TC04202

Appeal number: TC/2013/02317 & TC/2014/03735

EXCISE DUTY - appeals against refusal to restore vehicle and assessments for duty and penalty - applications to strike out appeals - seizure of excise goods and vehicle not contested - jurisdiction of the tribunal - applications granted in part - appeals against assessments for duty struck out - appeals against penalty and refusal to restore vehicle not struck out

FIRST-TIER TRIBUNAL
TAX CHAMBER

MICHAEL KEARY

First Appellant

SHARON LAKIN

Second Appellant

- and –

THE DIRECTOR OF BORDER REVENUE

First Respondent

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS

Second Respondents

TRIBUNAL: JUDGE GREG SINFIELD

Sitting in public at the Royal Courts of Justice, Strand, London WC2 on 11 December 2014

The First and Second Appellants in person

David Griffiths, counsel, instructed by the Home Office for the First Respondent and by the General Counsel and Solicitor to HM Revenue and Customs, for the Second Respondents

DECISION

Introduction

1. The First Appellant ("Mr Keary") and the Second Appellant ("Ms Lakin") appeal against a decision of First Respondent ("the Border Force") refusing to restore Mr Keary's car, which had been seized and condemned as forfeited, and assessments by the Second Respondents ("HMRC") for excise duty and penalties. This decision relates to applications by the Border Force and HMRC for a direction that the appeals be struck out under rule 8(2)(a) and, or alternatively, rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the FTT Rules") on the grounds that the Tribunal had no jurisdiction and, or alternatively, the appeals had no reasonable prospect of success. At the hearing of the applications, I granted the application to strike out the part of the appeals that related to assessments for excise duty and refused the applications in relation to the other parts of the appeals. I indicated that I would give my reasons in writing later. This Decision sets out those reasons.

Factual background

2. I set out the factual background to the applications below. I have taken the facts from the case files and a helpful chronology provided by Mr David Griffiths, counsel, who appeared for the Respondents. As I have not heard any evidence, the purpose of the summary of the facts is to put the applications in their proper context. While I hope that the facts stated below are accurate, they are not findings of facts for the purposes of the continuing appeals.

3. At around 15:20 on 31 October 2012, officers of the Border Force stopped a car in the UK Control Zone at Coquelles, France. The car belonged to Mr Keary. Inside the car were Mr Keary, his partner Ms Lakin and their two year old son. Ms Lakin was driving the car. Mr Keary and Ms Lakin said that they were on their way back from Dunkirk and Belgium. They said that they had tobacco with them. The boot of the car contained 10.5 kilos of hand-rolling tobacco ("HRT") and 200 cigarettes. Mr Keary and Ms Lakin were interviewed separately from around 16:00 until 17:30. Mr Keary said that the cigarettes were for a friend, who had paid for them, and the HRT was for him and Ms Lakin. Ms Lakin said that Mr Keary had bought the HRT and she had bought the cigarettes. They both denied buying tobacco on a previous trip in August/September. They did not appear to know how many roll ups could be obtained from a pouch of tobacco and gave different answers when asked how many pouches they used in a week. Mr Keary and Ms Lakin both signed the records of their interviews as accurate. HMRC gave Mr Keary and Ms Lakin a Seizure Information Notice (BOR156), warning letter (BOR162), Notice 1 and Public Notice 12A. The Border Force seized the car and the tobacco as liable to forfeiture. The warning letter (BOR162) stated that the Border Force may share information with HMRC who might take action including issuing an assessment for duty and a penalty.

4. Mr Keary and Ms Lakin have never challenged the seizure of the tobacco. Immediately after the seizure, Mr Keary wrote to the Border Force and asked for the car to be restored. The letter stated that Mr Keary relied on the vehicle to travel to work early in the morning and that the car was also required to take their son to nursery and playgroup. In addition, the letter stated that Ms Lakin's father relied on them to do his shopping and they also had to take the father and Ms Lakin's elderly

grandparents to hospital appointments. It appears that, although it was phrased as a request for restoration, this was intended to be a challenge to the liability of the car to seizure. The Border Force treated the letter as a claim that the car was not liable to seizure and initiated condemnation proceedings. On 26 November 2012, however, Mr Keary and Ms Lakin jointly wrote to the Border Force and stated that they did not wish to continue with their "appeal against the legality of the seizure and of the vehicle". Accordingly, the car and the tobacco were treated as duly condemned as forfeited by paragraph 5 of Schedule 3 to the Customs and Excise Management Act 1979 ("CEMA 1979").

5. On 10 December 2012, an officer of the Border Force wrote to Mr Keary and Ms Lakin refusing to restore the car. The letter set out a summary of the Border Force's policy in relation to restoration of vehicles but not how that policy related to the case of Mr Keary and Ms Lakin. The letter stated that there were no exceptional circumstances to justify departing from the policy that private vehicles should not normally be restored. The letter stated that only exceptional hardship could be considered.

6. On 22 January 2013, the Border Force received a letter from Mr Keary and Ms Lakin asking for a review of the decision not to restore the car. In the letter, they stated that the seizure of the car was causing them to suffer exceptional hardship because:

(1) Mr Keary had to stop working as a porter because there was no public transport and they have had to start claiming benefits.

(2) Public transport was too expensive.

(3) Their two-year-old son was unwell and has to go to hospital for appointments.

(4) Ms Lakin's father was having an operation in March.

(5) The two other vehicles at their home address belonged to Ms Lakin's father and brother and they did not have access to these vehicles.

(6) They had no savings.

7. On 1 March 2013, the Border Force wrote to Mr Keary and confirmed the original decision not to restore the vehicle. The letter set out the Border Force Policy on the restoration of private vehicles used for the improper importation or transportation of excise goods that have been seized. The general policy is that private vehicles should not normally be restored. The letter explained that vehicles may be restored at the discretion of the Border Force and subject to any appropriate conditions in certain circumstances, such as where the excise goods were destined for supply on a not for profit reimbursement basis or were intended to be supplied for a profit but the quantity was small and it was a first occurrence. On the basis of their answers in the interviews on 31 October 2012, the review officer doubted that Mr Keary or Ms Lakin smoked. He rejected the explanation given in interview for going to Belgium on previous trips, namely that it was cheaper than going to the beach in England. The officer concluded that they had probably bought tobacco on their previous trips. He concluded that the seized tobacco was held for profit and the policy that vehicles should not normally be restored in those circumstances was fair, reasonable and proportionate. Restoration would be considered in the case of a first offence involving a small quantity of excise goods but this was not a small quantity.

The officer did not consider the hardship caused by loss of the car to be exceptional hardship such as would justify departing from the policy.

8. After the decision not to restore was confirmed on review, Mr Keary submitted a notice of appeal, dated 24 March, to the Tribunal appealing against the refusal to restore the car. The notice of appeal did not contain any grounds for appeal but a letter attached to the notice of appeal set out Mr Keary's case. The letter stated that:

(1) the HRT was for their own use;

(2) a shop owner in Belgium had told them they could bring back a year's worth of tobacco, which they had done;

(3) they were tired and concerned for their young son and how they would get home without a car during the interviews; and

(4) Mr Keary needed the car, which had been left to Mr Keary by his late father, to travel to work and, as a result of not having it, he was now unemployed and claiming benefits.

9. On 24 June 2013, HMRC raised two assessments for the duty due in relation to the tobacco under section 12 of the Finance Act 1994. As Mr Keary and Ms Lakin had indicated, when they were stopped, that they owned the goods in equal shares, HMRC decided to issue an assessment for half the duty, ie £833, to each of them.

10. On 5 July 2013, Mr Keary wrote to HMRC and asked them to review the assessments on the grounds that the tobacco was for personal use and he was unemployed and could not afford to pay the duty. Following a review, HMRC notified Mr Keary and Ms Lakin by letter dated 19 July that the assessments were upheld. The basis of that decision was the decision of the Court of Appeal in *HMRC v Jones and Jones* [2011] EWCA Civ 824. The *Jones* case showed that the fact that the seizure of the HRT had not been challenged meant that it was deemed to be duly condemned as forfeited. As a consequence, the HRT must be regarded as having been imported illegally and Mr Keary and Ms Lakin could not now argue that the HRT had been imported legally for personal use.

11. On 29 July 2013, HMRC informed Mr Keary and Ms Lakin that they were each to be charged with a penalty of £176 under Schedule 41 to the Finance Act 2008. The penalty explanation letter stated that the behaviour that led to the penalty was considered to be non-deliberate with a prompted disclosure. HMRC allowed the maximum reduction (10%) for disclosure which gave a penalty of 20% of the potential lost duty. The penalty notices were issued to Mr Keary and Ms Lakin on 7 August.

12. On 9 August 2013, the Tribunal received a notice of appeal against the assessment for duty from Mr Keary. In the notice of appeal, Mr Keary referred to the appeal against the refusal to restore the car and wrote:

> "We cannot afford this amount. When they seized our car they took my saving what was the car and now I'm out of work. We live with my father in law because we can't afford anywhere else. They took the tobacco and now want £833.
>
> We have nothing.

> I don't feel I should have to pay the duty when they have taken all the tobacco including my vehicle."

13. On 27 August 2013, Mr Keary asked HMRC to review the imposition of the penalties. In a letter dated 10 October, having undertaken a review, HMRC upheld the penalties imposed on Mr Keary and Ms Lakin. The letter stated that the reduction in the penalty was the maximum possible under the legislation.

14. A hearing to consider Mr Keary's appeal against the Border Force's decision not to restore the car took place on 24 October 2013. Mr Griffiths, who appeared for the Border Force at that hearing, told me that the Border Force (and the Tribunal) only became aware of the Mr Keary's appeal against the assessment for duty and Ms Lakin's desire to appeal in relation to the duty and penalty at the hearing. The Tribunal (Judge Demack) adjourned the hearing of Mr Keary's appeal to enable that appeal to proceed together with the outstanding appeals in relation to the duty and penalty.

15. On 2 December 2013, I directed that Mr Keary's two appeals (TC/2013/02317 and TC/2013/05286) should be consolidated under appeal number TC/2013/02317. The consolidated appeal was against the Border Force's decision not to restore the car to Mr Keary and HMRC's decision to assess Mr Keary for excise duty of £883 in relation to the tobacco. There was no appeal by Mr Keary against the penalty of £176.

16. Ms Lakin appealed against the assessment for excise duty in the sum of £883 and the penalty of £176 in relation to the tobacco in a notice of appeal dated 26 June 2014. The notice of appeal was received by the Tribunal on 10 July. In July, I directed that Ms Lakin's appeal should be heard together with Mr Keary's consolidated appeal.

Applications

17. By an application dated 4 September 2014, HMRC sought a direction of the Tribunal that the Mr Keary's appeal against the assessment for excise duty and Ms Lakin's appeal against the assessment for excise duty and the penalty should be struck out:

> (1) under rule 8(2) of the FTT Rules on the grounds that the tribunal does not have jurisdiction in relation to the matter under appeal; and, or in the alternative,
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> (2) under rule 8(3)(c) on the grounds that there is no reasonable prospect of the appeals succeeding.

18. Two further matters arose at the hearing. First, although there was no application by the Border Force to strike out Mr Keary's appeal against the refusal to restore his car, Mr Griffiths asked me to consider whether that appeal should also be struck out. Mr Keary did not object and I agreed to do so. Secondly, Mr Griffiths had indicated in opening that the fact the there was no appeal by Mr Keary in relation to the penalty was probably an omission. Mr Keary stated that he thought that he had appealed against the penalty. Ms Lakin explained that she had dealt with all the paperwork and any omission was her fault. I indicated that I was prepared to allow Mr Keary to amend his grounds of appeal to include the penalty. Mr Griffiths, while noting that the formalities had not been complied with, did not resist too strongly.

Accordingly, I directed that the Mr Keary's grounds of appeal should be treated as including an appeal against the penalty.

Summary of relevant legislation

19. The legislation relevant to the appeals and applications is set out in an Appendix to this decision. I set out below a summary of how the legislation applies in this case. This section is intended to assist Mr Keary and Ms Lakin to understand the issues that arise in their appeals and the discussion of the Respondents' applications that follows.

20. Excise duty is payable on tobacco products held for a commercial purpose in the United Kingdom. The United Kingdom excise duty legislation applies to the Control Zone at Coquelles, France as if it were part of the United Kingdom. Tobacco products brought into the United Kingdom by a private individual who had bought them duty paid in another Member State of the European Union for his or her own use are not regarded as held for a commercial purpose and so excise duty is not payable on those goods. Own use includes use as a gift but not if the person to whom the goods are given pays for them in any way. If the tobacco products are not for the person's own use then they are regarded as held for a commercial purpose and excise duty is payable. HMRC can assess any excise duty that they consider is due. A person who has been assessed for an amount of duty can appeal against that assessment to the First-tier Tribunal (Tax Chamber).

21. A penalty is payable by a person who is concerned in carrying, keeping or otherwise dealing with goods in respect of which excise duty is due and has not been paid. The amount of the penalty is specified in Schedule 41 to the Finance Act 2008. The penalty is 100% of the potential lost duty, ie the unpaid excise duty in this case, for a deliberate and concealed failure. The penalty for a deliberate but not concealed failure is 70% of the potential lost duty. The penalty in any other case is 30% of the potential lost duty. Where there has been disclosure of the failure, the penalty is reduced. The amount of the reduction depends on the level of the penalty and whether the disclosure is prompted or unprompted. In the case of a 30% penalty the maximum reduction for disclosure is 10%, ie reducing the penalty from 30% to 20%. HMRC may also reduce the penalty if they consider that there are special circumstances. A reduction for special circumstances is not subject to a statutory minimum and can include a reduction to nil. The legislation states that "special circumstances" does not include the fact that someone is not able to pay the penalty. Where an act or failure is not deliberate, a person is not liable to a penalty if there is a reasonable excuse for the act or failure. The legislation states that a lack of funds is not a reasonable excuse, unless attributable to events outside the person's control.

22. Where excise duty is payable on goods and that duty has not been paid, the goods can be seized as liable to forfeiture. Any vehicle used to carry those goods is also liable to be seized. A person can challenge the seizure of goods by making a claim in writing to the authority that seized the goods within one month. Whether the goods were liable to seizure is determined in proceedings, called "condemnation proceedings", in the magistrates' court. If the owner does not make a claim within the time limit, or a claim is made and then withdrawn, the goods are deemed to have been duly condemned as forfeited.

23. Where goods have been condemned as forfeited, the relevant authority (the Border Force in this case) can restore the goods subject to any conditions that it thinks

appropriate. If the authority refuses to restore goods that have been condemned then the person claiming the goods can appeal against that decision to the First-tier Tribunal (Tax Chamber). On such an appeal, the Tribunal can only consider whether the authority's decision not to restore was reasonable. The Tribunal cannot make its own decision or remake the authority's decision. If the Tribunal decides that the decision could not reasonably have been arrived at, it can only direct that the decision be considered again by the authority, subject to any directions the Tribunal considers appropriate. If the owner does not challenge the seizure of the goods, then the Tribunal must address the reasonableness or otherwise of the decision not to restore on the basis that the goods were duly condemned as forfeited.

Case law on this issue

24. In the *Jones* case, Mr and Mrs Jones were stopped at Hull Ferry Port with a large quantity of tobacco, wine and beer that was seized, together with their car, on the basis that it was for held for a commercial purpose. The seizing officer reached that view following an interview with Mr and Mrs Jones. They were informed of their rights to challenge the legality of the seizure and request restoration of the goods. Initially, they challenged the legality of the seizure by serving a notice of claim pursuant to Paragraph 1 of Schedule 3 to the CEMA 1979. They were also notified by HMRC that if they decided to withdraw from the resulting condemnation proceedings they would have to accept that the goods were legally seized, for example that they were imported for commercial use. Subsequently Mr and Mrs Jones, who at that time were represented by solicitors, withdrew from the condemnation proceedings and pursued restoration of the goods. HMRC refused to restore the goods and Mr and Mrs Jones appealed to the First-tier Tribunal ("the FTT"). The FTT made findings of fact that the goods were for personal use and allowed the appeal. The Upper Tribunal upheld this decision. HMRC appealed to the Court of Appeal on the ground that the FTT were not entitled to make findings of fact inconsistent with the deemed forfeiture of the goods from which it was implicit that the goods were not for personal use. The Court of Appeal agreed. Mummery LJ's summary of his conclusions at [71] included the following:

> "(4) The stipulated statutory effect of [Mr and Mrs Jones's] 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.
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> (5) The deeming process limited the scope of the issues that [Mr and Mrs Jones] 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 [Mr and Mrs Jones] 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 [Mr and Mrs Jones]. In brief, the deemed effect of [Mr and Mrs Jones's] failure to contest condemnation of the goods by the court was that the goods were being illegally imported by [Mr and Mrs Jones] for commercial use."

25. Mummery LJ said at [73]:

> "… the FTT erred in law; the UTT should have allowed the HMRC's appeal on the ground that the FTT had no power to re-open and re-determine the question whether or not the seized goods had been legally imported for [Mr and Mrs Jones's] personal use; that question was already the subject of a valid and binding deemed determination under the 1979 Act; the deeming was the consequence of [Mr and Mrs Jones's] own decision to withdraw their notice of claim contesting the condemnation and forfeiture of the goods and the car in the courts; the FTT only had jurisdiction to hear an appeal against a review decision made by HMRC on the deemed basis of the unchallenged process of forfeiture and condemnation; and the appellate jurisdiction of the FTT was confined to the correctness or otherwise of the discretionary review decision not to restore the seized goods and car. No Convention issue arises on that outcome, as the process was compliant with Article 6 and Article 1 of the First Protocol: there is no judge-made exception to the application of paragraph 5 according to its terms; [Mr and Mrs Jones] had the option of contesting in the courts forfeiture on the basis of importation for personal use; they had decided on legal advice to withdraw from their initial step to engage in it; and that withdrawal of notice gave rise to the statutory deeming process which was conclusive on the issue of the illegal purpose of the importation."

26. The *Jones* case was only concerned with an appeal against a refusal to restore seized goods. The question whether a decision not to challenge the seizure of excise goods also prevents the Tribunal from finding that the goods were for personal use in an appeal against an assessment for excise duty was considered by the Upper Tribunal in *HMRC v Nicholas Race* [2014] UKUT 0331. In that case, HMRC found just under 11,000 cigarettes, 800 grams of HRT and 24.75 litres of red wine at Mr Race's home. As they were not satisfied that the excise goods were not held for a commercial purpose, HMRC seized the goods and assessed Mr Race for excise duty of £2,317. HMRC later assessed Mr Race for a penalty of £892. Mr Race appealed against both the excise duty assessment and the penalty. His sole ground of appeal was that the goods were purchased for personal consumption and as Christmas Gifts for his family. HMRC applied to strike out the appeal against the excise duty assessment (but not the penalty appeal) on the same basis as in this appeal, ie that the tribunal did not have jurisdiction and, or alternatively, that there was no reasonable prospect of the appeal succeeding. The First-tier Tribunal refused HMRC's application to strike out the excise duty appeal, holding, among other things, that it was arguable that the *Jones* case did not limit the jurisdiction of the tribunal in relation to an appeal against an assessment to excise duty. HMRC appealed to the Upper Tribunal.

27. In *Race*, Warren J reviewed the decision of the Court of Appeal in the *Jones* case and observed, at [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 by Mr and Mrs Jones, they were not held by the taxpayers for their own personal use in a way which 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."

28. In relation to the First-tier Tribunal's conclusion that the *Jones* case did not prevent the tribunal from considering whether the goods were for personal use, Warren J held that

> "33. … I do not consider it to be arguable that *Jones* does not demonstrate the limits of the jurisdiction. 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 is no different from that raised by Mr and Mrs Jones.
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> 34. The Judge supported his contrary conclusion by referring to the period between the expiry on the one month time limit for challenging seizure and the point at which the assessment to excise duty was issued. The Judge commented that the owner of seized goods should not be forced to seek condemnation proceedings simply to guard against the possibility of a future tax or penalty assessment … But that is precisely what he must do if he wishes to assert, if he were to be assessed, that goods were not subject for forfeiture. The effect of the deeming provisions is that the goods are legally forfeit. Notice 12A is clear that, unless the seizure is challenged it is not possible subsequently to argue that the goods were not liable to forfeiture because they were in fact held for personal use. I agree with [counsel for HMRC] that it is not surprising or a cause for complaint that HMRC are entitled to assess for unpaid duty in respect of such goods. In any event, 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 so that the factual issues in relation to an assessment and penalty assessment are likely to be different.
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> 35. As to the second of the Judge's reasons, concerning procedural unfairness, it is clear that paragraphs 5 and 6 of Schedule 3 are Convention compliant. That is not to say that HMRC could escape the consequences of any unfairness on their part in relation to the application of those statutory provisions. The remedy for that sort of unfairness, however, is judicial review, which itself gives a Convention-compliant remedy to a taxpayer alleging the sort of unfairness about which the Judge was concerned. The First-tier Tribunal has no inherent power to review decisions of HMRC, although it does have certain statutory powers in relation to certain decisions, it has no power to review, or to provide any remedy, in relation to procedural unfairness of the sort which concerned the Judge. It is not, in any case, immediately obvious that there is anything in the point concerning procedural unfairness in the light of the fact that Mr Race was provided with Notice 12A which set out clearly what he needed to do."

29. HMRC had not applied to strike out the appeal against the penalty in *Race* but the First-tier Tribunal had held that it would be able to consider whether the goods were for personal use in the context of that appeal. On that point, Warren J made the following observation at [39]:

> "… relating to the appeal against the Penalty Assessment, what the Judge was saying was that the issue whether Mr Race held the goods for his own personal use would arise for decision in the appeal against the Penalty Assessment. It is not correct, however, to say that that issue would arise in the appeal against the Penalty Assessment. This is because 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."

30. That was not the end of the matter in relation to the penalty, as Warren J held at [40]:

> "In any case, the issues raised by the appeal against the Penalty Assessment extend beyond the question of whether duty is payable and include, for example, an assessment of culpability because this is relevant to the level of penalty imposed under Schedule 41 of the Finance Act 2008. Further, the First-tier Tribunal will need to decide whether the level of mitigation afforded by HMRC for cooperation provided by Mr Race was sufficient and/or whether there should be further reductions for 'special circumstances'. Thus, even if the issue whether duty was payable may not be reopened there are other aspects of behaviour or conduct or circumstance raised by the penalty provisions which the First-tier Tribunal will be required to consider in respect of the appeal against the Penalty Assessment. It was for this reason that no application was made to strike out that appeal."

Submissions

31. In summary, the Respondents submitted that the appeals should be struck out because:

(1) In the absence of any challenge by way of condemnation proceedings, the tobacco products and the car have been duly condemned as forfeited under paragraph 5 of schedule 3 to the CEMA 1979.

(2) The appeals against the refusal to restore the car, the assessments to excise duty and the penalty appear to be based on two grounds, namely that:

(a) the tobacco products were for personal use; and

(b) Mr Keary and Ms Lakin cannot afford to pay the assessments for duty and penalty.

(3) Applying the reasoning of the Court of Appeal in the *Jones* case and the Upper Tribunal in *Race*, the First-tier Tribunal has no jurisdiction to determine whether the tobacco products were for the personal use of Mr Keary and Ms Lakin;

(4) Mr Keary's and Ms Lakin's alleged inability to pay the assessments and penalty is not relevant to the question of whether the excise duty and penalty are payable; and

(5) Accordingly, the Tribunal has no jurisdiction to hear the appeals and, or alternatively, the appeals have no reasonable prospects of success.

32. Mr Keary and Ms Lakin had set out their position in correspondence to the Tribunal in advance of the hearing and they also addressed me at the hearing. They maintained that the tobacco had been purchased for their own use. They had not realised that they could not bring that quantity into the UK. They also stated that the seizure of the car was unfair because it caused them exceptional hardship. The loss of the car had led to Mr Keary being unemployed and caused considerable inconvenience for them and their elderly relatives who relied on them to drive them to shops and hospital appointments. They stated that they could not afford to pay the excise duty and penalty. They considered that, in their circumstances, they should not be required to pay the duty and penalty.

Discussion

33. I am bound by the decisions of the Court of Appeal in *Jones* and the Upper Tribunal in *Race*. It is clear from those cases that the fact that Mr Keary and Ms Lakin did not challenge the seizure of the tobacco products in condemnation proceedings in the Magistrates' Court means that the HRT and cigarettes are deemed, by paragraph 5 of Schedule 3 to the CEMA 1979, to have been duly condemned as forfeited on the ground that they had been illegally imported. Those cases show that, once the products are deemed to be duly condemned as forfeited, the First-tier Tribunal cannot consider whether the tobacco products were for the personal use of Mr Keary and Ms Lakin but must treat them as having been held for a commercial purpose.

34. In relation to the appeals against the assessments for excise duty, Mr Keary and Ms Lakin have only put forward two grounds of appeal, namely that the HRT was for their personal use, and that they cannot afford to pay the amount of excise duty assessed. As I have stated above, the effect of *Jones* and *Race* is that, the First-tier Tribunal cannot consider whether the tobacco products were for the personal use of Mr Keary and Ms Lakin. In my view, it is clear that the First-tier Tribunal does not have jurisdiction to hear the appeals against the assessments for excise duty in so far as they are based on the argument that the tobacco products were for the personal use of Mr Keary and Ms Lakin. It is also clear that an appeal based on the fact that Mr Keary and Ms Lakin cannot afford to pay the assessments for excise duty has no reasonable prospect of success. The fact that a person cannot afford to pay an amount of duty does not mean that the duty is not properly chargeable or that the person is relieved of the obligation to pay it. Although the Upper Tribunal in *Race* referred to other arguments that might be raised in an appeal against an assessment for duty (such as it was wrongly calculated, was out of time, was raised against the wrong person or is otherwise deficient), those arguments have not been put forward in this case. Further, having reviewed the case files, I cannot see any other grounds of appeal that would be available to Mr Keary and Ms Lakin that would have a reasonable prospect of success. Accordingly, I grant HMRC's application to strike out the appeals of Mr Keary and Ms Lakin in relation to the assessments for excise duty.

35. In relation to the penalty, the situation is not as clear-cut. As *Race* shows, the fact that the tobacco products were deemed to have been duly condemned as forfeited on the ground that they had been illegally imported applies to an appeal against a penalty in exactly the same way as it applies to an appeal against an assessment for excise duty. Mr Keary and Ms Lakin can no more argue that the tobacco was for their personal us in the appeal against the penalty than they can in the excise duty appeal. However, it is clear from *Race* that the issues raised by an appeal against a penalty extend beyond the question of whether duty is payable and include other issues which are within the jurisdiction of the First-tier Tribunal. Those issues could include whether a disclosure was prompted or unprompted, whether the reduction allowed by HMRC for disclosure and co-operation was sufficient and whether there should be a further reduction for 'special circumstances'. Mr Griffiths submitted, correctly, that HMRC had allowed the maximum reduction for prompted disclosure so that the penalty was the minimum allowed by statute. He contended that there was no evidence that would support a finding of special circumstances to reduce the penalty further.

36. Notwithstanding Mr Griffith's forceful submissions on this point, I am not satisfied that the appeals against the penalty do not have any reasonable prospect of success. On the material that I have seen, I am not satisfied that arguments such as there are special circumstances would not have a reasonable prospect of success. That does not mean that I consider that such an argument would succeed if put forward. I have not heard any evidence from Mr Keary and Ms Lakin and they have not provided any witness statements. As they are unrepresented and have no experience of tribunal proceedings, it is understandable that they had focussed on arguing that the HRT and cigarettes were for their own use, which the First-tier Tribunal cannot consider, and not tried to put forward any grounds based on any other issues that might arise in a penalty appeal. I consider that it would not be fair or just to strike out the appeals against the penalties without giving Mr Keary and Ms Lakin an opportunity to argue that they should not have to pay the penalties because there are special circumstances. Accordingly, I refuse HMRC's application to strike out the appeals of Mr Keary and Ms Lakin in relation to the penalty. Of course, if Mr Keary and Ms Lakin decidee not argue that there are special circumstances (which do not include an inability to pay) or the Tribunal concludes that there are no special circumstances in their case then the penalty appeals must fail because the penalty is already at the lowest level allowed by the legislation for a prompted disclosure.

37. In relation to Mr Keary's appeal against the refusal to restore the car, the First-tier Tribunal's jurisdiction is limited to considering whether the Border Force's decision not to restore the seized car was reasonable. As discussed above, the First-tier Tribunal cannot consider whether the tobacco was being imported for own use and must regard it as having been imported illegally. That still leaves the issue of whether the Border Force's decision, in the letter dated 1 March 2013, not to offer to restore the car was reasonable. As in the case of the penalty, I consider that I cannot be satisfied that Mr Keary's appeal does not have a reasonable prospect of success until I have heard the evidence. The officer who made the decision relied on inconsistencies and inaccuracies in the answers given by Mr Keary and Ms Lakin to questions put in the interviews. It is clear from the correspondence that Mr Keary and Ms Lakin have criticisms of the circumstances in which the interviews took place and the treatment of them and their child. Those matters could affect the weight to be given to their answers. They also take issue with some of the officer's conclusions, such as that they did not smoke, which were used to justify the decision not to restore

the car. Finally, there is an issue as to whether the refusal to withdraw the car would cause Mr Keary and Ms Lakin exceptional hardship, which can only be considered in the light of the evidence, and what is meant by exceptional hardship. Accordingly, I refuse the Border Force's application to strike out Mr Keary's appeal against the refusal to restore his car.

Decision

38. For the reasons set out above, I have concluded that the appeals of Mr Keary and Ms Lakin in relation to the assessments for excise duty should be struck out under rule 8(2)(a) and rule 8(3)(c) of the FTT Rules. I have also decided that the appeals against the penalty and the refusal to restore Mr Keary's car should not be struck out. Directions for the continuation of the parts of the appeals that are not struck out accompany this decision.

Right to apply for permission to appeal

39. 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.

GREG SINFIELD
TRIBUNAL JUDGE

RELEASE DATE: 23 December 2014

APPENDIX

Relevant Legislation

Liability to excise duty

40. Section 2 of the Tobacco Products Duty Act 1979 provides that excise duty is payable on tobacco products when they are imported into the United Kingdom [TBC]

41. Article 5(2)(a) of the Channel Tunnel (Customs and Excise) Order 1990 provides that goods intended to be brought into the United Kingdom through the Channel Tunnel on a shuttle train are treated as being imported into the UK when they are taken into the control zone in France within the tunnel system.

42. Article 2 of the Channel Tunnel (Alcoholic Liquor and Tobacco Products) Order 2010 provides that:

> "The Excise Goods (Holding, Movement and Duty Point) Regulations 2010 apply in a control zone with the modifications indicated in the Schedule."

43. Regulation 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 provides:

> "13(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 -
>
> (a) by a person other than a private individual; or
>
> (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.
>
> (4) For the purposes of determining whether excise goods referred to in the exception referred to in the exception in paragraph (3)(b) are for P's own use regard must be taken of -
>
> (a) P's reasons for having possession or control of those goods;
>
> (b) whether or not P is a revenue trader;
>
> (c) P's conduct, including P's intended use of the goods or any refusal to disclose the intended use of those goods;
>
> …
>
> (h) the quantity of those goods and, in particular, whether the quantity exceeds any of the following quantities-

…

1 kilogramme of any other tobacco products

(i) whether P personally financed the purchase of those goods;

(j) any other circumstance that appears to be relevant.

(5) For the purposes of the exception in paragraph (3) (b)-

…

(b) "own use" includes use as a personal gift but does not include the transfer of goods to another person for money or money's worth (including any reimbursement of expenses incurred in connection with obtaining them).

44. Section 12(1A) of the Finance Act 1994 provides that HMRC may assess an amount of excise duty which it appears to them is due from a person

45. A person may appeal against an assessment to duty. Section 13A(2)(b) of the Finance Act 1994 provides that a decision that a person is liable to excise duty or the amount of such duty assessed under section 12 is a "relevant decision". Section 16(1B) provides that a person can appeal against a relevant decision. Section 16(5) provides:

> "(5) In relation to [decisions other than a decision as to an ancillary matter], the powers of an appeal tribunal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal."

Section 16(8) provides that a decision falling within section 13A(2)(b) is not an ancillary matter (see below for the significance of this).

Liability to penalty

46. Article 3 of the Channel Tunnel (Alcoholic Liquor and Tobacco Products) Order 2010 states that:

> "Paragraph 4 of Schedule 41 to the Finance Act 2008 (civil penalty for handling goods subject to unpaid excise duty) applies to goods in a control zone with the modifications indicated in the Schedule."

47. Paragraph 4(1) of Schedule 41 to the 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 a time when P acquires the goods, or is so concerned, a payment of duty on the goods is outstanding and has not been deferred."

48. The amount of the penalty payable under paragraph 4 is specified by paragraph 6 of Schedule 41:

> "6(1) The penalty payable under any of paragraphs 2, 3(1) and 4 is

(a) for a deliberate and concealed failure, 100% of the potential lost revenue,

(b) for a deliberate but not concealed failure, 70% of the potential lost revenue

(c) for any other case 30% of the potential lost revenue."

49. The degrees of culpability are defined in paragraph 5 of Schedule 41. The relevant provision is paragraph 5(4) which states

"(4) 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 is -

(a) 'deliberate and concealed' if it is done deliberately but 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."

50. Paragraphs 12 and 13 of Schedule 41 provide for reductions in penalties where there has been disclosure. Paragraph 12 is as follows:

"12(1) Paragraph 13 provides for reductions in penalties under paragraphs 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.

Paragraph 13 specifies the percentage reduction to be applied to a penalty of a specified percentage ("the standard percentage"). Paragraph 13(2) provides that in the case of a standard percentage of 30%, the penalty may not be reduced below 20% for a prompted disclosure.

51. Paragraph 14 provides for special reductions:

"14(1) If HMRC thinks it right because of special circumstances, it may reduce a penalty under [paragraph 4]

(2) In sub-paragraph (1) 'special circumstances' does not include –

(a) ability to pay, or

(b) the fact that the potential loss of revenue from one taxpayer is balanced by a potential over-payment by another."

52. Paragraph 17(1) of Schedule 41 provides that a person may appeal against a decision of HMRC that the person is liable to pay a penalty. Paragraph 17(2) provides that a person can appeal against a decision as to the amount of the penalty. Paragraph 19 provides:

> "(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."

53. Paragraph 20 deals with reasonable excuse:

> "20(1) Liability to a penalty under any 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 an appeal notified to the tribunal) the 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.
>
> (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."

Seizure of car and decision not to restore

54. Regulation 88 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 provides:

> "88. If in relation to any excise goods that are liable to duty that has not been paid there is –
>
> (a) a contravention of any provision of these Regulations, or
>
> (b) …
>
> those goods shall be liable to forfeiture."

55. The Customs and Excise Management Act 1979 ("CEMA 1979") provides as follows:

> "139(1) Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer…
>
> …
>
> 141(1) …where any thing has become liable to forfeiture under the customs and excise Acts -
>
> (a) any ship, aircraft, vehicle, animal, container (including any article of passengers' baggage) or other thing whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture, either at a time when it was so liable or for the purposes of the commission of the offence for which it later became so liable; and
>
> (b) any other thing mixed, packed or found with the things so liable,
>
> shall also be liable to forfeiture."

56. Paragraph 1 Schedule 3 CEMA 1979 provides for notice of the seizure to be given in certain circumstances. Paragraph 3 Schedule 3 CEMA 1979 then states:

> "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 …"

57. Where notice of a claim is given under paragraph 1, condemnation proceedings are commenced in the Magistrates' Court. Where no notice of claim is given Paragraph 5 Schedule 3 CEMA 1979 provides:

> "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 complied with the thing in question shall be deemed to have been duly condemned as forfeited."

58. Section 152 of CEMA 1979 provides …

> "The Commissioners may as they see fit –
>
> (a) …
>
> (b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under [the Customs and Excise Acts] …"

59. Sections 14 and 15 of the Finance Act 1994 makes provision for a person to require a review of a decision of HMRC under section 152(b) CEMA not to restore anything seized from that person. By virtue of Section 16(8) and Schedule 5 to FA 1994, a decision under Section 152 (b) of CEMA 1979 is a "decision as to an ancillary matter".

60. Section 16(1) of the Finance Act 1994 provides that a person can appeal against a decision on a review under section 15. Section 16(4) provides:

"(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say -

(a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;

(b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and

(c) in the case of a decision that has already been acted on or taken effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future."

Applications

61. Rule 5(1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides that the tribunal may regulate its own procedure and rule 5(2)(c) allows the tribunal to permit a party to amend a document.

62. The application to strike out the appeals is made pursuant to rule 8(2)(a), alternatively rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. These rules provide as follows:

"8(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 part of them

...

(3) The Tribunal may strike out the whole or part of the proceedings if –

…

(c) the Tribunal considers there is no reasonable prospect of the

appellant’s case, or part of it, succeeding.”