TC04809

Appeal numbers: TC/2014/06126
TC/2014/06127
TC/2014/06128

EXCISE DUTY – assessments to excise duty following seizure of goods on their being brought into the UK from an EU member state – appellants claims of unfairness and inadequacies in procedure - application to strike out appellants' appeals – application allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

BARRY FRITH **Appellant**

- and -

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

STEPHEN MAYO **Appellant**

- and -

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

NICHOLAS HEWITT **Appellant**

- and -

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

TRIBUNAL: JUDGE ASHLEY GREENBANK

Sitting in public at Lincoln on 13 August 2015
The Appellants in person
Catherine Hayes, Counsel, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents.

DECISION

Introduction

1. This decision relates to the applications by the Respondents ("HMRC") to strike out the appeals made by the Appellants against assessments for excise duty either (i) under rule 8(2)(a) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules") on the grounds that the Tribunal does not have jurisdiction in relation to the proceedings or (ii) under rule 8(3)(c) of the Tribunal Rules on the grounds that there is no reasonable prospect of the Appellants' cases succeeding.

The hearing

2. At the hearing, the parties agreed that the applications to strike out each of the Appellants' appeals could be heard together.

3. Following the hearing, the Tribunal gave a decision in summary form in accordance with rule 35(3)(a) of the Tribunal Rules allowing the applications made by HMRC and striking out the Appellants' appeals. The summary decision was issued on 28 August 2015.

4. The decision was given subject to the parties' rights to request full written findings and reasons under rule 35(4) of the Tribunal Rules. The Appellants have requested full written findings and reasons. This is the full decision.

Background

5. The hearing was not a substantive hearing. The Tribunal was not engaged in a full fact-finding exercise. I have described below, by way of background, some of the events which surround this application. Some of the factual background is not disputed, but some remains in dispute. HMRC's contention is that, even if the Appellants' version of the facts is accepted, these appeals should be struck out either on the basis that the Tribunal does not have jurisdiction in relation to the proceedings or that there is no reasonable prospect of the Appellants' cases succeeding.

6. Each of the Appellants was stopped at Humberside Airport on 21 October 2012 following a trip from Dubai via Amsterdam. Different amounts of tobacco and cigarettes were seized from each of them on the grounds that the tobacco and cigarettes had been imported from outside the EU and duty had not been paid.

7. Mr Frith was carrying 34.25 kilograms of hand rolling tobacco, 250 grams of pipe tobacco and 5,200 cigarettes. Mr Mayo was carrying 30.75 kilograms of hand rolling tobacco, 250 grams of pipe tobacco and 6,800 cigarettes. Mr Hewitt was carrying 30.25 kilograms of hand rolling tobacco, 250 grams of pipe tobacco and 7,000 cigarettes.

8. There remain significant areas of dispute surrounding the circumstances in which the Appellants were detained by UK Border Agency staff at Humberside Airport. In particular, the Appellants say:

(1) that they were stopped by UK Border Agency officials before they were able to enter the red channel and make a declaration; and

(2) that the line of questioning of the UK Border Agency officials was inadequate and inappropriate and failed to identify the relevant facts.

9. The UK Border Agency seized the goods on the grounds that they exceeded the limits for duty-free importation from outside the EU of goods liable to excise duty. The Appellants were provided with Notice 1 (which provides information on the goods that travellers can bring into the UK) and Notice 12A (which is entitled "What you can do if things are seized by HMRC or the UK Border Agency") and signed forms BOR156 (seizure information notice) and BOR162 (warning letter about seized goods).

10. In this respect, there is a dispute about the documentary evidence produced to the Tribunal. The Appellants say that the seizure information notice for Mr Frith which was presented to the Tribunal by the HMRC is not a true copy of the notice which he signed. The Appellants produced a copy of the notice which they say was signed by Mr Frith and given to him at the time the goods were seized. There are some differences in the two documents, although the information on both documents regarding the goods seized is the same.

11. Notice 12A sets out in paragraph 3.4 on page 5 (out of 18) the rights of a person whose goods have been seized to challenge the seizure. It states:

"**3.4 Is there a time limit for challenging the seizure?**

Yes. HMRC or Border Force must receive your Notice of Claim within 1 calendar month of the date of seizure shown on the Seizure Information Notice or the date shown on the Notice of Seizure. If HMRC or Border Force does not receive a Notice of Claim within the time limit, you will not be able to challenge the legality of the seizure.

The time limit is set by the law and there is no provision for late challenges. This means that unless the legality of a seizure is challenged within 1 calendar month time limit, you will automatically lose ownership of the seized thing. There is no other way to challenge the legality of a seizure.

One calendar month is defined as the corresponding date on which the goods were seized in the following month, irrespective of how many dates are in the month. For example, if the seizure occurred on the 10th day of the month you have to submit your claim by the 10th day of the following month."

12. The Appellants did not challenge the seizure of the goods within the one month time limit set out in Notice 12A.

13. There began a process of investigation under which the UK Border Agency and HMRC considered whether to levy civil penalties on the Appellants. Once again, there is some dispute about the details of that process. However, the Appellants co-operated with those enquiries and attended interviews with HMRC.

14. On 26 March 2014, HMRC issued civil evasion penalties to the Appellants under Section 8(1) Finance Act 1994 and Section 25(1) Finance Act 2003 for dishonest evasion of customs and excise duties.

15. The Appellants requested a review of the decision to impose the civil evasion penalties. HMRC responded to that request in letters to the Appellants dated 27 June 2014. The conclusion of the review was that the civil evasion penalties should be withdrawn. The reasons given included that, on the balance of probabilities "the majority of the cigarettes were purchased within the EU". The letters acknowledged that "the origin of the cigarettes could have been definitively established if the UK Border Agency officers had asked specific questions at the time of the challenge and seizure" and also stated "this decision is made without prejudice to any further action that may be considered appropriate by HMRC".

16. On 19 August 2014, HMRC raised assessments for excise duty on each of the Appellants. The amounts charged were £6,563 for Mr Frith, £6,611 for Mr Mayo and £6,590 for Mr Hewitt.

17. In a letter dated 14 September 2014, the Appellants jointly appealed against the assessments. In the letter, they raised the following grounds of appeal:

> (1) that they had been successful in their appeal against the civil evasion penalties and that the excise duty assessment was essentially punishing them twice in respect of the same matter;
>
> (2) that the line of questioning by the UK Border Agency officials had been inadequate and could and should have established the origins of the goods.

18. In a separate letter dated 15 September 2014, the Appellants jointly requested reviews of the assessment to excise duty.

19. The review was completed on 21 October 2014. On that date, HMRC sent letters to each of the Appellants confirming the assessments to excise duty.

20. On 25 March 2015, HMRC made an application to this Tribunal to strike out the Appellants' appeals on the grounds that the Tribunal does not have jurisdiction in relation to the proceedings and/or that there is no reasonable prospect of the Appellants' appeals succeeding.

The law

21. The statutory provisions relating to the seizure of goods on importation into the UK are set out in the Customs and Excise Management Act 1979 ("CEMA 1979").

22. Subject to certain exceptions, section 49(1)(a) CEMA 1979 provides that "where …. any imported goods, being goods chargeable on their importation with customs or excise duty, are, without payment of that duty … unloaded from any aircraft in the United Kingdom … those goods shall … be liable to forfeiture".

23. Section 139(1) CEMA 1979 then provides:

> "(1) Anything liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard."

24. The procedure for a person to challenge the seizure of goods is set in Schedule 3 CEMA 1979. The relevant provisions for present purposes are paragraphs 3 and 5 of Schedule 3. They are set out below so far as relevant.

> "**3**
> Any person claiming that anything 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**
> If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of anything, no such notice has been given to the Commissioners, ….. the thing in question shall be deemed to have been duly condemned as forfeited."

25. Assessments to duty are dealt with in the Finance Act 1994. Section 12(1A) provides so far as relevant as follows:

> "…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,
>
> the Commissioners may assess the amount of duty due from that person and notify that amount to that person or his representative.

26. The points at which duty is charged and the persons liable to duty are set out in the Excise Goods (Holding, Movement and Duty Point) Regulations 2010.

27. In relation to goods which have not previously been released for consumption in another EU member state, Regulation 5 provides that there is an excise duty point when the goods "are released for consumption in the UK". Regulation 6 defines the time at which goods are released for consumption in the UK. In the case of goods that

have not been and are not to be held in duty suspension arrangements, the goods are usually charged with duty on importation.

28. Regulation 13 defines the excise duty point for goods which have previously been released for consumption in another EU member state and the persons liable to duty. It provides:

> **13**
> (1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.
>
> (2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person -
>
> (a) making the delivery of the goods;
>
> (b) holding the goods intended for delivery; or
>
> (c) to whom the goods are delivered.
>
> (3) For the purposes of paragraph (1) excise goods are held for a commercial purpose if they are held -
>
> (a) by a person other than a private individual; or
>
> (b) by a private individual ("P"), except in a case where the excise goods are for P's own use and were acquired in, and transported to the United Kingdom from, another Member State by P.
>
> (4) For the purposes of determining whether excise goods referred to in the exception in paragraph (3)(b) are for P's own use regard must be taken of -
>
> (a) P's reasons for having possession or control of those goods;
>
> (b) whether or not P is a revenue trader;
>
> (c) P's conduct, including P's intended use of those goods or any refusal to disclose the intended use of those goods;
>
> (d) the location of those goods;
>
> (e) the mode of transport used to convey those goods;
>
> (f) any document or other information relating to those goods;
>
> (g) the nature of those goods including the nature or condition of any package or container;
>
> (h) the quantity of those goods and, in particular, whether the quantity exceeds any of the following quantities -
>
> 10 litres of spirits,

20 litres of intermediate products (as defined in article 17(1) of Council Directive 92/83/EEC),
90 litres of wine (including a maximum of 60 litres of sparkling wine)
110 litres of beer,
800 cigarettes,
400 cigarillos (cigars weighing no more than 3 grammes each),
200 cigars,
1 kilogramme of any other tobacco products;

(i) whether P personally financed the purchase of those goods;

(j) any other circumstance that appears to be relevant.

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

(a) "excise goods" does not include any goods chargeable with excise duty by virtue of any provision of the Hydrocarbon Oil Duties Act 1979 or of any order made under section 10 of the Finance Act 1993;

(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).

(6) Paragraphs (1) and (2) do not apply-

(a) where the excise duty point and the person liable to pay the duty are prescribed by the Excise Goods (Sales on Board Ships and Aircraft) Regulations 1999; or

(b) in the case of chewing tobacco.

The parties' arguments

HMRC's arguments

29. HMRC say that:

(1) the Appellants have raised no material grounds of appeal other than those that are relevant to whether or not the goods were subject to forfeiture;

(2) the goods were deemed to be subject to forfeiture under paragraph 5 Schedule 3 CEMA 1979;

(3) it is not open to the Tribunal to re-open the question of whether or not goods are subject to forfeiture either in a restoration appeal (see the decision of the Court of Appeal in *HMRC v Jones* [2011] EWCA 824) or

an appeal against an assessment to duty (see the decision of the Upper Tribunal in *Nicholas Race v HMRC* [2014] UKUT 331);

(4) the other matters raised by the Appellants are not within the Tribunal's jurisdiction.

30. On that basis, HMRC say that the Appellants' appeals should be struck out.

The Appellants' arguments

31. The Appellants' arguments are as follows.

(1) First, the interviews conducted by the UK Border Agency were not conducted correctly. On this point, the Appellants refer to the issues that were raised in the context of the dispute over the civil evasion penalties in which HMRC accepted that there had been some inadequacies in the interviews conducted by UK Border Agency officials at Humberside Airport.

(2) If the interviews had been conducted correctly then they would have been allowed to keep their goods. By this, I take the Appellants' to mean that if those interviews had been conducted correctly, it would have been established at the time that the goods originated from The Netherlands (as later accepted by HMRC) and that they were being imported for personal use.

(3) HMRC has never definitively established the origin of the goods. On this issue, it is true that the initial seizure was made on the basis that the goods originated from outside the EU. In the letter of 27 June 2014 withdrawing the civil evasion penalties, HMRC accepted that, on the balance of probabilities, the majority of the tobacco and cigarettes originated from the EU.

(4) At various stages of the process, they have been assured that they would have a right to appeal and to present their case. If their appeals are struck out, they will have been denied the opportunity to put their case before a court or tribunal.

(5) The Appellants say they have already won one appeal (against the civil evasion penalties) and that by pursuing an assessment to excise duty they are being punished twice in respect of the same matter.

(6) Finally, the Appellants point to various improprieties and irregularities in the conduct of the case by HMRC and the UK Border Agency. In particular, they refer to the inadequacies of the initial interview process and the questions relating to the seizure information notice issued to Mr Frith to which I have referred earlier.

Discussion

32. For the purposes of this discussion I have dealt with the Appellants' arguments in the following order: first, the substantive argument against the imposition of duty that

the goods were imported from the EU and were not held for a commercial purpose but for the Appellant's own use; second, their various complaints about the manner in which the various authorities, namely HMRC and the UK Border Agency, have handled their cases; third the argument that the Appellants are being punished twice for the same matter; and finally, the arguments that the process denies them their rights to appeal against the imposition of duty.

Goods for personal use

33. As I have mentioned above, the Appellants say that the UK Border Agency officials did not conduct the interviews properly and if they had done so, the Appellants would have been allowed to keep their goods. By this, I take the Appellants to mean that the Border Agency officials would have established – as was later accepted by HMRC – that the majority of the goods had originated from the EU and were not being imported for a commercial purpose.

34. I will discuss the challenge to the interview process later in this decision, but first I will deal with the argument that the goods were not subject to duty because they were imported from the EU for personal use.

35. It was not clear to what extent the Appellants were relying on this point. As I have mentioned above, the Appellants also raised a concern that HMRC had not at any point definitively established the origin of the goods. This may simply have been a challenge to the manner in which HMRC had conducted its enquiries. If so, I have dealt with that point later in this decision.

36. On the question of the Appellants' ability to rely on an argument that the goods were being imported for personal use, the law is clear.

37. A person whose goods are seized by UK Border Agency officials has a right to challenge the seizure of any goods in the courts. By virtue of paragraph 3 Schedule 3 CEMA 1979, that right has to be exercised within one month of the date of notice of the seizure (or, if no notice has been given, within one month of the seizure itself) by giving notice of the claim in writing to HMRC. If no notice of claim is given to HMRC within that period, the goods are "deemed to have been duly condemned as forfeited" under paragraph 5 Schedule 3 CEMA 1979.

38. The Appellants did not give any notice of claim to HMRC to challenge the seizure of the goods and so, by virtue of paragraph 5 Schedule 3 CEMA 1979, their goods were deemed to have been duly condemned as forfeited.

39. The effect of the statutory deeming on the jurisdiction of the Tribunal is described in the decision of the Court of Appeal in *HMRC v Jones*. I refer, in particular, to the judgment of Mummery LJ at paragraph [71]. I have set out this paragraph in full below as I will also refer to it later in this decision. Mummery LJ said:

> "[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.

(8) The tentative obiter dicta of Buxton LJ in *Gascoyne* 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 proposition that para 5 of Sch 3 is ineffective as infringing article 1 of the First Protocol or art 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 Respondents are entitled to argue in the tribunal that the goods ought not to be condemned as forfeited.

(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 did not expressly address, and also considered the doctrine of abuse of process. The Convention concerns expressed in *Gascoyne* 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.

(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 Respondents 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. The case of *HMRC v Jones* involved proceedings for restoration of goods. However, the position is the same in appeals against a charge to excise duty. This is demonstrated by the decision of the Upper Tribunal in the case of *Nicholas Race v HMRC*. I refer to the judgment of Warren J at paragraph [33], where he said:

> "….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."

41. In the present case, this means that Appellants have no prospect of success in an argument that no duty is payable on the grounds that the goods were imported from the EU and were for personal use. The deeming process effectively limits the matters that can be raised before the Tribunal. The Tribunal must treat the goods as if they had been duly condemned as illegal imports by order of a court. The Tribunal is not permitted to reopen questions which relate to the legality of the seizure. This includes whether or not goods are imported for personal use as that issue is taken into account in determining whether or not the goods are liable to seizure.

The exercise of HMRC and the UK Border Agency's powers

42. The Appellants have raised various matters which relate to the manner in which HMRC and the UK Border Agency have exercised their powers in the conduct of this matter. I referred to these issues above:

> (1) the arguments that interviews with UK Border Agency officials were not conducted appropriately;
>
> (2) the concerns that HMRC has never definitively established the origin of the goods; and
>
> (3) the questions that have been raised about the veracity of the copy of the seizure information notice that HMRC presented to the Tribunal (although, as I noted above, the detail of the goods seized was the same as that in the notice presented by the Appellants).

43. In each case, if and to the extent that the Appellants' argument is, in effect, to challenge the legality of the seizure of the goods, then the argument falls within the principles set out in *Jones* and *Race*. The Tribunal must treat that matter as having been decided by the courts. The Tribunal has no power to reopen the issue.

44. If and to the extent that these arguments question the fairness of HMRC and the UK Border Agency's application of the statutory provisions or their exercise of their powers under them, in my view, those are matters for which the appropriate remedy is judicial review. Although the Tribunal does have jurisdiction to review certain actions of HMRC, it has no general inherent power to do so. The Tribunal does not

have jurisdiction to review the decisions of HMRC or the UK Border Agency in the matters to which the Appellants refer.

45. In this respect, I refer to the decision of the Upper Tribunal in *Race* and to the judgement of Warren J at paragraph [35] where he said:

> "[35] As to the second of the Judge's reasons concerning procedural unfairness, it is clear that paragraphs and 5 and 6 of Schedule 3 are Convention compliant. That is not to say that the 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. It is not, in any case, immediately obvious that there is anything in the point concerning procedural unfairness in the light of the fact that Mr Race was provided with Notice 12A which set out clearly what he needed to do."

46. In this passage Warren J refers to the provision to the taxpayer of Notice 12A which informs the taxpayer that the taxpayer will not be able to challenge the legality of the seizure unless a notice of claim is sent to the relevant authorities within one month of the seizure. Notice 12A does not, however, inform the taxpayer of the other consequences of a failure to challenge the seizure of the goods in terms of the limited arguments that the taxpayer will as a result be able to raise on an appeal against the imposition of duty. To my mind, it should. It is also unhelpful that the advice in Notice 12A concerning the consequences of a failure to contest the seizure appears in the middle of a rather lengthy document. In my view, it should be more prominent. However, those observations do not affect the force of the statements made by Warren J in relation to the jurisdiction of the Tribunal in such matters.

The appeal against civil penalties

47. The Appellants also say that they have already been successful in an appeal against an assessment to civil penalties and so it would effectively punish them twice if they were to be assessed to duty on the goods.

48. It is clear that HMRC has powers to raise an assessment under section 12(1A) of the Finance Act 1994 in this case. The fact that a penalty assessment has been withdrawn does not preclude HMRC from raising an assessment. A penalty assessment involves separate and distinct issues from the underlying assessment to duty. It is not inconsistent for HMRC to withdraw a penalty assessment and to maintain an assessment for the underlying duty. In any event, HMRC reserved its position in relation to other matters in its response to the request from the Appellants for a review of the assessments to civil penalties.

49. If and to the extent that this argument is also an argument that HMRC, having agreed to withdraw the penalty assessments, would be exercising its powers unfairly if it raises an assessment for the underlying duty, then I would place it alongside the Appellants' other criticisms of HMRC and the UK Border Agency's exercise of their powers. As I have said, those are matters for judicial review. The Tribunal has no power to review the decision to raise the assessment on those grounds.

50. One other aspect of the extension of the principle in *Jones* to cases involving the assessment of duty is that, as in this case, HMRC may be raising an assessment in respect of goods which have been seized and are subject to forfeiture. It might be said that the effect is that the Appellants are punished twice in respect of the same matter. Once again, this point is dealt with in the decision in *Race*. In paragraph [34] of his decision, Warren J said:

> "… The effect of the deeming provisions is that, unless the seizure is challenged, it is not possible subsequently to argue that the goods were not liable to forfeiture because they were in fact held for personal use. I agree with Mr Puzey that it is not surprising or a cause for complaint that HMRC are entitled to assess for unpaid duty in respect of such goods."

Infringement of rights to a fair trial

51. The Appellants say that if the application to strike out their appeals is allowed, they will have been denied the right to appeal. They say that they have been promised the opportunity to make their case at various stages in the process.

52. This is in essence an argument that the limitations that the statutory deeming process imposes on the matters that can be raised before the Tribunal and the limitations on powers of the Tribunal on matters which are subject to judicial review amount to an infringement of the Appellants' rights that under the European Convention on Human Rights – whether under Article 1 of the First Protocol to the European Convention on Human Rights or Article 6.

53. In the context of the statutory deeming process, these arguments have been dealt with in the cases of *Jones* and *Race*. Those cases decide that the Appellants had a right to appeal to the courts, which they did not exercise and that those procedures are complaint with the Convention. The Appellants' rights under the Convention are not infringed by the limited nature of the matters that they are entitled to raise on a subsequent appeal to the Tribunal.

54. In this respect, I refer, once again, to the judgment of Mummery LJ in *Jones* at paragraph [71] to which I referred to at [39] above. The relevant comments are in sub-paragraphs (6) to (9). Those conclusions are supported by the decision of the Upper Tribunal in *Race* (see paragraph [35] of the decision of Warren J in that case to which I referred at [45] above).

55. As regards the limitation of the Tribunal's jurisdiction on matters which are more properly the subject of judicial review, the Appellants have a Convention-compliant remedy through an application to the courts (see, once again, the decision of the

Upper Tribunal in *Race* and, in particular the passage from paragraph [35] of the decision of Warren J to which I have referred).

56. For these reasons, in my view, the Appellants have no reasonable prospect of success in this claim.

Decision

57. I allow HMRC's application and strike out these appeals on the grounds that the Tribunal does not have jurisdiction in relation to the proceedings and/or that there is no reasonable prospect of the Appellants' appeals succeeding.

Post-script

58. This decision sets out the full findings and reasons for the decision previously issued in summary form to the parties on 28 August 2015.

59. I should also make reference to the recent decisions of the Tribunal in the cases of *Marcin Staniszewski v HMRC* [2015] UKFTT 349, *Charles Fleming v HMRC* [2015] UKFTT 362 and *James Murray v HMRC* [2015] UKFTT 371. Those decisions were not referred to in argument before me at the hearing and they did not form part of my reasoning in giving the decision. I refer to them here so that the parties might take into account the reasons given in those decisions in deciding upon the actions that they might wish to take in the future conduct of these appeals.

Rights of appeal

60. 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.

ASHLEY GREENBANK
TRIBUNAL JUDGE

RELEASE DATE: