



Appeal number: UT/2016/0020

EXCISE DUTIES — traveller stopped in UK control zone within France — in possession of 18kg of tobacco — traveller acknowledging that majority of tobacco intended for family members reimbursing cost — goods seized — no condemnation proceedings and goods therefore deemed to be forfeit — assessment to duty made and wrongdoing penalty imposed — whether duty point arose in control zone — not a matter within jurisdiction of tribunal but which must be raised in condemnation proceedings — whether error in statutory reference invalidates assessment to duty — no — whether offer of review of penalty satisfied statutory requirements — yes — whether cumulative effect of non-restoration, assessment and penalty disproportionate — no — appeal dismissed

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

KEVAN DENLEY

Appellant

- and -

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

Respondents

**TRIBUNAL: MR JUSTICE NEWEY
JUDGE COLIN BISHOPP**

Sitting in public in London on 28 and 29 June 2017

**Miss Sadiya Choudhury and Mr Thomas Chacko, appearing on a pro bono basis,
for the Appellant**

**Mr Kieron Beal QC and Mr Brendan McGurk, instructed by the General Counsel
and Solicitor to HM Revenue and Customs, for the Respondents**

DECISION

Introduction

- 5 1. In this case, Mr Kevan Denley challenges the refusal to restore some hand-rolling tobacco that had been seized from him, an assessment or purported assessment to excise duty and a related penalty. The First-tier Tribunal (“the FTT”) (Judge Michael Connell and Ms Liz Pollard) dismissed Mr Denley’s appeal, but he relies before us on points that were not taken before the FTT, where he appeared in person. He now has the benefit of representation on a pro bono basis from Miss Sadiya Choudhury and Mr Thomas Chacko.
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- 15 2. In what follows the shorthand “HMRC” includes both HM Revenue and Customs and the UK Border Agency.

Narrative

- 20 3. On 25 March 2012, Mr Denley was stopped by Officer Emma Curtis of the UK Border Force in the UK Control Zone at the French end of the Channel Tunnel in Coquelles (“the Coquelles Control Zone”). He was returning to the United Kingdom as a Eurolines coach passenger.
- 25 4. Mr Denley was carrying 36 packets of hand-rolling tobacco. Since each packet contained 500g of tobacco, he had 18kg of tobacco in total.
- 30 5. Mr Denley explained to Officer Curtis that six of the packets were for him and the remainder for his brothers and sisters. He said that he had received £200 from each of five members of his family. He also told the Officer that he had bought eight 500g packets (4kg in all) six weeks previously.
- 35 6. Taking the view that the tobacco that Mr Denley had with him was held for a commercial purpose, Officer Curtis seized it.
- 40 7. Since Mr Denley’s coach was about to leave, Officer Curtis told him that documents including a “Seizure Information Notice”, Notice 12A (which explained that a challenge to the legality of the seizure had to be made within one month) and a “Warning Notice” (which made it clear that the seizure was without prejudice to any other action that could be taken, including issuing an assessment for evaded excise duty and a wrongdoing penalty) would be posted to him (as they then were). She also said that he had one month in which to appeal. In this respect, the FTT said (in paragraph 56 of its decision):
- 45 “There is no reason why [Mr Denley] should not have received the seizure information notice and other notices sent to him by HMRC on 25 March 2012. In any event he was advised that he had thirty days within which to appeal the seizure to the Magistrates’ Court failing which the seizure will be deemed lawful.”

8. Mr Denley did not challenge the legality of the seizure within the one-month period.

5 9. On 8 August 2012, HMRC Officer Karen Ausher wrote to Mr Denley explaining that he was being issued with an assessment to excise duty on the tobacco. The letter included this:

10 “By virtue of Part 2 Regulations 13(1) and 13(2) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 you are liable to pay the excise duty on the goods seized from you.

15 I am issuing you with an EX601 Notice of Assessment for £2734.20 under Section 12(1A) of the Finance Act 1994. Please see the attached schedule which shows how the excise duty has been calculated.”

20 10. The EX601 form that was enclosed was headed, “Officer’s Assessment/Civil Penalty Excise”. It began:

25 “The Commissioners of HM Revenue & Customs (HMRC) hereby assess the amount(s) of excise duty, together with any liability to a civil penalty, due from you. Payment of any assessment is due under Section 116 of the Customs & Excise Management Act 1979.”

30 There followed a schedule in which £2,734 was shown as “Duty/Penalty due to HMRC”. The £2,734 represented excise duty at £151.90 per kilogram of tobacco.

35 11. On 17 August 2012, Mr Denley replied submitting the following “evidence in mitigation”:

40 • I was of the opinion that the amount of tobacco purchased related to my own use and that of my family and friends without prejudice nor profit making by myself.

45 • At the time of checking at Border Control I was questioned by officials as to the quantity purchased by me and willingly agreed to the goods being forfeited owing to my foolishness in not making myself fully aware of rules and regulations. I was of the opinion that this matter, following the seizure of the goods, was concluded and that punishment due to my naivety was done. In effect seizure and financial costs were the conclusion in this matter.

• I wish to add that since the seizure on 25th March 2012 I have received no subsequent correspondence, as I stated

previously, and I accepted the explanation given by the officer and never considered an appeal.

- The whole incident is hugely regretted by me personally and my financial position has degenerated as a consequence. In effect I am not in a position to pay the total duty sum requested as my financial position has been severely compromised by this most unfortunate matter.”

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12. In a letter dated 17 September 2012, Mr Denley asked for the tobacco taken from him to be restored. On 10 October HMRC wrote to inform him that he was too late to challenge the legality of the seizure, but that they would consider his request for restoration of the goods. However, on 26 November HMRC sent Mr Denley a letter in which they said:

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“I have considered your request under **section 152 (b)** of the Customs & Excise Management Act 1979 (‘the Act’) and our policy.

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In considering restoration I have looked at all of the circumstances surrounding the seizure but **I do not consider the legality or the correctness of the seizure** itself.

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I conclude that there are no exceptional circumstances that would justify a departure from the Commissioners’ policy for restoration. ... [T]he tobacco was disposed of in June 2012 in line with our disposal policy as restoration had not been requested. You have not supplied a reason for your delayed restoration request as we had asked for. Therefore I can confirm that as I cannot restore something we no longer hold the tobacco **will not be restored.**”

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13. Mr Denley asked for a review of HMRC’s decision. In a letter dated 9 January 2013, a review Officer informed Mr Denley that it had been concluded that the tobacco should not be restored. The policy on restoring goods was summarised in these terms:

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“The general policy is that seized excise goods should not normally be restored. However, each case is examined on its merits to determine whether or not restoration may be offered exceptionally.

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‘Not for profit’

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For *non-aggravated* cases only the policy for seized excise goods which are not for own use, but are to be passed on to others on a ‘not for profit’ reimbursement basis is that the excise goods will normally be restored for a fee equal to the total of the duty evaded, plus VAT on the duty, plus a penalty of 15% of the duty and VAT. The meaning of ‘*aggravated*’ is explained below.

Aggravating circumstances include:-

- Any previous offence by the individual
- Large quantities, for example more than:
 - 5Kg of handrolling tobacco or
 - 6,000 cigarettes or
 - 20 litres of spirits or 200 litres of wine or 225 litres of beer.
- Any other circumstances that would result in restoration not being appropriate.”

10 The review Officer went on to say:

“I conclude that the excise goods were to be passed on to others on a ‘not for profit’ reimbursement basis but should not be restored because of the following aggravating factors:-

A large quantity of excise goods were involved.

15 18kg (more than 5Kg) of handrolling tobacco.

Non restoration is fair, reasonable and proportionate in these circumstances.”

14. In the meantime, HMRC had raised a wrongdoing penalty of £546. The notice of penalty assessment was sent to Mr Denley on 13 December 2012. This included, under the heading “Appeals”, the following:

25 “If you do not agree with this assessment you need to write to us within 30 days of the date of this notice, telling us why you think our decision was wrong and we will look at it again. If you prefer, we will arrange for a review by an officer not previously involved in the matter. You will then have the right to appeal to an independent tax tribunal. Alternatively you can appeal direct to the tribunal within 30 days of this notice.

30 You can find further information about this in fact sheet HMRC 1 HM Revenue and Customs Decisions – What to do if you disagree”

35 15. The £546 represented 20% of the potential lost revenue. The “Penalty explanation” with which Mr Denley was supplied stated:

40 “We consider that your behaviour was non-deliberate. This is because this was your first offence and you co-operated with the UKBA Officer on 25 March 2012. You also contacted this office following our letter of 8 August 2012 to explain the circumstances.

45 The disclosure was prompted because you did not tell us about the wrongdoing before you had reason to believe we had discovered it, or were about to discover it.

For this ‘non-deliberate’ wrongdoing, with a prompted disclosure, the minimum penalty percentage is 20% and the maximum penalty percentage is 30%”

5 16. On 21 January 2013, Mr Denley appealed to the FTT against the review decision. He subsequently also appealed the assessment to excise duty and the penalty.

10 17. The FTT dismissed the appeal and confirmed the excise duty assessment and penalty. It explained that it did not have any jurisdiction to reopen the question of whether the tobacco was held for personal use. The goods having been lawfully seized as being held for a commercial purpose without the payment of duty, HMRC were entitled, the FTT said, to assess the duty amount on them and raise a penalty.

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The legislative framework

The imposition of excise duty

20 18. The Tobacco Products Duty Act 1979 provides for excise duty to be charged on tobacco products (including hand-rolling tobacco) imported into the United Kingdom. The time at which the requirement to pay duty takes effect (or “the excise duty point”) is addressed in the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (“the 2010 Regulations”). Regulation 13 of these provides as follows:

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“(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.

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(2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person—

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- (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—

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- (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.

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...

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

(a) ...;

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

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19. The Channel Tunnel (Alcoholic Liquor and Tobacco Products) Order 2010 deals with the application of the 2010 Regulations in a “control zone” such as that at Coquelles. By virtue of paragraph 6 of the Order, regulation 13 of the 2010 Regulations is to be read as if “or a control zone” were inserted after the words “United Kingdom” wherever they appear in regulation 13(1) and (3).

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15 *Assessment*

20. The power to raise assessments in respect of unpaid excise duty is to be found in the Finance Act 1994 (“FA 1994”). Section 12(1A) of FA 1994 is in these terms:

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“Subject to subsection (4) below, where it appears to the Commissioners—

(a) that any person is a person from whom any amount has become due in respect of any duty of excise; and

(b) that the amount due can be ascertained by the Commissioners,

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the Commissioners may assess the amount of duty due from that person and notify that amount to that person or his representative.”

21. Where a “revenue trader” (defined in section 1 of the Act) is due to pay excise duty, HMRC can demand it under section 116 of the Customs and Excise Management Act 1979 (“CEMA”).

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Forfeiture and restoration

22. Goods subject to excise duty can be liable to forfeiture under regulation 88 of the 2010 Regulations (if there is a contravention of those Regulations or a condition or restriction imposed by or under them) or section 49 of CEMA (if, for example, unshipped or unloaded without duty being paid).

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23. Section 139(1) of CEMA allows anything liable to forfeiture under the “customs and excise Acts” (i.e. CEMA and “any other enactment for the time being in force relating to customs or excise”) to be seized. The lawfulness of a seizure can be tested in proceedings in the Magistrates’ Court or High Court for which schedule 3 to the Act provides. Paragraph 3 of the schedule states:

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“Any person claiming that any thing seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of

seizure or, where no such notice has been served on him, within one month of the date of the seizure, give notice of his claim in writing to the Commissioners at any office of customs and excise.”

5 Where such a notice is given, paragraph 4 of the schedule provides for HMRC to “take proceedings for the condemnation of that thing by the court, and if the court finds that the thing was at the time of seizure liable to forfeiture the court shall condemn it as forfeited”. In the absence, though, of a notice of claim, paragraph 5 of the schedule applies. This states:

10 “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.”

24. HMRC have power, however, to restore goods that have been seized and forfeited. Section 152 of CEMA states:

20 “The Commissioners may, as they see fit—
(a) ...
(b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under those Acts [i.e. the customs and excise Acts]....”

Penalty

25. The penalty in the present case was imposed under schedule 41 to the Finance Act 2008 (“FA 2008”). Paragraph 4(1) of that schedule reads as follows:

30 “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 the time when P acquires possession of the goods or is so concerned, a payment of duty on the goods is outstanding and has not been deferred.”

26. Further provisions relating to penalties are to be found later in schedule 41 to FA 2008. Paragraph 14 empowers HMRC to reduce a penalty if they “think it right because of special circumstances”. Paragraphs 17-19 state as follows as regards appeals:

“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.

5 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
10 determination of the appeal by the First-tier Tribunal or the Upper
Tribunal)

19(1) On an appeal under paragraph 17(1) the tribunal may affirm
or cancel HMRC's decision.

15 (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.

20 (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
25 (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.

30 (4) In sub-paragraph (3)(b) '*flawed*' means flawed when
considered in the light of the principles applicable in proceedings
for judicial review.

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

27. Section 15A of FA 1994 is also relevant in this context. It provides:

40 "(1) If HMRC notify a person (P) of a relevant decision by HMRC,
HMRC must at the same time, by notice to P, offer P a review of
the decision.

(2) This section does not apply to the notification of the
conclusions of a review."

45 28. Section 15C of FA 1994 also deals with reviews. It states as follows:

- “(1) HMRC must review a decision if—
- (a) they have offered a review of the decision under section 15A, and
 - (b) P notifies HMRC of acceptance of the offer within 30 days beginning with the date of the document containing the notification of the offer of the review....”

The scope of the appeal

29. Judge Roger Berner, sitting in the Upper Tribunal, gave Mr Denley permission to appeal on two grounds:
- (a) whether an excise duty point arises in the Coquelles Control Zone (“the Coquelles Point”); and
 - (b) whether the refusal to restore the tobacco and/or the imposition of a penalty was disproportionate (“the Proportionality Point”).
30. On 13 June of this year, Mr Denley applied for permission to rely on two more grounds of appeal. They were stated in these terms in the application:
- (a) “The FTT erred in law in holding that the excise duty assessment had been correctly raised. There was no valid assessment under section 12 [FA] 1994. The only assessment made by HMRC was under section 116, [CEMA], which was not an assessment that HMRC had power to make because the Appellant was not a revenue trader” (“the Excise Duty Assessment Point”); and
 - (b) “The FTT also erred in confirming the penalty when the notice of the penalty assessment did not state that the Appellant had a statutory right to a review of the decision to issue a penalty” (“the Penalty Point”).
31. HMRC opposed the application to rely on additional grounds of appeal, albeit in the end without much vigour. Mr Kieron Beal QC, who appeared for HMRC with Mr Brendan McGurk, argued that the decision of the Court of Appeal in *BPP Holdings Ltd v Revenue & Customs Comrs* [2016] EWCA Civ 121, [2016] 1 WLR 1915, recently upheld by the Supreme Court (see [2017] UKSC 55), means that a stricter approach should nowadays be taken to compliance with procedural requirements. Mr Beal further relied on the summary of some of the principles governing applications to amend given in *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm). In that case, Carr J said this (at paragraph 38):
- “Drawing these authorities together, the relevant principles can be stated simply as follows:

- 5 a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
- 10 b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
- 15 c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;
- 20 d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;
- 25 e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;
- 30 f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;
- 35 g) a much stricter view is taken nowadays of non-compliance with the CPR and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so.”
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32. In the present case, Mr Beal pointed out, the application for permission to rely on the new grounds stated merely that they had been identified “[i]n the course of preparation for this hearing”. That, said Mr Beal, does not provide a proper explanation for the lateness of the application.

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33. On the other hand, Mr Denley’s application should not be regarded as “very late” for the purposes of the principles set out in *Quah*. An application for permission to amend grounds of appeal would be “very late” if it would cause the appeal date to be lost. That has not been the case with Mr Denley’s application. The points were fully argued at the hearing that had already been fixed.

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34. On balance, it seems to us that we should grant Mr Denley permission to rely on the further grounds of appeal. The issues he seeks to raise are essentially legal ones and can be addressed with no evidence beyond that which was before the FTT and is available to us. In the circumstances, it seems to us to be just, and not unfair to HMRC, to exercise our discretion to allow Mr Denley to amend his grounds of appeal in the way he wishes.

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20 **The Coquelles Point**

35. Under regulation 13 of the 2010 Regulations, as amended by the Channel Tunnel (Alcoholic Liquor and Tobacco Products) Order 2010, an excise duty point arises where goods already released for consumption in another Member State are first held for a commercial purpose in the United Kingdom *or the Coquelles Control Zone*. That there should be an excise duty point in the Coquelles Control Zone accords with arrangements agreed between the United Kingdom and France. The treaty between the two countries concerning the construction and operation by private concessionaires of a channel fixed link signed on 12 February 1986 (“the Treaty of Canterbury”) provided that frontier controls would be “organised in a way which will reconcile, as far as possible, the rapid flow of traffic with the efficiency of the controls” and for a supplementary protocol or arrangements to “make provision to enable public authorities to exercise their functions in an area in the territory of the other State where controls are juxtaposed”. Subsequently, on 25 November 1991, the United Kingdom and France entered into a protocol concerning frontier controls and policing, co-operation in criminal justice, public safety and mutual assistance relating to the Channel Tunnel (“the Sangatte Protocol”). This included, in article 5, the following:

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“In order to simplify and speed up the formalities relating to entry into the State of arrival and exit from the State of departure, the two Governments agree to establish juxtaposed national control bureaux in the terminal installations situated at Fréthun in French territory and at Folkestone in British territory. These bureaux shall be so arranged that, for each direction of travel, the frontier controls shall be carried out in the terminal in the State of departure.”

5 The protocol went on to state, for example, that the laws and regulations relating to frontier controls of the adjoining State should be applicable in the control zone situated in the host State and should be put into effect by the officers of the adjoining State in the same way as in their own territory (see article 9).

10 36. It is Mr Denley's case that, while the extension of regulation 13 of the 2010 Regulations to the Coquelles Control Zone might reflect what had been agreed bilaterally between the United Kingdom and France, it is incompatible with Council Directive 92/12/EEC ("the Excise Directive"). Article 33 of this Directive states, among other things:

15 "where excise goods which have already been released for consumption in one Member State are held for commercial purposes in another Member State in order to be delivered or used there, they shall be subject to excise duty and excise duty shall become chargeable in that other Member State".

20 37. Miss Choudhury, who argued this part of Mr Denley's case, pointed out that the Excise Directive thus provides for excise duty to be chargeable where goods already released for consumption in one Member State are held in "another Member State". Where, she submitted, goods released for consumption in France are held in the Coquelles Control Zone, they are still within France, not in "another Member State". In so far, therefore, as regulation 13 of the 2010 Regulations, in its amended form, contains provision for an excise duty point to arise in the Coquelles Control Zone, it is (so Miss Choudhury said) incompatible with the Excise Directive and ought to be disapplied.

30 38. Mr Beal took issue with Miss Choudhury's contentions on their merits. He maintained that the arrangements agreed between the United Kingdom and France give practical effect to the proper implementation of Article 33 of the Excise Directive. Giving the Excise Directive a purposive construction, conformably with the requirements of international law which are respected by EU law, it is appropriate, Mr Beal argued, to interpret the expression "another Member State" in article 33 as including an area in which another Member State has been empowered to give effect to the Excise Directive.

40 39. Mr Beal also, however, submitted that it is not open to us to rule on the issue raised by Mr Denley. The point had to be taken, if at all, in condemnation proceedings under schedule 3 to CEMA. Since Mr Denley did not challenge the seizure of the tobacco in accordance with paragraph 3 of that schedule, the tobacco is to be "deemed to have been duly condemned as forfeited" pursuant to paragraph 5 of the schedule. That means, Mr Beal said, that it is not open to Mr Denley now to advance any argument which, if correct, would imply that the seizure was illegal.

40. Mr Beal referred us in this context to *Revenue & Customs Comrs v Jones* [2011] EWCA Civ 824, [2012] Ch 414. In that case, Mr and Mrs Jones maintained in an appeal against the non-restoration of goods and their vehicle that the goods had been for their personal use and gifts for members of their family. The Court of Appeal concluded that the FTT had no power to re-open and redetermine the question whether or not the seized goods had been legally imported for personal use. That question, Mummery LJ (with whom Moore-Bick and Jackson LJ agreed) said (in paragraph 73), was “already the subject of a valid and binding deemed determination under [CEMA]” and “the FTT only had jurisdiction to hear an appeal against a review decision made by HMRC on the deemed basis of the unchallenged process of forfeiture and condemnation”. Mummery LJ explained the position as follows (in paragraph 71):

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15 “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 [i.e. CEMA], the relevant authorities, the articles of the Convention [i.e. the European Convention on Human Rights] and the detailed points made by HMRC.

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 (1) The owners’ goods seized by the customs officers could only be condemned as forfeit pursuant to an order of a court. The FTT and the UT are statutory appellate bodies that have not been given any such original jurisdiction.

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 (2) The owners 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.

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 (3) The owners 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.

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 (4) The stipulated statutory effect of the owners’ withdrawal of their notice of claim under paragraph 3 of Schedule 3 was that the goods were deemed by the express language of paragraph 5 to have been condemned *and* to have been ‘duly’ condemned as forfeited as illegally imported goods. The tribunal must give effect to the clear deeming provisions in the 1979 Act: it is impossible to read them in any other way than as requiring the goods to be taken as ‘duly condemned’ if the owner does not challenge the legality of the seizure in the allocated court by invoking and pursuing the appropriate procedure.

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- (5) The deeming process limited the scope of the issues that the owners 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 owners 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 owners. In brief, the deemed effect of the owners’ failure to contest condemnation of the goods by the court was that the goods were being illegally imported by the owners 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 owners 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 owners. 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’s case* [2004] QB 93 and as approved by the Court of Appeal in *Gascoyne’s case* [2005] Ch 215. 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.
- (8) The tentative obiter dicta of Buxton LJ in *Gascoyne’s case* on the possible impact of the Convention on the interpretation and application of the 1979 Act procedures and the potential application of the abuse of process doctrine do not prevent this court from reaching the above conclusions. That case is not binding authority for the

5 proposition that paragraph 5 of Schedule 3 is ineffective as infringing article 1 of the First Protocol or article 6 where it is not an abuse to reopen the condemnation issue; nor is it binding authority for the propositions that paragraph 5 should be construed other than according to its clear terms, or that it should be disapplied judicially, or that the owners are entitled to argue in the tribunal that the goods ought not to be condemned as forfeited.

10 (9) It is fortunate that Buxton LJ flagged up potential Convention concerns on article 1 of the First Protocol and article 6, which the court in *Gora's case* did not expressly address, and also considered the doctrine of abuse of process. The Convention concerns expressed in *Gascoyne's case* are allayed once it has been appreciated, with the benefit of the full argument on the 1979 Act, that there is no question of an owner of goods being deprived of them without having the legal right to have the lawfulness of seizure judicially determined one way or other by an impartial and independent court or tribunal: either through the courts on the issue of the legality of the seizure and/or through the FTT on the application of the principles of judicial review, such as reasonableness and proportionality, to the review decision of HMRC not to restore the goods to the owner.

25 (10) As for the doctrine of abuse of process, it prevents the owner from litigating a particular issue about the goods otherwise than in the allocated court, but strictly speaking it is unnecessary to have recourse to that common law doctrine in this case, because, according to its own terms, the 1979 Act itself stipulates a deemed state of affairs which the FTT had no power to contradict and the owners were not entitled to contest. The deeming does not offend against the Convention, because it will only arise if the owner has not taken the available option of challenging the legality of the seizure in the allocated forum.”

40 41. *Jones* was applied in *HMRC v Race* [2014] UKUT 331 (TCC) in the context of an appeal against an assessment to excise duty. Warren J, sitting in the Upper Tribunal, said (in paragraph 33 of his decision):

45 “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* [i.e. *HMRC v European Brand Trading Ltd* [2014] UKUT 226 (TCC), a decision of Morgan J]. 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.”

5 42. Morgan J’s decision in the *European Brand Trading* case, to which Warren J referred in this passage, was subsequently upheld by the Court of Appeal: see [2016] EWCA Civ 90. In the course of his judgment, Lewison LJ quoted and endorsed paragraph 33 of Warren J’s decision in *Race*: see paragraphs 38 and 39 of the judgment.

10 43. For her part, Miss Choudhury argued that the fact that Mr Denley could have taken the Coquelles Point in condemnation proceedings does not prevent him from advancing it in this forum. If, she said, no excise duty point can arise in the Coquelles Control Zone as a matter of EU law, it would be absurd to deem that to be the case. The true position, she submitted, is that someone who has not challenged a seizure in condemnation proceedings may be precluded from disputing factual matters but will not be shut out from taking points of law.

20 44. Miss Choudhury sought support for her submissions in the decision of the FTT (Judge Anne Redston and Mr Julian Stafford) in *Van Driessche v HMRC* [2016] UKFTT 441 (TC). There, the FTT concluded that penalty and restoration cases fell to be treated differently. In the FTT’s view, the deeming required by paragraph 5 of schedule 3 to CEMA did not apply to the penalty provisions with which it was concerned. In case, however, it was wrong about that, the FTT went on to consider briefly what the position would have been if deeming did apply generally to penalty cases. It asked itself whether, on that assumption, it would be required to find that the appellant (Mrs Van Driessche), who had flown to Gatwick Airport from Euroairport, was travelling from a third country and/or that the goods at issue were purchased duty free. As to this, the FTT said:

“188. We answered this question in the negative, for the following three reasons.

35 (1) As we have already noted, in *Jones* at [71(7)], Mummery LJ said that (our emphasis) ‘deeming something to be the case carries with it any fact that forms part of the conclusion.’ However, as Euroairport is physically situated within France, treating part of the airport as within Switzerland must be a question of law, not a question of fact.

40 (2) In [Peter] Gibson J’s authoritative statement on the scope of deeming provisions [in *Marshall v Kerr* [1993] STC 360, at 366], he said (again, our emphasis):

‘...because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from

or accompanying that deemed state of affairs, unless prohibited from doing so.'

5 From our analysis of the legal provisions at §110ff, we concluded that Euroairport is in the EU as a matter of European law. Assuming that is correct, a provision in CEMA Schedule 3 cannot deem a place to be outside the EU. That would be to allow a UK deeming provision to displace EU law.

10 (3) Third, [Peter] Gibson J also said that constructions which lead to absurdity should be avoided. We find that it would be 'absurd' for a place to be deemed to be in Switzerland when as a matter of fact and law it is in France.

15 189. Therefore, even if deeming applies generally to penalty appeals, it cannot extend to deeming a person to have arrived from a third country if she actually arrived from a place within the EU."

20 45. Miss Choudhury further referred to *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (Case 106/77) [1978] ECR 629, where the ECJ held (at paragraph 24 of the judgment) that:

25 "a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provisions of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means".

30 46. Mr Beal responded that the views expressed by the FTT in the *Van Driessche* case are not binding on us, appear to have been reached in ignorance of the Court of Appeal's decision in the *European Brand Trading* case and are in any event incorrect in law. As regards the *Simmenthal* case, Mr Beal took us to Joined Cases C-295/04 to C-298/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619, where the CJEU said (in paragraph 65 of its judgment):

40 "it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to prescribe the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)".

Here, Mr Beal argued, Parliament has determined that issues relating to seizure should be determined in condemnation proceedings and there is no suggestion that that system does not satisfy the principles of equivalence and effectiveness. There can therefore (so Mr Beal submitted) be no EU law objection to requiring the Coquelles Point to be determined in condemnation proceedings rather than proceedings such as those before us.

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47. In our view, the Coquelles Point cannot be taken in the present proceedings. Our reasons include these:

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(a) Mr Denley having given no notice of claim pursuant to paragraph 3 of schedule 3 to CEMA, the tobacco is to be “deemed to have been duly condemned as forfeited” under paragraph 5 of the schedule. We are, accordingly, required to take the tobacco as “duly condemned”;

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(b) The tobacco would not have been “duly condemned” if, as Mr Denley seeks to argue, the application of regulation 13 of the 2010 Regulations to the Coquelles Control Zone were incompatible with the Excise Directive and so invalid. On that basis, no excise duty point could have arisen by the time the tobacco was seized and, hence, the tobacco could not have been liable to forfeiture or seizure. The contention that Mr Denley is trying to advance is thus inconsistent with the assumption that the tobacco was “duly condemned”;

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(c) In the *Jones* case, Mr and Mrs Jones wanted to challenge the factual basis for the relevant seizure. It was in that context that Mummery LJ said that “[d]eeming something to be the case carries with it any *fact* that forms part of the conclusion” (emphasis added). His logic applies equally to legal points implicit in the deemed conclusion;

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(d) The fact that Mr Denley is relying on EU rather than domestic law makes no difference. We agree with Mr Beal that there can be no EU law objection to requiring the Coquelles Point to be determined in condemnation proceedings;

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(e) Miss Choudhury’s arguments, if right, would suggest that someone from whom goods had been seized could dispute the lawfulness of the seizure before the FTT even though it had already been held to be lawful in condemnation proceedings. That would make no sense;

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(f) We doubt, with respect, the correctness of the views expressed by the FTT in paragraphs 188 and 189 of its decision in the *Van Driessche* case.

48. In the circumstances, we do not consider it appropriate for us to comment on the underlying merits of the Coquelles Point.

The Excise Duty Assessment Point

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49. This point arises from the fact that the EX601 form that was enclosed with Officer Ausher's letter of 8 August 2012 referred to payment of the assessed amount being "due under Section 116 of the Customs and Excise Management Act 1979" (see paragraphs 9 and 10 above). Since, said Mr Chacko, who argued this part of the case on his behalf, Mr Denley was not a "revenue trader", section 116 of CEMA was not in fact applicable. Section 12(1A) of FA 1994 might have been, but an invalid assessment under section 116 CEMA cannot, Mr Chacko said, be treated as if it were a valid one under section 12(1A) of FA 1994.

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50. The EX601 form is a standard document that has been the subject of argument before. It featured in *Adewale v HMRC* [2017] UKFTT 103 (TC). In that case, the FTT (Judge Aleksander) said (in paragraph 59):

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"In addition, I would note that the excise duty assessment states on its face that the duty was payable under s116 CEMA. In fact it was payable under s12(1A) FA 1994 (I note that the correct legislative reference was given in HMRC's letter of 9 September 2014 and in the review decision letter of 31 July 2015). The error was drawn to my attention by [counsel for HMRC] in her skeleton argument and in her submissions, and a letter was sent to Mr Adewale on 9 January 2016 correcting the error and apologising for the mistake (Mr Adewale told me that he had not received the letter at the time of the hearing). [Counsel for HMRC] submits that this error is not fatal to the assessment, in the light of the decision of the High Court in *House (trading as P & J Autos) v HMCE* [1994] STC (as approved by the Court of Appeal ...). In that case, May J accepted the submissions made on behalf of the taxpayer that the minimum requirements for a valid notification of an assessment were that it should state the name of the taxpayer, the amount due, the reason for the assessment, and the period of time to which it relates. The difficulty (as is acknowledged in [counsel for HMRC's] skeleton) is that the incorrect legislative reference goes to the reason for the assessment."

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51. Mr Chacko sought further support for his submissions in *IRC v McGuckian* [1994] STC 888 (reversed on other grounds by the House of Lords: see [1997] 1 WLR 991), where Carswell LJ said (at 923) that he would be "slow to accept that an assessment which clearly specifies the source of the income or profits as income under Ch III of Pt XVII of the [Income and Corporation Taxes Act 1970] could be relied on to justify an attempt to hold the taxpayer liable under Ch II", Carswell LJ continued:

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“The material facts which the Revenue has to prove in each case are entirely different, and the taxpayer would be wholly unable to know whether to appeal against the assessment (or to which body, the General or the Special Commissioners) or, having done so, what evidence to adduce at the hearing.”

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52. Mr Beal said that the reference to section 116 of CEMA in the present context was a mistake. That that was so could be seen from the covering letter, which referred to the issue of an EX601 Notice of Assessment “under Section 12(1A) of the Finance Act 1994”. In any case, there was no error in the assessment itself, which was made under section 12(1A) of FA 1994. The EX601 form was not itself the assessment, but (taken in conjunction with the letter) was intended to notify Mr Denley of the assessment, and (so Mr Beal submitted) a notice of assessment will not be invalid just because it refers to the wrong statutory provision.

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53. The authorities to which Mr Beal took us on this part of the case included these:

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(a) *House (trading as P & J Autos) v C & E Comrs* [1994] STC 211, where May J said in a VAT context (at 226-227) that he did “not see why a notification cannot be contained in more than one document”; that, on the facts, he considered it permissible to read together a notice of assessment, letter and schedules; and that, doing so, they contained the “substantial minimum requirements” for which the taxpayer contended (viz. “the name of the taxpayer, the amount of tax due, the reason for the assessment and the period of time to which it relates” – see 223). On appeal, May J’s decision was upheld: see [1996] STC 154. The Court of Appeal considered (at 162) that the documentation that had been supplied was a “sufficient explanation in reasonably clear terms of the effect” of the assessment; and

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(b) *BUPA Purchasing Ltd v C & E Comrs (No 2)* [2007] EWCA Civ 542, [2008] STC 101, another VAT case, where Arden LJ (with whom Auld and May LJ agreed) said (at paragraphs 43-48) that, while as a matter of public law the Commissioners might be bound to supplement an assessment with a notification of the reasons, the statute itself did not refer to such obligations and “the reasons for an assessment do not form part of an assessment under s 73(1) to which statutory consequences as to alteration apply”.

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54. On balance, we agree with Mr Beal that the defect in the EX601 form does not matter in this case. Our reasons include these:

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(a) An assessment and its notification are, in principle, distinguishable. The distinction can be seen in section 12(1A) of FA 1994, which provides for HMRC to “assess the amount of duty due” and “notify that amount”;

- 5 (b) On the facts of the present case, there is no reason to doubt that an assessment was made under section 12(1A) of FA 1994. That is consistent not only with what was stated in the letter with which the EX601 form was enclosed, but with evidence given by Officer Ausher;
- 10 (c) Mr Chacko pointed out that Officer Ausher did not refer in her witness statement to having made a decision to assess in advance of the issue of the EX601 form. As he recognised, however, there was no need for Officer Ausher to explain matters in more detail before the FTT because the Excise Duty Assessment Point had not yet been raised. In the circumstances, we do not think it is open to Mr Denley to advance any argument before us on the basis that there was or may have been no prior decision to assess;
- 15 (d) The EX601 form is, as it seems to us, properly to be read with the letter that accompanied it;
- 20 (e) The letter stated that Mr Denley was liable to pay excise duty by virtue of regulation 13 of the 2010 Regulations, and the EX601 form said nothing to the contrary. Taken together, therefore, the documents correctly and unambiguously identified the basis on which Mr Denley was alleged to have incurred excise duty. The contradiction between the letter's reference to section 12(1A) of FA 1994 and the EX601 form's to section 116 of CEMA related to the assessment mechanism rather than the underlying liability. That being so, it seems to us that, overall, the documentation can be said to have provided an adequate explanation of the "reason for the assessment" (to quote from May J's judgment in the *House* case) and its "effect" (to borrow from the Court of Appeal decision);
- 25 (f) Although Mr Denley was erroneously told, via the EX601 form, that he was being assessed under section 116 of CEMA, he was also informed, through the covering letter, that the assessment of which he was being notified was made under section 12(1A) of FA 1994. Moreover, there is no evidence that Mr Denley was misled and he had a right of appeal on the merits. In all the circumstances, it appears to us that, even if it could be said that HMRC had failed to fulfil properly its public law duty to give reasons, that would not matter; and
- 30 (g) The passage from Carswell LJ's judgment in *McGuckian* was dealing with a rather different situation. In the present case, the letter and EX601 form, taken together, did not "clearly" specify that the assessment was under section 116 of CEMA rather than section 12(1) of FA 1994. Nor is this a case where it could be said (as Carswell LJ did) that the material facts which HMRC would have to prove would be "entirely different" or the person assessed
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5 would be “wholly unable” to know whether or where to appeal or what evidence to adduce. As already mentioned (see sub-paragraph (e) above), the documents sent to Mr Denley accurately identified the basis on which excise duty was said to have been incurred. In any event, the Court of Appeal (Northern Ireland)’s decision in the *McGuckian* case was later superseded by that of the House of Lords.

The Penalty Point

10 55. By virtue of section 15A of FA 1994, HMRC were required, when notifying Mr Denley of the £546 penalty, “at the same time, by notice to [him],” to “offer [him] a review of the decision”.

15 56. As mentioned above (paragraph 14), the notice of penalty assessment issued to Mr Denley stated under the heading “Appeals”:

20 “If you do not agree with this assessment you need to write to us within 30 days of the date of this notice, telling us why you think our decision was wrong and we will look at it again. If you prefer, we will arrange for a review by an officer not previously involved in the matter. You will then have the right to appeal to an independent tax tribunal. Alternatively you can appeal direct to the tribunal within 30 days of this notice.

25 You can find further information about this in fact sheet HMRC 1 HM Revenue and Customs Decisions – What to do if you disagree”

30 57. Miss Choudhury contended that this did not comply with section 15A of FA 1994. The statement that HMRC would arrange a review if Mr Denley would “prefer” one did not make it clear that he was statutorily entitled to a review; it merely suggested that he could ask for one. As a result, Miss Choudhury said, of the failure to offer a review in accordance with section 35 15A of FA 1994, the notification of the penalty assessment is invalid.

40 58. Miss Choudhury relied in support of her submissions on the decision of the FTT (Judge John Brooks) in *NT ADA Ltd v HMRC* [2016] UKFTT 642 (TC). That case concerned section 83A of the Value Added Tax Act 1994, which provides:

45 “(1) HMRC must offer a person (P) a review of a decision that has been notified to P if an appeal lies under section 83 in respect of the decision.

(2) The offer of the review must be made by notice given to P at the same time as the decision is notified to P....”

On the facts, the letter containing notice of a penalty had stated:

5 “If you disagree with this decision you can ask for a review by an independent HMRC Officer by writing to the address above within 30 days of the date of this letter. Or you can appeal to the Tribunal Service within 30 days of this letter. If you opt for a review, you can still appeal to the tribunal after the review has finished.”

10 59. The FTT agreed with the appellant that the penalty notice was ineffective. Judge Brooks said (at paragraph 29):

15 “I accept [counsel for the appellant’s] submission in relation to s 83A VATA and, given the mandatory requirement in the legislation, it is not sufficient for HMRC to state, as it did in the letter of 4 April 2016, that an appellant ‘can ask for a review’ without any assurance that it will be granted. Rather it should have
20 been stated, as it was in the 29 October 2012 letter, that an appellant has ‘a statutory right to a review’. In my judgment the failure to make it clear to NTJ that it was entitled to a review, and not could just ask for one, invalidates the decision which cannot therefore be an appealable matter within s 83(1) VATA. As such, the Tribunal does not have the jurisdiction to determine it.”

25 60. Mr Beal, however, argued that HMRC complied with section 15A of FA 1994 in the present case. We agree. The section obliged HMRC to “offer a review of the decision”. This they plainly did. They informed Mr Denley that, if he wanted, they would “look at it again” and that, if he preferred, they would “arrange for a review by an officer not previously involved in the matter”. That met the terms of the legislation. Section 15A does not
30 stipulate that the recipient of the notice must be told that there is a “statutory right to a review”. Nor does it attempt to differentiate between offers and invitations to treat (compare the *NT ADA* case, at paragraph 26). It was incumbent on HMRC to convey the message that Mr Denley could have a review if he wished, and they did so.

35 **The Proportionality Point**

40 61. There are two principal elements making up Mr Denley’s argument on this issue. The first is that while HMRC’s policies relating to the restoration, or non-restoration, of seized goods and to the imposition of penalties may be individually proportionate, it is incumbent on HMRC to consider their cumulative effect on a person such as Mr Denley. The second is that the gravity of his conduct is a material factor, with the implication that it was not considered, or adequately considered, when the decisions were taken.

45 62. Although both of those propositions were touched upon by the FTT, they were not advanced in the same way: Mr Denley argued (see paragraph 34 of the decision) that the tobacco was not held by him for a commercial purpose because he was not intending to resell it for profit, that he could not afford to pay and that “[r]eceiving a tax levy/charge in addition to

having the goods seized is wrong”. The FTT dismissed those arguments, saying, at paragraph 41, that the absence of a challenge to the seizure had the consequence the goods were deemed to be held for a commercial purpose and, at paragraph 54, that “The Appellant’s statement that he cannot afford to pay the assessment and penalty is not a valid ground of appeal.” There is nothing else in the decision which suggests that the FTT considered proportionality as a discrete topic.

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63. Mr Chacko, who argued this point for Mr Denley before us, accepted that he could not contend that HMRC should have considered proportionality when deciding whether or not to issue a duty assessment; the duty was either due or it was not, and there was no discretion to be applied in deciding whether or not to assess. But there was a discretion to decide whether or not to restore the goods, and a discretion to decide whether or not to impose a penalty, and in exercising their discretion HMRC were obliged to consider the cumulative effect of their decisions on the person concerned. That was made clear by Lord Bingham in *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368, a deportation case, in which, at paragraph 24, he said that it was necessary to consider the effect of deportation on the individual, and not the effect on deportees as a class; and similar observations were made by the European Court of Human Rights in *James v United Kingdom* (1986) 8 EHRR 123 and by the Supreme Court in *Bank Mellat v HM Treasury* [2014] AC 700.

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64. Although it could not be said that the decision to assess could itself be attacked on proportionality grounds, the fact of the assessment was a factor which should have been taken into account when HMRC decided whether or not to restore the goods, and whether or not to impose a penalty. For that argument Mr Chacko relied on the observations of a differently-constituted panel of the FTT in *Pilats v Director of Border Revenue* [2016] UKFTT 193 (TC) at [61]:

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

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65. Although the monetary penalty imposed on Mr Denley amounted to 20% of the duty, the refusal to restore seized goods is equivalent, Mr Chacko argued, to the imposition on the person concerned of a penalty of more

than 100% of the unpaid duty, as the goods cannot be replaced within the UK for less than their duty-inclusive price. Thus Mr Denley had suffered a total penalty of more than 120% of the duty sought to be evaded, yet the primary penal provision applicable to tax cases, schedule 41 to the Finance Act 2008, reserved penalties of more than 100% to the most serious cases of deliberate concealment and, as HMRC's own Officers had accepted, Mr Denley had not concealed the tobacco or the circumstances in which he was importing it.

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10 66. A further relevant factor was the extent of Mr Denley's culpability: as HMRC accepted, he had been open with Officer Curtis that he had been given money by his family in order that he could buy the tobacco, and there was no suggestion that what he said was untrue and that, in fact, he intended to sell the tobacco for profit. The proposition in HMRC's
15 response to Mr Denley's appeal to this tribunal that, because the tobacco was deemed to be forfeit, it must be assumed that it had been imported for the purpose of resale at a profit was wrong, and overstated what the Court of Appeal had decided in *Jones*; the tobacco was liable to forfeiture because Mr Denley had accepted money from his family, and there was no
20 rationale for assuming that he had brought it in for more nefarious purposes.

67. HMRC's own policy at the time of the seizure was that in "not for profit" cases without aggravating features the goods would normally be offered for restoration on payment of the duty and VAT, plus a penalty of 15%. That there was a distinction to be drawn between "not for profit" importations and true commercial smuggling was made clear by the Court of Appeal in *Lindsay v Customs and Excise Commissioners* [2002] EWCA Civ 267, [2002] STC 588 at paragraph 64, where the Master of the Rolls
25 observed that:
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35 "The commissioners' policy does not, however, draw a distinction between the commercial smuggler and the driver importing goods for social distribution to family or friends in circumstances where there is no attempt to make a profit. Of course even in such a case the scale of importation, or other circumstances, may be such as to justify forfeiture of the car. But where the importation is not for the purpose of making a profit, I consider that the principle of proportionality requires that each case should be considered on its
40 particular facts, which will include the scale of importation, whether it is a 'first offence', whether there was an attempt at concealment or dissimulation, the value of the vehicle and the degree of hardship that will be caused by forfeiture. There is open to the commissioners a wide range of lesser sanctions that will
45 enable them to impose a sanction that is proportionate where forfeiture of the vehicle is not justified."

68. In this case HMRC had treated Mr Denley as if he were a commercial smuggler, to the extent that in their written submissions they accused him of lying to Officer Curtis when she had accepted that he had been open and honest. The accusation was based on a misreading of the officer's notes. Mr Denley had been asked whether he had any prohibited goods, and correctly answered that he had not. It was only then that he was asked about tobacco, and he had immediately stated that he did have some. The decisions not to restore the goods and to impose a penalty were affected by this false perception of Mr Denley's culpability and for that reason must be disproportionate.
69. Mr Beal emphasised in his response the scale of the well-documented, indeed notorious, problem which tobacco smuggling presents, and the consequent legitimacy of the harshness of HMRC's policy. As Mr Chacko did not attack the policy itself we do not need to dwell on this point, save to observe that we accept (as indeed did the Court of Appeal in *Lindsay*) that there is a serious problem, and that punitive deterrent measures are justified. Further support for that proposition may be found in another case to which Mr Beal referred us, *Ali v Secretary of State for the Home Department* [2016] UKSC 60, [2016] 1 WLR 4799, in which Lord Reed remarked, at paragraph 46, that "where the Secretary of State has adopted a policy based on a general assessment of proportionality, as in the present case, [the tribunal] should attach considerable weight to that assessment".
70. In addition, as the European Court of Human Rights made clear in *Gasus Dossier-und Fördertechnik GmbH v Netherlands* (Application 15375/89) (1995) 20 EHRR 403, in enacting laws for the purpose of securing the payment of taxes a state has a wide margin of appreciation, which is to be respected unless the measure adopted "is devoid of reasonable foundation."
71. Whether an importation is for own use or commercial is, Mr Beal argued, a binary question: there is no separate category of "not for profit" importation, albeit the response to such an importation, when detected, may be less severe than would be the response to an importation of tobacco for the purpose of resale at a profit. Although Mr Denley had declared the tobacco he had with him when asked, HMRC do not accept that he was truthful when he claimed that 3 kg were for himself because he had no smoking materials (matches, lighter, open packets) in his possession when he was stopped. Moreover, even on his own case, this was an aggravated importation as described in HMRC's policy: Mr Denley had more than three times the threshold amount of 5 kg, and on his own admission he had made a similar, not for profit, importation in the recent past.
72. There was, Mr Beal said, nothing in the argument that HMRC should have considered the cumulative effect on Mr Denley of all of the relevant decisions. In *R v Smith (David)* [2001] UKHL 68 a smuggler was convicted of the fraudulent evasion of excise duty, for which he was

imprisoned; in addition a confiscation order, in the amount of the duty evaded, was made—the defendant had obtained a pecuniary advantage, even if it was short-lived, by his possession in the UK of excise goods which had not borne UK duty. In *R v Waya* [2012] UKSC 51 the Supreme Court observed, with reference to *Smith*, that the seizure of the smuggled goods did not undo the pecuniary advantage. In *Pilats* the FTT undertook an analysis of those authorities and correctly said at paragraph 59 that:

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

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73. As Mr Denley accepted, the penalty imposed on him had been properly calculated in accordance with schedule 41 to the Finance Act 2008. No exceptional circumstances had been identified to the FTT, and none were identified now, which might justify a departure from that calculation. The argument that the forfeiture of the tobacco was equivalent to another penalty of 100% was misconceived; what Mr Denley had lost by reason of that forfeiture was the price he had paid for the goods, and not the UK duty on them.

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74. We agree with Mr Beal that this ground of appeal must fail. Our reasons are these:

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(a) As Mr Chacko 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;

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(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;

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(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;

- 5 (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
10 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
15 our view, plain that what he has suffered is not "devoid of reasonable
foundation", as the court put it in *Gasus Dosier*.

Conclusion

- 20 75. We shall dismiss Mr Denley's appeal.
76. We should like, finally, to thank Miss Choudhury and Mr Chacko for the
help they have provided on a pro bono basis.



25 **Mr Justice Newey**



Judge Colin Bishopp

30 **RELEASE DATE: 25 August 2017**