Appeal number: TC/2013/04692

EXCISE DUTY – assessments for duty and penalties in relation to excise goods seized from the appellant - jurisdiction of the tribunal-Jones, Race, Swain v Hillman and Three Rivers considered - application to strike out appeals – application granted in respect of the duty appeal – application rejected in respect of the penalty appeal – directions given

FIRST-TIER TRIBUNAL
TAX CHAMBER

MATTHEW LANE **Appellant**

- and -

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL
MS ELIZABETH BRIDGE

Sitting in public at Bristol on 29 July 2015

The Appellant appeared in person

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

Introduction and outline

1. This is an Excise duty and penalties case. The appellant, Matthew Lane ("the appellant" or "Mr Lane") was stopped by officers of UK Border Force at Coquelles on 27 January 2013 with a travelling companion. When searched, their vehicle was found to contain 40.5kg of hand rolling tobacco. This tobacco was seized and subsequently condemned. HMRC subsequently raised assessments for duty and penalties on the appellant, against which the appellant has appealed.

2. HMRC has applied to the Tribunal to strike out both appeals on the basis that either this Tribunal has no jurisdiction to hear the appeals, or the appellant has no reasonable prospect of success.

3. For the reasons given below, we allow HMRC's application in respect of the duty appeal and the appellant's appeal against the duty assessment is hereby struck out. However, we have dismissed HMRC's application in respect of the penalties and allowed Mr Lane to proceed with his appeal, but only on limited grounds. Directions to this effect are at paragraph 89 below.

Evidence and findings of fact

4. The evidence comprised a bundle of documents. The respondents called no witnesses.

5. Mr Lane gave sworn oral evidence. He was not a wholly convincing witness. Relevant aspects of this evidence are discussed below.

6. The following facts are culled from HMRC's notice of application dated 3 February 2014. When these were put to Mr Lane, he took no issue with them other than in respect of the information purportedly given to him at the time of seizure, identified at paragraph 13 below. This is discussed at more detail at paragraphs 18-36 below.

7. On 27 January 2013 at Coquelles, the appellant was returning to the UK with travelling companion Jonathan Garraway when they were stopped by a UK Border Force Officer.

8. When initially questioned, the appellant declared that he was holding 5 kilos of Hand Rolling Tobacco for himself and some for family and friends. In the course of the initial interview both the appellant and Mr Garraway estimated that they had each purchased approximately another 14 kilos of HRT to give to family and friends as gifts.

9. A full search of the vehicle was conducted which revealed that the vehicle contained 31.5 kilos of HRT.

10. The appellant confirmed in the interview that he had paid for his tobacco and that his friends and family wrote down what they wanted and gave him money for it.

11. After the interview, it was agreed by the appellant and his co-traveller that they were each personally responsible for 50% of the tobacco.

12. The total tobacco seized was 40.5kg, 20.25kg of which belonged to the appellant.

13. The appellant was given a copy of BOR156 Seizure Information Notice, Notice 1 (travelling to the UK) and Notice 12A (what you can do if things are seized by HMRC or UKBF).

14. The tobacco was seized as liable to forfeiture under the Customs & Excise Management Act. The appellant did not challenge the seizure of the tobacco.

15. On 27 February 2013 HMRC raised an assessment for duty due on the tobacco in the amount of £3,323.00 and notified the appellant. In addition HMRC raised a penalty assessment on 25 April 2013 in the amount of £664.00.

16. The appellant requested a review of the assessment decision by letter dated 12 May 2013. The original decision was upheld on review.

17. The appellant submitted a Notice of Appeal dated 18 July 2013. The appellant also made an application for hardship. On 22 October 2013 the respondents agreed to the appeal proceeding notwithstanding the fact the sum owed has not been paid.

Discussion relating to the information given to the appellant at the time of seizure

18. As mentioned at paragraph 6 above, at the hearing, Mr Lane took issue with the facts identified at paragraph 13 above. In his oral evidence he said that "*a lot of paper was put in front of us. I had no knowledge of being given any notice, nor any chance of reading all the information that had been put in front of me."*

19. When asked whether he could remember being given the seizure information notice which was in the bundle at page 38, and which purported to show that Mr Lane had been issued with notice 1, a warning letter and notice 12A, Mr Lane responded:

> "*I can't say definitely one way or another. I can't remember whether I was given Notice 1, warning letter nor notice 12A. I hadn't signed the seizure information notice……*"

20. Mr Lane is correct when he says that he hadn't signed the seizure information notice which was in the bundle. This however purports to be an amended notice. The document is BOR156. In the signature page in the amended notice, there is no signature for Mr Lane. There are the words "*as per original BOR156 dated 27/1/2013*".

21. Although no evidence was given on the point, this strongly suggests that Mr Lane had signed an original BOR156. What is not clear, however, is whether the original showed that notices 1 and 12A and the warning letter had been issued. It is not clear why, and to what extent, the original BOR156 dated 27/1/2013 was amended on 28/1/2013.

22. However, the extract from the officers notes of interview with Mr Lane do indicate that the officer issued notice 1 and explained it to Mr Lane and Mr Lane has countersigned that aspect of the notebook.

23. Furthermore, there is contained in the bundle, signed by Mr Lane, a warning letter dated 27/1/2013.

24. So it is clear that two of the three documents identified in the seizure information notice (namely notice 1 and the warning letter) which were identified in that seizure information notice as having been issued to Mr Lane, were so issued.

25. And the warning letter was clearly issued notwithstanding there is no mention of that fact in the officers notebook.

26. We find, therefore, that on the balance of probabilities, notice 12A was also issued to Mr Lane at the time of seizure, and (unsurprisingly given this is 2½ years ago) he had simply forgotten that it had been so issued.

27. It is clear that Mr Lane certainly understood that he had an opportunity to challenge the legality of the seizure, but had made a conscious decision not to do so. The following are extracts of Mr Lane's oral evidence:

> *"Ms Bridge: You told us before that the reason you hadn't appealed against the forfeiture was because you didn't want to go through the same stress and you were worried about a negative outcome. Could you explain that?*
>
> *Mr Lane: I didn't want to go through the same stress as I had been at the border being told that I wasn't going to get the tobacco back. The Border Agency said that I would be losing the tobacco.*
>
> *Judge Popplewell: So you had been told that you could challenge the seizure, but you had made a conscious decision that you wouldn't do so because of the stress that this would cause you?*
>
> *Mr Lane: Correct*"

28. So, Mr Lane understood that he had the right to challenge the legality of the seizure but chose not to do so.

29. It is not clear from the evidence whether this understanding that he could challenge the seizure came from information given to him, orally, by Border Agency Officers, or from reading notice 12A.

30. We suspect both. Mr Lane is an intelligent man. On the basis of our finding that he was given notice 12A, we also find that it is more likely than not that he would have read it and thus learnt about his right to challenge the seizure in condemnation proceedings.

31. He would also have learnt of the consequences of failing to do so; namely he would not be able to subsequently argue personal use in, for example, restoration proceedings.

32. We would also note that in the review letter of 11 April 2013, the reviewing officer states that

> "At the time of the seizure you were issued with a copy of notice 12A which explained the action that you should take if you did not agree with their decision to seize your goods in essence. You were offered the opportunity of condemnation proceedings in a court of law. You did not exercise that right, and as one calendar month had passed from the date of the seizure the goods have been condemned as forfeit to the Crown....."

33. Mr Lane did not question the statement in this review letter that he had been issued with a copy of notice 12A either in subsequent correspondence nor in his notice of appeal.

34. We would make one further point on this issue.

35. It is a maxim of English law that ignorance or mistaken understanding of legislation is not accepted in law as an excuse for failure to comply with it. This is on the basis that a taxpayer should be thoroughly acquainted with the law, and such knowledge is required to be accurate.

36. The harshness of this maxim is mitigated by HMRC who publish a raft of notices (some of which have the force of law) which set out how the law operates in a wide variety of circumstances. One of these is notice 12A. But if Mr Lane believes that he was not given notice 12A, contrary to our finding above, and there has been a procedural unfairness meted out, then his remedy is an application for judicial review. For the reasons given at paragraph 43(5) below, this Tribunal has no jurisdiction to consider such procedural unfairness. In the context of the penalty appeal, our directions at paragraph 89 below take into account our finding of fact at paragraph 26 above.

The Law

37. 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).

(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 & Excise Management Act 1979 provides that goods imported without payment of duty are liable to forfeiture.

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

(6) That section also introduces Schedule 3 to the Act 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 assessed to a penalty on the basis that the failure to pay the duty was neither deliberate nor concealed. In the circumstances, the penalty is 30% 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. In the case of a 30% penalty the maximum reduction for disclosure is 10%, i.e. reducing the penalty from 30% to 20% (paragraph 13 of Schedule 41 FA 2008).

(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 on the issues and its relevance

The legality of the seizure

38. 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").*

39. 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.

40. 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."

41. 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."

42. 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".

43. 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....."

Striking out under Rule 8

44. Rule 8 (2) provides a mandatory direction that the Tribunal must strike out the whole or a part of the proceedings if it does not have jurisdiction in relation to the proceedings or that part of them.

45. Rule 8(3)(c) gives the Tribunal power to strike out an appeal if it "considers there is no reasonable prospect of the appellant's case, or part of it, succeeding."

46. In *Swain v Hillman* [2001] 1 All ER 91 Lord Woolf MR said, in relation to the similar power at Rule 24.2 of the Civil Procedure Rules:

> "The words 'no real prospect of being successful or succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or…they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

47. In *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2001] UKHL 16 [2001] ("*Three Rivers*") the House of Lords gave further guidance on how a court or tribunal should approach an application made on the basis that a claim has no real prospect of success. Lord Hope said:

> "94…..I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is - what is to be the scope of that inquiry?
>
> 95 I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he

will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be taking that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in *Swain v Hillman*, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all."

Relevance to the appeals

48. HMRC are applying to strike out the appellant's appeals. If we find that the appellant's circumstances fall exclusively within the ratio of *Race*, then we have no discretion and must strike out the appeals.

49. This is the consequence of the mandatory direction in Rule 8(2).

50. If, however, the appellant's circumstances fall outside the ratio of *Race*, then HMRC must show, and persuade us, that, to paraphrase Lord Hope it must be possible to say with confidence that the factual basis for the appellant's appeals are fanciful because they are entirely without substance. And in those circumstances we may strike out the whole or a part of the appellant's appeals since there is no reasonable prospect of his case succeeding in accordance with Rule 8(3).

The appellant's case

51. The appellant's grounds of appeal can be construed from his written representations to the respondents and from his oral submissions before us.

52. As we understand it, the appellant has four grounds of appeal:

(1) The tobacco was for personal and not for commercial use.

(2) There has been a misrepresentation (our words, not his) in the Citizens Advice Bureau booklet, and on HMRC's website on which he relied, and which in his submission, represent that an unlimited amount of hand rolling tobacco can be brought in without it being construed as being for commercial use.

(3) He cannot afford to pay the duty or the penalty.

(4) It is not fair to levy duty or a penalty on someone who is on the cusp of attaining intellectual and financial independence, having just finished a course at university.

The respondents' case

53. The respondents' case is set out in their strike out application.

(1) In respect of the duty appeal, we are bound by *Race*, and have no jurisdiction to consider personal use.

(2) In respect of the penalty appeal, we are also bound by *Race* as regards personal use. The penalty has been reduced to the lowest possible amount by HMRC and there is no possibility of a further reduction under the relevant

legislation. HMRC have considered special circumstances. The only matter that the appellant has raised in his written representation to the respondents, other than personal use, is financial hardship, which is specifically excluded from comprising a special circumstance.

54. The respondents did not address financial hardship in the context of the duty appeal, either in their notice of application, or in their oral submissions at the hearing. Nor did they make any representations regarding whether the appellant might have a reasonable excuse in respect of the penalty appeal.

55. Furthermore, the respondents have made no submissions in relation to the appellant's fourth ground of appeal (i.e. the fairness point set out at paragraph 52(4) above).

56. However, we consider these in more detail below.

Discussion

The Excise Duty appeal

57. This Tribunal is bound by the decisions in *Jones* and *Race*. Mr Lane did not challenge the seizure of the goods in condemnation proceedings. It is clear, as mentioned at paragraph 28 above, that the appellant made a conscious decision not to mount such a challenge.

58. 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.

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

60. Mr Lane's second submission was that he was "misled" by the government website, and the citizens advice bureau booklet both of which represented that an unlimited amount of hand rolling tobacco could be brought into the UK for personal use.

61. Mr Lane's evidence was unconvincing on this point. He initially indicated that the Citizens Advice Bureau document was the basis on which he believed he could bring back an unlimited amount of hand rolling tobacco. However, it became clear that he did not obtain this notice until after he returned from France. He then indicated that he had the information before he went to France from the Government website but he adduced no corroboration of this (for example by way of an extract from the Government website either at the time of seizure, or at the time of the hearing).

62. But in any case, Mr Lane's remedy for any such misrepresentation would be judicial review, and for the reasons given at paragraph 43(5), we have no inherent power to undertake such review.

63. As regards Mr Lane's third submission, i.e. that of financial hardship, it is clear that such a submission has no reasonable prospect of success. The fact that Mr Lane

cannot afford to pay the duty does not mean that it is not properly chargeable, or that he is relieved of the obligation to pay it.

64. We now come to Mr Lane's fourth submission, i.e. that this is unfair that he should pay the duty. It is not clear from this submission precisely why Mr Lane thinks unfairness will relieve him of the obligation to pay duty. We believe it may be in one of three ways.

65. The first is that he cannot afford it. For the reasons given at paragraph 62 above, it is clear that such submission has no reasonable prospect of success. The second is that it may be unfair in public law terms (ie. procedurally unfair). For the reasons given at paragraph 43(5) above, we have no jurisdiction to consider unfairness in the context of the penalty. Mr Lane's remedy is judicial review which we have no jurisdiction to deal with.

66. The third is that the duty is in some way disproportionate. The doctrine of proportionality is relevant to penalties (see below) but not to the duty itself.

67. And so in accordance with the principles outlined at paragraphs 48-50 above, the appellant has no reasonable prospect of succeeding in his appeal on any of the grounds which he has put before this Tribunal. Regrettably for him, his chances of succeeding in his appeal against the duty assessment are "fanciful".

Decision on the Excise Duty appeal

68. It is for these reasons, therefore, that we have decided that Mr Lane's appeal against the duty assessment should be struck out.

The Penalty Appeal

69. As regards his appeal against the penalty assessment, Mr Lane'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.

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

71. As mentioned at paragraphs 37(11) and 37(13) above, these include special circumstances and reasonable excuse.

Special circumstances

72. As regards special circumstances, notwithstanding Mr Lloyd's submissions on this point, we have not seen evidence that HMRC did consider special circumstances when assessing, or reviewing, the penalty.

73. While "special circumstances" are not defined, the courts accept that for circumstances to be special they must be "exceptional, abnormal or unusual" (*Crabtree v Hinchcliffe* [1971], 3 All ER 967) or "something out of the ordinary run of events" (*Clarks of Hove Ltd v Bakers Union* [1979], 1 All ER 152).

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

75. Although Mr Lane did not express his second and fourth submission in these terms, it is our view that they do have the potential to comprise special circumstances. In respect of his second submission, we would emphasise that Mr Lane would need to prove both reliance, and an unambiguous representation by the tax authorities. He has failed to do either at the hearing today; but we are mindful that he is a litigant in person and has not, therefore, perhaps focused on the possibility of raising this argument in detail. As we have said before, Mr Lane was unconvincing evidentially on this point, and the matter is finally balanced. But bearing in mind that striking out an appellant's case is a draconian remedy, we consider that Mr Lane should be permitted to seek to establish the facts which would demonstrate special circumstances at a substantive hearing.

76. Furthermore, Mr Lane's fourth submission, if construed as comprising procedural unfairness could, too, theoretically, comprise special circumstances. Mr Lane will have to demonstrate, with a great deal more specificity, how this is the case if he is to succeed at the substantive hearing. But we believe that he should have the opportunity of elaborating on this submission, too, and how it might comprise special circumstances at such a hearing.

Reasonable Excuse

77. As mentioned at paragraph 37(10) above, HMRC have reduced the penalty to the maximum possible extent that they are able to do by statute. Furthermore, when considering reasonable excuse, neither HMRC, nor ourselves, can take into account an insufficiency of funds, unless attributable to events outside Mr Lane's control. But the comments we make regarding Mr Lane's second and fourth submissions apply equally to reasonable excuse. Potentially they could each comprise a reasonable excuse, and, for reasons similar to those above, we believe Mr Lane should have the opportunity of elaborating on those submissions in the context of reasonable excuse at a substantive hearing.

78. As regards Mr Lane's submission that it is unfair that he should be subject to a penalty, the comments in paragraphs 62-64 above apply to lack of ability to pay as they apply to the duty assessment.

Proportionality

79. Finally, as regards the penalty, the doctrine of proportionality is relevant.

80. 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)"

81. And then, at paragraphs 53 and 54 of 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. There is, however, a passage in *Louloudakis*, which is helpful in the present context in that it is a general application. I 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"

54. 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"

82. 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. "

83. 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]).

84. The penalty assessment is for £664. As set out at paragraph 37(10) above, HMRC have determined that the penalty is due to careless behaviour by Mr Lane, thus rendering the maximum penalty for which he could be liable to 30% of the unpaid duty. HMRC have further reduced the penalty by the maximum amount open to it.

85. We are obliged, for the reasons given at paragraphs 57-58 above, 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 £664 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.

Decision on the penalty appeal

86. We cannot consider Mr Lane's submissions that the goods were for personal use in relation to the penalty appeal, any more than we have in the duty appeal. As

regards Mr Lane's submissions on financial hardship we consider that his chances of succeeding on these grounds are "fanciful".

87. However, and as mentioned above, this is very finally balanced, we consider that Mr Lane should be permitted to proceed with his substantive appeal against the penalty assessment, but only on the basis that his second and fourth submissions might comprise special circumstances and/or a reasonable excuse.

Directions

88. As mentioned above, we have decided that Mr Lane's appeal as regards the penalties should not be struck out, and that he should have the opportunity of arguing that his second and fourth submissions comprise special circumstances and/or reasonable excuse. This means there will be another hearing to decide these points.

89. We therefore direct as follows:

> (1) Mr Lane and HMRC's representatives are to inform the Tribunal Service, within 28 days of the date of issue of this Decision, of any dates when they cannot attend the Tribunal Centre in Bristol for the hearing during the period from 30 September 2015 to the end of this calendar year.
>
> (2) The Tribunal Service is then to arrange a further hearing with a time estimate of one hour, in Bristol, at the earliest possible date.
>
> (3) The hearing should be listed before either this Tribunal or a completely different Tribunal.
>
> (4) At the hearing the issues which may be ventilated by the appellant are restricted to:
>
> > (a) Whether Mr Lane's submission at paragraph 52(2) of this Decision comprises either special circumstances, or a reasonable excuse, for the penalty.
> >
> > (b) Whether Mr Lane's submission at paragraph 52(4) of this Decision comprises either special circumstances, or a reasonable excuse, for the penalty.

Reinstatement and appeal

90. Rule 8(5) allows the appellant to apply for the reinstatement of either or both of its excise appeal and, to the extent struck out, his penalty appeals. Rule 8(6) states that an application under paragraph (5) must be made in writing and received by the Tribunal within number 28 days after the date that the Tribunal sends notification of the striking out to the appellant.

91. 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. 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: 26 AUGUST 2015