[2022] UKFTT 86 (TC)

TC 08417

EXCISE DUTY – assessments for duty and penalty in relation to excise goods seized from the appellant – Jones and Race considered – goods deemed to be for commercial use – penalty – no reasonable excuse – no special circumstances – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/03499

BETWEEN

GARRY POUGHER **Appellant**

-and-

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL
DR CAROLINE SMALL

Hearing conducted in public remotely by video on 17 February 2022

The Appellant in person

Ross Birkbeck counsel instructed by the General Counsel and Solicitor to HM Revenue & Customs for the Respondents

DECISION

INTRODUCTION

1. The issue in this case is whether the appellant is liable to Excise Duty of £1,759 and a wrongdoing penalty of £351 in relation to 7.5kgs of hand rolling tobacco which were seized by UK Border Force from the appellant on 15 December 2018 at Coquelles, France (the "**goods**").

EVIDENCE AND FINDINGS OF FACT

2. The appellant gave oral evidence. Officer Joanne Lyttleton gave oral evidence on behalf of HMRC. We were provided with a bundle of documents which included, inter alia, copies of the notebooks of the two Border Force officers, Officer Dryland and Officer Harper who effected the seizure.

3. From the evidence we find the following facts:

(1) On 15 December 2018 the coach on which the appellant was travelling, was stopped at Inbound and Tourist Controls, Coquelles in France.

(2) He was interviewed by Officers Dryland and Harper. He was asked to accompany the officers to an interview room having identified as his a green holdall which he took to the interview. He told them that he was carrying about 150 pouches of hand rolling tobacco and that he had also bought some beer, prosecco and wine. He said that the goods were for himself and his family and friends who had given him money for those goods and that he had bought no cigarettes. He was read the commerciality statement.

(3) The notebooks go on to record that he said that he had no special needs; the goods belonged to him for personal use; he had bought goods for his girlfriend and his brother who was going to pay him £690 for 50 bags and that the total cost of the goods was £1,020 which he had paid in cash; he smokes 40 rollups a day and only smokes Turner brand tobacco; he earns £1,700 a month after tax and pays £250 for his mortgage; his partner is not working but receives child benefits and has two children; he has savings of £3,000; he smokes two to three pouches of hand rolling tobacco a week and used his savings to pay for the goods; he had no smoking materials on him but was pinching from his mates.

(4) Following the interviews, the goods were seized. The appellant was issued with four documents. BOR156 (Seizure information notice) and BOR 162 (Warning letter about the seized goods). He signed both of these documents. He was also given Notices 1 and 12 A (What you can do if things are seized).

(5) Paragraph 2.1 of Notice 12 A clearly states "if you do not challenge the legality of the seizure by submitting a notice of claim, you will not be able to challenge it later at the tribunal". It also states, at paragraph 3.4, that any challenge must be made by a claim submitted within one calendar month of the date of seizure.

(6) The appellant did not challenge the seizure in the magistrates court.

(7) On 28 October 2019 HMRC wrote to the appellant telling him that they were considering issuing an excise duty assessment for £1,759 and a penalty assessment for £351. Included with that letter were copies of a variety of HMRC explanatory documents. The appellant responded

to that letter by way of a letter dated 5 November 2019 in which he explained that the goods were for his personal use and for his partner and brother; he had freely handed over his bag to be searched; he had found the experience upsetting; he had been saving for many months to purchase the tobacco and that he could not afford to pay the duty or a penalty.

(8) On 22 November 2019 HMRC issued an excise duty assessment in the amount of £1,759 and an exercise wrongdoing penalty assessment in the amount of £351

(9) The appellant responded to this by way of a letter dated 3 November 2019 in which he asked for a formal review and appeal against the seizure. He explained that he was not in a position to appeal the decision to seize the goods and could not go to court since he could not afford to take time off work nor the expense of travelling to court. He was not aware that if he did not appeal he would be left with paying even more money and this was never explained properly in HMRC's letter.

(10) Following further correspondence, on 14 August 2020, HMRC issued their review conclusion letter which summarised their position, considered the reduction made to the penalty, mentioned special circumstances, and concluded that the excise duty and penalty assessments in the amounts set out above were upheld. On 28 September 2020 the appellant submitted a notice of appeal which was acknowledged by the Tribunal on 15 December 2020.

THE LAW

4. The relevant legislation provides as follows:

(1) Excise duty is charged on tobacco product imported into the United Kingdom (Section 2 of the Tobacco Products Duty Act 1979). The United Kingdom includes Coquelles by virtue of The Channel Tunnel (International Arrangements) Order 1993.

(2) HMRC can, by regulations, fix the point at which duty becomes chargeable (Section 1 of the Finance (No. 2) Act 1992).

(3) The relevant regulations provide that

(a) duty is chargeable on tobacco held for a commercial purpose in the UK

(b) tobacco brought into the UK by a private individual, who has bought it duty paid in another Member State for his or her own use, is not held for a commercial purpose (and so no duty is chargeable on it)

(c) the duty point for tobacco held for a commercial purpose is the time of importation.

(The Excise Goods (Holding Movement and Duty Point) Regulations 2010, Regulation 13).

(4) Section 49 of the Customs and Excise Management Act 1979 ("**CEMA**") provides that goods imported without payment of duty are liable to forfeiture.

(5) Section 139 of CEMA provides that anything liable to forfeiture can be seized by HMRC.

(6) That section also introduces Schedule 3 to CEMA which, in essence, provides that a person whose goods have been seized can challenge the seizure, but only if he does so in the proper form within the one month time limit. Then, the goods can only be forfeited under an

order of the court in condemnation proceedings. If the person fails to serve notice, then there is a statutory deeming under which the goods are deemed "to have been duly condemned as forfeited".

(7) Where it appears to HMRC that an amount has become due by way of excise duty from a person, that amount can be ascertained by HMRC who can then assess that person to that amount of duty (Section 12(1A) of the Finance Act 1994).

(8) A person who is assessed to duty has a right of appeal to this Tribunal (Section 16 of the Finance Act 1994).

(9) A penalty is payable by person who has failed to pay excise duty in these circumstances. The provisions dealing with the penalty are set out in Schedule 41 Finance Act 2008 ("**FA 2008**"). The penalty is calculated as a percentage of the potential lost duty, i.e. the unpaid excise duty in this case (see paragraphs 4, 5 and 6 of Schedule 41 FA 2008).

(10) In this case, the appellant was initially assessed to a penalty on the basis that the failure to pay the duty was deliberate. In such circumstances, the penalty is 70% of the unpaid duty. Where there has been disclosure of the failure, the penalty may be reduced. The amount of the reduction depends on the level of the penalty and whether the disclosure is prompted or unprompted. On review, the behaviour was subsequently "upgraded" to careless behaviour and the penalty reduced to £204.

(11) HMRC may also reduce the penalty if they consider that there are special circumstances. A reduction for special circumstances is not subject to a statutory minimum and can include a reduction to nil. The legislation states that "special circumstances" does not include the fact that someone is not able to pay the penalty (paragraph 14 of Schedule 41 FA 2008).

(12) A person who is assessed to a penalty has a right to appeal to this Tribunal (paragraph 17 of Schedule 41).

(13) Where an act or failure is not deliberate, a person is not liable to a penalty if there is a reasonable excuse for the act or failure. The legislation states that a lack of funds is not a reasonable excuse, unless attributable to events outside the person's control (paragraph 20 of Schedule 41 FA 2008).

Case law relevant to the legality of the seizure

5. The two leading cases which are relevant to whether this Tribunal has jurisdiction to consider the legality of the seizure in relation to the appeal are *HMRC v Jones and Jones* [2011] EWCA Civ 824 ("*Jones")* and *HMRC v Nicholas Race* [2014] UKUT 0331 (*"Race")*.

6. In *Jones,* Mr and Mrs Jones were stopped at Hull and large quantities of tobacco and alcohol were seized. Initially they challenged the legality of the seizure by issuing condemnation proceedings, but were subsequently advised by their solicitors to withdraw from those proceedings. They sought restoration of the car that had been seized along with the goods. The FTT made findings of fact that the goods were for personal use and allowed the restoration. The Upper Tribunal upheld this decision, and HMRC appealed to the Court of Appeal. The ground for this appeal was that the FTT were not entitled to make findings of fact inconsistent with the deemed forfeiture of the goods. It was bound by the deeming provisions that the goods were illegally imported for commercial use.

7. The Court of Appeal agreed. At paragraph 71 of their decision, Mummery LJ said as follows:

> "71. 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. In *Race*, Warren J had to consider whether *Jones* was restricted to restoration cases, or whether it was of more general application, and in particular, whether it applies to assessments for duty and penalties. He considered it to be of general application, and said, at paragraph 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 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. 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."

9. And again at paragraph 33 of that decision

> "Taking those factors in turn, I do not consider it to be arguable that *Jones* does not demonstrate the limits of the jurisdiction. 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".

10. The legal principles which these cases illustrate, and which are relevant to this appeal are:

(1) Goods are duly condemned as illegally imported if the appellant fails to invoke the Notice of Claim procedure to oppose condemnation (or, having so invoked that procedure, he subsequently withdraws from it).

(2) In these circumstances the goods are deemed to have been condemned as illegally imported goods (ie. held for a commercial purpose). And since they have been deemed to be held for a commercial purpose, the FTT cannot consider whether the goods were for the appellant's personal use.

(3) Nor can the FTT consider any facts which the appellant submits are relevant to any assertion that the goods were for personal use. I have no power to reopen the factual basis on which the goods were condemned.

(4) The foregoing principles apply to cases concerning restoration of the goods, to assessments for excise duty, and to assessments for penalties.

(5) Where an appellant complains of procedural unfairness, his remedy is judicial review. The FTT has no inherent power to review decisions of HMRC. (See *Race* at paragraph 35).

> "As to the second of the Judge's reasons, concerning procedural unfairness, it is clear that paragraphs 5 and 6 of Schedule 3 are Convention compliant. That is not to say that HMRC could escape the consequences of any unfairness on their part in relation to the application of those statutory provisions. The remedy for that sort of unfairness, however,

is judicial review, which itself gives a Convention-compliant remedy to a taxpayer alleging the sort of unfairness about which the Judge was concerned. The First-tier Tribunal has no inherent power to review decisions of HMRC; although it does have certain statutory powers in relation to certain decisions, it has no power to review, or to provide any remedy, in relation to procedural unfairness of the sort which concerned the Judge....."

The appellant's case

11. The appellant's grounds of appeal are that: the goods were his personal use; he cannot not understand why they had been confiscated from him as there were others on the coach who had bought the same amount of tobacco as him, yet were allowed to keep it; he was unfairly targeted; he now has to pay tax on tobacco which he never got to keep; he had told HMRC that he was not in a position to appeal and go to the court for the hearing as he could not afford it nor could he take time off work; he had lost all his money on purchasing the goods and could not now afford to pay the tax and fines to which he was being assessed; the purpose of the trip was to get himself and his partner's tobacco and wine which would have lasted them for months to come; he had saved money for months to be able to make the trip and to pay for the goods.

12. The respondents' case is that:

(1) This Tribunal is bound by the decision in *Jones* and *Race* and we must therefore disregard any submissions that the appeal should succeed on the basis that the goods were for personal use. This applies as much to the penalty as it does to the duty.

(2) None of the foregoing submissions made by the appellant comprise either a reasonable excuse or special circumstances.

DISCUSSION

Burden and standard of proof

13. HMRC have the burden of proving that they have issued valid in time duty and penalty assessments. If they have discharged that burden, it is for the appellant to show that he does not owe the duty or, as regards the penalty, has a reasonable excuse or that special circumstances apply. In both cases the standard of proof is the balance of probabilities.

14. We find that the excise duty assessment and the penalty assessment were valid in time assessments

The Excise Duty appeal

15. This Tribunal is bound by the decisions in *Jones* and *Race*. The appellant did not challenge the seizure of the goods in condemnation proceedings.

16. By failing to challenge the seizure, the goods are deemed to have been duly condemned and forfeited on the grounds that they have been illegally imported. In other words they are deemed to have been imported for a commercial purpose and not personal use.

17. We are therefore bound by *Race* to disregard the appellant's submission that his appeal against the duty assessment should succeed on the basis that the goods were for personal use.

18. The appellant's second submission which is applicable to the duty assessment is his claim that he was singled out. We deal with this at [43- 44] below.

The Penalty Appeal

19. As regards his appeal against the penalty assessment, the appellant's submission that the goods were for personal use is no more effective than in his appeal against the duty assessment. We cannot consider it.

20. As *Race* makes clear, there are other issues which are raised by an appeal against the penalty which the Tribunal can take into account.

21. These include reasonable excuse and special circumstances. In the context of special circumstances, we have also considered whether the penalty is disproportionate.

Reasonable excuse

22. The test we adopt in determining whether the appellant has a reasonable excuse is that set out in the *Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 234, in which Judge Medd QC said:

> "The test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?"

23. We remind ourselves that the legislation states that lack of funds is not a reasonable excuse unless attributable to events outside the person's control.

24. And so we cannot take into account the appellant's submission that he cannot afford to pay. Even if we could, he is submitting this in the context that he cannot afford to pay the penalty rather than he could not afford to buy duty paid tobacco in the UK in the first place. A lack of funds now cannot be relevant to the reason why he imported tobacco for commercial purposes in the first place.

25. Nor does the submission that he was singled out when others were not comprise a reasonable excuse.

26. Finally, the appellant submitted in oral evidence that he did not understand the process of challenging the seizure. We do not necessarily accept this evidence given that in correspondence, as evidenced above, he appeared to accept that he understood the procedure but did not follow it because it would have been too costly in time and money to attend the magistrates court. Mr Birkbeck's submitted that in any event ignorance of the law cannot be a reasonable excuse. We disagree with this as a general proposition (see paragraph 82 of the Upper Tribunal decision in *Christine Perrin* [2018] UKUT 156) but in the context of this appeal we do not think it was objectively reasonable for the appellant in his circumstances to have been ignorant of the requirement to challenge the seizure within a calendar month. He had been given Notice 12A following his interview, which makes the process expressly clear. Had he been in any doubt as to the meaning of the document, he had ample time to take advice. We are mindful of the appellant's financial position, but there is information online, and through

charities, which would have been accessible by him. But, as we have mentioned earlier, it seems that even if the appellant had accessed such information, he would still have chosen not to challenge the seizure because of the time and financial cost.

Special Circumstances

27. While "special circumstances" are not defined, the following extract from the Upper Tribunal decision in *Barry Edwards v HMRC* [2019] UKUT 131 *("**Edwards**")* sets out the correct test.

> "73. The FTT then said this at [101] and [102]:
>
> > "101. I appreciate that care must be taken in deriving principles based on cases dealing with different legislation. However, I can see nothing in schedule 55 which evidences any intention that the phrase "special circumstances" should be given a narrow meaning.
> >
> > 102. It is clear that, in enacting paragraph 16 of schedule 55, Parliament intended to give HMRC and, if HMRC's decision is flawed, the Tribunal a wide discretion to reduce a penalty where there are circumstances which, in their view, make it right to do so. The only restriction is that the circumstances must be "special". Whether this is interpreted as being out of the ordinary, uncommon, exceptional, abnormal, unusual, peculiar or distinctive does not really take the debate any further. What matters is whether HMRC (or, where appropriate, the Tribunal) consider that the circumstances are sufficiently special that it is right to reduce the amount of the penalty."
>
> 74. We respectfully agree. As the FTT went on to say at [105], special circumstances may or may not operate on the person involved but what is key is whether the circumstance is relevant to the issue under consideration."

28. In *Edwards* the UT also considered the relationship between special circumstances and proportionality, and took the view that, shortly stated, if a penalty was found to be disproportionate, that would comprise special circumstances:

> "66. We agree with Mr Ripley that the reasoning of *Bosher* is not applicable in relation to the question as to whether a penalty imposed pursuant to Schedule 55 to FA 2009 is disproportionate. Under paragraph 16 of that Schedule, the FTT has, in contrast to penalties imposed under s 98A TMA 1970 in respect of the CIS scheme, been given a limited power to consider whether there are special circumstances which would justify a reduction in the amount of the penalty. It is in the context of that specific jurisdiction that the question of proportionality must be considered. We did not take Mr Carey to argue to the contrary. It is therefore clear that the FTT erred by determining that it had no general power to reduce a penalty on the grounds that it is disproportionate on the basis of the reasoning of the Upper Tribunal in *Bosher*.
>
> 67. We therefore turn to the question as to whether the amount of the penalty imposed in this case for failure to file self-assessment returns on time in circumstances where no tax is payable is a relevant circumstance that HMRC should have taken into account when considering whether there were special circumstances in this particular case which justified a reduction in the penalty. "

29. We have therefore considered proportionality in the context of special circumstances.

30. Paragraph 14(2) of Schedule 41 provides that "special circumstances" does not include the ability to pay.

31. Failure to have considered the exercise of its discretion to reduce a penalty by virtue of special circumstances, in the first place, or failure to give reasons as to why (if HMRC has made a decision), special circumstances do not apply, can render the "decision" flawed.

32. However, we can only allow a taxpayer's appeal that HMRC have come to a flawed decision if we do not find that HMRC's decision was an inevitable one that it would have come to on the evidence before it.

33. In the review letter of14 August 2020, the reviewing officer deals with special reduction and special circumstances. He states that special circumstances are either uncommon or exceptional or where the strict application of the penalty law produces a result that is contrary to the clear compliance intention of that penalty law. He goes on to say that to be special, the circumstances must apply to the particular individual and not be general circumstances that apply to many taxpayers by virtue of the penalty legislation. He goes on to say that he has not found anything which would comprise special circumstances in the appellant's case. But he does not give reasons as to why this is the case, and because of this we do consider that HMRC's decision is flawed.

34. We can therefore consider whether there are special circumstances which apply to this taxpayer. But we do not consider that there are. We do not consider that the appellant's circumstances are sufficiently special that it is right to reduce the amount of the penalty. We deal with proportionality below, but at this stage we have to accept that he imported the goods for commercial purposes. The fact that he cannot pay must be statutorily disregarded. We do not think that being singled out for inspection when others were not or that they were allowed to proceed on their way with their unconfiscated goods, comprises special circumstances.

Proportionality

35. It is clear from the Court of Appeal decision in *John Richard Lindsay v Commissioners of Customs & Excise* [2002] EWCA SIV 267, that the doctrine of proportionality applies to penalties levied by HMRC where goods are imported into the UK. At paragraph 51 of the judgment:

> "Turning to European Community Law, Mr Baker submitted that here also the principle of proportionality had to be observed. Where penalties were imposed for the unlawful importation of goods, they must not be disproportionate (see *Louloudakis v Elliniko Demosio* (Case C-262/99) at paragraphs 63-69)"

36. And then, later in the judgment.

> "53. It does not seem to me that the doctrine of proportionality that is a well-established feature of European Community Law has anything significant to add to that which has been developed in the Strasbourg jurisprudence."

37. There is, however, a passage in Louloudakis, which is helpful in the present context in that it is a general application. We quote from paragraph 67:

"Subject to those observations, it must be borne in mind that, in the absence of harmonisation of the Community legislation in the field of the penalties applicable where conditions laid down by arrangements under such legislation are not observed, the Member States are empowered to choose the penalties which seem appropriate to them. They must, however, exercise that power in accordance with Community Law and it's general principles, and consequently with a principle of proportionality"

38. There are then references to Strasbourg authority. The judgment continues:

"The administrative measures or penalties must not go beyond what is strictly necessary for the objectives pursued and the penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the Treaty"

39. We are mindful of the view expressed by the Upper Tribunal in the case of *The Commissioners for HMRC v Total Technology (Engineering) Limited* [2012] UKUT 418 (TCC) where at paragraph 99 of the Judgment:

"99..... But in assessing whether the penalty in any particular case is disproportionate, the tribunal must be astute not to substitute its own view of what is fair for the penalty which Parliament has imposed. It is right that the tribunal should show the greatest deference to the will of Parliament when considering a penalty regime just as it does in relation to legislation in the fields of social and economic policy which impact upon an individual's Convention rights. "

40. The test is whether the penalty is "not merely harsh but plainly unfair" (see *Simon Brown LJ in International Transport Roth GmbH v Home Secretary* [2003] QB728 at [26]).

41. The penalty assessment is for £351. HMRC have determined that the penalty is due to careless behaviour by the appellant. So the maximum penalty for which he could be liable is 30% of the unpaid duty. HMRC have further reduced the penalty to 20% of the unpaid duty by giving him the maximum reduction for helping, telling and giving. This is the lowest amount which HMRC can reduce the penalty to in circumstances of prompted disclosure. HMRC have deemed it to be prompted as the appellant did not tell the Border Force officers about the wrongdoing before he had reason to believe they had discovered it or were about to discover it. We agree.

42. We are obliged to deem the goods held for commercial purpose. In pursuing the legitimate aim of ensuring that someone who imports goods for a commercial purpose pays duty on them in order that legitimate trade in the UK is not prejudiced, we believe that a penalty of £351 is proportionate; it is proportionate to the infringement, and to that legitimate aim. It is also proportionate to the amount of duty. It is very far from being plainly unfair.

43. In this case, therefore, the penalty is proportionate and does not comprise special circumstances.

Unfairness

44. The appellant submits that he was singled out when others travelling on the same trip were not stopped or penalised. And that others on the trip who were interviewed were allowed to proceed on their way notwithstanding that they had the same amount of tobacco as the appellant, and their tobacco was not confiscated. And that this is in some way unfair.

45. This Tribunal is a creature of statute and has no general, inherent, jurisdiction to consider whether or not HMRC have behaved fairly in any particular circumstances. Furthermore, this specific issue has been dealt with in *Race* which binds us. If the appellant does wish to pursue a complaint that he has been treated unfairly, then the matter must be brought by way of judicial review. We have to say that our view is that the prospects of the appellant succeeding in making a successful claim are slim.

DECISION

46. For the foregoing reasons we dismiss this appeal

RIGHT TO APPLY FOR PERMISSION TO APPEAL

47. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE
Release date: 04 MARCH 2022