TC07678

EXCISE DUTY – assessment for duty and penalty in relation to excise goods seized from the appellant – Jones and Race considered – goods deemed to be for commercial use – appeal against assessment dismissed – Appellant's belief that the goods were for own use - reasonable excuse - appeal against penalty allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/05872

BETWEEN

KATYA KOSTOVA

Appellant

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: JUDGE DAVID BEDENHAM
JOHN WOODMAN

Sitting in public at the Court House, Peterborough on 28 November 2019

The Appellant appeared in person

Paul Renteurs, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION AND SUMMARY OF DECISION

1. This is an appeal against an assessment to excise duty raised pursuant to s 12(1A) of the Finance Act 1994 ("FA 1994") and a penalty issued pursuant to paragraph 4 of Schedule 41 to the Finance Act 2008 ("FA 2008"). The assessment and penalty relate to tobacco products (cigarettes and hand rolling tobacco) that the Appellant brought into the UK from Bulgaria. In summary, Border Force officers seized those tobacco products pursuant to s 139 of the Customs and Excise Management Act 1979 ("CEMA 1979") on the basis that they were held by the Appellant for a commercial purpose rather than for own use, and therefore attracted UK excise duty which had not been paid. The Appellant did not challenge that seizure. Subsequently, HMRC issued the Appellant with an assessment to excise duty and a penalty in relation to the tobacco products.

2. The Appellant gave evidence before us. The Appellant told us that the tobacco products were not for a commercial purpose but were for her own use. The cigarettes were to be smoked by her and the hand rolling tobacco was a gift for a friend. We found the Appellant to be a credible and honest witness and we accept her evidence in its entirety.

3. However, despite accepting the Appellant's factual account in its entirety, we have concluded that we are unable to allow the appeal against the excise duty assessment because we must apply the statutory scheme and are bound by the Court of Appeal's decision in *HMRC v Jones and Anor* [2011] EWCA Civ 824 (considered in detail below). This conclusion will no doubt be rather unpalatable for the Appellant, but we are of the view that it is the only conclusion open to us based on the law as it currently stands. Therefore, with reluctance, we dismiss the appeal in relation to the excise duty assessment.

4. In relation to the penalty: again, we must apply the statutory scheme and we are bound by the Upper Tribunal's decisions in *Race v HMRC* [2014] UKUT 331 (TC) and *HMRC v Susan Jacobson* [2018] UKUT 0018 TCC which applied the reasoning in *Jones* to penalty appeals. However, we are of the view that the statutory scheme and the decisions referred to above do not prevent us from considering whether the Appellant's account (which we have accepted in its entirety) gives rise to a reasonable excuse within the meaning of paragraph 20 of Schedule 41 FA 2008. Having considered all the evidence, we find that the Appellant had a genuine and reasonable belief that the goods were not for a commercial purpose, and this constitutes a reasonable excuse. Therefore, we allow the appeal in relation to the penalty.

BACKGROUND

5. The Appellant is a Bulgarian national who resides in the UK.

6. On 10 January 2018, having visited family in Bulgaria over the festive period, the Appellant travelled back to the UK. On arrival at Luton airport, the Appellant was stopped by a Border Force officer who asked her whether she had any tobacco in her luggage. The Appellant confirmed she did. The Appellant told the Border Force Officer that the cigarettes were to be smoked by her and the hand rolling tobacco was a gift for a friend. The Border Force Officer asked the Appellant a number of further questions, all of which the Appellant answered. The Border Force Officer then proceeded to seize the tobacco products (8,000 cigarettes and 0.8kg of hand rolling tobacco) pursuant to s 139 CEMA 1979.

7. On 12 April 2018, HMRC wrote to the Appellant stating:

> "We are considering assessing you for excise duty and charging you with an excise wrongdoing penalty.

…

The seizure of the goods was without prejudice to any further action that may be taken by HM Revenue and Customs…civil action may include an assessment to recover the duty that is due and the imposition of a financial penalty…

You had the right to make a claim that the goods seized as liable to forfeiture were not so liable by submitting a Notice of Claim to the Border Force within one month of the date of seizure, this was explained in Notice 12A…as no such claim was made your goods are duly condemned as forfeited. This means that you no longer have the right to challenge the lawfulness of the seizure or the lability of the goods to forfeiture.

Liability to pay the excise duty

The seized goods were found to have been released for consumption in another member state and you were the person found to be holding these goods for a commercial purpose in the United Kingdom. This creates a duty point under regulation 13(1) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010.

…

Penalties

Because you have handled beyond the duty point, excise goods on which excise duty has not been paid, we are considering charging you an excise wrongdoing penalty…under Schedule 41 of the Finance Act 2008…."

8. On 25 April 2018, the Appellant replied to HMRC's 12 April 2018 letter. The Appellant again stated that the tobacco products were not for a commercial purpose.

9. On 15 May 2018, HMRC assessed the Appellant to excise duty in the sum of £2,474 and a penalty in the amount of £519. The penalty had been calculated on non-deliberate, non-concealed prompted basis with a reduction given for disclosure. Full reduction for disclosure was not awarded, however, because HMRC formed the view that this was not appropriate where the Appellant had not admitted the wrongdoing.

10. On 21 May 2018, the Appellant wrote to HMRC stating that she disagreed with HMRC's decision to assess her to excise duty and to issue her with a penalty.

11. On 6 June 2018, HMRC wrote to the Appellant as follows:

"I note that you state that the goods in your possession were for yourself…On this occasion, Border Force did not believe that the goods were for your personal use or a gift.

As the cigarettes are now a commercial import by law, then UK excise duty is due on the goods. This is regardless of the fact that tax may have been paid in another EU country.

…

Whilst I sympathise with your situation, it does not affect the assessment or penalty…as you did not appeal the seizure within 1 calendar month of the goods being seized, then you no longer have the right to challenge the lawfulness of the seizure…"

12. On 25 June 2018, the Appellant asked HMRC to conduct a statutory review of the decisions.

13. On 8 August 2018, HMRC notified the Appellant of the outcome of the statutory review. The review officer upheld the decisions to assess the Appellant to excise duty and to issue her with a penalty.

14. By Notice of Appeal dated 4 September 2018, the Appellant appealed to the Tribunal.

THE APPELLANTS' CASE

15. In her Notice of Appeal, the Appellant raised the following points:

(1) the tobacco products were not held for a commercial purpose. They were to be smoked by the Appellant and gifted away;

(2) excise duty has already been paid on the goods in Bulgaria; and

(3) she was unaware that there was a one month deadline within which to challenge the lawfulness of the seizure.

HMRC'S CASE

16. In relation to the Appellant's appeal against the excise duty assessment, HMRC submitted that the appeal was based on the tobacco products being for own use, and that such an argument could not properly be advanced in circumstances where the tobacco products had been seized and there had been no challenge by the Appellant to that seizure because, by operation of law, the goods were deemed to have been held for a commercial purpose. HMRC relied upon the case of *Jones*. HMRC also submitted that in circumstances where Notice 12A (which sets out information relating to challenging a seizure) was provided to the Appellant, she was (or ought to have been) aware of the deadline for challenging the lawfulness of the seizure.

17. HMRC further submitted that where excise goods are brought into the UK for a commercial purpose it is irrelevant that excise duty has already been paid on those goods in another member state; the goods are still liable to excise duty in the UK.

18. In relation to the Appellant's appeal against the penalty, HMRC again submitted that it was not open to the Appellant to argue that there was no UK duty due on the tobacco products (and therefore no penalty due) on the basis that they were for own use. HMRC relied on *Jones, Race*, and *Jacobson*. HMRC also submitted that the penalty had been properly calculated with all appropriate reductions applied.

19. At the outset of the hearing, we raised with the parties the question of whether the Appellant's *belief* that the tobacco products were for her own use could amount to a reasonable excuse within the meaning of paragraph 20 of Schedule 41 FA 2008 despite the fact that those goods were deemed, by operation of statute, to have been held for a commercial purpose. HMRC submitted that where it is deemed that the tobacco products were held for a commercial purpose, that necessarily suggests that Appellant intended them to be for that purpose.

THE LAW

Relevant Legislation

20. Excise duty is charged on the tobacco products by the Tobacco Products Duty Act 1979. Regulation 14 of the Tobacco Products Regulations 2001 provides that the duty is due at the excise duty point.

21. Regulation 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ("HMDP 2010") provides in material part:

> "(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
>
> …
>
> (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."

22. Regulation 20 of the HMDP 2010 provides in relevant part:

> "(1) Subject to –
>
> (a) the provisions of these Regulations and any other regulations made under the customs and excise Acts about accounting and payment;
>
> …
>
> Duty must be paid at or before an excise duty point."

23. Regulation 88 of HMDP 2010 provides that where there is a contravention of the regulations in relation to excise goods in respect of which duty was due but not paid, those goods are liable to forfeiture.

24. Section 49 of CEMA 1979 provides that goods imported without payment of applicable duty are liable to forfeiture.

25. Pursuant to s 139(1) CEMA 1979 any thing liable to forfeiture under the customs and excise Acts may be seized or detained by an appropriate officer.

26. Schedule 3 to CEMA 1979 provides in relevant part:

> "(3) Any person claiming that any thing seized as liable to forfeiture is not so liable shall, within one month of the date of the notice or seizure…give notice of his claim in writing to the Commissioners…
>
> …

> (5) If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of any thing no such notice has been given to the Commissioners…the thing in question shall be deemed to have been duly condemned as forfeited."

27. Section 12(1A) of FA 1994 provides:

> "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."

28. Section 12(4) of FA 1994 provides in relevant part:

> "An assessment to the amount of any duty of excise due from any person shall not be made under this section at any time after whichever is the earlier of the following times, that is to say –
>
> (a) subject to subsection (5) below, the end of the period of 4 years beginning with the time when his liability to the duty arose; and
>
> (b) 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"

29. Paragraph 4 of Schedule 41 to FA 2008 provides that a penalty is payable by a person who acquires or is concerned in carrying, removing, depositing, keeping or otherwise dealing with excise goods on which duty is outstanding and has not been deferred.

30. Paragraph 5(4) of Schedule 41 FA 2008 sets put the "degrees of culpability" as follows:

> "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 or (as the case may be) chargeable soft drinks in respect of which a payment of soft drinks industry levy is due and payable and has not been paid 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."

31. Paragraph 6B of Schedule 41 FA 2008 provides that the penalty payable for a non-deliberate act or failure is 30% of the potential lost revenue.

32. Paragraphs 12-13 of Schedule 41 FA 2008 provide for a reduction to the amount of a penalty if disclosure is made by the person liable to the penalty.

33. Paragraph 14 of Schedule 41 FA 2008 provides that "if HMRC think right because of special circumstances, they may reduce a penalty." Inability to pay cannot amount to a special circumstance.

34. Paragraph 20 of Schedule 41 FA 2008 provides that liability to a penalty does not arise if there was a reasonable excuse for the act or failure. This provision only applies to acts or failures which are not deliberate.

35. Paragraph 17(1) of Schedule 41 FA 2008 provides for an appeal to the FTT against a decision that a penalty is payable. Paragraph 17(2) provides for an appeal to the FTT against the amount of the penalty.

36. Paragraph 19 of Schedule 41 FA 2008 provides in relevant part:

> "(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 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."

Jones, Race and Jacobson

37. In *Jones,* Mr and Mrs Jones were stopped by border officers at Hull Ferry Port. Significant quantities of tobacco and alcohol were seized from the Joneses on the basis that the goods were for commercial rather than own use (and no UK excise duty had been paid on the goods). The Joneses initially challenged the legality of the seizure by filing a notice of claim pursuant to paragraph 1 of Schedule 3 CEMA 1979. Subsequently, on legal advice, the Joneses withdrew that notice. The Joneses had also sought restoration of the goods (and a car seized at the same time). HMRC refused to restore the goods, and the Joneses appealed to the FTT. The FTT made findings that the goods were for own use and allowed the appeal against the restoration refusal decision. The Upper Tribunal dismissed HMRC's appeal. HMRC appealed to the Court of Appeal on the basis that the FTT was not entitled to make findings of fact inconsistent with the deemed forfeiture of the goods which occurred when the Joneses withdrew their notice of claim. The Court of Appeal allowed HMRC's appeal. At [71], Mummery LJ said as follows:

> "I am in broad agreement with the main submissions of HMRC. For the future guidance of tribunals and their users I will summarise the conclusions that I have reached in this case in the light of the provisions of the 1979 Act, the relevant authorities, the articles of the Convention and the detailed points made by HMRC.
>
> (1) The respondents' goods seized by the customs officers could only be condemned as forfeit pursuant to an order of a court. The FTT and the UTT are statutory appellate bodies that have not been given any such original jurisdiction.

(2) The respondents had the right to invoke the notice of claim procedure to oppose condemnation by the court on the ground that they were importing the goods for their personal use, not for commercial use.

(3) The respondents in fact exercised that right by giving to HMRC a notice of claim to the goods, but, on legal advice, they later decided to withdraw the notice and not to contest condemnation in the court proceedings that would otherwise have been brought by HMRC.

(4) The stipulated statutory effect of the respondents' withdrawal of their notice of claim under paragraph 3 of Schedule 3 was that the goods were deemed by the express language of paragraph 5 to have been condemned *and* to have been "duly" condemned as forfeited as illegally imported goods. The tribunal must give effect to the clear deeming provisions in the 1979 Act: it is impossible to read them in any other way than as requiring the goods to be taken as "duly condemned" if the owner does not challenge the legality of the seizure in the allocated court by invoking and pursuing the appropriate procedure.

(5) The deeming process limited the scope of the issues that the respondents were entitled to ventilate in the FTT on their restoration appeal. The FTT had to take it that the goods had been "duly" condemned as illegal imports. It was not open to it to conclude that the goods were legal imports illegally seized by HMRC by finding as a fact that they were being imported for own use. The role of the tribunal, as defined in the 1979 Act, does not extend to deciding as a fact that the goods were, as the respondents argued in the tribunal, being imported legally for personal use. That issue could only be decided by the court. The FTT's jurisdiction is limited to hearing an appeal against a discretionary decision by HMRC not to restore the seized goods to the respondents. In brief, the deemed effect of the respondents' failure to contest condemnation of the goods by the court was that the goods were being illegally imported by the respondents for commercial use.

(6) The deeming provisions in paragraph 5 and the restoration procedure are compatible with Article 1 of the First Protocol to the Convention and with Article 6, because the respondents were entitled under the 1979 Act to challenge in court, in accordance with Convention compliant legal procedures, the legality of the seizure of their goods. The notice of claim procedure was initiated but not pursued by the respondents. That was the choice they had made. Their Convention rights were not infringed by the limited nature of the issues that they could raise on a subsequent appeal in the different jurisdiction of the tribunal against a refusal to restore the goods.

(7) I completely agree with the analysis of the domestic law jurisdiction position by Pill LJ in *Gora* and as approved by the Court of Appeal in *Gascoyne*. The key to the understanding of the scheme of deeming is that in the legal world created by legislation the deeming of a fact or of a state of affairs is not contrary to "reality"; it is a commonly used and legitimate legislative device for spelling out a legal state of affairs consequent on the occurrence of a specified act or omission. Deeming something to be the case carries with it any fact that forms part of the conclusion.

(8) The tentative obiter dicta of Buxton LJ in *Gascoyne* on the possible impact of the Convention on the interpretation and application of the 1979 Act procedures and the potential application of the abuse of process doctrine do not prevent this court from reaching the above conclusions. That case is not binding authority for the proposition that paragraph 5 of Schedule 3 is ineffective as infringing Article 1 of the First Protocol or Article 6 where it is

not an abuse to reopen the condemnation issue; nor is it binding authority for the propositions that paragraph 5 should be construed other than according to its clear terms, or that it should be disapplied judicially, or that the respondents are entitled to argue in the tribunal that the goods ought not to be condemned as forfeited.

(9) It is fortunate that Buxton LJ flagged up potential Convention concerns on Article 1 of the First Protocol and Article 6, which the court in *Gora* did not expressly address, and also considered the doctrine of abuse of process. The Convention concerns expressed in *Gascoyne* are allayed once it has been appreciated, with the benefit of the full argument on the 1979 Act, that there is no question of an owner of goods being deprived of them without having the legal right to have the lawfulness of seizure judicially determined one way or other by an impartial and independent court or tribunal: either through the courts on the issue of the legality of the seizure and/or through the FTT on the application of the principles of judicial review, such as reasonableness and proportionality, to the review decision of HMRC not to restore the goods to the owner.

(10) As for the doctrine of abuse of process, it prevents the owner from litigating a particular issue about the goods otherwise than in the allocated court, but strictly speaking it is unnecessary to have recourse to that common law doctrine in this case, because, according to its own terms, the 1979 Act itself stipulates a deemed state of affairs which the FTT had no power to contradict and the respondents were not entitled to contest. The deeming does not offend against the Convention, because it will only arise if the owner has not taken the available option of challenging the legality of the seizure in the allocated forum."

38. *Jones* was concerned with the situation where an appellant who had not challenged legality of seizure by way of condemnation proceedings sought nonetheless to argue in an appeal against a restoration refusal that the relevant goods were for own use. However, in *Race*, Warren J stated:

> *"26. Jones* is clear authority for the proposition that the First-tier tribunal has no jurisdiction to go behind the deeming provisions of paragraph 5, Schedule 3. If goods are condemned to be forfeited, whether in fact or as the result of the statutory deeming, it follows that, having been bought in a Member State and then imported…, they were not held by the taxpayers for their own personal use in a way that exempted the goods from duty. The reasoning and analysis in *Jones* did not turn on the fact that the case concerned restoration of the goods and not assessment to duty.
>
> ...
>
> *33.* ...It is clearly not open to the tribunal to go behind the deeming effect of paragraph 5 Schedule 3 for the reasons explained in *Jones*...The fact that the appeal is against an assessment to excise duty rather than an appeal against non-restoration makes no difference because the substantive issue raised by Mr Race [that the goods were in fact for own use] is no different from that raised by Mr and Mrs Jones.
>
> …
>
> 39…the First-tier Tribunal could no more re-determine, in the appeal against the Penalty Assessment, a factual issue which was a necessary consequence of the statutory deeming provision than it could re-determine a factual issue

> decided by a court in condemnation proceedings. The issue of import for personal use…has been determined by the statutory deeming."

39. In *HMRC v Susan Jacobson* [2018] UKUT 0018 TCC, the Upper Tribunal stated at [24]:

> "We respectfully agree with Warren J in *Race* that the reasoning and analysis in *Jones* applies to an appeal against a penalty in exactly the same way as it applies to an appeal against an assessment for excise duty. The deemed effect of Ms Jacobson's failure to contest the seizure of the HRT was that it was duly condemned as forfeited as, in the terms of regulation 88 of the 2010 regulations, goods liable to excise duty which had not been paid in contravention of the Regulations."

Reasonable Excuse

40. In *Christine Perrin v HMRC* [2018] UKUT 0156 (TCC), the Upper Tribunal considered an appeal relating to a late filing penalty in which the Appellant submitted there was a reasonable excuse because she genuinely believed that her tax return had already been filed (even though it had not been) and this is why she did not file the return on time. The Upper Tribunal stated:

> 71. In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, the tribunal should bear in mind all relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times (in accordance with the decisions in *The Clean Car Co* and *Coales*).
>
> 72. Where the facts upon which the taxpayer relies include assertions as to some individual's state of mind (e.g. "I thought I had filed the required return", or "I did not believe it was necessary to file a return in these circumstances"), the question of whether that state of mind actually existed must be decided by the FTT just as much as any other facts relied on. In doing so, the FTT, as the primary fact-finding tribunal, is entitled to make an assessment of the credibility of the relevant witness using all the usual tools available to it…
>
> 73. Once it has made its findings of all the relevant facts, then the FTT must assess whether those facts (including, where relevant, the state of mind of any relevant witness) are sufficient to amount to a reasonable excuse, judged objectively.
>
> 74. Where a taxpayer's belief is in issue, it is often put forward as either the sole or main fact which is being relied on – e.g. "I did not think it was necessary to file a return", or "I genuinely and honestly believed that I had submitted a return". In such cases, the FTT may accept that the taxpayer did indeed genuinely and honestly hold the belief that he/she asserts; however that fact on its own is not enough. The FTT must still reach a decision as to whether that belief, in all the circumstances, was enough to amount to a reasonable excuse. So a taxpayer who was well used to filing annual self-assessment returns but was told by a friend one year in the pub that the annual filing requirement had been abolished might persuade a tribunal that he honestly and genuinely believed he was not required to file a return, but he would be unlikely to persuade it that the belief was objectively a reasonable one which could give rise to a reasonable excuse."

EVIDENCE AND FINDINGS OF FACT

41. The Appellant gave sworn evidence to us. She used an interpreter to do this. The Appellant told us:

(1) she is a Bulgarian national;

(2) she has lived in the UK since 2016;

(3) since living in the UK she has had a number of jobs;

(4) she goes back to Bulgaria once every nine months or so;

(5) as at December 2017/January 2018, she was living in a shared house with a number of other Bulgarian nationals;

(6) in December 2017, she travelled to Bulgaria. She stayed in Bulgaria over the festive period – travelling back to the UK on 10 January 2018;

(7) the tobacco products were purchased in Bulgaria;

(8) the cigarettes were for her. The hand rolling tobacco was for Nikolay Hadzhyski who at that stage was just a good friend (and is now her boyfriend). Mr Hadzhyski did not live in the shared house with the Appellant;

(9) in addition to the hand rolling tobacco (a gift for Mr Hadzhyski), the Appellant purchased 4 different brands of cigarettes. She had smoked all of these brands previously and was happy to chop and change between these brands. She smokes 30 cigarettes per day. The cigarettes would last her approximately 9-12 months and bringing them into the UK from Bulgaria would help her save money as they were much cheaper in Bulgaria;

(10) English is not her first language. She did not have the benefit of an interpreter when speaking with the Border Force officer;

(11) the letters sent to HMRC by the Appellant had been written by her manager at work. The letters were wrong to suggest that the tobacco products were to be shared with her housemates. There may have been some misunderstanding when she explained things to her manager. The only gift she planned to make was to Mr Hadzhyski;

(12) she accepted she was given a Seizure Information Notice relating to the tobacco products and that the Seizure Information Notice refers to Notice 12A also having been given to her. She does not recollect whether she was given Notice 12A. In any event, she did not understand that there was a way of challenging the seizure. Nor did she understand that further action might be taken against her by way of assessments/penalties; and

(13) she did not challenge the seizure because she did not realise that she had any right to do so.

42. HMRC did not challenge the Appellant's account. The only question put in cross examination related to whether, prior to travelling, the Appellant had looked online to ascertain whether there were any limits on the amount of tobacco that could be brought into the UK for own use. The Appellant replied that she had not looked on the internet but had understood that there was no limit where the tobacco was for own use.

43. We asked the Appellant some questions about her evidence. Her answers were clear and convincing. As stated above, we found the Appellant to be honest and credible. Her evidence was also corroborated to some extent by Mr Hadzhyski. We accept the entirety of the Appellant's account.

44. Mr Hadzhyski gave sworn evidence to us. He used an interpreter to do this. Mr Hadzhyski told us:

(1) the Appellant is a chain smoker. She will smoke anything;

(2) when he had previously travelled to Bulgaria for a visit, he had brought the Appellant cigarettes back. The Appellant did not pay him for these cigarettes. They were a gift; and

(3) the Appellant said that when she was next in Bulgaria she would buy him some hand rolling tobacco.

45. Mr Hadzhyski was an honest and straightforward witness. His account was not challenged by HMRC. We accept his evidence in its entirety.

46. HMRC called only one witness, Officer Sean Reed. Officer Reed had no involvement in the seizure of the tobacco products but subsequently considered the papers and made the decision to assess the Appellant to excise duty and to issue her with a penalty. In addition to Officer Reed's evidence, HMRC relied upon the documents in the bundle including the notes of the Border Force officer (identified only as "K.Shaw") who seized the tobacco products.

47. Officer Shaw's notes recorded the following:

(1) the Appellant arrived in the UK on the Sofia flight;

(2) the Appellant had been in Bulgaria for Christmas, having left the UK on 23 December 2017;

(3) the Appellant said she had 44 cartons of cigarettes and some hand rolling tobacco;

(4) the Appellant's luggage contained 44 cartons of cigarettes (4 different brands) making a total of 8800 cigarettes plus 800 grammes of hand rolling tobacco;

(5) the Appellant stated the cigarettes were hers and "tobacco for my friend";

(6) the Appellant agreed to stay for interview;

(7) when asked "are you happy to continue in English?", the Appellant replied "I can try" to which the officer said "If for any reason you want a translator, we'll get a telephone interpreter";

(8) in response to questions asked by Officer Shaw, the Appellant:

(a) stated she had lived in the UK since 2016;

(b) stated she had purchased the cigarettes over the previous few days. She had paid in cash;

(c) stated she had taken £10,000 with her to Bulgaria, some of which she had spent and some of which she had put into her bank account in Bulgaria. She had saved this money from her wages;

(d) stated that, prior to this visit to Bulgaria, she had previously been out of the UK in February 2017. On that occasion she had brought back 16 cartons of cigarettes;

(e) stated she smoked "one pack and a half" per day;

(f) stated that if she purchased a carton of cigarettes in the UK it cost £70 and a packet cost £6.50;

(g) stated she lived in a shared house with other Bulgarian nationals; and

(h) detailed her income and her outgoings.

(9) "[I am] not satisfied these cigarettes are for your personal use…reasons for seizure are

(1) quantity in excess of any guideline.

(2) 4 different brands plus tobacco – someone who smokes 1 ½ packets a day are brand loyal.

(3) no open cigarettes…you haven't even broken into one carton.

(4) you stated you….buy the carton for £70 – if you buy from a legitimate shop you would be paying £100…

(5) not credible that you could have saved £10,000 with your outgoings and income…

With this many different brands and living in a house with 6 others, this is indicative – symptomatic of people who do cigarette purchases for everyone else in the house."

(10) "Ms Kostova had an open packet of Dunhill in her pocket…I explained I believed the [800] Dunhill [in the luggage] were for her and allowed her to take them. The rest were seized."

(11) Notice 12A and various other notices were issued and explained.

48. We have no reason to doubt the accuracy of Officer Shaw's notes. However, as explained above, having heard the Appellant's evidence and having had chance to ask questions of her (with the aid of an interpreter), we do not share Officer Shaw's concerns as to the veracity of the Appellant's account.

49. The hearing bundle contained a Seizure Information Notice which was signed as having been received by the Appellant. That Notice records that the Appellant was also issued with Notice 12A. On balance, we find that the Appellant was provided with Notice 12A.

50. Officer Reed gave sworn evidence during which he confirmed the accuracy of his witness statement. That witness statement simply set out a chronology of events and exhibited the relevant correspondence. In response to questions from the Tribunal, Officer Reed gave the following further evidence:

(1) "the fact that I gave a non-deliberate penalty means I accepted that [the Appellant] genuinely believed that [the tobacco products were] for personal use";

(2) a genuine belief that the goods were for personal use justifies a non-deliberate penalty but is not a reasonable excuse; and

(3) the Appellant answered all questions and co-operated as much as possible save she did not admit the wrongdoing;

51. We found Officer Reed to be an honest and straightforward witness. We accept his evidence of fact.

DECISION

52. The Appellant's central submission was that there was no UK duty point because the goods were for her own use. In view of the deeming provisions contained in the statutory scheme and the authorities cited above, we accept HMRC's submission that, in both the excise

duty appeal and the penalty appeal, it is not open to us to make a finding that the tobacco products were for own use (despite finding the Appellant to be honest and credible, and accepting her account in its entirety) and therefore to find that there was no UK duty point. We have reached the conclusion that this is so regardless of the reason for the failure to challenge the legality of the seizure (which we accept was because the Appellant, despite being provided with Notice 12A, had not understood that she could challenge the legality of the seizure).

53. However, we are of the view that neither the statutory scheme nor *Jones, Race* or *Jacobson* prevents us from holding that the Appellant's genuine and reasonable belief that the goods were not for a commercial purpose constitutes a reasonable excuse within the meaning of paragraph 20 of Schedule 41 FA.

54. We are satisfied that the Appellant's belief that the tobacco products were for own use and not for a commercial purpose was genuine. That was her evidence, which we have accepted.

55. We are also satisfied that the Appellant's belief that the tobacco products were for own use and not a commercial purpose was a reasonable one when viewed objectively. The Appellant understood that there was no limit on the amount of tobacco that she could bring to the UK provided that the tobacco was not for a commercial purpose. The Appellant had no intention of selling the tobacco products or otherwise putting them to any commercial purpose (rather she intended for the cigarettes to be smoked by her and for the hand rolling tobacco to be gifted to Mr Hadzhyski). It was therefore objectively reasonable for the Appellant to proceed on the basis that there would be no UK duty point and that the tobacco products could be held by her and brought into the UK without the payment of UK duty.

56. Given that we have held the Appellant has a reasonable excuse, she is not liable to any penalty.

57. In the result, the Appellant's appeal against the excise duty assessment is dismissed and the Appellant's appeal against the penalty is allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

58. 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.

DAVID BEDENHAM
TRIBUNAL JUDGE

RELEASE DATE: 17 APRIL 2020