TC07096

Appeal number: TC/2017/08972

TOBACCO PRODUCTS DUTY – appellant intercepted at airport on arrival from Bulgaria with 11,200 cigarettes – cigarettes seized and no appeal against seizure – assessment to duty and penalties raised on appellant – appeal on basis that cigarettes for personal use and that he intended to take them to Ireland (where he lived) – whether Tribunal could make findings about personal use – no,* Jones *and* Race *apply – whether Tribunal could find facts about intention to take goods to Ireland – held yes: a finding that the appellant was not holding the goods in order to deliver or use them in the United Kingdom was open to the Tribunal and not a deemed fact determined against the appellant as a result of the goods being deemed to have been "duly condemned" – finding that appellant intended to take goods to Ireland and therefore regulation 13 SI 2010/593 did not apply - assessment upheld because regulation 19 of 2010 regulations applied instead – penalty assessment upheld – appeals dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

AIDEN TOOMEY **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
SONIA GABLE

Sitting in public at Royal Courts of Justice, Belfast on 6 February 2019 with post-hearing submissions made by HMRC on 25 February 2019.

The Appellant in person

Adam Payter, instructed by the General Counsel and Solicitor of Revenue and Customs, for the Respondents

DECISION

1. This was an appeal by Mr Aiden Toomey ("the appellant") against an assessment to tobacco products duty made by an officer of the Respondents ("HMRC") in the amount of £3,063 and against an assessment of a penalty under paragraph 4 Schedule 41 FA 2008 of £602.

The evidence

2. We had witness statements from Mr John Belshaw, an officer of Her Majesty's Border Force and from Mr Andy Lawrence, an officer of revenue and customs. Both officers gave oral evidence and were cross-examined by the appellant.

3. The appellant also gave evidence and was cross-examined by Mr Payter.

4. We also had a bundle of the documents to which the witnesses made reference and other communications between the parties.

Facts

5. We set out here the facts we find, indicating where there was any dispute.

6. On 20 June 2016[1] the appellant, who was travelling with his wife, was intercepted at Belfast International Airport and escorted to the baggage bench. The appellant had arrived on a flight from Bulgaria.

7. Mr Belshaw said that the appellant was intercepted in the Blue Channel of the terminal. The appellant in his appeal notice says that when he arrived in the terminal an officer was standing by his bag which was in the middle of the walkway. We consider this issue (and its relevance to the appeals) later.

8. Mr Belshaw asked the appellant questions including:

   (1) Have you brought any large quantities of cigarettes into the UK?

   (2) Are these all of your bags and did you pack them yourself?

   (3) Are you carrying anything for anyone else?

   (4) Has anybody asked you or forced you to carry anything for them?

   (5) How many cigarettes do you have in your baggage?

9. To which the appellant's answers were respectively:

   (1) I have brought a large amount of cigarettes into the UK.

   (2) Yes.

   (3) No.

   (4) No.

   (5) 64 cartons.

[1] Mr Belshaw's witness statement said "2017". His notebook says "2016" and that is consistent with all the other documents so we take "2017" as a slip.

10. The appellant in his appeal notice said that he "immediately" informed the officer that he had cigarettes. We consider this issue (and its relevance to the appeals) later.

11. Mr Belshaw then interviewed the appellant. The admissions made by the appellant and not retracted by him subsequently include that:

(1) He had purchased the cigarettes in Bulgaria at a shop 5 minutes from the apartment block in Sunny Beach where he owned an apartment.

(2) They cost him €1500, paid for by card. He took €3500 with him to Bulgaria in cash.

(3) He had flown to Bulgaria from Dublin and had returned to Belfast because the limits for tobacco are lower in Ireland: 300 cigarettes he says he was told.

(4) He agreed with Mr Belshaw that his intention was to come to Belfast to smuggle them over the border, but that they were for his own use.

12. The appellant signed the pages in Mr Belshaw's notebook as a true account of what was said. But in his notice of appeal the appellant also says that as he knew he would be asked questions he included props he used in his show (he is a magician) where he makes lit cigarettes vanish (he also gave a YouTube address to show him doing this). This is not mentioned in Mr Belshaw's notebook or witness statement. However it is not relevant to the matters we have to consider and we make no findings about it.

13. Mr Belshaw then decided to seize the cigarettes. Included in his reasons were:

(1) The appellant was 11 times above the minimum indicative level for importing cigarettes from Europe.

(2) He did not believe the appellant was a smoker as he had an unopened packet in his pocket designed to give the impression that he was.

(3) He admitted importing the cigarettes with the intention of smuggling the cigarettes across the land border to Ireland.

14. Mr Belshaw seized them and gave the appellant forms BOR156 (seizure information notice), BOR 162 (warning letter about seized goods) and Notices 1 and 12A and he explained the appellant's right to contest the seizure.

15. On 27 June 2016 there was a referral from Border Force to HMRC[2].

16. On 19 June 2017 Ms E Jennings, an officer of HMRC, wrote to the appellant to say that she was assessing the appellant to excise duty and considering a penalty. The letter stated that the appellant had not appealed against the seizure and so the goods had been duly condemned as forfeit, and the appellant no longer had the right to challenge the lawfulness of the seizure or the liability of the goods to forfeiture.

17. She enclosed a notice of assessment made under s 12(1A) Finance Act 1994 on the basis that the appellant was liable to pay the duty under regulation 13 of the Excise

[2] This is what is said by Mr Lawrence at paragraph 5 of his witness statement. It is somewhat surprising, at least to us, that Border Force made this referral well within the time limit for the appellant to institute condemnation proceedings in a court of summary jurisdiction.

Duty (Holding, Movement and Duty Point) Regulations 2010[3] ("EDHMDPR"). The sum assessed was £3,063.

18. She also asked for further information from the appellant in connection with the proposed penalty, gave him Factsheets on the subject and gave the amount of the penalty she intended to charge as £612 (20% of the duty).

19. The appellant replied on 12 July 2017 reiterating that he intended to take them to Ireland. He said that there was nothing in government publications to indicate that there may be seizures, duty or penalties.

20. On 24 July 2017 Ms Jennings issued a penalty assessment calculated as she had notified the appellant.

21. On 26 July 2017 Ms Jennings replied to the letter of 12 July which she had received on 24 July. In this she said that "if no appeal is received by the Border Force the papers are passed to HMRC. When I checked our systems there was no record of an appeal received." She told him he could request a review of the duty assessment, and that she "will be (*sic*) issuing a wrongdoing penalty shortly". She added:

> "I consider your actions were deliberate because you exceeded the guidelines and our systems show that you have had a previous seizure".

22. On 11 August 2017 the appellant wrote to Ms Jennings to say that he had no recollection of a previous seizure and in the interest of protecting his good name asked her to post the details of the previous seizure.

23. The reply to this incorrectly dated 26 July 2017 and sent on 26 August came from Mr Andy Lawrence (the HMRC witness). He said he had checked the records and he could find no trace of a previous seizure. He had contacted Ms Jennings who told him she had put the sentence in the letter in error, as was the part about issuing a penalty "shortly". He apologised for the administrative error and for any concern and inconvenience this may have caused the appellant.

24. In a note of a phone call from the appellant on 19 September 2017, Lindsay Akins, an officer of Revenue and Customs, recorded that the appellant asked for a review and she told the appellant that he must request one in writing.

25. In a note of a phone call from the appellant on 21 September 2017, Mr Lawrence also recorded that he told the appellant could write in asking for a review.

26. In a letter dated 28 July 2017 but obviously post dating the phone call with Mr Lawrence and marked as received by HMRC on 5 October, the appellant wrote asking for a review.

27. On 24 October 2017 Mr Lawrence said that despite the fact that a review request must be made in writing within 30 days of the decision, he had accepted the request.

28. On 16 November 2017 Jordan Danks of the Birmingham reviews team in HMRC's Solicitors Office wrote from an address in Newcastle to give the conclusions

[3] SI 2010/592.

of his review. He upheld the decision of Ms Jennings. In relation to the penalty he preferred Ms Jennings' first letter saying the appellant's conduct was not deliberate.

29. Also on that day a Complaints officer, Jon Sansom wrote to the appellant in relation to the matters in a letter of 5 October which is not in the bundle. The appellant's complaint was partially upheld and he was offered £50 as an ex gratia yet and £5 for his postal expenses.

30. On 11 December 2017 the appellant appealed to the Tribunal.

Law

31. Tobacco products duty is charged by s 2(1) Tobacco Products Duty Act 1979:

> "(1) There shall be charged on tobacco products imported into or manufactured in the United Kingdom a duty of excise at the rates shown, … , in the Table in Schedule 1 to this Act."

32. Regulation 13 of the EDHMDPR says:

> "**Goods already released for consumption in another Member State-excise duty point and persons liable to pay**
>
> 13.—(1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.
>
> (2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person—
>
> (a) making the delivery of the goods;
>
> (b) holding the goods intended for delivery; or
>
> (c) to whom the goods are delivered.
>
> (3) For the purposes of paragraph (1) excise goods are held for a commercial purpose if they are held—
>
> (a) by a person other than a private individual; or
>
> (b) by a private individual ("P"), except in a case where the excise goods are for P's own use and were acquired in, and transported to the United Kingdom from, another Member State by P.
>
> (4) For the purposes of determining whether excise goods referred to in the exception in paragraph (3)(b) are for P's own use regard must be taken of—
>
> (a) P's reasons for having possession or control of those goods;
>
> (b) whether or not P is a revenue trader;
>
> (c) P's conduct, including P's intended use of those goods or any refusal to disclose the intended use of those goods;
>
> (d) the location of those goods;
>
> (e) the mode of transport used to convey those goods;
>
> (f) any document or other information relating to those goods;
>
> (g) the nature of those goods including the nature or condition of any package or container;

(h) the quantity of those goods and, in particular, whether the quantity exceeds any of the following quantities—

…

800 cigarettes,

…

(i) whether P personally financed the purchase of those goods;

(j) any other circumstance that appears to be relevant.

(5) For the purposes of the exception in paragraph (3)(b)—

(a) "excise goods" does not include any goods chargeable with excise duty by virtue of any provision of the Hydrocarbon Oil Duties Act 1979 or of any order made under section 10 of the Finance Act 1993;

(b) "own use" includes use as a personal gift but does not include the transfer of the goods to another person for money or money's worth (including any reimbursement of expenses incurred in connection with obtaining them)."

33. Regulation 13 implements parts of Council Directive 2008/118/EC ("the EDD") as follows:

"*Article 33*

1. Without prejudice to Article 36(1), where excise goods which have already been released for consumption in one Member State are held for commercial purposes in another Member State in order to be delivered or used there, they shall be subject to excise duty and excise duty shall become chargeable in that other Member State.

For the purposes of this Article, 'holding for commercial purposes' shall mean the holding of excise goods by a person other than a private individual or by a private individual for reasons other than his own use and transported by him, in accordance with Article 32.

…

3. The person liable to pay the excise duty which has become chargeable shall be, depending on the cases referred to in paragraph 1, the person making the delivery or holding the goods intended for delivery, or to whom the goods are delivered in the other Member State."

34. Section 12 FA 1994 provides for assessments of unpaid duty:

"(1A) Subject to subsection (4) below, where it appears to the Commissioners—

(a) that any person is a person from whom any amount has become due in respect of any duty of excise; and

(b) that the amount due can be ascertained by the Commissioners,

the Commissioners may assess the amount of duty due from that person and notify that amount to that person or his representative."

35. Schedule 41 FA 2008 provides in relation to excise wrongdoing:

"**Penalties: … Certain … Excise Wrongdoing**

4—(1) A penalty is payable by a person (P) where—

(a) after the excise duty point for any goods which are chargeable with a duty of excise, P acquires possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods, and

(b) at the time when P acquires possession of the goods or is so concerned, a payment of duty on the goods is outstanding and has not been deferred.

(2) In this paragraph—

"excise duty point" has the meaning given by section 1 of F(No 2)A 1992, and

"goods" has the meaning given by section 1(1) of CEMA 1979.

Degrees of culpability

5—…

…

(4) P's acquiring possession of, or being concerned in dealing with, goods on which a payment of duty is outstanding and has not been deferred is—

(a) "deliberate and concealed" if it is done deliberately and P makes arrangements to conceal it, and

(b) "deliberate but not concealed" if it is done deliberately but P does not make arrangements to conceal it.

Amount of penalty: standard amount

6B The penalty payable under paragraph[ ] … 4 is—

(a) for a deliberate and concealed act, 100% of the potential lost revenue,

(b) for a deliberate but not concealed act, 70% of the potential lost revenue, and

(c) for any other case, 30% of the potential lost revenue.

6D Paragraphs 7 to 11 define "potential lost revenue".

10 In the case of acquiring possession of, or being concerned in dealing with, goods the payment of duty on which is outstanding and has not been deferred the potential lost revenue is an amount equal to the amount of duty due on the goods.

Reductions for disclosure

12—(1) Paragraph 13 provides for reductions in penalties—

(a) …

(b) under paragraph[ ] … 4 where P discloses a relevant act .

(1B) Sub-paragraph (2) applies where P discloses—

…

(c) a relevant act … giving rise to a penalty under paragraph[ ] … 4.

(2) P discloses the relevant act … by—

(a) telling HMRC about it,

(b) giving HMRC reasonable help in quantifying the tax unpaid by reason of it, and

(c) allowing HMRC access to records for the purpose of checking how much tax is so unpaid.

(2A) Sub-paragraph (2B) applies where P discloses—

(3) Disclosure of a relevant act …—

(a) is "unprompted" 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 …, and

(b) otherwise, is "prompted".

(4) In relation to disclosure "quality" includes timing, nature and extent.

13—(1) If a person who would otherwise be liable to a penalty of a percentage shown in column 1 of the Table (a "standard percentage") has made a disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure.

(2) But the standard percentage may not be reduced to a percentage that is below the minimum shown for it—

(a) for a prompted disclosure, in column 2 of the Table, and

(b) for an unprompted disclosure, in column 3 of the Table.

(3) Where the Table shows a different minimum for case A and case B—

(a) the case A minimum applies if—

(i) the penalty is one under paragraph 1, and

(ii) HMRC become aware of the failure less than 12 months after the time when the tax first becomes unpaid by reason of the failure, and

(b) otherwise, the case B minimum applies.

Standard %	Minimum % for prompted disclosure	Minimum % for unprompted disclosure
30%	Case A: 10%	Case A: 0%
	Case B: 20%	Case B: 10%
70%	35%	20%
100%	50%	30%

Special reduction

14—(1) If HMRC think it right because of special circumstances, they may reduce a penalty under paragraph[ ] … 4

(2) In sub-paragraph (1) "special circumstances" does not include—

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

…

Assessment

16—(1) Where P becomes liable for a penalty under paragraph [ ] … 4 HMRC shall—

(a) assess the penalty,

(b) notify P, and

(c) state in the notice the period in respect of which the penalty is assessed.

(2) A penalty under paragraph[ ] … 4 must be paid before the end of the period of 30 days beginning with the day on which notification of the penalty is issued.

(3) An assessment—

(a) shall be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Act),

(b) may be enforced as if it were an assessment to tax, and

(c) may be combined with an assessment to tax.

(4) An assessment of a penalty paragraph[ ] … 4 must be made before the end of the period of 12 months beginning with—

(a) the end of the appeal period for the assessment of tax unpaid by reason of the relevant act in respect of which the penalty is imposed, or

(b) if there is no such assessment, the date on which the amount of tax unpaid by reason of the relevant act is ascertained.

(5) In sub-paragraph (4)(a) "appeal period" means the period during which—

(a) an appeal could be brought, or

(b) an appeal that has been brought has not been determined or withdrawn.

(6) Subject to sub-paragraph (4), a supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of potential lost revenue.

…

Appeal

17—(1) P may appeal against a decision of HMRC that a penalty is payable by P.

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

18—(1) An appeal shall be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or the Upper Tribunal).

(2) Sub-paragraph (1) does not apply—

(a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or

(b) in respect of any other matter expressly provided for by this Act.

19—(1) On an appeal under paragraph 17(1) the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 17(2) the tribunal may—

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the First-tier tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 14—

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 14 was flawed.

(4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

(5) In this paragraph, "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 18(1)).

Reasonable excuse

20—(1) Liability to a penalty under paragraph[ ] … 4 does not arise in relation to an act … which is not deliberate if P satisfies HMRC or (on an appeal notified to the tribunal) the tribunal that there is a reasonable excuse for the act ....

(2) For the purposes of sub-paragraph (1)—

(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the relevant act …, and

(c) where P had a reasonable excuse for the relevant act … but the excuse has ceased, P is to be treated as having continued to have the excuse if the relevant act … is remedied without unreasonable delay after the excuse ceased.

Interpretation

24—(1) This paragraph applies for the construction of this Schedule

(2) "HMRC" means Her Majesty's Revenue and Customs.

…"

Submissions

36. In the appellant's grounds of appeal he stated as background that:

(1) He had picked up a leaflet at Manchester Airport telling him that he could being into the UK as many cigarettes as he wished as long as they were for his personal use.

(2) After the seizure he decided not to appeal it and put it down to a bad experience.

37. The actual grounds of appeal were:

(1) The false allegations against him that he had had a previous seizure.

(a) He was worried that an allegation of seizure history would be on Border Force's records and those of other security agencies. He made his living travelling so it was of great concern.

(b) The conduct of Ms Jennings who on 24 July 2017 had denied she had received a letter from the appellant, yet he had a receipt from HMRC showing they signed for the letter on 17 July, and on 26 July Ms Jennings said HMRC got the letter on 24 July.

(c) He was insulted by the £50 offered to him in compensation for her errors.

(2) Government Publication Notice 1.

(a) He now knows he was naïve to think he could bring such a large quantity through Belfast, but he based his decision on Note 1.

(b) This document is misleading through omission. It doesn't warn the public of duty assessments or penalties. This is entrapment.

(3) Illegal seizure.

(a) He says the seizure was illegal because he was travelling through the United Kingdom. It was not his final destination, as the Border Force officer knew, since Mr Belshaw told the appellant where to get the Dublin bus.

(b) His understanding of EU law was that he was free to travel with them, as he had a receipt proving that the goods had been purchased in the EU and the relevant taxes paid.

(c) The cigarettes were a matter of concern for the Customs authority at the final destination, ie Ireland.

(d) Border Force should not have seized the cigarettes but alerted the Irish Customs.

38. The outcome he desired was that the duty and penalty charges should be dropped as he believed that the seizure was illegal and that he had been very badly treated.

39. HMRC say:

(1) The appellant was entitled to challenge the legality of the seizure in a court of summary jurisdiction but did not.

(2) As a result it was not open to him in this Tribunal to assert that the goods were for his personal use. As authority for this they cite *HMRC v Jones and Jones* [2011] EWCA Civ 824 ("*Jones*").

(3) They also refer to *HMRC v Nicholas Race* [2014] UKUT 331 (TCC) ("*Race*"), although without saying that in that case Warren J held that the *Jones* principle, which case was only about restoration proceedings, also applied for the purposes of assessments.

(4) Thus as a matter of fact UK duty was due on the goods and was recoverable from the appellant under regulation 13 of the EDHMDPR and the assessment was correct.

(5) As to the penalty HMRC say they may assess a penalty where after the excise duty point a person was concerned in carrying goods at a time when

payment of duty was outstanding. That is merely a statement of the law, but I infer they are arguing that this was the case with the appellant.

(6) HMRC say the wrongdoing was not deliberate, but the disclosure of it was prompted. On that basis the penalty zone is 20% - 30% and as maximum mitigation has been given, the penalty is 20%.

(7) There is nothing to "warrant (*sic*) reasonable excuse" under paragraph 20 Schedule 41, nor any special reasons for reduction (which we take to be a reference to paragraph 14 Schedule 41 – special reduction in special circumstances).

40. The appeals should be dismissed.

Discussion

41. We now deal with each of the three main headings in the appellant's grounds of appeal. The first ground, the issue of false allegations made by HMRC, and Ms Jennings in particular, is one which is only arguably within the jurisdiction of the tribunal in relation to the question whether there are special circumstances which would lead us to allow a further reduction in the penalty if we were satisfied that HMRC's decision on this matter was flawed. We therefore deal with it in that connection later.

42. The second and third grounds can, we think, be taken together. In effect the appellant is asking us to say that the assessment to duty is invalid, as, if it is, the penalty will inevitably fall.

43. An assessment may be invalid (or at least not enforceable) on procedural grounds, such as that it was not made in time or notice of it was not served on the intended recipient. In the case of an excise duty assessment under s 12 FA 1994, which this one was, the time limit for raising the assessment (found in subsection (4)(b)) is:

> "the end of the period of one year beginning with the day on which evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge."

44. The assessment was made not later than 19 June 2017 when Ms Jennings issued it. Therefore if the relevant facts came to the attention of the Commissioners before 20 June 2016 the assessment is out of time. The unchallenged evidence of Mr Belshaw is that it was on 20 June 2016 that he first became aware of the facts that might justify an assessment, so the assessment is in time (just). In treating Mr Belshaw's knowledge as the relevant knowledge I am recognising that as an officer of the Border Force who is designated as a general customs official (as Mr Belshaw says he was in paragraph 1 of his witness statement) Mr Belshaw was exercising general customs functions and that s 12(4)(b) FA 1994 is to be treated as referring to the Director of Border Revenue as well as the Commissioners (see s 7(6) Borders, Citizenship and Immigration Act 2008).

45. In relation to the penalty assessment Ms Jennings did not cut it quite so fine, as the time limit is 12 months beginning with the end of the appeal period for the assessment of duty unpaid by reason of the relevant act in respect of which the penalty is imposed. "Appeal period" here means the period during which an appeal that has been brought has not been determined or withdrawn. That period only ends with the date of this decision so has not begun to run.

46. There are no procedural defects in the assessment to duty or the penalty assessment that we can see. In considering this, and the time limit point above, we are

following the lead of Warren J in *Race* at [50], given that the appellant is a litigant in person.

47. An assessment may also be invalid if it was made outside the limits of the provision which allows for it to be made. In relation to ground 3(b) of the appellant's grounds he says that the seizure was illegal, because based on his understanding of EU law, he was entitled to bring the quantity of cigarettes he had because they were for his own use.

48. We hold that this argument cannot succeed. In *Race* Warren J very clearly and comprehensively sets out why the decision of the Court of Appeal in *Jones*, a decision on restoration, applies with equal force to an assessment. The crucial point is that, for whatever reason, the appellant did not contest the seizure by starting proceedings in a court of summary jurisdiction in Northern Ireland (paragraph 8(c) Schedule 3 Customs and Excise Management Act 1979). The goods are deemed to have been duly condemned as forfeit because they are deemed to have been brought into the UK for a commercial purpose and duty is unpaid after the duty point.

49. The third ground of appeal is that in essence as the appellant was in transit in the UK and on his way to his home in Dublin, the UK Border Force should not have seized his goods so the seizure was illegal on those grounds.

50. In their statement of case and in Mr Payter's oral submissions this ground did not receive any individual attention. We therefore directed that HMRC might make submissions as follows:

> (1) On the basis that it is a deemed fact that the appellant had a commercial purpose when he brought the seized cigarettes into the United Kingdom, does the fact that the appellant's intention was to take the cigarettes to Ireland for delivery and use prevent the making of an assessment on him under regulation 13(1) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010, given the words in that paragraph "in order to be delivered or used in the United Kingdom"?
>
> (2) Is there any case law of courts or tribunals in any part of the United Kingdom which has considered the words "in order to be delivered or used in the United Kingdom" or which deals with the issue of goods arriving in the UK intended for delivery or use in another member state?
>
> (3) Is there any case law of the Court of Justice of the European Union (and its predecessor) or of any other member state (such as Ireland) which deals with the equivalent words in art 33(1) of the Excise Duty Directive (2008/118/EC) or its predecessors or in the domestic law of a member state transposing art 33(1)?

51. In the submissions so made Mr Payter argued as follows:

> (1) *Jones* holds that the due condemnation of the goods deemed to have occurred by virtue of paragraph 5 Schedule 3 Customs and Excise Management Act 1979 ("CEMA") had the consequence that it could not be argued that the goods were legally imported. The goods were liable to lawful seizure because they had been imported into the UK without duty being paid and the duty was payable in the UK because a duty point had occurred by virtue of regulation 13 of the EDHMDPR.

(2) A finding of fact by the Tribunal that the appellant did not intend to use or deliver the goods in the UK would inevitably go behind the deemed finding that the goods were liable to forfeiture. The Tribunal cannot make any findings of fact in relation to the duty point and they cannot be taken into account in relation to either the duty assessment or the penalty assessment.

(3) In any case an aspect concerning the legality of the seizure was raised only after the evidential aspect of the hearing had concluded and so HMRC had no opportunity (because no prior reason) to test the appellant's account of going to Ireland or to adduce evidence in support of the following arguments:

(4) The goods were in fact "delivered" to the UK. The tribunal accepted that appellant held them for a commercial purpose in the UK and that the appellant was intending to travel across Northern Ireland with the goods in his possession to the Irish border. HMRC submit that because the goods were present in the UK for a commercial purpose they had been delivered in the UK within the meaning of regulation 13(1). HMRC know of no authority on this point.

(5) Article 33(4) of the EDD is clear that where goods move within the EU for commercial purposes they can only be regarded as not being held for those purposes until they reach their final EU destination if the formalities in Art 34 were complied with. They were not complied with in this case. Indeed he intended to avoid paying duty in Ireland.

(6) HMRC distinguish this case from *Prankl v Zollamt Wien* (C-175/14) [2015] STC 1275 ("*Prankl*").

52. The appellant did not make any submissions or comment on HMRC's.

53. We deal first with HMRC's complaint in §51(3) that this issue was a surprise to them for which they were not prepared. The issue was clearly put into play by the appellant in his third main ground of appeal. It may not have been expressed in the terms in which the tribunal expressed it, but it was obvious that that the appellant was arguing that he was not liable to duty or a penalty because he was in transit to Ireland. Mr Payter had the opportunity to ask Mr Belshaw about this and particularly about the appellant's point that Mr Belshaw showed him where the Dublin bus went from. HMRC chose not to respond to this ground in their statement of case, but Mr Payter could have responded to it[4].

54. Turning to the first point in the directions, if we ignore the words "in order to be delivered or used in the United Kingdom" the position here is absolutely clear, as we have set out in §45. The question is whether these words ("the territorial limitation")

[4] When we came to express our views in this paragraph we had in mind *CS v Secretary of State for Work and Pensions* (DLA) [2011] UKUT 509 (AAC) where at paragraph 18, Upper Tribunal Judge Warren stated:

> "... Appellants often have difficulty in identifying the decision or decisions which they should appeal.... In my judgement the approach to be adopted is that, once the appellant has expressed a grievance in the letter of appeal, it is then for those more knowledgeable with the process, be they officers of the DWP or tribunal judges to identify the decision of the decisions which are the source of the appellant's grievance and then to treat the letter of appeal accordingly."

That approach was subsequently endorsed by Upper Tribunal Judge Wikeley in *AJ v Secretary of State for Work and Pensions (II)* [2012] UKUT 209 (AAC) at paragraph 34.

make any difference to our ability to determine whether or not the assessment was validly made.

55. In neither *Jones* nor *Race* nor any other case we have looked at was the territorial limitation in issue. This is not surprising as it was clearly assumed that the Joneses and Mr Race being UK residents were intending to use or deliver the goods in their possession in the United Kingdom and they did not suggest otherwise. In other words it was a non-issue. The only possible argument open to the Joneses in condemnation proceedings to show why the goods were not liable to forfeiture was to explain that duty was not payable because the goods were for their own use and so the exception from duty in regulation 4 of the Excise Goods (Holding, Movement, Warehousing and REDS) Regulations 1992 applied.

56. Nor is it surprising that when discussing the jurisdiction of this tribunal, the courts and tribunals in those cases referred only to the private use issue as not being available to the Joneses or Mr Race in this Tribunal, whether in seeking restoration or as a defence against an assessment as a consequence of the goods having been deemed to be "duly" condemned as a result of paragraph 5 Schedule 3 CEMA

57. Because of this we need to look more closely at what "duly condemned" means in the context of the current legislative framework. Section 139 CEMA provides for seizure where goods are liable to forfeiture "under the customs and excise Acts". The provision cited by HMRC in their statement of case (and many others that we have seen) is regulation 88 of the EDHMDPR. The EDHMDPR were made under a large number of provision of those acts (as defined in s 1 CEMA). Regulation 88 states:

> "If in relation to any excise goods that are liable to duty that has not been paid there is—
>
> (a) a contravention of any provision of these Regulations, or
>
> (b) a contravention of any condition or restriction imposed by or under these Regulations,
>
> those goods shall be liable to forfeiture."

58. Under paragraph 3 Schedule 3 CEMA anyone claiming that any thing seized as liable to forfeiture is not so liable must give notice of his claim to HMRC at any office of customs and excise and under paragraph 5 if they fail to so, or do so but fail to meet the requirements in paragraph 4, the thing in question shall be deemed to have been duly condemned as forfeited. Thus the relevant court (in this case it would be a court of summary jurisdiction in Northern Ireland) is deemed to have held that the goods were indeed liable to forfeiture and that, as set out in regulation 88 of the EDHMDPR, as a matter of fact they were liable to duty, duty which had not been paid before the seizure.

59. In a case such as *Race* or *Jones*, that deemed holding of due condemnation carries the inevitable conclusion that the contravention concerned is the bringing into the United Kingdom for use or delivery there without payment of the duty at or before the duty point goods charged with excise duty. Since excise duty is not payable on goods which are for private use and no duty point exists in relation to them, it must follow that the goods were brought in for a commercial purpose and any exception for private use was deemed to have been held not to be available.

60. But a court dealing with a claim by a person whose goods were seized and who did not make an appearance in court or put in any arguments would not condemn the goods out of hand without some consideration of the legal position: *a fortiori* a case where there was a contested hearing. We consider that for there to be deemed a due condemnation HMRC must have a basis in law for the reasons for the seizure. We are not, and cannot, decide whether the goods were or were not liable to forfeiture, but in our view what we can consider is whether the contravention that they argue in this Tribunal happened was the right one.

61. In this case they argued that it was regulation 13 of the EDHMDPR which had been contravened and that the goods were liable to duty as a result. Clearly if it was regulation 13 which had been contravened they were right and the condemnation was "due".

62. Mr Payter had two arguments in support of it being regulation 13. Firstly he said that in fact the goods had been delivered in the United Kingdom, so that there was no breaching of any territorial limitation. We do not accept this. The use of both words, "delivery" and "use" is strongly indicative that they are separate concepts. In the case of excise goods such as tobacco or alcoholic drinks, a person uses them by smoking or drinking them[5], and delivers them by transferring them to someone else. We do not think that someone like the appellant who brings goods into the United Kingdom is thereby delivering them in the United Kingdom.

63. The second, more promising, argument was that as a consequence of the deemed due condemnation, the goods must be presumed to have been so delivered (or used). We do not accept this either. Condemning goods as properly liable to forfeiture is to hold that the requirements in regulation 88 are met because there was a contravention of any part of the EDHMDPR, in this case regulation 13. The territorial limitation is nothing to do with any contravention, it is simply a condition for the operation of regulation 13 and the establishment of a duty point.

64. It is we say open to us to find the facts about the territorial limitation in this case. From the evidence of both the appellant and Mr Belshaw we find as a fact that the appellant did not intend on arrival in the United Kingdom to use or deliver any cigarettes in the Kingdom, and we find as a fact that his intention was to transport the cigarettes to the Republic of Ireland, there to be used or delivered. Accordingly the appellant is not a person from whom any amount has become due in respect of any duty of excise as a result of any duty point established by regulation 13 of the EDHMDPR, as HMRC maintained when they issued the assessment (see §17).

65. That is not though the end of the matter. In his submissions in response to the directions Mr Payter raised an argument on the basis of art 33(4) of the EDD, which provides:

> "4. Without prejudice to Article 38, where excise goods which have already been released for consumption in one Member State move within the Community for commercial purposes, they shall not be regarded as held for those purposes until they reach the Member State

[5] Or in magic tricks, as the appellant said he did. Other uses not involving actually smoking or drinking might include lighting a fire or the brandy for a Christmas pudding.

of destination, provided that they are moving under cover of the formalities set out in Article 34."

Those formalities in art 34 are:

> "1. In the situations referred to in Article 33(1), excise goods shall move between the territories of the various Member States under cover of an accompanying document listing the main data from the document referred to in Article 21(1).
>
> The Commission shall, in accordance with the procedure referred to in Article 43(2), adopt measures establishing the form and content of the accompanying document.
>
> 2. The persons referred to in Article 33(3) shall comply with the following requirements:
>
> (a) before the goods are dispatched, submit a declaration to the competent authorities of the Member State of destination and guarantee payment of the excise duty;
>
> (b) pay the excise duty of the Member State of destination in accordance with the procedure laid down by that Member State;
>
> (c) consent to any checks enabling the competent authorities of the Member State of destination to satisfy themselves that the excise goods have actually been received and that the excise duty chargeable on them has been paid.
>
> The Member State of destination may, in situations and under conditions which it lays down, simplify or grant a derogation from the requirements specified in point (a). In such cases, it shall notify the Commission, which shall inform the other Member States."

66. The appellant, says Mr Payter, plainly did not comply with those formalities: indeed he intended to evade excise duty in Ireland, not pay it. We have sought to find how art 33(4) has been "transposed" into domestic law. The Transposition Note appended to the Explanatory Memorandum for the EDHMDPR says that that in domestic law the relevant provision is the Excise Goods (Sales on Board Ships and Aircraft) Regulations 1999.

67. Those regulations, in their Explanatory Note, say that the purpose of the regulations is to provide for the approval and registration of mobile operators who (on board ships and aircraft making journeys between the United Kingdom and other member States) intend to sell excise goods to be taken away from the ship or aircraft ("merchandise").

68. This seems odd. Article 33(4) may apply to the 1999 Regulations, but it seems most unlikely that the excise duty treatment of merchandise on aircraft and ships for sale on them is the sole area covered by art 33(4). We therefore looked at other provisions of the EDHMDPR.

69. Regulation 6 would fit the bill except it does not apply to "EU excise goods" which these goods are (see regulation 6(3)).

70. But we do think that regulation 19 applies, a regulation which provides:

"19.—(1) The excise duty point for excise goods in respect of which there has been a contravention described in any of paragraphs (2) to (5) is the time specified in paragraph (6).

…

(5) For excise goods to which Part 11 applies (imports of excise goods after release for consumption in another member state) the contravention is the failure by the person making the delivery of the goods, the person holding the goods intended for delivery or the recipient of the goods to comply with regulation 69(1) (requirements).

(6) The excise duty point is—

…

(c) for excise goods to which Part 11 applies, the time when the goods were first held for a commercial purpose in the United Kingdom.

(7) The person liable to pay the duty when an excise duty point specified —

…

(c) in paragraph (6)(c) occurs is the person making the delivery of the goods, the person holding the goods intended for delivery or the person shown as the recipient of the goods in the accompanying document.

(8) Any person whose conduct caused a contravention described in this regulation so that there was an excise duty point is jointly and severally liable to pay the excise duty at that excise duty point with the person specified in paragraph (7)."

71. Part 11 provides relevantly:

"**Application of Part 11**

67.—(1) Subject to paragraph (2), this Part applies to excise goods (other than chewing tobacco) imported from another Member State which have been released for consumption in another Member State.

(2) This Part does not apply—

(a) to excise goods imported under a distance selling arrangement;

(b) other than regulation 68, in any case to which the Excise Goods (Sales on Board Ships and Aircraft) Regulations 1999 applies; or

(c) to excise goods imported by a person for that person's own use.

Imports of excise goods after release for consumption

68.—(1) Excise goods to which this Part applies must be consigned—

(a) to the person shown on the accompanying document as the recipient; or

(b) if the recipient is not in the UK, to an ultimate destination outside the United Kingdom.

(2) The excise goods must at all times be accompanied by an accompanying document that complies with the EU requirements.

(3) An accompanying document must not be amended.

(4) The person to whom any excise goods are consigned must ensure, so far as it is in that person's power to do so, that the EU requirements are complied with at all times.

Requirements

69.—(1) The person delivering the excise goods, holding the excise goods intended for delivery or receiving the excise goods must—

(a) before the excise goods are dispatched—

(i) inform the Commissioners of the expected dispatch;

(ii) provide a guarantee satisfactory to the Commissioners securing payment of the duty or, subject to regulation 73, pay the UK excise duty chargeable on the goods;

(b) subject to regulation 73, on or before the excise duty point, pay any duty that has not been paid in such manner as the Commissioners may direct;

(c) consent to any check enabling the Commissioners to satisfy themselves that the goods have been received and that the duty has been paid.

(2) A person mentioned in paragraph (1) who is not approved and registered in accordance with regulation 70 shall be known as an unregistered commercial importer."

72. If Part 11 applies to the appellant, he had clearly contravened the requirements in regulation 69 as among other things he had not paid the duty. We can see no obvious reason why the Part does not apply to a person who is carrying goods released for consumption in another member state of the EU and regulation 68(1)(b) clearly contemplates that the goods may be for an ultimate destination outside the UK.

73. But there is an exception here which is where the goods are intended for the person's private use. Is the question whether the goods were for the appellant's private use taken out of our jurisdiction by *Jones* and *Race*? We think it must be, just as it is in relation to regulation 13.

74. But before we come to a decision we must consider the only case which HMRC have discovered as potentially relevant, *Prankl*. The facts in *Prankl* are that tobacco goods were released for consumption initially in Hungary and transported by lorry to the United Kingdom, where some loads were removed by persons unknown and some seized by the UK authorities. The Austrian customs authorities imposed tobacco duty of €1,249,820 on Herr Prankl, the driver of the lorry, on the grounds that he had handled the cigarettes at issue and had brought them to Austria, while driving them to the United Kingdom.

75. The CJEU held that Austria was not entitled to impose the duty. At [21] to [27] the CJEU said:

"21. It must also be borne in mind that Article 7(1) and (2) of Directive 92/12 lays down a general rule that where a product subject to excise duty and released for consumption in one Member State is held for commercial purposes in another Member State, the excise duty is to be levied in the latter State. The excise duty is therefore chargeable in the Member State for which the product is intended rather than the State where it is released for consumption (judgment in *Meiland Azewijn*, C-292/02, EU:C:2004:499, paragraph 35).

> 22 The interpretation to the effect that the levying of the excise duty occurs, in general, in one Member State only, namely that for which the product concerned is intended and in which it will be consumed, is moreover borne out by Article 22 of Directive 92/12, which provides, under certain conditions, for the reimbursement of the excise duties paid in another Member State (judgment in *Scandic Distilleries*, EU:C:2013:347, paragraph 24).
>
> 23 It is true that neither Article 7(1) and (2) of Directive 92/12 nor Article 9(1) thereof expressly precludes excise duty from being levied on smuggled goods in a Member State through which those goods have passed in transit, even though the goods are no longer in the territory of that State and have arrived in the Member State of destination.
>
> 24 However, the Court has held that, if products which are unlawfully introduced into the territory of the European Union are, like the goods at issue in the main proceedings, held for commercial purposes, it is apparent from Article 6(1), in conjunction with Article 7(1), of that directive that the authorities in the Member State in which those products were discovered are competent to collect the excise duty (judgment in *Dansk Transport og Logistik*, C-230/08, EU:C:2010:231, paragraph 114, and order in *Febetra*, C-333/11, EU:C:2012:134, paragraph 41). In the case in the main proceedings the authorities concerned are the United Kingdom authorities.
>
> 25 By contrast, it is only if the products at issue are not held for commercial purposes that the Member State of departure remains competent, pursuant to Article 6 of Directive 92/12, to collect the excise duty, even if the unlawfully introduced products were only discovered subsequently by the authorities in another Member State (see, to that effect, judgment in *Dansk Transport og Logistik*, EU:C:2010:231, paragraph 115, and order in *Febetra*, EU:C:2012:134, paragraph 42).
>
> 26 In those circumstances, it must be held that, in the same way as the Member State of departure, the transit Member States are not competent to collect the excise duty if such products are discovered by the authorities of another Member State in the territory of which they are held for commercial purposes.
>
> 27 It cannot reasonably be maintained that the EU legislature intended to favour the prevention of abuse and evasion by generally allowing, in cases where products subject to excise duty are unlawfully transported, all the transit Member States to levy excise duty."

76. Thus because the goods had been delivered to the United Kingdom it was not open to Austria or any other transit state to tax the goods. But the CJEU went on to say:

> "28 The fact that, in paragraph 57 of the judgment in *BATIG* EU:C:2007:788), the Court held that the EU legislature favoured the prevention of abuse and evasion to the detriment of the principle that taxation should occur in only one Member State does not cast doubt on that interpretation. That assessment is part, as is apparent from the first sentence of that paragraph, of the specific factual context of the case which gave rise to that judgment, which concerned the situation of an unlawful departure from a suspension arrangement on account of the theft of products to which tax markings had already been affixed in the Member State of departure and which was characterised by the fact that the Member State which had issued those tax markings was unable to

> establish that they had been destroyed. Those products thus gave rise to payment of excise duties in both the Member State in which they were released for consumption and the Member State in which they were intended for consumption and of which they already bore the tax markings.
>
> 29 By contrast with the situation in the case which gave rise to the judgment in *BATIG* (EU:C:2007:788), the goods at issue in the main proceedings did not bear any tax markings and did not disappear between the point of departure of the transport and the Member State of destination. In those circumstances, as the European Commission has pointed out, such a levy of the excise duty in the transit Member States, which may lead to multiple taxation, is not necessary to prevent abuse and evasion since both the importing Member State and the Member State of destination are known and it is common ground that the goods were delivered in the latter State.
>
> …
>
> 32 In the light of all of those considerations, the answer to the question referred is that Article 7(1) and (2) and Article 9(1) of Directive 92/12 must be interpreted as meaning that, where goods subject to excise duty that have been smuggled into the territory of a Member State are transported, without the accompanying document prescribed in Article 7(4) of that directive, to another Member State, in the territory of which those goods are discovered by the competent authorities, the transit Member States are not permitted also to levy excise duty on the driver of the heavy goods vehicle who transported them for having held those goods for commercial purposes in their territory."

77. Thus there is a difference between *Prankl* and this case, as HMRC point out. In this case Ireland is the ultimate destination state, but the goods never reached Ireland, so it had had no opportunity to tax them. We agree with HMRC that *Prankl* is not authority for the proposition that the UK, although a transit state, cannot impose duty on the goods.

78. The only question now is whether HMRC can at his stage in the proceedings seek to support the duty assessment on a basis other than that which they argued for. We think they can. The case of *Vickerman (H.M. Inspector of Taxes) v The Personal Representatives of Mason (deceased)* 58 TC 39 illustrates that a precise description of the legislation underlying an assessment is not necessary for income tax purposes, and we see no reason why the same should not apply where s 12 FA 1994 is concerned. All it requires is that there is a person from whom any amount has become due in respect of any duty of excise: an assessment under this section is not required to set out the precise reason why duty is payable. Accordingly we uphold the assessment on the basis that it is regulation 19 of the EDHMDPR that provides for the duty point and the appellant had not paid the duty before that point.

79. As to the penalty we hold that the appellant's act fell within paragraph 4 Schedule 41 FA 2008 (see *HMRC v Susan Jacobson* [2018] UKUT 18 (TCC)).

80. We accept HMRC's assessment of his conduct was not deliberate, and do not disagree with their giving 100% mitigation. We also agree the disclosure was prompted. This is so whether as the appellant says he immediately confessed to holding cigarettes when he saw Officer Belshaw with his bag or whether it was in response to Officer Belshaw's questions that he admitted to the quantity of cigarettes. An

unprompted disclosure of a paragraph 4 act can only be made by informing HMRC or Border Force beforehand or by going to the red channel.

81. The final questions are whether the appellant had a reasonable excuse for his actions or whether there were special circumstances.

82. He made a conscious choice to travel back to Belfast. He says he did obtain Notice 1 and understood it to say that he could bring in as much as tobacco as he liked as long as it was for his own use.

83. Notice 1 included in the bundle does indeed say this. But it also says that if the person is bringing in tobacco and Border Force has reason to suspect they may be for a commercial purpose, an officer may ask questions and make checks, and that they are more likely to ask you questions if you have more than 800 cigarettes.

84. The appellant also produced the equivalent notice for travellers arriving in Ireland. It has the same message that goods must be for personal use and not for sale and that the indicative quantity of cigarettes is 800, except for Bulgaria and Romania where it is 300 (thus what the appellant said to Mr Belshaw about Bulgaria is correct).

85. The documents also says that customs officers can still carry out selective checks on travellers coming from the EU to combat smuggling, so a person may be asked questions and have to produce baggage for inspection.

86. The appellant is by his own admission a seasoned traveller within and without the EU, obviously mainly from Ireland. He must have been aware, and he effectively admitted it, that the indicative limit in Ireland for goods brought in from other member states such as the UK and Spain is 800 cigarettes, the same as in the UK, with only Bulgaria and Romania being different. Both Notices warn of checks, with the UK one being rather more forthcoming about the effect of the indicative limit.

87. We think it was the mark of a reasonable Irish resident planning to return to the UK from Bulgaria to obtain Notice 1. It was reasonable for him to think that he would be stopped with such a large amount of cigarettes. He says he thought he could bring this amount so long as it was all for private use. But we do not think it was objectively reasonable for him to hold that view in the light of the admission he made to Officer Belshaw about his smoking habits, his previous importations of cigarettes into Ireland and his finances. Thus he had no reasonable excuse for his act.

88. As to special circumstances the review officer took into account the errors made by Ms Jennings. The officer held that it was not appropriate to make any reduction on account of the error, for which he again apologised and said there was no previous seizure on his record.

89. He also referred to the Complaints office letter dealing with the error.

90. In our view the response by the review officer was within the range of reasonable conclusions. Had it been our decision we might have made some reduction, but we cannot say HMRC's decision was flawed.

Decision

91. Under section 16 FA 1994 we uphold the assessment to duty.

92. Under paragraph 19(2)(a) Schedule 41 FA 2008 we affirm the decision to assess a penalty of £612.

Postscript

93. We wish to say this to Mr Toomey. You sought to have the assessments cancelled on account of the (mis)behaviour of HMRC and the lack of warning that duty and penalties might be charged on top of the forfeiture of the cigarettes.

94. On the first point you were especially concerned by the letter from Ms Jennings which said that your behaviour was deliberate "because you exceeded the guidelines and our systems show that you have had a previous seizure".

95. We share your concerns about this passage in the letter. *Our* first concern is that it is illogical, a flimsy basis on which to allege what is tantamount to fraudulent or dishonest behaviour. *Your* concern is that it was untrue, and that a false record of a previous seizure might have been the reason why you were intercepted and that it might prejudice your travelling in future.

96. To our minds HMRC have given every assurance they can that it was an error and there was no previous seizure. What convinces us most that it was an error was that Ms Jennings had only recently informed you that she regarded your behaviour as not deliberate and had calculated a penalty in an amount which reflected that. But what we still do not understand is how the error came to be made.

97. Mr Lawrence said that Ms Jennings had confirmed to him that she had "left the paragraph [in] the letter she had sent him in error and she was supposed to remove it." That does not answer the obvious question which is how it got into the letter in the first place. We find it difficult to believe that it was phrase used in a stock letter or template by this part of HMRC. We could understand if the template had alternative choices saying something like that "I consider your behaviour was deliberate because" and "I consider your behaviour was not deliberate" and that if the officer chose the first they had to add the reasons in their own words. But we think it very unlikely that the reasons given in the letter as to why the behaviour was deliberate in a particular case were part of the stock wording which should have been deleted in favour of the non-deliberate one. There must be variety of reasons why a traveller's behaviour might be thought to be deliberate.

98. We can also understand your suspicions about this matter when HMRC refused to put Ms Jennings forward as a witness and refused to help you at all when you sought to obtain a witness summons for her, given HMRC's refusal to put her forward. There also seemed to have been obfuscation by HMRC about what had actually happened to Ms Jennings, whether she had moved to a different job or had retired (or both).

99. That obviously did not allay your suspicions and was not clever on the part of HMRC. But we reiterate we do not believe there was anything sinister here.

100. We also add that we might have been prepared to make a reduction to the penalty on account of these errors and behaviour above and beyond the £50 offered to you. But

we have to operate by reference to the law, and in this case it does not allow us to do so. HMRC still have the opportunity to reduce the penalty under paragraph 14 Schedule 41 FA 2008 and we urge them to consider doing this.

101. As to the notice you complain of, it has long been the case that judges have themselves complained about the cumbersome and confusing system under which a person has to first start proceedings in the courts to get the goods restored, even if they do not want to, to be able to challenge the assessment or penalties on the grounds that the goods were for private use. But judges in courts senior to this tribunal have shown that that is the effect of the law and that we cannot get round it. That is the effect of the cases of *Jones* and *Race* which we refer to in this decision. Part of the problem now (and since 2009 or so) is that the seizure is a matter for Border Force while the assessments are a matter for HMRC. They are separate departments as Border Force comes under the Home Office, but in customs matters Border Force act on behalf of HMRC, and we agree that HMRC should have been able to confirm to you that Border Force have no records of previous seizures.

102. It is also, we accept, not made clear to travellers, as it should be, that if they don't appeal against the seizure within 30 days they have no hope of contesting a duty assessment which might not be issued until almost a year has passed from the seizure date. The problem is compounded by the fact that a loser in the courts (but not this tribunal) may get the winner's costs awarded against them and Border Force are not slow to point this out or the likely amount, which can have a chilling effect on anyone feeling bold enough to take proceedings. But again that does not affect the law or what this tribunal is allowed to do.

103. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 13 APRIL 2019