunal Rules whether or not the evidence would be admissible in a civil trial in the United Kingdom. None of the evidence from the criminal investigation and prosecution was disputed nor was the conviction appealed.

56. The FTT's finding that HMRC had investigated a possible earlier duty point was, therefore, not one which can be successfully challenged on the basis of *Edwards v Bairstow*.

57. We do not need to consider Mr Forde's argument as to judicial review as a remedy, because it is evident from the FTT's findings of fact that this was not a case in which HMRC

[4] *Edwards v Bairstow* [1956] AC 14.
[5] *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374, at 410F-411A.

"simply sat back and pointed to the burden being on the taxpayer", in the language used in *B&M*.

58. In relation to the FTT decision in *Murphy*, we comment on this below in our consideration of fairness and proportionality. In short, we do not consider that it provides any useful guidance of general application.

59. We therefore dismiss the Appellant's appeal on the basis of its arguments relating to the existence of an earlier duty point.

REMAINING GROUNDS OF APPEAL

60. As set out above, we deal with the Appellant's remaining grounds of appeal relatively briefly, since they were not the subject of oral submissions by either counsel.

"Holding"

61. In Mr Forde's skeleton argument he submitted that the FTT had erred in finding that the Appellant was "holding" the cigarettes in the Shed for the purposes of Regulation 10 of the HMDP Regulations, because the FTT had failed to take into account the "inescapable inferences" of the Appellant's agreed basis of plea. He asserted that a number of "agreed facts" flowed from the basis of plea and the circumstances of the search. In particular, he said, since the Appellant had no personal involvement in the purchase, sale, distribution "or otherwise" of the cigarettes, she could not be "holding" those cigarettes.

62. The FTT's discussion of this issue is at FTT[64]-[66], which followed a detailed analysis of the relevant authorities, as described above. The FTT referred, correctly, to the guidance in *WR* on the meaning of "holding" in this context, referring to "physical possession", which guidance was accepted as binding in *Perfect 2022*. The FTT found as a fact that the Appellant was in physical possession of the cigarettes for the purposes of Regulation 10: FTT[54]-[55]. The FTT stated, again correctly, that it was irrelevant whether the Appellant had any right or interest in the cigarettes and whether she was or should have been aware of the liability of those goods to excise duty. The FTT considered that this answered the arguments relating to the basis of plea.

63. We consider that the FTT correctly directed itself as to the law, and made a finding on this issue which was clearly open to it on the facts. Mr Forde's argument seeks to infer too much from the form of the agreed basis of plea. Indeed, the fact that the plea was based on the Appellant "knowingly" being involved in the "harbouring" of the cigarettes is consistent with the FTT's finding that she was holding the goods.

Failure to distinguish *Munir*

64. This ground asserted that the FTT had erred in relying for its conclusion on *Munir*, because the facts in that case were materially different, and, in particular, the basis of plea was different.

65. We need not recite the details of the Court of Appeal's decision in *Munir* to dispose of this argument. Mr Forde referred to the statement at FTT[53] that "the Court of Appeal decision in *Munir* provides a complete answer to the question that the Tribunal is required to determine". However, that sentence was part of the FTT's summary of HMRC's submissions, not a conclusion reached by the FTT. The relevance of *Munir* to the hearing before the FTT lay in what the Court of Appeal had to say about the evidential value of an admission against interest made as part of a plea in a criminal conviction (which was described as "weighty evidence"), and, in particular, the relevance to liability under section 170 CEMA of a plea that the person in question was "knowingly" involved in fraudulent evasion[6]. The FTT correctly identified

[6] The FTT set out the relevant passages from *Munir*, namely [28], [31]-[32] and [39] of *Munir*.

those passages in *Munir* at FTT[48]-[50], and in this appeal those points were relevant because the admission against interest made by the Appellant was that she had been "knowingly" involved in the relevant offence under section 170(1)(b) CEMA. The FTT had therefore referred to the principles in *Munir* as relevant to its finding of fact, at FTT[56]-[58], that the Appellant knew that the cigarettes in the Shed were duty unpaid. It was clearly correct to have done so.

Fairness and proportionality

66. The final ground of appeal was that the FTT erred in holding that the assessment against the Appellant did not breach EU law principles of fairness and proportionality, and in relying on *Perfect* and/or *Perfect 2022* for reaching that conclusion. It was also said that the FTT did not accept the relevance to this issue of the FTT decision in *Murphy*, partly on the basis that it was being appealed, but in the event the appeal has not proceeded.

67. The FTT dealt with fairness and proportionality at FTT[70]-[78]. It noted that in *Perfect*, the Court of Appeal stated, at [67], that "there is very considerable force in the argument that, given the policy underlying the [2008] Directive, the imposition of strict liability on a driver in these circumstances does not offend the principles of fairness or proportionality". The Court of Appeal in *Perfect 2022* considered that this view was consistent with the CJEU's decision in *WR*.

68. Insofar as Mr Forde relied in this context on what he asserted was HMRC's ability to identify an earlier duty point, as discussed above that assertion is inconsistent with the FTT's findings.

69. The statement at [67] of *Perfect* was, of course, made in relation to the circumstances of that case. However, it does indicate that the strict liability imposed by the statute does not of itself offend against the EU principes of fairness and proportionality. In all the circumstances of this case, taking into account the findings of fact made by the FTT and the guidance in *Munir* as to the evidential weight to be attached to the basis of plea (in the Appellant's case, being knowingly concerned in the harbouring of the goods with intent to defraud) we are clear that the assessment did not breach the relevant principles.

70. As to *Murphy*, the FTT correctly noted that that decision was released prior to the CJEU's decision in *WR*, and did not consider *Munir*, both of which were binding on the FTT, and appeared to be inconsistent with those decisions and with *Perfect*. We also note that the facts in *Murphy* were highly unusual[7], and, as the FTT found, the relevant guidance as to the applicable principles is contained in *Munir*, *Perfect* and *Perfect 2022*.

DISPOSITION

71. The appeal is dismissed.

JUDGE THOMAS SCOTT
JUDGE ASHLEY GREENBANK

Release date: 29 April 2024

[7] The HMRC witnesses provided "neither confirm nor deny" responses in cross-examination.