



**TC06361**

**Appeal number: TC/2014/03267**

*EXCISE DUTY – mental illness – whether special circumstances – yes*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**APPELLANT**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE ANNE FAIRPO**

**Sitting in private at Birmingham on 31 August 2017**

**The Appellant did not appear and was not represented**

**Joseph Millington, Counsel for the Respondents**

## DECISION

### Introduction

1. This is an appeal against a penalty assessment issued on 3 April 2013 under Schedule 41 Finance Act 2008 in the amount of £1046.00.

5 2. The substantive appeal against the underlying assessment as to excise duty was struck out by order of the Tribunal on 26 October 2016, on the basis that ‘personal use’ arguments could not be considered as part of an appeal against an assessment where the appellant had not challenged the lawfulness of the seizure in the Magistrates Court. The question of whether the appellant had a reasonable excuse was  
10 not included in the matters to be brought to appeal.

3. Therefore, what remained to be decided is whether the penalty assessment should stand and, specifically, whether there are special circumstances in this case which mean that the Respondent (HMRC) should have reduced the penalty.

4. The appellant was not present at the hearing nor represented. He had advised the  
15 Tribunal that he would not be able to attend the hearing due to disability. To accommodate the appellant, it was directed that he could attend the hearing by telephone instead, using the general case management powers in Rule 5(g) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Rules”). Conference call facilities were provided and details given to the appellant.

20 5. We had due regard to the Rules. We decided that it was in the interests of justice to proceed with the hearing in the absence of the appellant in accordance with Rule 33 of the Rules since it was likely, from the correspondence in this matter, that the appellant would not appear and that there has to be some determination of this appeal even if the appellant is unable to attend a hearing even by telephone. The appellant’s  
25 attention is drawn to Rule 38 of the Rules in the event that there was good cause for the non-attendance at this hearing.

### Private hearing and anonymisation

6. The hearing was held in private by direction of the Tribunal under Rule 32(2) of the Rules in order to protect the appellant’s right to respect for their private life in  
30 view of the appellant’s state of mental health as indicated to the Tribunal in correspondence around the time of listing of the hearing. HMRC had no objection to the hearing being held in private.

7. As the hearing was held in private, the non-disclosure provision set out at Rule 32(6) applies and so this decision has been anonymised.

### 35 Background

8. The decision of 26 October 2016 established that the appellant had brought a substantial number of cigarettes into the country from countries within the European Union. These were seized in November 2011 and the lawfulness of the seizure was not challenged in the magistrates’ court within the applicable time limits.

9. The appellant's appeal against the assessment was based on his assertion that the cigarettes were for personal use and he was therefore permitted by UK and European law to bring such quantities into the UK.

10. 'Personal use' arguments can only be brought when challenging the legality of the seizures in the magistrates' courts. As the legality of the seizure was not challenged, the cigarettes are deemed to have been imported for commercial purposes and it is not open to this Tribunal to consider arguments based on personal use (*Nicholas Race* [2014] UKUT 0331).

11. Accordingly, the appeal as to the underlying assessment was struck out. The appeal as to the penalty assessment, however, was allowed to continue and, as noted above, is the subject of this decision.

### **Appellant's submissions**

12. As the appellant did not appear, I considered the material that was available to me to determine the matter: primarily correspondence between the appellant and HMRC, and correspondence between the appellant and the Tribunal, together with material produced by HMRC and material produced to the hearing at which the appeal against the underlying assessment was struck out.

13. The appellant submitted in a letter of 19 September 2016 that "HMRC should suspend my penalties due to that my condition will never get any better". The appellant explained that he suffers from paranoid schizophrenia and is on indefinite benefits due to this condition. Evidence of his condition was clear from the correspondence throughout this appeal process and confirmed by information from the NHS trust providing his care on an outpatient basis since 2008, well before any of the events relating to this appeal.

### *25 Appeal documentation*

14. At the time of the appeal, although the appellant had focussed on his "personal use" argument in respect of the cigarettes, he also explained (in a letter received by the Tribunal in November 2014) that:

(1) He was a paranoid schizophrenic, and provided the details of his psychiatrist, and benefits position, which confirmed that he is entitled to Disability Living Allowance and specifically "higher rate care component for help with personal care, indefinitely" and "lower rate mobility component for help with getting around, indefinitely".

(2) He had "pieces of paper in my flat saying that the secret service, MI5 is out to get me and arranging for me to disappear and be killed".

*Information from seizure process*

15. In the notes of an interview with the appellant on 22 November 2011, in relation to the seizure, the appellant is noted as saying “mentally ill people get obsessive and I need to know I have the cigarettes”.

5 16. During that interview it was noted that the appellant travelled extensively, with his passport showing destinations in the Far East, the Americas and “Sub Continent”. The appellant confirmed that he had been to Budapest, Sofia, Poland, and Hong Kong and had returned from Calgary the day before the interview. He planned in the next  
10 six weeks (at the time of the interview) to go to Philadelphia and Bucharest as well as back to Sofia and Budapest, although he had now cancelled the flight to Budapest because he had been stopped at Heathrow when returning from his last trip. He subsequently said he had cancelled four trips because he was “getting hassle from the officer”. The appellant explained that he had funded the travel with money inherited from his parents’ estates and that he had been to Hong Kong “to check out the place  
15 that is my obsession”. His answers to questions indicate that the duration of his visits varied from 24 hours to up to ten days. He sometimes slept at the airport, or at youth hostels.

17. During the interview, the appellant was asked about some papers found at his house during the seizure process, which stated “Lynn 11 sleeves” and “John owes  
20 £65”. The appellant said his sister was named Lynn but he had not seen her since the funeral. He had lent his friend John £65 as he needed it. It was put to the appellant that he was selling cigarettes to fund his travels, and the appellant denied this.

18. In a statement taken later in relation to the seizure process, dated 23 January 2013, the appellant was described as saying that he was “mentally ill/disabled – I had  
25 so many cigarettes because I wanted to save a lot for when I’m not well (some times don’t leave flat for long periods) and cannot leave flat for months on end to get my cigarettes”.

19. In a letter dated 13 February 2013 to HMRC, the appellant explains the papers in his flat referred to in §14 above as follows:

30 (1) “[Lynn] was my girlfriend at the time and she was mentally ill and smoking a lot of my cigarettes. I wrote it down, however it has nothing to do with selling cigarettes ... It states nothing about money ... I gave them to her free. I write it down like it was so I could confront her if she started to smoke too many”.

35 (2) “[The paper referring to John] was never to do with selling cigarettes. John borrowed from me £100 about three weeks before and he still owed me £64 of it out standing. So I write it down on a piece of paper because of my mental health problems. As you can see there is nothing on the paper which indicates that I sold any cigarettes”.

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*Appeal documentation*

20. At the time of the appeal, although the appellant had focussed on his “personal use” argument in respect of the cigarettes, he also explained (in a letter received by the Tribunal in November 2014) that:

5 (1) He was a paranoid schizophrenic, and provided the details of his psychiatrist, and benefits position, which confirmed that he is entitled to Disability Living Allowance and specifically “higher rate care component for help with personal care, indefinitely” and “lower rate mobility component for help with getting around, indefinitely”.

10 (2) He had “pieces of paper in my flat saying that the secret service, MI5 is out to get me and arranging for me to disappear and be killed”.

*Correspondence relating to the Respondent’s strike out application*

21. In a letter to the Tribunal service dated 6 May 2016, apparently copied to HMRC, the appellant states that if he has not correctly followed processes in relation  
15 to the Tribunal procedure it is because he is “disabled with mental illness ... and could not think correct due to my disability and the amount of medication that I was taken for my illness”. Because he has “no one to help me. I have decided to call on the God of Israel to help me. This is what the God of Israel has said and told me to say to the Judge in this case ... I am proud of what the God of Israel has told me to write in  
20 my defence in this case.”

22. The appellant wrote again to the Tribunal in a letter received by the Tribunal on 23 May 2016 and which states that it is copied to HMRC. In this letter, he set out a “justification for the case to continue” in which he stated again that “the God of Israel is my representative in this case. This is what the God of Israel has said and told me to  
25 say in response to HMRC observations against my appeal.” This “Justification” also included several references to difficulties in writing, such as “voices are in my head and I need to stop for the day in thinking and writing this observation”.

23. In a letter dated 1 July 2016, the appellant wrote to the Tribunal and stated that “Staff at HMRC involve in my case have requested MI5, the secret service to beam  
30 microwave technology at me”.

24. In a letter dated 19 September 2016, the appellant wrote to the Tribunal stating that

(1) “Someone has helped with this letter because I am ill ... concerning the penalties.”

35 (2) “I hear voices in my brain everyday which disturbs me. These voices stops me from thinking correctly. The voices also stops me from doing everyday things like reading a book or writing, the voices gets loud in my bran and all I can do is stop what I am doing and rest for hours”>

40 (3) “I have also illusions every day, which stops me from operating normally from day to day. I think, for example, that The Secret Service, MI5, have

planted a device in my brain and is medically experimenting on me. I believe that The Secret Service, MI5 torments me every day by sending me messages to my brain. The secret service MI5 I believe can regularly keep me awake for hours as part of the medical experiments.”

5 *Correspondence relating to this hearing*

25. On 7 February 2017, the appellant wrote to the Tribunal in response to a letter from HMRC and stated that:

10 (1) “MI6, The secret service, in 1979 implanted devices into my brain as part of a secret behaviour study to control human beings. There afterwards since that date I have been hearing voices from their researchers through the devices in my brain. And on a number of occasions MI6, the secret service researchers has ordered me to carry out certain commands by beaming messages into my brain.”

15 (2) “In 2011, MI6 the secret service researchers implanted messages into my brain ordering me to go abroad and bring back cigarettes. They said it would be okay because it was for my personal use and I should not worry. MI6, secret service messages in my brain reassuring me things will be okay. And I should bring back as many cigarettes as I wanted to smoke. So I did as MI6 told me I brought back about 25,000 cigarettes. MI6, secret service research do strange experiments like this to cover the real reason for my mission. MI6, the secret service use this cigarettes story to hide a deeper command in my brain. I was used to carry messages subconsciously in my brain to reveal them to various agents in Eastern Europe”

20 (3) “I would like HM Revenue and Customs or the Tribunal to request details from MI6, the secret service to release the file the secret service has on me. Therefore I would like to put the blame on MI6, the secret service or the reason I brought all the cigarettes into the country ... I have spoken about MI6, the secret service researchers carrying out mind control by beaming messages in my brain to various psychiatrist and is well documented in my files.”

25 (4) “I would like to have asked ... why HMRC will not except Special circumstances to dismissed the penalty against me in this case because of my illness.”

30 26. On 3 May 2017, the appellant wrote to the Tribunal in response to a letter from HMRC dated 3 May 2017 and said:

35 (1) “MI6, The secret service, has planted in my brain voices ordering me not to read anymore letters from HMRC about this case.”

(2) “MI6, The secret services, has planted in my brain voices telling me that I should not have mentioned them in this case and I should not have revealed it was MI6, The secret services fault that I brought so many tobacco from abroad.”

40 27. During the hearing it became clear that HMRC had not seen the appellant’s correspondence with the Tribunal dated 7 February 2017 and 3 May 2017. Copies were provided to the officer and HMRC’s counsel for them to review.

## HMRC evidence and submissions

### *Evidence*

28. HMRC's witness, Officer Clydesdale, gave evidence in person at the hearing.

29. In her witness statement, the officer stated that she had examined all of the documents in preparing a case summary of the decision to issue the assessment and penalty and found that there was no reasonable excuse for holding excise goods subject to excise duty. She also found no evidence of any special circumstances that might allow a reduction in the penalty.

30. She noted that HMRC had allowed for the appellant's mental illness by classifying his behaviour as non-deliberate and had given a full reduction for his co-operation but that HMRC were unable to ignore the commercial quantity of cigarettes and papers found in the appellant's home.

31. In oral evidence, the officer noted that the appellant had not stated in the interview that he was compelled to bring in the goods as a result of his mental illness; he had not said that it was a spontaneous decision, for example. In interview, there was nothing about the voices in his head.

32. The officer confirmed that, at the time she prepared her witness statement, she had not seen the appellant's letter of 1 July 2016 or the correspondence in 2017.

33. She agreed that the appellant had now stated that his mental illness was the reason for bringing the goods into the country, but noted that no previous document had stated that MI6 had told him to bring them in. However, she was not the decision maker or the review officer and so could not know what had been said to them.

34. The officer agreed that this correspondence did raise questions but she was not sure it would change her decision that the penalty should stand. The goods had been brought in over various importations and the appellant had made various travel arrangements.

35. The officer had had input into the drafting of HMRC's Statement of Case and, while concluding that the appellant had not stated that the reason for bringing in the goods was his mental illness, had still considered the stockpiling aspect. However, as he had other travel booked, she had considered that this did not carry much weight as the further travel would have given him opportunities to acquire more cigarettes.

36. The officer was asked whether she had had any training on dealing with mental health issues. She had not, but had taken into account internal guidance on considering all factors in making a decision. In particular, she had considered whether there were uncommon or exceptional circumstances, and weighed these against the policy objectives underlying the penalty regime.

37. The officer commented that this was a difficult case, and she had tried to be sympathetic to the appellant's position.

38. As it is open to HMRC to change their position on special circumstances up to the end of the hearing, the officer was asked whether the additional correspondence in 2016 and 2017 would change the decision. On consideration, she considered that she should uphold the penalty decision and that she was not convinced that enough had changed to alter the decision.

### *Submissions*

39. For HMRC, it was submitted that:

- (1) the question of what is, or is not, a “special circumstance” involves an examination of the particular facts relevant to each appeal (*Medway*, para 53);
- 10 (2) to be a special circumstance, the circumstances in question must operate on the individual, and not be a mere general circumstance that applies to many taxpayers by virtue of the scheme of the provisions themselves (*Collis* [2011] UKFTT 588 at para 40);
- 15 (3) “special circumstances” mean “something out of the ordinary, something uncommon [or] exceptional, abnormal or unusual” (*Bluu Solutions* [2015] UKFTT 95, para 103);
- 20 (4) “Special circumstances” are normally something external to the person doing the action in question, in contrast to something within his control. An illness may constitute “special circumstances” (*Pendle* [2015] UKFTT 27, at para 116);
- (5) HMRC may exercise their discretion as to whether or not to reduce a penalty because of “special circumstances” at any time up to the conclusion of the Tribunal hearing (*Bluu Solutions*, para 109-110, 121-122);
- 25 (6) HMRC must give reasons for their decision in relation to “special circumstances” (*Bluu Solutions*, at para 149);
- 30 (7) The test on appeal is whether HMRC’s decision as to special circumstances is so demonstrably unreasonable as to be irrational or perverse, such at no reasonable authority could ever have come to it (*Bluu Solutions*, at para 128); in effect, an appellant must establish that HMRC’s position on “special circumstances” was flawed when considered in the light of principles applicable in proceedings for judicial review (*Medway Bond & Storage Co Ltd* [2016] UKFTT 169, para 12);
- 35 (8) The penalty regime under Schedule 41 FA 2008 is primarily directed at taxpayers who deliberately avoid their responsibilities to notify HMRC of their obligation to pay tax, not for tax payers who make a genuine mistake on their liability and disclose their mistake to HMRC (*Hillis*, [2013] UKFTT 196 at para 25);
- 40 40. HMRC submitted that the goods in this case were seized because they believed that they were being held for a commercial purpose rather than solely for personal use and in light of the quantity that the Appellant had in his possession.



41. HMRC acknowledged that it was open to the appellant to invoke “special circumstances” that would permit the Tribunal to reduce the penalty but the appellant had not invoked this.

5 42. HMRC agreed that the appellant’s mental illness was not in question but submitted that the appellant had not stated that his mental illness was the reason for bringing the cigarettes into the country without paying duty “i.e., he suddenly made a rash decision to bring back 25,000 cigarettes”. He had also not volunteered any information in the interview in 2011 and the statement in 2013 as to being influenced by MI6.

10 43. In this matter, HMRC submitted that the appellant was competent to research duty allowances and prices of cigarettes on the internet, and to compose correspondence and provide explanations for his behaviour, as well as to analyse the evidence available. The appellant clearly demonstrated a capacity for critical thinking. HMRC also contended that the appellant was competent enough to travel, make the  
15 conscious decision to purchase goods and bring them back to the UK. In support of this, HMRC referred to *Christopher Gray* [2015] UKFTT 685 in which the Tribunal found that the appellant’s chronic fatigue syndrome, anxiety and depression had not affected his ability to travel overseas and purchase goods.

20 44. HMRC submitted that the appellant’s conflicting explanations as to the identity of “Lynn” were inconsistent with an individual who could travel international and undertake research as to prices and duty allowances. Such an individual should be able to give this basic information.

25 45. In respect of the appellant’s contention in interview that he stockpiled cigarettes because he sometimes did not leave the house for three months at a time, HMRC submitted that there must have been a carer, relative or other visitor who brought foods and prescriptions and so could also have brought him cigarettes.

30 46. Further, it was submitted that the appellant’s information and evidence about wanting to stockpile cigarettes was a “personal use” challenge to the deemed fact that the cigarettes had been imported for commercial purposes. Following *Race* [2014] UKUT 331, such “personal use” arguments cannot be considered as part of an appeal against an assessment where the lawfulness of the seizure has not been challenged in the Magistrates Court. It was suggested that not all evidence as to commercial intention had been put forward because the commercial use had been deemed to be a fact by the failure to challenge the seizure.

35 47. It was submitted that the Officer has considered special circumstances. Allowances have been made for the appellant’s mental health issues, by issuing a penalty at the lowest level of 20% despite the commercial quantity of cigarettes and associated evidence of commercial holding. There are not considered to be special  
40 circumstances such that the penalty should be reduced further and this decision is not demonstrably unreasonable as to be irrational or perverse, such that no reasonable authority could ever have come to it.

## Discussion

### *Relevant law and Tribunal powers*

48. There is a right of appeal against this penalty assessment to the Tribunal under paragraph 17 of Schedule 41 FA 2008. The Tribunal's powers are set out in paragraph 19 of Schedule 41 of Finance Act 2008 but are limited to affirming the decision, or substituting another decision which HMRC had the power to make, but only where it is considered that HMRC's decision to be flawed in a public law sense: applying judicial review principles, the Tribunal must consider whether HMRC acted in a way that no reasonable body of commissioners could have acted, or whether they took into account some irrelevant matter or disregarded something to which they should have given weight.

### *Does the deemed legal status of the importation apply when considering special circumstances, such that circumstances which may be related to "personal use" cannot be considered?*

49. The deemed legal status of the import of the cigarettes arises under Schedule 3 of Customs and Excise Management Act 1979 ("CEMA"). These provisions operate, in effect, by treating the goods as having been condemned as forfeited as illegally imported goods in condemnation proceedings. It is therefore not open to an appellant to argue later that the goods were not illegally imported (as confirmed in *Race* and other cases). The effect of the deeming is that, in law, the goods were not held by the appellant for his own personal use in a way which exempted the goods from duty.

50. However, that deemed legal status for duty purposes does not, in my view extend to mean that the overall circumstances of the case and in particular in this case the appellant's mental illness cannot be taken into consideration by HMRC when assessing whether there are special circumstances in relation to the importation which apply in relation to a penalty, and whether to exercise a discretion in relation to that penalty.

51. HMRC's Compliance Handbook states that "special circumstances are ... where the strict application of the penalty law produces a result that is contrary to the clear compliance intention of that penalty law" (Compliance Handbook CH170600). As agreed by HMRC in this matter, the penalty regime under Schedule 41 FA 2008 is directed at taxpayers who deliberately avoid their responsibilities to notify HMRC of their obligation to pay tax.

52. Although HMRC manuals are not the law, it is worth noting that there is nothing in the HMRC Compliance Handbook on special circumstances which states that circumstances cannot be taken into consideration if they clash with a deemed legal status. Indeed, the manual anticipates that there may be relevant circumstances which have not been taken into account elsewhere: "[t]here may ... be other facts in relation to the inaccuracy that were not relevant to the behaviours or the quality of disclosures, but which because of their special nature could be relevant for special reduction" (CH174500).

53. Accordingly, I find that it would be against the purpose of the special circumstances legislation, which is to correct flaws that would otherwise arise as a result of the operation of law, to interpret the deeming which applies in respect of the excise duty assessment in this case as meaning that HMRC *must* disregard any  
5 circumstances of this case which relate to the deemed legal status of the goods when considering whether special circumstances might apply to reduce a penalty relating to that excise duty assessment. In my view, it would require clear words in the legislation to fetter HMRC’s discretion in relation to special circumstances in this way.

10 54. Although it was argued that obiter comments of Warren in *Race* might suggest that this would be the case, I would note that Warren concludes his decision in *Race* by stating that “[s]o far as concerns the Penalty Assessment, this is not the subject matter of any appeal or other application to the Upper Tribunal and I say nothing about it” (para 56).

15 55. I should also note that I make this finding only in relation to the consideration of special circumstances: this finding should not be taken to mean that the deemed illegality does not need to be taken into account when considering reasonable excuse. This appeal did not concern reasonable excuse and so I do not need to make any finding in respect of it.

20 *Is the appellant’s mental health capable of giving rise to “special circumstances”?*

56. Following the tests set out in case law, described by HMRC, to be a special circumstance, the circumstances in question must operate on the individual, and not be a mere general circumstance that applies to many taxpayers by virtue of the scheme of the provisions themselves, and must be “something out of the ordinary,  
25 something uncommon [or] exceptional, abnormal or unusual” and normally something external to the person doing the action in question, in contrast to something within his control.

57. Paranoid schizophrenia is clearly, therefore, capable of amounting to special circumstances and, indeed, I do not consider that HMRC were attempting to argue at  
30 any stage that it was not so capable.

58. Following the decision in *Gray*, I agree that the existence of an appellant’s mental illness alone is not sufficient to warrant a penalty reduction on the grounds of special circumstances. The mental illness must in some way be relevant to the facts of the case in order for a penalty reduction to be potentially available.

35 59. In this case, the appellant’s evidence at the initial interview in 2011 was that he purchased the cigarettes as a form of obsessive stockpiling; in later correspondence he gave other, mental health-related, reasons for the purchases of the cigarettes.

60. I find, therefore, that the appellant’s mental illness was relevant to the facts of the case in this matter and so capable of forming special circumstances to be taken  
40 into consideration when assessing the penalty.

*Does the appellant need to specifically argue that special circumstances should apply?*

5 61. HMRC submitted that it was open to the appellant to invoke special circumstances that would permit the Tribunal to reduce the penalty but the appellant had not invoked this in his appeal.

62. It is clear that the appellant has, in later correspondence, stated that special circumstances should have been applied although this was not a feature in his appeal. However, whilst the burden is on the appellant to show that the wrongdoing penalty was wrong, the obligation is on HMRC to consider whether special circumstances  
10 exist (para 14 of Schedule 41 FA 2008) and not for the appellant to specifically ask that special circumstances to be taken into consideration.

63. Further, the Tribunal has an obligation when an appellant is unrepresented to ensure that the overriding objective in rule 2 of the FTT Rules is met. To quote *Aleena Electronics Limited* [2011] UKFTT 608 (TC) (at 60):

15 “It is the ethos of the ... Tax Chamber of the First-tier Tribunal that a taxpayer can bring an appeal to a tax-expert Tribunal without the expense of instructing representatives. The Tribunal hearing a substantive appeal will be expert: it will know the law and will take the legal points at the hearing that an unrepresented appellant may not.”

20 64. Accordingly, even if the appellant had never made a reference to special circumstances it would be open to this Tribunal to have taken the point into consideration so that, in the context of this case, it is not relevant that the appellant may have failed to put forward the case in his appeal that his mental illness amounted to special circumstances.

25 65. Finally, I would also note that to require an unrepresented litigant with mental illness to necessarily appreciate and articulate in an appeal that such mental illness might amount to special circumstances might in some circumstances be a substantial failure to take that mental illness into account.

30 *Does the fact that the appellant may have failed to put forward the case that his mental illness was a reason for his actions in his appeal mean that it should not be taken into account?*

66. HMRC submitted that the appellant had not argued that his mental illness was a reason for his importation of the cigarettes because he had not, for example, stated that he had a sudden impulse to purchase the cigarettes.

35 67. I find that, from the information in the interview notes in 2011, the appellant had in fact put forward his mental illness as a reason for the purchase of the cigarettes, stating that “mentally ill people get obsessive and I need to know I have the cigarettes” (see para 13 above). He later gave other reasons for the purchase (and consequently importation) of the cigarettes which clearly relate to his mental illness,  
40 but the point was initially made in 2011. Although the appellant did not specifically set out his mental illness in his grounds of appeal, it was clearly known to HMRC prior to the appeal.

68. Even if the appellant had failed to articulate mental illness as a reason for his bringing the quantity of cigarettes into the country at all, that failure cannot preclude its being taken into account by HMRC or this Tribunal when considering special circumstances where it is known that the appellant has a mental illness, as in this case.  
5 The nature of mental illness can be such that an appellant may not in fact be able to specifically articulate the point in an appeal. To require otherwise would mean that the Tribunal would be assessing an appellant with mental illness against the criteria of a neurotypical person which cannot always be appropriate.

69. Whilst mental illness will not automatically amount to special circumstances sufficient to eliminate a penalty it would, in my opinion, be unreasonable where the information is otherwise available to HMRC to require an appellant to specifically allege mental illness as the reason for their actions in order for it to be taken into account by HMRC.  
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70. Accordingly, I find that it is not relevant to the decision in this appeal that the appellant did not specifically put forward his mental illness as a reason for his actions in his appeal.  
15

*Is HMRC's decision that there were no special circumstances unreasonable?*

71. This is not a case where HMRC completely failed to consider whether special circumstances existed. It was stated that the point had been considered, and that no special circumstances were considered to exist. The officer stated that she had considered whether there were uncommon or exceptional circumstances, and weighed these against the policy objectives underlying the penalty regime.  
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72. I agree with the decision in *Bluu Solutions* that HMRC must give reasons for their decision in relation to special circumstances; although there was no single statement of reasons for the decision, I consider that the reasons given by HMRC were:  
25

(1) The stockpiling argument of the appellant did not carry much weight as he had other travel booked, which would have given him opportunities to acquire more cigarettes;

30 (2) The argument that the appellant stockpiled cigarettes because he sometimes did not leave the house for three months at a time was discounted because there must have been a carer, relative or other visitor who brought foods and prescriptions and so could also have brought him cigarettes;

35 (3) HMRC were unable to ignore the commercial quantity of cigarettes and papers found in the appellant's home;

(4) The appellant was competent to research duty allowances and prices of cigarettes on the internet, and to compose correspondence and provide explanations for his behaviour, as well as to analyse the evidence available. He was also competent to book and undertake travel abroad.  
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73. HMRC also submitted that, although they had clearly done so, they were unable to take into account matters such as stockpiling that related to “personal use” because of the deeming provisions that applied to the legal status of the importation. As noted above, I do not consider that HMRC are thus constrained in relation to special circumstances and that any failure to take into account matters such as stockpiling would have amounted to an error in law which would have made the decision that there were no special circumstances flawed in a public law sense. However, as noted, HMRC’s evidence was that they did in fact consider these matters.

74. In my view, HMRC’s analysis of the appellant’s evidence that he was stockpiling events takes no account of his mental illness: there is no consideration given to the appellant’s statement in interview in 2011 that this is an obsessive behaviour. Instead, HMRC have analysed the argument on the basis of neurotypical behaviour responses: that there would be no need to stockpile because future travel was planned and/or that other people could bring cigarettes to the appellant. As such, neither analysis takes into account the appellant’s mental illness.

75. HMRC’s assessment that they were unable to ignore the commercial quantity of the cigarettes makes the same error. Stockpiling due to obsessive behaviour arising from mental illness could explain the accumulation of such a quantity of cigarettes. There is no indication that HMRC took the individual’s mental illness into consideration when categorising the quantity of cigarettes as commercial. As already noted, the deemed illegality of the import does not in my opinion prevent HMRC from taking the appellant’s mental illness into consideration for the purposes of assessing special circumstances.

76. HMRC’s view that the papers found at the appellant’s flat also showed commercial dealings with the cigarettes is not, in my view, established in a manner that would outweigh the mental illness considerations. The evidence indicated in the papers (two written notes, one as to a number of cigarettes with no reference to money and one as to an amount of money with no reference to cigarettes) does not appear to be sufficient to clearly demonstrate any commercial intention on the part of the appellant that might override any consideration of his mental illness for the purposes of considering special circumstances.

77. In discussion at the hearing, HMRC appeared to suggest that not all evidence as to commercial intention had been detailed because the commercial use had been deemed to be a fact by the failure to challenge the seizure.

78. There was nothing in the papers provided to the Tribunal, including HMRC’s decision and subsequent correspondence between HMRC and the appellant to indicate that any such further evidence existed. In the absence of any references to such evidence, let alone any such evidence itself, I must assume that HMRC meant that the papers found at the appellant’s flat had not been thoroughly assessed in the reasoning. If HMRC have in fact taken into account information which they have not provided, or explained, to either the appellant or the Tribunal then in my view their decision on special circumstances must be flawed in a public law sense as they would have “acted in a way that no reasonable body of commissioners could have acted”. However, as noted, I have assumed that this was a poor choice of words in discussion and not a

serious suggestion that HMRC had not provided all relevant evidence to the appellant and the Tribunal.

79. HMRC also gave as a reason for their decision the view that special circumstances did not exist because the appellant was competent to research duty allowances and prices of cigarettes on the internet and competent to book and undertake travel abroad. No consideration as to the nature of the appellant's mental illness is given: competence in certain areas does not mean that the appellant's mental illness does not, for example, drive the behaviour in a way that would not apply to a neurotypical individual. Indeed, one of the explanations given by the individual for the travel in his interview in 2011 did relate to his mental illness: when asked why he had visited Hong Kong, he replied that he wanted to see the place that was his obsession (para 14, above). The appellant has also subsequently stated that there were other mental health drivers for the travel.

80. Finally, HMRC also took the view that the appellant's ability to compose correspondence and provide explanations for his behaviour, as well as to analyse the evidence available, contributed to the view that there were no special circumstances. This clearly fails to take into consideration the appellant's mental illness: one only needs to consider that the appellant regularly stated that he had been instructed by his representative, the "God of Israel", to make the statements (paras 19 and 20) for it to be clear that an ability to correspond and analyse information does not preclude other behaviour, such as stockpiling, being driven by mental health issues rather than by neurotypical behaviour.

### **Decision**

81. For the reasons given above I find that, although HMRC stated that they had taken the appellant's mental illness into consideration in their assessment that there were no special circumstances which might apply to reduce the penalty, the reasons given by HMRC make it clear that they assessed the appellant's behaviour on the basis of the actions and decisions that would be expected of a person who was neurotypical and so did not in fact take into account the appellant's mental illness.

82. I find, therefore, that HMRC's decision that there were no special circumstances is therefore flawed in the public law sense as they failed to take into account the appellant's mental illness which, as has been established above, meets the necessary criteria to be capable of forming special circumstances for this purpose.

83. Having so found that the decision was flawed, it is open to this Tribunal to substitute another decision which HMRC had the power to make. Accordingly, considering:

(1) the evidence as to the appellant's mental illness and, in particular the appellant's evidence that he was stockpiling cigarettes as a result of obsessive behaviour, and further evidence of obsessive behaviour in his reasons for travelling; and

(2) that there is no prohibition on taking into account such evidence for the purposes of assessing a penalty despite the deemed illegality of the importation of the goods; and

5 (3) the clear evidence throughout correspondence as to the impact of the appellant's mental illness on his inability to engage with everyday matters in the same way as a neurotypical individual; and

(4) the purpose of the penalty regime and the purpose of the discretion given where special circumstances apply

10 I find that the penalty should be reduced to zero on the basis of special circumstances, such circumstances being the effect of the appellant's mental illness on his behaviour in relation to the importation of the goods.

15 84. I have come to this conclusion without considering the subsequent evidence put forward by the appellant in correspondence in late 2016 and 2017 that his travel and acquisition of cigarettes was driven by MI6 telling him, through voices in his head, to make the purchases. I do note that similar statements were made in 2014 when the appeal was made, albeit with reference to MI5, and that the scope of the appellant's travel plans were not inconsistent with the appellant's submissions as to the reasons behind his travel. This information was not apparently available to HMRC when their decision on special circumstances was made, although it was made available to them during the hearing and they were invited to reconsider their decision in the light of this information.

25 85. The additional information appears to reinforce the decision that I have come to but, as stated, I have not taken it into account because I do not need to do so in order to find that HMRC did not take into account material facts in considering special circumstances. It is also possible that the appellant's mental illness has drawn him into this belief about MI6 after the events leading to the importation of the goods and, as we have not had the benefit of any detailed evidence from the appellant's psychiatrist, I would prefer not to come to any conclusion on whether this *specific* explanation from the appellant did in fact have a direct impact on his behaviour at the time of the importation. The explanation does, of course, clearly support the overall evidence as to the appellant's mental health.

35 86. It should be noted that, as stated at the outset, this appeal did not consider the question of whether there was a reasonable excuse: the points raised might well have been applicable in the context of reasonable excuse but that option had not survived to be appealed.

87. In summary: the appeal against the penalty is allowed and the penalty is reduced to zero.

40 88. I must conclude by thanking Officer Clydesdale and Mr Millington for their assistance in this difficult and at times very distressing case. There is no question that they have acted at all times with sympathy for the appellant and with the best of intentions.



89. 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.

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**ANNE FAIRPO  
TRIBUNAL JUDGE**

**RELEASE DATE: 27 FEBRUARY 2018**