[2018] UKFTT 105 (TC)

TC06364

Appeal number: TC/2016/02275

Excise duty – wrongdoing penalties - seizure of vehicle –importation of cigarettes – whether penalties disproportionate

FIRST-TIER TRIBUNAL
TAX CHAMBER

Mr Andrzej Piotr Okroj **Appellant**

- and -

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

TRIBUNAL: JUDGE ABIGAIL MCGREGOR
TOBY SIMON

Sitting in public at Fox Court, London on 27 April 2017 and having considered written representations from the parties in the course of the Tribunal's review under Rule 41 of the Tribunal Rules.

Adam Gosiewski for the Appellant

Natasha Barnes, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by the Appellant ("**Mr Okroj**") under section 16 of Finance Act 1994 against a decision of HMRC on review to uphold an assessment of excise duty of £9,173 on the importation of cigarettes and a wrongdoing penalty for £6,879.

2. The original decision was issued to the parties on 25 July 2017.

3. HMRC applied for permission to appeal that decision on 14 September 2017.

4. On receiving an appeal against a Decision of the First-tier Tribunal, Rule 40(1) of the Tribunal Rules requires the Tribunal to consider whether to review the Decision. The Tribunal may only review a decision if it is satisfied that it contains an error of law.

5. On receiving HMRC's appeal, the Tribunal was satisfied that there was an error of law (within the meaning determined by *Edwards v Bairstow & Harrison* (1955) 36 TC 207) in the decision, and that it should therefore be reviewed.

6. This decision is therefore the decision following that review.

Background and key facts

7. The background, key facts and timeline relating to this case are not disputed and can be summarised as follows:

(1) Mr Okroj was stopped at the port of Dover by the Border Force on 28 September 2014 driving a heavy goods vehicle with a trailer (the "Vehicle");

(2) 38,600 cigarettes were found concealed in the spare tyres of the Vehicle;

(3) The cigarettes and the Vehicle were seized by the Border Force on that date;

(4) The Border Force told Mr Okroj on that date that he could recover the vehicle by paying a fee of £10,264.94;

(5) Mr Okroj travelled to London and borrowed that sum from friends, returning the next day to pay the fee in cash;

(6) At that point, an officer seized the cash under anti-money laundering powers and explained that Mr Okroj could not pay the fee in cash, but instead needed to pay the funds into a bank account;

(7) Mr Okroj asked his wife to borrow the funds in Poland, which she did and duly paid the fee into the named bank account on 1 October 2014;

(8) The vehicle was released to Mr Okroj;

(9) On 7 September 2015, HMRC issued a letter to Mr Okroj which:

(a) enclosed an assessment for excise duty in relation to the cigarettes of £9,173;

(b) warned Mr Okroj that HMRC was considering charging a wrongdoing penalty of £6,879; and

(c) gave Mr Okroj the opportunity to provide further relevant information;

(10) On 7 October 2015, HMRC issued a penalty assessment for a wrongdoing penalty of £6,879;

(11) Mr Okroj objected to the assessments by letter on dated 15 October 2015 through Mr Gosiewski;

(12) HMRC reconsidered the position but confirmed its assessments and offered Mr Okroj a review;

(13) Mr Okroj requested an independent review on 3 November 2015;

(14) HMRC set out its conclusions in a review letter dated 21 December 2015, which confirmed the original assessments of duty and wrongdoing penalty;

(15) Mr Okroj appealed to the Tribunal on 7 March 2016.

Late appeal

8. Mr Okroj's appeal to the Tribunal was made late approximately 6 weeks late.

9. HMRC confirmed in correspondence with the Tribunal dated 8 June 2016 that it did not object to the late appeal.

10. Mr Okroj's reason for making a late appeal was that he was a self-employed lorry driver who was away from home for long periods and had to get documents translated in order to respond fully.

11. Given HMRC does not object and that Mr Okroj's justification for the lateness of appeal appears to be reasonable, we conclude that it is in the interests of justice to allow the late appeal.

Evidence

12. Mr Okroj did not attend the Tribunal hearing; Mr Gosiewski attended on his behalf. He also did not submit a witness statement. He did however, submit a letter for the attention of the Tribunal to support the arguments put forward by Mr Gosiewski. While we have taken into account the comments made in this letter in the discussion that follows, since Mr Okroj was not available for cross-examination, we have put little weight on the statements made in this letter where there is no other evidence to support it.

13. We heard evidence from Officer Newbigging of HMRC, who adopted his witness statement as evidence in chief, answered further questions at the hearing and was cross-examined.

14. Both parties also submitted evidence in the form of bundles containing copies of documents and correspondence.

Law

15. We set out in the Appendix to this decision the relevant statutory provisions relating to the assessment of excise duty and the imposition of wrongdoing penalties, the right to appeal to the Tribunal against review decisions and the powers of the Tribunal on determination of such an appeal.

16. We note that the decision to make an assessment for excise duty is not an 'ancillary matter' and therefore this Tribunal has the power, under section 16(5) of Finance Act 1994 to quash or vary any decision and power to substitute our own decision for any decision quashed on appeal.

17. We also note that, under Paragraphs 17-19 of Schedule 41 to Finance Act 2008 the powers of the Tribunal, where the appeal is against the amount of the penalty, are to affirm HMRC's decision, or substitute for HMRC's decision another decision that HMRC had power to make.

Parties' arguments

Appellant's arguments

18. Mr Okroj submits that:

(1) When he paid the fee of £10,264 on 1 October 2014, he understood that he was paying the excise duty to HMRC because he was dealing with HMRC officers and asked to pay the amount into HMRC's bank account;

(2) He has therefore been charged the duty twice because the fee he paid in Dover amounted to the unpaid duty on the cigarettes and he has now been charged the same duty again;

(3) The total amount of the duty, fees and penalties is disproportionate on a single offence of smuggling;

(4) His English is not good enough to have understood all of the information he was presented with in Calais or to answer the questions fully when stopped by the Border Force;

(5) It was one stupid mistake when he was under enormous pressure with his family health and finances, in particular the health bills of one of his daughters, having previously suffered the death of two other daughters. He is full of remorse and will not make any such mistake again.

HMRC's arguments

19. HMRC submit that as Mr Okroj did not challenge the seizure of the Vehicle or cigarettes, they are deemed forfeit and it is not now open to him to challenge the legality of the seizure.

20. HMRC submit that the Border Force is not obliged to restore a seized Vehicle at all, but had applied its policy in deciding to restore the Vehicle for a fee. Again, Mr Okroj had not appealed against the decision on restoration, where it would have been open to the Tribunal to consider the reasonableness of the Border Force decision. It is therefore not open to him to challenge it here.

21. The documentation issued to Mr Okroj warned that the restoration fee was not the end of the process and that matters may be referred on to HMRC.

22. In relation to the adequacy of Mr Okroj's English, HMRC noted that Mr Okroj was not available to be cross-examined on this point and that his English was clearly adequate to understand some of what was going on, including:

(1) As noted in the hand-written notebook of the Border Force officer, he replied in response to the question 'do you understand English?' with "a little";

(2) He was able to understand that he needed to come back with the sum of £10,264 in order to get his Vehicle back; and

(3) It was open to Mr Okroj to obtain translations of documents, as he did later in this process.

23. HMRC submits that it is not open to this Tribunal to conclude that the assessment of duty was not proportionate, relying on the statements in *Staniszeski v HMRC* [2016] UKFTT 128.

24. In relation to the penalty, HMRC submits that it has been calculated correctly and therefore the amount cannot be challenged on the basis of its means of calculation. In summary, it was calculated on the basis that:

(1) the behaviour of Mr Okroj was deliberate and concealed, and

(2) the disclosure which Mr Okroj made in Calais was prompted

which enables a penalty based on 50 - 100% of the potential lost revenue.

The penalty has then been reduced based on the quality of disclosure (being 0% for 'telling'; 20% for helping and 30% for giving) meaning that a total reduction of 50% can be applied to the range of penalty, giving a final penalty of 75% of the potential lost revenue.

25. HMRC submit that a penalty can be challenged on proportionality grounds, but that those grounds do not apply to this penalty, in particular:

(1) There is clear authority in other Tribunal decisions that there is no structural flaw in the penalty regime, in particular *Pilats v HMRC* [2016] UKFTT 193 (TC) and *Staniszeski v HMRC* [2016] UKFTT 128;

(2) The charges that have been assessed against Mr Okroj are entirely within the statutory regime for the deterrence of smuggling, i.e. the regime allows for:

(a) The Border Force to charge a fee for the restoration of a vehicle that has been seized under section 152 of the Customs and Excise Management Act 1979;

(b) HMRC to assess the importer for duty on the imported goods under section 12 of Finance Act 2004; and

(c) HMRC to charge a penalty for wrongdoing under Paragraph 4(1) of Schedule 41 to the Finance Act 2008.

(3) If Parliament had intended to require HMRC and the Border Force to choose to do only one or some of these things, the statute would have restricted it, but it does not;

(4) There is clear public interest in Parliament's imposition of a robust scheme to deter smuggling. This is clear from two documents published by HMRC and the Border Force:

(a) Tackling Tobacco Smuggling – building on our success (April 2011), in which a very robust policy is set out, including increasing sanctions against those caught smuggling and giving an example of the effect of multiple sanctions, including seizure of goods, the duty assessment and a wrongdoing penalty; and

(b) Tackling illicit tobacco: From leaf to light (March 2015), in which HMRC and Border Force strategy is set out, including ensuring that 'officers consider all criminal and civil sanctions available to them to maximise impact and deterrent effect' and a fundamental review of all the sanctions available to assess whether tougher sanctions are needed.

(5) The penalty is not a repeat punishment for the same behaviour. In relation to the calculation of the Border Force fee, there is no evidence in this case as to whether it was calculated by reference to or based on an estimate of the unpaid duty on the goods seized. It was Mr Newbigging's evidence that such fees often were calculated based on such an estimate, but might also be based on the value of the Vehicle or on the commercial value of the goods seized. HMRC submits that, even if the restoration fee was calculated by reference to the duty lost, it is not an assessment of duty and is an entirely separate decision from the assessment of the duty. The first decision is one related to seizure of goods and restoration; the second is for non-payment of duty and the third is a penalty intended to be punitive;

(6) There is a high degree of culpability in this case. It is not close to the threshold for personal use and the cigarettes were concealed in a spare tyre, it is therefore an intentional, sophisticated attempt at smuggling against which HMRC is entitled to take a robust approach; and

(7) It is not open to an individual to decide whether he should be dealt with on a criminal or civil basis and while the criminal penalties may have been lower, a criminal conviction brings with it other non-financial impacts not associated with a civil penalty, such as a criminal record.

Discussion

26. The essential questions in this case are:

(1) whether there are any provisions under which this Tribunal may reduce or eliminate the assessment of duty and/or the wrongdoing penalty; and

(2) if there are, whether the facts and circumstances of this case are such that we conclude that we must apply such a reduction or elimination.

Jurisdiction of the Tribunal on the assessment of duty

27. In *Pilats v HMRC* [2016] UKFTT 193 (TC), applying the principles set out in *Staniszeski v HMRC* [2016] UKFTT 128 (TC), the Tribunal considered that "the assessment itself can never be regarded as disproportionate" (para 61). For the reasons set out in that decision, we follow that approach.

28. Therefore, the limit of this Tribunal's power as to the assessment of duty is to consider whether the requirements of the statute have been met for the raising of the assessment.

29. The taxpayer does not dispute the factual circumstances that gave rise to the assessment or that the duty is due and payable in accordance with the law. Although the notice of assessment was not in evidence before us, we find that it was issued to Mr Okroj and had been appropriately calculated in accordance with the evidence provided by Mr Newbigging.

30. Thus we find that the assessment to duty must stand.

Jurisdiction of the Tribunal on the wrongdoing penalty

31. As noted above, under Paragraphs 17-19 of Schedule 41 to Finance Act 2008 the powers of the Tribunal, where the appeal is against the amount of the penalty, are to affirm HMRC's decision, or substitute for HMRC's decision another decision that HMRC had power to make.

32. Once again, Mr Okroj does not dispute the circumstances that have given rise to the assessment of the penalty and accepts that it has been charged in accordance with the statutory regime and we find that it has be so charged.

33. However, we must also consider special circumstances under paragraph 14 and 19(3) of Schedule 41 to Finance Act 2008. HMRC did not expressly consider whether Mr Okroj's expressed personal difficulties, including the death of two daughters and illness of a third requiring the payment of medical bills could be a special circumstance to be taken into account. While these circumstances (other than his financial means) might amount to special circumstances that require a reduction, Mr Okroj did not submit sufficient evidence of these circumstances to the tribunal for us to consider that we would necessarily have done so.

34. However, in addition, we must consider whether the decision to impose the penalty was proportionate. The doctrine of proportionality has two separate sources in this context: that arising under the Convention for the Protection of Human Rights and Fundamental Freedoms, as scheduled to the Human Rights Act 1998 and that arising under EU law by virtue of the fact that excise duty derives from European directives.

35. We are guided by the principles that have been set out in previous decisions on proportionality in this context.

36. In *Matthew Lane v HMRC* [2015] UKFTT 423 (TC), the following principles were set out:

> **80.** It is clear from the Court of Appeal decision in *John Richard Lindsay v Commissioners of Customs & Excise* [2002] EWCA SIV 267, that the doctrine of proportionality applies to penalties levied by HMRC where goods are imported into the UK. At paragraph 51 of the judgment
>
> "Turning to European Community Law, Mr Baker submitted that here also the principle of proportionality had to be observed. Where penalties were imposed for the unlawful importation of goods, they must not be disproportionate (see *Louloudakis v Elliniko Demosio* (Case C-262/99) at paragraphs 63-69)"
>
> 81. And then, at paragraphs 53 and 54 of the judgment.
>
> "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 a 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 a principle of proportionality"
>
> 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 the penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the Treaty."

> 82. We are mindful of the view expressed by the Upper Tribunal in the case of *The Commissioners for HMRC v Total Technology (Engineering) Limited* [2012] UKUT 418 (TCC) where at paragraph 99 of the Judgment:
>
> > "99…… But in assessing whether the penalty in any particular case is disproportionate, the tribunal must be astute not to substitute its own view of what is fair for the penalty which Parliament has imposed. It is right that the tribunal should show the greatest deference to the will of Parliament when considering a penalty regime just as it does in relation to legislation in the fields of social and economic policy which impact upon an individual's Convention rights. "
>
> 83. The test is whether the penalty is "not merely harsh but plainly unfair" (see Simon Brown LJ in *International Transport Roth GmbH v Home Secretary* [2003] QB 728 at [26]).

37. We also consider the approach taken in *Pilats v HMRC* [2016] UKFTT 193 (TC), which was considering the proportionality of refusing to restore a vehicle where a duty assessment and penalty had also been imposed, where the Tribunal considered "whether in all the circumstances the seizure of the vehicle and the imposition of the penalty is disproportionate" and came to conclusion based on whether "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".

38. Officer Newbigging stated, unequivocally, in his evidence that, while he would acknowledge the fact that a restoration fee had been charged, he would not concern himself with the amount of the fee and it would never have an impact on the amount of the penalty. This is very similar to the position in *Pilats* that Officer Hodge had not taken into account the fact of the penalty when considering her decision on restoration. The absence of such a consideration in that case was considered to have been a flaw in the decision, albeit that it did not affect the outcome of the appeal. We note that Judge Herrington cautioned HMRC and the Border Force in paragraph 98 of the decision to develop a single comprehensive policy on the imposition of penalties and the decision not to restore goods and vehicles seized in order to avoid further flawed decisions being made.

39. We also note the conclusion in *Staniszeski v HMRC* [2016] UKFTT 128 (TC) relating to the proportionality of the penalty regime. Judge Brooks concluded (para 52) that:

> "the excise duty penalty regime has been arrived at by the application of a rational scheme that cannot be characterised as devoid of all reasonable foundation and, as such, I consider it does comply with the principle of proportionality. However, that is not to say that a penalty could never be disproportionate if it were plainly unfair with a possible example being a penalty issued after the seizure and forfeiture of a vehicle (in accordance with s 141 CEMA) which was not restored."

40. *Kevan Denley v HMRC* [2017] UKUT 0340 was released after the release of the initial decision in this case, and drawn to the Tribunal's attention in HMRC's application for permission to appeal). In that case the Upper Tribunal was considering a refusal of restoration of goods, an excise duty assessment and a wrongdoing penalty and, in particular, whether the cumulative effect of these sanctions was disproportionate. At paragraph 74, the Upper Tribunal rejected these arguments:

> We agree with Mr Beal that this ground of appeal must fail. Our reasons are these:
>
> (a) As Mr Chacko [Counsel for Mr Denley] correctly accepted, an assessment to excise duty which has become due is not a matter of discretion. We also do not see it in any way as a penalty: it is due because, for the reasons we have given, a duty point has occurred regardless of any wrongdoing;
>
> (b) Although a forfeiture of goods, accompanied by a refusal of restoration, has an adverse effect on their owner, we do not consider forfeiture and non-restoration to be a penal measure. Rather, it is the consequence of the detection of an unlawful importation: the goods become liable, for that reason alone, to seizure and subsequent condemnation as forfeit. Although it is likely that an unlawful importation will involve culpability, that is not necessarily the case. The deterrent effect of seizure would be undermined if restoration were routine rather than exceptional;
>
> (c) While the cumulative effect on a person of forfeiture without restoration, assessment and penalty might be a relevant factor in an exceptional case, we do not see it as a material consideration in an ordinary case, as this is. Mr Denley lost his goods because they were liable to forfeiture and there was no good reason, as Mr Chacko accepted, why they should be restored to him. He has been assessed to duty because he made himself liable to pay it. He has suffered a penalty because of his wrongdoing. Those are all the consequences prescribed by law of what he did;
>
> (d) In any event we do not consider that the cumulative effect on Mr Denley of what he has suffered can realistically be described as disproportionate. His importation was, as HMRC's policy puts it, aggravated. He had a very large quantity of goods in his possession, much more than the threshold quantity, and this was not the first occasion on which he had made an importation of this kind. When one balances the policy aims to which Mr Beal referred, aims which Mr Chacko did not challenge, against the potential loss of revenue occasioned by Mr Denley's conduct it is, in our view, plain that what he has suffered is not "devoid of reasonable foundation", as the court put it in *Gasus Dosier*.

41. Therefore, although the penalty regime as a whole is not so flawed as to have been struck down as disproportionate in its entirety, we may find that the penalty in all the circumstances of this case is disproportionate if we find that Mr Okroj is in exceptional circumstances and the imposition of the penalty is plainly unfair and/or goes beyond what is strictly necessary for the objectives pursued.

Application of the principles of proportionality to the penalty in this case

42. Since we must look at all the circumstances of the case, we consider that we must balance the following factors:

(1) The total financial sanction suffered by Mr Okroj, which amounts to £26,316.94 (being the restoration fee, duty assessment and penalty assessment), ignoring the impact of the loss of the seized goods. Taken together this amounts to approaching three times the amount of duty unpaid as a result of the smuggling attempt;

(2) The flaw in HMRC's decision making, which does not take into account the amount of the restoration fee already incurred by Mr Okroj; and

(3) There was no consideration of the applicant's means or of what would have been the penalty had the smuggling attempt been prosecuted. It is somewhat odd that criminal penalties are means-dependent while civil ones or not. Granted that incomes are much lower in Poland, it might be thought that penalties might become disproportionate more quickly when applied to those in a low-income environment, than to those who might be assumed to have the means to pay them.

Against these, there are factors that support the assessment of the penalty:

(4) The penalty is assessed in accordance with the statutory regime, or, as the Upper Tribunal put it in *Denley:* "Those are all the consequences prescribed by law of what he did";

(5) Mr Okroj's smuggling was a significant attempt – 38,600 cigarettes is not an inconsiderable amount; and they were concealed within the Vehicle, compounding the gravity of the attempt;

(6) The absence of any real evidence from Mr Okroj to support an argument that his circumstances were 'exceptional';

(7) The penalty regime is one of a number of sanctions introduced by Parliament within the armoury of its agencies to punish and deter smuggling and the statutory regime does not require the agencies to take sanctions under one regime into account in applying another; and

(8) There is considerable public interest in punishing and deterring smuggling.

43. While the position is finely balanced, we find that Mr Okroj has not shown that his position is sufficiently exceptional to conclude that the penalty has gone beyond what is strictly necessary to punish and deter smuggling.

Decision

44. For the reasons set out above, we dismiss the appeal against the assessment of duty and the wrongdoing penalty.

45. 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.

ABIGAIL MCGREGOR
TRIBUNAL JUDGE

RELEASE DATE: 28 FEBRUARY 2018

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.

4.

Section 16 of the Finance Act 1994 provides for the rights of appeal against such an assessment:

16 Appeals to a tribunal

(1) An appeal against a decision on a review under section 15 (not including a deemed confirmation under section 15(2)) may be made to an appeal tribunal within the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates.

…

(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 which 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.

(5) In relation to other decisions, the powers of an appeal tribunal on an appeal 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.

…

(8) Subject to subsection (9) below references in this section to a decision as to an ancillary matter are references to any decision of a description specified in Schedule 5 to this Act which is not comprised in a decision falling within section 13A(2)(a) to (h) above.

Liability to penalty

5.

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."

6.

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."

7.

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."

8.

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.

9.

Paragraphs 14, 17-19 of Schedule 41 to Finance Act 2008 set out the special circumstances and rights to appeal against penalties and the powers of the Tribunal on such appeal.

Special reduction

14

(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any of paragraphs 1 to 4.

(2) In sub-paragraph (1) “special circumstances” does not include—

(a) ability to pay, or

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

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

17

(1) P may appeal against a decision of HMRC that a penalty is payable by P.

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

18

(1) An appeal shall be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or the Upper Tribunal).

(2) Sub-paragraph (1) does not apply—

(a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or

(b) in respect of any other matter expressly provided for by this Act.

19

(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.

(5) In this paragraph, “tribunal” means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 18(1)).