TC04978

Appeal number: TC/2015/02518

EXCISE DUTY– seizure and condemnation of imported cigarettes and vehicle - cigarettes and vehicle deemed condemned as forfeit - request for restoration of vehicle and cigarettes refused - duty assessed and penalties imposed - no appeal against assessment for duty and penalty - appeal against refusal to restore the vehicle and the cigarettes - whether decision to refuse restoration reasonable - whether exceptional circumstances justifying restoration - no - whether refusal to restore disproportionate in light of seizure of cigarettes vehicle and assessment to duty and penalty - no - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

VLADIMIR PILATS **Appellant**

- and -

THE DIRECTOR OF BORDER REVENUE **Respondent**

TRIBUNAL: JUDGE TIMOTHY HERRINGTON
CAROL DEBELL

Sitting in public at Fox Court, 30 Brooke Street London WC1 on 19 November 2015 with post-hearing submissions received as directed from the Respondent on 15 January 2016 and the Appellant on 26 January 2016

Dr Anton van Dellen, Counsel, for the Appellant

Michael Newbold, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondent

DECISION

Introduction

1. The appellant is appealing against the decision of Officer Deborah Hodge of the UK Border Force, in a review she performed on 18 March 2015, to refuse to restore 20,200 cigarettes ("the Cigarettes") and a Volkswagen Passat ("the Vehicle") that were seized at Dover on 10 March 2014.

2. Although not the subject of this appeal, the appellant was notified on 18 November 2014 of HMRC's intention to assess him for excise duty in relation to the Cigarettes (in an amount of £4,659) and to charge him with a penalty of £3,028 on the basis of him having brought goods into the UK from the EU on which excise duty was due but not paid or accounted for.

Procedural matters

3. At the outset of the hearing Dr van Dellen drew attention to the failure of the Respondent (" the Border Force") to comply on time with the directions made by the Tribunal on 9 July 2015 in that it had not notified the Tribunal of the names of the witnesses it proposed to call. The Tribunal wrote to the Border Force a few days after compliance was due notifying them of this failure and warning them that failure to provide the names may result in the Judge at the hearing ruling that they may not call any witnesses. It would appear, however, that a witness statement of Officer Hodge had been prepared and exchanged much earlier as required by the directions. It was not clear whether Dr van Dellen was going to make an application that because of the non-compliance Officer Hodge should not be called but he was warned off doing so on the basis that any such application would be entirely without merit bearing in mind that the appellant had seen Officer Hodge's witness statement because it was in the bundle of documents prepared for the hearing and was therefore fully aware of the evidence that was to be given.

4. It should be noted that Dr van Dellen was himself responsible for non-compliance on the appellant's part with the directions in that his skeleton argument was only made available on the morning of the hearing rather than, as required by the directions, being exchanged and filed no later than 14 days before the hearing.

5. That non-compliance was of some significance. The appellant's notice of appeal, which was prepared and filed by Dr van Dellen on the appellant's behalf, disclosed only one very short ground of appeal, namely that the Cigarettes and the Vehicle "are for the appellant's own personal use". It is perhaps surprising that the Border Force did not apply to have the appeal struck out on the basis that such a ground had no prospects of success, bearing in mind that no application was made, via the Border Force, to a magistrates' court within one month of the date of the seizure to determine the legality of the seizure with the result that the Cigarettes and the Vehicle were deemed to be duly condemned as forfeited. Nevertheless, Mr Newbold

prepared his skeleton argument on the basis that the personal use argument was the only ground advanced and also noted that (as was the case) the appellant had advanced no argument, or provided any evidence, as to whether there were exceptional circumstances which would justify restoration.

6. There was also some ambiguity as to what was being appealed in the notice of appeal. The notice stated that the decision being appealed was Officer Hodge's decision of 18 March 2015 not to restore the Cigarettes and the Vehicle. However, the notice also stated that the appeal was against an amount of indirect tax and penalty of £7,687, which is the total amount referred to at [2] above. Dr van Dellen also made an application in the notice for consent for the appeal to proceed without payment of the tax in question on the grounds of hardship, again suggesting that there was an intention to appeal against the assessment to excise duty and penalty referred to at [2] above.

7. Nevertheless, the appellant has not contended that he has appealed against the assessment and the penalty and indeed, as described below, the further correspondence that has now been filed indicates that to be the case because the appellant is pursuing a possible judicial review of what he says is a failure by HMRC to carry out a review of its decision to make the assessment and charge the penalty.

8. We therefore proceed on the basis that neither the assessment nor the penalty in themselves are the subject of this appeal. However, it became apparent from Dr van Dellen's skeleton argument and the submissions that he made at the hearing that he was seeking to argue the case not on the personal use ground at all. His arguments were now that failure to restore will cause the appellant exceptional hardship and would be disproportionate and the assessment and the penalty were relevant in that context.

9. The proportionality argument was developed so as to contend that the decision not to restore the Cigarettes and the Vehicle was disproportionate in the light of the overall financial impact on the appellant caused by both the seizure of the Cigarettes and Vehicle and the making of the assessment and charging of the penalty. In particular, in cross examination of Officer Hodge Dr van Dellen put it to the Officer that her failure to take the penalty into account when deciding not to restore the Cigarettes and Vehicle caused her decision to be disproportionate.

10. Mr Newbold did not object to what in effect was a complete change of the grounds on which the appeal was being made, but he did, perfectly reasonably bearing in mind that he had not come prepared to argue the point, ask that he be given the opportunity of making written submissions on the proportionality point and in particular on the question as to whether Officer Hodge was obliged to take the fact of the penalty into account when making her decision.

11. The Tribunal also took the view that it would be assisted by having evidence on the question of the assessment and the penalty (there being no written material on it in the bundle of documents) and also by having written submissions from both parties on the question as to whether the making of the assessment and penalty determination was relevant to the question as to whether it was proportionate not to restore the Cigarettes and the Vehicle to the appellant. These directions were made immediately

after the hearing on 19 November 2015 and provided a timetable for the exchange of further evidence, the filing of a supplementary bundle and the exchange and filing of further written submissions. The latter were due to be filed by 15 January 2016 and although Mr Newbold's submissions were filed within that timeframe Dr van Dellen's submissions were not filed until 26 January 2015 without him having made an application for an extension of time. That was discourteous to the Tribunal but the Tribunal has taken those further submissions into account in making its decision.

Evidence

12. The appellant filed a witness statement and gave oral evidence on which he was cross-examined. We did not find the appellant to be a credible and reliable witness in all respects. He had clearly lied to the Border Force officers when he was stopped at Dover and although he was candid before the Tribunal in admitting that he had lied to the officers because he knew that he was carrying excise goods in excess of his allowance, some of his other evidence, as we find below, was implausible.

13. For the Border Force the review officer, Deborah Hodge, gave evidence on which she was cross examined. Whilst we have been critical of her approach we found her to be an honest and reliable witness and have accepted her evidence.

14. We also had a bundle of documentation, including notes of the appellant's interview with the Border Force at the time of the seizure and correspondence relating to the seizure and the subsequent request for restoration. Following the making of the directions referred to at [11] above, we received limited correspondence filed by the appellant regarding the assessment and the penalty. The Border Force also provided copies of two papers published jointly by HMRC and the Border Force in 2011 and 2015 respectively, dealing with those authorities' strategy for dealing with tobacco smuggling as well as a copy of the Border Force's policy for restoration of seized goods and vehicles.

Findings of fact

15. On the basis of the documents and witness evidence, we make the following findings of fact.

16. The appellant is Latvian but has lived in the United Kingdom for approximately 6 years. For the past 5 years he has worked as a lorry driver, based in Cambridgeshire, driving solely to destinations in the UK. Whilst we had no evidence to verify this, the appellant stated that his net earnings were £400 a week. That figure is plausible and we accept it. We had no evidence from the appellant as to his weekly outgoings. In his witness statement, which was dated 3 September 2015, the appellant stated that at that time he had £1,432.75 in his bank account but again there was no evidence to support that figure or as to what his bank balance might be as at the date of the hearing.

17. The Vehicle was some 11 years old when it was stopped at Dover. The appellant has owned it since 3 February 2014. He values it at approximately £1,200. Again, that figure seems plausible and we accept it. The appellant also owns two other vehicles; an Audi which is currently a non-runner and a BMW which since the Vehicle was seized the appellant has used to go to and from his place of work. We were told that the appellant has a 15 minute drive to get to work and that there is no

public transport that will get him there early enough in the morning for him to start work on time. The appellant told us that using the BMW to get to work rather than the Vehicle costs him an extra £70 a week, although there is no evidence to support that assertion. That figure appears to us to be high and in the absence of documentary evidence to support it we do not accept the appellant's assertion on this point. The appellant told us that if the Vehicle was restored to him he would sell the BMW.

18. On 10 March 2014 the appellant was stopped by Border Force officers whilst driving the Vehicle as he entered the UK at the port of Dover, having returned from a visit to Latvia. A friend of the appellant, Mr Mark Savko, was a passenger in the Vehicle.

19. Upon being questioned, the appellant stated that he had no cigarettes or tobacco products. Mr Savko produced a packet of 20 cigarettes which he showed to the officers. A different officer conducted a search of the vehicle which revealed 20,200 cigarettes held in luggage, in the fabric of the Vehicle, in the rear bumper, under the passenger seat, under the back seat and in the spare wheel well. When asked who those cigarettes belonged to the appellant answered that they were his. He admitted to hiding them because he "knew that it was not legal". The Cigarettes were seized as being liable to forfeiture pursuant to s 139 Customs and Excise Management Act 1979 (CEMA) on the basis that they were held for a commercial purpose, being well in excess of the guidelines for personal use, namely 800 cigarettes. The Vehicle was also seized under the same provision as being liable to forfeiture because it was used for the carriage of goods liable to forfeiture.

20. The appellant was given the usual Notice 12A which explained that the appellant could challenge the legality of the seizure in a magistrates' court by sending a notice of claim to the Border Force within one month of the date of seizure. The appellant was also given a standard warning letter about the seized goods which explained that the seizure was without prejudice to any further action that may be taken against him in connection with the matter, including the fact that the Border Force may share information with HMRC who may take action against him such as issuing him with an assessment for any evaded tax or duty and a wrongdoing penalty.

21. The appellant says that he paid £4,000 for the Cigarettes. He produced no evidence to verify that nor did he indicate in which country they were bought. If he did pay £4,000 for them that works out at approximately £4 per packet of 20 which appears to us to be a high figure if they were acquired in Latvia or another eastern European country where it is well known that cigarettes retail for a much lower price than they do in the United Kingdom. In the absence of any direct evidence on the true cost of the Cigarettes, we can make no definitive finding on that point but we do not accept the appellant's figure. In our view it is more likely than not that the appellant paid less than £4,000 for the Cigarettes. Indeed it is not even clear that the appellant himself financed the purchase; this would be a large amount of money for someone in his position. Again we had no evidence as to where the funds came from and can make no findings on that point.

22. The appellant maintained in the hearing his position that the Cigarettes were for his own use. He said that he alone would smoke them (although he did indicate that he would be willing to sell some to Mr Savko on a not-for-profit basis). The appellant

said that he smoked between 2 and 3 packets a day; on that basis the Cigarettes would take between one and one and a half years to smoke by which time their quality would have deteriorated.

23. We cannot accept that such a large quantity would be acquired in one transaction if they were meant solely for personal use. We note also that the Cigarettes consisted of a variety of brands which is a further indicator that they were not for the appellant alone. In our view it is more likely than not that the Cigarettes were to be sold and we reject the appellant's evidence on this point.

24. In his evidence the appellant confirmed that he had hidden the Cigarettes in the Vehicle because he knew that importing such a large quantity without paying duty on them was illegal. He said that he did not think of the consequences if he were caught; he candidly admitted that he was hoping he would not be caught and that he now understood that he was wrong to do what he did.

25. The appellant did not challenge the seizure of the Cigarettes and the Vehicle within the period of one month specified in the Notice 12A. Our conclusion is that at this stage the appellant had accepted the loss of the Cigarettes and the Vehicle on the basis that his gamble that he would not be caught had not paid off and he assumed that would be the end of the matter.

26. However, on 18 November 2014 the appellant was sent the letter referred to at [2] above notifying him of HMRC's intention to assess him for excise duty on the Cigarettes and charge him with an excise wrongdoing penalty. As the appellant confirmed in his oral evidence, it was the receipt of this letter that prompted him to challenge the seizure. The letter of 18 November 2014 made it clear that it was not in itself an assessment and did not charge the penalty. The appellant was given one month to make any further representations. We had no evidence that he did so. Nor did we have evidence of the actual assessment and penalty determination which we assume was made immediately after the period for the making of representations expired.

27. It was at this point that the appellant obtained legal advice and on 18 December 2014 (which is at the point at which we would have expected the actual assessment and penalty determination to have been issued) Dr van Dellen wrote to the Border Force challenging the legal right to have seized the Vehicle and the Cigarettes, requesting that the Border Force start condemnation proceedings and, further or in the alternative, that the seized items be restored. It does not appear that at this stage that the appellant took any steps to challenge the assessment and the penalty and, as we have indicated above, it does not appear that there has ever been a formal appeal against those decisions.

28. On 10 January 2015 the Border Force replied stating that for an appeal against the legality of the seizure to be valid under Paragraph 6 of Schedule 3 of CEMA it had to have been received within one month of the date of seizure and as it had not been made within that period the request to institute condemnation proceedings could not be entertained. The Border Force did, however, state that the request for restoration would be considered. It is one of the quirks of the legislation that there appears to be no time limit within which a request for restoration has to be made.

29. The request for restoration was refused on the grounds that there were no exceptional circumstances that would justify a departure from the usual policy that excise goods seized because of an attempt to evade payment of duty should not normally be restored. Dr van Dellen requested a review of that decision on the grounds that the Cigarettes and Vehicle were for the appellant's personal use.

30. On 18 March 2015 Officer Hodge wrote to Dr van Dellen setting out the results of the review which she carried out. Her decision was that neither the Cigarettes nor the Vehicle should be restored and it is that decision which is the subject of this appeal.

31. The review letter made it clear that Officer Hodge approached the issue against the general policy that seized excise goods should not normally be restored but that each case is examined on its merits to determine whether or not restoration may be offered exceptionally. In other words, Officer Hodge was looking for evidence of any mitigating or exceptional circumstances that should be taken into account. The letter also indicated that she had considered whether the result was fair, reasonable and proportionate in all of the circumstances. Officer Hodge's letter noted that the appellant was invited to provide further information in support of the request for a review but nothing was received. She confirmed in accordance with usual practice that the legality or correctness of the seizure itself had not been considered because it had not been challenged within the required statutory period.

32. The matters that Officer Hodge took into account in making her decision, as set out in her letter, can be summarised as follows:

(1) The fact that the only grounds given in the request for restoration was that the Cigarettes were for the appellant's own use and that it was established by the Court of Appeal in *HMRC v Jones and Jones* [2011] EWCA Civ 824 that the deeming process in CEMA limited the scope of the issues that an appellant was entitled to ventilate in the Tribunal on their restoration appeal. The tribunal had to take it that the goods had been "duly" condemned as illegal imports and it was not open to it to conclude that they were legal imports illegally seized by HMRC by finding as a fact that they were being imported for own use. The case established that the deemed effect of any failure to contest condemnation of the goods by the court was that the goods were being illegally imported for commercial use;

(2) The Tribunal in past cases has found as a fact that the general policy not to restore goods which have been correctly forfeited was reasonable because the policy allows for situations where a distinction can be drawn between primary seizure of goods and secondary seizure, for example where an innocent driver has had his vehicle made use of by others to import excise goods;

(3) The appellant and Mr Savko must have known that they were expected to answer questions from the Border Force truthfully and disclose the full quantities of any excise goods carried in the Vehicle;

(4) The appellant failed to disclose all of the Excise goods, thus misleading the Border Force Officer and on those grounds alone she had good reason to doubt the appellant's credibility;

(5) As the Cigarettes had been concealed in luggage and in various places around the Vehicle the appellant clearly knew that he was misleading the Border Force Officer and when asked why he had not declared the Cigarettes, admitted that he was aware that it was not legal;

(6) The quantity of excise goods exceeded by more than 25 times the guide levels specified in the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 and it was not unreasonable to take account of those criteria when considering any aggravating, mitigating or exceptional circumstances affecting restoration;

(7) As observed by the Court of Appeal in *Lindsay v HMRC* [2002] EWCA Civ 267 in the absence of exceptional hardship those who deliberately use their cars to further fraudulent commercial ventures in the knowledge that if they are caught their vehicles we rendered liable to forfeiture cannot reasonably be heard to complain if they lose those vehicles and given the extent of the damage caused the public interest it is acceptable and proportionate that subject to exceptional individual considerations the vehicles of those who smuggle for a profit, even for a small profit should be seized as a matter of policy;

(8) It was not appropriate to apply the Border Force's policy to consider restoring vehicles where small quantities of goods were involved, even if held for profit, because 20,200 cigarettes did not qualify as a small quantity;

(9) Whilst there was inevitably a degree of hardship caused by the loss of the Vehicle with expense in making other transport arrangements or even replacing the car this was a natural consequence of having a vehicle seized rather than exceptional, it being the case that replacement of the seized vehicle with another does not necessarily require replacement with one of equal specification;

(10) The appellant chose to become involved in a smuggling attempt and if he finds that the consequences of those actions put it in a difficult financial position that was something he should have considered before choosing to become involved; and

(11) Official records showed that the appellant was shown as the keeper of other vehicles;

33. Officer Hodge concluded that not to restore the Cigarettes and the Vehicle was fair, reasonable and proportionate in all those circumstances. The letter concluded with Officer Hodge informing Dr van Dellen that if he had any fresh information that he would like to be considered then he should write to her and informed Dr van Dellen of the appellant's right of appeal to the Tribunal. As far as we can see, no further information was provided in response to this invitation, in particular any evidence of exceptional circumstances or any information regarding the fact of the making of the assessment or the charging of the penalty.

34. As mentioned at [14] above, with their additional submissions the Border Force provided a copy of the existing policy for the restoration of seized goods and vehicles as well as two papers regarding the joint strategy of HMRC and the Border Agency regarding the response to tobacco smuggling. As far as the existing restoration policy is concerned, it is clear that this stands alone from the wider sanctions strategy set out in the joint papers referred to and it has not been amended to take account of the new strategy. In particular, it is clear that this policy was developed following the

judgment in *Lindsay* referred to at [32 (7)] above. This case decided that seizure of a vehicle used for smuggling was a proportionate response in the absence of exceptional circumstances but did not consider the question as to whether seizure as well as other sanctions were a proportionate response because at that time it was not the policy to impose further sanctions of the type referred to in the tobacco strategy papers mentioned above.

35. The restoration policy, with its emphasis on non-restoration, is described as being intentionally robust in order to give a proportionate and graduated response to the risk posed by tobacco and alcohol diversion and smuggling. The policy does refer to the fact that allowing restoration of smuggled goods, even on payment of duty and appropriate penalties, would do little to address the effect of smuggling activities on legitimate UK trade but it appears that this was addressing a point that is often put to the Border Agency from those seeking restoration of seized goods, namely that the offender is willing to pay the necessary duty and penalty in order to have the goods restored rather than any indication that it is the policy to assess and impose penalties as well as refusing to restore the seized goods. The restoration policy also makes it clear that vehicle restoration terms should provide a graduated response depending on the degree of blame that can be attributed to an individual and the potential harm caused by the evasion of excise duty.

36. It is clear however, from the two strategy papers that since the *Lindsay* judgment the Government believes that a robust non-restoration policy alone has not been sufficient to deter tobacco smuggling. The first paper, published in April 2011, stated that in order to deter and prevent fraud "we will increase the likelihood of being caught and increase the sanctions against those we catch." In particular, HMRC since this paper have adopted a policy of assessing seized goods to duty and imposing excise wrongdoing penalties as they did in the case of the appellant.

37. The second paper, published in March 2015 refers to these additional sanctions amongst the other civil and criminal sanctions available and comments as follows:

> "The sanctions available have developed piecemeal over many years. The time is right to take stock and assess whether tougher sanctions are needed, focusing across government on our objective of punishing and deterring criminal activity at all levels."

38. It is therefore clear that sanctions policy may change again and the paper recognises that there is currently a piecemeal approach. It is clear that excise duty evasion in respect of tobacco continues to be a major policy concern and despite reductions in the tax gap for cigarettes caused by smuggling since 2011 the latest government statistics that we were referred to show that the estimate of the tax gap for the year 2014/15 was 10% for cigarettes and 35% for hand rolling tobacco.

39. The absence of a holistic approach was starkly illustrated by Officer Hodge's evidence in this case. When it was put to her in cross examination that she should have taken account of the penalty charged by HMRC in considering the overall question of proportionality and hardship, the tone of her response can be characterised as one of indignation at the suggestion. She said that she was not aware of the penalty having been imposed. She stated that she was not in a position to answer questions relating to penalties imposed by "other departments" and had purely focused on the question as to whether the refusal to restore the Vehicle and the Cigarettes was

proportionate according to the restoration policy. Her view was she could not take into account a penalty issued by another department subsequent to the seizure and was not required to do so. She said that even if evidence of the penalty had been given to her in the context of her review she would have ignored it in coming to her decision.

40. We therefore assume that likewise HMRC, in deciding whether to assess the seized goods to excise duty and charge a penalty would do so without considering whether the overall financial impact on the offender, that is the seizure of the goods and the vehicle in which they were conveyed as well as the assessment and the penalty, was proportionate.

The Law

41. We set out in the Appendix to this decision the relevant statutory provisions relating to the seizure and the restoration of goods and vehicles, the right to seek a review of decisions not to restore, the right to appeal to the Tribunal against review decisions and the powers of the Tribunal on determination of such an appeal. We also set out for completeness the key provisions relating to the assessment of excise duty and the imposition of wrongdoing penalties, although as we have indicated, the assessment and the penalty imposed in this case are not the subject of this appeal.

42. It is important to bear in mind the limitations of the Tribunal's jurisdiction as set out in s 16 (4) FA 1994. By virtue of s 16 (8) and Schedule 5 of FA 1994, a decision under s 152 (b) CEMA whether or not to restore any item is a "decision as to an ancillary matter" as referred to in s 16 (4) FA 1994. Therefore in essence, our powers are limited to considering whether Officer Hodge's decision not to restore the Vehicle and the Cigarettes could not reasonably have been arrived at. If we find that it could not have been reasonably arrived at, our powers are limited to making directions of the type referred to at s 16 (4) (a) to (c) FA 1994. We have no power to order the Border Force to return the Vehicle or the Cigarettes to the appellant.

43. Following the Court of Appeal's judgment in *Jones*, when we are considering the question of reasonableness we must take as a "deemed fact" that both the Vehicle and Cigarettes were "duly" and therefore lawfully condemned as forfeit because the legality of the seizure was not challenged in the magistrates' court within one month of the seizure having taken place.

44. The Court of Appeal in *Customs and Excise Commissioners v J H Corbett (Numismatists) Ltd* [1980] STC 231 set out the correct approach for the Tribunal to follow where it has a supervisory (as opposed to a full merits) jurisdiction as it does in this case. In essence the Tribunal has the power to review the exercise of the discretion exercised by Officer Hodge and in so doing should answer the following questions:

(1) Did she reach a decision which no reasonable officer could have reached?

(2) Does the decision betray an error of law material to the decision?

(3) Did she take into account all relevant considerations?

(4) Did she leave out of account all irrelevant considerations?

45. However, *John Dee Ltd v Customs and Excise Commissioners* [1995] STC 941 is authority for the proposition that, if Officer Hodge's decision failed to take into account relevant considerations, we may nevertheless dismiss the appeal if we are satisfied that, even if she had taken into account those considerations, her decision would "inevitably" have been the same.

46. In *Balbir Singh Gora v C & E Comms* [2003] EWCA Civ 525, Pill LJ accepted that the Tribunal could decide for itself primary facts and then go on to decide whether, in the light of its findings of fact, the decision on restoration was reasonable. Thus, the Tribunal exercises a measure of hindsight and any decision which in the light of the information available to the officer making it could well have been quite reasonable may be found to be unreasonable in the light of the facts as found by the Tribunal. That principle is particularly relevant in this case where the evidence as to exceptional circumstances which was before Officer Hodge when she made her decision was minimal but where we have received some additional evidence during the course of the hearing on which we will make findings.

47. In ascertaining the reasonableness and lawfulness of Officer Hodge's decision it is necessary to consider whether the decision not to restore the Vehicle and the Goods was proportionate.

48. The seizure of the Vehicle and the Goods involved an interference with the appellant's rights under Article 1 of the First Protocol of the Convention for the Protection of Human Rights and Fundamental Freedoms, as scheduled to the Human Rights Act 1998 ("A1P1").

49. A1P1 provides:

> "Every natural legal person is entitled to the peaceful enjoyment of his possessions. No-one should be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provision shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

50. This provision has been the subject of judicial consideration in the context of cases involving the seizure of goods subject to unpaid excise duty and the vehicles in which they were conveyed. In particular the European Court of Human Rights said the following in *Air Canada v UK* (1995) 20 EHRR 150 at paragraph 36:

> "According to the Court's well-established case law, the second paragraph of Article 1 must be construed in the light of the principle laid down in the Article's first sentence. Consequently, an interference must achieve a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 as whole, including the second paragraph: there must therefore be a reasonable relationship of proportionality between the means employed and the aim pursued."

51. This passage was quoted with approval by Lord Phillips of Worth Matravers MR in *Lindsay*. At [52] to [54] he set out the applicable principles which arose both under the Convention and also under EU law (the latter being relevant because the UK domestic legislation relating to excise duty was derived from a European Directive) as follows:

> **"***Human rights*
>
> 52. The Commissioners' policy involves the deprivation of people's possessions. Under Article 1 of the First Protocol to the Convention such deprivation will only be justified if it is in the public interest. More specifically, the deprivation can be justified if it is 'to secure the payment of taxes or other contributions or penalties'. The action taken must, however, strike a fair balance between the rights of the individual and the public interest. There must be a reasonable relationship of proportionality between the means employed and the aim pursued (*Sporrong & Lonnroth v Sweden* (1982) 5 EHRR 35 at paragraph 61; *Air Canada* as cited above). I would accept Mr Baker's submission that one must consider the individual case to ensure that the penalty imposed is fair. However strong the public interest, it cannot justify subjecting an individual to an interference with his fundamental rights that is unconscionable.
>
> *European Community law*
>
> 53. It does not seem to me that the doctrine of proportionality that is a well established feature of European Community law has anything significant to add to that which has been developed in the Strasbourg jurisprudence. There is, however, a passage in *Louloudakis,* which is helpful in the present context in that it is of general application. I quote from paragraph 67:
>
> > "Subject to those observations, it must be borne in mind that, in the absence of harmonisation of the Community legislation in the field of the penalties applicable where conditions laid down by arrangements under such legislation are not observed, the Member States are empowered to choose the penalties which seem appropriate to them. They must, however exercise that power in accordance with Community law and its general principles, and consequently with the principle of proportionality."
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> 54. There are then references to Strasbourg authority. The judgment continues:
>
> > "The administrative measures or penalties must not go beyond what is strictly necessary for the objectives pursued and a penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the Treaty."

52. Taking account of these principles Lord Phillips concluded at [63] and [64] as follows:

> "63 Having regard to these considerations, I would not have been prepared to condemn the Commissioners' policy had it been one that was applied to those who were using their cars for commercial smuggling, giving that phrase the meaning that it naturally bears of smuggling goods in order to sell them at a profit. Those who deliberately use their cars to further fraudulent commercial ventures in the knowledge that if they are caught their cars will be rendered liable to forfeiture cannot reasonably be heard to complain if they lose those vehicles. Nor does it seem to me that, in such circumstances, the value of the car used need be taken into consideration. Those

circumstances will normally take the case beyond the threshold where that factor can carry significant weight in the balance. Cases of exceptional hardship must always, of course, be given due consideration.

64 The Commissioners' policy does not, however, draw a distinction between the commercial smuggler and the driver importing goods for social distribution to family or friends in circumstances where there is no attempt to make a profit. Of course even in such a case the scale of importation, or other circumstances, may be such as to justify forfeiture of the car. But where the importation is not for the purpose of making a profit, I consider that the principle of proportionality requires that each case should be considered on its particular facts, which will include the scale of importation, whether it is a 'first offence', whether there was an attempt at concealment or dissimulation, the value of the vehicle and the degree of hardship that will be caused by forfeiture. There is open to the Commissioners a wide range of lesser sanctions that will enable them to impose a sanction that is proportionate where forfeiture of the vehicle is not justified."

53. Judge LJ in his short judgment emphasised that whether the power to seize the vehicle should be exercised is fact -dependent. He said at [71] to [73]:

"71 I agree with the judgment of the Master of the Rolls on the issues of principle and their application to this appeal. My brief observations are by way of emphasis only. There is usually a marked distinction between those who smuggle alcohol, cigarettes and tobacco for profit and those who, without profit, smuggle amounts in excess of the permitted limits for their personal use and occasional distribution to family members and close friends. The vehicles used by those whose activity falls into either category are liable to be seized.

72 Given the extent of the damage caused to the public interest, it is, in my judgment, acceptable and proportionate that, subject to exceptional individual considerations, whatever they are worth, the vehicles of those who smuggle for profit, even for a small profit, should be seized as a matter of policy. However, the equal application of the same stringent policy to those who are not importing for profit fails adequately to recognise the distinction between them and those who are trading in smuggled goods. Accordingly the policy is flawed.

73 In my judgment, the question whether the power to seize the vehicle of a non-profit making smuggler should be exercised is fact dependent, requiring a realistic assessment of all the circumstances of the individual case, including the alternative sanctions available to the Commissioners, rather than the virtually automatic imposition of a burdensome and, at times, oppressive prescribed penalty."

54. As we have previously observed, the Border Force's current restoration policy reflects the judgments in *Lindsay*, and in particular makes provision for vehicles to be restored at the discretion of the Border Force, subject to conditions, in circumstances such as where the excise goods were destined for supply on a not for profit basis or if they were destined for supply for profit, the quantity of excise goods was small and it is a first occurrence.

55. We have no evidence as to whether HMRC's penalty policy takes account of such circumstances as described at [54] above, although we note that the letter sent to the appellant on 18 November 2014 informing him of the intention to charge a penalty indicated that penalties would not be levied in cases where excise duty was not evaded deliberately. Nevertheless, as we have found, there is no overall policy which sets out the circumstances in which both a penalty and non-restoration will be

justified or those circumstances where only one or the other of the sanctions would be applied.

56. As this Tribunal has recently observed in *Smouha v DBA* [2015] UKFTT 0147 (TC), the Supreme Court recently considered A1P1 and proportionality in *R v Waya* [2012] UKSC 51, in the context of whether a confiscation order made following Mr Waya's false declaration for mortgage purposes was compatible with A1P1. The facts are obviously different to the present case but the principles considered by the Court are essentially the same. The judgment in *Waya* was given by Lord Walker and Hughes LJ. At [12] they said:

> "It is clear law, and was common ground between the parties, that [A1P1] imports, via the rule of fair balance, the requirement that there must be a reasonable relationship of proportionality between the means employed by the state in, *inter alia*, the deprivation of property as a form of penalty, and the legitimate aim which is sought to be realised by the deprivation. That rule has consistently been stated by the European Court of Human Rights."

57. They then cited *Jahn v Germany* (2006) 42 EHRR 1084 at [93], describing it as setting out a principle "gathered from established Strasbourg jurisprudence in terms often repeated and generally applied":

> "The court reiterates that an interference with the peaceful enjoyment of possessions must strike a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights: see, among other authorities, *Sporrong and Lönnroth v Sweden* (1982) EHRR 35, para 69. The concern to achieve this balance is reflected in the structure of article 1 of Protocol No 1 as a whole, including therefore the second sentence, which is to be read in the light of the general principle enunciated in the first sentence. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions: see *Pressos Cia Naviera SA v Belgium* (1995) 21 EHRR 301, para 38.
>
> In determining whether this requirement is met, the court recognises that the state enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question: see *Chassagnou v France* (1999) 29 EHRR 615, para 75."

58. Mr Newbold also cited to us the opinion of the House of Lords in *R v Smith (David)* [2001] UKHL 68. That was a case where the defendant had evaded the payment of duty on imported cigarettes by smuggling them on a vessel past the customs post. He was convicted of fraudulent evasion of excise duty contrary to s 170 (2) CEMA. As Mr Newbold observed, as a result of the smuggling attempt the cigarettes and the boat in which they were conveyed were both seized, the defendant suffered a penalty in the form of a sentence of 21 months imprisonment and he was required to pay an amount equivalent to the duty evaded on the goods in the form of a confiscation order made under the provisions of the Criminal Justice Act 1988 of that amount. The court held that the defendant had obtained a benefit from his commission of the offence in the form of "a pecuniary advantage" in that he had evaded the duty he was liable to pay on the cigarettes and therefore a confiscation order in the amount of the pecuniary advantage could be made. The case was considered in *Waya* where at

[33] the House observed that the decision in *Smith* was that the pecuniary advantage had not retrospectively been undone by the subsequent seizure of the cigarettes.

59. *Smith* and *Waya* are therefore authority for the proposition that the imposition of a penalty, seizure of goods and the vehicle in which they were conveyed and the making of an assessment for the unpaid excise duty would not, depending on the circumstances, be a disproportionate response to a deliberate smuggling attempt.

60. Furthermore, this Tribunal has in the recent case of *Staniszeski v HMRC* [2016] UKFTT 128 held that the doctrine of proportionality is relevant to penalties but not to the duty itself. The Tribunal observed that excise duty is a tax derived from EU Directives and its aim is to raise revenue either directly or indirectly on the consumption of excise goods. Although the assessment power in s 12 FA 1994 was a revenue raising measure, it was not immune to challenge on grounds of proportionality. However, s 12 in the Tribunal's view clearly did not extend beyond its objective of a revenue raising mechanism and cannot, on any basis, be said to be devoid of reasonable foundation and it therefore follows that its provisions must be proportionate: see [48] to [50] of the decision. We respectfully follow the reasoning of the Tribunal in that case. This is also consistent with the reasoning in *Smith* to the effect that although the goods were only made available for consumption for the short period of time between the excise duty point occurring (once the customs post was passed) and the time that they were seized this was sufficient for the defendant to have obtained a benefit by having evaded the payment of excise duty. Likewise, it appears to us that the moment the appellant brought the Cigarettes into the UK without having declared them the excise duty point arose and the liability to excise duty arose and could be assessed pursuant to s 12. In those circumstances, we cannot see that it can be said that it is in principle disproportionate to assess duty on goods which have been seized because they have been taken past the excise duty point without them having been declared. The assessment is simply the inevitable consequence of an excise duty point having arisen and the appellant, as the person in possession of the goods at the time the excise duty point arose is the person liable to be assessed.

61. It is therefore our view that in considering the question of proportionality we should leave out of account the fact that that an assessment to excise duty has been made and the amount of that assessment. In other words, the assessment itself can never be regarded as disproportionate. We should therefore only consider whether the sanctions themselves for the failure to declare the goods are disproportionate in the circumstances that is the seizure of the Cigarettes and the Vehicle and the charging of the penalty. That is not to say that in an appropriate case it would not be necessary to take into account the overall financial impact of those sanctions on the offender, and in that regard clearly the fact that he has liability to pay the excise duty may need to be to be taken into account.

62. What this means in the context of the present appeal is that we need to examine whether Officer Hodge exercised her discretion not to restore the Cigarettes and Vehicle proportionately as that term is understood both under EU law and under the Convention, and that a failure to do so will make the decision unreasonable.

63. We accept Dr van Dellen's submission that in considering proportionality the decision maker should consider the financial effect on the owner of the deprivation of his goods in the context of the other financial consequences of the seizure but clearly the degree of culpability on the part of the owner and the strong policy need to deter smuggling must also be taken into account in that consideration.

64. It follows from our finding that all the relevant sanctions imposed as a result of the smuggling incident must be considered by the decision-making officer, regardless of which Department of State was responsible for imposing the particular sanction in question.

65. Mr Newbold submits that it is not necessary for the individual Border Force Officer to take into account the possibility of a penalty assessment being raised. He submits that the officer is entitled to proceed on the basis of the policy applied has been formulated against a background where there is an expectation that such a penalty will be issued, with such reduction being applied by HMRC as may be appropriate to the circumstances of the case.

66. He also points to various practical matters that in his submission dictates that the Border Force's policy takes into account the existence of other sanctions, rather than requiring an individual officer to do so. He says that as in this case a reviewing officer may not be aware whether a penalty assessment has been raised and, if so, in what amount, when she makes her decision. Even if she had to make reasonable enquiries of HMRC or the appellant, requiring her to take into account the assessment of duty and penalty would have the potential to lead to inconsistencies.

67. Mr Newbold points out that in this case, seizure took place in March 2014 but no assessment was raised until November 2014. Had the appellant sought restoration promptly, the review decision would in all likelihood have been taken before the assessment was raised. It was also possible that any appeal to the Tribunal against a decision not to restore might have been determined before the assessment was raised. There would therefore be a perverse incentive for an appellant to delay seeking restoration to wait the terms of any assessment and penalty before seeking restoration.

68. Similarly, he submits circumstances can be imagined where a reviewing officer makes a decision to restore goods based on overall proportionality taking into account assessed duty and penalties. However, the penalty may thereafter be challenged by an appellant and if it were to be reduced the result may be disproportionately favourable to the appellant. This creates a perverse incentive on the Border Force's part to delay making a decision on restoration while all issues relating to any penalty are resolved.

69. For these reasons, Mr Newbold submits that it is entirely appropriate for the Border Force to have a policy which is formulated against a background where it is known that assessments will be raised and penalties issued, and takes the likelihood of those assessments and penalties into account, rather than expecting reviewing officers to make those decisions on individual cases.

70. We find all of these submissions unconvincing and reject them. The need to act proportionately should not be diminished simply because the quirks of the legislation make a co-ordinated and holistic approach to the imposition of sanctions on a fully rational basis more difficult and administratively inconvenient for the government

departments involved. We note in this case that the assessment and penalty was not notified to the appellant until many months after the seizure had taken place. It may therefore be incumbent on the departments themselves to coordinate the position between themselves more effectively with the result that decisions on restoration and penalties are taken in a timely fashion and as far as practicable at the same time. The strategy papers we have seen suggest that the approach to sanctions is a joint one of the two departments but the evidence of Officer Hodge in this case and Mr Newbold's submissions indicate quite clearly that that is not the case in practice.

71. If there is a concern about the fact that an appellant may delay his request for restoration, the remedy appears to be for HMRC to ask Parliament to make provision for a time limit. The legislation makes no provision for an owner of seized goods to make his request for restoration "promptly" and he should not be criticised for exercising his legal rights in the manner envisaged by the legislation. As we mentioned above, if the government finds the current position unsatisfactory it can review the legislation.

72. If one department decides to make a decision ahead of the other, then obviously the later decision-maker will have to take into account what the other has decided so that she can decide whether the effect of her decision will be that the overall sanctions imposed are proportionate in the circumstances. We see nothing insuperably difficult about this if the departments choose to continue to make their decisions separately, notwithstanding that there is a single incident to which the State as a whole makes a response. Although, as Mr Newbold points out, one decision-maker delaying a decision until the other has made her decision is undesirable that does not mean that it should not be done if it is necessary to make an overall decision of the requisite quality.

73. We do not take it to be a significant risk that an appellant will end up with a disproportionately favourable result if his penalty is reduced on appeal after a decision has been made to restore his goods. It follows from our analysis that it would be incumbent on the Tribunal to take into account the fact that restoration has occurred in deciding whether or not the penalty should be reduced. Should the Tribunal err by failing to take into account all relevant factors in arriving at its decision to reduce any penalty then its decision may be capable of being appealed.

74. We therefore find that by following an approach whereby the decision making officer considering a request for restoration does not take into account on an individual case by case basis any sanction that may have been imposed in respect of the same incident by HMRC the officer concerned is fettering her discretion and failing to take into account all relevant circumstances. There is therefore a clear risk if this practice continues that the decision will be held to be unreasonable and set aside with the result that a further review will be necessary.

75. We therefore now turn to consider the reasonableness of Officer Hodge's decision in the light of the principles that we have outlined above.

Discussion

76. Dr van Dellen made submissions on two issues as follows. First, he submits that the evidence shows that there are exceptional circumstances which should be taken

into account in deciding whether to restore the Vehicle. Although in theory Dr van Dellen was also contending that there were exceptional circumstances that justified the restoration of the Cigarettes, he made no submissions on that point and concentrated on the position of the Vehicle. In our view he was wise to do so because we can see no exceptional circumstances which could justify restoration of the Cigarettes. We therefore consider that question in the context of proportionality alone.

77. We observe at the outset that Officer Hodge cannot be criticised for her decision that no exceptional circumstances justified the restoration of the Vehicle for the simple reason, as we have found, that the appellant put forward no such circumstances in his request for a review despite being invited to do so. Nevertheless, as contemplated in *Gora*, as referred to at [46] above, it is open to the Tribunal to decide on the basis of the evidence before it whether the decision on restoration was reasonable notwithstanding the fact that the evidence concerned was not available to the officer who made the decision. We will therefore proceed to assess the evidence on exceptional circumstances on that basis.

78. The second issue on which Dr van Dellen made submissions was the issue of proportionality. In that context, we need to assess whether Officer Hodge's decision was one that no reasonable officer could have made, taking into account the questions set out at [44] above. However, even if we find her decision to be unreasonable we need also to consider whether it would be inevitable that any further review that the Tribunal directed to be made would inevitably have resulted in the same decision.

Exceptional circumstances

79. Dr van Dellen's submissions on this issue amount to no more than this. The appellant has to use his BMW to drive to his place of work and the costs of so doing amount to some £70 a week more than would be the case if he still had the use of the Vehicle which is much cheaper to run. The Vehicle has been out of his possession for a long period of time so the extra cost has been considerable. The appellant says public transport is not an option as it would not get him to his place of work on time early in the morning.

80. In our view the appellant's case on exceptional circumstances is hopeless. He has produced no evidence as to his current financial position, such as bank statements, receipts for his petrol expenses, payslips or other evidence of earnings or any table of in goings and outgoings to verify what he says about his financial circumstances. His witness statement in any event shows that he had a significant amount of money in his bank account last September which suggests that at that time he was not struggling to meet his travel expenses. In the light of his lack of credibility on other matters (and in particular our findings on whether the Cigarettes were for personal use and the fact of his lies to the Border Force officers when stopped) we cannot accept his assertions without further evidence.

81. In any event the answer to the problem that he allegedly has because of the extra cost of running the BMW is simple. He should simply sell it and acquire another vehicle which is cheaper to run.

82. In short, the consequences of the seizure of the Vehicle are no greater than what would normally to be expected in the circumstances and in any event the appellant is

in a much better position than others who have their vehicles seized in that he does have an alternative means of transport and the ability to downsize it to fit his budget.

83. We therefore conclude that there are no exceptional circumstances which would call into question the reasonableness of Officer Hodge's decision not to restore the Vehicle.

Proportionality

84. Dr van Dellen's submissions on this point can be summarised as follows:

(1) In making her decision on restoration Officer Hodge failed to take a relevant factor into account, namely the total losses that the appellant has sustained as a result of the seizure, as detailed in (2) below;

(2) The appellant has borne a heavy burden in terms of the losses he has sustained as a result of the seizure. He has lost the Cigarettes, which cost him £4,000, he has had the increased cost of the use of an alternative vehicle at £70 a week for 80 weeks, which amounts to £5,600, he has lost the Vehicle which is valued at £1,200 and is liable to pay HMRC excise duty and a penalty of £7,687 in total. The Tribunal should "stand back" and conduct an overall proportionality assessment and given that the value of the cigarettes was only £4,000, a total loss of £18,487 is clearly disproportionate; and

(3) It would be disproportionate not to take into account the value of the property seized, the financial effect on the owner of the deprivation of his goods and the period for which the Vehicle has been detained.

85. We accept Dr van Dellen's first submission. This follows from our conclusion at [74] above. As a result of Officer Hodge's candid admission that she did not take into account the fact of the penalty, and indeed did not even think that it was her duty to do so it follows that she has failed to take a relevant factor into account in making her decision. Accordingly, her decision is flawed in the sense that it was one that no reasonable officer could have made and on that ground alone potentially her decision should be set aside.

86. However, as indicated at [78] above, that is not the end of the matter. We must decide whether or not it is inevitable that Officer Hodge would come to the same decision even if she had taken all relevant matters into account. In order to make that decision we need to consider the strength of the appellant's case on proportionality in the light of all the relevant circumstances.

87. In our view this is a case of a serious and aggravated smuggling attempt. The appellant was thoroughly dishonest in his initial answers to the Border Force officers and he was carrying a large quantity of Cigarettes which were not for his personal use. Had his smuggling attempt been successful, then there would have been a significant loss to the exchequer and unfair competition with the legitimate tobacco trade. The appellant was lucky not to have been the subject of a criminal prosecution.

88. This is just the kind of case that the Government's robust sanctions policy is designed to address. As we have found, tobacco smuggling remains a significant problem.

89. We now turn to the elements that Dr van Dellen submits amount to the appellant's loss. As far as the cost of the Cigarettes is concerned, this can be seen as the appellant's stake in an illicit gambling operation and he cannot complain if the operation fails and he loses his stake. The gamble that the appellant undertook was that he would not be caught with the Cigarettes but that gamble having failed he must accept the consequences. We therefore see no basis on which it would be appropriate to restore the Cigarettes to the appellant.

90. As far as the assessment to duty is concerned, we do not regard that as a loss to the appellant. He brought goods which were liable to excise duty into the United Kingdom and consequently incurred a liability to pay the duty. As we have previously explained, the assessment to duty is not a sanction, it is an inevitable consequence of an excise duty point having arisen and the appellant being in possession of the goods at the time the excise duty point arose.

91. For the reasons given at [80] to [82] above we discount the extra costs involved in running the BMW.

92. This leaves the question as to whether in all the circumstances the seizure of the Vehicle and the imposition of the penalty is disproportionate. We have no power to deal with the penalty because it is not the subject of this appeal. It was calculated on the basis that the appellant's actions were deliberate and concealed and his disclosure of the wrongdoing was prompted. We therefore simply need to consider whether in the circumstances it would be disproportionate for the Vehicle not to be restored.

93. In our view in the circumstances of this case it cannot be argued that a refusal to restore the Vehicle would be disproportionate. Whilst undoubtedly the overall effect of HMRC's and the Border Force's actions has been, as the appellant himself acknowledged in his oral evidence, to give him an "expensive lesson" as to the folly of tobacco smuggling and has resulted in financial liabilities which he may not have the resources to meet, in our view it would not be appropriate to lessen the deterrent effect of the sanctions imposed by granting a degree of relief by restoring the Vehicle. In that context, we have found that the loss of the Vehicle in itself will not result in any exceptional hardship to the appellant because he still has his BMW.

94. In our view it is plain in the circumstances of this case that the sanctions imposed on the appellant as a whole strike a fair balance between the rights of the individual and the public interest, the public interest in deterring deliberate tobacco smuggling being particularly strong.

95. Officer Hodge's reasons for her decision as summarised at [32] above present a compelling case against restoration. Consequently, it is our view that were we to set aside Officer Hodge's decision and direct a further review, which would only be necessary so that the issue of proportionality can be properly considered, that the inevitable conclusion of that review would be that it was not disproportionate not to restore the Vehicle.

96. For these reasons, we dismiss the appeal.

Postscript

97. The tenor of our decision is such that the Border Force and HMRC may take the view that the proportionality issue of imposing both a penalty and refusing restoration is unlikely to be troublesome to them in cases of aggravated smuggling.

98. Nevertheless, in our view it is important that the two agencies develop a single comprehensive policy which deals with the question as to when it would be considered appropriate to impose penalties as well as refusing restoration. This policy could cover both cases of deliberate smuggling for profit as well as less serious cases. As we have indicated, if the two agencies continue to have entirely separate policies there is a clear risk in more flawed decisions being made.

99. 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.

TIMOTHY HERRINGTON
TRIBUNAL JUDGE

RELEASE DATE: 18 MARCH 2016

APPENDIX

Relevant Legislation

Liability to excise duty

1. 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.

2. 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-
>
> …
>
> 800 cigarettes
>
> (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).

3. 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.

Liability to penalty

4. 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."

5. 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."

6. 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."

7. 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."

Seizure of car and decision not to restore

8. 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."

9. 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."

10. 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 …"

11. 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."

13. 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] …"

14. 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".

15. 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."