[2017] UKFTT 173 (TC)

TC05665

Appeal numbers: TC/2014/01764 & TC/2014/05772

EXCISE DUTY – 3,291 Cigarettes and 30 cigars brought in from another Member State - Assessment - Schedule 41 Finance Act 2008 - Wrongdoing penalty - Whether grounds given at the time for seizure? - Yes, contained in commerciality statement given at beginning of interview - Whether a seizure or a detention? - A seizure - Whether Public Notice 12A given to taxpayer? - Yes - Whether seizure can now be challenged before Tribunal? - No: Jones and Race applied - Wrongdoing penalty - Whether a reasonable excuse? - No - Appeal against assessment dismissed.

EXCISE - Restoration of Tobacco Goods - Whether decision not to restore was unreasonable? - No - Appeal against decision not to restore dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR MICHAEL AYRE **Appellant**

- and -

(1) THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS
Respondent (Appeal TC/2014/01764)

(2) THE DIRECTOR OF BORDER REVENUE
Respondent (Appeal TC/2014/05772)

TRIBUNAL: JUDGE CHRISTOPHER MCNALL
PETER R. SHEPPARD FCIS FCIB CTA AIIT

Sitting in public at 4th Floor, City Exchange, 11 Albion Street, Leeds LS1 5ES on 1 and 2 February 2017
Mr Anthony J. Harris, Tax Consultant, of Harris Taxation and Management Services, appeared for the Appellant.

Mr Rupert Davies, Counsel, appeared for both Respondents, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

Outcome

1. This Decision will be lengthy, and we know that Mr Ayre will be anxious to learn the outcome. Therefore, at the very beginning, we say that our decision is that neither of his two appeals has been successful and both appeals are therefore dismissed. The full reasons for this are set out in detail below.

Introduction

2. These appeals, heard together, further exemplify the legal and practical difficulties which can be thrown up by the split jurisdiction between condemnation proceedings in relation to seized goods, which are assigned by Parliament to the Courts (usually, but not always, the Magistrates' Court) under Schedule 3 of the *Customs and Excise Management Act 1979* on the one hand, and appeals against decisions not to restore seized goods, which are assigned by Parliament to this Tribunal on the other. As Barling J, sitting as a Judge of the Upper Tribunal, remarked in *Charles Shaw v HMRC [2016] UKUT 4* (at Para. [38]):

> "The divided jurisdiction between the magistrates court (condemnation proceedings) and the FTT (appeals against assessments and other decisions of HMRC relating to seized goods) has long been acknowledged to be unsatisfactory ... One expresses the hope that the anomalous division in jurisdictions will one day be rationalised."

3. The difficulties emerge most strikingly in circumstances where a person, for whatever reason, does not advance any Notice of Claim within the strict one-month time limit following seizure (laid down in Schedule 3 of the 1979 Act) so as to procure the initiation by HMRC of condemnation proceedings in court.

4. The failure to do so, on the face of it, produces a 'deemed' condemnation of the seized goods, for the reasons and with the effects set out by the Court of Appeal in *HMRC v Jones & Jones* [2011] EWCA 824.

5. The appellant in this present case has advanced arguments, both of fact and of law, as to why the circumstances surrounding the removal from him, by Officer Bernard Rafferty of UK Border Force, of 3,291 cigarettes and 30 cigars ('**the Goods**') at Leeds Bradford airport on 27 September 2013 should still be open for determination and decision by this Tribunal despite the absence of any challenge to that removal in the Magistrates' Court. Some of the legal arguments are complex and, as far as we are aware, novel.

6. We have used the word 'removal' in the immediately preceding paragraph since many of the Appellant's legal arguments depend on our determination, as a matter of fact, whether, on 27 September 2013, the goods were *seized* (within the meaning of Schedule 3 of the 1979 Act) or were *detained* (within the meaning of Schedule 2A of the 1979 Act, Schedule 2A having, at that time, come quite recently into force).

7. That point is pivotal to these Appeals not least since, if the goods were detained and not seized, then Mr Ayre's first letters to HMRC, dated 19 November 2013, would (and irrespective of any of the other circumstances surrounding the removal) have been within 30 days of the deemed seizure which arises on the expiry of a 30 day detention period, and hence have been in time so as to have been treated as a Notice of Claim.

8. The events of 27 September 2013 led, on 12 November 2013, to an assessment of duty by HMRC in the sum of £801, and on 7 January 2014 to the imposition of a wrongdoing penalty of £160. It will be noted that there was no correspondence from Mr Ayre to HMRC or UKBF until after he received the assessment of duty, which in his evidence he described as *'a bit heavy'*.

9. Both the assessment and the penalty were upheld by departmental review on 7 March 2014. HMRC's review decision of 7 March 2014 is subject to appeal TC/2014/01764, made by way of a Notice of Appeal dated 27 March 2014. The Grounds of Appeal include the following:

> *'He was never given a reason for the seizure, and an examination of the Border Officer's note book and record of interview do not give a reason for the seizure...No reason was given at the time for the seizure and...none has been given. As the cigarettes were not seized legally, they are not deemed seized under CEMA 1979 Schedule 3 Para 5 and no duty is payable'*

10. Subsequently, on 12 July 2014 UKBF decided not to restore the goods. That decision was also subject to review, and was upheld, with the decision being communicated in a letter dated 15 September 2014. UKBF's refusal to restore is subject to appeal (TC/2014/05772) made by way of a Notice of Appeal dated 14 September 2014 (which must be a mistake for 14 October 2014) and contains the same passage identified above. It also seeks to challenge the reasonableness of the decision not to restore.

11. The total sum at stake is £961, as well as the value of the Goods, which had been purchased in Spain for about EUR 754. Whilst this is a relatively modest sum, it is a significant sum for Mr Ayre, who is a pensioner, having retired from work as a process engineer in the chemicals industry. Moreover, he has come to be driven by a strong sense of injustice and wishes, as it has been put on his behalf, to 'establish his innocence'.

12. The Notice of Appeal against the penalty assessment generated an application by HMRC to strike it out. The present composition of the Tribunal heard and dismissed that application on 4 August 2015, for the reasons which are set out in our Decision issued on 25 August 2015: [2015] UKFTT 0426 (TC). We identified a number of triable issues of fact, of which the first was *'Whether a 'commerciality statement' was read to Mr Ayre at the beginning of the interview or not'.*

13. Several recently issued decisions were put before us at the hearing of these appeals in which different Judges of this Tribunal have expressed reservations,

sometimes sharply, actuated by the impression that applications to strike-out appeals against penalty assessments are made as a matter of course wherever condemnation proceedings had not been brought, relying on the 'deeming' provisions in Schedule 3 of CEMA and the decision in *Jones*, and irrespective of the substance of the grounds of appeal which are advanced, or whether those (for example) happen to disclose any triable issues: see, for example, *John Patrick Lewis v HMRC [2015] UKFTT 640 (TC)* (Judge Charles Hellier); *Liam Hill v HMRC [2017] UKFTT 018 (TC)* (Judge Richard Thomas); *Sunday Adewale v HMRC [2017] UKFTT 103 (TC)* (Judge Nicholas Aleksander).

14. The implicit criticism by those judges is that no proper account was taken of the various qualifications upon the effect of *Jones* which have been identified: see, for example, the important discussion by Judge Cannan in *Stewart Cade v HMRC [2016] UKFTT 048 (TC)* (dismissing an application to strike-out) articulating and applying the decision of Mann J in *Revenue and Customs Commissioners v Mills [2007] EWHC 2241 (Ch)*. The then-President of the Tax and Chancery Chamber, Warren J, had also identified other circumstances in which *Jones* might not apply in *Nicholas Race [2014] UKUT 331 (TCC).*

15. Our attention was also drawn to recent decisions in which further criticism has been expressed, again by different Judges of this Tribunal, as to whether such applications to strike-out always genuinely serve the overriding objective in the Tribunal Rules of dealing with cases fairly and justly, which includes *'avoiding delay, so far as is compatible with proper consideration of the issues'*: Rule 2(2)(e). As Judge Christopher Staker remarked in *Jamie Garland v HMRC [2016] UKFTT 0573 (TC)* at Para [17]:

> "In a case of any complexity, hearing and determining a strike out application may involve less time and fewer resources than the hearing of the substantive appeal. In such a case, if no viable grounds of appeal are set out in the notice of appeal, it may therefore be proportionate and efficient initially to determine at a strike out hearing whether there is any justification for the appeal to proceed to a substantive hearing, and for a strike out application to be granted if no ground of appeal with a reasonable prospect of succeeding has been identified at the strike out hearing. On the other hand, in a default paper case or a simple basic case, the time and resources required for a strike out application may be the same or nearly the same as the time and resources required to hear the substantive appeal. In such a case, the making of a strike out application may be disproportionate, unmeritorious though the appeal may appear to be. Given that there is always the possibility that the strike out application may not be granted, the most efficient way of disposing of the case may be simply to proceed to hear the substantive appeal, giving the appellant his or her day in court."

16. In *Liam Hill*, Judge Richard Thomas records that he was told that '*HMRC did not agree with Judge Staker's views*': [2017] UKFTT 018 (TC) at Para [132]. The present composition of the Tribunal (being made up of a Judge and one of the Tribunal's few Presiding Members) find Judge Staker's observations to be helpful and

we add our voice to them. They also happen to echo the words of Neuberger J (as he then was) in the analogous context of trials of preliminary issues in the parallel civil jurisdiction: *Steele v Steele [2001] CP Rep 106*. As part of his 'check-list' of factors to consider is the need to identify cases which are genuinely fit for summary or early determination, taking into account the risk that determination of that issue in an Appellant's favour may end up unduly increasing costs or introducing undue further delay.

17. This is relevant in the present case since the application to strike-out did introduce significant further delay and expense, not only to the parties but also to the public purse. Moreover, the cost to the parties was more than merely financial. It was clear to us, when hearing their evidence, that this appeal has weighed heavily both on Mr Ayre and Officer Rafferty. Had the application to strike-out not been made, then the present appeals would have come on for final hearing correspondingly sooner, and all the participants - and especially Mr Ayre and Officer Rafferty - would have not have had it hanging over them for so long. Both have been personally affected. In Mr Ayre's case there were his simmering and strongly-held feelings of injustice. In Officer Rafferty's case were the feelings that, for the first time in a long career, his integrity and honesty had been challenged.

18. Our determination of the strike-out application was followed by a Case Management Meeting in order to seek to identify and clarify the key issues in dispute between the parties. Those issues appeared of sufficient complexity to warrant, unusually, a 2-day hearing, most of which was occupied with the taking of evidence from the Appellant, and three officers of HMRC and UKBF.

19. We are grateful to both representatives for their detailed and comprehensive written and oral submissions, and for the temperate and courteous manner in which the hearing, and the cross-examination of witnesses, was conducted.

The evidence

20. The two principal protagonists are Mr Ayre and Officer Rafferty. Both had provided witness statements which stood as their evidence in chief. Both were extensively (but fairly) cross-examined: Mr Ayre for approximately 2.5 hours over two sessions; and Officer Rafferty for approximately 3 hours.

21. We therefore had a good opportunity to assess the evidence and demeanour of each of them. An assessment of that kind is important since this case involves, as its core issue, a disputed fact. That is whether a 'commerciality statement' was read by Officer Rafferty to Mr Ayre before his interview.

22. The mainstay of Mr Ayre's appeal was that no such statement had been read to him, nor had the words 'commercial purpose' been used during the interview. This was crucial to Mr Ayre's entire case since he argued that, not having been given any grounds for seizure on the day, and indeed, he argued, not until the review letter of 15 September 2014, his letter of 19 November 2013, albeit more than a month after the goods had been detained, was a Notice of Claim and/or the failure to give reasons

meant that the legality of the seizure could be determined by us. He argued that, if no reason for the removal of his goods was given at the time, then the circumstances of the removal remained open for determination to this Tribunal, seeking to adopt the reasoning of the Tribunal (Judge Mosedale) in *W Pash* v *Director of Border Revenue [2013] UKFTT 100 (TCC)*.

23. The Respondents' response to that was that Officer Rafferty had read Mr Ayre such a commerciality statement.

24. We are bound to note that, at the time the Notices of Appeal were lodged, and the strike-out application heard, that assertion of disputed fact was against the backdrop that the photocopy of Officer Rafferty's notebook produced in these appeals did not record the giving of any commerciality statement. It was only on the first morning of the hearing that the Tribunal was told that the photocopy of that notebook hitherto in circulation between the parties, and appearing in the hearing bundle, had been inadvertently 'cropped' in the copying or re-copying, thereby removing the last half-dozen lines, which on the face of it recorded the giving of a commerciality statement by Officer Rafferty, and which, on the face of it, was apparently signed by Mr Ayre.

25. Mr Harris, on behalf of Mr Ayre, did not object to the introduction of this late evidence. Although the position was unsatisfactory, we nonetheless gave permission for the complete copy of the notebook to be introduced. This was for the simple reason that excluding the full copy, knowing that it was in existence, would have meant finding facts on an artificial footing, which would not have furthered the overriding objective of dealing with the appeal fairly and justly.

26. Despite this development, Mr Ayre maintained his case that no grounds for seizure had been given to him.

27. Overall, Mr Ayre struck us as an honest individual. He gave his evidence calmly and in a measured and civil way. We did not consider that he had come before us to give false evidence. Indeed Mr Rupert Davies on behalf of HMRC, and consistently with the manner in which his cross-examination of Mr Ayre had been conducted, made it clear in his closing submissions that HMRC did not contend that Mr Ayre was lying, but rather that he was mistaken from the very outset, or had at some point come to convince himself, but mistakenly, that events at the airport had happened in a certain way.

28. In our view, Mr Ayre's evidence and recall of the two hours which he spent at the airport on 27 September 2013 (that is, over 3 years ago) were both shown to be patchy and imperfect, to the extent that we could not safely rely on his evidence as to what happened at the airport that day, albeit that his evidence was given in good faith and in the belief that it was correct.

29. Overall, Officer Rafferty struck us as a careful and conscientious individual. We found him to be an impressive witness. He is an extremely experienced officer, having served now for 40 years and, at the time, for 37 years. He conceded, at a

number of points in his cross-examination, that he did not recall certain finer details of that day. He also made a concession that the 6 pages of interview notes which he had kept were not 'best practice' (in not lining through every line where the text did not fill it).

30. However, he was steadfast and could not be shaken that his notebook and the 6 pages of interview notes (which he had used, instead of his notebook, as continuation sheets, since his notebook had run out and he did not want to keep Mr Ayre waiting whilst another notebook was signed out from the secure cupboard) had been correctly and accurately completed, at the time, and did not contain anything added after the event. Officer Rafferty was adamant that the commerciality statement had been read, as recorded in his notebook.

31. The above general remarks lead us to conclude that, where the evidence of Mr Ayre and Officer Rafferty are in conflict, that we should prefer the evidence of Officer Rafferty, especially if that oral evidence is consistent with documents completed at the time.

32. The burden of proof is on Mr Ayre.

33. We remind ourselves that the standard of proof is the ordinary civil standard, namely, the balance of probabilities. In *Re B (Children) (Care Proceedings: Standard of Proof) [2008] UKHL 35*, Lord Hoffmann made the following valuable remarks:

> "2. If a legal rule requires a fact to be proved (a 'fact in issue') a judge or jury must decide whether or not it happened. There is no room for a finding that it might not have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened.

Findings of fact

34. We make the following findings of fact.

35. On 27 September 2013, Mr Ayre flew from Barcelona to Leeds/Bradford Airport. He had with him two bags containing 3,280 cigarettes (being 3,000 Camel King Size Filters and 280 Mayfair) and 30 cigars. In addition, on his person, he had an opened packet of Mayfair containing 11 cigarettes.

36. He was stopped by Officer Rafferty, a duly authorised officer of UKBF, in the Blue Channel. We reject Mr Ayre's suggestion that he was apprehended by the luggage carousels, in the main body of the luggage hall. Mr Ayre had produced a sketch, suggesting that Officer Rafferty was in the middle of the baggage hall. That sketch was inaccurate. For instance, it did not accurately show the 'channels' - of

which there are two: a Blue Channel (for EU arrivals) and a Green Channel (for non-EU arrivals). Nor did it show the 'red phone', in the luggage hall, for use by passengers wishing to make a customs declaration, or to seek advice. Officer Rafferty drew his own plan of the luggage hall and arrivals area, with which he is extremely familiar.

37. We accept Officer Rafferty's evidence, which was clear and intelligible, that he would not apprehend anyone before they had entered the 'Channels' since, until they had done so, in Officer Rafferty's view, they had not irrevocably committed themselves to entering a particular channel. People sometimes, for example, used the toilets accessible from the baggage hall to get rid of items which they did not wish to carry through customs.

38. The stop was at 2pm. It was a random stop. It was not intelligence-led. UKBF did not have any particular information about either the flight or Mr Ayre. Officer Rafferty had not seen the passenger manifest. UKBF's later production of Mr Ayre's travel movements was compiled, after the event, in response to a Subject Access Request from Mr Ayre on 17 November 2013. It had not been available, or used, on the day.

39. After initial questions to establish Mr Ayre's identity and personal details and port of departure, his bags were passed through an 'airport' style X-ray machine or scanner. That revealed the presence of organic material in the bags: namely, the tobacco goods.

40. At the time, the 'indicative quantity' of cigarettes was 800 (under Regulation 13(4)(h) of the *Excise Goods (Holding Movement and Duty Point) Regulations 2010*, the limit having changed on 1 October 2011 from 3,200, which it had been since October 2002). The 'indicative quantity' is relevant since the Officer, for the purposes of determining whether excise goods are for a person's own use (and hence not held for a commercial purpose within the meaning of Regulation 13(3)(b)) must take regard of *'the quantity of those goods and, in particular whether the quantity exceeds ... 800 cigarettes'*.

41. Hence, Mr Ayre had with him more than 4 times the indicative quantity, and the Officer was required to determine whether the Goods were for Mr Ayre's own use.

42. Mr Ayre was civil and co-operative.

43. The following exchange took place, as recorded in Officer Rafferty's Notebook, which was contained in a black wallet, and which he was writing in as he went along, propped up on a 'pulpit':

> *"Q: Are you aware of the guideline rate importing tobacco from the EU.*
> *A: Is it 3,500'*

44. Mr Ayre signed the notebook under that entry.

45. We note the Officer's use of the expression 'Guideline rate' which referred to the indicative quantity. In his evidence to us, Mr Ayre told us that he had thought the limit was 3,500. We note that Mr Ayre had been to Spain in May 2012 - that is, he had been back to the UK from Spain at a time when the indicative amount had already, by that time for some months, been reduced from 3,200 to 800. He told us in evidence that he had been told by fellow travellers in Spain that he could bring back as much as he liked for personal use. As far as it goes, that is not incorrect, but it ignores both the guideline rate and the legislative treatment of the guideline rate. We find that Mr Ayre was of the belief, at the time, that the guideline rate was 3,200 and not 3,500.

The commerciality statement

46. We find that at 2.20pm Officer Rafferty read a 'commerciality statement' to Mr Ayre. Officer Rafferty read this verbatim from a pre-printed laminated card which he was carrying in his notebook. That card read:

> "*<u>Commerciality Statement</u>*
>
> *You have excise goods in your possession, and it appears that UK excise duty has not been paid on them. Goods may be held without payment of duty provided they have been acquired by you and are held for your own use.*
>
> *I intend to ask you some questions to establish whether these goods are held for your own use or for a commercial purpose. If you cannot provide me with a satisfactory explanation or if you do not stay for questioning it may lead me to conclude that the goods are held for a commercial purpose and your goods may be seized as liable to forfeiture.*
>
> *You are not under arrest and are free to go at any time. Do you understand?"*

47. Officer Rafferty read the statement to us. It is quite wordy. It took him about 50 seconds to do so, without gabbling. He told us that he has the card because the words are too long to remember. He told us that he has had the card for 'many moons'.

48. The commerciality statement makes it clear that the questions are being asked to ascertain whether the goods were being held for commercial use. That fits in with Regulation 13 of the 2010 Regulations already referred to and the task which the officer must perform. We do not though that the commerciality statement makes no reference to any duty being payable or the possible imposition of a penalty.

49. It also makes it clear that it is prospective, or forward-looking, insofar as it says that a consequence of leaving the interview before it is concluded will be that the goods will be treated as for a commercial purpose. It therefore contemplates that persons might leave the interview before it is concluded. That could be in circumstances (for example) of a person simply silently rising and leaving the room, without staying to sign anything, or giving any further explanation.

50. Officer Rafferty recorded the giving of that statement in his notebook, timed at 2.20pm. That entry reads:

> *"Commerciality Statement given. Elected to stay. Understood'.*

51. Mr Ayre signed underneath that entry. That is the last entry on the last page of the notebook (of which we, and the parties' representatives, saw the original at the hearing and had the opportunity to examine it).

52. On the matter of the commerciality statement, we record that we are in fact satisfied so that we are sure (that is, we are satisfied to the higher criminal standard of proof) that this statement was read, in full, to Mr Ayre. That conclusion comes from:

> (1) Our general comments above concerning the weight to be attached to the evidence of Mr Ayre and Officer Rafferty and our preference for the evidence of Officer Rafferty on this point;
>
> (2) The fact that Mr Ayre signed underneath the record that it had been read to him;
>
> (3) The fact that Mr Ayre is recorded as having understood the commerciality statement, which responds to the very last part of it ('Do you understand?);
>
> (4) The fact that Mr Ayre did absorb part of the commerciality statement, since he knew that he was free to leave which was part of the information imparted towards the end of the commerciality statement;
>
> (5) The physical evidence of the notebook and what it reveals as to Officer Rafferty's usual clerical practices, bearing in mind that, as he saw it, this was an ordinary stop on an ordinary working day and, at the time, he had no reason to suppose that it was anything out of the ordinary, and hence had no reason to adopt any different clerical practice.

53. As to the latter, it is obvious, from other entries in the notebook, including the one which immediately precedes it (which was also a stop of 2 EU nationals, arriving from Poland, with 10,000 cigarettes) that, whenever Officer Rafferty considers that he has come to the end of a 'stage' (or, as he put it, perhaps more poetically, a 'stanza'), such as initial questions, or the giving of a commerciality statement (which he explained was, to his mind, equivalent to a caution, and hence a 'stage') he signs underneath it and/or gets the passenger to sign underneath it and/or 'rules it off' with a diagonal stroke. In all cases this is done both to confirm what has gone before, and also as a clerical means of preventing the later insertion of any words. This latter tallies with his practice on each line of his notebook: if the entire line is not used, he rules across, horizontally.

54. It is significant that Officer Rafferty did not immediately 'rule off' the remaining four lines, at that very moment still blank, below Mr Ayre's first signature. We are sure that this was because, at that very moment, in Officer Rafferty's mind, the encounter was not ending then and there and that Officer Rafferty was intending to go on to the next 'stage', which was the giving of the commerciality statement.

55. We unhesitatingly reject any suggestion that the commerciality statement was written in the notebook at a later date.

56. The fact that we have rejected Mr Ayre's evidence that the commerciality statement was not read to him does not mean we consider Mr Ayre was lying. In our view he genuinely but mistakenly, at some point in the following weeks, formed the view that no such statement had been read. This belief only stood to be apparently corroborated by the unfortunate and careless photocopying error, described above, which succeeded in cutting off the last 4 lines of the notebook so that they did not appear on the copy eventually provided to Mr Ayre and his representatives.

57. Insofar as it is necessary for us to do so, we should add that our impression of Mr Ayre was that he is a diffident and quite deliberative individual. Judging from his attitude to us, we also judge that he is likely to have been deferential when stopped, after a longer than expected day's travelling (his flight having been delayed) by an uniformed official. He was anxious to see his sister, who was waiting outside to pick him up. As far as we are aware, he had never been stopped and questioned before. For these reasons, we think it very likely that Mr Ayre was nervous and that the experience and questioning, being unfamiliar, was simply going a little too fast for him to immediately and completely absorb.

The interview

58. Mr Ayre was then interviewed in a separate room. The interview began at 2.30pm: that is, about 10 minutes after the commerciality statement was read. This was explained to us by Officer Rafferty. He was equipping himself with interview sheets and getting Mr Ayre a glass of water from the kitchen area at the end of the corridor.

59. We find that the course of the interview was as set down by Officer Rafferty in the 6 pages of notes. Each of those pages, which are numbered sequentially, are signed at the foot both by Officer Rafferty and Mr Ayre. Page 6 carries a number of signatures. In his evidence, Mr Ayre accepted in his evidence that pages 1 to 5 were accurate. Page 1 begins with Officer Rafferty asking if Mr Ayre was fit to be interviewed, which Mr Ayre confirmed he was. During a passage in Officer Rafferty's cross-examination, we observed Mr Ayre shaking his head vigorously when Officer Rafferty said he had asked about Mr Ayre's welfare. This appeared wholly inconsistent with Mr Ayre's acceptance of the point on the previous day.

60. Mr Ayre chose to end the interview at no later than 3.20 (it is not clear whether the 3.20 recorded as the end time was the time the interview concluded, or the time that the final 'tidying-up' and formalities were concluded. In reality, there may be little difference). He said *'I want to go now'*. Officer Rafferty noted *'Interview Terminated'* and Mr Ayre signed immediately below.

61. It was Mr Ayre's right to end the interview. This is a civil matter and he was not under arrest. But, having been read the commerciality statement just over an hour earlier, he had been made fully and properly aware that, if he left, the Goods would be

seized as liable to forfeiture. We do not consider that there can have been any room for doubt or confusion that the Goods were being seized since the Officer, by virtue of Mr Ayre's departure, was being driven to conclude that the Goods were held for commercial purposes.

62. That is exactly what the next stage records:

> *"Officer: In view of this development the tobacco goods will be seized. Do you understand.*
>
> *Mr Ayre: Yes, I'm sorry for messing you around'*

63. *'This development'* refers to Mr Ayre's decision to leave. Mr Ayre signed below that. In his evidence to us, he confirmed that the note recorded *'exactly what I said'*.

64. We do not consider that Officer Rafferty needed to re-read Mr Ayre the commerciality statement. If there were any such requirement (and we were not taken to any reported decision on the point) then obvious anomalies would be created, since a person who (unlike Mr Ayre) suddenly left, without staying to sign anything, would appear then to be in a better position when it came to challenging seizure on that basis than someone who (like Mr Ayre) remained to do the formalities at the end of the interview. In short, in our view, in this case, it was appropriate for the Officer to administer the commerciality statement only once.

65. Moreover, once Mr Ayre had said that he would like to leave, it would not have been proper for the Officer to have continued to ask questions, or to have kept Mr Ayre at the airport for any longer than was strictly necessary.

66. We accept Officer Rafferty's evidence that he had not, at the time the interview came to an end, formed a concluded view as to whether the goods were for commercial use. His one and only reason for retaining the goods was that Mr Ayre was leaving the interview.

67. It was suggested that this operated unfairly to Mr Ayre since a passenger could, in effect, be detained for interview indefinitely and worn down or badgered to the point where they would choose to leave, thereby having their goods seized. But we do not form the impression that this is what happened in this case. It is not the impression given by the interview notes, in which the Officer was solicitous as to Mr Ayre's welfare. It would also be inconsistent with our impression of Officer Rafferty. The interview was not unduly prolonged. It was not perfunctory, but the flow must have been decelerated by the Officer's need to write down longhand the questions and answers.

68. The questions were not going round in circles. They were, within the practical limits of such an interview, planned and purposive. They reflected the matters to which an officer conducting such an interview should have regard: see Regulation 13 of the 2010 Regulations, including Mr Ayre's reasons for having the Goods; any documents relating to the Goods (the three receipts which Mr Ayre had kept and

which he produced); whether Mr Ayre had paid for them himself; the indicative quantity, and 'any other circumstance that appears to be relevant': Regulation 13(4)(j).

69. Regulation 13(4)(j) gives the Officer a fairly broad discretion.

70. Moreover, as Officer Rafferty explained to us, the questions were not improvisatory. Officer Rafferty showed us a set of pre-printed questions, on the back of his commerciality statement card, which he uses as a memory aid. The questions asked, the topics explored, and the order in which they are asked broadly corresponded with the interview notes, although Officer Rafferty accepted that he had never asked Mr Ayre about whether Mr Ayre was going to 'sell' the goods.

71. We reject Mr Ayre's suggestion that he had been asked about 'Working Men's Clubs'. There is no record of this in the Interview Notes. Moreover, Officer Rafferty denied having asked such a question, and we believed him. He explained that he would only ask detailed questions about a pub or club where someone was (for example) a licensee, or revenue trader. He had no need in this case to ask Mr Ayre: he knew that Mr Ayre was retired.

72. In our view, at the time the interview was ended by Mr Ayre, there were still other questions which could have been asked by Officer Rafferty about the Goods, in order to satisfy himself as to the use to which they were going to be put.

73. It is also fair to say that Officer Rafferty was probably getting near to the point where, had Mr Ayre not left, the Officer would have had to grasp the nettle and make a decision as to whether the goods were for Mr Ayre's personal use or not. But he had not, at the end of the interview, reached that point. We reject the suggestion that Officer Rafferty had made his mind up from the very outset that he was going to seize the Goods. Officer Rafferty denied the point when it was put to him, and we believed him. Moreover, it makes no sense, if Officer Rafferty indeed had intended, from the outset, to seize the Goods, why he would then go through a 50 minute interview with Mr Ayre.

74. A good deal was made in these appeals about Officer Rafferty smelling Mr Ayre's clothes, both in his bags, and a fleece which he was wearing, and saying that he could not smell smoke and for that reason did not believe that Mr Ayre was a smoker. Officer Rafferty was entitled to do those things although, for the sake of this Decision and for the record, we have no hesitation in finding, both from the documentary evidence (especially the doctor's record of October 2013), the original papers handed up by Mr Ayre during the hearing (which smelt strongly of smoke, and were discoloured by it), and our own observation of Mr Ayre that he was, and still is, a smoker. Had Officer Rafferty concluded that Mr Ayre was not a smoker (and that, if the Goods were not to be given away as presents, then they could not have been for personal use) then he would, in our view, and on that matter of fact, have been mistaken. But his mistake would not have been once-and-for-all: the law would have given a remedy to Mr Ayre in that situation, namely, his right to challenge seizure by going to the Magistrates' Court. But, and even had the Officer concluded that Mr Ayre

was a smoker, the Officer would still have been entitled to ask questions to establish whether the Goods were *all* for Mr Ayre's personal use.

The documents, and Notice 12A

75. Mr Ayre accepts that he was issued with forms BOR 156 (Seizure Information Notice) and BOR 162 (Warning Letter about Seized Goods). Whether he read them or not is immaterial. Mr Ayre signed both of these forms. Form BOR 156 records that Notice 1, Notice 12A, and Warning letter were all issued.

76. Mr Ayre did not accept that he had ever received Public Notices 1 and 12A. We are satisfied that he did, and we so find, for the following reasons:

(1) Form BOR 156, which was signed by Mr Ayre, and given to him at the time, records that Public Notices 1 and 12A were given;

(2) Page 6 of the Interview Notes also records that Notices 1 and 12A were given. That forms a 'stage' in the Notes, coming to three lines. We find that Mr Ayre, whether he remembered doing so or not, signed below that stage. Mr Ayre also signed at the foot of Page 6. We reject any suggestion that 'Notice 1 and 12A issued' was added subsequently. Officer Rafferty denied this when put to him, and we believed him;

(3) Officer Rafferty was firm in his evidence that the Notices had been given. He explained that he would always give a Notice 1 to any traveller who was stopped, irrespective of whether any goods were found, simply to advise them for the future. He explained that there were sufficient copies of these Public Notices in the customs area, always to hand;

(4) He explained, and we accept, that he had given the BOR 156, BOR 162, Public Notice 1 and Public Notice 12A as a 'packet'.

77. It is not therefore necessary for us to consider what would have happened had Notice 12A not been given, except to note, but only in passing, that Notice 12A is a Public Information Notice and we were not directed to any legislation which requires the giving of Notice 12A.

Seizure or Detention

78. At the relevant time, section 139(1) of CEMA provided (so far as relevant) that '*any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer*.'

79. Mr Ayre has argued that the Goods were either in fact, or should have been, detained under the new Schedule 2A to CEMA 1979 introduced by virtue of section 226 of the Finance Act 2013 (and which also amended section 139 of CEMA). Schedule 2A had been in force for some weeks on 27 September 2013.

80. We reject this argument. We find, as a fact, that the Goods were seized and not detained. Not only is the expression 'seizure' used throughout the documents, but the Officer's firm evidence, which we accept without reservation on this point, was that

he had seized the goods. Mr Ayre did not suggest that he believed, when he left the interview and the airport, that the goods had been taken other than by way of seizure. The Officer knew the difference between seizure and detention, and was able to give us examples of circumstances in which he would detain goods: for example, if further inquiries needed to be made, or goods were seized from someone who did not speak English and for whom no interpreter could be found, and hence could not be interviewed. This all made sense to us.

81. The Goods were liable to forfeiture. Officer Rafferty was empowered to seize them, and that is what he did.

82. Whilst he was also empowered to detain, under Schedule 2A, he was not obliged to do so. We do not read the legislation, nor the Parliamentary Explanatory Notes as providing that any seizure must inevitably be preceded by detention.

83. Therefore, at about 3.30pm on 27 September 2013, the true position was this:

(1) A reason for seizure had been given to Mr Ayre before the interview began (in the commerciality statement);

(2) That ground of seizure had been met in practical terms (namely, by Mr Ayre's decision to leave the interview);

(3) Officer Rafferty had decided to seize on that basis only ('in view of this development');

(4) The goods had been so seized; and

(5) Forms BOR 156 Seizure Information Notice and BOR162 Warning letter about seized goods had been issued to Mr Ayre.

Jurisdiction in relation to the Excise Assessment

84. Mr Harris submitted that the seizure was unlawful since the burden of proof of establishing reasonable grounds for the initial stop lies on HMRC. In this regard he sought to rely on the decision in *R (on the application of Hoverspeed Ltd and others) v Customs and Excise Commissioners [2003] STC 1273*.

85. We do not agree with the Appellant. We find that the initial stop was a valid and lawful one. But even if (i) we could legitimately inquire into the lawfulness of the stop in these proceedings in this Tribunal (a matter upon which we make no conclusion, but noting that *Hoverspeed* originated as an application for judicial review) and (ii) we were to have found the stop to have been without reasonable grounds, it makes no difference to the exercise of the power of seizure.

86. As the Court of Appeal made clear in *Hoverspeed*, overruling the Divisional Court on the point, the Divisional Court's 'intuitive reaction' (see the argument of Mr Rabinder Singh QC, as he then was, at Para [41]) that, if a decision to stop was invalid, then so was any seizure resulting from it, which had led the Divisional Court to quash the seizures, was wrong.

87. The seizure of the Goods could not be regarded as axiomatically invalid even if it had occurred as a result of an invalid check. The power of seizure is not dependent on the exercise of any power to stop and search. The object of undertaking a search would be to look for unlawfully held goods, but that did not mean that the validity of any seizure of such goods was conditional on the legitimacy of the search. The power to seize was exercisable even where no search was necessary: see Para. [44] of that decision, per Mance LJ (as he then was) with whom Lord Phillips MR and Latham LJ agreed.

88. A satellite dispute emerged as to the amount of the assessment, since the sum given on the face of the assessment was not the same as given by the reviewing officer in his letter.

89. We accept Officer Stuart Newbigging's evidence about this. He was the assessing officer, and he was confident that his assessment was arithmetically correct. It had been checked and signed off by a senior officer. He accepted that the way in which the calculation was set out could perhaps be described as complex, but we do not consider that it is unduly complex. It is a calculation of the RRP of the cigarettes, calculated at an 'ad valorem' rate (perhaps the use of the old Latin expression is less than desirable) with an amount per 1,000, or pro-rated.

90. We do not consider that the present case is akin to the Tribunal's decision in W. *Pash v Director of Border Revenue [2013] UKFTT 100 (TC)* (Judge Mosedale) upon which Mr Ayre relied heavily. That was a case in which the seizure had taken place, at a sorting office, in the absence of the taxpayer. A ground for seizure therefore had to be given: *Paragraph 1(2) of Schedule 1 of CEMA 1979* and an erroneous ground was given. But even if we were to accept that Paragraph 1 of CEMA, read purposively, requires a reason to be given for the seizure even in the presence of the passenger (which is not a matter upon which we are required to express any conclusion), we have nonetheless already found that a reason for the seizure was given, and was operative at the time of the seizure.

91. Therefore, in our view, when it comes to the duty assessment, and having made the above findings of fact, we are squarely in the territory already staked out by the Court of Appeal in *HMRC v Lawrence Jones and Joan Jones [2011] EWCA Civ 824* and by the Upper Tribunal in *Race v HMRC [2014] UKUT 331 (TCC*). Both of those decisions come down to us from higher courts or Tribunals, and they bind us. We have to apply and follow them.

92. In *Jones*, the Court of Appeal held unanimously (at Paragraphs 66 to 71 of its decision) that:

> (1) The legality of seizure was for decision by the Magistrates' courts in condemnation proceedings and not for this Tribunal;
>
> (2) In the scheme of the legislation governing the procedures relating to imported goods seized by HMRC, Parliament has provided different avenues for challenging condemnation and forfeiture (via the courts) on

the one hand, and the restoration procedure (via an appeal to the FTT against the refusal of HMRC to restore goods) on the other hand.

93. In *Race*, Mr Justice Warren was clear that the reasoning of the Court of Appeal in the *Jones* case meant that the First-tier Tribunal cannot go behind the deeming effect of Paragraph 5 of Schedule 3 of the *Customs and Excise Management Act 1979* when it comes to an assessment to excise duty: see Paragraphs [26] and [33] of his decision.

94. Hence, the fact that no claim was made in the Magistrates' Court means that the Goods are now 'deemed' to be (that is, treated as being) for commercial use, and are now treated as being lawfully seized, and are forfeit to the Crown.

95. In the absence of any challenge by Mr Ayre in the Magistrates' Court, that means that the issues of the legality of seizure and personal use cannot now be determined in this Tribunal. The Tribunal has no jurisdiction. Those issues should have been raised in the Magistrates' Court.

96. In consequence, the excise duty assessment cannot be challenged in this Tribunal, and therefore must be dismissed.

The wrongdoing penalty

97. On 7 January 2014, Officer Newbigging of HMRC issued an excise wrongdoing penalty under Schedule 41 of the *Finance Act 2008*, in the sum of £160.

98. On 26 November 2013, Officer Newbigging wrote inviting further information to be used in the calculation of the penalty. The wrongdoing was described as follows: "On 27 September 2013 Officers of United Kingdom Border Force seized 3,291 cigarettes from you. This is because it is significantly more than HMRC guidelines of 800 cigarettes'. There was no response to that letter either from Mr Ayre or, on his behalf, from Mr Harris: see Officer Newbigging's letter of 10 February 2014.

99. This description is broadly accurate, although it makes no mention of the cigars, and the 'guidelines' referred to are not, strictly speaking, 'HMRC guidelines' since they come down to HMRC from Parliament.

100. The penalty explanation provided on 24 December 2013 says that HMRC considered Mr Ayre's behaviour as 'non-deliberate' and 'prompted', giving a penalty range of 20% to 30%.

101. Deductions were then applied for 'telling', 'helping' and 'giving': each in the maximum permissible percentage, amounting to a total reduction of 100%, leaving an overall penalty percentage of 20%. £801 x 20% is £160 (rounded down).

102. There is a right of appeal against this penalty to the Tribunal. Our powers are set out in section 16(5) of the *Finance Act 2003* and also under Paragraphs 17(1) and 17(2) of *Schedule 41* but are limited to affirming the decision, or substituting another decision which HMRC had the power to make, but only where we consider HMRC's

decision to be flawed in a public law sense: namely, where it has taken something into account which it ought to have left out of account, or failed to take account of something which it should have done.

103. The burden is on Mr Ayre to show that the wrongdoing penalty was wrong in that sense: see section 16(6) of the *Finance Act 1994*

104. We acknowledge that the penalty was raised because Mr Ayre was holding the Goods at the relevant time, within the meaning and effect of the legislation, and that the reference to 'dealing' in Mr Rupert Davies' Skeleton Argument (but not in the Penalty letter itself) was mistaken.

105. We do not consider there to be any basis upon which we should interfere with the wrongdoing penalty. It was imposed in relation to 'wrongdoing' and not dishonesty. Dishonesty is not a relevant factor. There was no finding that Mr Ayre was dishonest, and there is no such finding in this Decision.

106. In our view, there is no demonstrable error of a public law character made by Officer Newbigging in arriving at the penalty calculation.

107. Mr Ayre has not shown that Officer Newbigging was wrong to treat the wrongdoing as 'deliberate'. We note that Mr Ayre knew that there was a 'guideline' limit from previous journeys and information seen in tobacconists' windows. We have already found that he believed that to be 3,200 cigarettes, even though it had changed almost a year earlier, and he had made at least one trip to Spain, and back through Leeds/Bradford airport after that change. Therefore, even on his own evidence, and even if he did not know that the guideline limit had been reduced to 800, he still knew, when he was stopped, that he had more than 3,200 cigarettes.

108. Mr Ayre has not shown that Officer Newbigging was wrong to treat the disclosure as prompted. We consider that to have been correct: Schedule 41 Paragraph 12(3) says that a disclosure is 'unprompted' only if made at a time when the person making it 'has no reason to believe that HMRC have discovered or are about to discover the relevant act of failure'. That was not the case here.

109. We do not consider that Officer Newbigging was wrong in a public law sense to fail to consider special circumstances or 'reasonable excuse'. No special circumstances of any character so as to qualify under the usual tests of well out of the ordinary were put forward. Schedule 41 Paragraph 20 only makes 'reasonable excuse' available in cases where the wrongdoing is *'not deliberate'*.

110. The appeal against the wrongdoing penalty of £160 is therefore dismissed and we affirm the penalty.

The decision not to restore

111. Section 152 of CEMA provides as follows:

The Commissioners may as they see fit (b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under [the Customs and Excise Acts]..."

112. This gives the Commissioners a broad discretion.

113. On 12 July 2014, it was decided not to restore the Goods.

114. A departmental review was requested. It was conducted by Officer Mark Collins who upheld the original decision on 15 September 2014.

115. The Appellant bears the burden of establishing that the decision not to restore was flawed in the conventional public law sense.

116. At the heart of the review was the following passage:

"By your client terminating the interview the Officer was unable to satisfy himself that your client's goods were being imported for own use and therefore concluded they were being held for a commercial purpose. The goods were seized then under section 139(1) of CEMA as being liable to forfeiture under both Regulation 88 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 and section 49(1)(a)(i) of CEMA"

117. Officer Collins confirmed his view that no Notice of Claim had been received within one month of the seizure and that therefore, in any event, the Goods were deemed forfeit as held in the UK for a commercial purpose.

118. The Officer expressly said that he did not consider the legality of the seizure itself.

119. The Officer outlined the submissions and the policy which he was applying.

120. It seems to us that the only possible argument of a public law nature is that the Officer, in approaching the matter in that way, and in treating everything related to the seizure as 'out of bounds' due to *Jones*, effectively restricted the scope of his own review to the point where there was little apparent point to it.

121. Mr Ayre may well have believed that the review on offer was a review of everything, including the legality of the seizure. The point being made by Mr Ayre about the giving of the commerciality statement was one which went to the legality of the seizure, which is a further example of the split jurisdiction leading to a lack of clarity for the taxpayer, especially one who is not legally trained.

122. Therefore, we do not consider that the Appellant has demonstrated, even on the balance of probabilities, that the decision not to restore was flawed in a public law sense. To our eyes, it was a review (and not a re-investigation) which arrived at a conclusion which is sound in public law terms.

Our Order

123. The appeal against the excise duty assessment is dismissed and we uphold the excise duty assessment in the sum of £801.

124. The appeal against the excise wrongdoing penalty is dismissed, and we affirm the excise wrongdoing penalty in the sum of £160.

125. The decision not to restore the seized Goods was not unreasonable, and we dismiss the appeal in that regard.

126. 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.

Dr CHRISTOPHER McNALL
TRIBUNAL JUDGE

RELEASE DATE: 13 FEBRUARY 2017