



**TC02015**

**Appeal numbers**      **MAN/07/809, 08/082**  
**(08/0087), TC/2009/10142**

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

*S73 VATA & S12 FA 1994 – assessed to best judgment – appeal based on existence of a  
confiscation order under the Proceeds of Crime Legislation – Appeal Dismissed*

**MICHAEL NUGENT  
(and BRIAN GORMAN)**

**Appellant**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY’S  
REVENUE AND CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE IAN WILLIAM HUDDLESTON**

**Sitting in public in Belfast on 2 August 2011**

**Mr. D. McNamee of McNamee Donnell Duffy for the Appellant**

**Mr. James Puzey BL for HMRC**

## DECISION

### The Appeals

5 1. The appeals in this case relate to a number of assessments, to both excise duty and VAT, arising out of the illegal smuggling of fuel across the border between Northern Ireland and the Republic of Ireland.

2. In summary, the relevant assessments are as follows:

10 (1) the Appeal MAN/08/0087 relates to an assessment dated 20 August 2004 in relation to the evasion of excise duty and was jointly raised against Michael Nugent (the Appellant in this case) and a Mr. Brian Gorman. It was originally raised in the amount of £531,797 which, on review, was reduced to a figure of £522,923 (based on duty evaded (assessed to best judgment)) on approximately 201,766 litres of fuel;

15 (2) the Appeal MAN/08/0082 relates to a best judgement assessment in respect of VAT assessed on the joint trading of Messrs. Nugent and Gormley which, again, was originally raised in the sum of £128,727 which was subsequently reduced to £102,234 on review;

20 (3) the Appeal MAN/07/8094 relates to a best judgment assessment raised solely against Michael Nugent in the sum of £259,821 for evaded excise duty;

(4) the Appeal TC/2009/10142 relates to a best judgment assessment to VAT raised against Mr. Nugent in respect of the trading period 1 June 2003 to the 20 February 2004. It was originally raised in the sum of £55,300 but was reduced on review to £48,830.

25 3. Each assessment is raised to "best judgment" pursuant to (in the case of excise duty) Section 12 of the Finance Act 1994 and (in respect of VAT) pursuant to the powers vested in HMRC pursuant to Section 73(1) of the Value Added Tax Act 1994 ("VATA").

30 4. Mr. Gorman appears not to have taken any active interest in relation to any of the appeals and the present appeal is brought solely by Mr. Michael Nugent (the Appellant) although it is technically brought against all of the assessments raised against him.

### Facts

35 5. The assessments arise out of the evasion of excise duty and VAT in relation to deliveries of smuggled road fuel to two services stations. The first station was known as Bridge Service Station, Main Street, Toomebridge, County Antrim. It is asserted by HMRC that the business operated there was jointly conducted by both Messrs. Gorman and Nugent and on that basis the relevant assessments have been raised jointly and severally against them.

6. The second fuel service station was known as Molly Sweeney's Service Station at Gortin Road, Omagh, County Tyrone. HMRC asserted that this filling station was operated solely by Mr. Michael Nugent who has been assessed on his own in relation to the alleged operations conducted at that filling station.

5 7. The allegations were the subject of criminal charges against both men (and  
others) which led to criminal proceedings. The outcome of those criminal  
proceedings resulted in Mr. Nugent pleading guilty on the 13 September 2006 to five  
specific counts of evasion of duty contrary to Section 170(2) of the Customs and  
Excise Management Act 1979 ("CEMA") relating to five specific instances where  
10 smuggled fuel was delivered to Bridge Service Station on specific dates. He was  
sentenced to a suspended term of imprisonment and was made the subject of a  
Confiscation Order in the sum of £17,810.13, that order being made under the  
provisions of the Proceeds of Crime Order (Northern Ireland) 1996. Mr. Gorman  
likewise pleaded guilty to a number of charges, was found guilty and was the subject  
15 of a separate Confiscation Order.

8. As part of the criminal proceedings under the Proceeds of Crime (Northern  
Ireland) Order 1996 a Prosecutors Statement was produced to the Crown Court  
asserting that Mr. Nugent had led a criminal lifestyle as defined in Article 8(1) of that  
Order, and therefore inviting the Court to make certain assumptions regarding his  
20 property as the Court is entitled to under Article 9 of that Order in calculating the  
benefit which the Defendant had received from his criminal endeavours. As a result  
of that approach, the Prosecutor sought a Confiscation Order in the sum of  
£120,250.00, although accepting that Mr. Nugent had only "free" property to the  
value of £89,056.09. The bulk of that free property arose from the value attributed to  
25 his matrimonial home at 66 Fair Green Park, Keady, BT60 5UR – a property held in  
Mr. Nugent's sole name, but occupied by both he, his wife and their family.

9. In terms of the particular criminal conduct, however, and based on the assessment  
of benefit on the illegal trade of 30,000 litres of fuel, the prosecutor identified a total  
benefit of £32,063.27, of which the Prosecutor attributed £17,810 as the amount  
30 attributable to Mr. Nugent.

10. We were not appraised of the full reasoning of the Judge in the High Court when  
the Confiscation Order was made, but the net effect of the Order was that the  
matrimonial home and the various bank accounts which Mr. Nugent and his wife held  
were excluded and the Confiscation Order related only to the Prosecutor's findings in  
35 relation to the specific criminal conduct which was the subject of the case (ie. the five  
charges in respect of which he pleaded guilty).

11. In due course Mr. Nugent satisfied the Confiscation Order.

12. At this stage, it should also be noted that as part of the Prosecutor's Statement,  
there was an averment that "to the best of [her] knowledge and belief, no persons have  
40 commenced any civil proceedings against the Defendant (Mr. Nugent) in connection  
with the criminal conduct to which this statement relates."

13. That statement was required to comply with Article 84 of the Proceeds of Crime (Northern Ireland) Order 1996 which restricts the Court's power to make a Confiscation Order where civil proceedings have been commenced to cover any loss suffered by the victim.

5 14. For the purposes of that Order, where there are civil proceedings pending the obligation of the Court to make a Confiscation Order (pursuant to Article 8(1)) is translated into a power (Article 8(4)).

10 15. Appeals having been lodged in relation to the assessments, the Appellant then made an interlocutory application to this Tribunal for his appeals to be allowed on the basis that for HMRC to pursue them subsequent to the criminal proceedings and the issue of a Confiscation Order, was an abuse of process.

### **The Interlocutory Proceedings**

16. The Appellant made its interlocutory application to this Tribunal, the decision of which was released on 23 April 2009.

15 17. As part of those proceedings, the Appellant asserted that:

(1) as HMRC did not declare that civil proceedings were in process at the time of the criminal case, that Mr. Nugent was entitled to assume that the assessments were not being pursued. That argument was rejected;

20 (2) that the lifestyle order, having been made, covered **all** of Mr. Nugent's criminal conduct from the 19 February 1999, and was included in the assessment of benefit in the amount of £17,810.13. That too was rejected;

25 (3) that for the Tribunal to adjudicate on the same subject matter as that which was the subject of the criminal proceedings would be unfair to such an extent that it would engage Mr. Nugent's rights under the European Convention of Human Rights on the grounds that it was fundamentally unfair. That too was rejected.

18. In relation to those determinations the Tribunal, whilst rejecting the arguments advanced, also made a number of other observations:

30 (1) in the first place, the Tribunal found that the making of a Lifestyle Confiscation Order did not preclude a Tribunal from hearing an appeal in respect of the assessments to tax that had been raised;

(2) that although the failure to notify the court of the pending assessments was clearly an omission, that there were, technically, no civil proceedings commenced for the purposes of Article 8(4) of the Order at the time when the Confiscation Order was made; and finally

35 (3) the Tribunal queried why the assessments had been raised only against Messrs. Nugent and Gorman, and not by all of their co-defendants.

19. Subsequent to the interlocutory proceedings, the Appellant wrote to the Tribunal (letters dated 8 July 2010 and 29 October 2010) to make it clear that the Appeal was proceeding solely on the ground that the Confiscation Order removed any liability on

the Appellant to pay either VAT or Excise Duty, and that the Appellant would not otherwise adduce evidence or otherwise challenge the basis of the assessments which had been made. That chain of correspondence resulted in a direction to that effect issued on the 11 March 2011 and it is, indeed, on that basis, that the appeals now  
5 come before this Tribunal.

### **The Appellant's Case**

20. The Appellant's representatives handed to the Tribunal on the day of the hearing comments upon HMRC's skeleton argument. The Appellant's arguments can be shortly summarised and, indeed, here we quote:

10 *"[this] is an application to the Tribunal to recognise that:*

(i) *the Lifestyle Confiscation Order obtained by HMRC against Mr. Nugent satisfied to that point in time all liability of Mr. Nugent to HMRC. It is not argued by the Appellant that the existence of a Confiscation Order excludes civil proceedings to recover tax and duty  
15 owing;*

(ii) *the Appellant's application is premised upon the assertion that the satisfaction of the Confiscation Order equates to the satisfaction of all liability including tax and duty to the Respondent."*

21. Mr. McNamee seeks to distinguish the case of her *Majesty's Revenue and  
20 Customs v Richard Alan Crossman (Junior) [2007] EWHC 1585 (Ch)* on which HMRC rely.

22. The facts of the Crossman Case were that the Crown Court determined the criminal benefit to Mr. Crossman of a course of conduct at £488,000 (the sum sought by HMRC) but, having found his realisable assets to total £55,000, made a  
25 Confiscation Order in that latter amount.

23. HMRC then made a statutory demand for the difference between the two figures. As against that, Mr. Crossman claimed that he had been given a legitimate expectation that, subject to his making payment in the amount of the Confiscation Order, that HMRC would not look to him for payment of the excess of the excise duty  
30 which he owed.

24. Rimer J, in that case, however, concluded that *"[nothing] was to be construed such as to deprive them [HMRC] of seeking to recover the excess of their debt over and above the amount paid under the Confiscation Order."*

25. Mr. McNamee sought to distinguish the Crossman Case on the basis that Mr.  
35 Nugent had his criminal benefit calculated by the Court in the sum of £17,810.13, ie. that unlike Crossman, the "benefit" figure equates in full to the "liability" of the Appellant. He argues that Mr. Nugent, having paid that amount in full, has no further liability to HMRC *"in law or in fact"*.

26. In short, he asserts that the benefit figure calculated by the Court in the criminal proceedings equates to Mr. Nugent's full tax liability and relies on the provisions of Section 158(2) of the Proceeds of Crime Act 2002 as justification for that proposition.

27. That section provides as follows:

5        "*Section 158(2)*

*The Court must –*

          (a)        *take account of conduct occurring up to the time it makes its decision;*

          (b)        *take account of property obtained up to that time."*

10        28. Mr. McNamee asserts that that Section requires an assessment based on all criminal conduct, and that where the resulting Confiscation Order is made, it in effect results in a cap on any future liability.

### **HMRC's Case**

15        29. HMRC's position as advanced by Mr. Puzey is that the Tribunal has already considered the Appellant's arguments and that they having been discounted at the interlocutory stage, and not having been then appealed, are Res Judicata based on the application of *Eco Power Co UK Limited v Transport for London (2010) EWHC 1683 (Admin)*.

20        30. Setting that point aside for the moment, the underlying and fundamental position of HMRC is that the Appellant's benefit arising from criminal conduct is not the same thing as the amount of duty evaded as a result of his actions.

25        31. It is HMRC's case that the assessments to duty were stayed pending the outcome of the criminal proceedings, and that the civil and criminal proceedings may co-exist, although accepting clearly that pursuant to the provisions of Section 278 of the Proceeds of Crime Act 2002, where property has been taken into account for the purposes of a Confiscation Order, that it may not be "double counted" for the purposes of the civil recovery action.

30        32. Consequently HMRC asserts that the mere fact that HMRC sought a Lifestyle Confiscation Order does not preclude the Tribunal from hearing an appeal against an assessment to duty, and nor is it an abuse of process or a breach of the Appellant's human rights to do so.

35        33. HMRC also make the point that it is entirely open to them to raise assessments on a joint and several basis against the Appellant and/or Mr. Gorman (Regulation 5(2) Excise Goods (Holding, Movement, Warehousing and REDS) Regulations 1992 ("the Regulations")), and that their primary goal in raising such assessments are to recover in relation to both the excise duty and VAT the total tax which they properly consider to be due on the facts of this (or indeed any) given case.

34. HMRC also indicate that they do not accept (as was suggested in the interlocutory proceedings and elsewhere) that the defendant was merely a "scout". They assert that both Messrs. Nugent and Gorman were principals in a fuel smuggling operation which lasted over a period of 15 months and, which they allege, involved  
5 over £1,000,000 in evaded tax and duty, and for which the Appellants are jointly and severally liable.

35. HMRC say that they are not attempting to establish what benefit the Appellant derived from his criminal conduct (which is the prerogative of the courts of criminal jurisdiction) but merely to calculate the proper amount of duty and tax which is  
10 owing. They rely full square on *Crossman* in relation to this distinction.

### Decision

36. Whilst Mr. McNamee did try to convince the Tribunal that his approach was somewhat different from that which had been the subject of the interlocutory proceedings, I must say that I am not convinced as to his rationale.

15 37. In essence, both in the interlocutory proceedings and this Tribunal, Mr. McNamee's position is that the Confiscation Order "mopped up" all of the liability arising from Mr. Nugent's criminal conduct.

38. That was rejected as part of the interlocutory application and, to the extent that it was rejected, the principles of Res Judicata apply and it is not open to Mr. McNamee  
20 to have that issue re-tried before this Tribunal.

39. To the extent, however, that there is any doubt on the point, this Tribunal finds that the concept of "benefit" as it is used in the Order or the POCA does not and cannot equate with the same concept as a "liability" for tax under the taxing legislation (in this case the Finance Act 1994, the Regulations and/or VATA).

25 40. Mr. McNamee, when asked, cited Section 158(2) as authority for his proposition that the Confiscation Order effectively operated as a cap on liability. I do not read that Section in the same way as Mr. McNamee. All that Section says is that the Court must:

- (1) take account of conduct occurring up to the time it makes its decision;
- 30 (2) take account of property **obtained** up to that time.

41. At that stage, all the court is doing is trying to establish what benefit has arisen.

42. That is a retrospective analysis of what a person has enjoyed from his criminal endeavours.

35 43. It is clearly something completely distinct from what this Tribunal, in the exercise of its statutory jurisdiction, is engaged with, namely where there are assessments, and appeals against those assessments, the attribution of the correct amount of tax and/or duty which is payable on any given factual matrix.

44. There is no doubt that in some cases (as indeed in this one) there may be a degree of overlap based on a single factual matrix but, where such overlap exists, there is (by virtue of Section 278) a limit on recovery so that the same property is not accounted for twice. Indeed, that point was made (and accepted by Mr. McNamee) in the  
5 interlocutory proceedings themselves. It logically follows that where there has been recovery on foot of the Confiscation Order which, to some extent, encompasses a confirmed tax liability, then the amounts recovered ought to be brought into account when the collection of tax is undertaken. That principle is clearly reflected in the case of *Crossman*, upon which Revenue sought to rely as acceptance of the principle that  
10 the civil and criminal liability can co exist.

45. Mr. McNamee sought to rely upon *Crossman* for entirely different reasons, namely that the assessment for benefit defined the maximum liability to tax which, when discharged, removed all future liability.

46. Having considered *Crossman* I see no basis for such an argument.

15 47. HMRC have a statutory prerogative pursuant to (in the case of VAT) Section 73 VAT Act and (in the case of excise duty) Section 12 of the Finance Act 1994 to assess tax that they do not feel has been returned. In the absence of detail those assessments can be made to best judgment. Once the assessments are made, they can be challenged and, if appealed, that will bring them before this Tribunal.

20 48. This Tribunal is solely tasked with attempting to find the "correct" amount of tax. Once it is established, it may then on collection need to be adjusted to reflect the extent to which the Crown may have already recovered the tax on foot of a Confiscation Order, but that is a question of enforcement.

25 49. Equally, as provided for in both the Regulations and VATA, the assessments can be made on a joint and several basis.

50. In this case Appeals were duly made against those assessments, but the Appellant has chosen not to advance evidence to disprove or, indeed, in any way challenge those assessments or, indeed, to engage this Tribunal in an analysis of how a proper assessment to the tax and duty evaded can be arrived at.

30 51. Rather, the Appellant has sought to rely solely upon the ground that the Confiscation Order (as made and satisfied) obviated the need to engage any further in attempting to challenge the nature of the assessments themselves. As I have indicated above, that view was rejected in the Interlocutory Proceedings. I too reject it.

35 52. As to the assessments themselves, no contrary evidence or challenge to the assessments was provided to the Tribunal and indeed the Appellant, before the appeal, confirmed in writing that no factual challenge would be made. In those circumstances, I can do nothing other than conclude that the assessments must stand.

53. No order as to costs.

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**

**RELEASE DATE: 4 May 2012**