**[2021] UKFTT 0407 (TC)**

# TC 08317/V

*EXCISE DUTY and PENALTY – tobacco products seized – deemed forfeiture – strike out application – Tribunal no jurisdiction to consider the excise duty assessment – wrongdoing penalty – Schedule 41 FA 2008 – whether 'Case A' or 'Case B' – behaviour as 'deliberate' in consequence of the deemed forfeiture – fact not available to decision maker at the time – whether culpability can be re-categorised as 'non-deliberate'– special reduction – penalty reduced – appeal allowed in part*

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

**Appeal number: TC/2020/00647**

**BETWEEN**

**RAFAL PAWEL SWIECKI** **Appellant**

**-and-**

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

**TRIBUNAL: JUDGE HEIDI POON**
**DUNCAN MCBRIDE**

**The hearing took place on 22 October 2021 on Tribunal Video Platform**

A face-to-face hearing was not held because of the coronavirus pandemic. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. The hearing was therefore held in public.

**Mr Rafal Swiecki in person for the Appellant**

**Mr Rupert Davies of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

### INTRODUCTION

1. Mr Swiecki ('the appellant') lodged a Notice of Appeal on 10 February 2020 against two assessments by the respondents in the combined sum of £4,784 in respect of:

(1) An excise duty assessment pursuant to section 12 Finance Act 1994 ('FA1994') issued on 9 December 2019 in the sum of £2,942;

(2) A wrongdoing penalty in the sum of £1,132 imposed under paragraph 4 of Schedule 41 to Finance Act 2008 ('Sch 41)'.

2. Ms Aleksandra Klimczok was present for the duration of the hearing as the interpreter, translating from Polish to English for the appellant, and her service greatly assisted with the efficient progress of the proceedings.

### WITNESS EVIDENCE

3. We heard the evidence of Border Force Officer Lynn Furness (by telephone link), and HMRC Officer Lindsay Laws. Their witness statements are adopted as evidence in chief and they answered supplementary questions. Both witnesses are credible and we accept their evidence as to matters of fact.

4. The appellant gave evidence in response to leading questions from the Tribunal, and was cross-examined by Mr Davies. We find the appellant to be in the main credible, although there was an instance of material inconsistency in his evidence whereby he seemed to have asserted an account of events perhaps in the belief that it would assist his case.

### RELEVANT LEGISLATION

5. In relation to the Excise Duty Assessment, the relevant provisions under FA1994 are:

(1) Section 12 provides HMRC with the power to assess duty on excise goods;

(2) Section 13A(2)(b) defines decisions under s 12 as to whether a person is liable to any duty of excise, or as to the amount of his liability is a 'relevant decision'.

6. The relevant provisions under the *Excise Goods (Holding, Movement and Duty Point) Regulations 2010/593* ('The 2010 Regulations') are the following:

(1) Regulation 13 defines the excise duty point as the time when the excise goods are first held (paragraph 1); and that the person liable for the duty is the person holding the goods at the duty point (paragraph 2).

(2) Paragraph (4) of Regulation 13 gives the guideline as to the quantity of excise goods to be imported for personal use for each category. For tobacco products, it is '800 cigarettes'; '400 cigarillos' (each less than 3 grammes); '200 cigars'; 1 kg of any other.

(3) Regulation 88 provides for the forfeiture of excise goods on which the duty has not been paid.

7. In relation to the forfeiture of excise goods, the Customs and Excise Management Act 1979 ('CEMA') provides under paragraphs 3 and 5 of Schedule 3 as follows:

> '**Notice of claim**
>
> **3** Any person claiming that any thing seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of the date of the seizure, give notice of his claim in writing to the Commissioners at any office of customs and excise.'

**'Condemnation**

**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, or if, in the case of any such notice given, any requirement of paragraph 4 above is not compiled with, the thing in question shall be deemed to have been duly condemned as forfeited.'

8. The rate of duty[1] in the present case is referable to Schedule 1 to the Tobacco Product Duty Act 1979, as amended by s 56 of the Finance Act 2019 ('FA2019'), which provides:

'Hand-rolling tobacco: An amount equal to the higher of –

(a) 16.5% of the retail price plus £228.29 per thousand cigarettes, or

(b) £293.95 per thousand cigarettes.'

9. The penalty was raised under paragraph 4 Schedule 41 FA 2008, which states as follows:

'**Handling goods subject to unpaid excise duty**

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 exercise, 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.'

**THE FACTS**

10. The facts in relation to the seizure of the excise goods are as follows:

(1) On 13 January 2019, the appellant was intercepted by Officer Furness of Border Force at 22:05 hours at Leeds Bradford Airport. He was returning from Poland.

(2) The appellant's luggage consisted of 2 large holdalls, which were x-rayed.

(3) The appellant was asked how many cigarettes he had; he replied: 'Fifty' (i.e. 50 sleeves).

(4) The luggage was searched and 10,000 L&M Kingsize cigarettes were found ('the Cigarettes').

(5) The appellant was asked further questions in response of which he stated that the cigarettes were for his own use, that he paid £1,500 for them (6850 Zloty); that he always brings '40 or 50' and had never had a problem.

(6) A check of his flight records showed that the appellant had last travelled to Poland in December 2018, and apparently had returned to the UK on 8 January 2019.

(7) The fact that the appellant had stated that he 'always' brings back 50 sleeves, and that he had returned to the UK from an earlier trip only the previous week, led Officer Furness to conclude that the Cigarettes were held for a commercial purpose.

(8) The Cigarettes were seized under s 139 of CEMA as being liable to forfeiture under regulation 88 of the 2010 Regulations.

[1] The duty rate contained within s 22 FA2019 came into force as of 29 October 2018; sub-section 22(3) states: 'The amendment made by this section is treated as having come into force at 6pm on 29 October 2018'.

(9) The appellant was issued with seizure documents: (a)Notice of Seizure; (b) Seizure Information Notice (BOR 156) signed and dated by the appellant;(c) Notice 12A on the time limit and the actions to take to challenge the seizure; (d) Warning Letter (BOR 162).

(10) The appellant did not challenge the legality of the seizure of the goods.

(11) On 15 November 2019, HMRC wrote to the appellant to notify him of the intention to raise an excise duty assessment for the seized goods and to issue a wrongdoing penalty. He was asked to provide any information that may affect the consideration of the penalty by 15 December 2019.

(12) By letter dated 25 November 2019, the appellant replied that he had been under stress from taking care of his sick mother, and having his car stolen, and asserted that the Cigarettes were for his own use.

(13) By letter dated 9 December 2019, HMRC issued an assessment of excise duty in the sum of £2,942, and of penalty in the sum of £1,132.

(14) The appellant wrote on 2 January 2020 to request an independent review, which upheld the assessments as stated in the review decision of 30 January 2020.

*Officer Furniss' evidence*

11. Officer Furness' witness statement referred to reading the 'commerciality statement' to the appellant in English as follows:

> 'You have excise goods in your possession (control) and it appears that UK excise duty has not been paid on them. Goods may be held without payment of duty providing they have been acquired by you and are held for your own use. I intend to ask you some questions to establish whether these goods are held for a commercial purpose and your goods may be seized as liable to forfeiture. This is a civil matter not a criminal one. You are not under arrest. You are free to leave at any time.'

12. The appellant confirmed to Officer Furness that he understood the commerciality statement and wanted to stay for interview and was 'okay to be interviewed in English'. When he was asked 'Are all the cigs for you?' he replied:

> 'I fly to Poland in Summer and Winter. I smoke maybe too much. These last 3 years my mum have dementia. 2 months ago my car stolen. My life is very hard. I always bring 40 to 50 and never had a problem.'

13. When asked how much he paid for the Cigarettes, the appellant replied: '1500 English' and handed Officer Furniss a receipt for 6850 Zloty, which he confirmed was paid in cash.

14. The appellant's replies to Officer Furness' further questions were consistent with his replies to Tribunal's questions during the hearing, as interpreted from Polish. Some of the answers to Officer Furness' questions in the appellant's own words included:

> 'LF – How many a day do you smoke
> RS – Box and a half
> LF – 30
> RS – Yes 30 to 40 per day'
>
> 'LF – When did you last travel
> RS – Summer August 2018'
>
> 'LF – Do you work
> RS – Yes Tesco distribution centre in Goole, Warehouse operator'
>
> 'LF – Do you live alone
> RS – Yes I have my son half the time and my ex has him the rest'

'LF – Do you pay anything towards you son
RS – £100 per month. I have my son every day, I pick him up from school every day and keep him until 5pm, sometimes stays until 8.30pm if she works late'
'LF – Do you have a lighter or open cigs in your pockets
RS – No I haven't smoked for a few days as I've got a chest infection'

15. Officer Furness' note book recorded the reasons being given to the appellant at the point of seizing the Cigarettes as follows:

> 'At 23:15 I returned to the customs examination area and said the following to SWIECKI
>
> "I am seizing the cigs for the following reasons
> 1. You claim to smoke but have no smoking paraphernalia on your person
> 2. You claim to smoke 30 to 40 per day and that 100000 will last you 5 to 6 months. On your stated consumption you would be smoking 5460 to 7280, not 10000
> 3. You claim your last travel to Poland was August 2018 but I have checked your flight history and you were in Poland 29/12/2018 to 08/01/2019
> 4. You state that you always bring 50 sleeves back from Poland and therefore will still have these left from last week"'

16. In evidence, Officer Furness explained that the appellant's flight history would have been checked while the interview was being conducted; that the check would return with any matches of the appellant's passport number with flight records, with the indication of status of the flights by three letters: 'B' for boarded; 'C' for cancelled; and 'D' for departed. She said that her notebook recorded the check as returning with details that the appellant had travelled on 8 January 2019 from Poland to the UK, which was only 5 days prior to the seizure event, but she had not retained the email advising the check results of the appellant's flight history.

*The appellant's evidence*

17. On 14 October 2021, a week before the hearing, the appellant lodged a document from RyanAir Customer Services Department and an 'Addendum Statement' which states:

> 'The attached document shows the following information:
>
> a. REMOVE FLIGHT – F 08 Jan19 KRK-LBA 1325/1505 FR 2333 – which should be read as removed from flight on 8th Jan 2019 from Krakow to Leeds Bradford – departure time 13:25hrs / arrival time 15:05hrs, flight number FR2333.'

18. In his oral evidence, the appellant maintained that the flight itself scheduled to depart from Krakow to Leeds Bradford on 8 January 2019 was cancelled; that he and his son boarded the flight on 8 January 2019, that due to weather condition ('heavy snow' he said) all passengers on board the flight were then asked to disembark.

19. The Tribunal put questions to the appellant that the cancellation would appear from the RyanAir document to be a cancellation of seats and not of the flight itself, as indicated by the preceding two entries above the 'Remove Flight' entry cited in the Addendum Statement:

> 'Remove Seat RS 08Jan19 KRK-LBA2333 Y29A Rafal Swiecki'

20. A repeat entry for seat Y29B (for the appellant's son with his name redacted) is shown before the 'Remove flight' entry. There are 4 entries of 'Cancel Fee' on the RyanAir printout, which would seem to be for the Seats and items of Baggage, followed by entries to remove seats and cabin and hold luggage. The four cancellation fees also tally with the difference between the payment noted of £165.98 and what would appear to be the refund of £106.38.

21. There were two communications '*relating to Cancellation*' logged by RyanAir on the document as having been sent to the appellant. The first communication was by email (with detail of the appellant's email address) sent on 'Date: 08/01/2019 13:06', and the second communication was by 'SMS' to a UK mobile phone number on the same date at 13:09 hours.

**THE APPELLANT'S CASE**

22. The appellant's grounds of appeal are: (i) that the Cigarettes were for his personal use; (ii) that he was under considerable stress at the time having been looking after his ill mother; (iii) that he had already paid around £1,600 to £1,800 for the Cigarettes; (iv) that he had not returned from Poland the previous week as the flight was cancelled; (v) the penalty should be quashed or reassessed on the basis that it was not deliberate.

23. In the Addendum Statement lodged with the RyanAir record document, the appellant's additional ground of appeal is stated as follows:

> … with this piece of evidence, it is clear Officer Furness had wrong information on which she based her decision to seize the cigarettes. She was misinformed about me having allegedly returned from Poland on 8th Jan 2019 and that is why she thought I had brought in more cigarettes than for what would be deemed a personal use. This piece of evidence confirms my assertion the last time I had been to Poland had been in summer (July or August 2018). This would have made my case of smoking 40-50 cigarettes per day more plausible to her and she would have most likely returned a different decision.'

24. In relation to the duty assessment, the appellant 'asks the Tribunal … to use its power to quash HMRC's assessment', which 'was clearly based on a wrong decision deriving [sic] from being in possession of wrong information by Officer Furness.'

25. In relation to the penalty assessment, the appellant said that he 'was not deliberately concealing [his] travel back from Poland on 8/01/2019', and 'cannot be treated as someone who is deliberately trying to conceal something'.

**HMRC'S CASE**

26. On behalf of the respondents, Mr Davies in opening the case, made a strike-out application under Rule 8(1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, against the appeal in relation to the excise duty assessment, on the ground that the Tribunal has no jurisdiction to hear this part of the appeal.

27. As respects the Penalty assessment, Mr Davies submits that in the light of the new piece of evidence from Ryanair which established that the appellant did not travel back to the UK on 8 January 2019, HMRC would downgrade the penalty by reclassifying the behaviour as 'standard' from 'deliberate' as formerly assessed.

**DISCUSSION**

***The excise duty assessment***

28. The Tribunal is satisfied that the appellant was duly served with a Seizure Information Notice, the Warning Letter and Notice 12A when the goods were officially seized on 13 January 2019 by Border Force. The appellant could have challenged the legality of the seizure of the goods within the statutory time limit at the Magistrates' court – but that did not happen.

29. As explained to the appellant at the hearing, where there is no timely challenge, the deeming provision under paragraph 5 of Schedule 3 to CEMA automatically applies. The goods seized are deemed as imported for commercial use, and duly condemned and forfeited. The duty assessment follows in consequence of the deemed forfeiture. The deeming provision is *final* and there is no scope for the Tribunal to re-open the case to consider whether the goods could have been imported for personal use: *HMRC v Jones and Jones* [2011] EWCA Civ 824.

30. This appeal is not against the seizure of goods as in *Jones*, but against the assessment to excise duty on the condemned tobacco. However, once the deeming provision has applied, the Tribunal lacks jurisdiction to re-consider the duty assessment for the same reasons as for goods restoration. This is made clear in *HMRC v Nicholas Race* [2014] UKUT 0331 (TCC) (‘*Race’*) at [33]:

> ‘The fact that the appeal is against an assessment to excise duty rather than an appeal against non-restoration makes no difference because the substantive issue raised by Mr Race is no different from that raised by Mr and Mrs Jones.’

31. The Tribunal therefore grants the respondents’ strike-out application, for the reason as explained to the appellant during the hearing in some detail, that the deemed forfeiture of the Cigarettes means that the Tribunal has no jurisdiction to hear the appeal on his stated ground that the Cigarettes were for his personal use.

32. Once deemed forfeiture applies, there are only limited aspects as concerns the duty assessment over which the Tribunal still has jurisdiction, as set out in *Race* at [34]:

> ‘… it remains open to a person subject to such an assessment to argue that it is wrongly calculated, is out of time, is raised against the wrong person, or is otherwise deficient …’

33. In other words, the only issues that the Tribunal can consider in relation to a duty assessment in a case of deemed forfeiture are restricted to: (a) the basis of the duty calculation; (b) the time limit for raising the assessment; (c) the person liable for the assessment.

34. In the present case, the Tribunal is satisfied that: (a) the quantum of the assessment is correct with reference to Schedule 1 to the Tobacco Product Duty Act 1979; (b) the assessment was raised within the relevant time limit; (c) the appellant is correctly identified as the person liable for the duty.

***Penalty Assessment and Tribunal’s Jurisdiction***

*The original penalty percentage*

35. The penalty under appeal was calculated on the basis that the appellant’s behaviour was ‘deliberate but not concealed’, and his disclosure was ‘prompted’. The penalty range is set by the statute, with the maximum penalty being 70% and the minimum being 35%. The overall mitigation for ‘helping’, ‘telling’ and ‘giving’ has been assessed at 90%, which is then applied to the penalty range of 35% (i.e. 70% maximum less 35% minimum) to give a penalty reduction of 31.5% from the maximum of 70%. The penalty percentage of 38.5% (i.e. 70% less 31.5%) is applied to the Potential Lost Revenue (‘PLR’) of £2,942 to arrive at the penalty of £1,132.67 under appeal.

*Effect on penalty from deemed forfeiture*

36. In relation to the penalty imposed under paragraph 4 of Schedule 41 FA 2008, the Upper Tribunal in *Race* set out the implications of the statutory deeming on the penalty issue at [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. The Tribunal is asked by the appellant to re-assess the penalty. It is the appellant’s contention that Officer Furness’ decision was based on incorrect information that he had travelled from Poland to the UK on 8 January 2019. The appellant submits in the Addendum

Statement that he 'cannot be treated as someone who is deliberately trying to conceal something, and 'when that something has not taken place, it cannot be deemed deliberate'.

38. Following *Race*, however, the Tribunal cannot re-determine the factual issue whether the goods were imported for personal use when considering the penalty assessment. In *HMRC v Jacobson* [2018] UKUT 18 (TCC) ('*Jacobson*'), the Upper Tribunal considered an appeal against the First-tier Tribunal's decision to cancel a penalty. Applying the reasoning at [39] of *Race*, the Upper Tribunal observed 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 Tribunal's jurisdiction as concerns penalty*

39. While the Tribunal cannot re-determine whether the goods seized and deemed forfeited could have been for personal use in relation to the appeal against the penalty, the Tribunal has jurisdiction to consider: (a) the assessment of culpability; (b) whether the level of mitigation afforded by HMRC for co-operation is sufficient, and/or (c) whether there should be further reductions for 'special circumstances': *Race* at [40].

40. We accept that the RyanAir document establishes that the appellant did not fly from Poland to the UK on 8 January 2019. However, the document does not prove that the flight FR2333 itself was cancelled and failed to depart as scheduled. It is most probable that the flight history check returned the flight on 8 January 2019 with the letter 'D', and still matched to the appellant's passport details for Officer Furness to draw the conclusion on 13 January 2019 that the appellant had only previously returned from Poland on 8 January 3019.

41. We are of the view that the appellant's oral evidence that the flight FR2333 on 8 January 2019 was cancelled is inconsistent with the information recorded on the RyanAir document. The inference we draw from the primary facts on the RyanAir document is that the appellant cancelled his (and his son's) seats on the day of the flight, and received the communications of the cancellation by email and text minutes before the departure time of the flight.

42. In any event, HMRC have revised their penalty decision following the lodgement of the RyanAir document, which was only made available by RyanAir after months of efforts by the appellant. The revised decision is not yet in writing, but was related by Mr Davies at the hearing as follows:

(1) The principal revision is to change the degree of culpability to 'non-deliberate';

(2) The type of penalty is Case B, with the penalty range being 20% to 30%;

(3) The same level of mitigation applies, being 90% on the difference between 30% (maximum) and 20% (minimum) for Case B penalty, to give 9% overall reduction;

(4) The penalty percentage is set at 21%, being 30% maximum less 9% reduction.

(5) The quantum of the revised penalty is at £617.82, being 21% of the PLR £2,942.

*Whether Case A or B minimum applies*

43. We note that the First-tier Tribunal in *Odinas v HMRC* [2021] UKFTT 0303 (TC) seems to have been determined on the basis that a wrongdoing penalty consequent on deemed forfeiture to be a Case A penalty, with the minimum penalty at 10%. However, and as Mr Davies submitted by going through the relevant citations in relation to excise duty obligations under paragraph 1 of Schedule 41, the obligation in question is not specified under paragraph 1, and therefore falls within Case B as provided under paragraph 13(3)(b) cited below.

44. We are satisfied that the wrongdoing penalty falls to be assessed as a case B penalty, with the relevant minimum being 20% as applied here. It is clear that where a Schedule 41 penalty is *not* categorised as deliberate, the 'standard' maximum is provided under paragraph 13 to be at 30%. The statute also provides for the minimum penalty percentage, but draw a distinction between Case A (at 10%) and Case B (at 20%). Sub-paragraph 13(3) of Schedule 41 defines whether a penalty is Case A or B in the following terms:

> '**13**(3) Where the Table shows a different minimum for case A and case B –
> (a) the case A minimum applies if –
> (i) the penalty is one under paragraph 1, and
> (ii) HMRC become aware of the failure less than 12 months after the time when the tax first becomes unpaid by reason of the failure, and
> (b) otherwise, the case B minimum applies.'

*Special reduction*

45. Under paragraph 14 of Schedule 41, HMRC are given the discretion to reduce a penalty further in special circumstances. For special circumstances to obtain, they have to be 'exceptional, abnormal or unusual' (*Crabtree v Hinchcliff* [1971] 3 All ER 967) or 'something out of the ordinary run of events' (*Clarks of Hove Ltd v Bakers' Union* [1979] 1 All ER 152). We consider that HMRC have exercised their discretion to a certain extent by revising the penalty downwards, albeit by reference to the penalty being re-categorised as 'standard' in the light of the new information from the RyanAir document.

46. The Tribunal does not consider that there is any evidence to merit further reduction. As a matter of fact, we do not consider that the (incorrect) flight history was the only reason leading to the seizure decision by Border Force. From the reasons read out to the appellant by Officer Furness before the seizure of goods, there were two other important factors being taken into account by Officer Furness. First, the very fact that the appellant was not carrying any cigarettes or lighter on his person, possibly suggestive that he might not have been a smoker himself, (notwithstanding the appellant's claim that it was due to his having had a chest infection). Secondly, even with the appellant's alleged consumption of smoking 30 to 40 cigarettes per day, the quantity of 10,000 far exceeded his personal needs for a six-month period. These were strong reasons behind the decision to seize the goods as imported for a commercial purpose, especially in view of the official guideline for personal use is only '800 cigarettes': 10,000 cigarettes represent 12.5 times of 800.

## DISPOSITION

47. In relation to the excise duty assessment of £2,942, the strike-out application is granted. The revised assessment of the wrongdoing penalty in the quantum of £617.82 is confirmed.

## RIGHT TO APPLY FOR PERMISSION TO APPEAL

48. 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.

**DR HEIDI POON**
**TRIBUNAL JUDGE**

**Release date: 09 NOVEMBER 2021**