Neutral Citation: [2022] UKFTT 00396 (TC)

Case Number: TC08624

FIRST-TIER TRIBUNAL
TAX CHAMBER

In public by remote video hearing

Appeal reference: TC/2021/01271

EXCISE DUTY – assessments for duty and a penalty for importing cigarettes through Luton Airport – HMRC application to strike out duty appeal – application granted – appeal against the penalty dismissed

Heard on: 29 September 2022
Judgment date: 25 October 2022

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL

Between

MARIUSZ SODA

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: In person

For the Respondents: Charlotte Brown of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The issue in this case is whether the appellant is liable to Excise Duty of £1,910 and a wrongdoing penalty of £735 following the seizure of 5,980 Marlborough Gold cigarettes (the "**cigarettes**") at Luton Airport on 27 August 2019 which were confiscated from the appellant on his return to the UK from Poland. The appellant has appealed against both the assessments to duty and to the penalty. HMRC are applying to strike out the appellant's appeal against the duty assessment on the basis that I do not have jurisdiction, or in the alternative, that his appeal has no realistic prospect of success.

EVIDENCE AND FINDINGS OF FACT

2. I was provided with a comprehensive bundle of documents. The appellant gave oral evidence. From the written and oral evidence, I find the following facts:

(1) The appellant is a Polish national who has worked in the UK for a five year period and then, separately, for a two year period. He has a working knowledge of English. However, as evidenced by the fact that this hearing was conducted with the aid of an interpreter, his English is far from perfect. Indeed, in order to correspond with HMRC, he had to use Google translate.

(2) His family live in Poland. At the time of the confiscation, he lived and worked in Sheffield.

(3) He would, on average, fly back to Poland twice a month to see his family. This was the main reason for his frequent flights to and from Poland.

(4) At approximately 7.35 in the morning on 27 August 2019 he was detained by an officer of UK Border Force at Luton Airport having flown there from Poland. He was interviewed by that officer. That interview was conducted in English and from the notes of interview, which run to some seven pages it appears that the appellant could understand the questions which he was asked and to which he gave coherent and relevant answers.

(5) He was asked whether he was importing any cigarettes or alcohol and told the officer that he was carrying a bottle of alcohol and 20 sleeves of cigarettes. 20 sleeves amounts to some 4,000 cigarettes. When his bag was searched, 5,980 cigarettes were discovered along with a bottle of alcohol.

(6) In his oral evidence, the appellant said that he had understood the question to mean that he needed to tell the officer how many cigarettes he was carrying for his own consumption. There is no record of this qualification in the interview notes. It is the appellant's evidence that he was carrying only 4000 cigarettes for his own consumption and the rest were for a friend of his with whom he was living in Sheffield.

(7) The cigarettes were contained in a laptop bag in the appellant's larger bag. There was no laptop in the laptop bag or that larger bag.

(8) The appellant had been stopped by UK Border Force officers on previous occasions. On one occasion, in May 2016 he been given information on the guideline amount (800). However, on no occasion had any cigarettes been confiscated from him.

(9) The appellant, on a previous occasion, had a conversation with a female officer, who told him that there was in fact no limit to the number of cigarettes which an individual could import into the UK, duty free.

(10) In answer to questions from the Border Force officer, on 27 August 2019, the appellant explained that he had purchased the cigarettes for himself and his friends. He had done this in Poland as it was cheaper. He had not been given money by anyone else. He had been stopped on previous occasions when entering the UK.

(11) The appellant signed the officer's notebook. His evidence was that he was "ordered" to do so. His further evidence was that he needed to get back on the bus in order to get to his workplace for a shift at 2 o'clock that afternoon. His main concern, therefore, was not what was put before him, but was to ensure that he met that deadline and did not put his job at risk.

(12) For the same reason, when offered the services of an interpreter at the interview, he declined the offer as he thought this would prolong the process.

(13) Following the interview the cigarettes were confiscated.

(14) The officer's notebook does not record that the appellant was given form BOR156, but a copy of that document was in the documents in the bundle and the appellant accepts that it was signed by him on 27August 2019. That notice evidences that Notice 1, Warning Letter, and Notice 12A had been issued to him.

(15) The appellant's evidence was that the officer probably told him about his appeal rights but he did not understand what that meant. He also thought that it was possible that he had been given those documents but given that they were in English, he couldn't understand them. However, as evidenced by the fact that he was conducting this appeal, had he understood that he had an appeal right to challenge the confiscation of the goods, he would have taken up that right. The only reason that he did not was because he did not understand that he could do so. And once he did understand his right to do so, it was too late. The 30 day period had expired.

(16) One of the reasons that he buys cigarettes in Poland, is because they are cheaper than in England. He bought the cigarettes from a conventional shop in Poland. At the relevant time, the UK was about to leave the EU, and he wanted to stock up on cigarettes as he thought that he would not be able to bring back as many once Brexit had taken place.

(17) His view is that it is unfair to charge him duty on goods that he no longer has. And indeed he does not have the means to pay the duty or a penalty.

(18) On 25 August 2020, HMRC issued an excise duty assessment which had been calculated at £1,910.

(19) On 7 October 2020 HMRC issued an assessment for a wrongdoing penalty for £735. The assessing officer had deemed the appellant's behaviour to be deliberate and prompted but not concealed. The penalty range therefore was between 35% and 70% of the potential lost revenue, and the officer applied a 90% reduction for the appellant's cooperation and quality of disclosure. The penalty percentage was therefore 38.5% of the excise duty of £1,910, which is £735.

(20) In HMRC's penalty explanation schedule which was issued with the preassessment letter dated 25 August 2020, HMRC explained why they considered the appellant's behaviour to be deliberate.

> "You were previously stopped by Border Force Officials on 04/05/2016 and a Notice 1 was issued. The Notice 1 explains what you can bring in and guideline amounts. You were therefore aware of the cigarette guideline amounts and that you were committing a wrongdoing. You are a frequent traveller having stated that you had travelled to Poland eight times in the previous eight months and were returning to Poland two weeks later. It is therefore not reasonable that you would need to bring in such a large quantity to stockpile. I therefore class your behaviour as Deliberate".

(21) The appellant asked for a review of the duty and penalty assessments, and in the review conclusion letter of 19 January 2021, HMRC upheld both in the original amounts. In that review conclusion letter, the reviewing officer considered whether there were special circumstances which should be taken into account in establishing the liability to or level of penalty. The text of the letter states:

> "I have considered whether there are any special circumstances to take into account. Special circumstances are either: uncommon or exceptional, [or] where the strict application of the penalty law produces a result that is contrary to the clear compliance intention of that penalty law. To be special circumstances, the circumstances in question must apply to the particular individual and not be general circumstances that apply to many taxpayers by virtue of the penalty legislation. Having considered all of the evidence made available to me I have not found any special circumstances that might allow a penalty reduction".

(22) On 12 May 2021, the appellant appealed against both the duty and penalty assessments. HMRC take no point that the appeal is out of time.

THE LAW

The legislation relevant to the duty and penalty assessments

3. The relevant legislation provides as follows:

(1) Excise duty is charged on tobacco product imported into the United Kingdom (Section 2 Tobacco Products Duty Act 1979).

(2) HMRC can, by regulations, fix the point at which duty becomes chargeable (Section 1 Finance (No. 2) Act 1992).

(3) The relevant regulations provide that

> (a) duty is chargeable on tobacco held for a commercial purpose in the UK
>
> (b) tobacco brought into the UK by a private individual, who has bought it duty paid in another Member State for his or her own use, is not held for a commercial purpose (and so no duty is chargeable on it)
>
> (c) the duty point for tobacco held for a commercial purpose is the time of importation.

(The Excise Goods (Holding Movement and Duty Point) Regulations 2010, Regulation 13).

(4) Section 49 Customs and Excise Management Act 1979 ("**CEMA**") provides that goods imported without payment of duty are liable to forfeiture.

(5) Section 139 CEMA provides that anything liable to forfeiture can be seized by HMRC.

(6) That section also introduces Schedule 3 to CEMA which, in essence, provides that a person whose goods have been seized can challenge the seizure, but only if he does so in the proper form within the one month time limit. Then, the goods can only be forfeited under an order of the court in condemnation proceedings. If the person fails to serve notice, then there is a statutory deeming under which the goods are deemed "to have been duly condemned as forfeited".

(7) Where it appears to HMRC that an amount has become due by way of excise duty from a person, that amount can be ascertained by HMRC who can then assess that person to that amount of duty (Section 12(1A) Finance Act 1994).

(8) A person who is assessed to duty has a right of appeal to this Tribunal (Section 16 Finance Act 1994).

(9) A penalty is payable by person who has failed to pay excise duty in these circumstances. The provisions dealing with the penalty are set out in Schedule 41 Finance Act 2008 ("**FA 2008**"). The penalty is calculated as a percentage of the potential lost duty, i.e. the unpaid excise duty in this case (see paragraphs 4, 5 and 6 Schedule 41 FA 2008).

(10) HMRC may also reduce the penalty if they consider that there are special circumstances. A reduction for special circumstances is not subject to a statutory minimum and can include a reduction to nil. The legislation states that "special circumstances" does not include the fact that someone is not able to pay the penalty (paragraph 14 of Schedule 41 FA 2008).

(11) A person who is assessed to a penalty has a right to appeal to this Tribunal (paragraph 17 Schedule 41).

(12) Where an act or failure is not deliberate, a person is not liable to a penalty if there is a reasonable excuse for the act or failure. The legislation states that a lack of funds is not a reasonable excuse, unless attributable to events outside the person's control (paragraph 20 Schedule 41 FA 2008).

Case law relevant to the legality of the seizure

4. The two leading cases which are relevant to whether this Tribunal has jurisdiction to consider the legality of the seizure in relation to the appeal are *HMRC v Jones and Jones* [2011] EWCA Civ 824 (*"**Jones**")* and *HMRC v Nicholas Race* [2014] UKUT 0331 (*"**Race**")*.

5. In *Jones*, Mr and Mrs Jones were stopped at Hull and large quantities of tobacco and alcohol were seized. Initially they challenged the legality of the seizure by issuing condemnation proceedings, but were subsequently advised by their solicitors to withdraw from those proceedings. They sought restoration of the car that had been seized along with the goods. The FTT made findings of fact that the goods were for personal use and allowed the restoration. The Upper Tribunal upheld this decision, and HMRC appealed to the Court of Appeal. The

ground for this appeal was that the FTT were not entitled to make findings of fact inconsistent with the deemed forfeiture of the goods. It was bound by the deeming provisions that the goods were illegally imported for commercial use.

6. The Court of Appeal agreed. At paragraph 71 of their decision, Mummery LJ said as follows:

> "71. I am in broad agreement with the main submissions of HMRC. For the future guidance of tribunals and their users I will summarise the conclusions that I have reached in this case in the light of the provisions of the 1979 Act, the relevant authorities, the articles of the Convention and the detailed points made by HMRC.
>
> (1) The respondents' goods seized by the customs officers could only be condemned as forfeit pursuant to an order of a court. The FTT and the UTT are statutory appellate bodies that have not been given any such original jurisdiction.
>
> (2) The respondents had the right to invoke the notice of claim procedure to oppose condemnation by the court on the ground that they were importing the goods for their personal use, not for commercial use.
>
> (3) The respondents in fact exercised that right by giving to HMRC a notice of claim to the goods, but, on legal advice, they later decided to withdraw the notice and not to contest condemnation in the court proceedings that would otherwise have been brought by HMRC.
>
> (4) The stipulated statutory effect of the respondents' withdrawal of their notice of claim under paragraph 3 of Schedule 3 was that the goods were deemed by the express language of paragraph 5 to have been condemned *and* to have been "duly" condemned as forfeited as illegally imported goods. The tribunal must give effect to the clear deeming provisions in the 1979 Act: it is impossible to read them in any other way than as requiring the goods to be taken as "duly condemned" if the owner does not challenge the legality of the seizure in the allocated court by invoking and pursuing the appropriate procedure.
>
> (5) The deeming process limited the scope of the issues that the respondents were entitled to ventilate in the FTT on their restoration appeal. The FTT had to take it that the goods had been "duly" condemned as illegal imports. It was not open to it to conclude that the goods were legal imports illegally seized by HMRC by finding as a fact that they were being imported for own use. The role of the tribunal, as defined in the 1979 Act, does not extend to deciding as a fact that the goods were, as the respondents argued in the tribunal, being imported legally for personal use. That issue could only be decided by the court. The FTT's jurisdiction is limited to hearing an appeal against a discretionary decision by HMRC not to restore the seized goods to the respondents. In brief, the deemed effect of the respondents' failure to contest condemnation of the goods by the court was that the goods were being illegally imported by the respondents for commercial use.
>
> (6) The deeming provisions in paragraph 5 and the restoration procedure are compatible with Article 1 of the First Protocol to the Convention and with Article 6, because the respondents were entitled under the 1979 Act to challenge in court, in accordance with Convention compliant legal procedures, the legality of the seizure of their goods. The notice of claim procedure was initiated but not pursued by the

> respondents. That was the choice they had made. Their Convention rights were not infringed by the limited nature of the issues that they could raise on a subsequent appeal in the different jurisdiction of the tribunal against a refusal to restore the goods.
>
> (7) I completely agree with the analysis of the domestic law jurisdiction position by Pill LJ in *Gora* and as approved by the Court of Appeal in *Gascoyne*. The key to the understanding of the scheme of deeming is that in the legal world created by legislation the deeming of a fact or of a state of affairs is not contrary to "reality"; it is a commonly used and legitimate legislative device for spelling out a legal state of affairs consequent on the occurrence of a specified act or omission. Deeming something to be the case carries with it any fact that forms part of the conclusion".

7. In *Race*, Warren J had to consider whether *Jones* was restricted to restoration cases, or whether it was of more general application, and in particular, whether it applies to assessments for duty and penalties. He considered it to be of general application, and said, at paragraph 26

> "*Jones* is clear authority for the proposition that the First-tier Tribunal has no jurisdiction to go behind the deeming provisions of paragraph 5 Schedule 3. If goods are condemned to be forfeited, whether in fact or as the result of the statutory deeming, it follows that having been bought in a Member State and then imported by Mr and Mrs Jones, they were not held by the taxpayers for their own personal use in a way which exempted the goods from duty. The reasoning and analysis in *Jones* did not turn on the fact that the case concerned restoration of the goods and not assessment to duty".

8. And again at paragraph 33 of that decision

> "Taking those factors in turn, I do not consider it to be arguable that *Jones* does not demonstrate the limits of the jurisdiction. It is clearly not open to the Tribunal to go behind the deeming effect of paragraph 5 Schedule 3 for the reasons explained in *Jones* and applied in [EBT]. The fact that the appeal is against an assessment to excise duty rather than an appeal against non-restoration makes no difference because the substantive issue raised by Mr Race is no different from that raised by Mr and Mrs Jones".

9. The legal principles which these cases illustrate, and which are relevant to this appeal are:

(1) Goods are duly condemned as illegally imported if the appellant fails to invoke the Notice of Claim procedure to oppose condemnation (or, having so invoked that procedure, he subsequently withdraws from it).

(2) In these circumstances the goods are deemed to have been condemned as illegally imported goods (ie. held for a commercial purpose). And since they have been deemed to be held for a commercial purpose, the FTT cannot consider whether the goods were for the appellant's personal use.

(3) Nor can the FTT consider any facts which the appellant submits are relevant to any assertion that the goods were for personal use. I have no power to reopen the factual basis on which the goods were condemned.

(4) The foregoing principles apply to cases concerning restoration of the goods, to assessments for excise duty, and to assessments for penalties.

(5) Where an appellant complains of procedural unfairness, his remedy is judicial review. The FTT has no inherent power to review decisions of HMRC. (See *Race* at paragraph 35).

> "As to the second of the Judge's reasons, concerning procedural unfairness, it is clear that paragraphs 5 and 6 of Schedule 3 are Convention compliant. That is not to say that HMRC could escape the consequences of any unfairness on their part in relation to the application of those statutory provisions. The remedy for that sort of unfairness, however, is judicial review, which itself gives a Convention-compliant remedy to a taxpayer alleging the sort of unfairness about which the Judge was concerned. The First-tier Tribunal has no inherent power to review decisions of HMRC; although it does have certain statutory powers in relation to certain decisions, it has no power to review, or to provide any remedy, in relation to procedural unfairness of the sort which concerned the Judge.....".

Striking out

10. Rule 8 (2) of the First-tier Tribunal (Tax Chamber) Rules provides a mandatory direction that the Tribunal must strike out the whole or a part of the proceedings if it does not have jurisdiction in relation to the proceedings or that part of them.

11. Rule 8(3)(c) gives the Tribunal power to strike out an appeal if it “considers there is no reasonable prospect of the appellant's case, or part of it, succeeding”.

12. In *Swain v Hillman* [2001] 1 All ER 91 Lord Woolf MR said, in relation to the similar power at Rule 24.2 of the Civil Procedure Rules:

> "The words ‘no real prospect of being successful or succeeding’ do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or…they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success”.

DISCUSSION

Burden of proof

13. HMRC have the burden of proving that they have issued valid in time and correctly calculated duty and penalty assessments. If they have discharged that burden, it is for the appellant to show that he does not owe the duty or, as regards the penalty, that special circumstances apply. Reasonable excuse cannot apply in the circumstances of this appellant since they do not apply where the penalty is assessed on the basis of deliberate behaviour. In both cases the standard of proof is the balance of probabilities.

14. I find that the excise duty assessment and the penalty assessment are both valid in time and correctly calculated assessments.

Submissions

15. In essence the appellant submits:

(1) The cigarettes were for personal use.

(2) Even if he had been given the documents which set out the procedure for challenging the legality of the seizure, he would not have understood them as they were in English.

(3) He signed the officer's notebook because he was ordered to do so and because he was in a hurry.

(4) He stocked up on the cigarettes because of Brexit.

(5) It is not fair that he is being asked to pay the duty and penalty when he does not have the cigarettes.

(6) He is being unfairly punished.

(7) He cannot afford to pay either the duty or the penalty.

16. In essence Miss Brown submits:

(1) I must strike out the appellant's appeal against the excise duty on the basis of the decisions in *Jones* and *Race*. The appellant has not challenged the legality of the seizure and cannot now say that the cigarettes were for personal use. Given that this is the only substantive ground of his appeal, I have no jurisdiction. Even if there was no challenge as the appellant misunderstood the procedure (either because he failed to read the relevant literature or online information or because, as a result of his poor English, he did not understand it) that does not detract from the deeming set out in *Jones* and *Race*.

(2) In the alternative the appellant's appeal against the duty assessment has no reasonable prospect of success. The cigarettes were in excess of the personal allowance; the appellant did not earn enough to pay for those cigarettes; given his frequency of travel he was, or should have been, aware of the personal allowance; he cannot argue that the goods were for personal use.

(3) The appellant has a far better grasp of English than he would like us to believe. He has lived in England for a considerable time. He was able to give coherent and relevant answers to the questions asked by the Border Force officer.

(4) As regards the penalty, he has been given a substantial discount against the maximum that would otherwise have been payable. His behaviour was deliberate. He knew or should have known of the personal allowance. He had been stopped before and been told what that personal allowance was. The cigarettes were concealed in a laptop bag and there was no laptop in either that or in his larger bag. The officer's notes do not suggest that the appellant, when asked how many cigarettes he was carrying, answered 20 sleeves on the basis that that was the amount of his personal use. There is no such qualification in the notes.

(5) Reasonable excuse does not apply to deliberate behaviour. There are no special circumstances.

Strike out

17. I am bound by the decisions in *Jones* and *Race*. The appellant did not challenge the seizure of the cigarettes in condemnation proceedings. This might have been because he did not know of the procedure, or because, having been given the relevant booklet, he failed to read it or having read it failed to understand its contents as a result of his poor English. But I am afraid for the appellant that this does not matter. The fact that he did not challenge the seizure means that the cigarettes are deemed to have been duly condemned and forfeited. They are deemed to have been imported for a commercial purpose and not for personal use. I am

therefore bound to disregard the appellant's submission that his appeal against the duty assessment should succeed on the basis that the cigarettes were for personal use. Given that this is his only substantive ground for appeal against the duty assessment, I accept Miss Brown's submission that I have no jurisdiction to hear his appeal, and that I must strike his appeal out under Rule 8(2)(a) of the Rules.

18. I also agree with Miss Brown's alternative submission that even if I did have jurisdiction, the appellant's appeal has no reasonable prospect of success. He is a frequent traveller who had been stopped before and been told what the personal allowance was. Given the frequency of travel, notwithstanding Brexit, there was no need for him to exceed the personal allowance. He could have imported another tranche of cigarettes, within his personal allowance, on a subsequent visit. The cigarettes are deemed to be imported for commercial, not personal, use. Shortage of funds is irrelevant to an appeal against the duty assessment. I have no jurisdiction, for the reason given at [9(5)] to consider unfairness. Unfortunately for the appellant, the liability to duty arises at the point of importation irrespective of what happens to the cigarettes after that. So, he is in the unhappy position of having to pay duty on the cigarettes which he no longer possesses. But that, I'm afraid, is the law. Should I allow the appeal to go forward, I do not think that the appellant has any reasonable prospect of succeeding in establishing that the excise duty assessment was not properly imposed. The fact that he was in a hurry to get to work is largely irrelevant.

19. For the foregoing reasons, therefore, I strike out the appellant's appeal against the duty assessment.

The penalty

20. The appellant has been assessed for a penalty based on deliberate behaviour. The officer who assessed the penalty, and who determined that there was deliberate behaviour, did so on the basis set out at [2(20)] above. In simple terms, the appellant knew the guidelines as he had been stopped before yet still sought to import an amount which was considerably greater than those guidelines. I agree with this assessment. It is my view that a wrongdoing penalty for deliberate behaviour requires HMRC to show that the appellant knew that the number of cigarettes which he was seeking to import was in excess of the personal allowance. HMRC have established this. The appellant had been stopped before and had been given a booklet telling him what the personal allowance was. He therefore had actual knowledge of the personal allowance. Furthermore, he had discussed the personal allowance with a Border Force officer who had said that there was no such personal allowance and that an individual was free to bring in as many cigarettes as he or she wished. The appellant suggested that this confused him. To my mind it should have put him on notice that the position was not clear and that he should have looked up the actual amount, which is readily available from the relevant website. I strongly suspect that he did not do this, possibly on the basis that ignorance is bliss, and he did not want to find out what the actual amount that he could import legally, was. This failure falls into the category of "reckless" behaviour, and if I am wrong that he had actual knowledge of the personal allowance, then this reckless behaviour, namely not wishing to find out about the actual amount, brings him within the ambit of deliberate behaviour, and thus within the ambit of the penalty.

21. Reasonable excuse cannot be pleaded by the appellant, since the penalty is for deliberate behaviour. But special circumstances are relevant.

22. While special circumstances are not defined, the following extract from the Upper Tribunal decision in *Barry Edwards v HMRC* [2019] UKUT 131 *("**Edwards**")* sets out the correct test.

> "73. The FTT then said this at [101] and [102]:
>
> > "101. I appreciate that care must be taken in deriving principles based on cases dealing with different legislation. However, I can see nothing in schedule 55 which evidences any intention that the phrase "special circumstances" should be given a narrow meaning.
> >
> > 102. It is clear that, in enacting paragraph 16 of schedule 55, Parliament intended to give HMRC and, if HMRC's decision is flawed, the Tribunal a wide discretion to reduce a penalty where there are circumstances which, in their view, make it right to do so. The only restriction is that the circumstances must be "special". Whether this is interpreted as being out of the ordinary, uncommon, exceptional, abnormal, unusual, peculiar or distinctive does not really take the debate any further. What matters is whether HMRC (or, where appropriate, the Tribunal) consider that the circumstances are sufficiently special that it is right to reduce the amount of the penalty".
>
> 74. We respectfully agree. As the FTT went on to say at [105], special circumstances may or may not operate on the person involved but what is key is whether the circumstance is relevant to the issue under consideration".

23. What is clear from *Edwards* is that the test for special circumstances is very different from that set out in HMRC's review conclusion letter (see [2(21)]. I can only come to a conclusion on special circumstances which is different from the conclusion reached by HMRC if I think that HMRC's conclusion is flawed in the judicial review sense. To my mind it is so flawed given that they have misdirected themselves as to the relevant law. I can therefore reconsider whether there are special circumstances which apply to the circumstances of this appellant and the confiscation of the cigarettes.

24. I cannot take into account the assertion that the goods were for personal use, as I am bound by *Jones* and *Race* in the same way as I am bound by those cases in respect of the duty assessment. Nor can I take into account lack of funds to pay the penalty.

25. I have considered whether there are any circumstances in this case which mean that it would be right for me to reduce the penalty. On the one hand, as evidenced by the fact that the appellant required the services of an interpreter to participate fully in the hearing, it is clear that he has difficulties with the English language. Furthermore, he was "ordered" by the interviewing officer to sign the statement. I also believe the appellant when he says that he would have challenged the confiscation had he understood that he could have done so, and as evidence of this he cites the fact that he has prosecuted this appeal notwithstanding his language difficulties and his use of Google translate to enable him to understand HMRC's correspondence.

26. However, weighed against this is the fact that he does have some English as a result of his years working in the UK; he clearly understood the questions posed of him by the Border Force officer and to whom he gave coherent and relevant answers; and although he might have wanted to get the interview over quickly in order to meet his shift deadline (and thus did not take up the offer of an interpreter) I cannot see how this would have prevented him from reading

the material provided to him following his interview which explained the process, even if that was in English, and seeking help if he could not understand it.

27. On balance, and regrettably for the appellant, I find that his circumstances are not special. Many individuals entering the UK will bring with them goods on which excise duty is payable. Many of those individuals will not have English as their first language and may struggle to understand it. Yet they still comply with the rules. The appellant's poor grasp of the English language which is at the root of his failure to challenge the seizure is not, to my mind, sufficiently special as to justify a reduction or cancellation of the penalty. I therefore uphold it.

DECISION

28. For the foregoing reasons I strike out the appellant's appeal against the duty assessment and I dismiss his appeal against the penalty assessment.

RIGHT TO APPLY FOR REINSTATEMENT AND PERMISSION TO APPEAL

29. Rule 8(5) allows the appellant to apply for the reinstatement of his excise duty appeal. Rule 8(6) states that an application under paragraph (5) must be made in writing and received by the Tribunal within number 28 days after the date that the Tribunal sends notification of the striking out to the appellant.

30. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

Release date: 25th OCOTBER 2022