[2015] UKUT 161 (TCC)
Appeal number: FTC/25/2013

Section 29 TMA – Appeals against Discovery Assessments – argument that liability resolved under Confiscation Orders granted under POCA 2002 – F-tT dismissed appeal - Appeal from F-tT Dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

JOHN MARTIN **Appellant**

- and -

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

TRIBUNAL: MR JUSTICE WARREN CP

Sitting in public at Bedford House, Bedford Street, Belfast on 20 March 2015

Ronan Lavery QC for the Appellant

Nicolas Hanna QC for the Respondents

DECISION

Introduction

1. The appellant ("**Mr Martin**") appeals from the decision of Judge Ian Huddleston ("**the Judge**") released on 4 May 2012 ("**the Decision**"). As appears from [1] and [2] of the Decision, the matters under appeal before the Judge related to discovery assessments raised by the respondents ("**HMRC**") pursuant to section 29 of the Taxes Management Act 1970 ("**TMA**") against Mr Martin in respect of the tax years ending 5 April 2001 to 5 April 2008 inclusive. The assessments were 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 amounted to a figure in excess of £560,000. The Judge rejected Mr Martin's argument that his tax liability had, as a matter of law, been concluded by a confiscation order (to which I will come) made against him by the Crown Court as subsequently varied by the Court of Appeal. Mr Martin now appeals to the Upper Tribunal raising the same point of law.

The facts

2. The underlying facts are not in dispute and appear for main part in [3] to [11] of the Decision although some further detail appears from the documents before the Judge. So far as material to this appeal, the position is as follows:

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

    b. 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 had a general criminal lifestyle.

c. On appeal, the amount of the Confiscation Order was reduced to £35,116. The order of the Court of Appeal was made on 14 January 2010. I have not seen the judgment of the Court on that appeal and have not read the reasoning by which it reached its decisions to reduce the figure. I am told that it was because there was an error, acknowledged by the Prosecutor, in the material which had been presented to the Crown Court.

d. HMRC wrote to Mr. Martin on 27 February 2009 indicating that they were commencing an investigation into his tax affairs. The Judge made no finding about whether, at that time, HMRC were aware of the Confiscation Order which had been made just over 3 weeks earlier. There is no evidence before me about that.

e. There followed a chain of correspondence leading up to a letter of the 3 August 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.

f. Following a subsequent meeting between HMRC and Mr Martin's solicitors during which the solicitors indicated their view that the assessments were incorrectly raised, HMRC wrote to the solicitors 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.

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

3. The Judge had before him the Prosecutor's Statement dated 22 June 2007 in support of the request for a confiscation order. The Judge did not refer to any of its detail. It is in the bundle before me. I do not understand its actual contents to be contentious so far as concerns matters of fact and the Prosecutor's beliefs about Mr Martin's assets and sources of income. The Prosecutor's Statement was made by Mr Richard Alhadeff of the Financial Investigation Unit, Economic Crime Bureau, Police Service of Northern Ireland. The prosecutor, it is to be noted, was the Public Prosecution Service and not HMRC. There was a second Prosecutor's Statement dated 22 January 2009; nothing turns on its detail.
4. The facts as set out in paragraph 2d to g above are taken from the Decision. They do not quite capture the flavour of the delay and non-engagement on the part of Mr Martin. I give a little more detail all of which can be seen from the correspondence before the Judge and in the materials before me.
5. The letter dated 27 February 2009 referred to in paragraph 2d above was sent just over 3 weeks after the decision of the Crown Court. As well as stating the she was commencing an investigation into Mr Martin's tax affairs, the writer (Mrs Hodge) stated that information held by HMRC suggested that fraudulent or negligent conduct may have resulted in a failure to notify chargeability to income tax and VAT and also the failure to submit accounts and returns. She noted that her information might be incorrect or might have a satisfactory explanation and stated that she nonetheless had a duty to investigate. She sought a meeting with Mr Martin and his accountant to discuss his tax affairs. No reply was received.
6. The chain of correspondence referred to in paragraph 2.e above included a chasing letter to Mr Martin on 18 March 2009. Having received no reply to that letter, Mrs Hodge wrote again on 6 April 2009 expressing her disappointment that no

contact had been made. She again stated that HMRC held information suggesting that Mr Martin had been in receipt of income which he had not notified to HMRC, noting that he had paid no tax for several years. She was prepared to give him a last opportunity to fix a meeting to discuss his tax affairs. If she did not hear from him, she indicated that she would be raising assessments for the years 1998/99 to 2007/08. The amounts specified were significant, ranging from £50,000 profits for one year to £200,000 for four of the other years.

7. There was some contact in May, but nothing resulted from it. On 6 July 2009, Mrs Hodge wrote again. It appears from her letter that there had been a phone conversation between her and Mr Martin on 3 June. She recorded that he had wished to speak to his solicitor before fixing a meeting but that he had failed to communicate further. She requested that contact be made by Mr Martin or his adviser within 10 days, failing which she would propose making assessments. This time, the assessments were to be for the years 2000/01 to 2007/08, with the total amount, whilst still substantial, being reduced.

8. On 3 August 2009, Mrs Hodge sent the letter referred to in paragraph 2e above. She said that her decision was "now to raise Revenue Assessments". These were for the same amounts as appeared in the 3 June letter and included one additional amount for the year 2003/04 which would appear to have been omitted. Assessments duly followed on 10 August 2009.

9. By late November 2009, Mr McNamee, Mr Martin's solicitor, had sent to HMRC an authority to act for Mr Martin to discuss his tax affairs. It was not until some weeks later, on 10 February 2010, that a meeting took place. This was the meeting referred to in paragraph 2f above. It was envisaged that the meeting would be

attended by Mr Martin, Mr McNamee and representatives of HMRC. Mr Martin did not in fact attend. Although this is not recorded by the Judge, it appears that matters were left that HMRC would write to Mr McNamee asking a full copy of the Confiscation Order and setting out various questions which they had regarding Mr Martin's income, activities and associated lifestyle. Once HMRC had received a response to these queries, HMRC would review that additional information.

10. A follow-up letter dated 18 February 2010 was sent; this is the letter referred to in paragraph 2f above. It sought certain information and a copy of the Confiscation Order. The information sought concerned the sources of Mr Martin's income and certain details in respect of his ownership of property (including 71 Ballyards Road and his then current home at 1 Boyds Row, Armagh and also vehicles owned by him).

11. On 15 June 2010, another officer of HMRC, Mr Barnett, wrote to Mr Martin. Mr Martin had asked for a review of the assessments; this letter was Mr Barnett's decision on the review. His decision was to uphold the assessments for the reasons which he proceeded to give. Mr Barnett recorded the history of non-engagement by Mr Martin. He recorded that, since the letter of 3 August 2009, Mr Martin had instructed a solicitor but that, in spite of this, Mr Martin had still not supplied relevant information to enable HMRC to consider the position and in particular had not replied to questions raised in a letter dated 18 February 2010. It is worth setting out two paragraphs of Mr Barnett's summary:

> "1. Information held by HMRC indicates taxable sources of income.
> …….
> 5. HMRC has been made aware of a Confiscation Order in place following an investigation by a law enforcement agency (Not HMRC). However, this does not prevent HMRC from conducting its own investigation into your tax affairs for the period concerned."

12. That last point is obviously correct. Even if Mr Lavery is correct in his submissions that HMRC cannot raise assessments in relation to criminal conduct which falls within the scope of the Confiscation Order, there may be tax liabilities which have nothing to do with any sort of criminal conduct and which do not themselves give rise to any sort of criminal conduct. There is no possible argument based on the Confiscation Order that HMRC could not carry out any investigation at all into the existence of such liabilities.

13. In his letter, Mr Bennett referred to the phone call on 3 June 2009. He recorded that it was stated by Mr Martin in that phone call that the only income he had been in receipt of in the relevant years of assessment was income support, in response to which Mr Martin was told that this was "in total contradiction to information held by HMRC".

14. Mr Lavery complains that this information was never presented to Mr Martin; but even if it had been, Mr Martin's case would still be that HMRC were bound, as the result of the decisions of the Crown Court and the Court of Appeal, to accept that no further tax was due. As he puts it, in the absence of any additional material, it is difficult to see how Mr Martin could have gone any further than he did. So far as Mr Martin was concerned, all the relevant material was before the Crown Court and the Court of Appeal.

15. On 28 June 2010, Mr Martin lodged his appeal against the assessments with the First-tier Tribunal ("**the F-tT**"). On 9 September 2010, HMRC lodged their statement of case. In paragraph 2 of that statement of case, HMRC addressed the suggestions that Mr Martin did not owe any tax because (i) he had been an employee subject to PAYE during most of the assessed period and (ii) he was

subject to a lifestyle confiscation order under POCA which covered all his liability. The following points were made in paragraph 3:

a. Mr Martin had never retuned any self-employed income to HMRC: the last PAYE income returned was during 1999 and subsequently Mr Martin's only known source of income was derived from benefits. HMRC believed him to have been in receipt of income in addition to benefits which had in turn funding the building and furnishing of 71 Ballyards Road. And therefore, HMRC "believe that Mr Martin has been in receipt of additional income and therefore does owe tax to HMRC".

b. It was believed by HMRC that 71 Ballyards road was built during 2003-04, with Mr Martin and his family moving in at the end of 2004. Thus the house was built and furnished when his only known income derived from benefits.

c. Mr McNamee stated that Mr Martin was in receipt of PAYE income during a large part of the time covered by the assessments, but had failed to provide any evidence of such income or tax paid.

d. In relation to the Confiscation Order, there had been a failure to supply a copy of this order setting out the relevant amounts and the period the order covered in spite of requests for the same made to Mr McNamee.

16. Quite apart from that, it is apparent that Mr Martin and Mr McNamee had provided none of the information sought in the letter dated 18 February 2010. Indeed, as the Judge observes, McNamee "has consistently throughout the correspondence taken the position that satisfaction of the Confiscation Order discharged Mr Martin's tax liability and that, therefore, no further liability arises.

He has declined to engage in further discussion in circumstances where the basis of HMRC's investigation is not disclosed".

The statutory provisions

(1) POCA

17. Confiscation orders, so far as concerns Northern Ireland, are dealt with in Part 4 of POCA, at sections 156 to 176. Particularly relevant are sub-sections (4) to (7) of section 156:

> "(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 subsection (4)(b) or (c) that 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 subsection (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 subsection (4) or (5) on a balance of probabilities."

18. The meanings of criminal conduct and benefit are found in section 224. Criminal conduct is conduct which constitutes an offence in Northern Ireland or would do so if it occurred in Northern Ireland.

19. General criminal conduct of the defendant is all his criminal conduct. Particular criminal conduct of the defendant is all his criminal conduct which (a) constitutes the offences concerned (b) constitutes offence of which he was convicted in the same proceedings as the offence concerned and (c) constitutes offence which the

court will be taking into consideration in deciding the sentence for the offence concerned.

20. A person benefits from conduct "if he obtains property as a result of or in connection with the conduct". 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". And if a person benefits from conduct his benefit is the value of the property obtained.

21. Section 158 deals with what is to be taken into account when deciding whether, and if so what, benefit a defendant has derived from his particular or general criminal conduct. The court must take account of conduct occurring up to the time it makes its decision and take account of property obtained up to that time. In the present case, the court decided that Mr Martin did have a criminal lifestyle. The Confiscation Order should therefore have reflected all his criminal conduct at least up to 3 February 2009 (the date of the Confiscation Order). I say "at least" because Mr Lavery suggests that the end date may be the decision of the Court of Appeal reducing the amount. I do not propose to decide that issue because nothing turns on it.

22. Where the court decides that the defendant has a criminal lifestyle, section 160 provides for certain assumptions to be made in deciding whether he has benefited form his general criminal conduct and deciding his benefit from the conduct. I mention three of them. It is to be assumed that:

    a. Any property transferred to him after the "relevant day" was obtained by him (a) as a result of his general criminal conduct, and (b) at the earliest time he appears to have held it.

b. Any property held by the defendant at any time after the date of conviction was obtained by him (a) as a result of his general criminal conduct, and (b) at the earliest time he appears to have held it.

c. Any expenditure incurred by the defendant at any time after the relevant day was met from property obtained by him as a result of his general criminal conduct.

23. However, the court must not make a required assumption in relation to particular property or expenditure if (a) the assumption is shown to be incorrect, or (b) there would be a serious risk of injustice if the assumption were made.

24. The "relevant day" for the purposes of section 160 is the first day of the period of 6 years ending with the day when proceedings for the offence concerned were started against the defendant. In the present case, the relevant day in relation to Mr Martin is 17 March 1999.

25. A confiscation order, once made, can be revisited, and a new calculation of the benefit made, in accordance with section 171. This provision applies (see section 171(1)) where there is evidence which was not available to the prosecutor or the Director when the original order was made and the prosecutor believes that if the court were to find the amount of the defendant's benefit in pursuance of the section it would exceed the previous amount. An application must be made by the prosecutor, and must be made before the end of the period of six years starting with the date of conviction. A new order may be made only if the court believes it is appropriate for it to proceed under the section.

26. There is one authority relevant to POCA to which I have been referred. It is the decision of Rimer J in *HMRC v Crossman* [2008] 1 All ER 483. The matter came before Rimer J on the hearing of a bankruptcy petition brought against Mr

Crossman by HMRC. The decision related to section 71 Criminal Justice Act 1988, which in some material respects was in similar terms to section 156 POCA. In that case, Mr Crossman was prosecuted by HMRC, not by a police or the Director of Public Prosecutions, for fraudulent evasion of VAT and excise duty. He was convicted. The Crown Court found that the value of Mr Crossman's proceeds of crime amounted to just over £488,000 (in respect of both the VAT and the duty fraud). Taking account of his assets, a confiscation order in the sum of just under £56,000 was made. So far as relevant for present purposes, it is necessary only to record Mr Crossman eventually paid the £56,000 and that HMC then sought to enforce payment of some £353,450, serving a statutory demand for that amount and then presenting a bankruptcy petition. That figure related solely unpaid excise duty; HMRC were pursuing separately the claim in relation to VAT.

27. Mr Crossman made an application to set aside the statutory demand, an application which was dismissed by the District Judge. The bankruptcy petition was then presented and served (I do not need to cover the matters concerning the contents of the petition and its service described by Rimer J in [9] and [10] of his judgment). Mr Crossman then formulated his grounds of opposition. Rimer J saw those grounds as raising the point that the claim to bankrupt Mr Crossman on the basis of his unpaid debt of £343,450 reflected (at least in part) a bid to achieve double recovery against him since he had already paid almost £56,000 under the confiscation order. Rimer J said that this payment was not made to HMRC, although it was paid to the Crown of which HMRC are part; nor was payment paid in part satisfaction of any unpaid duty. However, as he recorded, it was the policy of HMRC not to press for payment of at least that part of their debt equivalent to any amount paid to the Crown under a confiscation order. The first

issue identified by Rimer J was whether HMRC's policy was even more generous to debtors such that satisfaction of the confiscation order is treated as writing off the entirety of the debt to HMRC. HMRC disputed that that was or had ever been their policy.

28. Mr Crossman raised three defences to the petition: a public law defence, a non-disclosure issue and the absence of assets to justify the making of a bankruptcy order. As to the first of those, it comprised two limbs. I do not need to address the first limb since it turned on a particular representation said to have been made by HMRC in a letter to Mr Crossman which finds no parallel on the facts of the present case. The second limb, however, is relevant since it relates to the asserted policy of HMRC in relation to enforcement of debts. Rimer J found no support for the alleged policy in the materials relied on by Mr Crossman. The only policy which he considered was established was that where the amount of the confiscation order matches the amount of the unpaid duty, HMRC will not take civil proceedings to recover the amount of the unpaid duty. In this way, double recovery is avoided. And so, in the case before him, Rimer J held that HMRC's pursuit of Mr Crossman for the unpaid duty, after giving credit for the amount of the confiscation order, involved no departure from their stated policy.

29. Before leaving *Crossman*, it is worth pointing out that the statements of policy on which Mr Crossman had relied amounted to no more than ones "to the effect that where the amount of the confiscation order matches the amount of the unpaid duty, HMRC will not take civil proceedings to recover the amount of the unpaid duty" (see [19] of Rimer J's judgment). HMRC's policy is to avoid proceedings which would result in double recovery. What Rimer J did not say – and indeed what he actually said would be inconsistent with his saying – that payment of the

amount due under the confiscation order would amount to satisfaction of the actual debt due. In other words, he did not say that payment of the £56,000 was a payment of that amount of the outstanding duty even though the confiscation order related to, and only to, fraudulent evasion of tax.

(2) TMA

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:

a. *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 mustl 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."

b. *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 F-tT) that it is wrong, referring to *Haythornwaite & Sons Ltd -v- Kelly* (1927) 11 TC 657 at 667.

c. 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."

32. This burden of proof differs from that which the Crown Court must apply: as has been seen, the Crown Court must decide any question arising under section 156(4) or (5) on a balance of probabilities. If the court is uncertain where the truth lies, the prosecutor will not succeed.

Mr Martin's case

33. Mr Martin's case, in essence, is that the amount of the Confiscation Order included all the amounts of tax for which he was liable. This argument rests on two foundations. The first is that, since the Crown Court decided that he had a criminal lifestyle, all of his criminal activity from 17 March 1999 to 3 February 2009 (and possibly later) was taken account of in the amount of the Confiscation Order. In that context, the non-declaration to HMRC of the profits derived from the criminal activity is itself said to be criminal conduct. The second foundation is that when the challenged tax assessment was made, HMRC had no information which had not been available to the Prosecutor and the Crown Court. Further, it is said that there was no information before the Crown Court which was not before the Judge in the F-tT. All of the points raised by HMRC were, it is said, raised in the context of the making of the Confiscation Order, namely, to use the wording of Mr Martin's statement of case before the F-tT, "the finances used in order to construct [the house at 71 Ballyards Road], Mr Martin's work record in relation to the term when he was in PAYE employment, his benefit history and a full examination of all his bank, Credit Union and mortgage accounts". The amount of the Confiscation Order therefore reflected, it is said, all of Mr Martin's conduct including his non-payment of tax. It is not, Mr Lavery submits, possible for HMRC or the F-tT to justify any further assessment to tax by reference to the

same material as resulted only in the amount of the Confiscation Order. The essence of the argument is that HMRC are thereby estopped from asserting that the Confiscation Order did not include an amount equal to the entire tax for which Mr Martin was liable.

34. As part of that last argument, Mr Martin's case is that his home at 71 Ballyards Road Milford Armagh had been built with monies lawfully obtained and had been constructed more than 6 years prior to the commission of the offences of which he was convicted. If that had not been the case, the house would have had to be included in the benefit calculation as criminal property evidencing unlawful income in accordance with section 160 POCA. Mr Lavery submits that HMRC are seeking to use the assessment and recovery process as a way of going behind the lawful calculation and assessment of the amount derived from criminal income over the same period as the Confiscation Order. Although HMRC say that the house was constructed in 2000 to 2003, the Court of Appeal excluded it from the scope of the Confiscation Order. If the house had represented the proceeds of crime, the amount of the Confiscation Order would have been much higher than it was.

35. I will need to examine those two foundations (including the argument about the date of construction of the house), and the case on estoppel, in due course. But before I do that, I will deal with other arguments raised by Mr Lavery.

36. The first argument is that HMRC were, alternatively the Prosecutor was, under a duty to disclose to the Crown Court the fact that HMRC were contemplating alternative recovery procedures against Mr Martin. It is argued that section 156(4) requires such disclosure. It is said that, had such disclosure been made, the Crown Court might well have adjourned the application for a confiscation order

until it knew what, if any, recovery of tax HMRC would, or would be entitled, to make and might even have gone as far as dismissing the application altogether. It is said that, in the light of that failure of disclosure, it would now be unjust to allow HMRC to proceed against Mr Martin to recover the tax which they say is due.

37. In my view, there is nothing in this argument. Neither the findings of fact nor any of the evidence which I have been taken to demonstrate any close liaison between HMRC and the Prosecutor in relation to the application for a confiscation order. At most what is revealed is disclosure by HMRC to the Prosecutor of information which Mr Martin had himself disclosed to HMRC on his returns. In particular, there was information in relation to Mr Martin's social security benefits, but even that information showed a smaller amount than the information which the Prosecutor had received from the Social Security Agency. The Prosecutor relied on the latter. There is nothing to suggest that HMRC communicated to the Prosecutor the existence of any criminal activity on the part of Mr Martin.

38. In any case, the Prosecutor's first statement was made in June 2007. At that stage, there is no reason to think that HMRC actually were intending to start any proceedings against Mr Martin. Indeed, it was not until the end of February 2009 that Mrs Hodge even started an investigation. The same applied in relation to the Prosecutor's second statement dated 22 January 2009. There is no evidence that the Prosecutor had any idea that HMRC would be opening an investigation let alone that they might be intending to commence proceedings. In *Crossman*, Rimer J was critical of non-disclosure on the part of HMRC; but in that case, in contrast with the present case, HMRC were the prosecuting authority. It is not easy to see what duty HMRC might be under to make any disclosure to the Crown

Court (or indeed a prosecuting authority) about its future intentions even if they are aware that a confiscation order is being sought. But even if, in principle, such a duty could be established, I do not think that the facts of the present case come anywhere near establishing a breach of duty. I leave aside the question whether, in any case, HMRC can be said to be a victim of Mr Martin's criminal conduct for the purposes of section 156(6) POCA. Further, given that HMRC will not seek to effect double recovery, it is not easy to see what prejudice Mr Martin will have suffered from the Crown Court having made a confiscation order.

39. The second argument is based on the decision in *Crossman*. At [47] of the Decision, the Judge said that reliance was placed on *Crossman* for "the proposition that Confiscation Order identified the maximum liability which can arise". However, it was not, and is not, Mr Martin's case that, as a general proposition, a confiscation order identifies the maximum amount of tax. Rather, it is said that *Crossman* is authority for the proposition that HMRC may not seek to recover any amount which was the subject of a confiscation order. In *Crossman*, Mr Crossman had not been made subject to a Criminal Lifestyle order but rather an order for the confiscation of a specific amount of benefit. In contrast, in the present case, it is said that there is no "excess tax" since Mr Martin was made subject to a Criminal Lifestyle order; and so, on the facts of the case, the Confiscation Order against Mr Martin does represent the maximum amount of tax for which he is liable.

40. As to this second argument, I reject the suggestion that *Crossman* is authority for the proposition that HMRC may not seek to recover any amount which was the subject of a confiscation order. Rimer J said nothing expressly to that effect. In my judgment, that proposition is not implicit in his judgment. He simply had

nothing to say on the issue which did not arise in the case before him. It is true that *Crossman* differs from the present case in that it related to particular criminal conduct whereas the present case relates to general criminal conduct. But that difference does not assist one way or the other in resolving the arguments in the present case.

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.

43. This approach is, I consider, supported by consideration of the position before the taxpayer has actually met his obligations under the confiscation order. At that stage, he cannot contend that the relevant tax has been paid. He may refuse, or find himself unable, to meet his obligations under the confiscation order. It cannot, in my judgment, be suggested that the mere making of the confiscation

order discharges the obligation to pay tax. HMRC would remain entitled to make an assessment in the full amount. It would be at the enforcement stage that account would fall to be taken of any amount which had, by then, been paid under the confiscation order.

44. Quite apart from that, there was no finding by the Judge about when the amount due under the Confiscation Order was in fact paid. What is clear is that HMRC had no reason to think that such amount had been paid at the time when the assessment were raised, that is to say on 10 August 2010. If Mrs Hodge was otherwise justified in arriving at her decision to raise the assessments, the fact of the making of the Confiscation Order without any knowledge of payment pursuant cannot, in my judgment, be enough to establish that she could not reasonably hold the opinion that an assessment was necessary to make good to the Crown the loss of tax.

HMRC's case

45. HMRC's case is that the only relevance of the Confiscation Order is its potential for double recovery. By the time of the hearing before me, it was HMRC's clear position that they would not seek to enforce any valid assessment to the extent that the Confiscation Order subsumed the tax due under such an assessment. There would need to be some enquiry to ascertain what part of the amount actually paid pursuant to the Confiscation Order could properly be taken as reflecting any tax liability. HMRC's case is that the Confiscation Order does not preclude them from carrying out their own enquiry in order to establish the tax properly due and that the amount of the Confiscation Order is not determinative of any facts which would go to the ascertainment of that amount of tax. This is so even if the failure to file a tax return and the failure to pay the tax ultimately found due amounted, in

themselves, to a criminal offence of tax evasion; but it is not accepted that such conduct did amount to such a criminal offence.

Discussion

46. Mr Hanna commenced his oral submissions with an examination of what the position would have been had there been no Confiscation Order. His starting point was that the onus is on an appellant to show that assessment under section 29 TMA should be set aside. I agree: the case-law considered at paragraph 31 above establishes that proposition clearly. The normal way in which this is done is in the context of an appeal to the F-tT. I suppose that in an extreme case it might be possible to challenge the decision to raise an assessment as so unreasonable as to amount to a breach of HMRC's duties as a matter of public law; but no such case can be made before the F-tT which has no relevant judicial review jurisdiction. Accordingly, the F-tT must, in my view, proceed on the basis that Mrs Hodge had formed a reasonable opinion as to the amount of tax which needed to be charged in order to make good to the Crown the loss of tax and so was entitled to raise the assessments which she did.

47. Mr Hanna then submits as follows. The assessments were made on the basis of what HMRC believed to have been Mr Martin's profits in order to build, furnish and maintain that house and to maintain his lifestyle. It is clear that, if HMRC considered that Mr Martin's house had been built in 2002-3 and that his lifestyle could not have been maintained out of his declared income, they were entitled to raise an assessment accordingly. Mr Martin was given plenty of opportunity to explain his position to HMRC; he was also asked to answer specific questions raised in the letter of 18 February 2010. He declined to answer those questions and he declined to engage in the investigation at all. In particular, Mr McNamee

declined (see paragraph 16 above) to engage in further discussion in circumstances where the basis of HMRC's investigation was, according to him, not disclosed. Mr Martin did not co-operate at all. He produced no material to show that the house was built at an earlier time out of legitimate funds. As Mr Hanna put it, Mr Martin simply buried his head in the sand. He did so not only in relation to the house but in relation to all aspects of his tax affairs. He did so even to the extent that he produced no evidence at all before the F-tT.

48. Instead, Mr Martin relied on his argument that the Confiscation Order concluded his appeal to the F-tT in his favour. But if he is wrong on that, his appeal to the F-tT was bound to fail because the effect of the Confiscation Order was not raised as a preliminary point; the entire appeal was before the F-tT and, without any evidence, the Judge could not have decided that the burden which lay on Mr Martin was satisfied.

49. I agree with those submissions. If it were not for the Confiscation Order, Mr Martin's appeal to the F-tT was doomed to failure in the absence of any evidence at all from him. Mr Martin in fact gave no evidence to explain when the house had been constructed or how its construction and furnishing had been financed. He did not give evidence about his lifestyle or about how he maintained it. He did not even give evidence to the effect that he had received no income in the relevant years of assessment.

50. He did not, therefore, come to the F-tT and say that he simply did not understand HMRC's case because he in fact had no undeclared income or that the house had been constructed at an earlier time, funded out of legitimate funds. Had he done so, the evidence on each side could have been tested. The Judge would have known the factors relied on by HMRC to show that Mr Martin must have had

undeclared income and he would have had Mr Martin's explanation. He would then have been in a position to decide whether Mr Martin had been overcharged by the assessments. Instead Mr Martin, as I have said, buried his head in the sand. I am afraid he is the author of his own misfortune if his argument on the effect of the Confiscation Order fails. Mr Lavery asks how Mr Martin could have gone further than he did to meet HMRC's assertion that he had undisclosed income: see paragraph 14 above. The answer to that is that he could have engaged in discussions with HMRC and, as an important first step, answered the reasonable requests for information which had been made in Mrs Hodge's letter of 18 February 2010.

51. In a case where the taxpayer and HMRC both present evidence, the F-tT will have before it the material on which HMRC rely to justify the opinion that tax is due and will have such material as the taxpayer can produce to explain why that opinion is wrong. It will be a rare case, I suggest, where the F-tT presented with all the evidence will be unable to decide whether the taxpayer is overcharged to tax or not it will be rare case where the facts are so finely balanced that the decision turns on the burden placed on the taxpayer.

52. But where the taxpayer presents no evidence at all to the F-tT, the position is different. The F-tT does not then need to address the particular facts and circumstances relied on 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-tT could rely in order to decide that that opinion was incorrect and that the taxpayer was overcharged by the section 29 assessment. This was the position in relation to Mr Martin. In the absence of the Confiscation Order, Mr Martin's appeal would, to repeat, have been bound to fail.

53. What, then, is the impact of the Confiscation Order? Mr Hanna's first point is that under section 156(7) POCA, the court must decide, on a balance of probabilities, any question which arises under section 156(4) and (5). The onus is on the prosecutor to establish the relevant criteria for making a confiscation order. This to be contrasted with the position under section 29 TMA where the burden is on the taxpayer to show that he is overcharged by the assessment. What is not at all clear from the Decision or the materials before the Judge is the basis on which the Crown Court and the Court of Appeal left the house out of account in assessing the amount of the Confiscation Order. All that can safely be said, in my view, is that the Crown Court was not satisfied that the house was constructed after the relevant day as defined in section 160(8) POCA. There is no material before me to suggest that the Crown Court decided, on a balance of probabilities, that the house was in fact constructed before the relevant day.

54. On the basis, which I consider to be correct and the one on which Mr Lavery's arguments are to be judged, that the Crown Court did not decide that the house was constructed before the relevant day (and thus before the earliest of the assessment periods), there was no decision binding HMRC which precluded performance of the statutory duty under section 29 TMA to assess Mr Martin in the light of Mrs Hodge's opinion that income which ought to have been assessed had not been assessed. The Confiscation Order therefore has no impact on the conclusion which I have reached namely that, in the absence of the Confiscation Order, Mr Martin's appeal to the F-tT was bound to fail.

55. That is enough to dispose of Mr Martin's appeal to the Upper Tribunal. But in case I am wrong in my conclusion about what the Crown Court did decide, I turn to consider the position on the assumption that it decided, on the balance of

probabilities, that the house was constructed before the relevant date. That decision clearly does not preclude HMRC altogether from investigating Mr Martin's tax affairs. In my judgment, it does not preclude HMRC from raising assessments based on the results of their investigation; they are not bound to accept that the house was constructed before the earliest of the assessment periods. There are several reasons for reaching that conclusion.

56. The first reason is that the Confiscation Order is not itself necessarily final. Under section 171 POCA, the amount of a confiscation order can be revisited if there is evidence which was not available to the prosecutor. It seems to me, therefore, that the decision of the Crown Court would not give rise to *res judicata* or an issue estoppel so as to bind HMRC. The decision would not have the necessary element of finality to do so.

57. The second reason, which is closely related to and may even be part of the first reason, is that the relationship between HMRC and Mr Martin, as tax-gatherer and tax-payer, is far removed from the relationship between the prosecutor and Mr Martin. Mr Lavery asserts that the prosecutor and HMRC are each a branch of government and that it is not open to one branch of government to seek to re-determine any issue of fact which has already been dealt with by the Crown Court and the Court of Appeal. He did not produce any authority for that proposition, in effect a proposition that all government departments are but different emanations of the Crown and as such to be regarded as a single organisation for the purposes of applying the rules of *res judicata* and issue estoppel. I do not accept the proposition. It would give rise to wide-ranging and, to my mind, unacceptable consequences imposing impossible administrative burdens on government. It would in practice require an extraordinary level of liaison between departments if

it were necessary to ensure that nothing done in litigation between one department and a citizen was to result in a decision binding in other litigation between another department and that citizen. If Mr Lavery's submission were right, I would expect the point to have been argued and decided many times. The fact that counsel did not produce any authority on the point suggests that no-one hitherto has thought it arguable. Further, if the point were correct, it would follow logically that a citizen would be able to set-off against his tax-liability to HMRC, a sum of money owed to him by some other government department. I do not believe it is the law that such a set-off is available.

58. The third reason is that I am not satisfied that the failure by Mr Martin to file a return and to pay the tax due in respect of the profits to which the assessments relate was itself a criminal offence. If it was not a criminal offence, then those failures would not be part of the general criminal conduct which the Crown Court should have taken into account. The Confiscation Order did not therefore reflect the failure by Mr Martin to meet his tax liability as a part of the benefit obtained by him from his general criminal conduct. HMRC are not obliged, in raising assessment under section 29 TMA to identify the source of the income which they are assessing. Looking at Mr Martin's lifestyle and the assets known to her, Mrs Hodge formed the opinion that Mr Martin had undeclared income. HMRC would not be concerned, in assessing tax, whether the income was derived from criminal activity. The assessments stand unless Mr Martin explains why they are wrong.

59. The fourth reason is one of policy, which again may be a no more than a reflection of the first reason. The purpose of section 29 TMA is to ensure that a taxpayer pays the proper amount of tax. Where an officer of HMRC forms the opinion that income has not been charged to tax when it should have been, an assessment can

be made. The burden is on the taxpayer to show that the assessment is wrong. The policy of POCA in relation to the imposition of confiscation orders is entirely different: the purpose of a criminal lifestyle confiscation order is to ensure that a person with a criminal lifestyle is prevented from retaining the benefit of his criminal conduct; and in assessing the amount of the order, the assumptions under section 160 POCA are to be made. The policy of POCA, put that way, does not cut across the policy of section 29 TMA. In my view, the provisions of POCA in relation to confiscation orders should not be interpreted in a way which would result in the actual implementation of POCA from preventing the collection of the proper amount of tax owed by a taxpayer established in accordance with the tax legislation.

60. For all of these reasons, I consider that Mr Martin's appeal should be dismissed even if, contrary to my view, I ought to proceed on the basis that the Crown Court and the Court of Appeal decided that, on a balance of probabilities, Mr Martin's house was constructed and furnished before the relevant day as defined in section 160(8) POCA.

Disposition

61. Mr Martin's appeal is dismissed.

Mr Justice Warren

Release Date: 19 June 2015