[2017] UKFTT 645 (TC)

# TC06072

**Appeal number: TC/2016/3901**

***EXCISE DUTY AND PENALTY – application for strike out – appeal against duty struck out as no reasonable prospect of success – appeal against penalty struck out to extent no reasonable prospect of success – part to proceed to hearing***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**ROBERT KENNETH INCE** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE Barbara Mosedale**

**Determined on the papers with written representations from the parties.**

**Mr G Ince, for the Appellant**

**Ms L Poots, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

1. The appellant appeals against a review decision dated 2 July 2016 which upheld the imposition on him of an assessment to excise duty of £1,329 and a reduced excise wrongdoing penalty in the sum of £265.80.

2. On 27/9/16 HMRC applied for the appeal to be struck out on the bases either that the Tribunal had no jurisdiction or the appeal did not have a reasonable prospect of success, in either case because the goods were deemed to be duly forfeit and the appellant was therefore unable to contend that the goods were for personal use. The appellant, needless to say, did not agree that his appeal should be struck out and therefore the Tribunal was required to determine whether or not the whole or part of the appeal should be struck out on the grounds on which HMRC contended.

### Hearing on paper

3. Mr Ince's original stance that he was adamant he wanted an oral hearing as he wanted to vent his feelings to a judge about how much he deprecated UKBF's and HMRC's behaviour, but he consented to a paper hearing when he was refused a postponement application for the oral hearing which was called.

4. What his representative said later might, at a stretch, be taken as withdrawal of consent to a paper hearing. Nevertheless, as this is only a strike out hearing, the Tribunal does have the power to determine it without an oral hearing (Rule 29(3)) whether or not the parties consent to this. The question is whether it is appropriate to do so.

5. I consider that if I am in any doubt about the correct decision on the strike out application, I should hold a hearing to give parties the chance to explain their position fully. So far as Mr Ince's desire to vent his feelings is concerned, this is only a strike out hearing and there would be no opportunity to give evidence: in any event, the Tribunal exists to determine relevant law and facts; the Tribunal does not exist to enable persons to have the opportunity to complain about the behaviour of a government departure save to the extent it is relevant to the issue before the Tribunal. So one of the matters I will determine is the extent to which Mr Ince's case that UKBF and/or HMRC acted improperly is something that could affect the outcome of this appeal and therefore is something on which he must have the opportunity to give evidence.

6. But the hearing of HMRC's strike out application is not the appropriate forum for Mr Ince to give the evidence he wishes to give and going ahead with a paper determination does not deprive him of the opportunity to give that evidence as an oral strike out hearing would not have given him that opportunity.

7. As the parties have prepared for a paper hearing and produced written submissions, even if Mr Ince should be taken as withdrawing his consent to a paper hearing, it is right to deal with it by paper as I consider, for the reasons given below, that the outcome is clear.

## Facts

8. Mr and Mrs Ince, travelling in their car, together with two passengers were stopped at Dover by UKBF on return from France and Belgium on 27/4/15. The luggage in the car was found to include 3,200 cigarettes and 3KG hand-rolling tobacco, which Mr Ince accepted was his and had been purchased by him in Belgium in a retail outlet. Mr Ince was interviewed and the car and goods were seized.

9. The car was restored within a few hours. The goods were not. UKBF formed the view that the goods were being brought into the UK without the payment of excise duty for commercial purposes (in other words, to be sold).

10. HMRC's case is that Mr Ince was provided with various notices including one which informed him that he had to challenge the seizure within one month. He was provided with, and signed, a warning letter that HMRC might later assess tax and a wrongdoing penalty.

11. Mr Ince did not challenge the seizure of the goods in the Magistrates Court.

12. Very nearly a year later, on 19 April 2016 HMRC assessed Mr Ince to excise duty in the sum of £1,329 on basis the goods were liable to duty because they were imported for a commercial purpose by the appellant. And on 12 May 2016, HMRC assessed Mr Ince with an excise wrongdoing penalty in the sum of £465.

13. Mr Ince asked for and received a review of the assessments. The review upheld the duty assessment but reduced the penalty assessment to £265.80. Mr Ince then made a timely appeal against the assessments of duty and penalty.

## The law

14. HMRC's application is made under the First-tier Tribunal (Tribunal Procedure) (Tax Chamber) Rules 2009 which provide:

> 'The Tribunal must strike out the whole or part of the proceedings if the Tribunal (a) does not have jurisdiction in relation to the proceedings or that part of them....' Rule 8(2)(a)
>
> 'The Tribunal may strike out the whole or a part of the proceedings if...(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding' Rule 8(3)(c)

HMRC's application was, as I said above, made under both these provisions: HMRC claimed the Tribunal had no jurisdiction and/or the appeal did not have a reasonable prospect of success.

15. So far as the question of jurisdiction is concerned, the law is quite clear that the Tribunal has jurisdiction to hear an appeal against an assessment to excise duty and an excise duty wrongdoing penalty. HMRC's point is really that the Tribunal has no jurisdiction to consider the appellant's grounds of appeal in this particular case for the reasons explained below at §§20-22: however, even if that is right, it seems to me that it is not the case that the Tribunal has no jurisdiction over the proceedings but that the appeal may have no prospect of success. So I will consider the strike out application on the basis of Rule 8(3)(c): I will not strike it out for lack of jurisdiction.

16. So I need to decide what the appellant's case is in order to decide its prospects of success. What is in issue is whether the assessments to duty and penalty issued by HMRC were proper. The Tribunal has full appellate jurisdiction to determine whether the assessments were in accordance with the law. What is the appellant's case on this?

## Grounds of appeal

17. Mr Ince has stated various grounds on which he considers that he should not have been assessed to duty and/or a penalty. It is for HMRC to satisfy me that none of the grounds have a reasonable prospect of success: otherwise I cannot strike out the appeal and it must proceed to a full oral hearing.

18. Mr Ince alleges the following:

(1) the goods were not liable to seizure.

(2) he was not given a proper opportunity to challenge the seizure;

(3) he was not given the opportunity to keep the goods and pay the excise duty.

(4) the goods were not liable to duty as they were seized;

(5) he would have challenged seizure had he known he was to be assessed to duty as well as forfeit the goods;

(6) he relied on a leaflet and believed he was within the law;

(7) UKBF and/or HMRC behaved improperly; and

(8) the duty and penalty were disproportionate

And each of these grounds has to be considered in respect of the matters under the appeal. So are any of them a grounds appeal with a reasonable prospect of success with respect to:

(a) Liability to the excise duty?

(b) Liability to the wrongdoing penalty?

(c) A reasonable excuse for the wrongdoing penalty?

(d) A 'special circumstance' for the wrongdoing penalty?

(e) Whether the amount of the penalty should be further mitigated.

## (a)Liability to the excise duty

*(1) The goods were not liable to seizure*

19. Mr Ince says that he is a lifelong smoker and the goods were for his own use. If he could, and was allowed to, prove this statement, it would mean that UKBF were wrong to seize the goods as if the goods were for Mr Ince's own use it would mean the goods were not for a commercial purpose, not liable to excise duty and not liable to be seized.

20. HMRC's point is that it is not open to the appellant, even if he could, to put the case that the goods were for his own use. The goods were seized on the basis that there were held commercially and this was conclusively determined against Mr Ince when he failed to contest the seizure. There is binding authority (see *Jones & Jones* [2011] EWCA Civ 824) that the law does not allow a person two bites at the cherry: Mr Ince should have challenged the legality of the seizure in the Magistrates Court or not at all.

21. This is because the Customs and Excise Management Act 1979 ('CEMA') at Schedule 3 provides as follows:

> "(3) Any person claiming that any thing seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of the date of the seizure, give notice of his claim in writing to the Commissioners….
>
> (5) If on the expiration of the relevant period under paragraph 3 above for giving of notice of claim in respect of any thing no such notice has been given to the Commissioners, ….the thing in question shall be deemed to have been duly condemned as forfeited."

If there is no such challenge, the seizure is deemed lawful. As I have said, there was no challenge to the seizure in this case. Therefore, sub-paragraph (5) means that the cigarettes and tobacco were deemed to be duly condemned as forfeited. And that means that they were deemed to be for commercial use.

22. So I agree with HMRC that Mr Ince cannot claim that the goods were for personal use. The only forum in which he could have made such a claim was the Magistrates Court. This Tribunal has no jurisdiction to hear it. Therefore, it follows that a challenge to the excise duty assessment and penalty on the basis that the cigarettes and hand-rolling tobacco were for personal use is bound to fail.

23. (In any event, I note in passing that Mr Ince did not appear to be consistently making out a case that the goods were for his personal use. On the contrary, his representative said more than once in correspondence that Mr Ince 'accepted the seizure of the goods as a punishment for his wrongdoing', appearing to indicate that Mr Ince accepted that he was bringing the cigarettes and tobacco to the UK other than for personal use.)

*(2)He had no real opportunity to contest seizure*

24. Mr Ince accepts he did not challenge the seizure in the Magistrates court: it seems he understood he had the right to do so, but says that UKBF officers told him that if he did challenge the seizure, he would be liable to £3,000 or so in costs if he did so.

25. To the extent that this is a complaint about the behaviour of UKBF officers, this Tribunal has no jurisdiction to determine it as explained below at §48.

26. In any event, I do not accept that, even if it is true that UKBF officers wrongly discouraged Mr Ince from challenging seizure, Mr Ince could make out a case that he did not have a real opportunity to challenge the seizure. He was only with UKBF for a few hours on 27 April 2015. He had until 26 May 2015 to take legal or other advice on the best course of action and to ask an independent person about the risk of liability to UKBF's costs if he did challenge the seizure. But, despite knowing of the seizure, he chose to do nothing to challenge it during the next month and indeed until he received the duty assessment. I consider that he has no prospect of success on the facts that he puts forward of making out a case that he had no real opportunity to contest seizure.

27. Mr Ince also complains that, while he was handed leaflets about the seizure at the time, no one took the opportunity to explain what they meant. However, he does not suggest that he did not understand he had the right to contest the seizure: and even if he did not understand fully what was said to him on the day, he does not suggest that he was not able to take legal or other advice immediately afterwards.

28. His case on this has no prospect of success: he had one month in which to the challenge the seizure but he chose not to do so.

*(3)Mr Ince was not given the opportunity to pay the duty and keep the cigarettes.*

29. Mr Ince both lost the goods and was assessed to duty on them: in retrospect, he says that he would have preferred to keep the goods and pay the duty on them. He complains that the assessment must be bad because he was not given the opportunity to do so.

30. This ground of appeal has no prospect of success.

31. Regulation 13 of the Excise Duty (Holding, Movement and Duty Point) Regulations 2010 provides that goods released for consumption elsewhere in the EU which are then held for a commercial purpose in the UK are subject to duty and the person chargeable includes a person holding the goods. S 12 Finance Act 1994 permits HMRC to assess excise duty on any person who appears liable to pay it. A commercial purpose is defined in Regulation 13(3) as a purpose other than to be consumed, or given away free, by the person importing them. The same regulations provide at Regulation 20 that the excise duty must be paid before or at the moment the liability to excise duty arises.

32. HMRC assessed Mr Ince to the duty as he was the person holding the goods in the UK when they were driven into the UK from France, and he did not challenge UKBF's seizure of the goods made on the basis Mr Ince held the goods for a commercial purpose, and no duty had been paid on them in the UK.

33. Therefore, the duty was payable the moment Mr Ince entered into the jurisdiction of the UK. And unless he had paid the duty at that precise moment or before, the goods were liable to seizure. In other words, he was liable to both the seizure and the duty.

34. UKBF would have been quite wrong in law to offer Mr Ince the chance to pay the excise duty and keep the goods. A moment's reflection would show to the appellant that the law must operate in this way: otherwise, there would be no incentive to obey the law: if smugglers knew that if they were caught, they could simply offer to pay the duty they were seeking to evade and keep the goods, it would be impossible to stop smuggling taking place.

35. On the contrary, it is quite clear that, if caught evading excise duty, a smuggler will lose the goods and still be liable for the evaded duty.

36. As I have said, it is not open to Mr Ince to contest the validity of the seizure: that has been conclusively determined against him: sch 3(3) CEMA and *Jones and Jones.*

*(4)The goods were not liable to duty because they were seized*

37. While this was put forward as a separate ground of appeal, it is clear form what I have said above that the excise duty became payable at the moment Mr Ince was within the jurisdiction of the UK authorities and that was *before* they were seized. This ground of appeal therefore has no prospect of success.

*(5)He would have challenged the seizure if he knew that he would be assessed*

38. He complains that HMRC behaved badly by only assessing him to the duty and penalty with a few days to spare before the time limit expired. It is difficult to see why he complains about this: he implies it prejudiced him. The only possible prejudice appears to be that he might have decided to challenge the seizure if he had realised he would be assessed for the duty as well as losing the goods.

39. I do not think that this ground has any prospect of success. HMRC have no duty to assess within the one month to challenge the seizure. Indeed, as they are required by public law to exercise their power to assess in a reasonable manner, it is presumably a matter of policy that they only assess once it is clear that the seizure is not challenged or the challenge has been unsuccessful, and therefore once it is clear that the duty is due.

40. Moreover, documents handed to Mr Ince on the day of seizure, and signed by him, clearly stated that excise duty and penalty might be assessed on him by HMRC later. It was his choice not to challenge the seizure in these circumstances.

41. In any event, it amounts to nothing more than a challenge to how HMRC have chosen to exercise their discretion: in other words, the challenge is that HMRC could have issued the assessment earlier than they did. How HMRC exercise the discretion entrusted to them by Parliament is something over which it is quite clear this Tribunal has no jurisdiction: see, for instance, *Hok Ltd* [2012] UKUT 363 (TC).

42. This ground of appeal has no prospect of success.

*(6)Reliance on leaflet provided by retail outlet*

43. Mr Ince's case is that he relied on a leaflet provided to him by the retail outlet which sold him the goods and which (he said) stated how much tobacco he was entitled to bring into the UK without paying excise duty. He also stated that the leaflet had the appearance of being one issued by UKBF/HMRC.

44. If the leaflet did state limits on how much tobacco he might bring into the UK from Belgium/France, it was wrong. There is no limit. The question, as already explained, is whether the tobacco was imported for a commercial purpose. (The *amount* of the tobacco brought into the UK is only relevant to the question of evidence: the higher the amount, the less likely in general the importer's evidence it was for personal use only is to be believed.) And while there are limits on importation from outside the EU, they were (a) inapplicable to Mr Ince as he was within the EU and (b) inapplicable to Mr Ince as they only apply to excise goods imported for personal use and (c) inapplicable to Mr Ince as they are much lower than the amounts he attempted to bring into the UK.

45. Even assuming that Mr Ince could prove that he relied on a leaflet which misled him to believing he was not breaking the law, so far as the assessment to duty is concerned, his case about reliance on the leaflet is hopeless. Liability to tax can not be avoided because of ignorance of the true state of the law; it cannot be avoided even if Mr Ince was actually misled into an incorrect understanding of the law.

46. So his case on this has no prospect of success

*(7)Inappropriate behaviour by UKBF and HMRC?*

47. Mr Ince maintains that both UKBF and HMRC behaved inappropriately towards him although his allegations are fairly vague. So far as I can make out, he considers UKBF behaved inappropriately because:

> (a) He and his wife are elderly, disabled and diabetic and it was distressing to be kept at the port for several hours;
>
> (b) It was distressing to be informed that their car was seized and for it only to be restored to them a few hours later;
>
> (c) He says he was informed that challenging the seizure would be more expensive than accepting the seizure;
>
> (d) He was given leaflets about the seizure but, he says, no one took the trouble to explain to him what they meant.

48. He considers HMRC behaved inappropriately because they assessed just before the expiry of the time limit for assessments.

49. This Tribunal has no jurisdiction over the behaviour of officers of UKBF and HMRC. If Mr Ince wants to pursue a complaint about their behaviour, this Tribunal is not the jurisdiction in which to do so (see, for example, *Hok Ltd* [2012] UKUT 363 (TC). He has already been notified of the proper persons to whom to make complaints about UKBF and HMRC: he can also pursue a judicial review action in the Administrative Division of the High Court if he wishes.

50. But the behaviour of UKBF and HMRC is wholly irrelevant to the question of Mr Ince's liability to the excise duty. That liability arose the moment after Mr Ince imported goods without having paid the duty due on them before or at the moment of importation. Nothing done subsequently by UKBF or HMRC could affect Mr Ince's liability to the excise duty.

51. This aspect of his appeal has no prospect of success.

*(8)Disproportionate*

52. Mr Ince states that his only income is his state pension and an occupational pension of about £800 per month. He considers the assessments disproportionate to his means.

53. This is also a ground of appeal with no prospect of success. Excise assessments by law are proportionate to the amount of unpaid excise duty. They are not assessed by reference to the taxpayer's means. There is no legal requirement for them to be assessed by reference to means.

*Conclusion on excise assessment*

54. My conclusion is that none of the grounds put forward by Mr Ince in his appeal against the assessment to excise duty have any prospect of success. It is open to me to strike out his appeal against the excise duty assessment because the conditions of Rule 8(3)(c) are met.

**(b)Liability to the wrongdoing penalty**

55. The penalty was charged under paragraph 4 Sch 41 of Finance Act 2008 which provides that a penalty is payable by a person who carries goods after the excise duty point has passed without payment of the excise duty.

56. The penalty was originally imposed at £465 on the basis it was a prompted disclosure of deliberate wrongdoing albeit with some cooperation after the event. The review officer, as I have said, concluded it was non-deliberate wrongdoing, albeit a prompted disclosure, and reduced the penalty to 20% of the unpaid duty (£265.80). He did not accept that the appellant had a reasonable excuse for the wrongdoing and he also concluded that there were no special circumstances justifying mitigation of the penalty.

57. As HMRC no longer maintain that the wrongdoing was done deliberately, liability to the penalty depends on the same factors as the excise assessment. Therefore, the various defences (1)-(8) put forward by Mr Ince, listed at §18 above and rejected at §§19-53 above, fall to be rejected for the same reasons in respect of the liability to the penalty as the liability to the duty assessment, with two possible exceptions. One exception is the defence of 'proportionality' as penalties, but not assessments, can be disproportionate so I deal with this as a separate matter. The second relates to the excise duty point.

*(8) Proportionality*

58. Proportionality is relevant to penalties, in a way that it is not relevant to the duty. As I have said, it is possible for penalties in law to be disproportionate. The test for disproportionality is a high one: the penalty must be 'not merely harsh, but plainly unfair' (*International Roth Transport* [2003] QB 728 per Lord Justice Simon Brown). It is not considered disproportionate to measure the penalty by reference to the offence rather than to the offender's means. The penalty here was charged at 20% of the evaded duty and was therefore at the low end of the range. Even if the appellant's means were relevant, the penalty is clearly lower than his monthly income. A case that the penalty was disproportionate has no reasonable prospect of success.

*(1) and (4) goods not liable to seizure and/or duty*

59. As I have said, Mr Ince's failure to challenge seizure means it is conclusively determined that the goods were liable to duty and that duty was unpaid at the excise duty point. If this were not so, the seizure would have been invalid: but Sch 3(3) CEMA deems an unchallenged seizure to be lawful.

60. As I have also said, that deeming provision is as applicable to the assessment to duty as it is to the assessment of the penalty. However, in the recent case of *Jacobson* [2016] UKFTT 570 (TC) the Tribunal appeared to consider that paragraph 4 of Sch 41 (the provision under which the penalty was levied in this case as well) might not apply if it was unclear whether the duty point was immediately on arrival in the UK or only after the person carrying the goods had had a chance to pay the duty.

61. I have a great many doubts about the correctness of what was said in *Jacobson* not least because it appears to fly in the face of *Jones and Jones*, a case which is binding on the FTT. It is, not surprisingly, under appeal to the Upper Tribunal. I do not consider that an appeal against the penalty on the basis of a lack of clarity in paragraph 4 of Sch 41 has any real prospect of success: however, as the matter is before the Upper Tribunal I am reluctant to strike it out without a ruling on the issue by the Upper Tribunal. Taking into account I have a discretion whether or not to strike out even if I consider the appeal has no reasonable prospect of success, on this aspect of the appeal my conclusion is that it is proper to leave this ground of appeal live and wait for the Upper Tribunal's ruling on it.

*Conclusion*

62. An appeal against the penalty as such has no reasonable prospect of success, but I will not strike it out on grounds (1) and (4) pending the ruling of the Upper Tribunal in *Jacobson*. That is not the end of the strike out application because there is a possibility that an appeal against the penalty might succeed on other grounds and in particular on the basis it should be (i) cancelled because of a reasonable excuse, (ii) cancelled or reduced because of special circumstances or (iii) further reduced due to mitigating circumstances. I consider each in turn.

**(c)Reasonable excuse**

*(1)The goods were not liable to seizure*

63. This 'defence' cannot be a reasonable excuse because, as I have said at §§19-23, it is not true: the goods were liable to seizure.

*(2)He had no real opportunity to contest seizure*

64. As I have said at §§24-28, on the facts as put forward by Mr Ince, there is no reasonable prospect of such a defence succeeding, but in any event, it could never amount to a reasonable excuse because a reasonable excuse is something which causes the appellant to commit the wrongdoing while offering a reasonable explanation for it: so anything which happened after the wrongdoing cannot, by definition, be a reasonable excuse for the wrongdoing.

*(3)Mr Ince was not given the opportunity to pay duty and keep cigarettes.*

65. This 'defence' cannot be a reasonable excuse because, as I have said at §§29-35, it is not the law that a taxpayer is entitled to pay the duty and keep the cigarettes.

*(4)The goods were not liable to duty because they were seized*

66. This 'defence' cannot be a reasonable excuse because, as I have said at §36, it is not true: the goods were liable to seizure.

*(5)He would have challenged the seizure if he knew that he would be assessed*

67. This 'defence' cannot amount to a reasonable excuse because, as I have said, by definition something which occurred after the wrongdoing cannot be an explanation for the wrongdoing.

*(6)Reliance on leaflet provided by retail outlet*

68. This defence, however, is not so obviously one which has no prospect of success. It is Mr Ince's explanation for his wrongdoing. Does he have a reasonable prospect of proving this defence on the law and on the facts?

69. So far as the facts are concerned, Mr Ince has not produced a copy of this leaflet and says that he is unable to do so as he handed it to the UKBF officers at the time of the seizure and has not received it back. The absence of the leaflet, however, is not necessarily fatal to his case: a Tribunal might accept his oral evidence about what the leaflet said. This is only a strike out hearing: unless HMRC has shown that this part of the case has no reasonable prospect of success, it must go to a full hearing of the evidence.

70. But it is not just the factual case which matters: can such a defence be a reasonable excuse as a matter of law? So far as the penalty is concerned, Mr Ince is effectively putting forward a case that his failure to pay excise duty when it was due (at or before the moment of moving into the jurisdiction of the UK) was because he

was ignorant of the true state of the law and believed that what he did was lawful even though he was misled as to the true state of the law.

71. It is trite law that ignorance of the law is no excuse: if being ignorant of the law was an excuse then that would only encourage people to remain in ignorance of it, rather than try to acquaint themselves with it. As a matter of public policy ignorance of the law should not be a reasonable excuse as, however complicated the law is, accepting such an excuse would reward taxpayers who did not seek to understand the law over those who tried to comply with their legal obligations.

72. However, having said that, a Tribunal might accept that being positively misled as to the law could in law amount to a reasonable excuse for a failure to comply with the law. While I think Mr Ince might have difficulties establishing his legal and/or factual case on this, I am not completely satisfied that the case on this has no reasonable prospect of success and I cannot strike it out.

*(7)Inappropriate behaviour by UKBF and HMRC?*

73. This 'defence' cannot amount to a reasonable excuse because, as I have said, by definition something which occurred after the wrongdoing cannot be an explanation for the wrongdoing.

*(8)Disproportionate?*

74. The size of the imposed penalty can not be a reasonable excuse for the penalty as it cannot offer an explanation for why the wrongdoing occurred.

*Conclusion on 'reasonable excuse'*

75. There is one aspect of Mr Ince's case which I have not been satisfied by HMRC has no reasonable prospect of success, which was Mr Ince's claimed reliance on a leaflet, so that aspect of the case cannot be struck out and must be allowed to go to a full hearing. The rest of the case on reasonable excuse is struck out as having no reasonable prospect of success.

**(d)Special Circumstances**

76. The Tribunal must also consider whether the penalty should be discharged because of 'special circumstances' in any case were HMRC has failed to consider special circumstances at all, or failed to consider them reasonably.

77. In this case, the review officer did consider special circumstances. He stated that special circumstances would be something that was either:

(a) Unusual or uncommon

(b) Or where a strict application of the law led to a situation contrary to the intention of the law.

His conclusion was that there were no special circumstances.

78. The appellant's grounds of appeal set out at §18 have to be considered as to whether any of those could amount to special circumstances, and whether the review officer's failure to consider them to be such was unreasonable.

79. There is no definition in law of 'special circumstances'. I accept that ordinarily but not invariably a special circumstance would have to be something that was unusual or uncommon (see *Warren* [2012] UKFTT 57 (TC)); I accept that it could include situations where the strict application of the law led to a situation contrary to the intention of the law. But I do not think that that is an exhaustive definition of 'special circumstances'. I consider that a special circumstance would have to be something that was not causative of the late payment (because the defence of 'reasonable excuse' covered such circumstances) but nevertheless justified cancellation or partial cancellation of the penalty. It might include HMRC's behaviour (see *Morgan & Donaldson* [2013] UKFTT 317 (TC)) or that the taxpayer was HMRC's creditor as well as debtor (*Horne).* It might include a reason, albeit not the cause of the original late payment, why tax continued to be paid late such that a second penalty was incurred (see *Morgan & Donaldson* [2013] UKFTT 317 (TC)).

80. So I think the officer applied too narrower a test of special circumstances than is the test in law, and that would give the Tribunal the power to alter his decision if there was something in Mr Ince's grounds of appeal which amounted to special circumstances, and so I move on to consider whether HMRC have satisfied me that there is no reasonable prospect of success in Mr Ince's penalty appeal on 'special circumstances'

81. The first four defences put forward at §18 cannot be special circumstances, for the same reasons as given at §§59-62.

82. The defence at §18(5) that (he says) he would have challenged the seizure had he known he would be assessed cannot be special circumstances: the defence presupposes that the challenge to the seizure would have succeeded. But as I have explained at XXX the Tribunal must take it that such a challenge would have failed.

83. The defence at §18(6) is that he relied on a leaflet. I have said that 'special circumstances' cannot include something which *caused* the breach of the law, as 'special circumstances' is not intended to overlap with the reasonable excuse defence. So this defence is either a reasonable excuse or no defence at all.

84. The defence at §18(7) is that UKBF and/or HMRC behaved improperly. As I have said, I accept that in principle improper behaviour by UKBF and/or HMRC could in some situations amount to special circumstances sufficient to justify the penalty being reduced in whole or part, although such circumstances are likely to be rare.

85. Moreover, in this case it is difficult to understand what Mr Ince's grounds are for thinking UKBF and/or HMRC acted improperly. I have already commented that HMRC were entitled to wait until after the seizure passed unchallenged before levying the assessment and penalty. So far as UKBF's behaviour was concerned it is difficult to see what they did that could be said to be improper:

(a) Mr Ince complains his car was seized. But UKBF had the right to seize the car as it was carrying the tobacco which was liable to seizure. What UKBF was not obliged to do, but did do, presumably on compassionate grounds, was to restore the car to him within a few hours;

(b) He complains that in view of his age and disability the entire experience was unpleasant. However, since the seizure was justified, without more, I do not see how this could be an arguable case of special circumstances. It must be supposed that being stopped for carrying contraband goods is not going to be a pleasant experience;

(c) He complains that no one took the trouble to explain what was going on to him. If true, that is regrettable but as I have already said it still left him with a month to take independent advice on his situation.

86. The complaints are vague and I am concerned whether they have a reasonable prospect of success; nevertheless, taking into account that the behaviour of UKBF and HMRC appears to be at the root of why Mr Ince says he brought this appeal, and that I have already decided not to strike it out on two other issues, even if this ground does not have a reasonable prospect of success, in the exercise of my discretion I consider it right to allow Mr Ince his opportunity to make good this defence if he can.

**(e)Mitigation**

87. Paragraph 6B of Sch 41 provides that the maximum penalty where the excise wrongdoing is neither deliberate or concealed is 30% of the potential lost revenue. The lost revenue is the unpaid excise duty the amount of which was £1,329. As I have said, HMRC allowed mitigation of 80% of the potential lost revenue, so the penalty was charged as 20% of the unpaid excise duty (£265.80).

88. Mitigation is permitted by paragraph 12 and 13 of Schedule 14. For a penalty levied under paragraph 4, as this one was, the maximum possible reduction is to 20% in the case of prompted disclosure and 10% in the case of unprompted disclosure.

89. So, as the penalty was charged at 20%, the appellant could only have a case for further reduction if he can show his disclosure was unprompted. Unprompted is defined in paragraph 12(3)(a) as:

> '...made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the relevant act or failure....'

90. While Mr Ince was stopped by UKBF officers and not HMRC officers, it makes no difference. Historically, HMRC (and its predecessor HM Customs & Excise) have had sole responsibility for all excise duty matters. However, section 7(1) of the Borders, Citizenship and Immigration Act 2009, which received Royal Assent on 21 July 2009, gave the Director of Border Revenue concurrent jurisdiction with HMRC on "customs revenue matters". Customs revenue matters include the excise duties on tobacco. Section 7(5) of the Act provides:

> "So far as is appropriate for the purposes of or in connection with this section, references to the Commissioners for Her Majesty's Revenue and Customs, or to Her Majesty's Revenue and Customs, in an

> enactment, instrument or document to which this section applies are to be construed as including a reference to the Director."

91. In conclusion, paragraph 12(3)(a) should be read as referring to UKBF officers as well as HMRC officers. In other words, for the disclosure to be unprompted it would have to have been made at a time when Mr Ince had no reason to believe that UKBF officers had discovered, or were about to discover, his failure to pay excise duty on the cigarettes and tobacco he had brought into the country.

92. I do not think that such a case could have any prospect of success: any disclosure by Mr Ince was made *after* he had been stopped and questioned by UKBF officers. It may have been before they had actually discovered the non-duty paid tobacco but it was not before Mr Ince must have had reason to believe they were about to discover it.

**Conclusion**

93. Even where I am satisfied that an appeal has no reasonable prospect of success, I have a discretion whether or not to strike it out.

94. I strike out the appeal against the excise duty as, for the reasons given at §§19-53, it does not have a reasonable prospect of success, the matter has been thoroughly considered and I can see no good reason to leave that part of the appeal. In other words, Mr Ince must pay the duty of £1,329.

95. I do not entirely strike out the appeal against the penalty of £265.80. Three matters in respect of it are not struck out either because they have not been shown not to have a reasonable prospect of success or because in my discretion I do not consider it appropriate to strike them out, and they are:

> (a) Liability to the penalty at the excise duty point, and whether *Jones and Jones* applies to mean that the excise duty point had clearly passed before Mr Ince was questioned by UKBF officers;
>
> (b) Whether there is a reasonable excuse for the penalty because of Mr Ince's case about reliance on a leaflet;
>
> (c) Whether there are special circumstances because of Mr Ince's case in respect of the behaviour of UKBF and HMRC officers.

96. I consider the remainder of the appeal has no reasonable prospect of success and it is struck out.

97. The three remaining issues must be determined at a full hearing. There is no point in holding such a hearing until after the Upper Tribunal decision in *Jacobson.* Therefore I direct that this case is now stayed until final determination of the appeal in *Jacobson.*

98. Once the decision in *Jacobson* is final, this case must go to hearing on the three issues which I have not struck out. That does not mean that Mr Ince's case will necessarily succeed, merely that I am not convinced that it will fail. It will be important for Mr Ince to attend the hearing as it will be for him to prove at a hearing

(a) What the leaflet said;

(b) That he acted in reliance on what it said;

(c) Misbehaviour by UKBF and/or HMRC officers.

And it will for the hearing judge to determine, even if Mr Ince can prove his case, whether in law that amounts to a reasonable excuse or special circumstances.

99. I comment in passing that I doubt the wisdom of HMRC applying to strike out this appeal: in the simpler tax cases where HMRC are not relying on evidence from their own officers, the matter may be more quickly and cheaply resolved if even what HMRC perceive to be weak cases are allowed to proceed to hearing rather than being the subject of an application for striking out, as if (as here) even one aspect of the case is not struck out, the result is the need for two determinations.

100. 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.

**BARBARA MOSEDALE**
**TRIBUNAL JUDGE**

**RELEASE DATE: 18 AUGUST 2017**