



[2021] UKFTT 0341 (TC)

**TC08275**

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2018/08210**

**BETWEEN**

**EDVINAS ALISAUSKAS**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE JEANETTE ZAMAN**

**The Tribunal determined the appeal on 27 July 2021 without a hearing with the consent of both parties under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.**

**A hearing was not held because of the ongoing restrictions resulting from the COVID-19 pandemic. The documents to which I was referred were included in a hearing bundle of 204 pages which had been prepared by HMRC and included the Notice of Appeal, witness statements, copies of various public notices and correspondence between the parties.**

## DECISION

### INTRODUCTION AND OUTCOME

1. Mr Alisauskas has appealed against an Excise Duty Assessment for £10,176 for unpaid excise duty (“the Assessment”), and an Excise Wrongdoing Penalty for £5,088 (“the Penalty”) which were issued on 17 December 2014. The Assessment and the Penalty have been imposed in respect of a seizure which was made by UK Border Force at Dover Eastern Docks on 1 May 2014 of 43,780 mixed brand cigarettes (the “Cigarettes”). The Penalty has been calculated on the basis that Mr Alisauskas’ behaviour was deliberate and concealed and the disclosure was prompted, but HMRC have allowed the maximum reduction for disclosure.

2. The appeal to the Tribunal was made late. The Assessment and Penalty had been issued on 17 December 2014 and Mr Alisauskas gave Notice of Appeal to the Tribunal, dated 26 November 2018, which was only received by the Tribunal on 13 December 2018. In that Notice of Appeal he states that he only received the demand for payment in a letter dated 3 August 2016 from the Lithuanian Ministry of Finance seeking recovery of the amounts imposed by HMRC. Mr Alisauskas then sent a response (undated) which was received by HMRC Debt Management on 24 November 2017. That team forwarded the letter to Officer Lloyd of HMRC (who had issued the Assessment and Penalty) but no action was taken. HMRC Debt Management followed up with Officer Lloyd on 28 September 2018. HMRC then sent a letter to Mr Alisauskas on 11 October 2018 stating that Mr Alisauskas was out of time to respond to HMRC and he would need to appeal to the Tribunal. Mr Alisauskas then appealed to the Tribunal.

3. HMRC have confirmed in their Statement of Case (the first version of which was dated 24 July 2019) (the “SOC”) that they do not oppose the appeal proceeding out of time. All correspondence from HMRC has been sent to Mr Alisauskas at the address he provided at the time of the seizure of the Cigarettes. However, on the basis that HMRC do not oppose the appeal proceeding out of time, that HMRC have prepared the SOC and the evidence for the hearing of Mr Alisauskas’ appeal, I agree that it is in the interests of fairness and justice to admit the late appeal.

4. Having considered all of the evidence in the bundle of documents before me, I have concluded that:

- (1) the Assessment of £10,176 was correctly issued and is upheld; and
- (2) HMRC have established that the behaviour was deliberate and concealed and the disclosure prompted. They have already allowed the maximum reduction for disclosure and imposed the Penalty at 50% of the potential lost revenue (“PLR”). That Penalty is also upheld.

5. The appeal is dismissed. A summary of my findings and reasons was released to the parties on 4 August 2021; Mr Alisauskas has applied for full written findings and reasons and this is that decision.

### FINDINGS OF FACT

6. On 1 May 2014 Mr Alisauskas arrived at Dover Eastern Docks, having travelled from Lithuania. He and his passenger (Indre Jonaityte) were stopped by Border Force Officer Neil Fielder.

7. When questioned by Officer Fielder Mr Alisauskas stated that he lives in Lithuania and they were travelling to London to see his sister. Mr Alisauskas said that the vehicle was not

his - it was a friend's car. Vehicle documentation was produced in the name of Berenis Laurynas.

8. When asked by Officer Fielder if he was carrying any cigarettes, Mr Alisauskas said they were carrying a block and a half each.

9. Border Force Officers searched the vehicle. During the search of the vehicle Border Force Officer Mallinson had cause to examine the floor area. Upon inspection underneath, the plastic tray running the length of the vehicle had been damaged and was showing signs of disturbance. The fuel tank had been sectioned removing the top half and plating off the bottom half. Border Force Officers loosened off the four retaining bolts then undid the jubilee clip securing the fuel filler to the tank. The tank was lowered and turned ninety degrees to reveal an access panel in the box section in the floor of the vehicle. The Border Force Officer drilled the floor from above into a box section, tobacco was produced and cigarettes were sighted on the snap on scope. A total of 43,780 mixed brand cigarettes were removed from the box section.

10. Officer Fielder seized the Cigarettes. Mr Alisauskas was issued with Form BOR 156 (Seizure Information Notice), referral notes (BOR 156), Form BOR 162 (Warning Letter About Seized Goods), Public Notices 1 "Travelling to the UK- what you can bring in, what you can't bring in, what you must declare" and 12a "What you can do if things are seized by HM Revenue and Customs". On the basis of the evidence of Officer Fielder I accept that these documents were issued to Mr Alisauskas, and note that Officer Fielder recorded in his notebook that Mr Alisauskas and his passenger had declined to sign the papers to acknowledge that they had been issued to them.

11. Mr Alisauskas did not contest the legality of the seizure within one month.

12. On 12 November 2014 Officer Franklin of HMRC issued a pre-assessment and pre-penalty letter to Mr Alisauskas. This advised him that HMRC were considering issuing him with an assessment for the excise duty on the seized goods (with an excise duty schedule setting out the calculation of the assessment to duty) and also issuing him with a wrongdoing penalty. The letter was accompanied by the relevant factsheets and explained that HMRC considered the behaviour was deliberate and concealed.

13. No response was received to this letter.

14. On 17 December 2014 Officer Lloyd of HMRC wrote to Mr Alisauskas to advise him that the Assessment and Penalty had been issued to him. The letter was accompanied by copies of EX601 Notice of Assessment, EX603 Excise Assessment Explanatory Notes, NPPS2 Notice of Penalty, NPPS2s Schedule, NPPS8B Payslip and factsheet HMRC1 HM Revenue & Customs decisions. That letter set out that Mr Alisauskas could respond within 30 days to ask HMRC to look again at the assessment or ask for an independent review, following either of which he could then appeal to the Tribunal, or appeal to the Tribunal within 30 days.

15. On or around 24 November 2017 an undated letter was received by HMRC Debt Management from Mr Alisauskas.

16. On 11 October 2018, Officer Lloyd wrote to Mr Alisauskas to advise him that his request to HMRC for an appeal was outside the accepted time limit and that he would need to apply directly to the Tribunal. On 26 November 2018 the Appellant sent a Notice of Appeal to the Tribunal.

## **ISSUES**

17. HMRC have issued the Assessment and the Penalty as described above. Mr Alisauskas is appealing against both.

18. The burden of proof is on HMRC to establish that they were validly issued. If they discharge that burden, Mr Alisauskas must then show that his grounds of appeal are made out such that the Assessment and/or Penalty should be cancelled, or the amount of the penalty varied. The standard of proof is the balance of probabilities.

19. Mr Alisauskas has stated in his Notice of Appeal that:

- (1) the examination of the vehicle was not conducted in his presence;
- (2) he was not provided with any documents by the customs officers at the time of the seizure;
- (3) there is no evidence that he acquired or held the Cigarettes that were seized or that he was aware or should reasonably have been aware that the Cigarettes were brought into the UK unlawfully; and
- (4) he has not been provided with documents supporting the legal basis for the recovery of the amounts imposed, his requests for copies of these documents have been ignored and this is an infringement of his human rights.

## **RELEVANT LEGISLATION**

20. Excise duty is charged on tobacco products by the Tobacco Products Duty Act 1979. regulation 14 of the Tobacco Products Regulations 2001 provides that the duty is due at the excise duty point.

21. Where goods have been released for consumption in another Member State (as in this case), the Excise Goods (Holding Movement and Duty Point) Regulations 2010 (the “HMDP Regulations 2010”) provide, by regulation 13:

- (1) If the goods are held for a commercial purpose in the UK, then there is an excise duty point at the first point when the goods are so held (regulation 13(1));
- (2) Regulation 13(3)(b) provides that excise goods will be held for a commercial purpose if they are held by a private individual except where the excise goods are for P’s “own use”;
- (3) Regulation 13(4) provides that for determining whether goods are for own use, regard must be taken of various things, including whether the quantities exceed, in the case of cigarettes, 800 cigarettes; and
- (4) Regulation 13(2) provides that the person holding the goods at the excise point is liable to pay the duty.

22. Under s12(1A) Finance Act 1994 (“FA 1994”), where a person has become liable to excise duty and the Commissioners can ascertain the amount due, the Commissioners may assess the amount of duty due.

23. Part 11 of the HMDP Regulations 2010 regulates the import of excise goods after release for consumption in another Member State (save for when imported for that person’s own use). Commercial importation is possible, but there are a number of requirements, including that there must be an accompanying document, and (under regulation 69) before the importation of the goods HMRC must be informed of the expected dispatch, and a guarantee for securing

payment of the duty provided, and then excise duty be paid on or before the excise duty point. Provision is also made for the approval and registration of commercial importers.

24. Regulation 19(5) provides that a failure to comply with regulation 69 will constitute a contravention.

25. Regulation 88 provides that where there is a contravention of the regulations in relation to excise goods in respect of which duty was due but not paid, those goods are liable to forfeiture.

26. Section 139 of Customs and Excise Management Act 1979 (“CEMA 1979”) provides that any thing liable to forfeiture may be seized. Section 139(6) provides that Schedule 3 to that Act shall have effect. Schedule 3 to CEMA 1979 then provides:

“(3) Any person claiming that any thing seized as liable to forfeiture is not so liable shall, within one month of the date of the notice or seizure...give notice of his claim in writing to the Commissioners...

...

(5) If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of any thing no such notice has been given to the Commissioners...the thing in question shall be deemed to have been duly condemned as forfeited.”

27. Paragraph 5 of Schedule 3 provides that if no such notice is given, the thing in question shall be deemed to have been duly condemned as forfeited.

28. Paragraph 4 of Schedule 41 to Finance Act 2008 (“FA 2008”) provides for a penalty for handling goods subject to unpaid excise duty: a penalty is payable where after the excise duty point, a person is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods, and at that time, a payment of duty is outstanding.

29. The calculation of the penalty is determined under Schedule 41:

(1) Paragraph 5(4) provides that 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 and 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.

(2) Paragraph 6B provides that the penalty payable under paragraph 4 for an act which is deliberate and concealed is 100% of the PLR, and for an act which is deliberate but not concealed is 70% of the PLR.

(3) Paragraph 10 provides that the PLR is the amount of excise duty due on the goods.

(4) Paragraph 12 and 13 provides for reductions in penalties under paragraph 4 where the person 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.”
- (5) For prompted disclosures, the penalty range is 50%-100% of the PLR for deliberate and concealed acts and 35%-70% of the PLR for deliberate but not concealed acts.
- (6) Paragraph 14 provides that “if HMRC think right because of special circumstances, they may reduce a penalty.” Inability to pay cannot amount to a special circumstance.
- (7) Paragraph 20 provides that liability to a penalty under paragraph 4 does not arise in relation to an act or failure which is not deliberate if P satisfies HMRC or (or on appeal, the Tribunal) that there is a reasonable excuse for the act or failure. This provision only applies to acts or failures which are not deliberate.

30. In respect of the penalty under Schedule 41 FA 2008, paragraph 17 provides that P may appeal against a decision that a penalty is payable, or the amount of such penalty, and paragraph 18 provides the appeal shall be treated in the same way as an appeal against an assessment to the tax concerned. The Tribunal’s powers on appeal are set out at paragraph 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.”

## **DISCUSSION**

31. When determining this appeal, I have considered all of the arguments put forward by Mr Alisauskas, including his (undated) letter to HMRC and the attachments to the Notice of Appeal.

32. I deal first with Mr Alisauskas’ argument that he did not receive any documentation at the time of the seizure of the Cigarettes and that his requests for copies of these documents have been ignored.

33. I have already found that he was issued with the required documentation at the time of the seizure but he declined to sign them to acknowledge receipt. Mr Alisauskas has said that he did not receive any notice of the Assessment or Penalty until 6 August 2016. I have a copy of his response to that letter (which was only received by HMRC on 24 November 2017) and note that he has referred to sending another letter to HMRC in February 2017. I do not have a

copy of such letter – HMRC have not included this in the bundle, from which I infer that they did not receive it, and nor has a copy been provided by Mr Alisauskas. I do not regard the absence of that February 2017 letter as being of any significance. In any event, HMRC did not respond to Mr Alisauskas until 11 October 2018, at which point they included copies of the documentation which had previously been issued to him. Whilst Mr Alisauskas’ statement that his requests for copies of documents had been ignored is not a valid ground of appeal, I have concluded that it is not made out. HMRC did send him copies when they informed him that he was out of time to appeal and that he needed to apply to the Tribunal.

### **Assessment**

34. There is no limit on the amount of duty paid cigarettes that can be brought into the UK as long as they are for personal use. The guideline amount for bringing cigarettes into the UK for personal use is 800 cigarettes. The Cigarettes seized were more than 54 times that guideline amount.

35. In accordance with the HMDP Regulations 2010, if the goods are held for a commercial purpose in the UK then there is an excise duty point at the first point when the goods are so held, and goods are held for a commercial purpose if they are held by a private individual except where the excise goods are for that person’s own use.

36. On the basis of my findings of fact, I conclude that Mr Alisauskas was holding the Cigarettes. They were found in the vehicle which he was driving, and this possession is sufficient to constitute the holding of the Cigarettes for this purpose. It is irrelevant that he was not the legal owner of the vehicle.

37. In *HMRC v Jones* [2011] EWCA Civ 824, the Court of Appeal concluded at [71]:

(1) The goods must be taken as “duly condemned” if the owner does not challenge the legality of the seizure under paragraph 3 of Schedule 3 CEMA 1979.

(2) That deeming process would limit the scope of the issues before the Tribunal on a restoration appeal:

“The FTT had to take it that the goods had been ‘duly’ condemned as illegal imports. It was not open to it to conclude that the goods were legal imports illegally seized by HMRC by finding as a fact that they were being imported for own use”.

(3) The deeming provisions were compatible with Article 1 of the First Protocol and Article 6 ECHR, because there were provisions enabling the legality of the seizure to be challenged.

(4) Deeming something to be the case (such as that the imports had been legally seized) “carries with it any fact that forms part of the conclusion”.

38. In short, the Court of Appeal in *Jones* concluded at [73] that the Tribunal had no power to re-open and re-determine the question of whether or not the seized goods had been legally imported for personal use. The Upper Tribunal confirmed in *HMRC v Race* [2014] UKUT 331 (at [26] and [39]) that the reasoning and analysis in *Jones* did not depend on the fact that that case concerned restoration of goods, and not assessment to duty, and the Upper Tribunal held (at [33] and [39]) that it was equally not open to the Tribunal in an appeal against either the assessment to excise duty, or against a penalty assessment, to go behind the deeming effect of paragraph 5 of Schedule 3.

39. In the present case, as no appeal was made against the legality of the seizure and the Cigarettes have been duly condemned under paragraph 5 of Schedule 3 Customs and Excise

Management Act 1979, I cannot find otherwise than that they were legally seized, which necessarily imports the fact that they were held for a commercial purpose. Even if that were not the case, given the quantity of the Cigarettes I consider that it is an almost inevitable inference that they were held for commercial purposes and not for own use.

40. Mr Alisuskas did not challenge the calculation of the duty and I consider that it was correctly calculated.

41. The appeal against the Assessment is dismissed.

### **Penalty**

42. As regards the appeal against the Penalty, again as a result of the facts that are deemed by way of the condemnation of the Cigarettes as liable for seizure, Mr Alisuskas cannot challenge his liability to a penalty under Schedule 41 Finance Act 2008, because the deemed facts are that he was carrying the Cigarettes for a commercial purpose with duty unpaid.

43. Officer Lloyd imposed the penalty on the basis that Mr Alisuskas' behaviour was deliberate and concealed and the disclosure was prompted. The penalty range was therefore 50%-100% of the PLR, which in this case was the amount of the duty assessed. He has allowed full mitigation for the quality of the disclosure made.

44. On the basis of my findings of fact, including as to the quantity of Cigarettes, Mr Alisuskas' statement to Officer Fielder that they were carrying a block and a half of cigarettes each and the location of the Cigarettes in a hidden section created within the vehicle, I agree that the behaviour was deliberate and concealed.

45. I also agree that the disclosure was prompted as Mr Alisuskas had not told Border Force about the wrongdoing before they discovered it; indeed, he had declared a different quantity of cigarettes when asked.

46. Officer Lloyd has allowed full mitigation for the quality of disclosure, involving telling, helping and giving. This was on the basis that Mr Alisuskas had answered the Border Force officer's questions and he had not been asked to give them access to records.

47. On an appeal against a penalty the Tribunal may affirm HMRC's decision or substitute another decision that HMRC had power to make. I am therefore able to apply to different percentage mitigation. I have considered whether to do this, on the basis that HMRC's approach is somewhat generous given that Mr Alisuskas gave a different (wrong) answer to the number of cigarettes they were carrying and his level of cooperation has been somewhat minimal. However, given that once they had found the Cigarettes HMRC did not require information as to the quantities or brands involved, and did not require (or have not asked for) access to records, I accept that HMRC's approach is within the range which might be expected. I am also mindful that as HMRC have prepared their SOC on the basis that full mitigation has already been given, Mr Alisuskas cannot have been expected to put forward to the Tribunal any additional information or explanation to seek to support the level of mitigation given. It would therefore be unfair for me to seek to increase the amount of the penalty (by reducing the amount of mitigation allowed) without first asking for representations from Mr Alisuskas.

48. As I have concluded that the behaviour was deliberate, the provisions relating to reasonable excuse cannot apply.

49. HMRC considered that there were no special circumstances which may merit further reduction of the penalty. I do not consider that this decision was flawed.



**CONCLUSION**

50. Mr Alisaukas' appeal against the Assessment and the Penalty is dismissed.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

51. 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.

**JEANETTE ZAMAN  
TRIBUNAL JUDGE**

**RELEASE DATE: 16 SEPTEMBER 2021**