



[2019] UKFTT 353 (TC)

TC07181

EXCISE DUTY – assessments for duty and penalties in relation to excise goods seized from the appellants – Jones and Race considered – goods deemed to be for commercial use - assessments in time - appeals against assessments dismissed – appeals against quantum of penalties allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**Appeal number: TC/2016/00036
TC/2016/00038**

BETWEEN

**(1) DAVID BICK
(2) ANGELA EARWICKER**

Appellants

-and-

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

Respondents

TRIBUNAL: JUDGE DAVID BEDENHAM

Sitting in public at Bedford County Court on 3 May 2019

The Appellants appeared in person

Richard Evans, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. On 6 November 2014, the Appellants (who are husband and wife) arrived at Dover having travelled by ferry from Calais. Border Force Officers stopped the Appellants' car, which was ultimately found to contain 20kgs of hand rolling tobacco ("the HRT").
2. After speaking with the Appellants, the Border Force formed the view that the HRT was held for a commercial purpose rather than for own use, and therefore attracted UK excise duty, which had not been paid. Accordingly, the HRT was seized pursuant to s 139 of the Custom and Excise Management Act 1979 ("CEMA 1979"). The Appellants did not contest the seizure.
3. Subsequently, HMRC assessed each of the Appellants to excise duty in the sum of £1,804 pursuant to s 12(1A) of the Finance Act 1994 ("FA 1994"). HMRC also issued to each of the Appellants a penalty pursuant to paragraph 4 of Schedule 41 to the Finance Act 2008 ("FA 2008") in the sum of £1,073 in the case of Mr Bick, and £947 in the case of Ms Earwicker.
4. The Appellants each filed an appeal with the Tribunal against the assessment to excise duty and the Schedule 41 penalty. The Tribunal ordered that the Appellants' appeals be heard together.
5. HMRC applied to strike out the Appellants' appeals against the excise duty assessments on the basis that the appeals were premised upon the goods being for own use, and such an argument was not open to the Appellants in circumstances where they had not contested the seizure of the HRT. In making this application, HMRC relied upon the Court of Appeal decision in *HMRC v Jones and Anor* [2011] EWCA Civ 824 and the Upper Tribunal decision in *Race v HMRC* [2014] UKUT 331 (TC). It was directed that HMRC's strike out application be heard at the substantive appeal hearing.
6. At the substantive appeal hearing a further issue arose as to whether the excise duty assessments had been made within the statutory time limits.
7. In relation to the penalty appeals, HMRC did not apply to strike them out but did submit that the Tribunal could not entertain any argument that was based upon the HRT being for the Appellants' own use. Again, HMRC relied upon the decisions in *Jones* and *Race*.

THE APPELLANTS' CASE

8. In his Notice of Appeal, Mr Bick stated his Grounds of Appeal as follows:

"I wish to appeal because I wish my case to be heard independently. I have committed no crime but been treated like a criminal and feel that HMRC have not listened. I openly cooperated with border force, and answered their questions and gave the appropriate reasons. They had no reason to believe the goods were not mine (which they were for me), I am totally innocent of their accusations and wish my voice to be heard and state my case to an independent panel, as I do not see how HMRC can be accuser, judge, jury and executioner all in one. Undemocratic.

The reason original appeal was not made was because I was told that it would cost me £750 to go to Dover mag, had no chance of success and the HMRC would be in contact in due course. At the time, I was in danger of having a diabetic hypo seizure, my wife had a panic attack which required an ambulance to be called, and through this I was very ill, traumatised and frankly needed to be "out of there". Totally disorientated. I did not lie. I answered for

me alone. If they (Border Force) misinterpreted my reply. Not my fault but it was clarified later.

As I said before, I wish to prove my innocence. HMRC certainly cant prove my guilt because there is none.”

9. In her Notice of Appeal, Ms Earwicker stated her Grounds of Appeal as follows:

“Same reasons as my partner Mr David Bick.

This made me very unwell with my health, panic attacks, depression.”

10. In opening remarks made on behalf of both Appellants, Mr Bick repeated that the HRT was for own use. In relation to HMRC’s submissions that *Jones* and *Race* prevent any further consideration of whether the goods were for own, rather than commercial, use, Mr Bick stated that such a position was very unfair, especially when (so he asserted) the reason he did not challenge the seizure was because he was discouraged from so doing by a Border Force officer. Mr Bick also stated that the notices of assessment had arrived more than one year after the date of the seizure, and his understanding was that this meant that the assessments were not valid.

11. In his evidence, which is considered in more detail below, Mr Bick repeated that the HRT was for own use and that he had not in any way sought to mislead the Border Force officers.

12. In her evidence, which is considered in more detail below, Ms Earwicker stated that the HRT was for own use and that she had not in any way sought to mislead the Border Force officers.

HMRC’S CASE

13. In relation to the Appellants’ appeals against the excise duty assessments, HMRC submitted that these appeals were based on the HRT being for own use, and that such an argument could not properly be advanced in circumstances where the HRT had been seized and there had been no challenge by the Appellants to that seizure. Accordingly, HMRC submitted that the appeals against the excise duty assessments should be struck out (or, alternatively, dismissed on the merits). HMRC relied upon the cases of *Jones* and *Race*.

14. HMRC further submitted that the excise duty assessments were not out of time. They were made on 3 November 2015. They were then notified to the Appellants by letters dated 3 November 2015.

15. In relation to the Appellants’ appeals against the penalties: HMRC did not apply to strike out the appeals but said that they should be dismissed on their merits. HMRC, at paragraphs 25-26 of Mr Evan’s skeleton argument, submitted “It appears this argument that goods were for personal use is deployed to establish that the goods were not ‘chargeable with a duty of excise’ (which is necessary for liability to a penalty to arise under Schedule 41, para 4)...It is not open to the Appellant to advance this argument in the context of a penalty appeal...”. Again, HMRC relied upon the cases of *Jones* and *Race*.

16. Further, the penalties were properly imposed on the basis of “deliberate, non-concealed behaviour with prompted disclosure” and the appropriate levels of reduction were given for “telling”, “helping” and “giving”. Given the penalties were issued on the “deliberate” basis, the reasonable excuse provision in paragraph 20 of Schedule 41 to the Finance Act 2008 does

not apply, nor are there any “special circumstances” within the meaning of paragraph 14 of Schedule 41.

17. HMRC further submitted that if, contrary to their primary position, the issue of “own use” could properly be raised in these appeals, the evidence supported that the HRT was not for the Appellants’ own use.

THE LAW

18. Excise duty is charged on HRT by section 2 of the Tobacco Products Duty Act 1979. Regulation 14 of the Tobacco Products Regulations 2001 provides that the duty is due at the excise duty point.

19. Regulation 13 of the Excise Goods (Holding, Movement and Duty Point) regulations 2010 (“HMDP 2010”) provides in material part:

“(1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.

(2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person -

- (a) making the delivery of the goods;
- (b) holding the goods intended for delivery; or
- (c) to whom the goods are delivered.

(3) For the purposes of paragraph (1) excise goods are held for a commercial purpose if they are held

...

(b) by a private individual (‘P’), except in a case where the excise goods are for P’s own use and were acquired in, and transported to the United Kingdom from, another Member State by P.”

20. Regulation 20 of the HMDP 2010 provides in relevant part:

“(1) Subject to –

(a) the provisions of these Regulations and any other regulations made under the customs and excise Acts about accounting and payment;

...

Duty must be paid at or before an excise duty point.”

21. Regulation 88 of HMDP 2010 provides that where there is a contravention of the regulations in relation to excise goods in respect of which duty was due but not paid, those goods are liable to forfeiture.

22. Section 49 of CEMA 1979 provides that goods imported without payment of applicable duty are liable to forfeiture.
23. Pursuant to s 139(1) CEMA 1979 any thing liable to forfeiture under the customs and excise Acts may be seized or detained by an appropriate officer.
24. Schedule 3 to CEMA 1979 provides in relevant part:
 “(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 or 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 the 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.”
25. Section 12(1A) of FA 1994 provides:
 “Subject to subsection (4) below, where it appears to the Commissioners –
 (a) that any person is a person from whom any amount has become due in respect of any duty of excise; and
 (b) that the amount due can be ascertained by the Commissioners,
 the Commissioners may assess the amount of duty due from that person and notify that amount to that person or his representative.”
26. Section 12(4) of FA 1994 provides in relevant part:
 “An assessment to the amount of any duty of excise due from any person shall not be made under this section at any time after whichever is the earlier of the following times, that is to say –
 (a) subject to subsection (5) below, the end of the period of 4 years beginning with the time when his liability to the duty arose; and
 (b) the end of the period of one year beginning with the day on which evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge”
27. Paragraph 4 of Schedule 41 to FA 2008 provides that a penalty is payable by a person who acquires or is concerned in carrying, removing, depositing, keeping or otherwise dealing with excise goods on which duty is outstanding and has not been deferred.
28. Paragraph 5(4) of Schedule 41 FA 2008 provides:
 “P’s acquiring possession of, or being concerned in dealing with, goods on which a payment of duty is outstanding and has not been deferred or (as the case may be) chargeable soft drinks in respect of which a payment of soft drinks industry levy is due and payable and has not been paid is –
 (a) “deliberate and concealed” if it is done deliberately and P makes arrangements to conceal it, and

(b) “deliberate but not concealed” if it is done deliberately but P does not make arrangements to conceal it.”

29. Paragraph 6B of Schedule 41 FA 2008 provides that the penalty payable for a “deliberate but not concealed” act or failure is 70% of the potential lost revenue.

30. Paragraphs 12 -13 of Schedule 41 FA 2008 provide for reduction to the amount of a penalty if disclosure is made by the person liable to the penalty. Where the applicable penalty is 70% of the potential lost revenue, a reduction for a prompted disclosure may not reduce the penalty below 35% of the potential lost revenue.

31. Paragraph 14 of Schedule 41 FA 2008 provides that “if HMRC think right because of special circumstances, they may reduce a penalty.” Inability to pay cannot amount to a special circumstance.

32. Paragraph 20 of Schedule 41 FA 2008 provides that liability to a penalty does not arise if there was a reasonable excuse for the act or failure. This provision only applies to acts or failures which are not deliberate.

33. Paragraph 17(1) of Schedule 41 FA 2008 provides for an appeal to the FTT against a decision that a penalty is payable. Paragraph 17(2) provides for an appeal to the FTT against the amount of the penalty.

34. Paragraph 19 of Schedule 41 FA 2008 provides in relevant part:

“(1) On an appeal under paragraph 17(1) the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 17(2) the tribunal may –

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 14 –

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 14 was flawed.

(4) In sub-paragraph (3)(b) “*flawed*” means flawed when considered in the light of the principles applicable in proceedings for judicial review.”

JONES AND RACE – DISCUSSION AND DECISION

35. In *Jones*, Mr and Mrs Jones were stopped by border officers at Hull Ferry Port. Significant quantities of tobacco and alcohol were seized from the Joneses on the basis that the goods were for commercial rather than own use (and no UK excise duty had been paid on the goods). The Joneses initially challenged the legality of the seizure by filing a notice of claim pursuant to paragraph 1 of Schedule 3 CEMA 1979. Subsequently, on legal advice, the Joneses withdrew that notice. The Joneses had also sought restoration of the goods (and a car seized at the same time). HMRC refused to restore the goods, and the Joneses appealed to the FTT. The FTT made findings that the goods were for own use and allowed the appeal against the restoration refusal decision. The Upper Tribunal dismissed HMRC’s appeal. HMRC appealed

to the Court of Appeal on the basis that the FTT was not entitled to make findings of fact inconsistent with the deemed forfeiture of the goods which occurred when the Joneses withdrew their notice of claim. The Court of Appeal allowed HMRC's appeal. At [71], Mummery LJ said as follows:

"I am in broad agreement with the main submissions of HMRC. For the future guidance of tribunals and their users I will summarise the conclusions that I have reached in this case in the light of the provisions of the 1979 Act, the relevant authorities, the articles of the Convention and the detailed points made by HMRC.

(1) The respondents' goods seized by the customs officers could only be condemned as forfeit pursuant to an order of a court. The FTT and the UTT are statutory appellate bodies that have not been given any such original jurisdiction.

(2) The respondents had the right to invoke the notice of claim procedure to oppose condemnation by the court on the ground that they were importing the goods for their personal use, not for commercial use.

(3) The respondents in fact exercised that right by giving to HMRC a notice of claim to the goods, but, on legal advice, they later decided to withdraw the notice and not to contest condemnation in the court proceedings that would otherwise have been brought by HMRC.

(4) The stipulated statutory effect of the respondents' withdrawal of their notice of claim under paragraph 3 of Schedule 3 was that the goods were deemed by the express language of paragraph 5 to have been condemned *and* to have been "duly" condemned as forfeited as illegally imported goods. The tribunal must give effect to the clear deeming provisions in the 1979 Act: it is impossible to read them in any other way than as requiring the goods to be taken as "duly condemned" if the owner does not challenge the legality of the seizure in the allocated court by invoking and pursuing the appropriate procedure.

(5) The deeming process limited the scope of the issues that the respondents were entitled to ventilate in the FTT on their restoration appeal. The FTT had to take it that the goods had been "duly" condemned as illegal imports. It was not open to it to conclude that the goods were legal imports illegally seized by HMRC by finding as a fact that they were being imported for own use. The role of the tribunal, as defined in the 1979 Act, does not extend to deciding as a fact that the goods were, as the respondents argued in the tribunal, being imported legally for personal use. That issue could only be decided by the court. The FTT's jurisdiction is limited to hearing an appeal against a discretionary decision by HMRC not to restore the seized goods to the respondents. In brief, the deemed effect of the respondents' failure to contest condemnation of the goods by the court was that the goods were being illegally imported by the respondents for commercial use.

(6) The deeming provisions in paragraph 5 and the restoration procedure are compatible with Article 1 of the First Protocol to the Convention and with Article 6, because the respondents were entitled under the 1979 Act to challenge in court, in accordance with Convention compliant legal procedures, the legality of the seizure of their goods. The notice of claim procedure was initiated but not pursued by the respondents. That was the choice they had made. Their Convention rights were not infringed by the limited nature of the issues that they could raise on a subsequent appeal in the different jurisdiction of the tribunal against a refusal to restore the goods.

(7) I completely agree with the analysis of the domestic law jurisdiction position by Pill LJ in *Gora* and as approved by the Court of Appeal in *Gascoyne*. The key to the understanding of the scheme of deeming is that in the legal world created by legislation the deeming of a fact or of a state of affairs is not contrary to "reality"; it is a commonly used and legitimate legislative device for spelling out a legal state of affairs consequent on the occurrence of a specified act or omission. Deeming something to be the case carries with it any fact that forms part of the conclusion.

(8) The tentative obiter dicta of Buxton LJ in *Gascoyne* on the possible impact of the Convention on the interpretation and application of the 1979 Act procedures and the potential application of the abuse of process doctrine do not prevent this court from reaching the above conclusions. That case is not binding authority for the proposition that paragraph 5 of Schedule 3 is ineffective as infringing Article 1 of the First Protocol or Article 6 where it is not an abuse to reopen the condemnation issue; nor is it binding authority for the propositions that paragraph 5 should be construed other than according to its clear terms, or that it should be disapplied judicially, or that the respondents are entitled to argue in the tribunal that the goods ought not to be condemned as forfeited.

(9) It is fortunate that Buxton LJ flagged up potential Convention concerns on Article 1 of the First Protocol and Article 6, which the court in *Gora* did not expressly address, and also considered the doctrine of abuse of process. The Convention concerns expressed in *Gascoyne* are allayed once it has been appreciated, with the benefit of the full argument on the 1979 Act, that there is no question of an owner of goods being deprived of them without having the legal right to have the lawfulness of seizure judicially determined one way or other by an impartial and independent court or tribunal: either through the courts on the issue of the legality of the seizure and/or through the FTT on the application of the principles of judicial review, such as reasonableness and proportionality, to the review decision of HMRC not to restore the goods to the owner.

(10) As for the doctrine of abuse of process, it prevents the owner from litigating a particular issue about the goods otherwise than in the allocated court, but strictly speaking it is unnecessary to have recourse to that common law doctrine in this case, because, according to its own terms, the 1979 Act itself stipulates a deemed state of affairs which the FTT had no power to contradict and the respondents were not entitled to contest. The deeming does not offend against the Convention, because it will only arise if the owner has not taken the available option of challenging the legality of the seizure in the allocated forum."

36. *Jones* was concerned only with the situation where an appellant that had not challenged legality of seizure by way of condemnation proceedings sought nonetheless to argue in an appeal against a restoration refusal that the relevant goods were for own use. However, in *Race*, Warren J stated:

"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..., they were not held by the taxpayers for their own personal use in a way that 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.

...

33. ...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*...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 [that the goods were in fact for own use] is no different from that raised by Mr and Mrs Jones.

...

39...the First-tier Tribunal could no more re-determine, in the appeal against the Penalty Assessment, a factual issue which was a necessary consequence of the statutory deeming provision than it could re-determine a factual issue decided by a court in condemnation proceedings. The issue of import for personal use, assuming purchase in a Member State, has been determined by the statutory deeming.”

37. In *HMRC v Susan Jacobson* [2018] UKUT 0018 TCC, the Upper Tribunal stated at [24]:

“We respectfully agree with Warren J in *Race* that the reasoning and analysis in *Jones* applies to an appeal against a penalty in exactly the same way as it applies to an appeal against an assessment for excise duty. The deemed effect of Ms Jacobson’s failure to contest the seizure of the HRT was that it was duly condemned as forfeited as, in the terms of regulation 88 of the 2010 regulations, goods liable to excise duty which had not been paid in contravention of the Regulations.”

38. In view of the authorities cited above, I accept HMRC’s submission that, in both the excise duty appeals and the penalty appeals, it is not open to me to make a finding that the HRT was for own use. I have reached the conclusion that this is so regardless of the reason for the failure to challenge the legality of the seizure of the HRT. I note here that the reason that the taxpayers in *Jones* withdrew their notice of claim was because of advice received from their lawyers. Accordingly, even if I had been satisfied that a Border Force officer sought to discourage the Appellants from challenging the legality of the seizure, that would not have altered my view of the consequences of the statutory deeming provision.

HMRC’S APPLICATION TO STRIKE OUT THE APPEALS AGAINST THE EXCISE DUTY ASSESSMENTS

39. Rule 8 of the Tribunal Procedure (FTT) (Tax Chamber) Rules 2009 (“the FTT Rules”) provides in relevant part:

“(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal:

(a) does not have jurisdiction in relation to the proceedings or that part of them; and

(b) does not exercise its power under Rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.

(3) 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.”

40. Given my conclusion at paragraph 38 above, I am satisfied that I have no jurisdiction in relation to the Appellants' appeals to the extent that they are premised upon the HRT being for own use. In any event, I am satisfied that, to the extent the Appellants' appeals are premised upon the HRT being for own use, the Appellants' appeals have no reasonable prospect of success.

41. Accordingly, the Appellants' grounds of appeal based on the HRT being for own use are struck out. However, I do not think it appropriate to strike out the excise duty assessment appeals in their entirety because the Appellants have also raised a time limit point in respect of which I do have jurisdiction, and to which I consider I should give substantive consideration.

EVIDENCE AND FINDINGS OF FACT

42. Mr Bick gave sworn evidence. He confirmed the accuracy of the content of a letter dated 4 January 2017 that he had written to the Tribunal, and gave a more detailed account of the events of 6 November 2014. Mr Bick was cross examined by HMRC's counsel.

43. Ms Earwicker gave sworn evidence. She confirmed the accuracy of the content of two letters (both dated 19 November 2015) that she had written to HMRC and the Border Force Complaints Team respectively, and gave a more detailed account of the events of 6 November 2014. Ms Earwicker was cross examined by HMRC's counsel.

44. HMRC filed two witness statements (one relating to Mr Bick and the other relating to Ms Earwicker) from Helen Jennison, an officer of HMRC. Ms Jennison also gave oral evidence during which she confirmed the accuracy of her witness statements and elaborated on certain aspects of her evidence. Ms Jennison was cross examined by the Appellants. HMRC also relied upon documents that were included in the hearing bundle, in particular the notebooks of the Border Force officers who dealt with the Appellants on 6 November 2014.

45. In the letter of 4 January 2017, Mr Bick stated in relevant part:

“On the 9th of Sept 2014 I was changed to inuslin control for my diabetes. DVLA were informed...I did not know if I would keep my licence, and if suspended when I would get it back.

...I spoke with the wife [Ms Earwicker] and because of the uncertainty of the license situation decided to have a day trip to Belgium and buy a years worth of tobacco for ourselves.

On the day in question we did so and called into a French hypermarket at Calais. At the time because of the migrant camp lots of British cars were being targeted and broken into. Because my car was a hatchback and easily looked into, we found every nook and cranny to keep the tobacco from view and what was left was covered with coats, shopping bags and other less valuable purchases.

...

On leaving the ferry I was not feeling well, which at the time I put down to a choppy crossing, but later realised I was close to a hypo-Glycemic reaction.

When we were stopped I was asked how many packs of tobacco I had and I said 20. The wife was asked, she replied the same. I was asked and answered for me and did not because when I went to school 20 + 20 + 40.

...

I made a statement but because of my impending blood sugar problem was a bit confused and disorientated. Also, after a couple of hours waiting in the cold with no food and water, I was getting concerned for the wife as the stress had brought on an asthma attack so bad a paramedic had to be called [for Ms Earwicker]...whilst he was treating the wife, the female officer was in the wife's face trying to con a confession from her. The paramedic told her to leave the room.

...

I asked about our tobacco and [the Border Force officer] said 'Its gone. You could apply to Dover Court to get it back but it will cost you £750 and you have no chance. They always back us.'

She went on to say that paperwork would be passed on and we may hear from the powers that be. We did, 1 year and 3 days later.

...

We have insisted all along the goods were for personal use only. There is no evidence to suggest anything other than that..."

46. Mr Bick's oral evidence in relevant part was as follows:

(1) In 2013, after 18 years as a coach driver, he was made redundant. From his redundancy pay he purchased a new car;

(2) In 2014, his diabetes became unmanageable by tablets so he was prescribed insulin. His doctor referred him to the DVLA. There was uncertainty as to whether Mr Bick would be able to retain his driving licence;

(3) The Appellants would on average make two trips per year to other member states to purchase tobacco products for their own use. Due to the uncertainty in relation to his driving licence, he and Ms Earwicker decided to make a trip to Belgium to purchase enough tobacco to last them for a year. They had already made a number of previous trips that year but had not purchased tobacco on every occasion;

(4) On 6 November 2014, the Appellants travelled to Calais and then on to Belgium where they purchased 40 "packets" of HRT. Mr Bick explained that a "packet" (or "carton") is made up of ten 50 gramme "pouches" wrapped together in cellophane. So each packet contained 500 grammes meaning that the 40 packets totalled 20 kilograms – although Mr Bick said he did not think about the HRT in terms of weight but rather in numbers of packets;

(5) Half of the HRT purchased was for Mr Bick's use. The other half was for Ms Earwicker's use. The HRT would have lasted the Appellants approximately one year.

(6) On the way back to the ferry port at Calais, the Appellants stopped to purchase some other (non-excise) goods. They were advised by one of the retail establishments from which they bought goods that vehicles with British number plates were being broken into by people living in the migrant camp known as "the Jungle";

(7) The Appellants decided to cover up their purchases using coats and put the HRT in various places in the car. This was not to conceal any "smuggling" but to protect it from people that might break into the vehicle;

(8) When first stopped and asked by a Border Force officer (Atmore) about tobacco purchases, Mr Bick said he had replied that he had purchased ten packs but corrected this to 20 “pretty much straight away”. Mr Bick said that in answering this question, he was only answering for himself (and therefore did not mention Ms Earwicker’s 20 packets of HRT);

(9) The Appellants agreed to stay for an interview with Border Force;

(10) Mr Bick explained to the Border Force officer (Allum) who interviewed him that the HRT was for personal use. There was some confusion over the phraseology of “pouches” and “packets”;

(11) Mr Bick started to feel disoriented because his blood sugar levels were going down;

(12) A Border Force officer gave Mr Bick a notice of seizure and a leaflet about what can and cannot be brought into the UK;

(13) Mr Bick asked the Border Force officer “What happens now?” and was told words to the effect of “If you want the goods back, you have got to go to Dover magistrates’ court on Monday morning, It will cost you £750. But you won’t win. The magistrates always back us”. Mr Bick said that having been told this “it seemed to me that I could write the goods off and do nothing or I could try and get the goods back by going to Dover magistrates’ court”;

(14) Mr Bick heard nothing further for over a year. On 12 November 2015, he received a letter from HMRC dated 3 November 2015 (with enclosures) relating to an assessment to excise duty on the HRT and a penalty charge; and

(15) During cross examination:

(a) Mr Bick confirmed he had signed as accurate the notebook of Officer Atmore (the Border Force officer that had first spoken with Mr Bick at Dover);

(b) When asked why, in response to Officer Atmore’s question “Where have you been?”, he had replied “Calais, Cite Europe, to meet some friends for lunch” rather than mention that he had been to Belgium, Mr Bick stated that the Appellants had met friends for lunch and that the officer “didn’t ask me for all my movements since I got up so I didn’t see that I had to mention Belgium at that point. But I did mention it later”;

(c) When asked why, in response to Officer Atmore’s question “Have you purchased any cigarettes or tobacco?”, he had replied ‘twelve packs of tobacco’ and later “twelve pouches”, Mr Bick stated that it was all for own use so the amount did not seem to him to be of any consequence. Mr Bick also repeated that he was answering only for himself and not for Ms Earwicker;

(d) The following extract from the Officer Atmore’s notebook was put to Mr Bick:

“FA - Can you show me the tobacco please?

Mr Bick opened the boot of the car and showed me two plastic bags.

DB – Theres six in that bag and six in the other bag

FA – is there any other tobacco anywhere in the car?

DB – No

...

FA - Who is the tobacco for?

DB – Us.”

Mr Bick was then asked why, when the officer was clearly only aware of 12 packets of HRT, Mr Bick had said “no” to the question “Is there any other tobacco anywhere in the car?”. Mr Bick replied “I was only asked for me. I answered for me”. Mr Bick later stated that when he said there was no other tobacco anywhere in the car that must have been a “slip of the tongue”;

(e) When put to him that the HRT had been concealed in various parts of the car including in the boot tool storage area, Mr Bick replied that he had tried to cover up the goods so that his vehicle was not broken into;

(f) When put to him that, along with the notice of seizure and the leaflet about what can and cannot be brought into the UK (Notice 1), Mr Bick was also given a copy of Notice 12A, Mr Bick replied “I may have received it. I don’t remember seeing it.”;

(g) When asked why he had said to a Border Force officer (Alan Bonner) that the reason he didn’t tell Border Force about all of the HRT was because “I’ve heard the stories”, Mr Bick replied that he did not say this;

(h) When put to him that the Border Force officer had not said words to the effect of “if you want the goods back, you have got to go to Dover magistrates’ court on Monday morning. It will cost you £750. But you won’t win. The magistrates always back us”, Mr Bick replied “Believe what you like. She said it.”; and

(i) When asked how he knew that the 3 November 2015 letter arrived on 12 November 2015, Mr Bick replied “I knew they [HMRC] had to do it within a year”.

47. In the letter of 19 November 2015 to the Border Force Complaints Team, Ms Earwicker stated in relevant part:

“...[We] formally request that this case be reviewed and that...the sums detailed in the [HMRC] letter of 3 November 2015 be terminated.

The reasons are as follows:

As we stated at the time, the tobacco was for our own use only:

We bought 40kg as we are both smokers. My husband suffers from diabetes and is at risk of losing his drivers licence due to his deteriorating health. We decided to have a day out and ‘stock up’ as this may have been our last chance to do so.

The border control officers were sceptical of this as when asked how much tobacco we had purchased, we both answered ‘20kg’; this was because 20kg was for my husband and 20kg was for me. This clearly led to a misunderstanding with the Border Control Officers thinking that we were attempting to conceal our total purchases of 40kg. This was compounded by the fact that some of the tobacco was concealed...to ensure that the goods were not visible through the car windows as they may be liable to theft...

The Officers told us at the time that it would be pointless to appeal as we had ‘no chance’ of success and it would cost us around £700 to do so.

I was traumatized by the episode and the behaviour of the officers involved. I suffered a panic attack, had difficulty breathing due to asthma and an ambulance was subsequently called..."

48. Ms Earwicker's oral evidence in relevant part was as follows:

- (1) In relation to events prior to arrival at Dover, Ms Earwicker agreed with (and had nothing to add to) the evidence given by Mr Bick;
- (2) At Dover, Border Force stopped the car and asked Mr Bick to get out. The officer then proceeded to ask Mr Bick questions. Ms Earwicker stayed in the car;
- (3) Ms Earwicker has significant hearing difficulties (and did so as at 6 November 2014);
- (4) Ms Earwicker did not hear all of the questions put by the Border Force officer to Mr Bick or all of Mr Bick's answers;
- (5) Ms Earwicker signed as accurate Officer Atmore's notebook (which recorded the questions asked by the officer of Mr Bick and Mr Bick's answers) because she was traumatised and just wanted to get out of there. She is not someone that reads "small print" and did not fully read the notebook entries before signing to confirm their accuracy;
- (6) Half of the HRT (20 "packets") belonged to Ms Earwicker. The other half belonged to Mr Bick. The references in the 19 November 2015 letter to "40kg" were in error. Those references should have read "40 packets";
- (7) Ms Earwicker had no recollection of being given Notice 12A;
- (8) A Border Force officer told Mr Bick, in Ms Earwicker's presence, that a challenge to the seizure of the HRT would cost £750 and that the courts always find for Border Force;
- (9) The 3 November 2015 letter did not arrive until 12 November 2015; and
- (10) During cross-examination:
 - (a) When asked why she had signed Officer Atmore's notebook if she had not heard the questions and answers put to Mr Bick, Ms Earwicker said that she did so because the officer had talked to Mr Bick and so the notebook was accurate in that regard. Ms Earwicker repeated that she did not hear all that passed between Mr Bick and Officer Atmore because she was in the car (and the questioning took place outside of the car) and she suffers from hearing difficulties;
 - (b) When asked why she had said in interview with a Border Force officer that her 20 packets would last 4-5 months when, on her own account, she smoked only two pouches per week, Ms Earwicker said she had a brother and brother-in-law who smoke HRT and she would have given some to them; and
 - (c) When asked whether she knew that the seizure could be challenged in the magistrates' court, Ms Earwicker confirmed that she did, but repeated that a Border Force officer had said that such a challenge would cost £750 and that the courts always find for Border Force.

49. In her witness statement in relation to Mr Bick, Ms Jennison said in relevant part:

(1) “On 26 October 2015, I checked seizure referral papers for Mr David John Bick and his co-traveller Angela Karen Earwicker received from Border Force. The papers gave details of the goods seized, copies of seizure documents issued and a copy of the seizing officer’s notebook. Mr David John Bick was issued with seizure information notice BOR 156 the warning letter about seized goods notice BOR 162 and he signed both copies”;

(2) “I considered the information within the officers notebook and made the decision that an Excise Duty Assessment was due...”;

(3) “On 3 November 2015, I issued the Excise duty and Penalty preliminary notice letter, assessment £1804 and penalty £1072, Officers Assessment/Civil Penalty Excise – EX601, the Penalty Notice (NPPS100), the Penalty explanation (NPPS100(S)), and the Excise Duty Schedule. The assessment was issued by virtue Part 2 Regulations 13(1) and 13(2) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010.”;

(4) “On 4 December 2015, I issued the Excise duty and penalty assessment letter, notice of penalty assessment...the penalty is calculated as a percentage of the Potential Lost Revenue, which in this case is the duty amount of £1804. The calculations and reasons are shown on the NPP100(s) penalty explanation issued on 3 November. In considering the issue of the penalty, I decided that David John Bick’s behaviour was deliberate, but not concealed, as he under declared the amount of tobacco he had to the Border Force Officer and continued to do so. There was a potential element of concealment, as goods were packed in a manner to prevent detection but I considered the evidence insufficient to support a deliberate and concealed wrongdoing.”;

(5) “The disclosure was prompted because the appellant did not tell us about the wrongdoing before he had reason to believe we had discovered it, or were about to. For this deliberate wrongdoing, with a prompted disclosure the minimum penalty chargeable is 35% and the maximum 70%.”; and

(6) “In calculating the quality of disclosure, I looked at Telling, Helping and Giving. As he under declared the amount of tobacco, I gave him no reduction for telling 0%. Although he remained for interview with the Border Force he continued to be evasive, I gave him no reduction for helping 0%. I gave full reduction for Giving 30% as he could not assist with this. The total penalty charge is 59.5% of £1804, which equals £1073.”;

50. In her witness statement in relation to Ms Earwicker, Ms Jennison said in relevant part:

(1) “On 26 October 2015, I checked seizure referral papers for Angela Karen Earwicker and her co-traveller Mr David John Bick received from Border Force. The papers gave details of the goods seized, copies of seizure documents issued and a copy of the seizing officer’s notebook. Angela Karen Earwicker was issued with seizure information notice BOR 156 the warning letter about seized goods notice BOR 162 and she signed both copies.”;

(2) “I considered the information within the officers notebook and made the decision that an Excise Duty Assessment was due...”

(3) “On 3 November 2015 I issued the Excise duty and Penalty preliminary notice letter, assessment £1804 and penalty £947, Officers Assessment/Civil Penalty Excise – EX601, the Penalty Notice (NPPS100), the Penalty explanation (NPPS100(S)), and the Excise Duty Schedule. The assessment was issued by virtue Part 2 Regulations 13(1) and 13(2) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010.”;

(4) “On 4 December 2015, I issued the Excise duty and penalty assessment letter, notice of penalty assessment...the penalty is calculated as a percentage of the Potential Lost Revenue, which in this case is the duty amount of £1804. The calculations and reasons are shown on the NPP100(s) penalty explanation issued on 3 November. In considering the issue of the penalty, I decided that Angela Karen Earwicker’s behaviour was deliberate, but not concealed. Although Mr David John Bick answered the initial questions and under-declared the amount of tobacco he had to the Border Force Officer and continued to do so, Angela Earwicker was present and had the opportunity to answer. There was a potential element of concealment, as goods were packed in a manner to prevent detection but I considered the evidence insufficient to support a deliberate and concealed wrongdoing.”;

(5) “The disclosure was prompted because the appellant did not tell us about the wrongdoing before she had reason to believe we had discovered it, or were about to. For this deliberate wrongdoing, with a prompted disclosure the minimum penalty chargeable is 35% and the maximum 70%”; and

(6) “In calculating the quality of disclosure, I looked at Telling, Helping and Giving. As the amount of tobacco was under declared, I gave no reduction for telling 0%. Although Angela Earwicker remained for interview with the Border Force and then admitted to the full amount, from where it was purchased but not why, I gave 20% reduction for helping. I gave full reduction for Giving 30% as she could not assist with this. The total penalty charge is 52.5% of £1804, which equals £947.”

51. Ms Jennison’s oral evidence in relevant part was as follows:

(1) The excise duty assessments were made on 3 November 2015. They were notified to the Appellants by letters dated 3 November 2015;

(2) When cross examined by the Appellants and asked questions by the Tribunal, Ms Jennison:

(a) In response to Ms Earwicker’s question “how can you say I misdeclared how much tobacco we had. I didn’t say anything until the interview?”, replied “I didn’t know that at the time”;

(b) When asked by Mr Bick why the 3 November 2015 letter had not arrived until 12 November 2015, replied “I can’t explain that, I put it in the postroom before midday on 3 November 2015. It would have been posted on the same day. That is how the system works”;

(c) Stated that the 3 November 2015 letter would have been sent by second class post;

(d) Said she was unaware of when Border Force had sent the relevant papers to HMRC (although she only considered them in October 2015);

(e) Said she was working on the basis that the excise duty assessments needed to be issued within one year of 6 November 2014; and

(f) Said she did not check with Border Force whether or not Ms Earwicker was present when Mr Bick was being asked questions by Officer Atmore. Rather, she simply relied on the notebook of Officer Atmore.

52. The documents relied on by HMRC included:

(1) The Seizure Information Notice (Form BOR 156) which recorded that the Appellants had been issued with Notice 1, Notice 12A and a warning letter. The Appellants had each signed the Seizure Information Notice to acknowledge receipt;

(2) A “Warning letter about seized goods” which materially stated:

“the goods listed in the attached schedule...have been seized...This is without prejudice to any further action that may be taken against you in connection with this matter...HM Revenue and Customs...may take action against you such as issuing you with an assessment for any evaded tax or duty and a wrongdoing penalty...”

The Appellants had each signed the warning letter to acknowledge receipt;

(3) Officer Atmore’s notebook which recorded the following relevant exchange between Officer Atmore (“FA”) and Mr Bick (“DB”) (at the point that Officer Atmore first stopped the Appellants’ car):

“FA: Where have you been?

DB: Calais, Cite Europe to meet some friends for lunch.

...

FA: Have you purchased any cigarettes or tobacco?

DB: Twelve packs of tobacco.

FA: Is that 12 Kilos?

DB: I’m not sure...

FA: Can you show me the tobacco please?

Mr Bick opened the boot of the car and showed me two black plastic bags.

DB: There’s six in that bag and six in the other bag.

FA: Is there any other tobacco anywhere else in the car?

DB: No.

FA: Do you have receipts for the tobacco?

DB: No

FA: Who is the tobacco for?

DB: Us

FA: Do you both smoke?

DB: Yes.”

Both Appellants signed Officer Atmore’s notebook as a “true account”;

(4) The notebooks of Border Force officers who found in the Appellants’ car (including in the “boot tool storage area”) HRT other than that in the two black plastic bags shown by Mr Bick to Officer Atmore;

(5) The notebook of a Border Force officer (Bonner) who asked Mr Bick why he had not told Border Force about all of the HRT in the car and was told by Mr Bick “I’ve heard the stories”. Mr Bick signed the officer’s notebook as being “correct”;

(6) The notebook of a Border Force officer (Allum) (“RA”) which recorded the following relevant interview exchange with Mr Bick (“DB”):

“RA: Are you fit and well to be interviewed today?

DB: Yes

...

RA: Where [was the HRT] purchased?

DB: PJ’s Chocolate Factory, Gistel

RA: How much did they cost?

DB: £53.30 a pouch

RA: How many pouches do you have?

DB: 40 or 36.

Worked out at 9kg

...

RA: Can you remember the total sum you paid?

DB: £2140

...

RA: When did you last travel abroad?

DB: August for a weeks holiday.

RA: Where did you go?

DB: Holland

RA: did you purchase any tobacco then?

DB: Yes, I bought cigarettes

...

RA: How many trips have you made in the last 12 months?

DB: We went on a coach trip last November to Cologne Christmas markets. We went to Cite Europe – February, March time. So about 4 I think, with today.

RA: Did you purchase cigarettes or tobacco on all of those trips?

DB: I don’t think we did on the coach trip. I think we may have got a couple of cartons on the boat on the way back.

...

RA: What was your previous job?

DB: I was a coach driver...[for] about 16 years.

RA: Did you do continental trips?

DB: Yes.

RA: What’s the total amount in kilos the two of you brought in today between you.

DB: About 9kg? A kilo is 1000g, yeah?

RA: Do you have any receipts?

DB: I looked for them but I couldn't, I must have left them.

RA: Is there anything else you'd like to add or clarify?

DB: Basically, the reason that there so much is because of health problems. I have to have a doctors medical in December for the DVLA because I've gone onto insulin for my diabetes and I'm struggling to control it...I may lose my driving licence. This being the case I thought of making the trip over to get a years worth of tobacco as I thought there was unlimited control for personal use."; and

(7) The notebook of Officer Atmore ("FA") which recorded the following relevant interview exchange with Ms Earwicker ("AE"):

"FA: Are you fit to stay for an interview

AE: Yeah

FA: How much of the tobacco belongs to you?

AE: Probably about 20 of them?

FA: 20 of the packets wrapped in black?

AE: Yeah, because then Ive got a whole lot of them to use.

FA: How much is in the car in total?

EA: 40 I think

FA: Who is it for?

EA: Me and David

...

FA: How many pouches do you smoke a week?

EA: About 2

FA: How long do you expect the goods to last?

EA: Until February or March next year if not longer.

...

EA: David next door has just had insulin and if he goes all clammy he'll need jelly babies. Can you let them know?

...

FA: Do you have any receipts for the goods brought today?

EA: No

FA: Where did you buy them?

EA: PJ's

FA: is that in Calais?

EA: No, Belgium isn't it.

FA: Have you contributed towards the purchase?

EA: Yeah...about £300...well, it comes out of our account.

...

FA: Why was the amount of tobacco you have misdeclared?

AE: Don't know.

FA: Why was it hidden around the car?

AE: I didn't think it was. Just put around the car that's it."

53. Having considered all of the evidence, I make the following findings of fact:

(1) The accounts of the conversations between the Appellants and the Border Force contained in the Officers' notebooks are accurate. Indeed, the Appellants signed the notebooks to confirm this;

(2) The Appellants carried or otherwise dealt with excise goods on which duty was due and had not been paid (the HRT). Indeed, given it is not open to the Appellants to argue "own use", I could not properly find otherwise. The Appellants were regular travellers to other member states, where they would buy tobacco products. I am satisfied that they knew that HRT brought into the UK from another member state other than for own use attracts UK excise duty. I am satisfied that the Appellants' dealings with the HRT were deliberate – the goods were not for own use and yet the Appellants took a conscious decision to bring them into the UK without payment of UK duty;

(3) Mr Bick did initially seek to mislead Border Force as to the amount of HRT in the car. He told Officer Atmore that he had purchased 12 packs of HRT. He then showed Officer Atmore two bags which he said contained those 12 packs. He was then asked the direct question "Is there any other tobacco anywhere else in the car?" to which he replied "No". That was not a truthful answer. There was other HRT in the car. I reject Mr Bick's assertion that in answering Officer Atmore's question he was answering only in relation to his share of the HRT (rather than Ms Earwicker's share). Officer Atmore's question was clear; "is there *any* other tobacco anywhere else in the car?". Further, when Officer Atmore asked the follow-up question "Who is the tobacco for?", Mr Bick replied "Us". Nor was Mr Bick forthcoming in other regards including when asked where the Appellants had been. He mentioned that they had been to Cite Europe in Calais for lunch with friends but omitted that they had also been to Belgium to purchase HRT. I do not accept that Mr Bick's attempts to mislead Officer Atmore had anything to do with his diabetes. I note that at the start of his interview with Officer Allum (which was later than his conversation with Officer Atmore), Mr Bick confirmed he was fit and well for interview (albeit I accept he later needed to take insulin for his condition);

(4) When Mr Bick was later interviewed by Officer Allum, he sought to give an accurate account of how much HRT was in the car saying that there were "40 or 36 pouches". Mr Bick then said that each "pouch" cost £53.50. It is clear to me that when Mr Bick said he had 40 (or 36) pouches he actually meant to refer to 40 (or 36) "packets" (i.e. ten 50 gramme "pouches" wrapped together in cellophane) – otherwise the reference to each unit costing £53.50 would not make any sense (given Ms Earwicker told Officer Atmore then a pouch cost approximately £16.50 in the UK). It is correct that Mr Bick later in the interview said (tentatively, as shown by the inclusion of a question mark) that the HRT came to a total weight of 9kg. However, I accept Mr Bick's evidence that he did not think in terms of weight but rather in terms of numbers packets. Mr Bick also explained from where the HRT had been purchased, and answered other questions put to him. By the time of Mr Bick's interview with Officer Allum, it was clear that Border Force had found (or would find) all of the HRT in the Appellants' car. Accordingly, Mr Bick's disclosure to Officer Allum was prompted;

(5) Ms Earwicker did not hear all of the questions asked by Officer Atmore of Mr Bick. Nor did she hear all of Mr Bick's answers. In reaching this conclusion I have taken into account Ms Earwicker's evidence (which I accept on this point) that she was in the car whereas the conversation between Officer Atmore and Mr Bick took place outside the car, and that she is hearing impaired. I also accept Ms Earwicker's explanation that in signing Officer Atmore's notebook as a "true account" she was confirming that Officer Atmore had spoken with Mr Bick (some of which conversation she had heard) but was not adopting the answers given by Mr Bick to Officer Atmore. The first time that Ms Earwicker gave an account of events was during her interview with Officer Atmore. In that interview, Ms Earwicker stated that there were 40 packs of HRT (which was correct) and that half of them were hers. She also stated that the HRT had been purchased in Belgium. In all of the circumstances, I have reached the view that Ms Earwicker did not seek to mislead Officer Atmore (or any other Border Force officer) and provided accurate information about the quantity of HRT and from where it had been purchased albeit, by this stage, it was already clear that Border Force had found (or would find) all of the HRT in the car. Accordingly, Ms Earwicker's disclosure was prompted;

(6) The Appellants knew that the seizure of the HRT could be challenged in the magistrates' court. This was clear from Notice 12A, which I find was provided to the Appellants. Further, Mr Bick confirmed in his oral evidence that "it seemed to me that I would write the goods off and do nothing or I could try and get the goods back by going to Dover magistrates' court". Given that the Appellants were clearly made aware that they could challenge the seizure of the HRT by way of proceedings in the magistrates' court, and given that I have held that the reason why a person might have failed to progress such a challenge is irrelevant to the operation of the statutory deeming provisions, I do not need to (and do not) make a finding as to whether a Border Force officer told the Appellants that challenging the seizure would cost £750 and that the court always finds for Border Force. If such a statement were made, it would have been both inaccurate and inappropriate;

(7) The Appellants knew that in addition to the seizure of the HRT, other action might be taken against them. This was explained in the "warning letter about seized goods" of which the Appellants acknowledged receipt;

(8) Ms Jennison made the excise duty assessments on the morning of 3 November 2015. The 3 November 2015 cover letters and assessments were put in the post-room before midday and were sent out on 3 November 2015 by second class post; and

(9) In the 4 January 2017 letter, Mr Bick stated that the Appellants heard from HMRC "1 year and 3 days later". That would have been 9 November 2015. This is inconsistent with the oral evidence given by both Appellants that the letters arrived on 12 November 2015. Further, neither Appellant could explain how, over 3 years later, they could remember that the date of receipt was 12 November 2015. Nor was there any contemporaneous record of receipt on that date (such as a contemporaneous annotation recording the receipt date). I therefore reject the Appellants' evidence that the 3 November 2015 letter were not received until 12 November 2015 (or 9 November 2015). On balance, I am satisfied the 3 November 2015 letters reached the Appellants by 6 November 2015 at the latest. I reach this conclusion because I am satisfied that Ms Jennison made the assessments on 3 November and ensured the letters were in the post-room by midday so they would, following HMRC's normal process, have been posted that day by second class post. Normal delivery times for second class post are within 3

working days of posting. Here I remind myself that s 7 of the Interpretation Act 1978 provides:

“Where an Act authorises or requires any document to be served by post (whether the expression “serve” or the expression “give” or “send” or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.”

Even if not directly applicable to the present situation, this provision supports that in the absence of evidence to the contrary, regard can properly be had to the normal delivery times when determining when an item of post was received.

THE APPEALS AGAINST THE EXCISE DUTY ASSESSMENTS

54. The Appellants advanced their appeals against the excise duty assessments on two grounds: that there was no duty point because the goods were for own use; and that the letters notifying them of the assessments were received more than one year after the seizure.

55. For the reasons set out above, I have struck out the Appellants’ grounds of appeal based on own use.

56. In relation to the time limit point: s 12(4) FA 1994 provides that an assessment shall not be made at any time after the earlier of (1) 4 years beginning with the time when the liability to duty arose; and (2) the end of the period of one year beginning with the day on which evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge.

57. Ms Jennison gave evidence that she worked on the basis that the one year period began on the date of the seizure (6 November 2014). She said that she did this even though HMRC would not have known of the HRT seizure on that date (given it was Border Force that seized the HRT, and the seizure did not take place until the evening of 6 November 2014). Such an approach seems to me to be an overly generous one given that the phrase “comes to their knowledge” in s 12(4) FA 1994 does not extend to constructive knowledge (see [25] of *Lithuanian Beer Ltd v HMRC* [2018] EWCA Civ 1406) and so, in my judgment, also does not extend to knowledge held by Border Force but not yet conveyed to HMRC.

58. Ms Jennison could not say when Border Force conveyed to HMRC that the HRT had been seized but I find that, at the very earliest, this was 7 November 2014 (given the seizure took place on the evening of 6 November 2014). It may have been considerably later.

59. Section 12(4) FA 1994 simply requires that the assessment be “made” within the applicable time limit. I am satisfied that HMRC made the excise duty assessments on 3 November 2014.

60. I asked the parties to consider whether HMRC’s “Excise Assessments Interim Guidance – EAIG 9200” (which states that “for all assessments made on or after 1 March 2001 as a matter of policy we will rely on the date of notification of an assessment as the material date for time limit purposes”) was of any relevance or effect in the present appeals. For HMRC, Mr Evans made some brief submissions in relation to the nature of such guidance and whether it was to be considered mandatory or advisory. Mr Evans then submitted that, in any event, on the facts

of the present appeals, the excise duty assessments were made on 3 November 2014 and were notified by the letter of 3 November 2014. For their part, the Appellants repeated that their understanding was that HMRC was required to ensure that the assessments were received by the Appellants no later than one year from the date of the seizure.

61. Ultimately, I have decided that I do not need to further consider the effect (if any) of HMRC's guidance. This is because I have found as a fact that the excise duty assessments were received by the Appellants no later than 6 November 2015. So, even on the Appellants' construction of what HMRC is required to do within the one year window (given that the one year window cannot have commenced until 7 November 2014 at the earliest) the excise duty assessments were in time.

62. Accordingly, I dismiss the Appellants' appeals against the excise duty assessments.

THE APPEALS AGAINST THE PENALTIES

63. As set out at paragraph 53(2) above, the Appellants deliberately carried or otherwise dealt with goods on which duty was due and had not been paid. Where an act giving rise to a penalty was deliberate, the reasonable excuse provision set out in paragraph 20 of Schedule 41 FA 2008 does not apply. Accordingly, the Appellants are each liable for a penalty pursuant to paragraph 4 of Schedule 41 FA 2008. HMRC did not contend that the Appellants "concealed" their acts and so, pursuant to paragraph 6B of Schedule 41 FA 2008, the penalty payable, subject to any reduction, is 70% of the potential lost revenue.

64. Pursuant to paragraphs 12-13 of Schedule 41 FA 2008, a reduction to the amount of a penalty must be given if relevant disclosure is made by the person liable to the penalty. Although, where the applicable penalty is (as in these appeals) 70% of the potential lost revenue, the reduction for a prompted disclosure may not reduce the penalty below 35% of the potential lost revenue. I have found that the disclosures made by both Appellants were prompted.

65. In calculating Mr Bick's penalty, HMRC gave no reduction for "telling". The penalty explanation stated that this was because "you misdeclared the amount of tobacco that you had in an attempt to evade detection, therefore no reduction is given." Mr Bick sought to mislead Officer Atmore (as to the amount of HRT) and gave to Officer Atmore evasive answers (for example as to where the Appellants had been on 6 November 2014), I am therefore of the view that Mr Bick was not entitled to any reduction for "telling".

66. In calculating, Mr Bick's penalty, HMRC gave no reduction for "helping". The penalty explanation stated that this was because "although you remained for interview, you continued to be evasive during questioning, therefore full reduction is not given." I am of the view that during the interview with Officer Allum, Mr Bick did seek to give accurate answers to the questions asked of him including in relation to the total amount of HRT and where it had been purchased from. I do not agree that that Mr Bick's answers in this interview can properly be described as "evasive". That said, he did not explain in interview why he had initially sought to mislead Officer Atmore. In all the circumstances, I am of the view that Mr Bick should have been given a 15% reduction for "helping".

67. In calculating Ms Bick's penalty, HMRC gave a 30% reduction for "access to records". The penalty explanation stated that this was because "you were not required to assist with this element therefore full reduction was given".

68. In calculating Ms Earwicker's penalty, HMRC gave no reduction for "telling". The penalty explanation stated that this was because "you misdeclared the amount of tobacco that

you had in an attempt to evade detection, therefore no reduction is given.” I have found that Ms Earwicker did not misdeclare the amount of HRT. That was Mr Bick’s doing. When Ms Earwicker was interviewed she did give an accurate account of how much HRT was in the car. In all the circumstances, I am of the view that Ms Earwicker should have been given the full reduction for “telling”.

69. In calculating Ms Earwicker’s penalty, HMRC gave a 20% reduction for “helping”. The penalty explanation stated that this was because “you remained for interview, admitted the full amount of tobacco and from where you bought it, but you did not admit why you initially misdeclared the goods, therefore only part reduction was given.’ Given that I have found that Ms Earwicker did not misdeclare the amount of HRT, I do not consider that the reduction for “helping” should be reduced because Ms Earwicker “did not admit why [she] initially misdeclared the goods”. In all the circumstances, I am of the view that Ms Earwicker should have been given the full reduction for “helping”.

70. In calculating Ms Earwicker’s penalty, HMRC gave a 30% reduction for “access to records”. The penalty explanation stated that this was because “you were not required to assist with this element therefore full reduction was given”.

71. HMRC concluded that there were no special circumstances (within the meaning paragraph 14 of Schedule 41 FA 2008) such as to justify any further reduction in the level of the penalties imposed on the Appellants. I agree that there are no special circumstances in these appeals.

72. It follows, therefore, that:

(1) Mr Bick’s appeal against the decision to impose a penalty is dismissed but his appeal against the amount of the penalty is allowed to the extent set out at paragraph 66 above. HMRC should now recalculate Mr Bick’s penalty applying a 15% reduction for “helping” and the full reduction for “access to records” (with no reduction for “telling”); and

(2) Ms Earwicker’s appeal against the decision to impose a penalty is dismissed but her appeal against the amount of the penalty is allowed to the extent set out at paragraphs 68 and 69 above. HMRC should now recalculate Ms Earwicker’s penalty applying the full reduction for each of “telling”, “helping” and “access to records”.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

73. 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.

**DAVID BEDENHAM
TRIBUNAL JUDGE**

RELEASE DATE: 03 JUNE 2019