[2019] UKFTT 272 (TC)

TC07111

EXCISE DUTY – penalties for dealing in non-duty paid excise goods – time-limits – General Transport SpA *applied – no causal link between duty point assessed and appellants' penalised behaviour so time-limit running 12 months from ascertainment of tax – tax ascertained when earlier duty point assessed – preliminary issue decided in favour of appellants*

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal numbers: TC/2017/7602 and TC/17/7603

BETWEEN

J C HARNESS & CO
-and-
DDS SUPPLIES LIMITED **Appellants**

-and-

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Taylor House, Rosebery Avenue, London on 4 March 2019

Mr M Glover, counsel, instructed by Cubism Law, for the Appellant

Mr D Sternberg, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION on PRELIMINARY ISSUE

INTRODUCTION

1. In the period 30 June 2010 to 31 January 2012, the first appellant purchased 113 loads of wine from Dawson's (Wales) Ltd ('DWL') and sold them to WM Morrisons PLC ('Morrisons'). The purchase was arranged for it by the second appellant, who acted as broker. Following a visit to the premises of the first appellant by HMRC on 30 November 2011, HMRC formed the view that excise duty had not been paid on the wine.

2. On 29 June 2017, HMRC imposed an excise wrongdoing penalty on each of the appellants in the sum of £416,689.81 (based on potential lost revenue of £2,083,449.08). The appellants appealed. The penalties were revised down to £355,714 in each case on 29 October 2018.

TIME LIMIT - PRELIMINARY ISSUE

3. In September 2018, the parties agreed, and I directed that there would be a hearing of a preliminary issue in this appeal.

4. The hearing of the preliminary issue was timed to take place after the release by the Upper Tribunal of its decision in the case of *General Transport SpA* [2019] UKUT 4 (TCC). It had been released by the time of the hearing but it was not clear whether or not there would be an appeal from the decision. That remains the position at the time of writing: the Upper tribunal has refused the appellant permission to appeal on the point relevant in this preliminary issue but the appellant may obtain permission from the Court of Appeal. In any event, both parties were agreed that the preliminary hearing should go ahead despite the possibility of an appeal against the Upper Tribunal's decision.

5. The hearing preceded on the presumption, as set out in the preliminary issue below, that it could be proved that the supplies in respect of which the appellants were assessed to a penalty, were all supplies on which DWL had been assessed to excise duty in 2013 and which DWL had appealed, and which appeal was still unresolved.

6. In the event, I was given further factual background to the case. I record this below to set the decision in context but as can be seen from below, whether or not these facts could be proved, would not affect the outcome of the preliminary issue.

7. Those further background facts were that the first appellant bought and sold the relevant 113 batches of wine without ever having physical possession of them. In 2012, after the visit by HMRC in late 2011, the appellants provided HMRC with a spreadsheet of all their purchases from DWL for the relevant period. Not only was DWL assessed in 2013 to excise duty in respect of these 113 batches of wine, but in March 2014, HMRC assessed Morrisons (the first appellant's customer) for a penalty in respect of the same goods. The appellants were then purportedly assessed to a penalty on 24 April 2016. These assessments were withdrawn in early 2017 as HMRC formed the view they had been raised improperly. The assessments the subject of this appeal were issued on 22 May 2017. They were in a different amount to the earlier assessments due to a duty rate change part way through the period assessed which had not been reflected in the withdrawn assessment and had only been identified by HMRC in February 2017. The appellants did not assert that duty had ever been paid on the goods.

8. The preliminary issue was to determine whether the assessments on the appellants were out of time and was:

> Whether, on the assumption (yet to be proved) that all the supplies that were the subject of penalties in these two appeals were all supplies in respect of which Dawson's (Wales) Ltd was assessed in 2013 and has appealed under

reference TC/13/7977, were the appealed penalties assessed in time on the appellants?

THE STATUTORY LAW

9. The penalties were imposed under sch 41 of the Finance Act 2008. The time-limit for such an assessment is set out in ¶16 of that Schedule, as follows:

> *Assessment*
>
> 16.
>
> …
>
> (4) An assessment of a penalty under any of paragraphs 1 to 4 must be made before the end of the period of 12 months beginning with –
>
> (a) the end of the appeal period for the assessment of tax unpaid by reason of the relevant act or failure in respect of which the penalty is imposed, or
>
> (b) if there is no such assessment, the date on which the amount of tax unpaid by reason of the relevant act or failure is ascertained.
>
> (5) In sub-paragraph (4)(a) 'appeal period' means the period during which –
>
> (a) an appeal could be brought, or
>
> (b) an appeal that has been brought has not been determined or withdrawn.
>
> (6) Subject to sub-paragraph (4), a supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of potential lost revenue.

THE DISPUTE

10. The appellant's position was that the time limit under ¶16(4)(a), which was calculated by reference to the appeal period for a tax assessment, was irrelevant to the penalty assessment on the appellants because there was, they said, no such tax assessment. Therefore, the default time limit under s 16(4)(b) applied and that time limit had expired years before the assessments were made on the appellants.

11. HMRC did not agree. They considered that the time-limit under ¶16(4)(a) was the applicable time limit because the assessment on DWL was an assessment of tax unpaid by reason of the relevant act or failure in respect of which the penalties on the appellants were imposed. They further considered that the appeal period for that assessment had not yet expired because DWL had appealed the assessment and that appeal had not yet been determined or withdrawn.

THE CASE LAW – GENERAL TRANSPORT SPA

12. A similar, but not identical, issue had arisen in the case of *General Transport SpA* [UKUT] 2019 4 (TCC). The appellant in that case, which I shall refer to as GT, had been assessed to an excise duty wrongdoing penalty in respect of a movement of excise goods on which its customer had been assessed to pay the duty. Before the assessment to a penalty, GT had been itself assessed for the duty, but HMRC had then withdrawn that assessment and had assessed GT's customer ('GBT') for the duty instead.

13. Both parties to the appeal before me cited the Upper Tribunal decision extensively and both relied on it to support their position, although in the case of the appellant, its reliance was caveated by the statement that it also reserved the right to argue that it was wrongly decided should this appeal go further. So what did the Upper Tribunal decide?

14. There were various matters at issue in *General Transport SpA* which do not arise in this preliminary issue and I will not refer to them. It was the third issue in *General Transport* which was relevant as that was the question of whether the penalty assessment was in time.

15. The FTT had held that the penalty assessment was in time under ¶ 16(4)(a) because it was assessed within 12 months of the end of the appeal period of the *withdrawn* assessment on GT. This finding was overturned by the Upper Tribunal who said:

> [110]…we do not consider that Parliament can have intended that the withdrawn assessment should still drive the determination of a time-limit under ¶16(4)(a)……

16. But, in the alternative, the FTT had also found that the penalty assessment was timely because it was within 12 months of the end of the appeal period for the assessment on GT's customer (GBT). That finding was upheld by the Upper Tribunal who said:

> [112] The question, therefore, is whether the assessment on GBT was 'an assessment of tax unpaid by reason of the relevant act or failure in respect of which the penalty is imposed [on GT]'. We think that the focus in ¶16(4)(a) is on the reason the tax is unpaid, not the reason why HMRC chose to make the assessment. Therefore, the relevant question is whether the tax (for which HMRC decided to assess GBT) was unpaid by reason of the 'relevant act or failure'.
>
> [113]…given the definition of 'relevant act or failure' in ¶11(2) of Sch 41, the focus is on [GT's] act (or failure). It follows that the 'relevant act or failure' is [GT's] act (or failure) in acquiring possession of the wine, being concerned in carrying, removing, depositing, keeping or otherwise dealing with that wine at a time when payment of duty is outstanding (the requirements for a penalty under ¶4 of Sch 41).
>
> [114] In asking whether the tax is unpaid 'by reason of the relevant act or failure', we do not consider that ¶16(4)(a) is inviting any consideration of blameworthiness. Paragraph 16(4)(a) is concerned with timelimits and questions of blame that are relevant to the penalty are the province of the define of 'reasonable excuse.' Therefore, ¶16(4)(a) is simply asking whether [GT's] act or failure caused the tax which was assessed on GBT to be unpaid. We consider that it did. Even though [GT] was not aware that there was wine in its container, its acts in arranging transport of the wine caused it to come into the UK in circumstances where UK excise duty was not paid. That conclusion follows whether or not [GT] was to blame or was at fault. It also follows even though there were others whose acts also caused UK excise duty to go unpaid (for example the acts of GBT and the smugglers themselves). Therefore, we consider that the causal connection prescribed by ¶16(4)(a) is present even though HMRC made their excise duty assessment on GBT and not [GT].

The appellant points out that the Upper Tribunal upheld the FTT's further finding that the assessment was in time under ¶16(4)*(b)* in any event; in other words, the FTT had found that the tax was ascertained less than 12 months before the penalty was assessed on GT.

17. I move on to consider whether the assessments were in time under either ¶16(4)(a) or 16(4)(b).

WERE THE ASSESSMENTS IN TIME UNDER ¶16(4)(A)?

Appellants' position

18. The appellants' position is that the interpretation of ¶16(4)(a) given in *General Transport SpA* leads to the conclusion that the assessment was out of time in this case. That is because,

if the assessment to duty on DWL was the one from which time ran under ¶16(4)(a), it had to be an 'assessment of tax unpaid by reason of the relevant act or failure in respect of which the penalty is imposed'. The relevant act of the appellants which gave rise to the penalty was dealing in the wine after DWL's duty point; that relevant act was not the *reason* the duty was unpaid by DWL. The duty was left unpaid at DWL's duty point long before the appellants had any involvement in the goods in issue. The appellants rely on the Upper Tribunal's reasoning at [112], set out above.

HMRC's position

19. HMRC's position is that *General Transport SpA* establishes in a ruling binding on this Tribunal that it is possible for a person to be assessed to a penalty where the time limit for the penalty is calculated by reference to an assessment to tax on a third party. The appellants' analysis of *General Transport SpA* necessarily accepts that: while the appellant reserves its position to argue that the Upper Tribunal was wrong on this point, the decision is binding on this Tribunal.

20. HMRC did not accept that the appellants had correctly interpreted what the Upper Tribunal meant at [112]. HMRC's position was that it is clear that 'a relevant act or failure' which could be penalised under Sch 41 included:

> ¶11(2)(d)
>
> Acquiring possession of, or being concerned in dealing with, goods the payment of duty on which is outstanding and has not been deferred.

21. It is, therefore, the case that Parliament intended penalties to be imposed for certain behaviours which occurred after the duty point and which could not have caused the duty point to arise. So, says HMRC, ¶16(4) should be interpreted on basis that behaviour, such as that set out in 11(2)(d) does have a causal connection to the tax going unpaid.

Decision

22. The FTT must apply binding Upper Tribunal decisions. The Upper Tribunal's ruling (at [112]) was that ¶16(4)(a) meant, by the words 'tax unpaid by reason of the relevant act or failure in respect of which the penalty is imposed', to refer to 'the tax (for which HMRC decided to assess [the third party]) [which] was unpaid by reason of the 'relevant act or failure'. What they meant by this can be elucidated from how they applied it to the facts of that case in [144] where they said:

> …[GT's] acts in arranging transport of the wine caused it to come into the UK in circumstances where UK excise duty was not paid. …. It also follows even though there were others whose acts also caused UK excise duty to go unpaid (for example the acts of GBT and the smugglers themselves). Therefore, we consider that the causal connection prescribed by ¶16(4)(a) is present even though HMRC made their excise duty assessment on GBT and not [GT].

23. The appellant's position is that the Upper Tribunal requires there to be a causal connection with the tax going unpaid at the first point in time that it was due to be paid; in *General Transport SpA,* there was a duty point when the goods crossed the border into the UK and GT was causally (if not morally) responsible (with others) for the goods crossing that border.

24. In this appeal, the relevant act of the appellants in respect of which the penalty was imposed was dealing in the goods *after* the assessed duty point arose. It is not possible for the tax in respect of which DWL was assessed, which arose at that duty point, to have been unpaid by reason of the appellants' later dealing. Therefore, reasons the appellant, ¶16(4)(a) cannot

establish a time limit in respect of the penalty assessments the subject of these two appeals. Only ¶16(4)(b) is relevant.

25. Other cases, primarily *B&M Retail Ltd* [2016] UKUT 429 (TCC) and *Davison & Robinson* [2018] UKUT 437 (TCC), establish that the same goods can have more than one duty point. Therefore, it appears that the appellants' dealing in the goods will (probably) have created a duty point; but ¶16(4)(a) sets a time limit for assessment of a penalty by reference to the duty point for which the duty *assessment* was raised. The only duty assessment on these goods, and the one on which HMRC relies, is the one on DWL. The duty point assessed by that assessment was necessarily *before* the appellants dealt in the goods.

26. HMRC's case is that I have to interpret the legislation as intended. But I have to say that I find HMRC's case hard to follow. I agree that Parliament intended the act of dealing in duty unpaid goods after the duty point to be something which should be penalised; it follows that ¶16 should be interpreted in such a way that this obvious intention is not thwarted. But it clearly is not thwarted on the appellant's interpretation, because even if the time limit in §16(4)(a) cannot be met because the penalised act does not give rise to a duty assessment, it is possible for the time limit in ¶16(4)(b) to be met. Whether it is actually met in this case does not matter: it would have been possible for HMRC to assess the penalty in time in this case under ¶16(4)(b). But it is clear from the words at the start of ¶16(4)(b), 'if there is no such assessment', that Parliament anticipated that the time limit in ¶16(4)(a) would not apply in every case and set up ¶16(4)(b) as the alternative for that eventuality.

27. I see no reason to suppose that Parliament must have intended the time-limit in ¶16(4)(a) to be the one to apply in a case such as the present one where the assessment was in respect of a duty point which arose before the behaviour that is penalised. The Upper Tribunal decided that the time limit in ¶16(4)(a) applies where the penalised behaviour was causative of the duty point assessed; that does make sense on the literal wording of the legislation. Moreover, it is certainly not irrational for Parliament to have tied the time limit for assessing a penalty to the tax assessment caused by the penalised behaviour, but in other cases simply to tie the time limit to the ascertainment of the tax. See [109] of *General Transport SpA* on this. There is, as I have said, no logical reason that I can see why Parliament must be supposed to have intended to tie the time limit for assessing a penalty to a tax assessment in circumstances where the penalised behaviour was not causative of the assessment.

28. On the contrary, what I think Parliament's intention with the time limits was to give a standard 12 month time limit in the 'default' situation, but an extended time limit to deal with the possibility of a liability appeal where there was an assessment. It makes no sense to give the extended time limit when the penalised behaviour is not causally linked to the assessment.

29. In conclusion, applying the literal wording of ¶16(4)(a) and the interpretation given to it by the Upper Tribunal in *General Transport SpA*, the appropriate time limit for the assessments the subject of these two appeals is that in §16(4)(b) because there was no assessment to duty unpaid by reason of the relevant act (being the appellants' dealing in the wine) in respect of which the penalties were imposed.

Postscript to finding on ¶16(4)(a)

30. In the hearing, the assessment on Morrisons was not really canvassed by either party as relevant to the time-limit under ¶16(4)(a). The appellant's position was that it was a penalty assessment. If so, it would follow that it would be irrelevant to the ¶16(4)(a) time limit because that time limit only refers to assessments to tax. Elsewhere in the papers there was a suggestion it was a tax assessment. But even if it was (which appears very unlikely as HMRC should not assess the same tax twice), it would not make the assessments on the appellants timely (even assuming the appellants' behaviour caused Morrisons' duty point to arise) because it appears

Morrisons did not appeal and so the appeal period expired more than 12 months before the penalty assessment on the appellants.

WERE THE ASSESSMENTS IN TIME UNDER THE ¶16(4)(B) TIME LIMIT?

The appellants' position.

31. The appellants' position was that, as the ¶16(4)(a) time limit was inapplicable to these penalties, the penalties could only be timely under ¶16(4)(b). However, the appellants considered it clear that the amount of tax unpaid was ascertained no later than 2014 (when Morrisons was assessed) and that was well over 12 months before the penalty assessments. The assessments, say the appellants, were therefore out of time and the appeals must be allowed.

32. The appellants did accept that the quantum of the penalty was recalculated in 2017. Their position is that a recalculation of quantum can't re-start the clock ticking because otherwise the time limit in ¶16(4) would be rendered all but meaningless as HMRC could re-calculate tax at any moment in order to re-start the 12 month period for assessment of a penalty. It should be implicit, says the appellant, that 'ascertained' in ¶16(4)(b) refers to when the duty is first ascertained, and not when it is re-ascertained following a re-calculation.

33. As a matter of general interpretation of the provisions, the appellants' position was that the purpose of ¶16(4) was plainly to protect taxpayers from tardy assessments; ¶16(4) should be interpreted with that principle in mind. For that reason, 'ascertained' should be understood to mean when first ascertained.

HMRC's position

34. HMRC relied on ¶11(2)(d) (above at §20) and the Upper Tribunal's decision in *General Transport SpA.* The dispute in respect to ¶16(4(b) in that case centred on a letter which HMRC had sent more than 12 months before the penalty assessment the subject of the appeal. That letter had given the appellant the opportunity to comment on HMRC's stated intent to assess the duty and a penalty. The duty was calculated on an excise duty rate of £273.31. If the tax was 'ascertained' by the date of that letter, the assessment was out of time under ¶16(4)(b).

35. However, HMRC actually assessed the duty and penalty some 6 weeks later and when they did so, they did so on a different excise duty rate, being only £266.72. That assessment was just within the 12 months. As I have stated above, that assessment was later cancelled and reissued to GT's customer (GBT), but the amount of the assessment on GBT was found by the FTT to have been ascertained the day before the (later withdrawn) assessment on GT. The effect was that the FTT found the penalty assessment on GT was just in time under ¶16(4)(b).

36. GT considered that the tax was ascertained by the time the opportunity letter was written; but the Upper Tribunal on appeal upheld the FTT's decision, saying:

> '[120]…[the appellant's representative] submitted that [HMRC's submission] amounts to HMRC being allowed to benefit from their own mistake, since, on 21 November 2014, when they wrote the letter…they had all the information they needed to determine the correct amount of duty. Therefore, the fact that they belatedly realised that they had made a mistake in their calculations should not allow them to benefit from an extended time limit for charging a penalty.
>
> [121] The short answer to this submission is that ¶16(4)(b) …does not ask when the amount of duty becomes ascertainable. Nor does ¶16(4)(b) …set a time limit by reference to the date on which specified facts come to HMRC's knowledge. Rather the relevant question is when that tax became 'ascertained'.'

37. HMRC's case is that in these appeals the amount of tax was not ascertained until February 2017 when an officer identified the correct rate of duty; that was within 12 months of the date of the penalty assessments the subject of this appeal. HMRC accept that they had ascertained an amount of tax earlier, but, they say, that ascertainment was incorrect and *General Transport SpA* shows that they can rely on their own mistake.

Decision

Time-limits are alternatives

38. My first concern was whether the time-limit in ¶16(4)(b) had any application in a situation where there was an assessment to the duty and the time-limit in ¶16(4)(a) was potentially applicable. This is because it is clear from the words ¶16(4(b) 'if there was no such assessment' that the two time-limits are alternatives and mutually exclusive.

39. However, I concur with Mr Sternberg in concluding that the time-limit in ¶16(4)(a) only applies where there is an 'assessment of tax unpaid by reason of the relevant act or failure in respect of which the penalty is imposed'. The time-limit in ¶16(4)(b) is not excluded simply by virtue of there being an assessment of the tax in respect of which the penalty is imposed. Otherwise there would be a lacuna in the time-limits in a situation where a person dealt in excise goods on which excise duty was not paid but where the dealing did not cause the assessed duty to go unpaid: neither the ¶16(4)(a) nor 16(4)(b) time limit would apply with the result that certain prescribed conduct could never be penalised. That cannot have been Parliament's intent. So it is clear that where the causal link between penalised conduct and an assessment described by the Upper Tribunal in *General Transport SpA* does not exist, ¶16(4)(b) is the applicable time-limit.

40. I have found that there was no such causal link between the appellants' conduct and the assessment on DWL and so ¶16(4)(b) is the applicable time-limit in this case.

Meaning of ascertained

41. There appear to be (at least) three discrete questions surrounding the meaning of 'ascertained'. The first is what duty has to be ascertained? The second is when is that duty ascertained? And the third is what happens if the duty is re-ascertained? The Upper Tribunal in *General Transport Spa* did not appear to need to deal with the first question and the parties did not discuss it in the hearing before me; the second and third question are linked and were considered in *General Transport.*

Which duty must be ascertained?

42. Nothing was said about this first question in the hearing but it is not necessarily the most easily answered question. The legislation is on its surface quite clear in ¶16(4)(b). It is the duty:

> unpaid by reason of the relevant act or failure

As ¶16(4)(a) refers to the:

> relevant act or failure in respect of which the penalty is imposed

it seems clear that the 'relevant act or failure' referred to in ¶16(4)(b) is the act/failure in respect of which the penalty was imposed. In other words, it is the conduct falling with ¶11(2)(d). So the duty which must be ascertained is the duty unpaid by reason of the act/failure in respect of which the penalty was imposed.

43. I agree with the appellants, for the reasons given in respect of my conclusion on ¶16(4)(a), that the duty assessed on DWL was not the duty unpaid by reason of the appellants' acts or failures. DWL's triggering of a duty point was necessarily before the appellants dealt in the goods.

44. So it is clear that the unpaid duty referred to is not the duty assessed on DWL. That makes sense as the ¶16(4)(a) time limit is the time-limit intended to operate when there is such an assessment. But what is the duty to which ¶16(4)(b) refers? It seems to me that ¶16(4)(b) requires the Tribunal to identify the wrongdoer's act (or failure) which, firstly, is the act/failure in respect of which the penalty is imposed and, secondly, is the reason the relevant duty is unpaid. In other words, the Tribunal must identify the act/failure which gives rise to the penalty and then see what amount of excise duty it caused to be unpaid.

45. The act for which the appellants were penalised was dealing in the excise goods on which duty was unpaid. So I think the question is whether that dealing triggered a duty point for which tax was not paid.

46. I was not addressed on whether any duty points arose after the (alleged) duty point assessed on DWL. The assumed facts were that the appellants never had physical possession of the goods: there must be a question over whether they ever were 'holding' the goods. It seems virtually certain, however, that there would have been a holding by Morrisons who took physical possession of the goods and presumably sold them to the public.

47. Would such 'holding' be a release for consumption giving rise to a duty point? HMRC clearly consider that an earlier duty point arose when DWL held the goods. The Upper Tribunal in *B&M Retail* and *Davison & Robinson* appears to have confirmed that there can be multiple duty points in respect of the same goods, although it is not clear whether at [76] the Tribunal in *Davison* was saying that the existence of a prior duty point which was assessed would mean that there could be no subsequent duty points, or merely no subsequent duty points which could be assessed.

48. The point is significant here. Because if *Davison* should be understood as meaning that once there was an identifiable duty point, no further duty points arose, then in this appeal it would not be possible to say that excise duty went unpaid by virtue of the appellants' dealing in the goods. That is because the duty point which (allegedly) arose on DWL and was assessed by HMRC must have been earlier in time than the appellants' dealing in the goods. If there could be no duty points arising after DWL's holding of the goods, then the appellants' dealing in the goods did not cause any duty to go unpaid.

49. If that were true, it would mean that the time limit in ¶16(4) was inapplicable: either the penalty could not be raised at all or could be raised with no time bar. Either interpretation would clearly not be intended by Parliament.

50. Moreover, if *Davison* should be understood as meaning that once there was an identifiable duty point, no further duty points arose, it would mean that in many cases it might be impossible to collect any duty because the identified release for consumption may have been by a straw company. I do not think Parliament intended dealing in non-duty paid excise goods after the first identifiable duty point to be free of tax and penalty liability.

51. My preferred view of the law and the decisions in *B&M Retail* and *Davison & Robinson* is that there can be multiple duty points on the same goods, albeit only one of the releases for consumption can be assessed to duty. That would be consistent with Parliament's intention to ensure that duty was both assessable and collected. It also means that there will always be an applicable time limit to a penalty assessment under ¶16(4): one set by ¶16(4)(a) or by ¶16(4)(b). I do not therefore have to consider whether, if neither ¶16(4)(a) or (b) applied to a particular dealing, the result would be that no penalty could be levied or that a penalty could be levied without any time limit.

52. In conclusion, it is clear that the ¶16(4)(b) time-limit is meant to apply in circumstances where there is no assessment to the duty. It is the 'alternative' time-limit which applies when

there is no assessment. So it is clearly referring to a duty liability that was not assessed. That appears consistent with *B&M Retail* and *Davison & Robinson* as I understand them as meaning that there can be multiple duty points in relation to a single batch of excise goods, albeit only one of them can be assessed. It means that the duty to which ¶16(4)(b) refers is the duty arising on duty point(s) triggered by the penalised act.

53. In this case, the act of dealing by the appellants may have been a release for consumption; and it is very likely that the physical holding of the goods by Morrisons would have been a release for consumption. Proceeding on the assumption (yet to be proved) that there was such a duty point, the next question is when the tax on that duty point was ascertained.

When is the duty ascertained?

54. I agree with the appellant that the question posed by ¶16(4) is when is the excise duty ascertained, and not when the penalty is ascertained. While I have interpreted *B&M Retail* and *Davison* as meaning that there can be more than one duty point in respect of the same goods which have been traded without duty being paid, albeit only one duty point can be assessed, nevertheless, the duty due remains the same whichever duty point is identified and/or assessed.

55. I recognise that the difficulty with this view of §16(4)(b) is that it raises the possibility of a time-limit that is expired before the wrongful conduct is discovered. Parliament could not have intended that. Therefore, it may be better to understand 'the date on which the amount of tax unpaid by reason of the relevant act or failure is ascertained' as referring to the date the tax was first ascertained after the duty point triggered by the relevant act or failure was ascertained. That would not affect this case where HMRC were aware of the appellants' dealing in the goods before they assessed DWL to the tax.

56. Therefore, I agree with the appellants that HMRC ascertained the duty when they assessed DWL to the duty. At this point HMRC did know the amount of duty unpaid by reason of the appellants' dealing in the wine.

What happens if the duty is re-ascertained?

57. The duty on which the penalty was calculated was re-ascertained by HMRC less than twelve months before the penalty the subject of this appeal was assessed. It seems this was because HMRC noticed in February 2017 that its previous calculation had failed to take into account a change of duty rate during the period assessed. HMRC's position is that this was the relevant ascertainment for the purposes of the time-limit.

58. The appellant does not agree, pointing out that if HMRC were right, any slight error in the calculation of the tax could start the clock running again on a penalty ad infinitum. As it must be presumed that a time limit on assessments is meant to protect taxpayers from tardy assessments, a construction that gives in effect an unrestricted time in which to assess is clearly going against Parliament's intention.

59. I think that the Upper Tribunal's decision at [120-122] should be understood as upholding the FTT's decision that the tax was 'ascertained' on a particular date. While there was a suggestion that the primary fact finding indicated that the tax was ascertained on an earlier date, albeit later refined, the FTT's conclusion had been that the tax was 'ascertained' at the later date. The Tribunal at [121] was drawing a distinction between tax which had been ascertained and tax which was merely ascertainable. I do not think it was saying that a re-ascertainment of the tax re-started the clock.

60. Therefore, I agree with the appellant that Parliament did intend a cut-off point for assessments. There is always the possibility of error in calculations and no reason why the making of such errors would lead to an indefinitely extended time limit for the making of an

assessment. So I think the 12 months starts to run from when the tax is first ascertained, even if that first ascertainment contains an error.

61. I am fortified in that view by consideration of ¶16(6) which provided:

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

The drafter of (6) was clearly under the impression that an error in the assessment did not start time running again; on the contrary, sub-paragraph (6) is stated expressly to be subject to sub-paragraph (4), which contains the time-limits. So a further assessment to supplement an assessment made on an under-estimate of the duty could only be made within the original time limits.

62. In conclusion, a re-ascertainment of the duty does not re-start the clock.

Applying the law to the assumed facts

63. In this case, the duty on the goods that were the subject of duty point to which the appellants' penalised behaviour (the dealing) was causally linked was first ascertained (in my view) when DWL was assessed in 2013. DWL was assessed to the duty: albeit the duty point on which DWL was assessed was not the same duty point triggered by the appellants' penalised behaviour, it was nevertheless the same duty because it was the same goods. The same goods can only be assessed once to excise duty, however many duty points there might have been. So the duty must have been ascertained before DWL was assessed.

64. The duty was ascertained again when Morrisons was assessed to a penalty, and then again when the appellants were first purportedly assessed to a penalty in 2016. These re-ascertainments did not re-start the clock for making an ascertainment; even if they did, they were both more than 12 months before the penalties the subject of this hearing and therefore the penalty assessments would still have been out of time.

65. The re-calculation of the duty (downwards) immediately before the penalty assessments were made in May 2017 did not re-start the clock. It is irrelevant that this re-calculation was within 12 months of the date of the penalty assessments.

CONCLUSION ON PRELIMINARY ISSUE

66. It follows from what I have said above that, on the assumption that all the supplies that were the subject of penalties in these two appeals were all supplies in respect of which DWL was assessed in 2013 (and has appealed), the penalties on the appellants were assessed too late and the penalty assessments should be discharged.

67. This is because the duty assessment on DWL, although under appeal, was not an assessment of tax unpaid *by reason of* the appellants' dealing in the goods in respect of which the penalty was imposed, so that the extended time limit in ¶16(4)(a) could not apply; nevertheless, the DWL assessment could only have been made by HMRC ascertaining the duty due on the excise goods the subject of the appellants' dealing and therefore the date of that assessment started the 12-month clock running under ¶16(4)(b) such that, while the assessment on Morrisons in early 2014 appears to have been in time, the assessment on the appellants in 2017 was years out of time.

68. I do not find this a surprising conclusion. While Parliament intended wrongful dealing in non-duty paid alcohol to be penalised, they did not intend HMRC to drag its heals in making penalty assessments. Once the unpaid duty the subject of the dealing was ascertained, HMRC had 12 months to make the penalty assessments. No explanation was given to me as to why Morrisons were assessed fairly promptly in 2014 but assessments on the appellants were not

first raised until 2016. And while Parliament clearly intended an extended time limit for assessing penalties where the related duty liability was under appeal, as it is normal for liability to penalties to depend on liability to duty, DWL's liability (or not) to pay the duty would not affect the appellants' liability to the penalty as the appellants' dealing was not the cause of the assessment on DWL, which was, if at all, caused by DWL's prior dealing in the goods. Therefore, there was no extended time limit for the penalty assessment on the appellants just because of the appeal against the duty assessment by their supplier. See the similar analysis at [109] of *General Transport SpA.*

69. My understanding when I ordered this preliminary issue to take place was that if the conclusion was that the penalties were assessed too late, then that would be the end of the proceedings. It is therefore my expectation that the appeals should be allowed; however, my conclusions were made on certain factual assumptions, so if HMRC does not agree that they were correct, it may be that there will have to be a further hearing. However, it seems to me that the only factual assumptions which were critical to my decision were that the duty assessment on DWL was in respect of the same goods as the penalty assessment on DWL, which DWL sold to the first appellant with the second appellant acting as broker, and that the assessment was made in 2013. While I have referred to other facts, such as the assessment on Morrisons, none of these other facts were in the event critical to the decision I reached. But it will be for the parties to decide whether they can agree the necessary facts or to inform the Tribunal that a further hearing is necessary.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

70. This document contains full findings of fact and reasons for the decision on the preliminary issue set out at §8 above. 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. However, either party may apply for the 56 days to run instead from the date of the decision that disposes of all issues in the proceedings, but such an application should be made 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 24 APRIL 2019