[2021] UKFTT 168 (TC)

TC08137

EXCISE DUTY – Assessment to excise duty and wrongdoing penalty in respect of cigarettes seized at airport - whether assessments invalidated by breach of appellant's right to an interpreter in criminal proceedings in accordance with Article 2 of EU Directive 2010/64 and/or right to information about the accusation in accordance with Article 6 of EU Directive 2012/13 – jurisdiction of Tribunal to consider whether the cigarettes were for personal use – appeal dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/06239

BETWEEN

KESTUTIS VISOCKAS — **Appellant**

-and-

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

TRIBUNAL: JUDGE ROBIN VOS
HELEN MYERSCOUGH

Sitting in public at Taylor House, London on 6 March 2020

The Appellant in person through an interpreter

Mr Ben Elliott, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. The Appellant, Mr Visockas is from Lithuania. In November 2016, he arrived at Luton Airport carrying 16,400 cigarettes.

2. The Border Force seized the cigarettes as they considered that Mr Visockas was holding the cigarettes for commercial purposes and not for his own use.

3. Sometime later, in October 2017, HMRC issued an assessment for excise duty of £4,160 under s.12 Finance Act 1994 ("**FA 1994**") and assessed a penalty of £873 (21% of the amount of the excise duty) under paragraph 4 of Schedule 41 to Finance Act 2008 ("**Schedule 41**"). The penalty was calculated on the basis that Mr Visockas' actions were not delibertate but that the disclosure was prompted as it only came to light when he was stopped by the Border Force going through the Blue Channel at Luton Airport.

4. Mr Visockas says that the first he knew about these assessments was when the Lithuanian Tax Authorities attempted to collect the amount due in April 2018, having been requested to do so by the UK Tax Authorties.

5. Mr Visockas has appealed against both the excise duty assessment and the penalty assessment. The grounds of appeal were put together by his lawyer in Lithuania and are based on a failure to provide Mr Visockas with information about the criminal act which he is suspected or accused of having committed contrary to Article 6 of EU Directive 2012/13 and the failure to provide Mr Visockas with an interpreter contrary to Article 2 of EU Directive 2010/64. ("**the Directives**")

6. In Mr Visockas' notice of appeal, the relief sought is that he should be provided with the decision or other legal document setting out the grounds on which the recovery of the debt said to be due from Mr Visockas to HMRC is based and that HMRC's request to the Lithuanian Tax Authorities to recover the debt should be annulled.

7. Neither parties suggested that the Tribunal in fact had any jurisdiction to consider, let alone annul, HMRC's request to the Lithuanian Tax Authorities to help them recover the amounts which they say are due from Mr Visockas. This appeal has therefore been treated as an appeal against the assessments to excise duty and the penalty rather than an appeal against HMRC's attempts to collect the amounts shown as due in those assessments.

8. Unfortunately, Mr Visockas' Lithuanian lawyer did not represent Mr Visockas at the hearing and, as a result, we did not hear full argument from Mr Visockas as to the applicability of the Directives referred to in his grounds of appeal and the consequences of any infringement of his rights under those Directives. We have however dealt with these issues based on the points made in the grounds of appeal and on the submissions made by Mr Elliott on behalf of HMRC.

9. In putting forward his case, Mr Visockas also sought to challenge the assessments on the basis that he was bringing the cigarettes to the UK for his own personal use and/or to make gifts.

10. Mr Visockas' appeals against the assessments have been made outside the statutory time limit. HMRC do not object to the late appeal. Given our finding (see below) that Mr Visockas did not receive the original notices of assessment and given that he acted promptly after becoming aware of the assessments, we grant permission for the appeals to be notified to the Tribunal out of time.

11. Sometime before the hearing, Mr Visockas was asked if he would like to have an interpreter at the hearing. No response was received to the Tribunal's letter. The day before the hearing, the Tribunal again asked Mr Visockas' lawyer whether Mr Visockas would require an interpreter and was informed that he would. Fortunately, the Tribunal was able to arrange for an interpreter to attend the hearing.

SEIZURE OF GOODS AND EXCISE DUTY/PENALTY ASSESSMENTS – THE LEGAL FRAMEWORK

12. Excise duty is payable on cigarettes imported into the United Kingdom (s.2 Tobacco Products Duty Act 1979).

13. The point at which duty becomes payable includes a situation where cigarettes are held for commercial purposes in the UK (Regulation 13 Excise Goods (Holding, Movement and Duty Point) Regulations 2010). Regulation 13 also provides that cigarettes are not held for commercial purposes if they are held by a private individual for that persons own use (including to make gifts).

14. If cigarettes which are liable to duty are brought into the UK without the duty being paid, they are liable to forfeiture (s.49 Customs & Excise Management Act 1979 ("**CEMA**")).

15. S.139 CEMA authorises the Border Force to seize any cigarettes which are liable to forfeiture. If the individual from whom the cigarettes are seized wishes to challenge the seizure, he has one month from the date of the seizure to notify HMRC that he wishes to do so (paragraph 3 of Schedule 3 CEMA).

16. If a notice contesting the seizure is given to HMRC, HMRC must start proceedings in the Magistrates Court or the High Court so that the court can determine whether the cigarettes were in fact liable to forfeiture (paragraph 6 of Schedule 3 CEMA).

17. If no notice is given to HMRC within the relevant time limit, the cigarettes are deemed "to have been duly condemned as forfeited" (paragraph 5 of Schedule 3 CEMA).

18. It is to be noted that it is only the High Court or the Magistrates Court which is given jurisdiction to consider any challenge to the seizure itself. No such jurisdiction is given to the Tribunal.

19. Separately from the seizure of the cigarettes, HMRC is given power to assess any excise duty in respect of the cigarettes which has not been paid. Generally speaking, the assessment to excise duty must be made within one year from the date on which HMRC became aware of the facts giving rise to the assessment and notice of the assessment must be given to the person who is assessed (s.12 FA 1994).

20. In addition to assessing the excise duty, a penalty is payable where a person is holding cigarettes on which duty should have been paid but has not been paid (paragraph 4 of Schedule 41).

21. Where a penalty is payable, HMRC must assess the penalty and notify the assessment to the relevant individual (paragraph 16 of Schedule 41).

22. The standard amount of the penalty where the act is not deliberate is 30% of the amount of excise duty (paragraph 6B of Schedule 41) but this may be reduced by HMRC to reflect any disclosure made. Where the disclosure is prompted, the penalty cannot be less than 20% of the amount of the excise duty (paragraphs 12 and 13 of Schedule 41). In this case, HMRC have reduced the penalty from 30% to 21% of the excise duty.

23. No penalty is payable if the individual has a reasonable excuse for his actions (paragraph 20 of Schedule 41).

24. HMRC may make further reductions to the amount of the penalty if they believe that there were special circumstances which would make it right to do so. The Tribunal may only interfere with HMRC's decision if it is "flawed" in a judicial review sense (paragraph 14 of Schedule 41).

PERSONAL USE

25. Although it was not mentioned in his grounds of appeal, in his evidence to the Tribunal, Mr Visockas stated that he was bringing the cigarettes to the UK for his personal use and/or to make gifts.

26. It is now well established that, in considering an appeal against an assessment to excise duty or a penalty assessment, the Tribunal has no jurisdiction to consider whether the cigarettes were in fact being brought to the UK for personal use. Instead, the only way Mr Visockas could have established that the cigarettes were for personal use would have been to send a notice to HMRC within 30 days of the seizure and for this then to be determined in proceedings before the Magistrates Court or the High Court.

27. As he did not do so, the cigarettes are deemed to have been "duly condemned as forfeited" (paragraph 5 of Schedule 3 CEMA) and, in considering the appeal against the assessment to excise duty and the penalty, the Tribunal must assume that the cigarettes were being imported for commercial purposes as, if they were not, they would not have been liable to forfeiture.

28. This has been confirmed a number of times by the Upper Tribunal. Having considered the decision of the Court of Appeal *in Jones v. Revenue & Customs Commissioners* [2011] EWCA Civ 824, the Upper Tribunal concluded in *Race v. Revenue & Customs Commissioners* [2014] UKUT 331 (TCC) [at 26] that:

> "*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 a result of the statutory deeming, it follows that, having been bought in a member state and then imported by Mr and Mrs Jones, they were not held by the taxpayers for their own personal use in a way which exempted the goods from duty."

29. The Upper Tribunal went on to say [at 33] that:

> "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* and applied in *EBT*. 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 is no different from that raised by Mr and Mrs Jones."

30. The Upper Tribunal in *Race* confirmed [at 39] that the same principles apply to an appeal against a penalty assessment:

> "The First-Tier Tribunal could no more re-determine, in the appeal against the penalty assessment, a factual issue which a necessary consequence of the statutory deeming provision than it could re-determine a factual issue decided by a court in condemnation proceedings. The issues of import for personal use, assuming purchase in a member state, has been determined by the statutory deeming."

31. Although the extent of this statutory deeming in relation to an appeal against penalties was doubted by the First-Tier Tribunal in *Van Driessche v. Revenue & Customs Commissioners* [2016] UK FTT 441 (TC) [at 105], the comments of the Upper Tribunal in *Race* were recently approved by the Upper Tribunal in *Revenue & Customs Commissioners v. Jacobson* [2018] UKUT 18 (TCC) where the Tribunal said 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."

32. As Mr Visockas did not challenge the seizure of the cigarettes by sending a notice to HMRC within one month of the seizure in accordance with paragraph 3 of Schedule 3 CEMA the cigarettes are deemed to have been duly condemned as forfeited and it is not open to Mr Visockas to argue before the Tribunal that he was importing them for his own personal use. Instead, we must assume that they were indeed liable to forfeiture as they were being imported for commercial use.

THE EVIDENCE AND THE FACTS

33. Before we go on to consider the remaining issues, we need to set out the key facts.

34. The evidence before us consisted of a bundle of documents and correspondence produced by HMRC. We also heard oral evidence from Colette Connor, the Border Force officer who interviewed Mr Visockas at Luton Airport, Sean Reed, the HMRC officer who issued the excise duty and penalty assessments and from Mr Visockas himself.

35. Ms Connor's evidence was relatively straightforward although there were one or two matters which she could not recollect. Mr Reed's evidence was also straightforward and we have no hesitation in accepting what they told us.

36. We found some parts of Mr Visockas' evidence difficult to reconcile with the other evidence before us. However, this mostly related to the question as to whether the cigarettes were being brought to the UK for personal use which, as a result of the deeming mentioned [at 32] above is not something in respect of which we need to make any finding of fact. Apart from this, we have accepted the evidence which Mr Visockas gave.

37. Based on all the evidence before us, our findings of fact are set out below,

38. Mr Visockas flew from Lithuania to Luton Airport on 16 November 2016. He was carrying with him 16,400 cigarettes.

39. Mr Visockas was stopped in the Blue Channel at Luton Airport along with three other individuals from the same flight who were carrying similar amounts of cigarettes of the same brand. The boarding passes of all four individuals had the same booking reference number.

40. Mr Visockas was holding a return ticket to Lithuania for a flight later the same day.

41. The officer who stopped Mr Visockas was Ms Connor. Mr Visockas indicated to her that his English was not all that good.

42. Ms Connor asked Mr Visockas some basic questions and then searched his luggage, finding the cigarettes.

43. Ms Connor gave Mr Visockas a copy of what is referred to by the Border Force as the "commerciality statement" a Lithuanian. This states that cigarettes may be imported for personal use, that the individual can stay for an interview to discuss whether the cigarettes are in fact for personal use or for commercial purposes and that, if the individual does not do so, the cigarettes may be seized.

44. Mr Visockas read the commerciality statement and confirmed he understood it but declined to stay for an interview. As a result, Ms Connor seized the cigarettes and issued Mr Visockas with a seizure information notice, a warning letter about the seized goods (warning that HMRC may issue assessments for excise duty and a penalty), again a general notice about what can and cannot be brought to the UK without payment of duty and notice 12A which explains how an individual may challenge the seizure of goods.

45. Mr Visockas then returned to Lithuania later the same day using his return ticket.

46. Mr Visockas did not send a notice to HMRC challenging the seizure of the cigarettes within 30 days of the seizure in accordance with paragraph 3 of Schedule 3 of CEMA.

47. On 4 September 2017 Mr Reed wrote to Mr Visockas to let him know that HMRC were proposing to issue assessments for excise duty and for a penalty in relation to the cigarettes which had been seized. This letter requested a response by 5 October 2017. However, the letter was not received by Mr Visockas so no response was received.

48. Mr Reed therefore issued an excise duty assessment and a penalty assessment and put notice of these assessments to Mr Visockas on 14 October 2017. These documents were also not received by Mr Visockas.

49. The reason we have concluded that the September and October letters were not received is that Mr Visockas and his lawyer have been consistent throughout that they had been given no information about the amounts said to be due. Mr Visockas' lawyer wrote to HMRC on more than one occasion complaining about this. Copies of the notices of assessment were not attached to the notices of appeal sent to the Tribunal and were only provided to the Tribunal in October 2018 after copies had been supplied to Mr Visockas by HMRC.

50. At some point prior to 23 April 2018, HMRC requested the Lithuanian Tax Authorities to collect the unpaid excise duty and penalty from Mr Visockas. The Lithuanian Tax Authority contacted Mr Visockas on 2 May 2018.

51. Mr Visockas called HMRC on 23 May 2018 to find out what the amounts said to be due related to and how he could challenge them.

52. In July 2018, Mr Visockas' lawyer in Lithuania sent a notice of appeal to the Tribunal. However this was returned as copies of the decisions being appealed against (ie the notices of assessment) were not attached to the notice of appeal.

53. On 31 July 2018, Mr Visockas' lawyer therefore wrote to HMRC complaining that Mr Visockas had not received copies of the relevant decisions.

54. Mr Visockas' lawyer sent a further notice of appeal to the Tribunal on 6 September 2018. This attached the documentation from the Lithuanian Tax Authority setting out the request from HMRC for them to collect the tax and penalty which HMRC believed to be due. It did not however attach copies of the excise duty and penalty assessments.

55. On 7 September 2018, Mr Visockas' lawyer sent a further letter of complaint to HMRC.

56. HMRC sent Mr Visockas copies of the notices of assessment on 19 September 2018.

57. On 8 October 2018, HMRC's complaints team wrote to Mr Visockas enclosing a copy of their response to his lawyer which they were not able to send direct as they did not have authority to correspond with Mr Visockas'. lawyer. This response also enclosed copies of the notices of assessment.

58. Mr Visockas must have received one or both of these letters as it is apparent from the Tribunal file that, by 22 October 2018, Mr Visockas' lawyer was in possession of the notices of assessment as she provided them to the Tribunal on that date.

ISSUES FOR THE TRIBUNAL

59. Having explained why the Tribunal has no jurisdiction to consider whether the cigarettes were being imported for personal use, we must now deal with the grounds of the appeal put forward by Mr Visockas. As mentioned above, these are based on the alleged infringement of his rights under two EU Directives. We will need to decide;

1. Whether the Directives confer directly enforceable rights on Mr Visockas;
2. If so, whether these are criminal proceedings to which the Directives apply;
3. If they are, whether the tribunal has jurisdiction to consider any breaches of Mr Visockas' rights;
4. Whether there has in fact been any breach of his rights; and
5. If so, the consequences of any such breach.

60. Although it was not a point raised specifically by Mr Visockas, we should also consider whether Mr Visockas was given the required notice of the assessments given our finding that the original notices were not received by him.

61. In addition we need to decide whether, in the light of Mr Visockas' explanation for his actions, he has a reasonable excuse for bringing the cigarettes into the UK without paying excise duty.

62. Finally, we need to determine whether HMRC's decision that there were no special circumstances justifying a further reduction in the amount of the penalty is flawed (in a judicial review sense) and, if so, whether we should allow any such reduction.

THE EU DIRECTIVES

63. By way of background, the two Directives in question form part of a programme of measures adopted by the European Council in order to implement the principle of mutual recognition of decisions in criminal matters amongst member states.

64. It was recognised that this requires measures to be applied in all member states which safeguard the rights of individuals who are suspected or accused of criminal matters. The Directives record that these rights are based on Article 6 of the European Convention for the Protection of Human Rights.

65. The first directive relied on by Mr Visockas is Directive 2010/64/EU. The key provisions are as follows:

> **"Article 1**
>
> **Subject matter and scope**
>
> 1. This directive lays down rules concerning the right to interpretation and translation in criminal proceedings and proceedings for the execution of a European Arrest Warrant.
>
> 2. The right referred to in paragraph 1 shall apply to persons from the time that they are made aware by the competent authorities of a member state, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether they have committed the offence, including, where applicable, sentencing and the resolution of any appeal.
>
> 3. Where the law of a member state provides for the imposition of a sanction regarding minor offences by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed to such a court, this directive shall apply only to the proceedings before that court following such an appeal."
>
> **"Article 2**
>
> **Right to interpretation**

1. Member states shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings

…

4. Member states shall ensure that a procedure or mechanism is in place to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter."

"Article 3

Right to translation of essential documents

1. Member states shall ensure that suspected or accused persons who do not understand the language of the criminal proceedings concerned are, within a reasonable period of time, provided with a written translation of all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings.

2. Essential documents should include any decision depriving a person of his liberty, any charge or indictment, and any judgment".

66. The second directive relied on by Mr Visockas is Directive 2012/13 EU which relates to an individual's right to information in criminal proceedings. The key provisions are as follows:

"Article 2

Scope

1. This directive applies from the time persons are made aware by the competent authorities of a member state that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the criminal offence, including, where applicable sentencing and the resolution of any appeal.

2. Where the law of a member state provides for the imposition of a sanction regarding minor offences by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed to such a court, this directive shall apply only to the proceedings before that court, following such an appeal."

"Article 6

Right to information about the accusation

1. Member states shall ensure that suspects or accused persons are provided with information about the criminal act that they are suspected or accused of having committed. That information shall be provided promptly and in such detail as is necessary to safeguard to the fairness of the proceedings and the effective exercise of the right to defence.

…

3. Member states shall ensure that, at the latest on submission of the merits of the accusation to a court, detailed information is provided on the accusation, including the nature and legal classification of the criminal offence, as well as the nature of participation by the accused person."

67. Mr Visockas' complaints are that:

(1) At the time of his appeal to the Tribunal, he had not been given any documents explaining the basis of the sums said to be due to HMRC; and

(2) He had not been provided with an interpreter. The grounds of appeal do not state the circumstances in which Mr Visockas believes that he should have been provided with an interpreter but, given that his only face to face interaction with the UK authorities was when he was stopped by the Border Force at Luton Airport, it is implicit that the allegation is that he should have been provided with an interpreter on that occasion.

Direct effect

68. Unlike an EU regulation, a directive normally has to be transposed into domestic law. However, where a directive is not transposed by a member state, it can in certain circumstances confer enforceable rights on an individual. The European Court of Justice said the following in *Becker* (1982) C-8/81 at [1]:

> "It would be incompatible with the binding effect which Article 189 of the EEC Treaty ascribes to Directives to exclude in principle the possibility of the obligation imposed by it being relied upon by persons concerned. Particularly in cases in which the Community authorities have, by means of a directive, placed member states under a duty to adopt a certain course of action, the effectiveness of such a measure would be diminished if persons were prevented from relying upon it in proceedings before a court and national courts were prevented from taking it into consideration as an element of Community law. Consequently, a member state which has not adopted the implementing measures required by the Directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the Directive entails. Thus, wherever the provisions of a Directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the Directive or in so far as the provisions define rights which individuals are able to assert against the State."

69. The European Court has clearly assumed in a number of cases that the Directives in question are capable of having direct effect – see for example *Staatsanwaltschaft Offenburg* (2020) C-615/18.

70. There therefore seems little doubt that these Directives do confer enforceable rights on Mr Visockas. Mr Elliott did not attempt to argue to the contrary.

Criminal proceedings

71. The Directives only apply to "criminal proceedings". However, the Directives are designed to implement the protections conferred by the European Convention on Human Rights (see the relevant provisions of the Preambles). The definition of what is "criminal" must therefore be based on the jurisprudence of the European Court of Human Rights.

72. In *Jussila v Finland* ECtHR (Application 73053/01) the Court held that a 10% VAT default surcharge was criminal for the purposes of Article 6 of the European Convention on Human Rights. The Court stated [at 31] that:

> "It is enough for the offence in question by its nature to be regarded as criminal or that the offence renders a person liable to a penalty which by its nature and degree of severity belongs in the general criminal sphere (see *Ezeh* and *Connors*, cited above, paragraph 86). The relative lack of seriousness of the

> penalty cannot divest an offence of its inherently criminal character (see *Öztürk v. Germany*, judgment of 21 February 1984, Series A no. 73, paragraph 54; also *Lutz v. Germany*, judgment of 25 August 1987, Series A no. 123, paragraph 55)."

73. In relation to the particular penalty, the Court concluded [at 38] that:

> "the tax surcharges were not intended as pecuniary compensation for damage but as a punishment to deter re-offending. It may therefore be concluded that the surcharges were imposed by a rule whose purpose was deterrent and punitive. Without more, the Court considers that this establishes the criminal nature of the offence. The minor nature of the penalty renders this case different from *Janosevic* and *Bendenoun* as regards the third *Engel* criterion but does not remove the matter from the scope of Article 6. Hence, Article 6 applies under its criminal head notwithstanding the minor nature of the tax surcharge."

74. The sanctions imposed on Mr Visockas are as follows:

(1) The cigarettes have been seized.

(2) He has been assessed to excise duty in respect of the cigarettes.

(3) He has been charged a wrong-doing penalty for possessing or carrying goods in the UK on which excise duty is payable at a time when the duty has not been paid.

75. Based on the approach in *Jussila*, there can be little doubt that any proceedings relating to the seizure of the cigarettes and the liability for a penalty are "criminal" for the purposes of the European Convention on Human Rights (and therefore for the purposes of the Directives) as these sanctions are clearly intended to be deterrent and punitive. Any proceedings relating to the assessment to excise duty are not, however, criminal proceedings as this relates only to the recovery of tax which it is said is lawfully due and has no element of deterrence or punishment.

Can the Tribunal take account of any infringements on Mr Visockas' right at the time of the seizure

76. Although Mr Elliott did not make any submissions on this point, it is implicit in Mr Visockas' grounds of appeal that he believes his rights under the Directives were infringed at the time of the seizure. We therefore need to consider whether the statutory deeming discussed [at 26-32] above prevents the Tribunal from taking into account any irregularities in relation to the seizure itself.

77. Paragraph 5 of Schedule 3 of CEMA deems the cigarettes "to have been duly condemned as forfeited".

78. In an appeal against an assessment to excise duty or a penalty, the Tribunal cannot go behind this deeming either based on the facts (for example whether the cigarettes were for personal use – *Jones/Race*) or on the basis of the law, including EU law (for example whether an excise duty point had arisen – *Denley v HMRC* [2017] UKUT 340 (TCC) [at 47(c)-(e)]).

79. Any infringement of the rights conferred on Mr Visockas by the Directives, however, falls within a different category. It has nothing to do with whether the conditions for forfeiture/seizure of the cigarettes have been satisfied. Instead, the question is whether Mr Visockas, as someone who is accused of a criminal offence, has been treated fairly by ensuring that he understands the allegations against him and his rights and so is able to defend himself. On the face of it, this is not covered by the deeming in paragraph 5 of Schedule 3 CEMA.

80. However, it is clear that Parliament has decided that the Tribunal should have no jurisdiction in relation to the seizure. The only remedy for this is for the owner of the goods to make a claim to HMRC who must then start condemnation proceedings either in the Magistrates Court or the High Court. It follows from this that any objection to the seizure, whether on the basis that the goods were not liable to forfeiture or that there has been some sort of procedural irregularity should be decided by that court and not by the Tribunal.

81. The fact that there is a 30 day time limit for giving a notice of claim to HMRC is no objection to this, even if the result of the infringement of the Directives is that the owner of the goods is unaware of the right to challenge the seizure or the relevant time limit, as the European Court of Justice has made it clear that the appropriate remedy is to put the individual whose rights were infringed into a position which enables him to defend himself – see for example *Staatsanwaltschaft Offenburg* (2020) case C-615/18 [at 58]):

> "It is therefore crucial that a suspect or accused person whose right to be informed of the accusation has been breached is restored to his or her previous position. How that is achieved in systemic terms is of little relevance to EU law, so long as it is prompt and effective."

82. This might for example be achieved by allowing Mr Visockas to bring a challenge to the seizure outside the 30 day time limit.

83. The appeal to the Tribunal, however, relates to the assessment to excise duty and the penalty assessment. Although those assessments are to some extent based on the question as to whether the cigarettes were liable to forfeiture, where the deeming in paragraph 5 of Schedule 3 CEMA applies, it is not in our view legitimate for the Tribunal to consider whether there has been any procedural irregularity in the seizure process any more than it is able to consider legal or factual questions as to whether or not the goods were liable to forfeiture in the first place. The reason for this is that paragraph 5 requires the Tribunal to assume that the cigarettes have been "duly" condemned as forfeited.

84. The effect of this is that Mr Visokas' appeal against the excise duty assessment cannot succeed on the basis that, as submitted by Mr Elliott, his appeal against the excise duty assessment itself does not constitute "criminal proceedings" and so the rights conferred by the directives do not apply.

85. Mr Elliott accepts that, on the basis of the decision in *Jussila*, the appeal against the penalty assessment is capable of constituting criminal proceedings. However, he submits that, if so, the penalty constitutes a sanction regarding a minor offence imposed by an authority other than a court having jurisdiction in criminal matters and so falls within Article 1(3) of Directive 2010/64/EU and Article 2(2) of Directive 2012/13/EU. The result of this is that the rights conferred by the directives only apply to the appeal to the Tribunal.

86. Assuming this is right, Mr Elliott argues that Mr Visockas' rights in relation to the proceedings before the Tribunal have not been infringed as he has received full information about the reasons why the penalty has been charged which are contained in the notice of the penalty assessment and HMRC's statement of case, thus satisfying Article 6 of Directive 2012/13/EU. In addition, he has had the benefit of an interpreter at the hearing in accordance with his rights under Article 2 of Directive 2010/64/EU.

87. Although a wrongdoing penalty under paragraph 4 of Schedule 41 is capable of being a sanction for something other than a minor offence (for example if HMRC were to contend that the acts were both deliberate and concealed), we agree that, where the wrongdoing is accepted by HMRC not to be deliberate, this does indeed fall into the category of "the imposition of a sanction regarding minor offences by an authority other than a court having jurisdiction in criminal matters" and that, therefore, the protections are limited to the

proceedings before the Tribunal. We also agree with Mr Elliott that, in relation to these proceedings, Mr Visockas' rights have not been infringed for the reasons he gives.

88. We note that Mr Visockas did not complain of any infringement of his right to translation of essential documents in accordance with Article 3 of Directive 2010/64/EU. We infer that this was because, as he accepted in his evidence at the hearing, his lawyer in Lithuania was able to provide any necessary translation. The preamble to the Directive makes it clear that its purpose is to ensure that an individual is able to fully exercise their right of defence and to safeguard the fairness of the proceedings. In the circumstances of this case, we are satisfied that this has been achieved.

89. Although it is not necessary for us to do so given the conclusion which we have come to, it may be helpful given that, as far as we are aware, the application of these Directives to the seizure of goods and any subsequent assessments to excise duty and penalty has not previously been raised, if we make some comments about the extent to which the Border Force procedures comply with the rights under those Directives.

90. Ms Connor gave evidence that she was satisfied when asking her initial basic questions that Mr Visockas said he understood enough English to be able to answer those questions. She said that had she had doubts about this, she would have arranged for an interpreter to be present. She told us that the Border Force had access to interpreters for this purpose.

91. It seems to us that this may well be sufficient to comply with the obligation in Article 2(4) of Directive 2010/64/EU to have in place a procedure for determining whether an interpreter is needed.

92. The Border Force had the commerciality statement available in Mr Visockas' own language. The interpreter at the hearing criticised this document as being a poor translation of the English version and potentially difficult to understand although she accepted that it conveyed the general sense of the statement. However it appears that some words were not translated. For example the interpreter told us that the words "this is a civil matter and not a criminal one" did not appear in the Lithuanian translation which instead simply confirmed "you are not under arrest and are free to leave at any time". Whilst this does not necessarily give rise to any infringement of Mr Visockas' rights, it does demonstrate that the Border Force should perhaps conduct a review of the translation of any relevant documents to check that the translations are accurate and make sense.

93. Ms Connor also gave evidence that, had Mr Visockas elected to stay for an interview, an interpreter would, at that stage, have been provided. Again, this would satisfy any rights which Mr Visockas may have under Directive 2010/64/EU.

94. One area where it appears there is room for improvement is ensuring that an individual such as Mr Visockas clearly understands the implications of any seizure. Mr Visockas' evidence was that he was left with the clear impression following the seizure that if he just left, everything would be fine. Of course, this was not the case as, almost a year later, HMRC produced assessments for the excise duty and for a penalty. By this time, Mr Visockas could not put forward the argument that the cigarettes were for personal use as he should have done that within 30 days of the seizure.

95. Given the number of cases which come before the Tribunal where the Appellant wishes to argue that excise goods have been brought to the UK for personal use but then find out that the Tribunal has no jurisdiction to consider this point, this is clearly a wider problem and not just one which affects individuals who may not have a good understanding of English. Much more needs to be done to make sure that people understand that they must challenge the seizure within 30 days if they believe that the good were not liable to forfeiture (for

example because they were for personal use) and that, if they do not do so, they may not be able to challenge any subsequent assessment to excise duty or a penalty. There could for example be a warning included in the "warning letter about seized goods" (BOR162). For those individuals who do not have a good understanding of English, it may well be that, in order to comply with the requirements of Article 3 of Directive 2010/64/EU, some of the documents provided at the time of the seizure should be available in the individual's own language, particularly those documents which set out the appeal rights and the possibility of further action being taken.

REASONABLE EXCUSE

96. Mr Elliott reminded the Tribunal that Mr Visockas has the burden of showing that he has a reasonable excuse for his actions.

97. The test is objective. The question is what a responsible individual Mr Visockas' position would have done in all of the circumstances.

98. Mr Visockas told us that he did not realise that he was liable to pay duty on the cigarettes. Indeed, he did not think about whether he might be committing an offence. He also said in his evidence that he did not know what the different customs channels at the airport were for and did not think to ask anybody.

99. Mr Elliott does not accept this. Indeed he suggests that Mr Visockas was well aware that the cigarettes were subject to duty.

100. Although Mr Visockas stated in his evidence that he was planning to come to the UK for 6-12 months and that he smoked 40 cigarettes a day, Mr Elliott suggested that this would still not justify by importing 16,400 cigarettes which, at the maximum rate of consumption by Mr Visockas would last at least 14 months.

101. In any event, Mr Elliott does not find Mr Visockas' statement that he intended to remain in the UK for 6-12 months credible given that he held a return ticket for the same day.

102. Mr Elliott also drew attention to the fact that there were three other individuals who held similar amounts of the same cigarettes and who had been booked on the same flight using the same booking reference as Mr Visockas. All of this, he suggests, points to organised smuggling.

103. Mr Elliott does however accept that HMRC have not alleged dishonesty and cannot therefore advance a case which is based on dishonesty. However, even on the basis that Mr Visockas was, at best, naïve, Mr Elliott submits that this does not constitute a reasonable excuse for importing the cigarettes without paying any duty. Mr Elliott drew attention to the fact that, by his own admission, Mr Visockas stated that he did not know whether any duty was payable. He simply did not think about it. He also did not ask for any assistance in deciding whether to go through the Blue Channel, the Red Channel or the Green Channel.

104. We agree with Mr Elliott that this is not how a responsible individual intending to comply with their obligations would act when carrying 16,400 cigarettes. It should be expected that somebody carrying that many cigarettes would at least think about whether they were permitted to bring so many cigarettes into the country and would take some action to check the position. They certainly would think twice before deciding which customs channel to go through.

105. Mr Visockas does not therefore in our view have a reasonable excuse for bringing the cigarettes into the UK without paying any duty.

HMRC'S REDUCTION FOR DISCLOSURE

106. For completeness, although it was not a point raised by Mr Visockas, Mr Elliott referred to the reduction allowed by HMRC for Mr Visockas' disclosure.

107. As mentioned above, the maximum penalty is 30% of the excise duty. The minimum penalty is 20%. HMRC have reduced the penalty from 30% to 21%. The reason they have not allowed a full reduction is that Mr Visockas did not admit to any wrongdoing.

108. In our view, the reduction allowed by HMRC is reasonable. Mr Visockas, in his evidence to the Tribunal, provided further explanations about the background to his import of the cigarettes. For example, he argued that that they were being brought to the UK for personal use. However, despite being invited to do so, he declined to stay and explain this to the Border Force.

109. HMRC's decision as to the amount of reduction is therefore upheld.

SPECIAL CIRCUMSTANCES

110. HMRC confirmed in their statement of case that they have considered whether there were are any special circumstances which would justify a further reduction in the amount of the penalty but have decided that there are not. The statement of case explained in detail all of the background to this matter including the two EU Directives.

111. The Tribunal can only interfere with HMRC's decision in relation to special circumstances if that decision was "flawed" in a judicial review sense. This means either that HMRC have not taken into account all of the relevant factors, have considered irrelevant factors or have reached a decision which no reasonable officer of HMRC could have reached in the circumstances.

112. It is clear to us that HMRC have taken all the relevant factors (recorded in the statement of case) into account. We cannot say that their decision is one which is outside the bounds of reasonableness in the circumstances. The Tribunal does not therefore have jurisdiction to reconsider this aspect. Even if we could, we do not believe that any further reduction beyond that allowed by HMRC would be justified.

WAS MR VISOCKAS GIVEN NOTICE OF THE ASSESSMENTS?

113. Section 12(1A) FA 1994 requires HMRC not only to assess the amount of any excise duty but also to notify that amount to the person from whom it is due (in this case Mr Visockas).

114. Similarly, paragraph 16 of Schedule 41 requires HMRC to assess a penalty and to notify the person who is liable of the assessment.

115. We have found that as a fact Mr Visockas did not receive the original notices of assessment which were issued in October 2017.

116. Mr Elliott however argues that, even if Mr Visockas did not receive the assessments, as soon as HMRC became aware of the problem they dealt with it.

117. Mr Elliott suggests that it is not clear from the brief summary of the call made by Mr Visockas on 23 May 2018 that he had not in fact received the notices of assessment. This only became clear to HMRC when his lawyer wrote to HMRC on 31 July 2018, the letter being received by HMRC in Shipley on 16 August 2018. HMRC then sent Mr Visockas further copies of the assessments on 19 September 2018 and again on 8 October 2018. It is apparent Mr Visockas received one or both of these letters as his lawyer sent copies of the assessments to the Tribunal on 22 October 2018.

118. The authorities relating to the notification of assessments were considered in detail by the Tribunal recently in *Kothari and Others v. HMRC* [2019] UKFTT 423 (TC). In summary, the Tribunal concluded [at 83-85] that, although there is no specific time limit within which notice of an assessment must be given to the taxpayer, there must be some proximity or nexus between the making of the assessment and the giving of the notice. Although we are not bound to follow the decision in that case, we agree with the Tribunal's reasoning and with its conclusion.

119. In that case, a delay of over three years between making the assessment and giving the notice was too long. In this case however, the notice was given less than a year after the assessments were made and there were good reasons for the delay. HMRC posted the assessments to the address given to them by Mr Visockas. They could not have known that the assessments had not been received.

120. Unlike in *Kothari*, HMRC followed up reasonably promptly by asking the Lithuanian Tax Authorities to try and collect the excise duty and the penalty in April 2018. Although this was approximately six months after the assessments were issued, we do not think it is unreasonable for HMRC to wait this long before trying to collect the tax given that Mr Visockas was based abroad and, given the language barrier, might well take longer to respond than somebody in the UK.

121. We accept that Mr Visockas' call on 23 May 2018 would not necessarily have alerted HMRC to the fact that Mr Visockas had not received the assessments. It was only when they received his lawyer's letter in the middle of August 2018 that this became clear. The delay of a further month before sending replacement notices of assessment to Mr Visockas is not, in our view, unreasonable in the circumstances.

122. Although the fact that the notices were only served some time after the assessments were made meant that Mr Visockas would inevitably be out of time in submitting any appeal against the assessments, the fact that both HMRC and the Tribunal have power to permit the late notification of appeals means that this is not a material factor in our decision on this point. Indeed, HMRC have not objected to the appeals being notified late and the Tribunal has given permission for the late notification of the appeals.

123. In the circumstances of this particular case, we are therefore satisfied that Mr Visockas was given valid notice of the assessments in September/October 2018.

DECISION

124. The Tribunal does not have jurisdiction to consider whether the cigarettes were being imported for personal use.

125. The Tribunal also does not have jurisdiction to consider whether Mr Visockas' rights under the two Directives were infringed at the time of the seizure of the cigarettes.

126. The appeal against the assessment of excise duty does not represent criminal proceedings and so the Directives do not apply to that appeal.

127. Although the two Directives apply to the appeal against the penalty assessment, Mr Visockas' rights only relate to the proceedings before the Tribunal and his rights were not infringed in that respect.

128. Mr Visockas was given valid notice of the assessments in September or October 2018.

129. Mr Visockas does not have a reasonable excuse for his actions.

130. The reduction in the amount of the penalty allowed by HMRC is reasonable and the Tribunal does not consider that any further reduction is appropriate.

131. The Tribunal does not have jurisdiction to interfere with HMRC's decision that there were no special circumstances which would justify any further reduction.

132. Mr Visockas' appeal is therefore dismissed and the assessments to excise duty and to the penalty are upheld.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

133. 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.

ROBIN VOS
TRIBUNAL JUDGE

RELEASE DATE: 02 APRIL 2020