



TC05601

Appeal number: TC/2014/02070

EXCISE DUTY – Restoration of tobacco goods - Jurisdiction of the Tribunal - Revenue and Customs Commissioners v Jones and Jones [2011] EWCA Civ 824 and Revenue and Customs Commissioners v Mills [2007] EWHC 2241 (Ch) considered - Forfeiture proceedings in the Magistrates' Court - Goods condemned as forfeit, but Respondent unable to prove to the Tribunal the basis upon which the tobacco goods had been condemned - Consequently, no finding binding on the Tribunal as to commercial use - Whether issue of personal use justiciable by the Tribunal? - Yes - Whether goods held for personal use? - Yes - Appeal allowed - Further review directed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

STEWART ANTHONY CADE

Appellant

- and -

THE DIRECTOR OF BORDER REVENUE

Respondent

**TRIBUNAL: JUDGE CHRISTOPHER MCNALL
MRS GAY WEBB**

Sitting in public at the Tribunal Hearing Centre, 4th Floor, City Exchange, 11 Albion Street, Leeds LS1 5ES on 21 November 2016

The Appellant appeared in person

Mr Rupert Davies, Counsel, instructed by the Home Office Cash Forfeiture and Condemnation Legal Team for the Respondent

DECISION

Introduction

1. By his Notice of Appeal dated 13 April 2014, Mr Cade appeals against the Respondent's review decision not to restore certain tobacco goods which had been
5 seized from him at Dover Eastern Docks on 9 December 2013. Mr Cade argues that the goods were bought legitimately and for his own personal use. On that basis he argues that they should be restored to him.

2. Following seizure of the tobacco goods, Mr Cade made a Notice of Claim in relation to them. Condemnation proceedings were commenced. There was a hearing
10 in the East Kent Magistrates' Court and the goods were condemned as forfeit.

3. The circumstances of that condemnation lie at the heart of this appeal.

The strike-out application

4. In response to the Notice of Appeal, the Respondent contended that the
15 condemnation, treated in the light of the decision of the Court of Appeal in *Revenue and Customs Commissioners v Jones and Jones [2011] EWCA Civ 824*, meant that Mr Cade was now barred, in this Tribunal, from asserting that the goods were bought for his own use. On that basis, the Respondent applied to strike-out Mr Cade's appeal.

5. However, by a Decision released on 29 January 2016, the Tribunal (Judge
20 Cannan and Mrs Webb) dismissed that application: [2016] UKFTT 048 (TC)

The undisputed facts

6. We adopt the Tribunal's earlier account of the 'undisputed facts' (at Paras 11 to
21 of its Decision):

25 *"11. The Appellant was stopped at the port of Dover on 9 December 2013 returning from Belgium. He was driving his own vehicle and travelling with his friend Mr Irving who was a passenger. 11.55kg of hand rolling tobacco and 1,760 cigarettes were in the vehicle. The Border Force officer was not satisfied that those excise goods were for personal use and
30 they were seized, together with the Appellant's vehicle. The officer decided to restore the vehicle.*

35 *12. In broad terms it seems that the Appellant had purchased approximately half the tobacco (5.5kg) and 600 of the cigarettes. The remainder had been purchased by Mr Irving, save possibly for 160 cigarettes which the Appellant maintains were in the vehicle on their way out to Belgium and belonged to the Appellant's sister. We were told by the Appellant that his goods and Mr Irving's goods were in separate carrier bags on the back seat of the vehicle when they were stopped. We make no findings of fact in
40 that regard, but for the purposes of this application only we shall assume these facts.*

- 5 13. *On 13 December 2013 the Appellant challenged the legality of the seizure of his excise goods and at some stage also asked for restoration of the goods. We did not have a copy of any of that correspondence. On 5 February 2014 the Border Force wrote to state that they would commence condemnation proceedings in the magistrates' court. At some stage Mr Irving also challenged the legality of the seizure of his goods and he was a party to the condemnation proceedings.*
- 10 14. *On 29 January 2014 the Border Force apparently refused the request for restoration. On 13 February 2014 the Appellant appears to have asked for a review of that decision. We did not have a copy of those letters.*
- 15 15. *We did have a copy of the decision on review dated 14 March 2014, which is the subject of this appeal. It set out the review officer's understanding of the circumstances and explained that he had not considered the legality or correctness of the seizure which was a matter for the magistrates' court. That included any claim by the Appellant that the goods he was importing were for "own use". He noted that the only ground on which the Appellant had sought restoration was that the goods were for own use, an issue which could only be raised in condemnation proceedings. In applying the Border Force's policy on restoration he therefore assumed that the goods were held in the UK for a commercial purpose.*
- 20 16. *The Appellant's Notice of Appeal against the review decision was filed on 30 April 2014. The grounds of appeal were effectively that the goods he wanted restored were for own use and he had not done anything wrong.*
- 25 17. *On 30 April 2014 the Respondent applied to strike out the appeal on the basis that following the Court of Appeal decision in Jones & Jones the Tribunal had no jurisdiction over the issue of own use.*
- 30 18. *Meanwhile the condemnation proceedings of the Appellant and Mr Irving were continuing in the magistrates' court. On 18 June 2014 the Respondent applied to stand over this appeal pending the outcome of the condemnation proceedings and a direction to that effect was made.*
- 35 19. *The condemnation proceedings were heard in the magistrates' court on 11 June 2015. The Appellant provided us with a copy of an order made by the East Kent Magistrates' Court to the effect that the 11.55kg of hand rolling tobacco and 1,760 cigarettes were condemned as forfeit. On the same date the court ordered that the Appellant and Mr Irving should be jointly and severally liable to pay costs of £2,610.*
- 40 20. *We understand that Mr Irving did not attend the magistrates' court hearing because of illness. The Appellant did attend. He made certain criticisms of the hearing before the magistrates' court but we are not*
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concerned with those criticisms for present purposes, nor indeed does it seem to us that they would be relevant to this appeal generally.

5 21. *On 22 September 2015 the Respondent renewed the application to strike out. The Appellant has maintained his opposition to that application on the basis that the goods he had purchased were for his own use."*

The Tribunal's earlier analysis

10 7. Having considered the well-known passage from the judgment of Mummery LJ in *Jones* (at Para. [71] of that judgment) which deals with the operation of the deeming provisions under the *Customs and Excise Management Act 1979*, Judge Cannan went on to remark (at Paras. [25] and following):

15 "25. *As Mummery LJ stated ... "deeming something to be the case carries with it any fact that forms part of the conclusion". It does not carry with it any fact that does not necessarily form part of the conclusion. The Respondents accepted that proposition most recently in the Upper Tribunal in Revenue and Customs Commissioners v Shaw [2016] UKUT 0004 (TCC) at [23] to [28].*

20 26. *There is further authority to support that proposition in Revenue and Customs Commissioners v Mills [2007] EWHC 2241 (Ch). In that case Mann J was concerned with an appeal from a decision of the VAT & Duties Tribunal. Mr Mills and Mr Kerry were stopped at the Customs control zone at Coquelles. A large quantity of tobacco found in several boxes was seized on the basis that it was not for own use. Mr Mills and Mr Kerry each claimed ownership of half the tobacco. The vehicle was also seized.*

30 27. *Mr Mills gave notice challenging the legality of the seizure and condemnation proceedings were commenced by HMRC. However Mr Mills later withdrew from those proceedings. At the same time he sought restoration of the vehicle which was refused, a decision which was confirmed on review. He appealed to the Tribunal and his appeal was*
35 *allowed following a full hearing. Part of the Tribunal's reasoning was that the deemed forfeiture did not necessarily carry with it the implication that Mr Mills' tobacco was for commercial use. Mr Mills' goods could have been lawfully seized pursuant to section 141(1)(b) and condemned as forfeit on the basis that they were mixed with Mr Kerry's goods. The review officer therefore erred in failing to consider the issue of own use in*
40 *relation to Mr Mills' goods.*

28. *Mann J. endorsed that approach. At [35] to [38] he stated:*

45 "35. *...If Mr Mills had decided to challenge the forfeiture in the magistrates' court it would have been open to him to try to prove that Mr Kerry's goods were not in fact liable to forfeiture. He would*

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not himself have been bound by Mr Kerry's failure to apply within time. That emerges from the decision of Lightman J in Fox v HMCE [2002] EWHC 1244 (Admin). However, a similar point to the Tribunal's point can be made. If Mr Mills had applied to the magistrates' court he might still have failed to prove that Mr Kerry's goods were for his (Mr Kerry's) own use; if he had so failed then Mr Kerry's goods would have been properly forfeited, and so would Mr Mills' (with which they were mixed) and the car which carried them. The result is the same as the Tribunal's decision - in those circumstances one cannot say that a deeming of a proper forfeiture arising out of a failure to apply for forfeiture proceedings inevitably carries with it an assumption or inference of own use on the part of Mr Mills.

36. *Accordingly, while it would be an abuse to challenge the forfeiture, one cannot identify other underlying facts which must also be assumed against Mr Mills. The abuse point therefore does not run, or at least not in the same way. One can test the matter in this way. Had there been a debate in the correspondence about whether own use could be argued in the restoration proceedings at the outset, and had HMRC sought to say that if he wanted to take the point then Mr Mills should go through condemnation proceedings so that it could be determined there, the correct stance for Mr Mills to have taken would have been to have said that the point would not necessarily be decided there because of the mixing with Mr Kerry's goods. He would therefore have been entitled to require HMRC to consider it as part of the restoration exercise, and to do so would not have been an abuse. By the same token, inviting the Tribunal to consider it on appeal would not have been an abuse.*

37. *Of course, that did not happen in the present case, and judging from the evidence that degree of subtlety did not occur either to HMRC or to Messrs Mustoe Shorter. The latter firm did not insist on HMRC considering the own use point on the footing that the magistrates' court would not decide it. They merely indicated that they did not wish to apply to the court and then put forward all their submissions to HMRC. It is therefore necessary to decide whether that makes a difference.*

38. *I do not consider that it does. Mr Mills did not clearly acquiesce in an assumption being made against him on the own use point - the correspondence does not show that, and Notice 12A only makes it plain that forfeiture, and not all conceivable bases of forfeiture, will be assumed against him. Since the logic of the procedure does not mean that Mr Mills must be taken to have conceded the own use point, I do not see why it should be an abuse of the process for him to take it. Absent some clear act of acquiescence on the part of Mr*

Mills, it would be unfair to conclude that he is debarred from running a point when a proper appreciation of the situation would have meant he would have been entitled to run it in the restoration proceedings anyway because HMRC could not have "insisted" that it be determined in the magistrates' court."

8. Having set out that passage from Mann J's judgment in *Mills*, Judge Cannan went on to say (at Para. [30]):

"30. *It makes no difference that in this appeal Mr Irving also initiated condemnation proceedings but his goods were condemned as forfeit, whereas in Mills the passenger had not initiated condemnation proceedings. Nor for the reasons given by Mann J does it make any difference that the goods were condemned as forfeit following a hearing before the magistrates' court. **In the present case the magistrates' court simply made an order condemning as forfeit all the goods in the vehicle. We were not taken to any finding that the Appellant's goods were not for own use or indeed that Mr Irving's goods were not for own use. In those circumstances it is not a necessary part of the magistrates' finding that the Appellant's goods were not for own use** [Emphasis supplied by the present Tribunal]*

31. ***We are not satisfied therefore on the undisputed or assumed facts of this appeal that the Appellant is barred from contending that the goods he had purchased were for his own use.** The Tribunal does have jurisdiction over that issue. Having said that we accept that the Appellant cannot challenge the legality of the seizure. That was determined by the East Kent Magistrates' Court. He can assert that his goods were for his own use, but he cannot at the same time assert that Mr Irving's goods were for Mr Irving's own use."* [Emphasis supplied by the present Tribunal]

The effect of that analysis on the present Tribunal

9. Even if that Decision does not formally bind us (a matter upon which we were not addressed) it is nonetheless an unappealed interlocutory decision in this appeal and it must be given due regard. Judge Cannan's reasoning is unimpeachable, and we adopt it as our own. If this composition of the Tribunal had begun afresh from first principles, it would have arrived, by the same process of reasoning, at the same conclusion.

10. It was not in dispute that the Tribunal in January 2016 set out the scope of the issues before the present composition of the Tribunal.

11. The emphasised part of Paragraph [30] of the earlier Decision is particularly important. It sets out, clearly and unambiguously, what the Tribunal considered, as the

outcome of its reasoning, to be the important evidential point of this appeal when it eventually came to be heard.

12. Paragraph 14 of Schedule 3 of the *Customs and Excise Management Act 1979* is clear how condemnation is to be proved:

5 *"In any proceedings, the condemnation by a court of any thing as forfeited may be proved by the production either of the order or certificate of condemnation or of a certified copy thereof purporting to be signed by an officer of the court by which the order or certificate was made or granted."*

10 13. However, this does not automatically answer the point in this appeal, which was not the *fact* of condemnation, but the *basis* upon which that had been determined by the Magistrates in relation to Mr Cade's tobacco goods.

15 14. Given the observation made by Judge Cannan at Paragraph [30] of the Decision, it was notable that the Respondent had not produced any evidence as to the course of proceedings in East Kent Magistrates' Court, except for the summonses and the orders, which Judge Cannan had already considered and found wanting on the point.

20 15. When the file came before the present Tribunal chair, on 13 November 2016, he ordered the production of (amongst other things) (i) a copy of any document which gave the Magistrates' reasons for their decision and (ii) a copy of any note of evidence which was heard by the Magistrates' Court. Those directions were given on the expressed assumptions (i) that the Respondent was represented at the Magistrates' Court and (ii) that the hearing was a matter of public record. Given the fact that the present Tribunal chair's order of 13 November 2016 had been made without a hearing, and of the Tribunal's own initiative, the usual provision was attached that either party could apply to vary it or set it aside. Neither party did.

30 16. Since the Respondent wishes to rely on what happened in the Magistrates' Court, it bears the evidential burden. It bears the particular burden of establishing that the Magistrates' Court - as a matter of fact - decided that Mr Cade's tobacco goods were for commercial use and/or (insofar as materially different) were not for his personal use.

35 17. In the present appeal, we consider that the Respondent also bears a corresponding burden of establishing that the Magistrates did not, by reason of the non-attendance of Mr Irving, take a 'short-cut', and treat the goods seized from Mr Cade as liable to forfeiture simply on the basis that they were 'found with' Mr Irving's goods.

The Notes

40 18. An Attendance Note, emailed on the day to the Respondent by Counsel who appeared in the Magistrates' Court, Mr Tapsell, was put into evidence. It was - as it made clear - a 'brief report'. It did not go beyond saying that Mr Cade swore ownership of 5.5kg of hand-rolling tobacco and 760 cigarettes. It referred to an

'opening etc' and to 'live evidence from Atmore and Mr Cade'. It did not say what that evidence had been. As such, it was not helpful in resolving the issue which Judge Cannan had identified.

19. The Respondent, principally through the endeavours of its Counsel Mr Rupert
5 Davies, subsequently procured a handwritten note from Mr Tapsell. That note, and a
typed transcript of it, was provided to Mr Cade shortly before the hearing, and to the
Tribunal at the hearing.

20. Mr Cade was critical of this. But Mr Davies is not to be criticised in seeking to
further the overriding objective by assisting the Tribunal. It was clear that he had
10 identified the gist of the Tribunal's concern, first expressed by Judge Cannan in
January 2016 (at a hearing not attended by Mr Davies) and repeated by the present
Judge almost 10 months later - namely, what had been said, and established, in the
Magistrates' Court when it came to the basis upon which Mr Cade's tobacco goods
were condemned.

15 21. Albeit reluctantly, we admit Mr Tapsell's handwritten note into evidence. Even
though it emerged only at a very late stage, we consider it contrary to the interests of
justice to exclude it.

22. That Note, in its entirety, reads:

20 "[1] *In this case Customs and Excise are required to prove on the balance of
probabilities that the goods imported on 9th December were not for
personal use.*

[2] *We do not believe all the goods were for personal use they were to be
distributed for reward not gifts*

25 [3] *Our decision is based on the fact of multiple trips made by Mr Cade so
there was no need to import excessive amounts and that Mr Cade's
brother also makes (regular/frequent?) trips"*

30 23. The accuracy of its contents was challenged by Mr Cade. Mr Cade '*did not
recall*' [1]. In cross-examination he said that [2] '*had never been said at all*' but then,
asked by the Tribunal, went on to say he '*did not recall*'. He denied [3], and asserted
in cross-examination that that '*no mention*' had been made of his brother by the
Magistrates' Court although, again, when asked by the Tribunal, he said he '*did not
35 recall*', and '*could really only recall the barrister telling him that Mr Irving's goods
were forfeit*'. He then shifted position again and said, unequivocally, that he was
'*positively saying that those things were not said*', whether [1], [2] or [3]. He was
particularly insistent that [3] had not been said, and that '*no mention had been made of
any other person except my sister-in-law*'.

40 24. In this regard, Mr Cade's evidence before us was not entirely consistent.
However, and making allowances for the following: (i) the hearing in the Magistrates'
Court had taken place over a year before the hearing before us; (ii) Mr Cade had

represented himself at that hearing and had not himself taken a note; (iii) Mr Tapsell's handwritten note had emerged shortly before the hearing before us and Mr Cade had not had much time in which to consider it; and (iv) Mr Cade was, before us, relying solely on his memory, then some inconsistency was unsurprising. The content and manner of Mr Cade's evidence before us served to emphasise the importance of the Respondent taking appropriate steps itself to record in writing (or to extract a record in writing from the Magistrates' Court) the evidence heard and the reasons given.

25. Over and above Mr Cade's challenge to the Note:

- (1) The note does not mention any of the substance of any of the evidence;
- 10 (2) It is a very short note, and even on the face of it, does not make much sense;
- (3) Although it is in abbreviated form, we cannot be satisfied that it records all the reasons given at the end of the contested condemnation hearing;
- 15 (4) Mr Tapsell was not called to be asked questions about it (whether supplementary questions in chief, cross-examination, or questions by the Tribunal). No adjournment was sought in order to allow him to attend;
- (5) The handwritten note was not supported with a Statement of Truth, nor exhibited to a witness statement.

26. These features, taken together, significantly detract from the weight to be given to the handwritten note.

27. We have conclude that we cannot fairly and justly give it any weight in ascertaining the basis upon which the Magistrates' Court condemned the tobacco goods. Therefore, that note has no probative value when it comes to ascertaining that issue.

25 **The Magistrates' Order**

28. This then leaves only the order which was made on 11 June 2015 as evidence of how the matter was dealt with by the Magistrates. It is notable that Judge Cannan had already seen that order and had already set out his view, with which we agree, as to its failure to deal with the key question.

29. In our view, even looking at the order afresh, there is such significant difficulty with its wording that we cannot safely rely on it as evidence as to the reasons for the Magistrates' decision, and in particular whether the Magistrates condemned the Appellant's goods as forfeit on the basis that they were held for commercial use (primary forfeiture), or condemned them on the basis that they were found with Mr Irving's goods (secondary forfeiture).

30. Clause 4 of the Order reads:

"The goods were liable to forfeiture under section 49(1)(a) of the Customs and Excise Management Act 1979 and/or Regulation 88 of the Excise

Goods (Holding, Movement and Duty Point) Regulations 2010 (SI 2010/593) and/or section 7(2) of the Tobacco Products Duty Act 1979 in that:

- 5 (a) *they had been released for consumption in another Member State of the European Union and at importation into the United Kingdom were held for a commercial purpose*
- 10 (b) *they were therefore chargeable with excise duty on importation by virtue of section 2(1) of the Tobacco Products Duty Act 1979; and*
- (c) *no excise duty had been paid on the goods"*

31. Clause 6 of the Order reads:

15 *"Insofar as any item which was not liable for forfeiture by virtue of the aforementioned provisions, that the goods were liable to forfeiture by virtue of section 141(1)(b) of the Customs and Excise Management Act 1979 as being mixed, packed or found with a thing liable to forfeiture."*

20 32. The end of the Order reads:

"IT IS THIS DAY ADJUDGED that the Complaint is true and it is ordered that the said goods be condemned as forfeit".

25 33. There is an obvious and material inconsistency between Clauses 4 and 6 of the Order. In our view, reading the order objectively, it is not clear why Mr Cade's tobacco goods were condemned. Whilst Clause 4 indeed mentions 'commercial use' its effect is then thrown into doubt by Clause 6. There is no allocation of the tobacco goods as between Clauses 4 and 6. It is therefore possible that all the goods were condemned under Clause 4 (in which case Clause 6 would be otiose) or vice versa.

30 The wording admits of either conclusion.

34. On the basis of that Order, we do not know, and hence cannot determine, whether Mr Cade's goods were condemned by the Magistrates as primary forfeiture (i.e., commercial use) or secondary forfeiture (i.e., 'found with' Mr Irving's goods). An unusual feature of the Order, suggestive that Mr Cade's claim and Mr Irving's claim

35 (albeit formally separate) somehow came to be treated together is the undifferentiated costs order. Mr Cade and Mr Irving were ordered to pay costs of £2,610 (jointly and severally). As such, Mr Cade was made liable to meet the Respondent's costs arising from Mr Irving's claim although Mr Cade and Mr Irving were two separate claimants and there is no evidence that their individual claims were conjoined. They were each

40 claiming different goods (with Mr Cade swearing to his ownership of certain identified goods).

35. The basis for the condemnation becomes even more obscure when the 160 cigarettes said by Mr Cade to have belonged to his sister-in-law are factored in.

36. The uncertainty - which in our view cannot be resolved by interpretation - goes right to the heart of this aspect of the appeal. It is the issue which was identified by Judge Cannan in January 2016.

5 37. Mr Rupert Davies invited us, as a fall-back position, to make findings of fact, on the balance of probabilities, as to what had happened in the Magistrates' Court and in particular to make findings as to the basis upon which the goods had been condemned. We decline to adopt that approach. It seems to us that it is not only novel but also inconsistent with the general principles of how a decision of one court should be treated by another. We are a tribunal of first instance. We do not have any
10 jurisdiction to sit on appeal (or as if we were on appeal) from the Magistrates' Court.

38. The Respondent bears the burden of establishing the reasons given by the Magistrates for making their order, and of proving that all the goods were condemned on the basis that they were for commercial use. It has failed to do so. This failure is partly due to the fact that the Respondent is using a standard form template for orders, the wording of which, used without amendment - at least, in the circumstances of the
15 proceedings relating to Mr Cade in the Magistrates' Court - has given rise to the uncertainty identified above.

39. We are bound to add the following remarks. This discussion concerns the wording of the Magistrates' order, and how matters are properly proved through the adducing of appropriate evidence. We do not impeach the honesty or integrity of Mr
20 Tapsell.

40. It may also be useful to add that we do not make any findings in relation to the sharp criticisms which are levelled by Mr Cade against the manner of proceeding which he alleged the Magistrates' Court to have adopted. The reason is simple: those
25 matters cannot be considered in this appeal. They are outside our jurisdiction. We limit ourselves to observing that, if Mr Cade indeed had complaints, then those were matters for him to take up elsewhere, whether in the Crown Court or the Divisional Court. As far as we are aware, Mr Cade never sought to pursue any procedurally permissible avenue of appeal or challenge from the Magistrates' Court even though
30 Mr Cade wrote that he had spoken to a solicitor about the matter.

41. No appeal from the Magistrates' Court lies to this Tribunal.

The Review

42. In the strike-out Decision, the Tribunal remarked as follows:

35 "32. [...] as we have indicated Ms Lynch also invited us to strike out the appeal on the ground that it had no reasonable prospect of success. She contended that even if the goods were for the Appellant's own use, there were no exceptional circumstances that would justify restoration of those
40 goods to the Appellant.

33. *We have not heard any evidence in relation to the policy of the Respondents in those circumstances or how a review officer would apply the policy in those circumstances. What is clear is that the review officer's letter proceeded on the assumption that the Appellant's goods were not purchased for his own use. If the Tribunal having heard the evidence were to find that assumption was wrong then prima facie the appeal would succeed, subject only to the Respondents arguing that despite failing to take into account that the goods were for own use the result of a new review would inevitably be the same (see John Dee Ltd v Customs and Excise Commissioners [1995] STC 941)"*

43. The review was based on the footing that, the tobacco goods having been condemned, it was no longer open to Mr Cade to contend that the goods were for his personal use.

15 **The evidence**

44. In the light of the above discussion, we consider that it is open to us - most unusually - to consider the matter of personal use.

45. Mr Cade's evidence, both written and oral, was largely concerned with his strongly-held feelings of grievance arising from the manner in which he alleged (variously) the Border Officer, the Reviewing Officer, the Magistrates' Court, and the Tribunal to have dealt with his case.

46. Nonetheless, we are able, on the balance of probabilities, to make the following findings of fact:

25 (1) Mr Cade was stopped inbound at Dover Eastern Docks at 11am on 9 December 2013, having travelled out to Belgium on the 3.20 sailing earlier that morning;

30 (2) That morning, he had bought 5.5kg of tobacco and 600 cigarettes. He spent about £700, which was his savings, as a pensioner, from around two months' disposable income;

(3) The purpose of this short trip was shopping, and especially to buy tobacco goods in advance of Christmas;

(4) Mr Cade's tobacco goods were in open view in carrier bags in the back of the car. They were not concealed;

35 (5) There were also 160 cigarettes, loose, in the car which belonged to, or were intended for, Mr Cade's sister-in-law, having been bought by Mr Cade on the previous trip in September but not handed over to her;

(6) At the time of the seizure, Mr Cade was a smoker, smoking 4 or 5 pouches a week (although he has since given up);

40 (7) The Golden Virginia tobacco was for Mr Cade's own use;

(8) Mr Cade was co-operative with the Border Force. He answered the questions that he was asked. He volunteered the information that he had bought tobacco. He produced the documents, including the receipts, that he was asked to produce;

5 (9) Mr Cade told the officer, and we accept that this was true, that he had bought the tobacco goods for himself, but that most of it was for his family for Christmas. This was a straight answer to a straight question. There was no attempt by Mr Cade to obfuscate or mislead;

(10) Mr Cade told the truth about his previous trip abroad, in September 2013.

10 47. We find that Mr Cade has a relaxed 'free for all' attitude to the cigarettes and tobacco which he buys abroad. We accept his evidence that he is 'probably a soft touch' to his relatives. We accept his evidence that he keeps a tin of tobacco on the coffee table and his five sons and numerous other relatives from his extended family and friends come around to see him, and enhance the pleasure of their visit to Mr
15 Cade by helping themselves.

48. As such, the cigarettes and tobacco are shared with, or made available, to his friends and relatives who come to visit him. This is done through a spirit of generosity and as 'treats'. It is not done in return for money, or reward. It is not a commercial purpose. Mr Cade gives cigarettes and tobacco away. He does not sell them.

20 49. Whilst Mr Cade gives cigarettes and tobacco to those members of his family who help him, we do not consider that this is done as a 'quid pro quo' or as payment in kind for otherwise unremunerated services. His family help him out because they are his family. They are not his employees. Mr Cade gives them cigarettes since he has a natural and understandable affection for those persons who help him.

25 50. Mr Cade had bought the quantity he did on this occasion since he was due for an operation and was concerned that he would not be able to travel again to Belgium for some time. He wanted to stock up.

30 51. We find that these particular cigarettes and tobacco goods were bought both for his own use, and the use as described above, and as Christmas presents for his family, including his mother and stepfather, *'in their 80s, but still puffing away'*. Some were destined for his daughter-in-law, *'who smokes like a chimney'*.

52. Mr Cade intended to post some of these tobacco goods - Amber Leaf - to his brother, Terry, in Kettering. He later in fact did send about 300g of hand-rolling tobacco to Terry. The rest of the Amber Leaf was for his brother Alan.

35 53. We find that Mr Cade's tobacco and cigarettes were in bags on the back seat of his car, separate from anything belonging to Mr Irving.

54. We conclude that the tobacco goods were all for personal use, and that none of them were for commercial use.

Our Powers

55. Our powers in an appeal of this kind are set out in section 16 of the *Finance Act 1994*. A review decision to confirm a decision to refuse restoration is an 'ancillary matter'. As such, the jurisdiction of the Tribunal is limited to considering whether the
5 decision of the review officer was 'reasonable', in the conventional public law sense: see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (Court of Appeal) in which Lord Greene M.R. (with whom Somervell LJ and Singleton J agreed) remarked (at 233-234)

10 "The court is entitled to investigate the action of the [decision-maker] with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account..."

56. The review decision by Officer Harris did not consider any of the above matters
15 of personal use. Officer Harris deliberately did not consider them, since he believed he could not properly consider them.

57. Therefore, the review decision is prima facie unreasonable in the conventional public law sense in that it failed to take account of material factors.

58. We do not consider, had the reviewing officer been apprised of the above facts,
20 when undertaking his review, that he would inevitably have arrived at the same conclusion.

The outcome

59. *Section 16 Finance Act 1994* provides as follows:

25 "16(4) *In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the*
30 *following, that is to say:*

- (a) *to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;*
- 35 (b) *to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and*
- 40 (c) *in the case of a decision which has already been acted on or taken effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken*

for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future."

5 60. We order the Respondent to conduct a further review of the original decision, on the basis of the undisputed facts and (insofar as additional or different) the facts which we have found above.

61. The Appeal is allowed on those terms.

Postscript

10 62. Following the hearing, the Tribunal received two letters from Mr Cade. A short email sent on the next day sought to 'put on record' that Mr Cade wanted 'the hearing at Leeds cancelled because of several breaches of protocol, regardless of impending Decision'.

15 63. In a letter dated 24 November 2016 Mr Cade again called for the hearing to be declared 'null and void' and set out at considerable length what he referred to as 'breaches of protocol'. Mr Cade was again very clear that he would be seeking to set aside our decision irrespective of the outcome.

64. We did not treat Mr Cade's correspondence as a formal application and no such application was made.

20 65. Although the Tribunal read Mr Cade's post-hearing correspondence, it has not played any part in our decision-making.

25 66. 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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**DR CHRISTOPHER MCNALL
TRIBUNAL JUDGE**

RELEASE DATE: 16 JANUARY 2017

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