



**TC01990**

**Appeal numbers TC/2010/05463**

**FIRST-TIER TRIBUNAL  
TAX**

*S9 TMA – Appeals against Discovery Assessments – argument that liability resolved under  
Confiscation Orders granted under POCA 2002 – Appeal Dismissed*

**JOHN MARTIN**

**Appellant**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY'S  
REVENUE AND CUSTOMS ("HMRC")**

**Respondents**

**TRIBUNAL: IAN WILLIAM HUDDLESTON, TRIBUNAL JUDGE**

**Sitting in public in Belfast on 23 August 2011**

**Mr. D. McNamee, Solicitor, appearing on behalf of the Appellant**

**G. Forbes for HMRC**

## DECISION

### The Appeal

5 1. The matters under appeal relate to discovery assessments raised by HMRC  
pursuant to Section 29 of the Taxes Management Act 1970 against the Appellant in  
respect of the tax years ending 5 April 2001 to 5 April 2008 inclusive. The  
assessments are made to "best judgment" and amount to a total tax assessed of  
£382,687.20. With surcharges and interest the total amount alleged due by HMRC  
10 amounts to a figure in excess of £560,000.

2. The assessments were all raised and issued on the 10 August 2009 and are the  
subject of an appeal raised by the Appellant on the 20 November 2009. The Appeal  
was raised as a result of reviews undertaken by HMRC, but which in each case upheld  
the original assessment.

### 15 Factual Background

3. Mr. Martin was arrested and questioned in relation to his involvement in the sale  
of counterfeit / contraband cigarettes in 2005. He was subsequently charged and, on  
the 26 March 2007, was convicted of a number of offences in relation to breach of  
trademark and dealing in the proceeds of crime. He was given an 18 month sentence  
20 in relation to the offences. The Prosecution applied for a Confiscation Order to be  
made under the Proceeds of Crime Act 2002 ("POCA").

4. On the 3 February 2009 a Confiscation Order was made in the amount of £55,316  
in relation to the offences of fraudulently using a trademark contrary to Section  
92(1)(b) of the Trademarks Act 1994, the Court being then satisfied that Mr. Martin  
25 had a criminal lifestyle.

5. That Order was, on appeal, reduced to a figure of £35,116.

6. HMRC wrote to Mr. Martin in February 2009 indicating that they were  
commencing an investigation into his tax affairs.

7. There followed a chain of correspondence leading up to a letter of the 3 August  
30 2009 in which HMRC indicated that they were proposing to raise assessments on a  
protective basis in respect of the tax years 2000 / 2001 to 2007 / 2008 inclusive.

8. After the assessments were raised, Messrs. McNamee McDonnell & Duffy,  
Solicitors, entered into correspondence with HMRC on behalf of the Appellant,  
indicating that they felt that the assessments were incorrectly raised. The chain of  
35 correspondence culminated in a meeting between Mr. McNamee of that firm and  
HMRC on the 10 February 2010. Mr. Martin did not attend that meeting.

9. As a follow up to that meeting, HMRC wrote to Mr. McNamee on the 18  
February 2010 asking for the production of information as to the sources of Mr.  
Martin's income and certain details in respect of his ownership of property.

10. At the same time, HMRC sought a copy of the Confiscation Order.

11. Whilst a good deal of correspondence appears to have passed between the parties, no information was provided in response to these specific requests from HMRC. Messrs. McNamee, McDonnell and Duffy have consistently throughout the  
5 correspondence taken the position that satisfaction of the Confiscation Order discharged the Appellant's tax liability and that, therefore, no further liability arises.

12. That indeed is (and remains) the Appellant's case.

### **The Discovery Assessments**

13. HMRC take the position that they have raised discovery assessments on the basis  
10 that they believe that Mr. Martin has failed to return self employment income or trading profits to HMRC. They have considered his lifestyle and his property holdings (largely consisting of a family home) and formed the view that his declared and taxed earnings would have been insufficient to maintain or achieve either.

14. It is accepted that Mr. Martin, for the period from June 1994 to September 1999  
15 was employed by Armagh District Council, and that he was in receipt of PAYE income during that period.

15. Following cessation of his employment, it is also accepted that Mr. Martin appears to have been in receipt of benefit in the form of disability living allowance, incapacity benefit and income support. It appeared in evidence that the Social  
20 Security Agency terminated Mr. Martin's benefit payments after he was established to be guilty of benefit fraud during the period October to December 2004.

16. HMRC, clearly on the back of the criminal prosecution, have undertaken an investigation into Mr. Martin's tax affairs which has resulted in the discovery assessments which are the subject of this Appeal.

17. Neither the Appellant, nor his advisers, has sought to challenge the detail of those  
25 assessments but have, as commented upon above, taken the stance that they have been incorrectly raised on the basis that the Confiscation Order, as granted, covered all of the Appellant's liabilities.

18. HMRC, contrary to that position, and having undertaken an investigation of Mr.  
30 Martin's ability to build and furnish a home a 71 Ballyards Road, Milford, Armagh, and other items of expenditure, and have assessed him to undeclared taxable income.

19. The assessments which have been raised have been based on what HMRC believed Mr. Martin's profits to have been in order to build and furnish that home, as well as maintaining that property and his lifestyle.

20. From HMRC's statement of case, it is clear that they believe that Mr. Martin's  
35 income during the periods covered by the tax assessments stemmed from the same of counterfeit / non-uk duty paid cigarettes and tobacco products.

## **Appellant's Case**

21. The Appellant's case is, as indicated above, simply that the Confiscation Order covers all tax liability arising out of the periods in question – on the basis that any liability could only have arisen from the criminal conduct for which Mr. Martin was convicted.

22. In their letter of the 25 June 2010 (under which they enclosed their notice of appeal) it was stated on behalf of the Appellant that the grounds of his appeal are:

*"These assessments are wrong as Mr. Martin was a PAYE worker for a large period of time covered by the assessments. He was further subject to a Lifestyle Confiscation Order under POCA 2002 which covered all his liability. He does not owe any tax."*

23. In the Appellant's statement of case the argument is advanced that:

*"The criminal benefit of Mr. Martin's conduct has already been calculated in the Crown Court and, again, subsequently in her Majesty's Court of Appeal. The Confiscation Order has been made in relation to that benefit and any further recovery of monies by HMRC would be double recovery. There cannot be double recovery in relation to monies previously recovered under the terms of the Proceeds of Crime Act 2002."*

24. The Appellant's bald assertion, therefore, is that all of the tax liability which arises on foot of the assessments has been encompassed within the calculation of benefit which resulted in the Confiscation Order. In support of that contention the Appellant's representatives rely on the case of *HMRC v Richard Alan Crossman (Junior)* [2007] EWHC 1585 (Ch).

## **HMRC'S CASE**

25. HMRC accept that the Confiscation Order was made in respect of a six year period from the 17 March 1999 to the 16 March 2005, but make the point that only the tax periods 2000 / 2001, 2001 / 2002, 2002 / 2003, 2003 / 2004 and 2004 / 2005 fall within that six year period. Namely that the period through which benefit was assessed is shorter than the tax periods through which the discovery assessments have been raised.

26. They also assert that based on the information which they have, they feel that Mr. Martin was still involved in the purchasing and distribution and sale of non-UK paid / counterfeit cigarettes in August 2005 (ie. after the period to which the Confiscation Order relates). Equally they assert that Mr. Martin had been in receipt of income prior to the benefit period in question, none of which he has returned to HMRC.

27. HMRC accept that the amounts assessed may need to be reduced, to the extent that tax has already been received by the Crown on foot of the Confiscation Order – applying the principles set out in *Crossman*.

28. Basing themselves on that case, HMRC's position is as follows.

(1) if HMRC were seeking to collect tax which has already been dealt with and paid on foot of a Confiscation Order, then any collection of tax would amount to double recovery;

5 (2) where, however, a Confiscation Order does not cover the entirety of any established tax debt, there is no basis for an argument that HMRC should be prevented from seeking recovery of any such amounts;

10 (3) where Confiscation Orders are computed on the basis of available assets, there is nothing to prevent HMRC seeking to collect any excess amounts of unpaid debts should further assets come to light or, indeed, by petitioning for bankruptcy in respect of any such excess amounts.

29. As to the case generally, HMRC say that *Crossman* deals only with the right to collect tax, and that it has no impact on the obligations of HMRC to make assessments of tax where it is apparent that taxpayers have not fulfilled their statutory obligations, or to collect that tax where it has not been encompassed within a Confiscation Order.

30. In short, HMRC say that they have raised assessments to establish what is the "proper" amount of tax which is due by Mr. Martin. In the absence of his engagement on that issue, they have raised those assessments to best judgment pursuant to Section 29 TMA 1970 and they now assert that unless amended through this appeal, they will define the Appellant's tax liability.

31. Once that liability is established, however, they would not propose seeking enforcement in respect of amounts which have already been the subject of a Confiscation Order but, subject only to that, would seek recovery of any "excess" tax that may be due.

32. To the extent that Mr. Martin and/or his advisers indicates that he has no responsibility to deal with HMRC in relation to the assessments (based on the earlier Confiscation Order) HMRC say that this view is wrong both in fact and in law.

### **Decision**

30 33. There was clearly confusion as to the interplay between the civil procedures leading to the assessment of tax which is due and the criminal procedures which arise under the Proceeds of Crime Act and how the two interrelate.

35 34. On first principles, Section 29 of the Taxes Management Act allows HMRC quite wide powers to issue discovery assessments upon taxpayers where they feel they have not been appraised of the information upon which to raise a "proper" assessment. It is well established law that where such an assessment is raised, then the onus of proof falls upon the Appellant to set it aside – see (*Jonas v Banford (51TC1)*; *Bio Flex Caribbean Limited (63TC515)*; *Norman v Golder (26TC293)*; *Haythornwait & Sons Limited v Kelly (11TC657)* and *Hurley v Taylor (71TC268)*).

35. At this point it should be said that the Appellant has not adduced any evidence to disprove or otherwise challenge the assessments which have been raised in this case and has sought, rather, to focus upon the effect of the Confiscation Order to ground his argument that, fundamentally, the Confiscation Order "mops up" any potential liability on the basis that a Lifestyle Confiscation Order was both sought and granted.

36. Section 156 of the Proceeds of Crime Act 2002 allows a criminal court the ability to assess the benefit arising from "general criminal conduct".

37. In terms of making such a Confiscation Order, the Court must first assess the benefit which has been derived from the conduct (Sections 158 to 160) and if it finds that benefit has occurred then assess the extent of the realisable property which is available to discharge it.

38. In *Crossman*, the Confiscation Order confirmed a benefit of circa £488,000 but, because of the limited extent of available assets, the Order itself was limited in amount to £55,000. This, in due course, led HMRC to seek recovery of the balance leading to its application for a bankruptcy order against Mr. Crossman, which was the subject of those particular proceedings and Rimer J in that case upheld their entitlement to do so.

39. In the present case, in the criminal proceedings, the Prosecutor's statement indicated that the prosecutor was of the view that Mr. Martin had total realisable assets of circa £350,890 – including his matrimonial home.

40. In his supplemental report the Prosecutor attributed the amount of benefit derived by the Appellant from his general criminal conduct to be between £55,516 and £89,291.

41. The original Confiscation Order was for the lower amount which, on appeal, was then reduced to £35,116. The Courts' finding, in both those proceedings, was limited to the assessment of benefit derived by Mr. Martin and the amount available to discharge it. In the view of this Tribunal that "benefit" does not equate (in the view of this Tribunal) with the concept of a "liability". By its nature, the concept of a liability – particularly one which is assessed to best judgment such as in the case of discovery assessments – is one which is of a much wider and more general application.

42. To the Tribunal's mind, that particular concept was not in the mind of the Crown Court, or indeed the Court of Appeal when assessing what benefit the Appellant had derived from his criminal conduct. The two are separate jurisdictions and the approaches adopted are different even if they arise out of the same or similar facts.

43. We agree with HMRC's proposition that one must first establish, through assessment and, if not by that then dialogue with the taxpayer, and ultimately appeal to this Tribunal, the tax which is properly due and payable. This Tribunal is empowered to hear appeals specifically within that domain and, where assessments are raised to best judgment, then this Tribunal often hears evidence as to why the assessment should be reduced or, indeed, altered.

44. As indicated above, the onus of proof in relation to those proceedings falls squarely upon the Appellant.

45. Subsequent to the settlement of what tax is properly due and payable, it then is logical that one looks at the terms of any Confiscation Order which may be in  
5 existence (and any payment made under it) to see to what extent that tax liability may already have been met by payments made to the Crown to ensure that there is no double recovery.

46. That, to this Tribunal's mind, relates, however, to the question of enforcement rather than to the calculation of tax. It is clear that the question of enforcement falls  
10 outside the jurisdiction of this Tribunal, but it is accepted by HMRC that in no circumstances can there be double recovery for the same amount. This is a position which has been acknowledged by them and endorsed in the *Crossman* case.

47. Mr. McNamee sought to rely on *Crossman* as authority for his proposition that Confiscation Order identified the maximum liability which can arise.

15 48. With respect, this Tribunal does not agree with that proposition or, indeed, his interpretation of that case. In certain circumstances it may be the case that the proceedings under the Proceeds of Crime Act does indeed encompass an assessment of all of the tax liability which may or may not be due in particular circumstances but that can only be determined after the assessment process has been undertaken.

20 49. There is no evidence before us, however, to indicate that that was the analysis carried out by the Criminal Courts in this case. Indeed, the assessment periods cover a much wider period than the six year period encompassed within the Confiscation Order itself and it remains HMRC's position that the Appellant was carrying out taxable activities throughout that wider period failing, for each of the relevant tax  
25 years, to make the appropriate tax returns.

50. It is that which has led them to issue the discovery assessments which are in point.

30 51. Had evidence been adduced as to inaccuracies or other deficiencies in those assessments, then this Tribunal would have taken that evidence into account. As it is, no such evidence was produced and, therefore, as the onus of proof has not been discharged by the Appellant, this Tribunal finds that the assessments must stand.

52. The appeal is dismissed.

53. No order as to costs.

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

"Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)"  
which accompanies and forms part of this decision notice.

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**IAN WILLIAM HUDDLESTON**

**TRIBUNAL JUDGE**

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**RELEASE DATE: 4 May 2012**