[2017] UKFTT 852 (TC)

TC06247

Appeal number: TC/2016/07184

EXCISE DUTY – Penalty under schedule 41 to Finance Act 2008 – whether lorry driver liable for penalty where excise duty assessed on someone else – yes – whether conduct deliberate – yes – whether penalty disproportionate for EU or Human Rights Act purposes – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

LUDWIK GORGON **Appellant**

- and -

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

TRIBUNAL: JUDGE ROBIN VOS
CHARLES BAKER

Sitting in public at Taylor House, London on 14 September 2017

The Appellant appeared in person

Edward Waldegrave, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Driving lorries containing dutiable goods across international borders can be a risky business. There have been a number of cases where HMRC have assessed unpaid excise duty and charged penalties on lorry drivers where the owners of the goods or the vehicles cannot be traced.

2. The appellant, Mr Gorgon has been charged a wrongdoing penalty by HMRC under schedule 41 to Finance Act 2008 ("schedule 41") in respect of a lorry load of beer and wine which Mr Gorgon drove from France to England in January 2014 and on which duty had not been paid.

3. HMRC have not however assessed the duty on Mr Gorgon. Instead, the duty has been assessed on Walker Transport Services Limited ("WTSL"), the haulage company which Mr Gorgon was working for at the time.

4. Mr Gorgon appeals both against the decision to impose the penalty and against the amount of the penalty which is £12,822.

The evidence and the facts

5. The Tribunal had before it a bundle of documents and correspondence produced by HMRC. We were also provided with two additional documents at the hearing, one from HMRC and one from Mr Gorgon.

6. In addition, we had a witness statement and heard oral evidence from an HMRC officer, Liz Howat who dealt with the investigation into the liability for excise duty and the subsequent assessment of penalties. We found Ms Howat to be a straightforward and credible witness and have no hesitation in accepting the evidence she gave.

7. Mr Gorgon also gave evidence. He appeared to have some difficulty in giving a straightforward answer to certain questions put to him by Mr Waldegrave on behalf of HMRC. In relation to some areas, his responses were somewhat evasive, despite requests for clarification from the Tribunal. This has affected the weight which we have given to some of his evidence.

8. From the evidence before us, we find the following facts.

9. Mr Gorgon has been a lorry driver for 20 years. Before that, he was a coach driver.

10. In early January 2014, Mr Gorgon started working for WTSL. His main contact was "Andy" (surname unknown) who worked in the office giving instructions in relation to the movement of goods although he also knew the owner of WTSL, Mark Adams.

11. Mr Adams also operated at least one other haulage business (Morrisons in Sittingbourne) which Mr Gorgon had worked for.

12. WTSL had a contract with Coca Cola to transport "Monster" energy drinks from Belgium to the UK.

13. At some point shortly before 21 January 2014, Mr Gorgon was instructed by Andy to pick up a lorry with an empty trailer at WTSL's premises in Grays, Essex and to take the empty trailer to a secure parking area at OTN (a bonded warehouse in France), leave the empty trailer there and pick up a full one.

14. Mr Gorgon travelled out to France from Dover on the afternoon of 21 January 2014 driving a lorry with the registration number AC07 DDO.

15. As instructed, he deposited the empty trailer at the secure parking area at OTN and picked up the full trailer containing a load of beer and wine. The trailer was not sealed. The documentation relating to the transport of the beer and wine was inside the trailer.

16. The consignment note (known as a "CMR") showed that the goods were being sent from SARL Care Distribution (a bonded warehouse in France) by DSK European Traders to Medway Bond & Storage (a bonded warehouse in England). The CMR identified the haulage company as Maple Haulage in Ireland and that the vehicle transporting the goods had registration number KF05 YZF. In addition, the CMR described the goods to be transported which comprised 6,048 litres of wine and 13,357.68 litres of beer.

17. Mr Gorgon did not see the trailer loaded. However, he did a quick visual inspection to ensure that everything looked right, that the trailer did not contain any illegal immigrants and that everything was strapped down.

18. He then set off for England, arriving in Dover at around 4:00am on 22 January 2014.

19. UK Border Force ("UKBF") in Dover stopped and searched the vehicle. The vehicle and its contents were seized as the UKBF officer was not satisfied that the goods would reach their stated destination (the bonded warehouse operated by Medway Bond & Storage).

20. During the course of his interview with the UKBF, Mr Gorgon stated that he had seen the trailer loaded. He also said that he was going direct to Medway Bond & Storage.

21. Mr Gorgon told us in his evidence that, after he was stopped but before his interview with the UKBF officer, he called Andy who suggested to him that maybe the reason he had been stopped is that there were some drugs in the trailer.

22. HMRC dispute whether this conversation took place or, if it did take place, that it occurred before Mr Gorgon was questioned by the UKBF officer.

23. Mr Waldegrave pointed out that there is no evidence from the UKBF officer's record of his conversation with Mr Gorgon that there was any gap between stopping the vehicle and asking Mr Gorgon the questions which are recorded in the notebook. Mr Waldegrave also made the point that, despite officer Howat asking a number of times for any relevant information in relation to the possible assessment of duty or a penalty, Mr Gorgon had never mentioned this conversation until the day of the hearing.

24. On the balance of probabilities, for the reasons given by Mr Waldegrave, we think it more likely than not that the conversation did not take place or, if it did take place, it only took place after the initial series of questions recorded by the UKBA officer in his notebook.

25. Following the search of the trailer, it was found to contain 6,048 litres of wine and 13,179.12 litres of beer (slightly less than shown on the CMR).

26. In her witness statement, officer Howat asserts that DSK does not have an account with Medway Bond. In her oral evidence, she explained that this information was given to her in the initial report from UKBF to HMRC in relation to the incident. She described this report as a "restricted" document. As a result of this, the report was not contained in the bundle of documents provided to the Tribunal. Whilst we do not approve of HMRC's attempt to assert facts based on documents which they are not willing to provide, we are satisfied on the basis of officer Howat's evidence that DSK does not have an account with Medway Bond given that Mr Gorgon did not challenge this statement.

27. There was however a disagreement between HMRC and Mr Gorgon as to whether or not Medway Bond were expecting delivery of the load in question. At the hearing, each party produced a document in support of their position.

28. The document provided by HMRC was a report of a visit to Medway Bond by three officers of HMRC's Revenue Fraud Detection Team on 4 April 2014. The officers met with a Mr Bramley who is recorded as confirming to the HMRC officers that the goods had not been booked in and that Medway Bond had not been contacted about the load.

29. Mr Gorgon has provided an extract from Medway Bond's computerised records with HMRC which record any movement of goods. This document shows the intended transport of the beer and wine from SARL Care Distribution in France to Medway Bond on 21 January 2014

30. In her evidence, officer Howat explained that this information is generated automatically by computer through the Excise Movement Control System (EMCS) when an application is made for an administrative reference code (ARC) in relation to a proposed movement of goods.

31. We were provided with a copy of the records from the EMCS system which shows the application for the ARC. This contains the same information as is shown on the print out from Medway Bond's online account with HMRC.

32. It is clear from the description of the EMCS process provided by officer Howat that the named recipient of the goods need not have any input into the application for the ARC and is not automatically notified that they have been registered as the intended recipient of a consignment of goods.

33. It is equally clear from the documentation provided by Mr Gorgon that the information it contains is a direct result of the details which have been put into the EMCS.

34. Given that Medway Bond specifically confirmed to HMRC that they were not expecting the goods and that the computer information provided by Mr Gorgon does not prove that Medway Bond were aware of the proposed movement of goods, we have come to the conclusion that, on the balance of probabilities, Medway Bond were not expecting the goods.

35. Following the seizure, the UKBF wrote to Maple Haulage (the haulier mentioned on the CMR), Medway Bond (the purported recipient of the goods), SARL Care Distribution (the purported sender of the goods), WTSL (the actual haulier) and Mr Gorgon confirming the seizure and notifying each of them of their right to challenge the legality of the seizure. Each of the letters also encouraged the recipient to contact the owner of the seized goods, vehicle or trailer if that person did not themselves own the items in question.

36. No appeal against the legality of the seizure was made by any person, nor was any application made for restoration of the goods or the vehicle.

37. Maple Haulage in Ireland, the haulage company named on the CMR, was subsequently found to be a company which had been dissolved.

38. HMRC were unable to trace any details for a vehicle with a registration number KF05 YZF, the vehicle identified by the CMR as being the one which would transport the goods in question.

39. On 9 July 2014, officer Howat wrote to Mr Gorgon warning him that he may be liable to pay the excise duty and a wrongdoing penalty and inviting him to provide her with any information about the circumstances and events surrounding the movement of the goods.

40. Mr Gorgon responded on 31 July 2014. In his reply he explained that, if the load had not been booked in to Medway Bond, he would have taken them to WTSL's yard so they could be booked in at a later stage. He also told officer Howat in that letter that the trailer was already loaded when he collected it at OTN.

41. On 8 October 2014, HMRC assessed the excise duty of £30,530 on WTSL together with a wrongdoing penalty of £18,318.

42. HMRC assessed Mr Gorgon's penalty of £12,822 on 23 February 2015. The penalty was assessed on the basis that the potential lost revenue (the excise duty in question) was £30,530. In charging the penalty, HMRC determined that Mr Gorgon's behaviour had been deliberate but unconcealed and that any disclosures he made were prompted rather than unprompted. HMRC allowed an 80% reduction of the difference between the maximum and minimum penalties, giving a full reduction for helping HMRC understand what had happened and giving them access to any information required but only a 10% reduction (out of a maximum of 30%) for telling HMRC about the wrongdoing. This was on the basis that Mr Gorgon at no stage accepted (and still does not accept) that he did anything wrong.

43. The result of this was that the penalty is 42% of the potential lost revenue.

The assessment of the penalty

Liability for a penalty

44. Schedule 41 contains a penalty regime which includes penalties for certain wrongdoings in relation to excise duty. In particular, paragraph 4 of schedule 41 provides as follows:

> "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."

45. Mr Waldegrave accepts that it is for HMRC to prove that the requirements for charging a penalty have been satisfied.

46. Paragraph 4 contains four requirements:

(1) The goods are subject to excise duty.

(2) The person on whom the penalty is charged has either acquired possession of the goods or has been concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods.

(3) An "excise duty point" has occurred.

(4) The duty has not been paid or deferred.

47. Mr Waldegrave submits that requirements (1), (3) and (4) are deemed to have been satisfied as the seizure of the vehicle and the goods was not challenged.

48. In order to examine this, it is necessary to look at the legislation under which the vehicle and the goods were seized.

49. The main provisions relating to the transport of goods subject to excise duty are contained in the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (the "Excise Regulations").

50. Due to the discrepancies in the CMR and the UKBF's belief that the goods would not be delivered to the destination stated on the CMR, it was alleged that various breaches of the excise regulations had taken place.

51. Regulation 88 of the Excise Regulations provides that where goods are liable to excise duty which has not been paid and that there has been a breach of the Excise Regulations, the goods are liable to forfeiture.

52. Where any goods are liable to forfeiture, s 139 of the Customs & Excise Management Act 1979 ("CEMA") gives HMRC the power to seize the goods.

53. In addition, s 141 of CEMA allows HMRC to seize any vehicle in which such goods are carried.

54. Schedule 3 to CEMA gives a person the right to challenge the seizure. However, paragraph 5 of schedule 3 provides that if the seizure is not challenged "the thing in question shall be deemed to have been duly condemned as forfeited".

55. The courts have discussed the meaning of this provision a number of times. The Court of Appeal in *HMRC v Jones* [2012] Ch. 414 confirmed that the effect of the deeming provision in paragraph 5 of schedule 3 to CEMA is that the First Tier Tribunal has no jurisdiction to reconsider whether the items have been correctly seized and must assume that the conditions for them to be seized have been satisfied.

56. On this basis, Mr Waldegrave says that we must accept that the goods are subject to excise duty, that the excise duty point has passed and that duty has not been paid or deferred.

57. As mentioned above, regulation 88 of the Excise Regulations only permits forfeiture if the goods are liable to duty and that duty has not been paid. This can only happen if an excise duty point has occurred and so we agree that we must assume that these three requirements have been satisfied.

58. The only other requirement for a penalty to be charged is that Mr Gorgon either acquired possession of the goods or was concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods.

59. Mr Waldegrave suggested that the most appropriate of these categories in Mr Gorgon's case is that he was concerned in carrying the goods. An alternative, he says is that Mr Gorgon was concerned in dealing with the goods.

60. As the driver of the vehicle carrying the goods, there cannot be any doubt in our view that Mr Gorgon was indeed involved in carrying the goods.

61. In principle, Mr Gorgon is therefore liable to a penalty in accordance with paragraph 4 of schedule 41.

The amount of the penalty

62. The amount of the penalty depends first of all on what is described in schedule 41 as the degree of culpability. The question is whether the behaviour is deliberate and, if so, whether it was concealed.

63. HMRC have assessed the penalty on the basis that Mr Gorgon's behaviour was deliberate but not concealed.

64. Schedule 41 does not contain any definition of what constitutes "deliberate" behaviour but Mr Waldegrave submits that, in this case, what that means is that Mr Gorgon must have known that he was involved in smuggling. We agree that this is the correct test.

65. Mr Waldegrave submits that Mr Gorgon did know that he was involved in something illegitimate. In support of this, he relies on the following:

(1) Given the discrepancies in the CMR, he must have known that it was not valid for the proposed movement of goods in question and that the goods were therefore illegitimate.

(2) Mr Gorgon lied to the UKBF officer when he told him that he had seen the trailer loaded and that he was going to go direct to Medway Bond (rather than via WTSL's yard).

(3) Telling the UKBF what he thought they wanted to hear (rather than the truth) would be consistent with Mr Gorgon knowing that what he was doing was illegitimate.

(4) Mr Gorgon has come up with further explanations for his actions at the hearing which had not previously been mentioned either to the UKBF or to HMRC.

66. Mr Gorgon on the other hand is adamant that he did not know that anything untoward was going on and that he intended to deliver the goods to Medway Bond.

He argues that the only reason the goods did not get to Medway Bond is because they were seized by the UKBF.

67. Mr Gorgon had some explanations for the apparent discrepancies in the CMR.

68. The first discrepancy is that the CMR shows the goods as being dispatched by SARL Care Distribution whereas he in fact picked them up from a secure parking area at OTN (a different bonded warehouse). Mr Gorgon's explanation for this is that, in order to avoid delays, a different vehicle/trailer would get the goods loaded at SARL Care Distribution and then drive it to the secure parking area at OTN. He described this vehicle as a "shunter".

69. Mr Gorgon did not say so specifically but we infer that he was suggesting that the vehicle mentioned on the CMR as having the registration number KF05 YZF operated by Maple Haulage would have been the shunter in this case. This would then explain the apparent discrepancies on the CMR in relation to the identity of the haulier and the vehicle transporting the goods.

70. There is a further box on the CMR where a "successive carrier" can be identified. Mr Gorgon told us that he made a mistake in failing to complete this box, presumably with the details of WTSL and his own vehicle registration number.

71. As previously mentioned, there was a small discrepancy in the amount of beer identified on the CMR compared with the amount transported. We are also told that there were some discrepancies in the alcohol level of some of the beers described compared to those which were actually carried on the vehicle. Mr Gorgon argued that he could not be expected to pick up such small discrepancies. We agree with this.

72. Mr Gorgon therefore submits that he had no reason to suspect that anything was amiss based on the documentation he was provided with.

73. Mr Gorgon also gave explanations for the inconsistencies between the information given to the UKBF in Dover and the subsequent information given to HMRC.

74. The first inconsistency related to whether or not he had seen the trailer loaded; he told the UKBF that he had seen the trailer loaded whereas he told HMRC (and confirmed at the hearing) that he had not.

75. Mr Gorgon put this down to his nervousness when he was being questioned at Dover as a result of the telephone call he says he had with Andy where the suggestion was made that some drugs had been hidden in the trailer.

76. In cross examination, Mr Waldegrave put to Mr Gorgon that he was just saying what he thought the UKBF would want to hear in the hope that he would be allowed to continue his journey. Despite being asked about this a number of times, Mr Gorgon never accepted this.

77. The other discrepancy related to the question as to whether he really intended to drive direct to Medway Bond (as he told the UKBF) or whether he was planning to go first of all to WTSL's yard.

78. Mr Gorgon's explanation for this was that the delivery had to be booked in at Medway Bond as lorries could not just turn up as and when they pleased. Therefore, whilst he did intend to go to Medway Bond, it was possible that he would have to leave the lorry parked securely at WTSL's yard whilst the consignment waited for its allocated slot at Medway Bond. Effectively, he was saying that there was no real inconsistency between what he said to the UKBF and what he subsequently said to HMRC. He just did not mention to the UKBF the possibility that he might have to travel via WTSL's yard.

79. Mr Gorgon also argues that he cannot have done anything wrong as the movement of goods was in fact legitimate. He says that all the correct processes were followed. He points out that an ARC was obtained and maintains that the evidence shows that the goods were to be moved in accordance with the information supplied in order to get the ARC. On this basis, he submits that the UKBF had no reason to suspect that he would not deliver the goods to Medway Bond in accordance with the CMR and should not therefore have seized the goods and the vehicle.

80. Mr Gorgon also blamed his apparent failure to co-operate fully both with the UKBF in Dover and subsequently with HMRC on the fact that he had not been told why the goods had been seized until some correspondence was sent to him by HMRC in September 2016 after he had lodged a complaint.

81. Mr Waldegrave pointed out to Mr Gorgon that the UKBF officer's notebook made it clear that he had been told that the vehicle and the goods had been seized as the officer believed that if Mr Gorgon had not been stopped, the load would not have reached its destination. Mr Gorgon accepts that he was told this but maintains that this cannot have been the real reason for the seizure as all the paperwork checked out.

82. In any event, he says that there was no point co-operating to the UKBF as, in his view, it was clear that they had made up their mind very early on that the goods were going to be seized.

83. Taking all of the evidence into account, we are satisfied on the balance of probabilities that Mr Gorgon did know that the movement of goods was not above board.

84. Mr Gorgon accepted in cross examination that he was familiar with bonded warehouses and the ARC system. It was also apparent from his comments at the hearing that this was the case.

85. The discrepancies in the CMR in relation to the identity of the sender, the haulage company and the vehicle which was supposed to be transporting the goods were not minor. Although Mr Gorgon gave us an explanation for these discrepancies at the hearing, that explanation is not verified by any other evidence. In particular, it

is not something he had previously mentioned at any stage either to the UKBF or to HMRC.

86. Bearing in mind that Maple Haulage, the haulage company shown on the CMR, has been dissolved and the vehicle registration shown on the CMR could not be traced, we think that Mr Gorgon's explanation for the discrepancies is unlikely to be correct. Instead, we think HMRC's explanation that the goods had simply been loaded into a trailer and left at the secure parking at OTN in order to be transported to England illegally to be much more likely to be true.

87. Mr Gorgon was very evasive in answering the questions which were put to him about the reasons why he gave incorrect or misleading information to the UKBF officer in Dover. Again, he came up with an explanation (the suggestion that drugs might have been hidden in the trailer) only at the hearing and had not mentioned this to HMRC when he had been asked to explain the circumstances and events surrounding the movement of the goods and their subsequent seizure.

88. HMRC suggest that the reason Mr Gorgon said what he did was that he thought that, if he did so, it was more likely that he would be allowed to go on his way without further enquiries. Again, we think this is a much more likely explanation and that, as suggested by Mr Waldegrave, this does provide some indication that Mr Gorgon knew that the movement of the goods was not above board.

89. Mr Waldegrave quite rightly accepted that Mr Gorgon could not have known that Medway Bond were not expecting the delivery. However, the fact that they were not expecting the goods does lend support to the proposition that Mr Gorgon was planning to take the goods to WTSL's yard and not to Medway Bond.

90. Mr Gorgon explained that the bonded warehouse in France (SARL Care Distribution) would not release bonded goods without an email from the recipient bonded warehouse (Medway Bond) confirming that it was expecting the goods. Whilst this may be true, we had no evidence that such an email had been sent. In addition, it pre-supposes that the goods originated from the bonded warehouse. We have seen no plausible evidence of who loaded the trailer or where. The only indication of this is the discredited CMR document.

91. As officer Howat pointed out in her evidence, this sort of smuggling can only take place with the co-operation of the driver as it depends on the load being delivered to somewhere other than the destination shown on the CMR.

92. For all of these reasons, we have decided that Mr Gorgon's behaviour was deliberate within the meaning of schedule 41 and that HMRC were therefore correct to impose a penalty on the basis of deliberate but unconcealed conduct.

93. HMRC are required to reduce the penalty to take into account the quality of a person's disclosure.

94. The only issue here is whether HMRC should have allowed a reduction of more than 80%.

95. Officer Howat has explained that the reason for not allowing the remaining 20% is that Mr Gorgon has never accepted that he was involved in any wrongdoing.

96. In addition to this, we note that Mr Gorgon himself accepted at the hearing that he had perhaps not been as forthcoming as he could have been with HMRC.

97. Taking all of this into account, in our view, an 80% reduction is appropriate.

98. The amount of the penalty also depends on whether any disclosures by Mr Gorgon were prompted or unprompted. Paragraph 12 of schedule 41 defines a disclosure as being unprompted if it is "made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the relevant act or failure".

99. HMRC have assessed the penalty on the basis that any disclosures were prompted. Given that all disclosures took place after the vehicle had been stopped at customs, there cannot be any doubt that this is correct.

Who should be penalised

100. Mr Gorgon also complains that HMRC should have done more to track down the owner of the goods or the holder of the operator's licence for the haulage company and should have charged the wrongdoing penalty on those people and not on him.

101. HMRC make the point that they have in fact charged a wrongdoing penalty on WTSL.

102. In any event, Mr Waldegrave submits that, under paragraph 4 to schedule 41, there may be a number of people who may be liable to a wrongdoing penalty and that there is nothing in the legislation which requires HMRC to impose penalties in any order of priority, nor indeed to prevent HMRC from imposing penalties on several different people in relation to the same events.

103. Unfortunately for Mr Gorgon, this is correct. Whilst there may be other people who could be liable for a penalty, there is nothing which stops HMRC from assessing a penalty on Mr Gorgon in this case whether or not they have assessed a penalty on those other people.

Proportionality

104. Mr Gorgon argues that a penalty of almost £13,000 is disproportionate. He refers to the European Convention on Human Rights as well as EU law.

105. In this context, Mr Gorgon says that the penalty is unfair. He also says that his income should be taken into account. We do not in fact have details of Mr Gorgon's income although the bundle of documents provided to us does contain a letter from the Department for Work and Pensions confirming that, in August 2016, Mr Gorgon was in receipt of disability living allowance of £21.80 per week.

106. Neither party had come to the hearing prepared to make any specific submissions on the question as to whether (and if so to what extent) the Tribunal should take into account the income or means of a person on whom a penalty has been charged in determining whether the penalty is disproportionate either for the purposes of EU law or the Human Rights Act. The Tribunal therefore directed HMRC to provide written submissions on this point and invited Mr Gorgon to make his own submissions should he wish to do so. The Tribunal also directed that submissions should be made as to the Tribunal's power to reduce or cancel the penalty should it be found to be disproportionate.

107. Mr Waldegrave on behalf of HMRC and Brett Wilson LLP, solicitors engaged for the purpose by Mr Gorgon have made submissions on these points. We are grateful for these submissions and have taken them into account in reaching our decision.

108. As excise duty and the handling/movement of dutiable goods are the product of EU directives, EU principles of proportionality are engaged. Although dealing with different sanctions, that much is apparent from the decision of the Court of Appeal in *Lindsay v HMRC* [2002] EWCA Civ 267 [at 53-54].

109. Article 1 of the First Protocol to the European Convention on Human Rights (A1P1) which is contained in part 2 of schedule 1 to the Human Rights Act 1998 provides that:

> "Protection of Property
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No-one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

110. The courts have determined that, in order to comply with the Human Rights Act, any measures designed to secure the payment of taxes must be balanced against the right of an individual not to be deprived of their property and must therefore be proportionate (see, for example, *Lindsay* [at 52]).

111. There is some debate as to whether the tests relating to proportionality are the same under EU law and under the Human Rights Act. In *Lindsay*, for example, the Master of the Rolls (Lord Phillips), observed [at 53] that:

> "It does not seem to me that the doctrine of proportionality that is a well established feature of European Community law has anything significant to add to that which has been developed in the Strasbourg jurisprudence."

112. The Supreme Court in *R (on the application of Lumsdon & Others) v Legal Services Board* [2015] UK SC 41 however stated [at 26] that:

> "It is also important to appreciate, at the outset, that the principle of proportionality in EU law is neither expressed nor applied in the same way as the principle of proportionality under the European Convention on Human Rights. Although there is some common ground, the four stage analysis of proportionality which was explained in *Bank Mellat v HM Treasury (Number 2)* [2013] UK SC 39; [2014] AC 700 paras 20 and 72-76, in relation to the justification under domestic law (in particular, under the Human Rights Act 1998) of interferences with fundamental rights, is not applicable to proportionality in EU law."

113. It is possible that these two statements can be reconciled on the basis that the test for proportionality depends on the context in which it is being applied and, in a tax context, it may well be that the two tests will often lead to the same result.

114. Having said this, it is worth exploring what the courts have said both in the context of EU law and the Human Rights Act.

Proportionality under EU law

115. In *Louloudakis v Elliniko Dimosio* (Case-262/99) [2003] 2 CMLR 3, the European Court of Justice had to consider penalties imposed in Greece in relation to the illegal importation of vehicles into the country without the payment of customs charges. The court concluded [at 67] that:

> "It must be borne in mind that, in the absence of a harmonisation of the community legislation in the field of the penalties applicable where conditions laid down by arrangements under such legislation are not observed, the Member States are empowered to choose the penalties which seem appropriate to them. They must, however, exercise that power in accordance with community law and its general principles, and consequently with the principle of proportionality. The administrative measures or penalties must not go beyond what is strictly necessary for the objectives pursued and a penalty must not be so

> disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the Treaty."

116. In that case, the freedom concerned was the free movement of people as the penalties in question related to a breach of an EU directive exempting vehicles imported on a temporary basis from being subject to customs duties.

117. Some courts have interpreted this passage as meaning that a penalty will fail the EU test of proportionality if:

(1) it goes beyond what is strictly necessary for the objectives pursued; or

(2) it is so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the treaty.

118. We do however think it is more likely that these tests are cumulative and that, an order for proportionality to be relevant for EU purposes there must be some EU right which risks being restricted by the existence of the penalty. This is supported by the fact that the ECJ in *Louloudakis* went on to say [at 70] that:

> "It is for the national court to assess whether, in view of the overriding requirements for enforcement and prevention, as well as of the amount of the taxes in question and the level of the penalties actually imposed, those penalties do not appear so disproportionate to the gravity of the infringement that they become an obstacle to the freedoms enshrined in the Treaty."

119. In this case, the EU freedoms involved are potentially the freedom of movement of goods and the freedom of movement of people as the penalties payable under schedule 41 cover not just cases of smuggling but also any case where dutiable goods enter the UK without duty having been paid, whether this is done deliberately or inadvertently. A very high fixed penalty with no right of appeal and no possibility of mitigation could, for example, inhibit that freedom of movement.

120. Schedule 41 however contains provisions under which the amount of the penalty is linked to the seriousness of the offence as well as containing provisions removing any liability where the person in question has a reasonable excuse for the failure to pay duty and also giving HMRC discretion to reduce a penalty if there are special circumstances. All of this is overseen by the courts through rights of appeal.

121. Bearing in mind all of these safeguards, we do not think that it can be seriously argued that the penalty regime as a whole contained in schedule 41 is disproportionate for EU law purposes. Indeed, Mr Gorgon did not seek to argue that it is. Instead, his complaint is that the penalty is disproportionate in his particular circumstances. In his written submissions, he has put forward the following points:

(1) Neither the goods nor the vehicle belonged to him. He was just the driver and therefore did not stand to gain from the smuggling operation other than through payment for his services, whereas the penalty is fixed by reference to

the amount of duty evaded which in turn is a percentage of the value of the goods.

(2) He has no savings or assets and very little income (being in receipt of incapacity benefit). He cannot therefore afford to pay the penalty.

122. This raises the question as to whether, as far as EU law is concerned, it is legitimate to look not just at the penalty regime as a whole but also to look at the circumstances of a particular individual.

123. It seems clear from the comments of the EJC in *Louloudakis* (and in particular the passage quoted at paragraph [123] above) that the national court must take into account the particular circumstances of the case in question. This was confirmed by the Upper Tribunal in *HMRC v Trinity Mirror Plc* where the Tribunal said [at 62] that:

> "The task of the Tribunal is to consider the relevant tests in the context of the individual case before it."

124. The Upper Tribunal in *HMRC v Total Technology (Engineering) Limited* took the same view, commenting [at 75-76] that:

> "75. The question of an infringement of convention rights is clearly to be addressed at an individual level …
>
> 76. We consider that the same approach should be applied when the Tribunals come to consider whether a VAT default surcharge is compliant with the principle of proportionality under EU law. Even if the structure of the surcharge regime is a rational response to the late filing of returns and late payment of VAT, it is, nonetheless, necessary to consider the effect of their regime on the individual case in hand. It is necessary to do so not least because *Louloudakis* and *Urbán* show that a penalty must not be disproportionate to the gravity of the infringement in the sense described in those decisions, that is to say that the penalty must not become an obstacle to, as we identified, the underlying aims of the directive."

125. HMRC, in their written submissions, appear to accept that the circumstances of the individual case (including financial circumstances) must be taken into account but submit that, where the penalty regime as a whole has been found to be proportionate, a particular penalty will only be disproportionate if there are wholly exceptional circumstances. They refer to the decision of the Upper Tribunal in *Trinity Mirror* [at 66]:

> "However, we accept that, applying the tests we have described, the absence of any financial limit on the level of surcharge may result in an individual case in a penalty that might be considered disproportionate. In our judgement, given the structure of the

> default surcharge regime, including those features described in *Total Technology*, this is likely to occur only in a wholly exceptional case, dependent upon its own particular circumstances."

126. Mr Gorgon on the other hand submits that a comparison with the VAT default surcharge regime (which is what was being considered in *Trinity Mirror*) is inappropriate on the basis that the VAT default surcharge regime is to deter late payment whereas the penalty in this case is a penalty on an individual for wrongdoing.

127. Mr Gorgon refers to the decision of the First Tier Tribunal in *Okroj v HMRC* [2017] UKFTT 580. In that case, a wrongdoing penalty under schedule 41 was held to be disproportionate in the particular circumstances of the case. One of the factors the Tribunal took into account was the fact that HMRC had not considered the appellant's means or what penalty might have been imposed by a criminal court had the smuggling attempt been prosecuted. The Tribunal observed that it was odd that criminal penalties are means dependent whilst civil ones are not.

128. We return however to the point that, in the context of EU law, the question is whether the penalty is so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the treaty or to the exercise of some other right conferred by EU law.

129. In our view, this is the reason why the Upper Tribunal in *Trinity Mirror* concluded that, in the circumstances where the penalty regime as a whole passes the test of proportionality, it would be very unusual for an individual penalty to be found to be disproportionate. One of the reasons that the penalty regime in *Trinity Mirror* (and indeed in this case) was found to be proportionate is that it does take account of the gravity of the infringement.

130. We do not see any significant difference in this context between the VAT default surcharge regime and a wrongdoing penalty under schedule 41 and we accept Mr Waldegrave's submission that we should follow the guidance in *Trinity Mirror*. In that context, we think it is unlikely that an inability to pay the penalty would, on its own, render a penalty disproportionate for EU law purposes although it is of course possible that, when combined with other factors, it may do so.

131. We do not think that the penalty regime under schedule 41 can be compared to a fine which might be levied if a criminal prosecution were brought against the person in question. Whilst it may be true that, in a criminal court, the individual's means would be taken into account in setting the level of any fine, it has to be borne in mind that a criminal court has a much wider range of penalties, including the possibility of imprisonment.

132. We have found that this was a deliberate smuggling attempt. As HMRC point out, this is widely acknowledged to constitute a major social problem. Parliament has decided that, where the behaviour is deliberate, a penalty can be charged on anybody

involved in the smuggling and not just on the owner of the goods or the vehicle involved. They have also decided that there should be a minimum level of penalty and that the penalty cannot be reduced on the basis of the person's inability to pay.

133. Given the legitimate aim of preventing smuggling of alcohol, we do not believe that the result is in this case is disproportionate to the gravity of the infringement even if Mr Gorgon has the limited means that he has suggested (and about which we make no finding as we do not have the evidence to do so) and even taking into account the fact that Mr Gorgon did not own the goods and may not have benefited personally to any significant degree from the smuggling attempt. We also do not consider that in a case of deliberate behaviour, the imposition of a penalty under a regime which contains the safeguards contained in schedule 41 and which itself clearly complies with the EU concept of proportionality can be an obstacle to the freedoms enshrined in the treaty.

134. In reaching this conclusion, we bear in mind the warning of the Upper Tribunal in *Total Technology* [at 73] that:

> "One might, however, expect UK courts and tribunals to be cautious in the extreme in saying that national legislation has overstepped the mark in setting the level of penalty. … A smaller penalty will always be less interventionist than a larger one; but it cannot sensibly be argued that the state must therefore impose the minimum penalty which might have some deterrent effect. The state must be entitled to impose the penalty which it considers to be the most efficacious for achieving the aim pursued constrained only by the requirement that the penalty is not disproportionate to the gravity of the infringement."

Human Rights Act and proportionality

135. The test for proportionality in the context of human rights was summarised recently in the Supreme Court in *Bank Mellat v HM Treasury* [2014] A.C. 700 [at 20] as follows:

> "… The question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community."

136. There is no suggestion in this case that questions (i) and (ii) cannot be answered in the affirmative. The issue is how questions (iii) and (iv) should be answered.

137. The European Court of Human Rights addressed the issue of measures to secure the payment of taxes in *Gasus Dosier-und Fördertechnik GmbH v Netherlands* (1995) 20 EHRR 403. The Court decided that in relation to what it described as procedural tax laws [at 60] that:

> "In passing such laws, the legislature must be allowed a wide margin of appreciation … The court will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation."

138. The court went on to say [at 62] that any interference with an individual's A1P1 rights must:

> "achieve a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights."

139. The court also made it clear [at 67] that the circumstances of the individual case must be taken into account:

> "In either case the essential question must be whether as a consequence of the tax authority's actions against the goods to which title has been retained, the vendor has had to bear 'an individual and excessive burden'."

140. As far as the margin of appreciation is concerned, the Court of Appeal in *International Transport Roth GmbH & Others v Secretary of State for the Home Department* [2002] EWCA Civ 158 concluded [at 26] that in looking at the penalty regime under the Human Rights Act the key question to ask is:

> "Is the scheme not merely harsh but plainly unfair."

141. It does appear to us that, under the Human Rights Act, Mr Gorgon has a higher hurdle to clear than under EU law given the requirement for the penalty regime to be devoid of reasonable foundation, for the penalty to be not merely harsh, but plainly unfair and the requirement for the Tribunal to give Parliament a wide margin of appreciation.

142. This is a point which was emphasised by Mrs Justice Andrews DBE in the High Court in *R (on the application of St Matthews (West) Limited and Others) v HMRC* [2014] STC 2350 in commenting [at 60] that:

> "The more the legislation concerns matters of broad social policy, the less ready will be a court to intervene. It has been judicially observed more than once in this specific context that the hurdle for the claimants on A1P1 is 'very high'."

143. The comments of Mrs Justice Andrews have been approved and repeated more recently by the Upper Tribunal in *Allan v HMRC* [2015] STC 890 [at 40] and in *R & J Birkett v HMRC* [2017] UKUT 89 (TCC) [at 57].

144. The Upper Tribunal in *Total Technologies* [at 99] has also warned that:

> "In assessing whether the penalty in any particular case is disproportionate, the Tribunal must be astute not to substitute its own view of what is fair for the penalty which Parliament has imposed. It is right that the Tribunal should show the greatest deference to the will of Parliament when considering a penalty regime just as it does in relation to legislation in the fields of social and economic policy which impact upon an individuals' convention rights."

145. As far as the penalty regime as a whole is concerned, we are satisfied, for the reasons set out in paragraph [120] above that the penalty regime contained in schedule 41 as a whole is a proportionate response to the social objective of eradicating or deterring smuggling of dutiable goods. We therefore turn to consider the specific penalty imposed on Mr Gorgon.

146. In considering whether the relevant legislation strikes the appropriate balance, it is clear that the individual's behaviour is a key consideration. Lord Phillips in *Lindsay* referred to the decision of the European Court of Human Rights in *AGOSI v United Kingdom*[1986] 9 EHRR 1 where the Court in that case said [at 54] that:

> "The striking of a fair balance depends on many factors and the behaviour of the owner of the property, including the degree of fault or care which he has displayed, is one element of the entirety of circumstances which should be taken into account."

147. Taking this into account, Lord Phillips concluded [at 63] that:

> "Having regard to these considerations, I would not have been prepared to condemn the Commissioners' policy had it been one that was applied to those who were using their cars for commercial smuggling, giving that phrase the meaning that it naturally bears of smuggling goods in order to sell them at a profit. Those who deliberately use their cars to further fraudulent commercial ventures in the knowledge that if they are caught their cars will be rendered liable to forfeiture cannot reasonably be heard to complain if they lose those vehicles. Nor does it seem to me that, in such circumstances the value of the car used need be taken into consideration. Those circumstances will normally take the case beyond the threshold where the factor can carry significant weight in the balance. Cases of exceptional hardship must always, of course, be given due consideration."

148. These comments confirm that the circumstances of each individual case must be taken into account. They also confirm that, in the case of deliberate smuggling, the person who has been penalised is unlikely to succeed in an argument under the Human Rights Act based on proportionality, even though the penalty may be harsh.

149. Mr Gorgon submits that the penalty is disproportionate in circumstances where it is plainly unfair and/or goes beyond what is strictly necessary to uphold to the objective of the legislation in question. He further submits that a penalty of almost £13,000 imposed on a former lorry driver with no personal interest in the goods and who is now unemployed is plainly disproportionate, despite the aim of the legislation to provide a strong deterrent against smuggling.

150. Whilst we have some sympathy with this view, the fact remains that Mr Gorgon knowingly participated in an attempt to smuggle a large quantity of alcohol into the UK. That was his choice. The fact that he is subject to a penalty which he may not be able to afford to pay is certainly harsh but given that the penalty is intended to be punitive and to deter others, it is not plainly unfair or devoid of reasonable foundation, even in circumstances where Mr Gorgon did not stand to benefit financially in the same way as the owner of the goods in question. As HMRC have pointed out, this sort of smuggling can only take place with the co-operation of somebody like Mr Gorgon who is prepared to drive the vehicle and to deliver the goods to somewhere other than the destination shown on the paperwork.

151. Although the Tribunal might, left to its own devices, have imposed a lower penalty, this is not a case where the result is so unfair that it would be right (in the words of the Upper Tribunal in *Trinity Mirror*) for the Tribunal to substitute its own view of what is fair for the penalty which Parliament has imposed.

Conclusion on proportionality

152. For the reasons set out above, we have decided that the penalty is not disproportionate either under EU law or under the Human Rights Act.

Special circumstances

153. Paragraph 14 of schedule 41 allows HMRC to reduce a penalty if they think it is right to do so as a result of the existence of special circumstances. Special circumstances cannot however include the person's ability to pay.

154. HMRC considered whether there were any special circumstances which would justify a reduction. They say that Mr Gorgon has not provided details of any checks carried out to ensure that WTSL and/or the movement of goods was legitimate. They also say that Mr Gorgon has provided no information which would justify any reduction.

155. The Tribunal has power to take into account special circumstances but only if HMRC's decision on this aspect is "flawed" in a judicial review sense.

156. This means looking at whether HMRC took into account all of the right circumstances and, assuming they have done so, whether their conclusion is within the reasonable range of decisions which they could have come to.

157. In the context of proportionality, Mr Gorgon has raised two points. The first is the fact that he has limited means. The second is that he did not own the goods or the vehicle and did not stand to benefit in any significant way from the smuggling operation. Although we have decided that the penalty is not disproportionate, we need to consider whether these factors are special circumstances which would justify a reduction in the penalty.

158. As mentioned above, paragraph 14 of schedule 41 specifically excludes a person's ability to pay from being a special circumstance for this purpose and so HMRC were right not to take that into account.

159. HMRC also did not take into account in their consideration of special circumstances the fact that Mr Gorgon did not own the goods or the vehicle and that, as a result of this, any financial benefit to him was likely to be relatively minor. The question is whether this was a "special circumstance".

160. HMRC have referred us to two decisions of the House of Lords (*Crabtree v Hinchcliffe* [1971] 3 All ER 967 and *Clarkes of Hove Limited v Bakers' Union* [1979] 1 All ER 152) which (admittedly in a different context) indicate that "special circumstances" denotes something exceptional, abnormal, unusual or out of the ordinary run of events.

161. In this case, Parliament has enacted a penalty regime which specifically allows a penalty to be charged not only on the owners of the goods or the vehicle but, as we have found [at 58-61 above] also on anybody concerned in carrying the goods, including the driver of the vehicle in question. Had Parliament intended that there should be some different level of penalty depending on whether the person in question owned the goods or the vehicle, it would, in our view, have said so.

162. It follows from this that the mere fact that Mr Gorgon did not own the goods or the vehicle and so did not stand to profit significantly from the operation cannot be a "special circumstance" within paragraph 14 of schedule 41 and so HMRC were right not to take this into account.

163. On this basis, HMRC's decision in relation to special circumstances is not "flawed" in a judicial review sense as they correctly concluded that there were in fact no special circumstances in this particular case.

Decision

164. We are satisfied that the penalty has been properly imposed in accordance with schedule 41.

165. Mr Gorgon's behaviour was deliberate and his disclosure was prompted.

166. The percentage reduction in the penalty applied by HMRC to reflect Mr Gorgon's co-operation is appropriate.

167. The amount of the penalty is not disproportionate either under EU law or under the Human Rights Act.

168. HMRC's decision in relation to special circumstances is not "flawed" in a judicial review sense and we cannot therefore interfere with it.

169. For these reasons, we dismiss the appeal.

170. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ROBIN VOS
TRIBUNAL JUDGE

RELEASE DATE: 30 NOVEMBER 2017