Neutral Citation Number **[2024] UKUT 00409 (TCC)**

Appeal number: UT/2023/000125

EXCISE DUTY – penalty issued under paragraph 4 of Schedule 41 to the Finance Act 2008 – whether appellant had reasonable excuse – application of rule in Browne v Dunn and rejection of evidence without challenge in cross-examination

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

B&M RETAIL LIMITED **Appellant**

-and-

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: **JUDGE ANDREW SCOTT**
JUDGE VIMAL TILAKAPALA

Sitting in public at The Royal Courts of Justice, Rolls Building, Fetter Lane, London on 17 September 2024

Ben Elliott, instructed by Kennedys Law LLP, for the Appellant

Joanna Vicary, instructed by the General Counsel and Solicitor for His Majesty's Revenue & Customs, for the Respondents

DECISION

Introduction

1. This appeal is about whether the appellant (B&M Retail Limited or "B&M" for short) had a reasonable excuse, for the purposes of a penalty issued under paragraph 4 of Schedule 41 to the Finance Act 2008 ("FA 2008"), for acquiring possession of beer and wine in circumstances where B&M could not prove that excise duty on those goods had been paid. In a decision of the First-tier Tribunal ("the FTT"), released on 10 January 2023, the FTT concluded that B&M did not have a reasonable excuse and upheld a penalty in the amount of £1,172,340.94.

2. The FTT arrived at that conclusion because, in its view, there was further due diligence that B&M could have undertaken in relation to the person who supplied the goods (Ruby Trading Company Ltd or "Ruby" for short) and in relation to the specific goods themselves. B&M's primary ground of appeal was that this conclusion was contrary to the unchallenged evidence of one of B&M's witnesses that there was nothing further that B&M could have done in the circumstances to assure itself that duty had been paid on the goods concerned. The FTT's reasoning was, so it was argued, contrary to the general principle of procedural fairness that the evidence of a factual witness could be rejected only if it was challenged in cross-examination. In addition, the appellant submitted that the FTT failed to consider whether any further steps that could have been taken would actually have been material to the alleged act or failure resulting in the penalty.

3. A preliminary issue concerning the excise duty assessments of the goods in question was determined by the Upper Tribunal in *B&M Retail Ltd v HMRC* [2016] UKUT 429 (TCC). HMRC had assessed B&M on the basis that B&M had been holding the goods. The preliminary issue concerned the circumstances (if any) in which HMRC were entitled to assess to excise duty a person who was holding the relevant goods after another excise duty point had occurred. The Upper Tribunal held that HMRC were entitled to assess a person holding excise goods where they were unable to assess any other person in connection with a prior release for consumption.

4. In the light of that judgment and following further investigation, HMRC agreed to reduce the assessments to excise duty to £3,993,419.75, reflecting the fact that another party was identified as having held some of the goods earlier in the supply chain.

5. On 8 August 2013 HMRC issued a penalty under paragraph 4 of Schedule 41 to FA 2008 in the amount of £1,175,028.60, which was calculated as 20% of the full amount of excise duty unpaid. The fact that B&M was assessed to a lower amount of duty was irrelevant to the assessment of the penalty. HMRC later accepted that this figure contained an arithmetical error and that the correct figure was £1,172,340.94 (which was the figure upheld by the FTT on appeal).

6. B&M appealed to the FTT challenging the penalty on five separate grounds, including that it had a reasonable excuse. The other grounds are not being pursued in these proceedings.

The relevant law relating to excise duty penalties

7. Paragraph 4 of Schedule 41 to FA 2008 provides for a penalty to be payable by a person acquiring possession of excise goods at a time when payment of duty on the goods is outstanding:

> "*Handling goods subject to unpaid excise duty etc*
>
> 4. (1) A penalty is payable by a person (P) where–
>
> > (a) after the excise duty point for any goods which are chargeable with a duty of excise, P acquires possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods, and
> >
> > (b) at the time when P acquires possession of the goods or is so concerned, a payment of duty on the goods is outstanding and has not been deferred.
>
> (2) In sub-paragraph (1)–
>
> > "excise duty point" has the meaning given by section 1 of F(No.2)A 1992, and
> >
> > "goods" has the meaning given by section 1(1) of CEMA 1979."

8. The liability to the penalty is not fixed by reference to the person's own liability to excise duty. Accordingly, HMRC are able to impose penalties on every person in a supply chain who has dealt with the goods even if only one of them is assessed to the duty.

9. No penalty is payable, as a result of paragraph 20 of Schedule 41 to FA 2008, if the taxpayer can satisfy the tribunal on appeal that there is a reasonable excuse for the act or failure giving rise to the penalty. Paragraph 20(1) of that Schedule provides as follows:

> "*Reasonable excuse*
>
> 20. (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."

10. The approach to determining whether a taxpayer has a reasonable excuse is set out in *Christine Perrin v HMRC* [2018] UKUT 156 (TCC) at [81]:

> "(1) First establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether viewed objectively those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT in this context to ask itself the question "Was what the taxpayer did (or

> omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?".”

11. Section 154(2) of the Customs and Excise Management Act 1979 applies to penalty proceedings: in accordance with the provisions of that subsection, it was, therefore, for B&M to show that excise duty had been paid on the beer and wine concerned.

12. In *Euro Wines (C&C) Limited v HMRC* [2018] EWCA Civ 46 the Court of Appeal rejected the submission that, in the case of penalties issued under paragraph 4(1) of Schedule 41 to FA 2008, the reverse burden of proof imposed by that subsection was incompatible with Convention rights under the ECHR. In response to the submission that traders faced great difficulties in rebutting the presumption, the Court of Appeal said:

> "40. What is undeniable is that traders are in a good position, and it should be part of the routine conduct of their business, to undertake due diligence as regards the provenance of goods purchased by them. As the Upper Tribunal said at [42]:
>
> > "Nevertheless, who is in the best position, when carrying out its own trade, to know the circumstances of that trade. In every case a trader who is at the point of acquiring dutiable goods has the opportunity to take steps in order to satisfy itself about whether duty has been paid before going ahead. A trader who goes ahead without being satisfied knows or ought to know it is at risk. A trader in that situation can avoid the risk entirely by refusing to take such goods."
>
> 41. Due diligence is not foolproof. There will be occasions when, notwithstanding the reasonable steps taken by a trader, it transpires that duty has not been paid on goods purchased by him. In such a case, the trader will establish the defence of reasonable excuse."

The FTT's decision

13. The FTT set out the background to the excise duty assessments at [5] to [10] of its decision. In summary:

> (1) B&M was a retailer selling a wide range of products, including alcohol;
>
> (2) HMRC were concerned that duty had not been paid on consignments of beer and wine received by B&M from Ruby;
>
> (3) In May 2010 some beer and wine were seized by HMRC as they had been unable to confirm that duty had been paid on those goods;
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> (4) In April 2011 further goods were detained and subsequently seized for the same reason;
>
> (5) In November 2011 HMRC carried out checks on all alcohol sold by Ruby to B&M and detained further goods;
>
> (6) As a result of this seizure, B&M stopped trading with Ruby and the goods detained in November 2011 were then seized in February 2012 as HMRC were unable to verify that duty had been paid on the goods; and

(7) In August 2012 HMRC issued a notice of assessment to excise duty in respect of some of the goods and further notices of assessment were issued between October 2012 and February 2013 in respect of the other goods seized.

14. The penalty assessments, which are the subject of this appeal, were issued in July 2013.

15. In determining whether B&M had a reasonable excuse in the case of those penalty assessments, the FTT summarised the evidence relied on by B&M at [41] to [56] of its decision and the evidence relied on by HMRC at [57] to [62] of its decision. In doing so, it is clear that the summary of the evidence reflected both the terms of the witness statements as well as the oral evidence given by the witnesses.

16. It is important to note here that there were no express statements made by the FTT accepting or rejecting any of the evidence which it summarised. Equally, as Mr Elliott pointed out in his skeleton argument, in the case of the evidence of Mr Arora, none of the material points of Mr Arora's evidence were challenged in cross-examination and there is no indication in the FTT's summary of the evidence to suggest that his evidence was not accepted. We did not understand HMRC to take issue with that.

17. In summary, the FTT recorded the following points in reciting the evidence of Mr Arora (who was B&M's chief executive officer) and the evidence of Mr Nutall (who, in the relevant period, was the lead buyer for B&M):

(1) Mr Arora set the framework for purchases and the due diligence procedures which were required and which were carried out by individual buyers (see [41]);

(2) A B&M buyer would meet the potential supplier and enquire about various matters, including the supply chain of the goods and how the supplier was able to secure its prices (see [42]);

(3) B&M also had a "Supplier Take On Procedures" form, which required a range of information (running to 16 different categories of information), including research in relation to VAT fraud involving the supplier, references from other persons in the trade and reference to HMRC Notice 726 – which was the relevant guidance at the time in relation to due diligence (see [43]);

(4) The completed form for Ruby was not provided in evidence ([44]) but the relationship with Ruby had been in place since 2005 ([50]);

(5) The processes did not specifically mention procedures in respect of alcohol purchases but Mr Arora stated that excise duty aspects were emphasised for alcohol suppliers and that the procedures were intended to prevent loss to HMRC and were based on HMRC guidance (see [45]);

(6) B&M was concerned to minimise the risk of a VAT liability as a result of a failure by its suppliers: this was for cost and reputational reasons (see [46]);

(7) B&M was a value trader but did not want to be involved with "too good to be true" deals ([46]);

(8) B&M's terms and conditions as to reimbursement for breach of warranty were intended to provide a remedy to B&M but were also included to deter

potential suppliers who were not concerned with compliance with the applicable legislation (see [47)];

(9) Suppliers were made aware from the beginning of the relationship with them that B&M would only purchase duty-paid goods ([48]);

(10) Mr Nutall (the lead buyer) did not know from whom Ruby had obtained its goods: if he had known, he would have approached Ruby's suppliers directly to see whether B&M could get a lower price ([51]);

(11) Ruby did not take physical possession of the goods ([51]);

(12) The price charged by Ruby for the goods was not considered to be materially different from the price charged by other suppliers and the supplier would be asked why it was selling stock at the relevant price, which B&M would then check for reasonableness ([52]);

(13) As an example of that process, in the case of some Oranjeboom seized, the goods had a short best-before date and needed to be sold quickly ([52]);

(14) Mr Nutall's witness statement said that the goods seized in November 2011 had been bought on a 'normal' basis and were not 'end of line' stock ([52]);

(15) Following the initial detention of the goods, Ruby had assured B&M that the goods were duty paid ([53]) and had reimbursed B&M after the goods were seized ([54]);

(16) B&M had initially continued to trade with Ruby as a result of these assurances and also because, when asked, HMRC had not advised B&M to stop trading with Ruby ([54]);

(17) Mr Arora considered that HMRC's view that the business should not make purchases from intermediaries in the 'grey market' was unrealistic: it would not otherwise be possible to undercut the main supermarkets without purchasing from wholesalers who could sell at a lower price ([55]); and

(18) Finally, in a passage which is central to the appeal before this Tribunal, the FTT recorded that Mr Arora "considered that there was nothing else that B&M could have done to check that the relevant goods purchased were UK duty paid, and did not think that anyone from HMRC had suggested that there had been a failure in the due diligence procedures" ([56]).

18. Before summarising the evidence on behalf of HMRC given by Officer Smith, the FTT noted that Officer Smith was not the original decision-maker and had not been involved with the visits or the decision to issue a penalty assessment. The decision-maker (Officer Bowcock) had retired from HMRC in October 2017. The FTT recorded the following points in reciting the evidence of Officer Smith:

(1) Officer Smith agreed that HMRC Notice 726 was a guide of reasonable checks and that B&M had carried out such checks while noting that HMRC could not be prescriptive as to processes and procedures for due diligence ([59]);

(2) He could not, on being asked, "think of anything else that could have been done in the due diligence procedures" but "considered that due diligence alone was not enough" ([59]);

(3) A trader should, in Officer Smith's view, consider its position in the supply chain and, in particular, the risks involved in buying from suppliers who do not take physical possession of the goods they sell and, in this particular case, "with hindsight", he considered that B&M could have sourced products from a business that had physical possession of the goods ([59]);

(4) HMRC had raised concerns in November 2010 and, in particular, the wine seized in May 2010 had been purchased for £1.95 a bottle when the duty was £1.69, which showed that it was unrealistically priced when considering overheads ([60]);

(5) Officer Smith considered that the concerns in purchasing in the grey market were compounded in a visit report in March 2011 when Mr Nutall stated that he could buy the alcohol at the same price from much larger companies ([60]);

(6) Officer Smith considered that there was insufficient margin in some of the prices paid to provide a profit to each party given that B&M was unaware of the number of persons in the supply chain ([60]);

(7) He considered that the first seizure of goods should have been a warning and that B&M should have responded to the seizures in May 2010 and April 2011: three seizures in respect of one supplier should have set off alarm bells ([61]); and

(8) He did not consider that Ruby had been complicit in the failure ([61]) and agreed that HMRC had not been able to determine that duty had been paid as there was a missing trader in the chain ([62]).

19. Having summarised the evidence, the FTT then went on to consider, under the heading "***Submissions and discussion***", the issue of reasonable excuse. Having set out at [63] and [64] the terms of paragraph 20 of Schedule 41 to FA 2008 and the passage in *Perrin* quoted at {10} above, the FTT put the central issue before it in these terms at [65]:

> "There was no particular dispute as to the due diligence procedures which B&M carried out. The question was whether these amounted to an objectively reasonable excuse."

20. The FTT concluded at [91] that B&M did not have an "objectively" reasonable excuse.

21. The FTT began by summarising the submissions on behalf of B&M and HMRC at [66] to [69]. This included the submission by B&M that "there was nothing further that they could have done which would have proved that the goods were duty paid" and that their due diligence procedures, together with assurances by Ruby that the duty had been paid, were sufficient to establish a reasonable excuse (see [68]).

22. It seems to us that the reasons why the FTT rejected that submission are to be found at [70] to [90] of its decision. There are, however, places in that part of its decision where the FTT also seems to make further findings of fact. And there are also places where, despite its

statement at [65] that there was no particular dispute as to the due diligence procedures which B&M carried out, the FTT appears to cast doubt on that statement.

23. B&M did not have permission to challenge any of the findings of fact of the FTT. Rather, B&M's central challenge in the appeal before us was to the parts of the FTT's findings that were, in B&M's view, not based on the evidence and that were, in effect, propositions founded on closing submissions made by HMRC or arrived at by the FTT on the tribunal's own initiative.

24. There is, however, a qualification to this in the case of who did what in relation to the "Supplier Take On Procedures" form and the "New Account Form", which we consider further below at {56} to {63}. Suffice it to say for present purposes that the FTT said, at [70] and [71] of its decision, the "Supplier Take On Procedures" form was completed by the supplier and that there was no evidence that B&M carried out any check on the completeness or accuracy of the information provided by the supplier (see [72] and also [75]).

25. We think that, so far as possible but recognising that the divisions into these categories are not clear-cut, it is helpful to set out what appear to be: (1) further findings of fact by the FTT; (2) findings that were, according to B&M, propositions founded on closing submissions made by HMRC or arrived at by the FTT on its own initiative; and (3) the reasoning adopted by the FTT in determining whether there was an objectively reasonable excuse.

26. We consider that the following are further findings of fact (or, more accurately, findings that there was no evidence of a particular matter) made by the FTT:

> (1) There was no documentary evidence to demonstrate what information had been obtained in relation to Ruby nor when it was obtained (see [73]);
>
> (2) There was no evidence that B&M undertook any specific checks to ensure that duty was paid on the goods (see [74]); and
>
> (3) There was no check made as to B&M's suppliers' due diligence processes with regard to each supply of goods (see [80]).

27. We consider that the following are findings that were, according to B&M, propositions founded on closing submissions made by HMRC or arrived at by the FTT on its own initiative:

> (1) As an example of the sort of checks that could have been made to ensure duty had been paid on the goods, copies for import declarations could have been requested (see [75]);
>
> (2) The implication in the discussion of the warranty and invoices was that other "reliable assurance as to compliance" in respect of the payment of duty was available (see [76] and [77]);
>
> (3) The implication that there were steps that could have been taken to confirm whether the supplier's statement that duty had been paid was correct (see [81] and also [83] and [84]);
>
> (4) As an example of the sort of information which B&M could have asked Ruby, B&M could have sought redacted evidence of the payment of duty (see [82]);

(5) The implication at [83] and [84] that there were steps that could have been taken to find out whether duty had been paid on the goods, including direct evidence of duty payments or doing more than checking why the goods were priced in the way they were (see [85]); and

(6) The implication at [88] that it was possible, in some cases at least, for B&M to have obtained some evidence of the payment of duty on the goods, leaving it a choice not to carry out a transaction if it was unable to obtain "reasonable" evidence that goods were duty paid.

28. We consider that the following formed the essential components of the FTT's reasoning as to whether B&M had an objectively reasonable excuse:

(1) It was surprising that B&M had not undertaken its own searches on suppliers, and it was difficult to see why B&M would require a supplier to confirm it had been visited and to obtain references (see [71]);

(2) The inclusion in B&M's terms and conditions of a warranty that all UK legislation had been complied with was not of any particular assistance: the warranty was insufficient to ensure compliance with UK duty requirements by suppliers in respect of a particular supply (see [76] and [89]) and simply provided B&M with potential contractual redress for financial loss (see [81]);

(3) The invoices were similarly insufficient evidence that duty had actually been paid (see [77]);

(4) B&M was unable to provide details of queries made by it as to supplier due diligence processes, either by Ruby or generally (see [79]);

(5) Due diligence was required as to the supply of the particular goods: it was not enough to carry out due diligence on the supplier, or rely on statements by a supplier that duty was paid, without taking steps to confirm that those statements were reliable (see [83] and [84]) and that was particularly the case with suppliers like Ruby who did not take physical possession of the goods (see [85]);

(6) In particular, evidence that goods were duty paid throughout the relationship with Ruby could not be founded merely on the length of the trading relationship with Ruby (see [84]) and the price paid for the goods does not inevitably mean that duty had been paid (see [85]); and

(7) If B&M (like HMRC) was unable to obtain satisfactory evidence that goods were duty paid, it was open to them not to have undertaken the transaction and, in all the circumstances, not undertaking the transaction is what a reasonable taxpayer would have done (see [88]).

The grounds of appeal

29. The appellant's primary ground of appeal was that the FTT had erred in law in failing to apply the general principle of procedural fairness that a witness's evidence may be rejected only if it is challenged in cross-examination. The appellant relied, in particular, on the rejection by the FTT of the evidence of Mr Arora that there was nothing further that B&M could have done in the circumstances to check that duty had been paid on the beer and wine in question.

30. The appellant's second ground of appeal was that the FTT had erred in law in failing to identify a causative connection between the various steps that it considered B&M could have undertaken and the incurring of the relevant liability or in failing to identify further steps that were material to the relevant act or failure that resulted in the incurring of the penalty.

The law relating to unchallenged evidence of witnesses (the principle in *Browne v Dunn*)

31. It is a fundamental rule of fairness in civil proceedings that, if a party wishes to submit that a witness's evidence should not be accepted on a particular point, the other party must challenge that evidence by cross-examination. This is often referred to as the rule in *Browne v Dunn* (1893) 6 R 67. In that case, the Lord Chancellor (Lord Herschell) said this at pp 70 – 71:

> "I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses."

32. Lord Halsbury, in agreeing with the statements of the Lord Chancellor as to the way in which a trial should be conducted, put matters in these terms at pp. 76 -77:

> "To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to."

33. The above principles, and the case law authorities in which those principles were expounded (including *Browne v Dunn*), were extensively considered by the Supreme Court in *Griffiths v TUI UK Ltd* [2023] UKSC 48. At [70] Lord Hodge (giving the unanimous judgment of the Court) summarised the relevant principles as follows:

> "In conclusion, the status and application of the rule in *Browne v Dunn* and the other cases which I have discussed can be summarised in the following propositions:
>
> > (i) The general rule in civil cases, as stated in *Phipson*, 20th ed, para 12-12, is that a party is required to challenge by cross-examination the evidence of any witness of the opposing party on a material point which he or she wishes to submit to the court should not be accepted. That rule extends to both witnesses as to fact and expert witnesses.
> >
> > (ii) In an adversarial system of justice, the purpose of the rule is to make sure that the trial is fair.

> (iii) The rationale of the rule, ie preserving the fairness of the trial, includes fairness to the party who has adduced the evidence of the impugned witness.
>
> (iv) Maintaining the fairness of the trial includes fairness to the witness whose evidence is being impugned, whether on the basis of dishonesty, inaccuracy or other inadequacy...
>
> (v) Maintaining such fairness also includes enabling the judge to make a proper assessment of all the evidence to achieve justice in the cause. The rule is directed to the integrity of the court process itself.
>
> (vi) Cross-examination gives the witness the opportunity to explain or clarify his or her evidence. That opportunity is particularly important when the opposing party intends to accuse the witness of dishonesty, but there is no principled basis for confining the rule to cases of dishonesty.
>
> (vii) The rule should not be applied rigidly. It is not an inflexible rule and there is bound to be some relaxation of the rule, as the current edition of *Phipson* recognises in para 12-12 in sub-paragraphs which follow those which I have quoted in para 42 above. Its application depends upon the circumstances of the case as the criterion is the overall fairness of the trial. Thus, where it would be disproportionate to cross-examine at length or where, as in *Chen v Ng*, the trial judge has set a limit on the time for cross-examination, those circumstances would be relevant considerations in the court's decision on the application of the rule.
>
> (viii) There are also circumstances in which the rule may not apply: see paras 61–68 above for examples of such circumstances."

34. In our view, Mr Elliott was right to say that one rationale for this principle was that, if a judge is considering not accepting the witness's evidence for specific reasons, those reasons must be put to the witness so as to provide an opportunity to address them through clarification or explanation. This was a point on which the Court of Appeal in *Ullah v Secretary of State for the Home Department* [2024] EWCA Civ 201 at [37] (per Green LJ) referring to [70(vi)] of the Supreme Court judgment in *TUI UK Ltd* said this:

> "As was pointed out, cross-examination enables a witness to explain, in greater detail, his position. True it is that cross-examination might undermine the evidence of a witness but not infrequently it serves to reinforce and strengthen it."

35. We consider that this point is helpfully elucidated in a decision of the Privy Council (*Chen v Ng* [2017] UKPC 27) referred to by the Supreme Court in its judgment in *TUI UK Ltd*.

36. *Chen v Ng* was an appeal from a decision of the Court of Appeal of the Eastern Caribbean Supreme Court and concerned the ownership of shares. A witness, Mr Ng, had been challenged in cross-examination that he was not telling the truth about the basis on which the shares had been transferred. However, the judge disbelieved his evidence on two grounds neither of which had been put to Mr Ng in cross-examination. The Board considered that, in proceeding in that way, the judge had acted unfairly: the issue on which Mr Ng had been disbelieved was key to a determination of the proceedings.

37. At [53] to [55] the Board explained the principles in the following terms:

> "53. In other words, where it is not made clear during (or before) a trial that the evidence, or a significant aspect of the evidence, of a witness (especially if he is a party in the proceedings) is challenged as inaccurate, it is not appropriate, at least in the absence of further relevant facts, for the evidence then to be challenged in closing speeches or in the subsequent judgment. [..].
>
> 54. The Judge's rejection of Mr Ng's evidence, and his reasons for rejecting that evidence, do not infringe this general rule, because it was clear from the inception of the instant proceedings, and throughout the trial that Mr Ng's evidence as to the basis on which the Shares were transferred in October 2011 was rejected by Madam Chen. Indeed, Mr Ng was cross-examined on the basis that he was not telling the truth about this issue. The challenge is therefore more nuanced than if it was based on the general rule: it is based on an objection to the grounds for rejecting Mr Ng's evidence, rather than an objection to the rejection itself. It appears to the Board that an appellate court's decision whether to uphold a trial judge's decision to reject a witness's evidence on grounds which were not put to the witness must depend on the facts of the particular case. Ultimately, it must turn on the question whether the trial, viewed overall, was fair bearing in mind that the relevant issue was decided on the basis that a witness was disbelieved on grounds which were not put to him.
>
> 55. At a relatively high level of generality, in such a case an appellate court should have in mind two conflicting principles: the need for finality and minimising costs in litigation, on the one hand, and the even more important requirement of a fair trial, on the other. Specific factors to be taken into account would include the importance of the relevant issue both absolutely and in the context of the case; the closeness of the grounds to the points which were put to the witness; the reasonableness of the grounds not having been put, including the amount of time available for cross-examination and the amount of material to be put to the witness; whether the ground had been raised or touched on in speeches to the court, witness statements or other relevant places; and, in some cases, the plausibility of the notion that the witness might have satisfactorily answered the grounds."

38. The Board then went on to apply those principles to the case before it:

> "57. […] The ultimate factual dispute between the parties in the litigation was the basis upon which, and circumstances in which, the transfer of the Shares took place, and therefore the issue on which Mr Ng was disbelieved was central to the proceedings.
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> 58. The two grounds on which the Judge relied were not by any means obscure. […] Both grounds could have been put very easily in the course of a 90-minute cross- examination […]
>
> 59. […]
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> 60. It is not hard to conceive of answers which might have been available to Mr Ng to answer the first ground, and which might have satisfied or at least mitigated the Judge's concern. Mr Ng had dealt with the second point in his witness statement, but it is not impossible that he might have had more to say about it if it had been raised in cross-examination. […]
>
> 61. In summary, then, (i) the issue concerned was central to the whole proceedings,(ii) neither ground which the Judge gave for disbelieving Mr Ng on

> that issue was put to Mr Ng, (iii) neither ground was referred to at the hearing at any time, save that the second (less significant) ground had been addressed in Mr Ng's witness statement, (iv) neither ground was obscure or difficult and so each could reasonably be expected to have been raised in cross-examination, (v) it is quite possible that Mr Ng would have given believable evidence which weakened or undermined those grounds, and (vi) there is nothing in the judgment which can reasonably be invoked to say that it is reasonably clear that the judge would have reached the same conclusion without those grounds."

39. It was not disputed that the above principles apply equally to proceedings before the FTT. Indeed, the principles have been considered relatively recently in a tax context by the Court of Appeal in *Travel Document Service & Ladbroke Group International v HMRC* [2018] EWCA Civ 549 at [43] to [47] and [57] to [59] and by the Upper Tribunal in *Andrew Davies and others v HMRC* [2020] UKUT 0067 (TCC) at [26] to [40].

40. In *Travel Document Service* a submission was made on behalf of the taxpayer to the effect that the failure by HMRC to cross-examine a witness (Mr Turner) for the appellant as to the purpose for holding shares meant that HMRC could not succeed in its 'unallowable purpose' challenge. In giving a judgment with which the other members of the Court of Appeal agreed, Newey LJ did not accept that submission. The conclusion that the appellant had an 'unallowable purpose' in holding the shares did not depend on disbelieving Mr Turner (see [45]). Newey LJ had found that it followed inevitably from the FTT's findings that securing a tax advantage must have been a main purpose for which the appellant held the shares. Bean LJ gave a separate judgment agreeing with Newey LJ in which he considered the application of the principle in *Browne v Dunn*. In short, Bean LJ considered that the critical passage in Mr Turner's evidence was essentially a statement of the argument for the appellant or of Mr Turner's opinion on an issue of law (see [57]). In addition, he considered that it was unlikely that a direct challenge by Counsel for HMRC would have elicited any new evidence or enabled Mr Turner to raise points he had not already made (see [58]).

41. In *Andrew Davies* it was said on behalf of the appellants that the evidence of a witness, Mr Howard, was that the motive for the transactions concerned was one of tax efficiency or mitigation. As the relevant law turned on whether or not the appellants had a tax avoidance purpose and as it was never put to Mr Howard that the motive was tax avoidance, it was submitted that the failure to put that allegation in cross-examination meant that there was no evidence on which the FTT could have (fairly) concluded that one of the purposes of the transactions was tax avoidance. The Upper Tribunal dismissed that submission. Their view was that the appellants had in fact been cross-examined about the purposes of the transactions and that the circumstances of the case were very similar to those considered in *Travel Document Service*: see [37] and [38]. Among other things, it was not necessary to disbelieve the witnesses when they gave their evidence. And, in any event, there was nothing unfair or inappropriate in the way in which HMRC presented their case or cross-examined the witnesses (see [39]).

Application of the law relating to procedural fairness to this case

42. We consider that, largely for the reasons advanced by Mr Elliott on behalf of B&M, it was procedurally unfair for the FTT to have arrived at its conclusions by reference, at least in part, to matters that could have been put directly to B&M's witnesses.

43. In particular, we consider that each of the matters that we have set out at {27} above were the kind of matters that, as in the Privy Council case of *Chen v Ng*, might have been elucidated further by Mr Arora in his evidence.

44. Like in *Chen v Ng* (which, in our view, has close parallels to this case):

> (1) The issue as to the steps that could have been taken by B&M to check whether duty had been paid was central to the whole proceedings;
>
> (2) None of the matters set out at {27} above, relied on in part by the FTT in its reasoning, were put to Mr Arora;
>
> (3) None of the matters were obscure or difficult and consequently they could reasonably be expected to have been raised in cross-examination; and
>
> (4) It is quite possible (as per *Ullah*) that Mr Arora might have given believable evidence which undermined or served to reinforce or strengthen the reasonableness of the due diligence B&M had undertaken.

45. HMRC placed emphasis in their submissions on the fact that they accepted Mr Arora's own (subjective) belief was that B&M could have done nothing else but pointed out that the question for the FTT was whether, objectively, there was a reasonable excuse and, accordingly, the principle in *Browne v Dunn* was not engaged. It was, as they put it in their skeleton argument, no part of HMRC's case that Mr Arora's subjective view should be rejected; rather, it was objectively unsustainable: "for reasons that are perhaps obvious, a subjective belief alone cannot be determinative of reasonable excuse but fall[s] to be weighed against facts objectively proven". But it was no part of B&M's case that, just because Mr Arora considered that B&M had a reasonable excuse, it did have a reasonable excuse. Rather, B&M took issue with the fact that the FTT had, in determining whether there was an objectively reasonable excuse, relied on matters that could, and (in their view) should, have been put directly to their witnesses.

46. Although we referred Counsel to *Travel Document Service* and *Andrew Davies* at the hearing, we consider that neither case provides any assistance to HMRC in this appeal. In *Travel Document Service*, the submission on behalf of the taxpayer rejected by the Court of Appeal was, in effect, a statement of the argument for the taxpayer or of an opinion on an issue of law. In addition, it was doubted that further evidence would have been elicited that would have been of material assistance in the determination by the court of the legal question before it. Neither is true here: (1) the matters went to the heart of the case and, as explained above, it is at least possible that Mr Arora could have provided further evidence that was relevant to the issue; and (2) the dispute in these proceedings was about the matters on which the FTT relied in coming to its conclusions.

47. The same points apply even more so in relation to *Andrew Davies*. As explained above, the principle in *Browne v Dunn* is a matter of procedural fairness but in *Andrew Davies* there was, in the UT's view in that case, nothing unfair or inappropriate in the way in which HMRC had conducted the proceedings.

48. We also consider that, as we have set out above, the matters to which the FTT did have regard were a material part of the reasoning for the FTT's conclusion that B&M did not have an objectively reasonable excuse. Or, putting matters another way, we are not confident that

the FTT would (not 'might') have arrived at the same conclusion without having regard to those matters (see the dicta of Henderson LJ in *Patrick Degorce v HMRC* [2017] EWCA Civ 1427 at [95]).

49. Accordingly, we consider that, for the above reasons, there has been an error of law and that, as we consider it to be a material error, we must set aside the decision under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act").

Causative connection between the taking of the steps and the acquisition of the goods

50. We can deal more briefly with the second ground of B&M's appeal, namely that the FTT had erred in law:

> (1) in failing to identify a causative connection between the various steps that it considered B&M could have undertaken and the incurring of the relevant liability; or
>
> (2) in failing to identify further steps that were material to the relevant act or failure that resulted in the incurring of the penalty.

51. The essence of B&M's submission was that there must be a causal connection between the taking of any further due diligence and the acquisition of the goods: unless the further due diligence would (or at least could) have caused B&M not to acquire the goods, then there is no causal link that is required to establish a penalty under paragraph 4 of Schedule 41 to FA 2008. In B&M's submission, there was no reason to consider that, on the facts of this case, any of the suggested steps would (or could) have made any difference. Even if it was assumed that further due diligence could have been taken, it would not have revealed that there was a deregistered or missing trader earlier in the supply chain and there was no indication that B&M would have obtained any further information that would have indicated that the goods were not duty paid.

52. We do not accept that submission. We agree with HMRC that it is clear that paragraph 20 of Schedule 41 to FA 2008, when applied to a penalty issued under paragraph 4 of that Schedule in a case where goods have been acquired, is concerned with the reasonableness or otherwise of acquiring the goods in circumstances where the duty payable on the goods is outstanding. There is nothing in the statutory test to require the taking of particular steps that, if the taxpayer had taken them, would (or might) have caused it not to acquire the goods.

53. It was, as was made clear by the Court of Appeal in *Euro Wines* (in the passage quoted at {12} above), the intention of the penalty system provided for by paragraph 4 of Schedule 41 to FA 2008 that the taxpayer should take some responsibility for securing that duty had been paid on goods it purchased (whether or not the taxpayer was assessable to any duty chargeable on the goods). As the UT said in that case in a passage cited with approval by the Court of Appeal:

> "a trader who goes ahead without being satisfied knows or ought to know it is at risk. A trader in that situation can avoid the risk entirely by refusing to take such goods."

54. The test is, in our view, a simple one. In relation to the facts of this case (where B&M has acquired the goods), the statutory question asked by paragraphs 4 and 20 of Schedule 41 to FA 2008 is this: has the taxpayer a reasonable excuse for acquiring goods in circumstances where

duty is payable on the goods and at the time of acquisition the duty was outstanding? That was the question which the FTT did address and, accordingly, there was no error of law in its decision in doing so.

Remaking decision or remitting the decision to the FTT

55. As we have set aside the FTT's decision, we must, in accordance with section 12(2)(b) of the 2007 Act, either remit the case to the FTT for its reconsideration or re-make the decision. If we re-make the decision, we may make such findings of fact as we consider appropriate (see section 12(4)(b) of the 2007 Act).

56. As we mention above, it is clear that the FTT placed at least some significance in its decision on the fact that "the 'Supplier Take On Procedures' form was stated by both Mr Arora and Mr Nutall to be completed by the supplier" ([72]) and that, as per that paragraph of its decision, "given that B&M's evidence was that this information [internet searches against a supplier, confirmation it had been visited etc] was provided by the supplier", there was "no evidence that B&M carried out any check on the completeness or accuracy of the information provided by the supplier".

57. It was noted in brackets at the end of paragraph 39(1) of B&M's skeleton argument that the passages cited above were "contrary to the FTT's own record of the actual evidence" that the procedures were carried out by the individual buyers, which, in the case of B&M, was Mr Nuttall. We should also add that, as noted above, the FTT recorded at [65] that "there was no particular dispute as to the due diligence procedures which B&M carried out" (our emphasis). And it also seems to us of some relevance that the FTT had recited the evidence given on behalf of B&M without appearing to challenge the parts of the evidence that it set out (see what we say at {16} above).

58. It is, therefore, not clear to us that the findings at [71] and [72] should necessarily be taken at face value: they do, to some extent at least, sit uneasily with what was said at [65] and the way in which the FTT had dealt with the evidence given on behalf of B&M. Equally, it is right to note that, as was recognised by Mr Elliott, B&M did not have permission to challenge any of the facts found by the FTT.

59. In paragraph 13 of HMRC's skeleton argument under the heading "The unverified 'Supplier Take On Procedures' form ('the New Account Form')", Ms Vicary began her account of what she considered to be the first of the reasons for the FTT's conclusion on reasonable excuse. She commented on the information to be included in the New Account Form (an example of which she said was in the documents bundle before us at pages 71 and 72), noting, at paragraph 14 of her skeleton, that B&M witnesses both confirmed to the FTT that "the New Account Form was completed by the supplier" (her emphasis). She then referred to the passages at [71] and [72] of the FTT's judgment referred to above. And, at paragraph 16 of her skeleton, in the second reason she gave for the FTT's conclusion, she referred to the fact that "the New Account Form" had not been provided in evidence.

60. In an email sent to this Tribunal at 12.46pm on 16 September 2024 (the day before the hearing), the solicitors for B&M explained that, after reviewing HMRC's skeleton argument alongside the FTT judgment, there was, in their view, some confusion between B&M's "Supplier Take On Procedures" form and "the New Account Form". The "Supplier Take On

Procedures" form was – so they said in the email – completed by B&M and "the New Account Form" was completed by the supplier. The solicitors for B&M attached what "we understand to be Guy Nuttall's served witness statement with the 'New Account Form' attached". The form attached to the witness statement that we were provided with as an attachment to the email was not, as stated by the solicitors for B&M in their email, the form to which Ms Vicary referred to in paragraph 13 of her skeleton argument.

61. In her submissions, Ms Vicary took issue with this. She said that there was no confusion between the two forms. She pointed out that the form to which she referred in her submissions was the same form as was appended to the witness statement of Mr Nuttall in the hearing bundle before the FTT and in the documents bundle before this Tribunal. And she noted that there could not, in any event, be a dispute about this because B&M did not have permission to challenge any of the FTT's findings of fact.

62. Mr Elliott returned to the issue in his reply to HMRC's submissions. He said that the wrong form had mistakenly appeared as the appendix to Mr Nuttall's witness statement in the bundle of documents both before us and the FTT. He accepted that he could not directly challenge the facts. But he did submit that Mr Arora could have been directly asked about this in his evidence and he could then have dealt with any confusion.

63. This is, in our view, a somewhat unfortunate state of affairs in relation to an issue that is material for the purpose of determining the reasonable excuse issue. Mr Elliott's submissions as to how the appeal should be determined if we chose to remake it (paragraphs 45 to 49 of his skeleton) were premised on the fact that there was no dispute that the relevant due diligence was carried out in relation to Ruby. Whether or not that is so, there is, in our view and in the light of the matters we have just set out above, a lack of clarity as to the person who carried out the due diligence and as to what the FTT actually decided. As explained above, the decision of the FTT is not wholly consistent on this point. What was said by B&M and their solicitors shortly before and at the hearing suggests that the FTT might not have been clear about this matter because of an (alleged) mistake in the documentation before it. HMRC had, however, no opportunity to consider (let alone object to) this point as it was only fully explained by Mr Elliott in his reply at the very end of the hearing.

64. It seems to us that, in the light of the uncertainty on this material point, we cannot safely re-make the decision ourselves. As we have set aside the FTT's decision, we do have the power to make findings of fact. We consider that, in principle, this power extends to clarifying what the FTT's findings were. But, unfortunately, we do not consider that we are in a position to do so in this case and nor do we consider it would be just to do so without giving HMRC a chance to consider more fully the points made by B&M about the two forms.

65. It would – it seems to us – equally be wrong to proceed on the basis that, notwithstanding that B&M did not have permission to challenge any of the findings of fact made by the FTT, the documents bundle before us and the FTT was correct in circumstances where there is, as a minimum, doubt as to whether that was the case – a doubt which has arisen in part as a result of the way in which the FTT had expressed itself in its decision.

66. We consider that the way out of this difficulty is to remit the case to the FTT. We reach that decision with real reluctance. The penalty assessment subject to this appeal was, after all,

issued more than a decade ago. But, for the reasons given above, we consider that this is, regrettably, the lesser of two evils.

Disposition

67. We consider that, as explained above, there has been a material error of law in the FTT's decision. The decision was procedurally unfair. In our view, the appropriate course of action is, for the reasons given above, to remit the matter to a differently constituted FTT for the matter to be reconsidered in the light of our decision.

68. We direct that the newly constituted FTT should reconsider the reasonable excuse issue by reference to such further evidence as it considers appropriate to determine the following factual matters:

> (1) whether B&M's due diligence procedures required the "Supplier Take On Procedures" form to be completed by B&M or by the supplier and whether those procedures required the New Account Form to be completed by B&M or by the supplier; and
>
> (2) whether, in the light of all the evidence, those forms were actually completed by whoever the applicable person is.

69. We direct that it is for the FTT to determine whether a further hearing is necessary to determine those two factual matters although we should record here our hope that the parties will be able to agree those matters without the need for a further hearing.

70. Subject to that, the findings of primary fact by the FTT are to stand and are not to be questioned further. But, for the reasons set out above, procedural fairness requires that no account is to be taken by the differently constituted FTT of any of the matters we refer to above at {27}.

JUDGE ANDREW SCOTT
JUDGE VIMAL TILAKAPALA

RELEASE DATE: 10 December 2024