[2018] UKUT 14 (TCC)

Appeal number UT/2016/0057

INCOME TAX -"income tax assessments" -"best judgment" - confiscation order - proceeds of crime - agreed basis of plea - tax liability - assessment stage - enforcement stage - double recovery - double jeopardy

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

MALACHY HIGGINS

Appellant

and

THE NATIONAL CRIME AGENCY

Respondent

TRIBUNAL: MR JUSTICE HORNER

Sitting in public at Royal Courts of Justice, Chichester Street, Belfast BT1 3JF on 25-26 October 2017

Arthur Harvey QC and Ciaran Harvey, instructed by McCallion Keown, for the Appellant

Craig Dunford for the Respondent

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A. INTRODUCTION

[1] Malachy Higgins ("the appellant") appeals against the decision of the First Tier Tribunal ("FTT") of 29 January 2015 in respect of income tax assessments for the years 1998/1999 to 2003/2004 made by the respondent, the National Crime Agency ("NCA"), formally SOCA adopting the general revenue function of HM Revenue and Customs ("HMRC") having served Notices under Section 317(2) of the Proceeds of Crime Act 2002 ("POCA") that they were taking over the general revenue functions of the HMRC in respect of the appellant's tax returns for the years 1996/1997 to 2002/2003 and 2003/2004. The appellant's liability for tax had been assessed by NCA as follows:

(a) Income tax - £70,618.86.

(b) Class 4 NIC - £943.24.

(c) Interest - £35,100.13.

(d) Penalties - £42,937.26.

Total: £149,599.69 less paid - £8,950

Balance due - £140,649.69

[2] The FTT concluded that the confiscation order of £400,000 which had been paid by the appellant was a gross sum and must have included income tax. In the circumstances the FTT offset the amount paid by the appellant of £400,000 in respect of the confiscation order against what it calculated as the total sum due by the appellant, namely £517,624, leaving an outstanding liability of £117,624.

[3] Leave to appeal was granted by Tribunal Judge Harriet Morgan on the basis that while an appeal could only be made on a point of law, it was arguable that no court acting judicially

and properly instructed as to the relevant law could have come to the determination that the FTT did. In other words she gave leave to appeal only on the well-recognised basis of *Edwards v Bairstow* [1956] AC 14 although in somewhat ambiguous terms. She said:

> "4. I consider that in accordance with Rule 40 of the Tribunal Procedure (First Tier Tribunal) (Tax Chamber) Rules 2009 whether to review the decision but decided not to undertake a review as **I was not satisfied that there was an error of law in the decision**.
>
> 5. An appeal only lies in a question of law (under S.11 of the Tribunals, Courts and Enforcement Act 2007). This includes not only questions of pure law but also cases treated as a question of law, such as where a finding of fact had been made without sufficient evidence whereupon a view of the facts which could not be reasonably entertained or if the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination (on the principles set out in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14).
>
> 6. I consider that whether the Tribunal was correct in law (understanding a question of law to be as set out in 5) to draw the conclusions it did in the decision (as challenged by the appellant set out in 3) is not clear and, therefore, I have decided to give permission for the appeal to be made to the Upper Tribunal." (Emphasis added)

There is no distinction in law between questions of pure law and "cases treated as a question of law."

[4] The NCA cross-appealed on the grounds that *inter alia*:

(a) There were no challenges to the assessments and thus the FTT had no option but to confirm them.

(b) Any consideration of the confiscation order made against the appellant by the Crown Court under Section 156 of POCA was, as a matter of law, entirely irrelevant.

(c) The findings of fact were findings that the FTT was entitled to reach and no point of law arose under *Edwards v Barstow.*

[5] I would like to express my gratitude to counsel on both sides for their comprehensive, insightful and thought provoking submissions, both written and oral.

B. FACTUAL BACKGROUND

[6] Unfortunately, it is necessary to look in some little detail at the facts and circumstances that lie behind this particular appeal. They are rather complicated and confusing. They have already been set out in some detail by the Court of Appeal following

the appellant's application to extend time to appeal arising from the appellant's convictions on his pleas of guilty on 17 October 2006 at Antrim Crown Court to the offences of:

(i) Keeping, treating and disposing of controlled waste in a matter likely to cause environmental pollution or harm to human health; and

(ii) Breach of the terms and conditions of a discharge consent issued by the Department of Environment of 29 May 1996.

These offences involved on the one hand dumping waste unlawfully because the appellant did not have the necessary licence and on the other breaching fundamental terms of the licence he had in disposing of waste at that location. He was sentenced to 4 months' imprisonment in respect of these offences. Further, on 13 August 2008 the Crown Court made a confiscation order against him under Section 156 of POCA in the sum of £400,000. On 17 February 2016 the appellant with a completely new legal team applied for an extension of time in which to appeal against the confiscation order. The same legal team who presented the case in the Court of Appeal appeared in the FTT. This is the same legal team that has appeared before this court, but, as I have observed, a different one from the legal team that represented the appellant at the Crown Court.

[7] The Lord Chief Justice set out the background as follows:

> "**Background**
>
> [2] The applicant commenced a skip hire business in 1981. On 30 August 1993 he purchased a parcel of land now known as Craigmore Landfill Site near Garvagh. The Department of the Environment granted Discharge Consent 817/96 on 29 May 1996 to discharge effluent into the underground stratum at the site subject to conditions that the site should only receive categories A and B waste, should be developed in a phased manner and on a cellular basis, that cells which had been filled should be capped appropriately and that no discharge from the site should contain any substance which is toxic or injurious to fish or other aquatic organisms.
>
> [3] A Waste Disposal Licence, 96/10, was granted to the applicant in respect of the site by Coleraine Borough Council on 30 September 1996. On 23 September 1999 the applicant was registered with EHS as a carrier of controlled waste and a waste disposal licence was granted permitting him to accept categories A and B waste which comprises inert waste or material which may decompose slowly but its deposited form is only slightly soluble in water.
>
> [4] On 26 February 2003 Coleraine Borough Council issued a notice revoking the applicant's waste disposal licence. An appeal against the revocation was unsuccessful. On 6 May 2003 officers from EHS visited the site and raised concerns about its operation and the waste that had been accepted for infill. On 30 May 2003 they returned to the site to complete a full

inspection. They observed all areas of the site showed heavy infestation of flies, numerous rats, underground fires, a very strong odour of landfill gas and decaying waste with large quantities of household waste with similar commercial and industrial waste. Sample exhibits were taken and observations were conducted to determine the quantity, depth and nature of the waste deposited on the site. It was noted that one lorry was tipping waste which had originated in Donegal. The applicant sold the site in February 2004 and on 16/17 October 2006 EHS assessed the total amount of category B and C waste on the site at somewhere between 65,000 m^3 and 70,000 m^3. That figure was not in dispute as an assessment made at that time.

[5] A basis of plea document was agreed between the parties prior to sentencing on 15 March 2007. The prosecution contended that the net benefit to the applicant was somewhere between £1.3 million and £2.3 million whereas for the purposes of that hearing the applicant accepted a net benefit between £1.3 million and £1.7 million. It was however agreed between the parties that these figures were agreed solely for the purpose of the plea and that they were not binding in relation to the question of confiscation. **One of the issues in dispute was the amount actually paid to the applicant per tonne for the waste deposited and at least some of the figures were based on the cost of removal rather than the benefit to the applicant.**

[6] The confiscation hearing was held on 13 February 2008. There was considerable discussion between the parties before that. One of the matters discussed was a so-called retrospectivity argument. The Proceeds of Crime Act 2002 came into operation on 24 March 2003. Accordingly it was being contended on behalf of the applicant that the prosecution could only maintain confiscation in respect of the period after 24 March 2003. This argument had been rejected in a judgement delivered on 28 November 2007 (R v Allingham [2007] NICC 53) by His Honour Judge Babington. He concluded that the offence consisted of the keeping of the materials on site and that the keeping of the entire materials was a continuing offence which occurred on the dates on which the offences were charged. That analysis was subsequently affirmed by the Court of Appeal (R v McKenna [2012] NICA 29).

[7] The applicant was advised of the issues in the case including the approach to the retrospectivity issue and gave authority to agree a benefit amount assessed at £400,000. An Order was subsequently made to that effect. The money has now been paid. It appears that the applicant enquired about his right to appeal the Order on 28 April 2008 but was advised by

his then solicitors that he could not do so as he had consented to the Order being made.

[8] On 1 September 2009 a notice under section 317 of the Proceeds of Crime Act 2002 was issued by SOCA taking over the income tax, national insurance contributions and capital gains tax functions from HMRC for the period 1996/97 to 2002/03 in respect of the applicant. A further notice included the period 2003/04. SOCA determined that an additional sum of £160,104.94 was owing to HMRC in income tax and penalties for that period. The matter was appealed to the First-Tier Tribunal ("FTT"). Before that tribunal it appears that there was considerable confusion as to how the confiscation sum had been assessed at £400,000 and **it was submitted on behalf of SOCA that the amount had been assessed on the basis of the applicant's ability to pay.** The FTT accepted that this was the basis on which the compensation amount had been calculated and considered that accordingly the applicant had paid only one quarter of his criminal gain which it assessed on the basis of the figures contained in the document prepared as a basis of plea. The FTT concluded that the total monetary value of the applicant's criminal activity would have been £1,663,378. **For some reason the FTT further considered that the case had been settled in the sum of £400,000 because the applicant's legal team had assessed his liability from 24 March 2003 and counsel for the prosecution felt that if the amount was increased it might well give rise to further proceedings. There was absolutely no evidential base for any of this reasoning as far as we can see.** We understand that the decision of the FTT is at present subject to appeal.

[9] In light of what had happened in the FTT we asked Mr Mateer to take precise instructions in relation to the position of SOCA on the calculation of the confiscation sum. In a letter dated 8 November 2016 the Public Prosecution Service indicated that their position on the confiscation order was as follows:

> `Please be advised that as far as the Prosecution is concerned the confiscation order dated 13 February 2008 was based on the following:
>
> 1. An acceptance that it reflected Mr Higgins' criminal conduct from the time he opened the waste site in 1996 until the date the offending was detected. For the avoidance of doubt, the sum recovered was not restricted to offending behaviour occurring after the commencement of the Proceeds of Crime Act regime in 2003.

> 2. The sum of £400,000 was to reflect Mr Higgins' criminal benefit for the offending period and the confiscation order was not made in this amount due to inadequate or insufficient assets on his part.
>
> 3. The calculations on which the application for a confiscation order proceeded at no time took into account income tax and were based on a gross receipt by Mr Higgins of criminal benefit. It follows that in directing confiscation of the entire sum, any income tax payable on the gross receipts by Higgins is already contained within the gross figure confiscated.'
>
> Although that would appear to undermine to at least some extent the reasoning of the FTT Mr Mateer indicated that the National Crime Agency stand over their own position in the matter before the tribunal". (**Emphasis added**)

[8] It will be noted that this exposition of the facts and circumstances is very different indeed from that set out in the judgment of the FTT which is currently under appeal. It found:

> "9 There was considerable confusion between the parties as to the terms on which the £400,000 had been calculated. **It was, however, agreed by the parties that the initial calculation of the benefit to Mr Higgins was based on the notional cost of removing the material from the Craigmore Landfill site**. Mr Higgins has indicated in his statement of 11 September 2014 that the court incorrectly assessed the value of the waste material that he had illegally placed on the site. Mr Higgins was represented by counsel at the proceedings, as was SOCA, and all the parties accepted that the methodology used to calculate the benefit was the best that could be achieved because Mr Higgins had no details of the value of the actual amounts deposited on the site. **It was accepted that the resulting value did not necessarily represent the monies that Mr Higgins had actually derived from his criminal activity.** Mrs Dee Traynor (Mrs Traynor), on the instructions of the Judge in the Crown Court, had provided 3 separate bases for the calculation and we and both parties accepted that the Court adopted Option 1.
>
> 10 Option 1 was based on the period from 30 September 1996, when the licence was granted, until 30 May 2003 the date on which the Environmental & Heritage Service (EHS) completed their full inspection. The calculations were as follows:–

• At a tonnage of 45,500 to 70,000 tonnes the financial benefit from the Category B & C waste was a minimum of £1,137,500 and a maximum of £2,100,000.

• At a tonnage of 157,000 to 165,000 the financial benefit from Category A waste was a minimum of £472,000 to £495,000.

• Taken together the total benefit from Category A plus B plus C was £1,609,500 to £2,595,000

• Over the period Mr Higgins had paid £273,246 in landfill tax. We have been shown an extract from the court record, which shows that Judge Grant took the view that the net benefit (after the payment of the Landfill Tax) was between £1,336,254 and £2,321,754 on the prosecution's case and between £1.298,750 and £1,696,754 on the defence's case.

11 Mrs Traynor also identified for the Court assets which Mr Higgins had available to him at the beginning of 2008 the following amounts:

`Properties at:

65 Portrush Road, Coleraine
12.1 hectares at Townland of Mayboy
This site was sold to Coleraine Skip Hire which subsequently sold the Skip Business to Mr Lavery for
Of which £403,000 of the £600,000 was used to buy three properties. It is unclear what happened to the balance of
Jaguar XK8 2001
Bank accounts: Northern Bank t/a Coleraine Skip Hire
Sabadell Atlantic, Marbella
Investments in the name of deceased father M A Higgins
Norwich Union Maxi ISA
Norwich Union Portfolio Bond
Axa Investment Bond ISA
Premium bonds
Sterling Investment account
Skandia Multi Fund Plan

Mr Higgins stated that all the accounts in his father's name were for administrative purposes only. Mr Higgins looked after his father's affairs until his father died on 24 January 2007. He did not indicate whether he had inherited any property from his father. Mrs Traynor concluded that Mr Higgins had available to him £1,238,545.

12 John Kearney BL and John Larkin QC, for Mr Higgins, in their skeleton argument in relation to the proposed confiscation order submitted:

> `…the Court's focus must be narrowly restricted to the benefit accruing to the defendant from the offence at 30 May 2003, it is also submitted that the court cannot, in any event, look back beyond the 24 March 2003 when the relevant provisions of the 2002 act came into force…'

The prosecution argued:–

> `The basis of plea accepted by both parties on 12 March 2007 and in respect of which the accused was sentenced on 15 March 2007 clearly entitled the sentencing Judge to have regard to the full circumstances including the quantity of waste estimated to be present at the Defendant's site of 30 May 2003 (as a result of having been deposited there in the period since his operation began) and the amount of benefit obtained by him in arriving at that situation.'

13 We note that the period from 1996 to 2003 was the period agreed in the "Agreed Basis of Plea" accepted by Mr Higgins. We also accept that as a result those agreed two sets of figures must have been gross figures net of Landfill Tax (See Option 1 above). The basis of the calculation of the confiscation order would have been clear if the figure used had been one of the two sets of figures identifying the benefit. **However, POCA restricts the amount of a confiscation order to what Mr Higgins could reasonably provide.**

14 **Mr Dunford submitted that Judge Grant had not addressed the issue of income tax at all, nor had it been addressed in the final negotiations leading to the confiscation order.** He stated that Mrs Traynor made reference to the failure to raise any returns with regard to the Higgins Waste Business;

> `4.17. I have made enquiries of HM Revenue and Customs (Inland Revenue) to ascertain if separate returns were made by the defendant in respect of the "Higgins Waste" partnership.'

No such details have been provided in any of the returns made by Mr Higgins and `… The fact that his returns do not include any income for the Higgins Waste partnership, is indicative of no such returns having been made..'

15 Mr Dunford believed that Judge Grant, a judge in the criminal court, was never asked to consider income tax. With the consent of the parties, he finally assessed the amount of the confiscation order at £400,000 based on the balance of probabilities of Mr Higgins' ability to pay.

16 Section 157 of POCA provides that Mr Higgins has to pay an amount equal to the benefit he has received as set out in Option 1. Section 157 (2) states that if the available amount is less than the benefit, then the payment has to be the available amount based, on the balance of probabilities, as to Mr Higgin's actual means. Helpfully Mr Dunford referred us to the negotiations between the parties giving rise to the eventual sum of £400,000. **It is clear from those negotiations that the figure of £400,000 was agreed to by all the parties as it was the best figure either side believed could be achieved.**

17 We have been provided with a transcript of a hearing on 13 February 2008 before Judge Grant and argued by John Larkin QC (JL) and John Kearney BL, appearing for Mr Higgins and Peter Mateer QC appearing for the Prosecution with Maria O'Loan (MOL), Mr Higgins' solicitor in attendance.

Paraphrasing the note:

> `JL advised that the Prosecution suggested a figure of £1,000,000 to settle the case. JL advised the Prosecution that that figure could not be considered as Mr Higgins' assets totalled £1,200,000 and that any proposals would have to be below £400,000. When the parties had retired, JL advised Mr Higgins that if the court could be persuaded that the benefit should only be either the amount of waste on the site at 30 May 2003 or in relation to waste deposited between 24 March 2003 and 30 May 2003 and the order was made on that basis, then the Prosecution might appeal the confiscation order so made to the Court of Appeal.
>
> Mr Higgins stated that he wanted to keep the assets and money he had and did JL think the Prosecution would settle for less. JL said that it was unlikely. Mr Higgins said that he could only afford £100,000. JL said that Mr Higgins would have to accept £400,000 as that was the least the Prosecution were likely to accept. Discussion took place between JL MOL and Mr Higgins as to the basis of the proposed offer of £400,000 and that it would be based on option 1 the "Agreed Basis".

> JL had been asked by Mr Higgins what the prospects would be for the Judge to accept that the period of benefit could be either the value on the site on 30 May 2003, or the value of the quantities of waste delivered to the site between 24 March 2003 and 30 May 2003. JL had said that if the Court were to agree 12,250 tonnes a £30 per tonne the order would be £367,000 and that it was his view that that they could not confiscate before 24 March 2003, but that might not be the Judge's view. Mr Higgins insisted that all the figures and calculations, as to the waste and benefit to him, were incorrect, but that he would settle for the £400,000 and that he would not dispute the "Agreed Basis".

18 The Prosecution invited the Court to make an order in the sum of £400,000. The Judge asked if Mr Higgins accepted that a benefit had accrued to him from his criminal conduct. JL confirmed that although Mr Higgins did not, as a lay person, understand the legal argument as to the benefit JL accepted, on Mr Higgins behalf, that within the meaning of section 224 (5) of the Proceeds of Crime Act 2002 Mr Higgins had obtained a benefit and the benefit amounted to £400,000.

Section 224 (5) reads:

> `If a person obtains a pecuniary advantage as a result of or in connection with conduct, he is to be taken to obtain as a result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage.'

Mr Higgins has subsequently objected to the basis on which the confiscation order was made. As, however, his counsel and solicitor have both explained the position to him and Mr Higgins confirmed that he had agreed the methodology, we are bound to consider the confiscation order in light of that agreement.

19 A confiscation order was consequently made on 13 February 2008 in the sum of £400,000 and is silent as to whether the £400,000 was meant to represent a gross payment, less the landfill tax. It appears that Judge Grant understood that the figure, which Mr Higgins could afford namely the £400,000, had been assessed on the basis of Option 1 which was a gross calculation. It also appears from the note of the negotiations that Mr Larkin had calculated the offer of £400,000 on the basis that POCA was not retrospective and that the benefit should therefore be of the order of £376,000, for

> either, the period to 30 May 2003, or for the period 24 March 2003 to 30 May 2003 In those circumstances an offer of £400,000 was of the right order.
>
> 20 We have decided, however, that if Mr Higgins had paid the full figure of £2,595,000 assessed by the NCA or the lower figure of £1,298,750 assessed by the defence, he would have paid back everything he had illegal obtained, which would have included any income tax due on the entire amount. As a result, even though we accept that Judge Grant did not consider any income tax, if the confiscation order of £400,000 was based on a proportion of the gross figures of either £2,595,000 or £1,298,750 as agreed by the parties under Option 1 then income tax at the appropriate level must have been included in the figure of £400,000 based on a gross methodology." (Emphasis added)

[9] There are a number of problems with this history of the relevant facts. These include:

(i) The conclusion that the sum of £400,000 was settled on because the appellant's team had assessed his liability on 24 March 2003, and counsel for the prosecution felt that if the amount was increased it might give rise to further proceedings. As the Court of Appeal pointed out there was no evidential basis for this conclusion.

(ii) The sum of £400,000 was arrived at because it represented what the applicant could afford to pay is not supported by any reliable evidence.

(iii) The determination of the relevant benefit is based on the estimates of the tonnage and volume of material dumped on the Craigmore Landfill Site but there is no evidence other than figures that were agreed for the basis of the plea of guilty only. Further, these figures are based, at least in part, on the costs of removal, which is not the correct test in assessing pecuniary advantage.

(iv) There is no evidence at all as to what the appellant was actually charging hauliers to dump waste unlawfully at this landfill site.

[10] I do not underestimate the problems which faced the FTT. These included:

(i) The appellant had no records for Higgins Waste as the accounts had been lost. There was no record of any payments being made for the dumping of the noxious waste.

(ii) There was disparity between the returns of landfill tax to the HMRC and the EHS records obtained from hauliers which should have matched.

(iii) There were no returns from Higgins Waste.

(iv) The figures used for the basis of the plea were confined to that task alone. They were not intended to have a wider significance.

[11] The FTT then went on to give its decision:

"The decision

56 We have considered the law and the evidence and we partially allow the appeal. We think it would be helpful to suggest a figure for the maximum amount that Mr Higgins had obtained from his criminal activity. The court had been given two sets of figures namely:

• Those of the prosecution between £1,336,254 to £2,321,754. The average in that range is £1,829,004. (£1,336,254 + £2,321,754 = £3,658,008 divided by 2).

• The defence figures were in the range £1,298,750 to £1,696.754. The average in that range was £1,497,752. (£1,298,750 + £1,696,754 = £2,995,504 divide by 2).

• If we take the average of both ranges together, the maximum figure would have been £1,663,378. (£1,497,552 +£1,829.004 = £3,326,756 divided by 2)

• We shall use the figure of £1,663,378 as the maximum amount that Mr Higgins could have to pay under the confiscation order. That figure never needed to be agreed as an absolute figure as Mr Higgins' offer, which was accepted, was £400,000.

There is no doubt in our minds that if Mr Higgins had paid £1,663,378 he would have paid back all the benefit that he had received from his criminal activity. As such, that sum would have included any income tax due and penalties because it represents the totality of his liability as it was a gross figure, albeit net of Landfill Tax.

• **It is accepted that the court considered that the payment of £400,000 was the best that Mr Higgins could afford.** A confiscation order is assessed under two criteria. The first as to the monetary value of the criminal act. The second as to what defendant can reasonably afford. On any showing, however, Mr Higgins has only paid a quarter of his criminal gain.

• We have decided that it is open to the NCA to consider assessments under the Taxes Management Act 1970. **We have decided that whether Mr Higgins should have to pay more than the £400,000 will depend on whether any additional payments are proportionate.**

We have needed to arrive at a maximum figure to be able to assess the tax and penalties, which we consider are due, as appears later in this decision". (Emphasis added)

[12] It is clear that the facts and circumstances as outlined by the Court of Appeal and the conclusion reached by the FTT respectively are contradictory and inconsistent. Two examples should suffice:

(i) Did £400,000 reflect the criminal benefit obtained by the appellant from his unlawful conduct as per the judgment of the Court of Appeal or was it circa £1.6m as per the judgment of the FTT?

(ii) Was the amount of the confiscation order based on the amount of what the appellant could afford (FTT) or on the basis of the actual amount of the criminal benefit (Court of Appeal)?

[13] As the FTT notes in its judgment there was considerable confusion between the parties as to the terms on which the £400,000 had been calculated. The parties seemed to accept that at least in part it was based on notional costs of removing material from the Craigmore Landfill Site where it should not have been deposited. It was also accepted that the "resulting value did not necessarily represent the monies that Mr Higgins had derived from his criminal activity".

[14] There were different bases of calculations. The FTT was given two sets of figures. It then took averages of both ranges. It then concludes on the basis of the average which is taken that if the appellant had paid £1,663,278 then he would have paid back all the benefit that he had received from his commercial activity. As such that sum would have included any income tax due and penalties because it represented the totality of his liability as it was a gross figure, albeit net of landfill tax. But the Court of Appeal's inquiry of the PPS produced a response that the sum of £400,000 was a gross sum intended to reflect the appellant's unlawful conduct and the benefit he derived from that conduct from 1996 until the offending was detected. But NCA (or HMRC) do not agree that this sum does encompass all the benefit which accrued to the appellant as a consequence of his wrongdoing.

[15] Quite simply the FTT did not have the evidential basis to reach the conclusions it did as to the relevant gain made by the appellant. There is some force in the complaint of the appellant that the FTT was speculating about the facts. Of course the appellant by "losing" his record has no-one to blame but himself. As the Court of Appeal in England said in *R v David Lee Jones* [2006] EWCA Crim 933:

> "But the fact remains that if persons such as this applicant in this particular business choose to operate their business dealings in such a way as to deal only in cash, to keep no records of any kind whatsoever they have to take the consequences that may arise not least for the purpose of the potential application of the POCA 2002."

The same reasoning applies to those business owners who are so careless that they manage to "lose" all their records.

[16] The Upper Tribunal is satisfied that the FTT was not equipped and did not have the information necessary to consider the basis of the assessment which had been made by HMRC, never mind being satisfied to the necessary standard that the assessments were incorrect. The basis on which the FTT reached its conclusion necessarily involved using information which had been specifically agreed for the purpose of the plea only and making

assumptions because the appellant did not offer any documentary records at all as to the operation of his unlawful business at the Craigmore Landfill Site. Some of the assumptions, for instance that the assessment of £400,000 was on the basis of being the "best figure either side believed could be achieved" are demonstrably wrong. In effect, the appellant offered no evidence and the FTT was left to try and do its level best on the figures provided which were based on estimates both of the quantities of waste deposited and on the income which was likely to have been generated by such unlawful dumping. No reliance can be placed on the FTT's conclusion that the total benefit of the appellant's criminal activity would have been just over £1,600,000. Nor can any reliance be placed on its conclusion that £400,000 was all that this appellant could afford. It may be that the decisions of the Court of Appeal and the FTT are *res inter acta alios*. But, even if they are, it is wholly unsatisfactory that there are decisions of the Court of Appeal, the Crown Court and the FTT, which all relate in some way to the appellant's unlawful operation at the Craigmore Landfill Site over a period of years, and which on their face appear to be contradictory and inconsistent. The reasons for these contradictions and inconsistencies will be explored later in this judgment.

C. THE CASES MADE ON APPEAL

The Appellant's Case

[17] In essence the appellant says that the compensation order was made on the basis that £400,000 reflected the criminal benefit conferred on the appellant and that any income tax payable on the gross receipts has been discharged when the applicant on the basis of legal advice paid the full amount. This case is supported by the letter of 18 November 2016 from the PPS referred to in the Court of Appeal judgment. He also seeks to argue that there is double jeopardy.

[18] The respondent says:

(i) The instant proceedings are concerned only with the assessment of the appellant's tax liability and do not relate to recovery of tax.

(ii) The confiscation order is entirely irrelevant at the assessment stage. It is at the enforcement stage that the issue of double recovery comes into play. It will be then that a court will be able to investigate and assess what element of the money which has been paid on foot of the confiscation order represented tax.

(iii) There is no double jeopardy (and no leave has been granted to argue this) because the criminal offending and its punishment is separable and distinct from the tax penalties which are to punish a taxpayer for fraudulently or negligently submitting a false return.

D. RELEVANT STATUTORY PROVISIONS

[19] Section 156 of POCA provides:

> "The Crown Court must proceed under this section if the following two conditions are satisfied.
>
> (2) The first condition is that a defendant falls within either of the following paragraphs –

(a) He is convicted of an offence or offences in proceedings before the Crown Court;

(b) He is committed to the Crown Court in respect of an offence or offences under Section 218 below (committal with a view to a confiscation order being considered).

(3) The second condition is that –

(a) The prosecutor asks the court to proceed under this section; or

(b) The court believes it is appropriate for it to do so.

(4) The court must proceed as follows –

(a) It must decide whether the defendant has a criminal lifestyle;

(b) If it decides that he has a criminal lifestyle it must decide whether he has benefited from his general criminal conduct;

(c) If it decides that he does not have a criminal lifestyle it must decide whether he has benefited from his particular criminal conduct.

(5) If the court decides under sub-section (4)(b) or (c) the defendant has benefited from the conduct referred to it must –

(a) Decide the recoverable amount; and

(b) Make an order (a confiscation order) requiring him to pay that amount.

(6) But the court must treat the duty in sub-section (5) as a power if it believes that any victim of the conduct has at any time started or intends to start proceedings against the defendant in respect of loss, injury or damage sustained in connection with the conduct.

(7) The court must decide any question arising under sub-section (4) or (5) on a balance of probabilities.

(8) The first condition is not satisfied if the defendant absconds (but section 177 might apply).

(9) Reference in this Part to the offence (or offences) concerned are to the offence (or offences) mentioned in sub-section (2)."

[20] In this case the confiscation order was made on the basis that the appellant had benefited from criminal conduct, namely the unlawful disposal of waste.

[21] Under Section 6(4) the court when considering a confiscation hearing and in a case not involving a criminal lifestyle, the court must consider whether or not the defendant has benefitted from "his particular criminal conduct".

[22] Under Section 75(5) "relevant benefit" is defined for the purposes of Section 75(2)(b) as:

"(a) benefit from conduct which constitutes the offence;

(b) benefit from any other conduct which forms part of the course of criminal activity and which constitutes an offence of which the defendant has been convicted;

(c) benefit from conduct which constitutes an offence which has been or will be taken into consideration by the court in sentencing the defendant for an offence mentioned in paragraph (a) or (b)."

Under Section 75(6):

"(6) Relevant benefit for the purposes of subsection (2)(c) (where the offence has committed over a period of at least 6 months and the defendant has benefited from the conduct which constituent the offence), is defined as—

(a) benefit from conduct which constitutes the offence;

(b) benefit from conduct which constitutes an offence which has been or will be taken into consideration by the court in sentencing the defendant for the offence mentioned in paragraph (a)."
(see Millington and Sutherland Williams on the Proceeds of Crime (4th Edition) at 857)

Both Section 6(4)(b) and (c) refer to "criminal conduct which is defined at Section 76(1) and includes the offences under consideration.

Section 76 goes on to say:

"(4) A person benefits from conduct if he obtains property as a result of or in connection with the conduct.

(5) If a person obtains a pecuniary advantage as a result of or in connection with conduct, he is to be taken to obtain as a

result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage.

(6) References to property or a pecuniary advantage obtained in connection with conduct include references to property or a pecuniary advantage obtained both in that connection and some other.

(7) If a person benefits from conduct his benefit is the value of the property obtained."

[23] Under Section 76(4) a person benefits from Criminal Conduct if he obtains property as a result of or in connection with that conduct. Furthermore, if a person does benefit from criminal conduct then his benefit is taken to be the value of the property obtained: see Section 76(7). Under Section 6(5) of POCA, once the court has decided under Section 6(4)(b) or (c) the defendant has benefitted from criminal conduct, then it must then decide the recoverable benefit as per Section 7 of POCA and go on to make a confiscation order requiring him to pay that amount in full.

[24] The House of Lords in *R v May* [2008] 1 AC 1028 set out three questions:

(a) Has the defendant benefitted from the relevant criminal conduct?

(b) If so, what is the value of the benefit the defendant has so obtained?

(c) What sum is recoverable from the defendant?

Before answering these questions the court has to first establish the facts as best it can and those facts will usually be decisive. (This decision was followed by *R v Waya* [2012] UKSC 51 which explored the effect of the Human Rights Act 1998 on the confiscation regime but which is not relevant to the present appeal.)

[25] For example, if a defendant smuggles contraband cigarettes in the UK, thus avoiding the need to pay the excise duty chargeable upon them, the pecuniary advantage he has secured for himself will become, by operation of Section 76(5) equivalent to the sum of money in his hands that will be "property": see *R v Cadman-Smith* [2002] 1 WLR 54. In such a case the defendant has by his criminal conduct avoided a financial obligation that he is bound to satisfy. In the confiscation application it appeared that the pecuniary advantage obtained by the appellant was estimated income he derived from permitting waste to be dumped unlawfully on the landfill site. Instead the FTT, at least in part, has attempted to calculate the sum by assessing the cost of removing the waste and taking it to a lawful location. Accordingly, his pecuniary advantage may have been assessed, at least partly, on the cost of removing the waste and taking it to a suitable location.

E. TAXES MANAGMENTACT 1970

[26] Section 29 of the Taxes Management Act 1970 ("TMA") provides:

"29 **Assessment where loss of tax discovered**

(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—

(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

(2) Where—

(a) the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, and
(b) the situation mentioned in subsection (1) above is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed,

the taxpayer shall not be assessed under that subsection in respect of the year of assessment there mentioned if the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—

(a) in respect of the year of assessment mentioned in that subsection; and

(b) . . .in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board—

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) informed the taxpayer that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—

(a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim."

[27] This provision was considered in some detail by Warren J in *John Martin v The Commissioners for Her Majesty's Revenue and Customs* [2015] UKUT 0161 (TCC). He said at paras [30]-[31]:

"30. Section 29 TMA applies where an officer of HMRC "discovers" in relation to a taxpayer for a year of assessment that any income which ought to have been assessed to income tax or chargeable gain which ought to have be assessed to capital gains tax have not been assessed or that an assessment is or has become insufficient. In such a case, the officer may make an assessment 'in the amount, or further amount, which ought **in his… opinion** [my emphasis] to be charged in order to make good to the Crown' the loss of tax. The taxpayer has a right of appeal to the F-tT. If the F-tT decides that the appellant is overcharged by an assessment (other than a self-

assessment) then the assessment shall be reduced accordingly.

31. The word 'discover' in section 19 does not mean "ascertain by legal evidence" but mean simply that the officer comes to his conclusion from the examination he makes and information which he receives: see *Bray J in R v Kensington Tax Commissioners (ex p Aramayo)* (1913) 6 TC 279 at 283. This approach is reflected in the decision of Walton J in *Jonas v Bamford* (1973) 51 TC 1 at 23 where it was enough that Mr Jonas was the possessor of resources which would not be explained by reference to his known sources of capital and income. Mr Hanna has referred to passages of some length from other authorities. I do not propose to set out the whole of those passages but give the gist:

- Bi-Flex Caribbean Ltd. V IRC (1990) 63 TC 515 at 519: in this case, Lord Lowry, when considering the principles on which a "best of judgment" assessment should be made and should be reviewed by the court referred, with approval, to the following passage from N Ltd -v- Commission of Taxes (1962) 24 SATC 655 (a decision of the High Court of Nyasaland) at 658:

  > 'The onus is upon the appellant, by satisfactory evidence, to show that the assessment ought to be reduced or set aside, that is, the appellant has to attain the standard of proof in a civil suit to prove his case. When the evidence of the appellant and his books are satisfactory, which is an identical standard of proof, the burden of proof is shifted from the appellant to the Commissioner. The circumstances that the facts are peculiarly within the knowledge of one party is a relevant matter in considering the sufficiency of evidence to discharge a burden of proof. Obviously, the facts in relation to his income are facts peculiarly within the knowledge of the taxpayer or, in a company, of its agents. In the absence of some record in the mind or in the books of the taxpayer, it would more often than not be quite impossible to make a correct assessment. The assessment would necessarily be a guess to a more or less extent and almost certainly inaccurate in fact. There is every reason to assume that the legislature did not intend to confer upon a potential taxpayer the valuable privilege of disqualifying himself in that capacity by the simple and relatively

> unskilled method of losing either his memory or his books. The application of section 41 is not excluded as soon as it is shown that an element of the assessment is a guess or that it is very probably wrong. It is prima facie right and remains right until the appellant shows it is wrong. The taxpayer must as a general rule, show not only negatively that the assessment is wrong but also, positively, what correction should be made to make it right or more nearly right.'

- **Norman -v- Golder (1944) 26 TC 293 at 297: Lord Greene MR considered it to be clear that a "best judgment" assessment stands, unless and until the taxpayer satisfies the Commissioners (now the FTT) that it is wrong, referring to Haythornwaite & Sons Ltd -v- Kelly (1927) 11 TC 657 at 667**.

- That the burden of proof lies on the taxpayer is shown again in Hurley v Taylor (HM Inspector of Taxes) (1998) 71 TC 268 at 286, where Park J (whose observations on this point were not criticised by the Court of Appeal) said:

> 'If the Commissioners [now the F-tT], having heard his case, are uncertain where the truth lies, they must dismiss the appeal and uphold the assessment.'" (Emphasis added)

I accept this is a correct statement of the law and I intend to apply it to the facts of the present case.

F. THE APPROACH TO BE TAKEN BY THE UPPER TRIBUNAL

[28] In *Revenue and Custom Commissioners CMRS v Pendragon Plc and Others* [2015] UKSC 37 Lord Carnwath gave advice about the role of the Upper Tribunal in hearing appeals from the First Tier. He said:

> "44. I agree that the appeal should be allowed for the reasons given by Lord Sumption JSC. I add a brief comment only in respect of Lloyd LJ's comments on the role of the Upper Tribunal in an appeal of this kind [2014] STC 844.
>
> 45. He identified the "principal question on the appeal" as being whether, in reversing the decision of the First-tier Tribunal, at para 6:

> ‘the Upper Tribunal went beyond what is properly open to an appellate court or tribunal where facts have been found and evaluated by the court or tribunal from which the appeal is brought.’

Later in his judgment, in a passage headed ‘The proper approach of the appellate body’ (para 70ff), he referred to the often-cited observations of Lord Radcliffe in ***Edwards v Bairstow [1956] AC 14*** , 33, on the role of the court when reviewing decisions on issues of fact by a lower tribunal. In the context of VAT he found guidance in the judgments in ***Procter & Gamble UK v Revenue and Customs Comrs [2009] STC 1990***, in which, as he put it, there had been, at para 75:

‘an evaluative task on the evidence which was entrusted to the VAT and Duties Tribunal, predecessor of the First-tier Tribunal in the present case, subject to an appeal on a point of law from there to the High Court as now to the Upper Tribunal.’

He quoted the words of Jacob LJ, who in the leading judgment had recorded the agreement of counsel that the focus of the debate should be on the decision of the tribunal, rather than that of the High Court, at para 7:

> ‘For it is the tribunal which is the primary fact finder. It is also the primary maker of a value judgment based on those primary facts. Unless it has made a legal error in that in so doing (eg reached a perverse finding or failed to make a relevant finding or has misconstrued the statutory test) it is not for an appeal court to interfere.’

46. Applying the same approach to the present case, Lloyd LJ said, at para 77:

> ‘Accordingly, the first issue for us is whether the First-tier Tribunal erred in law in reaching the conclusion that the essential aim of the transactions was not to achieve the tax advantage. Was that a conclusion to which it was entitled to come? The Upper Tribunal held that it had so erred. Of course we need to look at the basis for the Upper Tribunal's decision but in the end our decision is as to whether the First-tier Tribunal went wrong, not (directly) whether the Upper Tribunal went wrong.’

47. Mr Nigel Pleming QC did not question the court's reliance on the Proctor & Gamble principles, in its consideration of whether the decision of the First-tier Tribunal disclosed an error of law. But he submitted that at the next stage, in looking at the consequences of such an error if found, the court failed to take account of the extended jurisdiction conferred on the Upper Tribunal by the Tribunal, Courts and Enforcement Act 2007, as compared to that of the High Court on an appeal under the previous law. By section 12, where the Upper Tribunal 'finds that the making of the decision concerned involved the making of an error on a point of law', it is not obliged to remit the matter for redetermination by the First-tier Tribunal. Instead it may itself 're-make the decision' (section 12(2)(b)(ii)), and in doing so it may—'(a) may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision, and (b) may make such findings of fact as it considers appropriate': section 12(4).

48. This extended jurisdiction recognises that under the new tribunal system, established by the 2007 Act, the Upper Tribunal is itself a specialist tribunal, with the function of ensuring that First-tier Tribunals adopt a consistent approach to the determination of questions of principle which arise under the particular statutory scheme in question.

49. In *R (Jones) v First-tier Tribunal (Social Entitlement Chamber) [2013] 2 AC 48* (in a judgment agreed by the majority of the court), I spoke of the role of the Upper Tribunal in the new system, at para 41:

> 'Where, as here, the interpretation and application of a specialised statutory scheme has been entrusted by Parliament to the new tribunal system, an important function of the Upper Tribunal is to develop structured guidance on the use of expressions which are central to the scheme, and so as to reduce the risk of inconsistent results by different panels at the First-tier level.'

This was consistent with the approach of the preceding White Paper (paras 7.14-7.21), which had spoken of the intended role of the new appellate tier in achieving consistency in the application of the law, "law" for this purpose being widely interpreted to include issues of general principle affecting the jurisdiction in question. Such a flexible approach was supported also by recent

> statements in the House of Lords, in cases such as *Moyna v Secretary of State for Work and Pensions [2003] 1 WLR 1929* and *Lawson v Serco Ltd [2006] ICR 250* . In the latter case (para 34), Lord Hoffmann had contrasted findings of primary facts with the 'an evaluation of those facts' to decide a question posed by the interpretation of the legislation in question:
>
> > 'Whether one characterises this as a question of fact depends … upon whether as a matter of policy one thinks that it is a decision which an appellate body with jurisdiction limited to errors of law should be able to review.'"

[29] Accordingly, it is the role of the Upper Tribunal to determine important questions of principle which arise under the present statutory scheme. I consider that an important question of principle arises as to how best to deal with the issue of double recovery in general and confiscation orders in particular, where there is a dispute about the tax due from a person who has benefited from his criminal conduct.

G. DISCUSSION

Double Recovery

[30] There is one issue in which the parties are united. HMRC should not make a double recovery from any taxpayer even if that taxpayer has attempted to evade his liability to pay tax. HMRC's policy is to avoid proceedings which result in double recovery. It seeks only to recover what is lawfully due to it in respect of tax and is determined to ensure that there is no double recovery of tax from the taxpayer, even one who has been convicted of criminal offences.

[31] There can be no doubt that "relevant benefit" is different from and not synonymous with "taxable profits of a business". In some cases it may be the same. But more often than not they will be different. Nor can it be said with any certainty that liability for taxable profits will always be included within the "relevant benefit".
That may be the case if the relevant benefit, as here, should encompass all the income received for the unlawful disposal of waste. But that may not necessarily be the case where the business comprises lawful and unlawful activities. It may also not be the position in respect of some types of offending such as evading import duty.

[32] The relevant benefit in a case such as the present one may include:

(a) Any landfill tax which should have been paid but was not; and

(b) the income derived from the illegal dumping of waste at the Craigmore Landfill site; and

(c) the income derived from any lawful business.

[33] As I have noted the relevant benefit on the one hand and taxable profits and liability to income tax on the other hand are very different concepts. Of course there may be an overlap. The relevant benefit of an unlawful operator of a waste tip may be £X, but his profits from running the waste tip may be £XX+, £XXX+, £X+ or he may even suffer a loss, say -£2X

[34] This is because relevant benefit means a pecuniary advantage conferred on the unlawful operator of the landfill site. The tax liability is assessed on the profits made by the operator. Relevant benefit is assessed on the amount of the avoidance of landfill tax and/or the receipt of income from permitting the illegal dumping. Both these sums should be readily ascertainable from any records kept. Taxable income is calculated on profits made, whether lawful or otherwise. The amount of profit (or loss) a business makes and which dictates its liability to pay tax is dependent on a whole host of different factors, which are unrelated to the criminal offending, but which can include, namely:

(a) demand;

(b) efficiency;

(c) competition.

An efficient and successful operator without any competition of an unlawful landfill site in an area of high demand may make very substantial profits on which he will have to pay tax. However, an inefficient and hopeless operator in an area where there is no demand and lots of competition may, despite his criminal offending, operate the landfill business at a loss. In those circumstances, despite his criminal behaviour, he will not incur a liability to pay tax other than the landfill tax which he has evaded. However, he will still be liable to a confiscation order for the relevant benefit conferred by his unlawful activity, that is, the landfill tax, if any, he has avoided paying and/or the income he received from the illegal dumping on his site.

[35] In this case, as I have observed, the appellant has produced no evidence at all to challenge the assessment of the taxable profits made by NCA. He claims to have no records, as I have noted. Instead the appellant relies, *inter alia*, on the proposition that the payment of the confiscation order must have extinguished his tax liability and looks to support from the PPS who prosecuted the case not on behalf of SOCA or NCA or HMRC but on behalf of the Environmental and Heritage Service ("EHS"). The sum of £400,000 was agreed with the PPS which was prosecuting on behalf of the EHS. But it does not bind HMRC or NCA who refuse to accept it as representing the relevant benefit which the appellant derived from his criminal conduct. The problem for the appellant is that HMRC or NCA never reached any agreement with the appellant or his original legal team that £400,000 was a gross sum and included all his potential liability for tax arising out of his operation of the landfill site. Nor did HMRC or NCA represent to the appellant that the payment of £400,000 extinguished all of the appellant's tax liability. The only agreement related to the basis of his plea of guilty not to the confiscation order and in any event the agreement was with the PPS acting on behalf of the EHS. There was no factual or legal basis for an argument that the NCA (or HMRC) was estopped or that there was a legitimate expectation that it would accept that the payment of £400,000 on foot of the confiscation order discharged completely or in part the appellant's liability to pay any tax on his business profits. Indeed no such case was made out on the appellant's behalf. Of course it had been open to the appellant and his original legal team to reach such an agreement with HMRC or its proxy at the time the confiscation order was

made. But no such agreement was made. Nor was there any assurance given by HMRC or its proxy. In any event, the appellant's protection is that it is the policy of HMRC not to seek double recovery, a policy which this court endorses and in the appropriate circumstances, will enforce. But the Upper Tribunal cannot possibly assess the appellant's tax liability at this stage because it does not have sufficient information to do so. The FTT chose to accept estimates and to make assumptions which were unsupported by such evidence as was available. However, it remained the duty of the appellant to adduce the necessary evidence as to his actual income and profits during the relevant period if he wanted to challenge the assessments of the HMRC or NCA. The appellant had to satisfy the FTT that HMRC or NCA had erred in those assessments, the burden of proof lying at all times with the appellant, the taxpayer. The appellant chose not to put any such evidence before the FTT.

[36] In my view the submissions made by NCA are to be preferred. When a taxpayer, as here, is appealing against a "best judgment" tax assessment under Section 29 of the TMA the onus is placed upon the taxpayer. He has the burden of proving the assessment is wrong. In this case the appellant has chosen not to produce any credible evidence as to his actual turnover in challenging the assessments of NCA. The FTT in those circumstances should have affirmed the assessments in the absence of cogent, contradicting evidence. In *Martin v HMRC* at para [52] Warren J said:

> "But where the taxpayer presents no evidence at all to the F-Tt, the problem is different. The F-tT does not need to address the particular facts and circumstances relied upon by HMRC and to decide whether the taxpayer's evidence and explanations displace the opinion which HMRC have formed. In such a case there is no material on which the F-fT could rely in order to decide that that opinion was incorrect and that the taxpayer was overcharged by the s29 assessment."

[37] But there is another reason why the appellant's appeal must fail. This was set out in some detail by Warren J in *Martin v HMRC* at paras [41]-[42]:

> "41. The third argument concerns a dispute about the way in which double recovery is to be avoided, as HMRC accept it must. Mr Martin's case is that payment under the Confiscation order, to the extent that it matches any tax liability, represents a payment of tax so that his liability, if any, is reduced to that extent. He says that HMRC can only assess him, under Section 29 TMA, for the reduced amount which, in the present case, Mr Martin says is nil since he has already paid, pursuant to the Confiscation order, all of the tax for which he is liable. HMRC's position is that Mr Martin's tax liability is for the full amount and that is the amount which falls to be assessed under Section 29. It is only at the enforcement stage that account is taken of amounts paid pursuant to the Confiscation order. As to this dispute:
>
> (a) In favour of Mr Martin's approach is the fact that the amount payable under the Confiscation order is payable to the Crown so that, to the extent that it reflects unpaid

> tax, there is no need **to make good to the Crown the loss of tax** within the meaning of section 29(1).
>
> (b) In favour of HMRC's approach is that payment under the Confiscation order is not in fact a payment of tax.
>
> 42. In my view, HMRC's approach is correct. Test this by way of an example. Consider a case where a criminal lifestyle order is made against a taxpayer, resulting in a confiscation order of £Y. Suppose that, as part of his criminal conduct, he has made a profit of £X in relation to a particular offence so that confiscation of that profit of £X is included in the figure £Y. The payment of £Y does not include a payment of the tax which would be due on the profit of £X; rather, the inclusion of the figure of £X is designed to take away from the offender the profit which he has made. The tax consequence of making that profit is entirely separate. There may, in fact, be no tax at all: for instance, the taxpayer might have losses against which he could set the profit. There is, it seems to me, no question of the Crown Court, when fixing the amount £Y, having to break the £X part of that amount into two elements, one the tax on the £X and the other the net figure after tax. However, for the taxpayer to pay tax on the profit of £X which had already been confiscated would be to effect double recovery in relation to the offence: the taxpayer would lose the benefit of his criminal activity and yet still be liable to pay tax on it as though he had retained it. It is not because payment under the confiscation order discharges the tax that the taxpayer avoids double recovery; rather it is because it would be unjust for the Crown to recover twice. Whether this injustice is avoided as a matter of legal right once the taxpayer has met his obligations under the confiscation order or whether it is a matter of concession on the part of HMRC does not matter. The point is that the tax liability for which an assessment can be raised is a liability in respect of the profit of £X."

I note that leave to appeal this decision of Warren J was refused by the Court of Appeal.

[38] I consider that this is a correct approach and the one which all FTTs should in general follow. The assessment is made. The taxpayer is free to appeal the assessment and to adduce evidence to demonstrate that it is incorrect by providing evidence of his taxable profits, whether lawful or unlawful. If no evidence is produced at the assessment stage, then when HMRC (or NCA) seeks to collect the tax at the enforcement stage any issue of double recovery on foot of the payment of any confiscation order can be determined by investigating and assessing what element of the money which has been paid by the taxpayer on foot of the confiscation order represented tax which was due by the taxpayer in respect of his business during the relevant period.

[39] The appellant sought to distinguish *Martin* on the basis that the facts were different from the instant case. It is true that in *Martin* the court was dealing with a criminal lifestyle

whereas in this case it relates to particular criminal conduct. I agree with Warren J that this is neither here nor there – "… that difference does not assist one way or the other in resolving the arguments of the present case".

Double jeopardy

[40] As I have pointed out leave was not given to argue this ground. Indeed it does not appear to form part of the grounds of appeal. It is also without merit. Confiscation orders are made in criminal proceedings to deprive the criminal of the benefit he has derived from his wrongdoing. Tax penalties are imposed for a wholly different reason. They are to punish the fraudulent or negligent taxpayer who has failed to deliver his tax returns or who has submitted a tax return which is inaccurate: see TMA Section 95 and Finance Act 2007 Section 96 and Schedule 24. This is separate and distinct from the commission of any criminal offence. Thus there is no question of the appellant being punished twice for the same act or omission. In those circumstances no issue of double jeopardy arises.

H. CONCLUSION

[41] For the reasons given I dismiss the appellant's appeal. I have remade the decision so as to correct the error of law that arises from the FTT attempting to challenge the assessment of tax at this stage in the absence of any evidence being adduced by the appellant to challenge the assessments. More importantly, it was wrong in principle for the FTT to attempt at the assessment stage to calculate whether any, and if so, how much, of the confiscation order should be off set against the assessment of NCA in respect of tax which it assessed as being due. The issue of double recovery on foot of payment of a confiscation order is a matter to be raised at the enforcement stage, not on a challenge to any assessment(s) and certainly not without adducing evidence to demonstrate that on the balance of probabilities the assessment(s) was incorrect. No doubt at the enforcement stage the appellant will seek to place reliance on the evidence adduced from the PPS. But that is a matter for another day and is not a matter which should have been of any concern to the FTT. Further, there is no substance to the double jeopardy argument for the reasons which I have set out.

[42] I will hear the parties on the issue of costs when they have had an opportunity to digest this judgment.

MR JUSTICE HORNER

RELEASE DATE: 16 January 2018