



**TC07282**

**Appeal number: TC/2016/04743**

*EXCISE DUTY – hand rolling tobacco – s.12(1A) Finance Act 1994 and Schedule 41 to Finance Act 2008 – strike out application – illiteracy – appellant unable to read – Jones and Race considered – deeming of commercial use – the temporal effect of the deeming rule – no reasonable excuse – no special circumstances – appeal against assessment struck out – penalty upheld – article 8 First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008 – Judge’s casting vote*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**PAUL CLARK**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE JAMES AUSTEN  
MRS ANN CHRISTIAN**

**Sitting in public at Leeds on 22 May 2019**

**The Appellant appeared in person**

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

## DECISION

### **Note to Mr Clark from Judge Austen**

Mrs Christian and I decided at the hearing in Leeds that you have to pay the excise duty (tax) of £1,064. We had to decide that when you brought the tobacco into the UK, you did not want to keep it for yourself. I am afraid we must say that was the case, even if it is not true, because the law makes us do so.

I have now decided that you must also pay the penalty of £212. This is because you do not have a “reasonable excuse” for bringing the tobacco into the UK without declaring it.

The rest of this document explains in legal terms why the Tribunal reached these decisions.

James Austen  
Tribunal Judge

### **Appeal**

1. This is an appeal by Mr Paul Clark (“the appellant”) against:
  - (1) An assessment to UK excise duty in the amount of £1,064 pursuant to regulation 13 Excise Duty (Holding, Movement and Duty Point) Regulations 2010 and s.12(1A) Finance Act 1994; and
  - (2) A penalty in the sum of £212, pursuant to paragraph 4 of schedule 41 to Finance Act 2008.
2. The Tribunal:
  - (1) Strikes out the appeal insofar as it relates to the assessment to excise duty; and
  - (2) dismisses the appeal in respect of the penalty  
for the reasons set out below.
3. The decision to strike out the excise duty appeal was unanimous; the decision to dismiss the appeal against the penalty was taken on the basis of my casting vote as the presiding member because the Tribunal could not reach agreement on the application of the law to the facts as deemed and/or found.

## **Background**

4. Save as mentioned below, the essential facts were straightforward and not in dispute:

(1) At around 8.50am on 12 March 2015, the appellant disembarked from the ferry The Pride of York at the P&O Zeebrugge foot passenger terminal at the King George Dock, Hull, travelling from Zeebrugge in Belgium. He was travelling with a friend, Mr Paul Marriot.

(2) The appellant was intercepted by HM Border Force Officer Paul Moody having passed through the “blue” channel at Customs (i.e. claiming he had no dutiable goods to declare).

(3) Upon being stopped by Officer Moody, the appellant acknowledged that he had with him 5.9kg of hand-rolling tobacco and he claimed to Officer Moody that the tobacco was for his own personal use.

(4) The appellant was interviewed by Officer Moody, who made contemporaneous notes of the interview in his pocket book. Those notes were produced to the Tribunal in evidence. The appellant signed the notes as a true and accurate record of the interview.

(5) The appellant failed to satisfy Officer Moody that the tobacco was for his personal consumption and Officer Moody accordingly seized it as being held for a commercial purpose.

(6) The appellant did not contact HMRC to request that condemnation proceedings for the recovery of the tobacco be initiated in the Magistrate’s Court by the due date of 11 April 2015.

(7) HMRC issued a duty assessment to the appellant in the amount of £1,064 on 12 February 2016; a wrongdoing penalty, calculated on the basis that the appellant’s actions were deliberate, was issued three days later, on 15 February 2016, for £372.

(8) On 3 May 2016, HMRC received an undated letter from the appellant asking the assessing officer to review the matter. The appellant re-stated his belief that the tobacco in question was held for his own personal consumption. On 24 May, HMRC upheld its earlier decision but sent the matter for an independent review by a review officer not connected with the case. HMRC confirmed on 18 July that it would review the decision notwithstanding that the appellant’s request was received out of time.

(9) On 12 August, HMRC wrote to the appellant on the conclusion of the review, upholding the duty assessment (which it confirmed was arithmetically correct) and reducing the penalty assessment from £372 to £212 on the grounds that the appellant’s wrongdoing was, in the opinion of the reviewing officer, non-deliberate. The revised penalty was formally issued to the appellant on 15 August 2016.

(10) By a Notice of Appeal dated 1 September 2016, the appellant appealed the excise duty assessment and the penalty to this Tribunal.

(11) On 28 September 2016, the appellant applied for the excise duty and penalty to be postponed on grounds of hardship, which HMRC accepted on 11 November 2016.

(12) On 2 February 2017, HMRC applied to strike out the appellant's appeal against the excise duty assessment on the basis that the Tribunal has no jurisdiction to hear the matter or, in the alternative, that it had no reasonable prospect of success.

5. The Tribunal heard HMRC's application to strike out the excise duty appeal and the appellant's appeal against the penalty in Leeds on 22 May.

6. Further facts are found where necessary below in the discussion of the evidence.

### **Excise duty and penalties - the law**

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

(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

8. Paragraph 5 of Schedule 3 to CEMA 1979 states:

If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of anything no such notice has been given to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with, the thing in question shall be deemed to have been duly condemned as forfeited.

9. Section 12(1A) Finance Act 1994 states:

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.

10. Section 12(4) Finance Act 1994 states:

(4) An assessment of the amount of 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 arise; 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;

But this subsection shall be without prejudice, where further evidence comes to the knowledge of the Commissioners at any time after the making of an assessment under this section, to the making of a further assessment within the period applicable by virtue of this subsection in relation to that further assessment.

11. Section 13 Finance Act 1994 states insofar as relevant:

13. - Assessment to penalties.

(1) Where any person is liable to a penalty under this Chapter, the Commissioners may assess the amount due by way of penalty and notify that person, or his representative, accordingly.

(2) An assessment under this section may be combined with an assessment under section 12 above but any notification for the purposes of any such combined assessment shall separately identify any amount assessed by way of a penalty.

12. Paragraph 4 of Schedule 41 to Finance Act 2008 states:

4(1) A penalty is payable by a person (P) where –

(a) After the excise duty point for any goods which are chargeable with a duty of excise, P acquires possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods, and

(b) At the time when P acquires possession of the goods or is so concerned, a payment of duty on the goods is outstanding and has not been deferred

4(2) In sub-paragraph (1) -

“excise duty point” has the meaning given by section 1 of F(No2)A 1992,  
and

“goods” has the meaning given by section 1(1) of CEMA 1979.

13. Paragraph 12 of Schedule 41 to Finance Act 2008 states:

(1) Paragraph 13 provides for reductions in penalties under paragraph 1 to 4 where P discloses a relevant act or failure

(2) P discloses a relevant act or failure by-

(a) Telling HMRC about it,

(b) Giving HMRC reasonable help in quantifying the tax unpaid by reason of it, and

(c) Allowing HMRC access to records for the purpose of checking how much tax is so unpaid.

(3) Disclosure of a relevant act or failure-

(a) Is “unprompted” if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the relevant act or failure, and

(b) Otherwise, is “prompted”.

(4) In relation to disclosure “quality” includes timing, nature and extent.

14. Paragraph 20 of Schedule 41 to Finance Act 2008 states:

20 (1) Liability to a penalty under any of paragraphs 1, 2, 3(1) and 4 does not arise in relation to an act or failure which is not deliberate if P satisfies HMRC or (on appeal) the First-tier Tribunal that there is a reasonable excuse for the act or failure.

(2) For the purposes of sub-paragraph (1)—

(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the relevant act or failure, and

(c) where P had a reasonable excuse for the relevant act or failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the relevant act or failure is remedied without unreasonable delay after the excuse ceased.

15. It is not open to this Tribunal to entertain an argument, such as personal use, which is inconsistent with the deemed position under paragraph 5 of Schedule 3 to CEMA 1979. The decision of the Court of Appeal in *HMRC v Jones & another* [2011] EWCA Civ 824 is clear authority to this effect. That principle extends to assessments and to penalties (per Warren J in *Race v HMRC* [2014] UKUT 331 (TC)) and not just, as in *Jones*, to restoration proceedings.

### **Evidence**

16. In addition to witness statements by Mr Paul Moody, an Officer of HM Border Force and Ms Margaret Davies, of HM Revenue and Customs, and the papers in the Tribunal file, we heard oral evidence on oath from Mr Moody and Ms Davies and from the appellant. The salient details are set out below.

### **The appellant's evidence and case**

17. In undated handwritten correspondence with HMRC (written by the appellant's support worker but in the first person as if from the appellant), it was explained that:

- (1) The appellant had cashed in a pension to buy tobacco for his own personal use;
- (2) He did not go through the red channel at Hull ferry terminal because he did not appreciate that he had to give his intended personal use of the tobacco;
- (3) Two years previously, the appellant had been stopped by a Border Force officer at Leeds Bradford Airport, but his tobacco had been returned to him and he was told by the Border Force officer that he could not buy any more tobacco [or, more accurately, perhaps, ought not to import non-duty-paid tobacco into the UK] for two to three years;
- (4) The appellant had complied with the advice given to him at Leeds Bradford Airport and waited more than two years before bringing more tobacco into the UK;
- (5) The appellant had been diagnosed with Chronic Obstructive Pulmonary Disease ("COPD").

18. By the date of the hearing before us, the appellant had difficulty recalling the details of the events of 12 March 2015 and some aspects of the evidence given in sworn evidence before us differed from the above summary. The differences were not, in our view, material to the appeal.

19. In oral evidence, cross-examined by Ms Bond, the appellant claimed as follows:

- (1) The Leeds Bradford Airport incident had occurred three years previously, and he had been told not to bring back more tobacco for one year after that date.
- (2) I asked the appellant to read a page from Notice 12A (“what you can do if things are seized”) and he confirmed that he was unable to read – a point returned to at [43] below.
- (3) He left school aged 15 without any formal qualifications and worked as a roofer until his COPD diagnosis.
- (4) He could not remember any details of the interview with Officer Moody (considered at [27] below), nor having been given any papers to read and take away. He did not remember being asked to roll a cigarette. He acknowledged that the signature at the bottom of the photocopy of Officer Moody’s notebook looked like his, but he did not recall signing the book; in any event, as he ultimately acknowledged, he was unable to read Officer Moody’s handwritten transcript of the interview.
- (5) He was unaware of the guidelines about the importation of non-duty-paid tobacco into the UK and explained his (correct) understanding that there was no limit on the importation of tobacco if it was for personal consumption. He did not understand Ms Bond’s reference to a kilogram.
- (6) His COPD was smoking-related and he expressed the view that he was on the verge of developing emphysema.
- (7) The medical evidence before the Tribunal included a printout of his GP’s notes. Under ‘active’ problems, suspected COPD is listed, as is an older diagnosis of alcohol dependence syndrome.
- (8) He had been drinking on the ferry to Hull and that this might have impaired his memory of events.
- (9) He had cashed in a pension in 2013 for the purpose of travelling to mainland Europe to buy tobacco (which he did on 12 March 2015).
- (10) He was very vague about how long he expected the 5.9kg of hand-rolling tobacco would last him: when he was asked if it might last him six or seven months, he replied: “six, seven, eight, nine, ten”. He thought he might smoke approximately one pack a month.

20. The appellant’s case was essentially that the tobacco was for his own personal consumption, that a similar quantity had been returned to him when he was stopped at Leeds Bradford Airport two to three years previously, and that he had complied with the Border Force officer’s advice to him at that time not to import more tobacco for at least one year. He had not understood what he had been told by Officer Moody (partly as a result of his inability to read and partly because he had been drinking on the ferry). As a result, he did not challenge HM Border Force’s seizure of the tobacco within the required 30-day period. In that context, he thought, it was unfair to assess him to excise duty or to levy a penalty.



## HMRC's evidence and case

21. Dealing first with HMRC's strike out application, and having taken us through the statutory provisions quoted above, Ms Bond referred us to *Jones and Race*. She submitted – and we agreed – that we should strike out the appellant's appeal against the assessment to excise duty. We duly did so.

22. A small question arose as to whether we were bound to strike out the excise duty appeal pursuant to Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Rules"), or whether we had discretion to do so pursuant to Rule 8(3)(c) of the Rules on the basis that it had no reasonable prospect of success. The question came down to whether the Tribunal had jurisdiction to hear the appeal in light of the effect of Paragraph 5 of Schedule 3 to CEMA 1979. HMRC's application was made under both of these provisions in the alternative.

23. The same question arose in *Ince v HMRC* [2017] UKFTT 0645 (TC) (Judge Barbara Mosedale). Judge Mosedale said at [15]:

...the law is quite clear that the Tribunal has jurisdiction to hear an appeal against an assessment to excise duty and an excise duty wrongdoing penalty. HMRC's point is really that the Tribunal has no jurisdiction to consider the appellant's grounds of appeal in this particular case [because of the effect of Paragraph 5 of Schedule 3 to CEMA 1979 and the cases of *Jones and Race*]...: however, even if that is right, it seems to me that it is not the case that the Tribunal has no jurisdiction over the proceedings but that the appeal may have no prospect of success. So I will consider the strike out application on the basis of Rule 8(3)(c): I will not strike it out for lack of jurisdiction.

24. In our view, Judge Mosedale's explanation of the Tribunal's jurisdiction – even given the existence of Paragraph 5 of Schedule 3 to CEMA 1979 – has much merit: the Tribunal's jurisdiction in excise duty appeals is surely not so fragile that it can automatically be ousted by the nature of the appellant's proposed arguments. Other arguments might conceivably exist. Jurisdiction is hardier – and more binary – than that. However, the Upper Tribunal in *Hill v HMRC* [2018] UKUT 0045 (TC) (Judge Greg Sinfield and Judge Thomas Scott) held at [53] that the Tribunal in that case ought to have struck out the appeal pursuant to Rule 8(2)(a) "...because the FTT had no jurisdiction to consider the issue, and any arguments to the contrary stood no realistic prospect of success." As noted above, Rule 8(2)(a) only refers to the mandatory striking out of appeals in respect of which the Tribunal has no jurisdiction; the lack of any realistic prospect of success is covered by Rule 8(3)(c).

25. One suspects that these differences in approach are a consequence of different uses – one specific and technical, the other more general – of the word 'jurisdiction'. Whatever the merits of Judge Mosedale's analysis in *Ince*, *Hill* is authority for the contrary view that the Tribunal *must* strike out an appeal such as this one for lack of jurisdiction and it was pursuant to that Rule that we did so.

26. We then went on to hear evidence from HMRC's witnesses in relation to the penalty appeal.

27. Officer Moody confirmed that the contents of his witness statement were true and he read the transcript of his interview with the appellant (with Ms Bond reading the part of the appellant). He gave evidence as follows:

- (1) He read the “commerciality statement” to the appellant prior to beginning the interview, and he gave the appellant copies of “Notice 1”, the “Warning letter”, and Notice 12A as was his standard practice.
- (2) He could not remember the circumstances of the interview with the appellant, though he thought he would not have given any further explanation to the appellant of the contents and effects of the documents he had given to him. Insofar as he could recall, he did not specifically check the appellant’s understanding of the issues.
- (3) He had five reasons for concluding that the appellant was not importing the tobacco for his own personal consumption:
  - (a) The appellant’s description of his smoking habits was not, in his view, credible given that it would have cost him £240 per month – which exceeded his monthly income (on benefits);
  - (b) The appellant gave vague answers to his questions and was generally vague and non-committal;
  - (c) The appellant did not know how many roll-up cigarettes he might expect to make from one pouch of tobacco: in Officer Moody’s experience, an habitual smoker such as the appellant claimed to be would have known this (typically in the region of 60-70);
  - (d) The appellant claimed to have bought the tobacco from cashing-in his pension, which Officer Moody considered implausible and not credible;
  - (e) The appellant had six times the recommended government guidelines for returning to the UK with hand rolling tobacco, which indicated an intended use other than personal consumption.

28. Officer Moody was not cross-examined by the appellant and his evidence was therefore unchallenged.

29. We then heard from Margaret Davies of HMRC, who confirmed the contents of her witness statement. Ms Davies described the procedural history of the excise duty assessment and penalty and had no other relevant evidence to give.

30. Ms Davies was not cross-examined and her evidence was therefore unchallenged.

31. After the oral evidence had concluded, Ms Bond submitted that the Tribunal should not put any weight on the appellant’s evidence of the purported exchange between him and a Border Force officer at Leeds Bradford Airport. She noted that HMRC had not had an opportunity to identify the officer concerned, not to seek contrary evidence.

## Discussion and conclusions

32. We find it easy to believe that the appellant presented as vague and non-committal when questioned by Officer Moody: that would also be an accurate description of his evidence to the Tribunal.

33. Notwithstanding that, we found the appellant to be a generally truthful and credible witness. We did not consider his vagueness to indicate untruthfulness.

34. We did not doubt that the appellant had a substantial and long-term smoking habit (which had led to his diagnosis of COPD). We found it eminently plausible that he might smoke a pack of tobacco a month. We found that the appellant's vagueness – especially about quantities, weights and measures – was probably a consequence of his illiteracy and general lack of educational attainment (perhaps compounded by alcohol).

35. We considered Ms Bond's submission that we should put little if any weight on the appellant's evidence of the purported events at Leeds Bradford Airport. The evidence before us was insufficient for us to make any meaningful finding of fact on the point, save to mention that we considered it to be inherently plausible and consistent with the appellant's understanding of the issue. On that basis, we were content to accept it as fact for these purposes. We accepted that the appellant had a genuine and honest belief that the Border Force officer had told him that he could import as much tobacco as he pleased provided it was for his own personal consumption. This is relevant to the consideration of the penalty at [52] to [58] below.

36. As to Ms Bond's submission that HMRC had not had an opportunity to seek rebuttal evidence, this was not so: the appellant raised this point in his undated letter to HMRC, which was received some considerable time before the hearing. HMRC had all the information it needed to ascertain that the exchange was an important part of the appellant's case and had ample time to seek other evidence if it wished to do so. That HMRC decided not to do so, and to present its case on other grounds, was a matter for it and we do not entertain an argument that the issue as raised in the hearing was prejudicial.

37. We accepted the evidence of Officer Moody and Ms Davies.

38. The Tribunal had considerable sympathy with the appellant. Given his characteristics (in particular his inability to read and his consumption of alcohol), he found himself unable to navigate the complex issues around the seizure and condemnation of non-duty-paid tobacco. The Tribunal notes – and gratefully adopts – the comments in *Law v HMRC* [2015] UKFTT 0001 (TC) and *Zydelis v HMRC* [2017] UKFTT 76 (TC).

39. As Judge Porter said in *Law* at [7]:

I have sat as a Chairman, and latterly as a Judge, in this Tribunal for many years and I have, over the years, asked that Notice 12A be made comprehensible to

the members of the public. It has been my experience in several of those cases, that even counsels appearing before me have had difficulty understanding the ‘deeming’ provisions and, in the alternative, the right to restoration. How a traveller confronted by the loss of his/her goods and his or her vehicle, often late at night with the prospect of having to use public transport to get home then or later, is meant to understand the nicety of a ‘deemed forfeiture’ is beyond reason. It has even taken some of the Chairmen and Judges several years to get clarity on the issue.

40. The same is doubtless true of a person with the characteristics of the appellant in this case.

41. We also agreed with the sentiments expressed by Judge Brown in *Zydelis* at [24] and [26]:

In the view of the Tribunal neither the BOR documentation nor the Notice clearly (and arguably at all) notifies the owner of the goods that the only way of challenging that he or she is liable to pay duty on the goods is through challenging seizure in the magistrates courts. The explanation in the notice of condemnation proceedings focuses on the ownership of the goods and not on the legality of the import or the associated charge to duty. Ms Poots [Counsel for HMRC] confirmed that the only paragraph of the Notice which drew any link between the liability to duty and seizure is in paragraph 3.14 which addresses a particular situation i.e. when the owner withdraws a challenge to seizure...

The legislative separation of powers between the magistrates court and the Tribunal is a matter for Parliament but Border Force and HMRC are tasked with enforcing this confusing position and, in the view of this Tribunal, do it in a way which relies on a far greater knowledge of the system than can be reasonably expected of a member of the public... The number of cases that come before the Tribunal which are the subject of strike out applications on the grounds that the charge to duty cannot be challenged must at least be indicative that the information on procedure for challenge is not as clear as it should be in the interests of cost effective administration.

42. In reaching our decisions, we were concerned about the potential for injustice in this case caused by the wide deeming effect of Paragraph 5 of Schedule 3 to CEMA 1979.

43. In particular, we felt that the appellant’s illiteracy would have been a particular disadvantage to him when interviewed by Officer Moody. We could not help but wonder whether someone giving a more compelling and fluent testimony would have been more readily believed and free to take his tobacco home, and free of a charge to duty and a wrongdoing penalty. It would be a cause for concern and regret if the appellant’s characteristics predisposed him to condemnation of his tobacco and the imposition of duty and a penalty.

44. The lack of a judicial review jurisdiction in this Tribunal further compounded this problem, as we were unable to consider the essential fairness of decisions by HMRC and Border Force. It would be unreasonable to expect this appellant to issue a claim in the Administrative Court on this point, yet absent that, the fairness or otherwise of his treatment will not be a matter for judicial determination.

45. It seems from the published cases in this Tribunal that there has been little express consideration of illiteracy as a particular problem for taxpayers (*Bickell v HMRC* [2014] UKFTT 781 (TC) (Judge Redston and Mrs Farquharson) being a rare exception). But we consider that the issues are similar to those of a language barrier, explored for example in *Raczkowski v HMRC* [2018] UKFTT 671 (TC) (Judge Michael Connell and Susan Lousada). It is clearly unsatisfactory if a confusing and punitive regime is being enforced on those with little or no functional understanding of their predicament.

46. We were mindful in the hearing of the recommendations in Chapters 1 and 11 of the *Equal Treatment Bench Book* and we were satisfied that the appellant could fully participate in the proceedings.

#### *Excise duty assessment*

47. Notwithstanding our concerns about the possible injustice caused in this case by the wide deeming provision of Paragraph 5 of Schedule 3 to CEMA 1979, as noted above, we struck out the appeal against the duty assessment. The appellant must pay the excise duty of £1,064.

#### *Penalty*

48. The situation in respect of the penalty is more complex: the appellant had an opportunity to satisfy us that either (a) he had a reasonable excuse for his default; or (b) special circumstances existed which warranted a reduction of the penalty. We heard submissions from Ms Bond on these points and we reserved our decision for further consideration of the authorities and discussion between ourselves.

49. Having considered the decision of the Upper Tribunal in *Edwards v HMRC* [2019] UKUT 131 (TCC) (Nugee J and Judge Timothy Herrington), we unanimously decided that there were no special circumstances in this case.

50. The proper test for considering whether a reasonable excuse to a tax penalty exists has a long judicial history. We had regard to the decisions of HHJ Medd OBE QC in *The Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 239; [1991] BVC 568 at 569-570 and Judge Guy Brannan in *Coales v HMRC* [2012] UKFTT 477 (TC) at [29], [31] and [36]. Those decisions have been superseded to a large extent by the decision of the Upper Tribunal in *Perrin v HMRC* [2018] UKUT 156 (TCC) (Judge Timothy Herrington and Judge Kevin Poole). *Perrin* settled the correct test to be applied when considering reasonable excuse arguments in this Tribunal. It determined as follows:

[70] ...[T]he task facing the FTT when considering a reasonable excuse defence is to determine whether facts exist which, when judged objectively, amount to a reasonable excuse for the default and accordingly give rise to a valid defence. The burden of establishing the existence of those facts, on a balance of probabilities, lies on the taxpayer. In making its determination, the tribunal is making a value judgment which, assuming it has (a) found facts capable of being supported by the evidence, (b) applied the correct legal test and (c) come to a conclusion which is within the range of reasonable conclusions, no appellate tribunal or court can interfere with.

[71] In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, the tribunal should bear in mind all relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times (in accordance with the decisions in *The Clean Car Co* and *Coales*).

[72] Where the facts upon which the taxpayer relies include assertions as to some individual's state of mind (e.g. "I thought I had filed the required return", or "I did not believe it was necessary to file a return in these circumstances"), the question of whether that state of mind actually existed must be decided by the FTT just as much as any other facts relied on. In doing so, the FTT, as the primary fact-finding tribunal, is entitled to make an assessment of the credibility of the relevant witness using all the usual tools available to it, and one of those tools is the inherent probability (or otherwise) that the belief which is being asserted was in fact held; as Lord Hoffman said in *In re B (Children)* [2008] UKHL 35, [2009] 1AC 11 at [15]:

"There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities."

[73] Once it has made its findings of all the relevant facts, then the FTT must assess whether those facts (including, where relevant, the state of mind of any relevant witness) are sufficient to amount to a reasonable excuse, judged objectively.

[74] Where a taxpayer's belief is in issue, it is often put forward as either the sole or main fact which is being relied on – e.g. "I did not think it was necessary to file a return", or "I genuinely and honestly believed that I had submitted a return". In such cases, the FTT may accept that the taxpayer did indeed genuinely and honestly hold the belief that he/she asserts; however that fact on its own is not enough. The FTT must still reach a decision as to whether that belief, in all the circumstances, was enough to amount to a reasonable excuse. So a taxpayer who was well used to filing annual self assessment returns but

was told by a friend one year in the pub that the annual filing requirement had been abolished might persuade a tribunal that he honestly and genuinely believed he was not required to file a return, but he would be unlikely to persuade it that the belief was objectively a reasonable one which could give rise to a reasonable excuse.

[75] It follows from the above that we consider the FTT was correct to say (at [88] of the 2014 Decision) that “to be a reasonable excuse, the excuse must not only be genuine, but also objectively reasonable when the circumstances and attributes of the actual taxpayer are taken into account.”

51. Regrettably, the Tribunal was divided in its opinion about whether the appellant had a reasonable excuse.

52. Mrs Christian was influenced by the fact that the appellant had relied in good faith on his discussion with the Border Force officer at Leeds Bradford Airport. Given his inability to read, relying on what he had been told by a person in a position of authority was, in her view, reasonable in the circumstances. In her opinion, the appellant had a genuine – and, she considered, an objectively reasonable – belief that he did not need to notify HM Border Force, or HMRC, that he was chargeable to tax at the time he went through the blue channel at Hull ferry terminal customs.

53. Mrs Christian did not consider that the deemed commercial purpose for importing the tobacco was relevant in this context - the "fault" was bringing the goods in without notifying HM Border Force, for whatever purpose.

54. As a result, she concluded that the appellant did have a reasonable excuse which merited reducing the penalty to nil.

55. Reluctantly, I disagreed with Mrs Christian on this point for the following reasons:

(1) *Jacobson v HMRC* [2018] UKUT 18 (TCC) (Zacaroli J and Judge Sinfield) at [46] is authority for the proposition that a person is holding goods in the UK for the purposes of Regulation 13 The Excise Goods (Holding, Movement and Duty Point) Regulations 2010 “at the latest” when they reach the territorial UK. In this case, that occurred when the ferry tied up at Hull.

(2) To ascertain the significance of this fact, it is necessary to have regard to the precise effect of the deeming provision in Paragraph 5 of Schedule 3 to CEMA 1979: this provision deems dutiable goods on which no duty was paid to be “duly condemned” for all purposes and, crucially in this context, prospectively and retrospectively in time.

(3) Warren J observed in *Race* at [39] that the deeming provision, once it applied, applied equally to excise duty *and* penalties: “...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.” This approach was approved by the Upper Tribunal in *Jacobson* at [24].

(4) The combined effect of *Jacobson* and the deeming provision is that the appellant’s tobacco was already subject to duty – and the appellant in default – by the time he carried it off the ferry, and well before he reached the blue channel at customs.

(5) For that reason, it was not open to us to consider the objective reasonableness of the appellant’s honest belief that he could import the tobacco: the appellant’s state of mind when he approached the blue channel in customs was irrelevant.

(6) Yet because the CEMA deeming only became relevant once Officer Moody had stopped the appellant, had seized the tobacco, and the appellant failed to require HMRC to issue condemnation proceedings in the magistrates court within 30 days, it would not have been possible conclusively to determine this in advance. Had Officer Moody not stopped the appellant, or had he permitted him to keep his tobacco, then neither *Jacobson* nor CEMA would have been in point and the appellant would have been free to enjoy his tobacco for his own personal consumption in the UK. At first sight, this seems illogical – unfair, perhaps – but it is nevertheless, in my view, the only proper conclusion available to us.

56. In my opinion, it is impossible to conclude that the appellant had a reasonable excuse in relation to the penalty without re-determining the factual question of whether or not the tobacco was imported for the appellant’s personal use. This is impermissible, per *Race* and *Jacobson*.

57. Reading *Race* at [40], I take it that whilst we may consider reductions in the penalty payable in mitigation for “telling”, “helping” and “giving”, and we may consider whether any special circumstances existed (both aspects specifically mentioned by Warren J), we are not permitted to consider reasonable excuse (which is not mentioned there), because none could arise if the tobacco was imported for commercial purposes.

58. The root of the disagreement between us on this point is the temporal effect of the deeming provision: Mrs Christian rightly points to the fact that until the appellant was stopped at customs (accepting his evidence for a moment) neither he nor anyone else was to know that the tobacco was not for his personal consumption: it was possible at that point that he would be allowed to keep the tobacco and use it himself, as he had been at Leeds Bradford Airport. I agree. However, the effect of the deeming provision is that it retrospectively – and conclusively – determines otherwise. Once the deeming provision took effect (30 days after the seizure), the tobacco was deemed to be duly condemned (because, as deemed, it was imported for commercial gain), then and, for these purposes, always. It therefore re-wrote history in respect of the matters under appeal before us. One might chafe at the perceived unfairness of that, but in my view we have no power to undo it.



59. As a result of the disagreement between us, I have exercised my casting vote as the chairman of the Tribunal pursuant to Article 8 First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008. It follows that the decision of the Tribunal is that set out at [55] to [58] above.

60. We note that the revised penalty, calculated on the basis that the appellant's default was "not deliberate" has the benefit of the maximum reductions for "telling", "helping" and "giving". HMRC argues that the appellant's disclosure was "prompted", ie he was stopped by Officer Moody at Customs whilst going through the blue channel. We agree that the penalty is arithmetically correct and we do not seek to disturb the bases of its calculation.

61. For completeness, we note that the proportionality of the penalty is not a matter before this Tribunal (*General Transport SPA v HMRC* [2019] UKUT 0004 (TCC)).

### **Disposition**

62. The Tribunal:

- (1) Strikes out the appeal insofar as it relates to the assessment to excise duty; and
- (2) dismisses the appeal in respect of the penalty.

63. 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.

**JAMES AUSTEN**

**TRIBUNAL JUDGE**

**RELEASE DATE: 25 July 2019**