[2016] UKFTT 570 (TC)

TC05319

Appeal number: TC/2014/06579

EXCISE DUTY – cigarettes brought in from another member state – assessment to duty and penalty for handling under Sch 41 FA 2008 – whether duty payable: yes - whether penalty payable: no.

FIRST-TIER TRIBUNAL
TAX CHAMBER

SUSAN JACOBSON **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
SUSAN STOTT FCA CTA(Member)

Sitting in public at City Exchange, Leeds on 18 May 2016

The Appellant in person

Mr Andrew Scott, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This was an appeal by Susan Jacobson ("the appellant") against an assessment to excise duty of £2,591 and an assessment of a penalty of £906. The assessments were raised following the seizure from the appellant by the Border Force of 15kg of hand rolling tobacco which she had in bags (also seized) when arriving at Leeds Bradford International Airport on a flight from Alicante, Spain.

2. We say now that we have upheld the assessment to duty but not the penalty. This means that Ms Jacobson will have to pay the duty of £2,591 but not the penalty of £906.

3. In this decision:

"CEMA" means the Customs and Excise Management Act 1979,

"EDR" means Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (the Excise Duty Directive),

"FA" means Finance Act,

"HMRC" means the Commissioners for Her Majesty's Revenue and Customs including officers of Revenue and Customs,

"HRT" means hand rolling tobacco,

"LBA" means Leeds Bradford® Airport,

"the Movement etc Regulations" means the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (SI 2010/593),

"Schedule 41" means that numbered Schedule to FA 2008, and "paragraph" without more refers to a paragraph of Schedule 41.

The evidence

4. We had a bundle from HMRC which included witness statements from Ms Margaret Milne, an officer of HMRC and Ms Eve O'Keeffe, the Border Force officer on duty at LBA on the day that the appellant arrived there from Alicante. Both officers gave oral evidence and were cross-examined by the appellant. Mr Scott ably assisted the appellant in formulating some telling questions of the officers and we are very grateful to him for assisting the appellant both in the hearing and we understand before it and during a break in the hearing. The bundle also contained HMRC's statement of case, Officer O'Keeffe's notebook entries and correspondence between the parties.

5. We found Ms Milne and Officer O'Keeffe to be honest and credible witnesses. We accept Ms Milne's evidence in full. Officer O'Keeffe's evidence and her Notebook entries were challenged vigorously by the appellant. Subject to what we say below, we accept Officer O'Keeffe's evidence.

6. Ms Jacobson was giving evidence for much of the time, and she had with her Reg Jacobson, her former partner, who was also on the flight from Alicante to LBA. Mr Jacobson made a few interventions in support of the appellant.

7. We have not found it necessary to decide whose account is correct where there are differences between the evidence of the appellant and Officer O'Keeffe. We think that in the noise and confusion of a crowed green channel after the arrival of a number of delayed flights there was room for genuine misunderstanding. We think that the appellant in particular may not have understood what Border Force wanted, and that Border Force may not have made sufficient allowance for the appellant's confused and anxious state of mind, something evidenced most starkly by the fact that she left her passport behind in the green channel, an action which Officer O'Keeffe admitted was very unusual.

8. We add that much of her evidence and the appellant's challenging of it was irrelevant to the questions we have to decide, as it related to the seizure of the appellant's goods and baggage. Although the appellant applied to have her goods restored, no issues relating to the restoration claim was before us.

9. It is possible that the appellant may have been deprived of an opportunity to put her case about the use to which the HRT was to be put. We say this because in her post-hearing submissions to the Tribunal, the appellant denied that she had ever brought in goods for commercial use and disclosed that she has successfully resisted condemnation proceeding in a Magistrate's Court in Hull in 2004 and is an experienced traveller with tobacco from another EU country.

10. She also referred in evidence to having completed and sent to the Border Force a form with Sections A and B in it. We asked HMRC or Border Force to identify, if they could, this form and to supply a copy of it if in their possession, together with any other correspondence or notes of calls, meetings etc between the appellant and Border Force, but none were supplied (see our interpolated remarks in §12(8)).

11. However if the appellant was deprived of an opportunity to give her explanation of her intended use of the tobacco, it may be that the requirements of Article 32.2 of the EDR (and regulation 13(4) of the Movement etc Regulations) were not met. Whether or not this is the case this Tribunal is unable to do anything about it, as the appellant's remedy would, if there was one at all, lie in proceedings against the Home Office and not in an appeal against any action of HMRC.

The facts

12. The matters set out below are undisputed and we find them as facts.

(1) On 10 October 2013 the appellant arrived at LBA on a Ryanair flight from Alicante, Spain.

(2) After going through the baggage reclaim she entered the green channel carrying two red/orange bags.

(3) When she was asked to go to the desk in the green channel she said "I've got tobacco, I've no receipts, I've not got a leg to stand on….." [In her post-hearing submission the appellant in effect admits the account of what she said that appears in Officer O'Keeffe's notebook]

(4) Border Force found 15kg of HRT in the bags she was carrying.

(5) The appellant left the green channel leaving behind the bags with the HRT and her passport. She had been given a number of notices by Border Force relating to seizure.

(6) Officer O'Keeffe seized the HRT and the bags.

(7) On 18 October 2013 Border Force gave a notice of seizure (Form 12A) to the appellant at her address in Hull.

(8) The appellant did not institute condemnation proceedings in the Magistrate's Court. [Although there was a suggestion at the hearing that she had notified Border Force of her intention to institute such proceedings, the documents that Border Force supplied in post-hearing submissions do not bear this out and in her post-hearing submissions the appellant has not suggested that she did.]

(9) On 28 October 2013 the appellant requested the restoration of her goods.

(10) On 26 November 2013 HMRC wrote to the appellant at her address in Hull about the duty to which they said the appellant was liable and sent her a notice of assessment to excise duty (tobacco products duty) .

(11) On 18 February 2014 Border Force wrote to the appellant refusing to restore the goods.

(12) This decision was upheld on review in a letter from Border Force of 9 May 2014, in which it is stated that the appellant did not contest the seizure of the goods in a Magistrate's Court.

(13) On 7 March 2014 HMRC sent a notice of their intention to raise a penalty assessment seeking comments.

(14) On 14 March 2014 the appellant wrote to HMRC and to the Border Force.

(15) On 14 May 2014 HMRC raised a penalty assessment.

13. From these facts, we find that the appellant at no time had any intention of declaring the goods or paying the duty, and did not declare them before she was intercepted in the green channel.

The law

14. We set out here first the law that relates to what is in issue here, the movement to the UK of excise goods that have been released for consumption already in another member state.

15. Such movements are covered by European Union Law in the shape of the EDR.

16. The preamble to the EDR includes:

> "(28) In cases where, following their release for consumption in a Member State, excise goods are held for commercial purposes in another Member State, it is necessary to establish that excise duty is due in the second Member State. For these purposes, it is necessary, in particular, to define the concept of 'commercial purposes'."

17. The EDR has in Chapter V, a section 2 which relevantly says:

> "**SECTION 2**
>
> **Holding in another Member State**
>
> *Article 33*
>
> 1. Without prejudice to Article 36(1), 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.
>
> For the purposes of this Article, 'holding for commercial purposes' shall mean the holding of excise goods by a person other than a private individual or by a private individual for reasons other than his own use and transported by him, in accordance with Article 32.
>
> 2. The chargeability conditions and rate of excise duty to be applied shall be those in force on the date on which duty becomes chargeable in that other Member State.
>
> 3. The person liable to pay the excise duty which has become chargeable shall be, depending on the cases referred to in paragraph 1, the person making the delivery or holding the goods intended for delivery, or to whom the goods are delivered in the other Member State.
>
> …
>
> 6. The excise duty shall, upon request, be reimbursed or remitted in the Member State where the release for consumption took place where the competent authorities of the other Member State find that excise duty has become chargeable and has been collected in that Member State."

18. The UK provisions which put this part of the Directive into practice are in the Holding etc Regulations as follows:

> "**Application of Part 11**

67.—(1) Subject to paragraph (2), this Part applies to excise goods (other than chewing tobacco) imported from another Member State which have been released for consumption in another Member State.

(2) This Part does not apply—

…

(c) to excise goods imported by a person for that person's own use.

…

Requirements

69.—(1) The person delivering the excise goods, holding the excise goods intended for delivery or receiving the excise goods must—

(a) before the excise goods are dispatched—

(i) inform the Commissioners of the expected dispatch;

(ii) provide a guarantee satisfactory to the Commissioners securing payment of the duty or, subject to regulation 73, pay the UK excise duty chargeable on the goods;

(b) subject to regulation 73, on or before the excise duty point, pay any duty that has not been paid in such manner as the Commissioners may direct;

(c) consent to any check enabling the Commissioners to satisfy themselves that the goods have been received and that the duty has been paid.

(2) A person mentioned in paragraph (1) who is not approved and registered in accordance with regulation 70 shall be known as an unregistered commercial importer."

19. The provision for establishing the time of the duty point and the liable person is:

"**Goods already released for consumption in another Member State-excise duty point and persons liable to pay**

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—

…

(b) holding the goods intended for delivery; or

….

(3) For the purposes of paragraph (1) excise goods are held for a commercial purpose if they are held—

…

(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.

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

…

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

Time of payment of the duty

20.—(1) Subject to—

(a) the provisions of these Regulations and any other regulations made under the customs and excise Acts about accounting and payment;

…

duty must be paid at or before an excise duty point.

… "

20. The law relating to the assessment of excise duty is in s 12 FA 1994:

"(1A) 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) at 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.

(3) Where an amount has been assessed as due from any person and notified in accordance with this section, it shall, subject to any appeal under section 16 below, be deemed to be an amount of the duty in question due from that person and may be recovered accordingly, unless, or except to the extent that, the assessment has subsequently been withdrawn or reduced.

(4) An assessment of the amount of any duty of excise due from any person shall not be made under this section at any time after whichever is the earlier of the following times, that is to say—

(a) subject to subsection (5) below, the end of the period of 4 years beginning with the time when his liability to the duty arose; and

(b) the end of the period of one year beginning with the day on which evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge;

but this subsection shall be without prejudice, where further evidence comes to the knowledge of the Commissioners at any time after the

making of an assessment under this section, to the making of a further assessment within the period applicable by virtue of this subsection in relation to that further assessment.

…

(6) The reference in subsection (4) above to the time when a person's liability to a duty of excise arose are references—

(a) in the case of a duty of excise on goods, to the excise duty point; and

(b) in any other case, to the time when the duty was charged."

21. The law relating to penalties for excise wrongdoing is in Schedule 41 FA 2008. The paragraph imposing the penalty sought by HMRC in this case is paragraph 4 which reads:

"*Handling goods subject to unpaid excise duty*

4(1) A penalty is payable by a person (P) where—

(a) after the excise duty point for any goods which are chargeable with a duty of excise, P acquires possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods, and

(b) at 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.

(2) In sub-paragraph (1)—

"excise duty point" has the meaning given by section 1 of F(No 2)A 1992, and

"goods" has the meaning given by section 1(1) of CEMA 1979."

22. "Excise duty point" in this case has the meaning in regulation 13(1) of the Movement etc Regulations, which are made under the vires in s 1 Finance (No. 2) Act 1992.

23. The other parts of Schedule 41 which are relevant to this case are in the Appendix.

The submissions

24. The appellant's primary submission to Border Force, HMRC and the Tribunal was that she was deprived of an opportunity to put her case to Border Force about the use to which she was intending to put the HRT.

25. Mr Scott requested that he be allowed to make closing submissions on the evidence in writing and we agreed to this course. But as the evidence of the witnesses had raised some questions in our minds which we would have asked Mr Scott in the course of his closing, the Tribunal issued directions asking for submissions specifically on a number of points, relating in particular to paragraph 4 Schedule 41 FA 2008. We raised these points partly because we were unclear about a number of

matters and partly because the appellant is a litigant in person and we have thought it right to raise points which, had she been legally advised, she might have raised.

26. Those submissions were duly made and we consider them in the section of this decision that covers the paragraph 4 penalty. We gave the appellant the opportunity to comment on HMRC's submissions, which she took, and we have also taken these responses by her into account.

27. In relation to the assessment of duty, Mr Scott argued that *HMRC v Jones & anor* [2011] EWCA Civ 824 ("*Jones*") and *HMRC v Race* [2014] UKUT 331 (TCC) ("*Race*") show that we cannot revisit the seizure and condemnation, and that the deemed condemnation carried with it the necessary conclusion that the goods were for commercial use. We could not go behind that.

28. Accordingly the duty assessment was valid and could not be argued against on the grounds put forward by the appellant.

29. As to the penalty HMRC accepted that it was open to challenge, but it was their submission that the appellant's conduct amounted to that penalised by paragraph 4 Schedule 41. The conduct was deliberate and the disclosure prompted. Maximum mitigation had been given and the penalty was correct and should be upheld. The question of whether there could be "special circumstances" that would justify a reduction in the penalty was also the subject of written submissions which we deal with below.

Discussion: the assessment to duty

30. In relation to excise duty the burden of proof is on the appellant to show that the assessment is wrong. She has not disputed the amount of the duty or HMRC's right to raise the assessment. As she was unrepresented we have considered, in accordance with the decision of this Tribunal in *Sokoya v HMRC* [2009] UKFTT 163 (TC) (Judge Roger Berner) whether there are any arguments that she might have made that we could put to HMRC or consider ourselves. But the difficulty facing anyone such as the appellant who has not, as we have found, contested the seizure of their goods is that we are bound by the decisions in *Jones* and *Race*. They show that where goods have been duly condemned as a result of no proceedings being instituted in the Magistrate's Court then that condemnation means that, in these circumstances, the goods were irrebuttably presumed to have been brought into the UK for commercial purposes (that is not for "own use" as that term is defined in regulation 13(5)(b) of the Movement etc Regulations).

31. It does not seem to us that there is any escape from the proposition that the appellant became liable to excise duty (in this case Tobacco Products Duty). She has not shown that she paid, on or before the excise duty point, the duty for commercial excise goods that were released for consumption in another member state. The excise duty point in such a case is given by regulation 13(1) of the Movement etc Regulations and the liability of the appellant by regulation 13(2) (even where, as here, it is alleged by the appellant that one of the bags was not hers). We hold that there are no valid grounds for any appeal against the assessment and that it stands.

Discussion: does paragraph 4 Schedule 41 apply to a seizure at the airport?

The burden of proof

32. It is accepted by HMRC that the burden is on it to show that the appellant has become liable to a penalty. That means that they must demonstrate that the facts of the case fully meet the legal description of the conduct which gives rise to the penalty and of any conditions imposed by the provision imposing the penalty.

Our doubts about paragraph 4

33. We have held that the appellant is liable to pay the duty. The facts on which we based that holding are that the appellant attempted to bring in to the United Kingdom a quantity of HRT which was retrospectively deemed not to have been intended for her private use and on which she did not pay the duty.

34. We stress here, for Mrs Jacobson's benefit, that we ourselves have not decided whether she was in fact intending to use the HRT for herself and others without payment. This is because we have to follow what the law says, and not the actual facts (whatever they were). We have to follow decisions of Courts and Tribunals senior to us and they say that because the goods have been "duly condemned" they are "deemed" to have been brought into the country for commercial use, even if it might have actually been the case that she did not intend to profit from the goods or to seek reimbursement of her costs.

35. It had been taken for granted in HMRC's Statement of Case that the appellant's conduct in taking into the green channel 15kg of HRT that she had in the bags constituted the conduct required for there to be a valid penalty under paragraph 4 Schedule 41 FA 2008.

36. But we had doubts which surfaced when we asked Ms Milne, the HMRC officer who determined the penalty and its amount, why she had determined that the appellant's disclosure was "deliberate and prompted" (something which determines the rate of penalty). We have no doubt that it was deliberate, but the appellant's statement on being stopped that she "hadn't a leg to stand on" seemed to us to be unprompted in the ordinary sense of those words.

37. Ms Milne referred to the wording of paragraph 12(3) of Schedule 41 which treats as prompted any disclosure that is made where the person had reason to believe that their wrongdoing is about to be discovered. We asked her what, in the circumstances of a person bringing in goods from the EU vastly in excess of the guidelines or otherwise intended for commercial use, would count as an unprompted disclosure of wrongdoing. Ms Milne's off the cuff answer was that declaring the goods at the red channel would be.

38. We do not hold HMRC to that answer as any form of official view on the meaning of paragraph 12(3), and we do not need to decide whether it is correct or not

in order to decide this case. Reflecting on it later though it concerned us. We thought of a not impossible scenario by which to test the consequences of her answer.

39. Suppose that PX is in a restaurant in a dustier corner of Alicante province than is Benidorm. On the wine list PX sees an old and very highly regarded wine which is substantially underpriced by UK standards (even allowing for differences in alcohol duties). PX does a deal with the owner and buys two bottles unopened. PX decides while in Spain that he will keep one for his own enjoyment and will pass the other on to a friend in the UK and fellow wine buff at cost price. PX knows that by doing that he is bringing one bottle in for commercial use. He therefore collects his baggage at the UK airport containing the two bottles and goes straight to the red channel to declare one bottle.

40. In that situation UK Border Force would we assume (and hope) charge PX whatever duty is payable and would allow PX to keep the wine.

41. But even if Ms Milne is right in saying that by declaring the goods at the red channel PX is making an unprompted disclosure of paragraph 4 wrongdoing, PX has nonetheless incurred a penalty under that paragraph and is liable to pay a penalty of 70% (for deliberate but unconcealed conduct) which may at HMRC's discretion be reduced to 20% for an unprompted disclosure. PX could therefore expect a letter from HMRC charging the penalty. In fact by virtue of paragraph 16(1) "HMRC shall" (ie must) assess the penalty, so a penalty is inevitable.

42. It seemed to us instinctively that this could not be right. And the idea that PX in this situation seems to be liable to a penalty at all led us to look more closely at the wording of paragraph 4.

43. We set out here again the relevant wording of that paragraph:

> "**Handling goods subject to unpaid excise duty**
>
> **4**(1) A penalty is payable by a person (P) where—
>
> (a) after the excise duty point for any goods which are chargeable with a duty of excise, P […] is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods, and
>
> (b) at the time when P […] is so concerned, a payment of duty on the goods is outstanding and has not been deferred.
>
> (2) In sub-paragraph (1)—
>
> "excise duty point" has the meaning given by section 1 of F(No 2)A 1992, and
>
> "goods" has the meaning given by section 1(1) of CEMA 1979."

44. The conduct penalised by this paragraph is, in a case such as this, the "carrying, removing, depositing, keeping or otherwise dealing" ("carrying etc") of the dutiable goods. There are two conditions which must be met, and shown by HMRC to have been met, and in order of appearance they are that the action which the paragraph penalises has to take place *after* the excise duty point, and that when the action takes

place a payment of duty *is outstanding* (deferral is not relevant in this type of situation).

The principle of doubtful penalisation

45. Where a Tribunal has doubts about the meaning of a penal provision, rather than about its application to the facts of the case, it is relevant to consider the terms of the principle of doubtful penalisation.

46. This is the principle of legal policy (expressed in Code s 271 of *Bennion on Statutory Interpretation* ("*Bennion*")) that a person should not be penalised except under clear law. It is also expressed in the pithy maxim that "a person is not to be put in peril upon an ambiguity". If high authority is needed for the principle's validity it can be found in *R v Z* [2005] UKHL 35 where at [16] Lord Bingham approved *Bennion* Code s 271.

47. The principle applies to civil cases as well as criminal: the only requirement is that the statute concerned inflicts detriment. It should be noted that the specific conduct penalised by paragraph 4 was a criminal offence from 1992 to 1994: s 170A CEMA as originally enacted. In this case as well as the obvious financial detriment arising from a penalty there is also a possible reputational detriment (*Bennion* Code s 279) (see §60).

48. In accordance with the principle the legislation needs to be construed narrowly or strictly, so that if there is a "penumbra of doubt", as *Bennion* puts it, the finding should be for the appellant.

49. We express our views on whether there is a penumbra of doubt here below after looking at the meaning of the two conditions in paragraph 4 that we identified at §44.

When is the duty point?

50. We asked HMRC in our directions to answer this question:

> "Is it HMRC's view that the "excise duty point" in paragraph 4 means the point defined in regulation 13(1) of the Excise Goods (Holding, Movement and Duty Point) Regulations SI 2010/593, and that in this case the point is the time when the appellant entered the green channel at Leeds Bradford Airport?"

51. HMRC's submission on this point is that the answers to the Tribunal's questions are "yes" and "no". Specifically they say that they agree that the duty point is given by regulation 13(1) of those regulations – that is the time when the excise goods are first held in the United Kingdom, but they say that "the excise duty point was not the time when the appellant entered the green channel at LBA. By the time the appellant entered the green channel, she had already passed [*sic*] the excise duty point."

52. We added a "sic" there because it is our understanding that the excise duty point is a time rather than a place, so that the answer should read "… green channel, the excise duty point had passed".

53. What this answer lacks, although it is a literal answer to the question, is any indication of when in this (and other cases) in HMRC's view the excise duty point precisely was. There are a number of possibilities in a flight: the time when the aircraft first entered UK airspace, the time it touched down at the airport, the time the person penalised picked up their hand luggage on the plane, the time they stepped off the plane with that luggage, and (in the case of the goods having been in hold baggage) the time the person picks the luggage containing the goods off the carousel.

54. The first in time of these possible duty points is when the aircraft is in flight and enters UK airspace. On a straightforwardly literal view of the word "held", if the goods are in the hold, they are not being held for a commercial purpose by the person being penalised (P). If they are in the luggage lockers in the cabin then they are also not literally being held by P.

55. The same considerations apply at the time the aircraft lands at its (first) airport in the UK. The act of taking down and carrying the bags in a cabin baggage case would seem to be literally the first time they are held. For a hold baggage case the time when they are first held may be the time when the goods are picked up from the carousel. We do not think it matters if the bag is a wheeled one, pulled behind P rather than being carried by P: they are held by P as being under P's physical control.

56. But whichever of these possible points in time is the duty point, it follows from saying that the duty point has to be a time before the passenger enters the customs areas that a person like PX (see §§39 - 41) cannot escape from a penalty if they are conscientious enough to go to the red channel to declare the one bottle of wine they are passing on to a friend at cost price with a view to paying the duty. This is a perverse result: a less conscientious person would go through the blue/green channel and in the unlikely event they were stopped would simply tell the officers about, or possibly be required to show the officers, the two bottles of wine whereupon they would almost certainly be waved through. (And it may well be that the officers already know that there are only two bottles in the luggage if the bags were X-rayed on arrival).

57. HMRC in their submissions to the Tribunal agree with our conclusions about PX. They say:

> "Entering the red channel does not negate liability for a penalty, but doing so voluntarily may be considered to amount to 'unprompted disclosure.'"

58. This of course is what Ms Milne said in answer to the Tribunal. Oddly earlier in their submission they say:

> "… in the case of EU arrivals there are no green or red channels available for passengers to use. All such passengers should use the blue channel. This is clearly marked in all UK airports."

59. We assume that the writer did not mean "available" in the usual sense of that word, but was making the same point as in their next sentence. That sentence makes the position of PX even worse. If someone wishing to pay the duty in the PX

situation should, and are told to, go through the blue channel, they are being deprived of the opportunity to declare the goods.

60. This seems to us to be a surprising and to our minds hyper-technical and unrealistic approach to a provision imposing a penalty which in terms of Article ("Art.") 6 of the European Convention on Human Rights ("ECHR") is a criminal offence (see below at §§77 - 88). Such a penalty may have serious consequences beyond the financial for certain groups of people particularly in regulated professions and offices. We think that if there is a way of construing paragraph 4 which does not give rise to the problems we have discussed we should do so. But before coming to a definitive view we need to consider whether the second condition casts any more light on the issue of when the duty point is for the purpose of this paragraph.

A payment of duty is outstanding

61. The second condition is arguably more important than the first as it is reflected in the heading to the paragraph. The conduct penalised must be done when "a payment of duty on the goods is outstanding", because it is the non-payment of the duty which is the target of the penalty, according to the heading. That requires us to examine when the liability to pay the duty in a case of this sort arises. In their submissions HMRC drew our attention in this connection to regulation 20 of the Movement etc Regulations which, like regulation 13, is in a part of the regulations dealing with duty points and payment of duty generally. Regulation 20 says that:

> "(1) Subject to--
>
> (a) the provisions of these Regulations and any other regulations made under the customs and excise Acts about accounting and payment;
>
> …
>
> duty must be paid at or before an excise duty point."

62. HMRC's submissions are to the effect that "payment of duty is outstanding as soon as the excise duty point is reached without the duty having been paid".

63. HMRC did not refer in their submissions to any other part of the same regulations or to any other regulations where there is a requirement to pay at or before the duty point. We see from our scrutiny of the Movement etc Regulations that there is a Part, Part 11, headed "Imports of Excise Goods after Release for Consumption" and in which regulation 68(1) puts it beyond doubt that it refers to goods that have been released for consumption in another member state.

64. Regulation 69 in Part 11 says:

> "(1) The person delivering the excise goods, holding the excise goods intended for delivery or receiving the excise goods must--
>
> (a) before the excise goods are dispatched--
>
> (i) inform the Commissioners of the expected dispatch;

(ii) provide a guarantee satisfactory to the Commissioners securing payment of the duty or, subject to regulation 73, pay the UK excise duty chargeable on the goods;

(b) subject to regulation 73, on or before the excise duty point, pay any duty that has not been paid in such manner as the Commissioners may direct;

(c) consent to any check enabling the Commissioners to satisfy themselves that the goods have been received and that the duty has been paid

(2) A person mentioned in paragraph (1) who is not approved and registered in accordance with regulation 70 shall be known as an unregistered commercial importer."

(Regulation 73, to which regulation 69(1)(b) is subject, applies only to a registered commercial importer, which by virtue of regulation 69(2) the appellant isn't.

65. It seems to us that regulation 20 must be subject to regulation 69, not only because regulation 20(1)(a) seems to say so, but also because regulation 69 is the more specific provision dealing as it does only with imports of EU excise goods. We note that there is a small difference between the relevant parts of each regulation: regulation 20(1) says that payment must be made "at" or before the duty point, whereas regulation 69(1)(b) says the duty must be paid "on" or before the time. "At" without words such as "a time when" seems to indicate a location rather than a time, whereas "on" is clearly referring to a time.

66. What we do not know of course is whether the Commissioners have made any directions as to the manner of payment where payment is made on or at the duty point. However it seems to us that because regulation 69 permits payment to be made "at or before" the duty point, it is not making payment *before* the duty point mandatory. (The same applies to regulation 20 if it is that regulation which is relevant). So far as we are aware, there are no officers of the Commissioners or the Border Force on board aircraft and ships with the equipment to allow them to take the duty when the plane enters UK airspace or when it lands or even when the passenger picks up their luggage from the carousel. We assume (without finding it as a fact) that in a UK airport the only place where there are officers able to accept payment of the duty is the customs area.

67. In these circumstances it seems to us that there is an arguable case that a person who in the red channel or (as in some airports) using a phone in the single channel, declares goods and offers to pay and does pay the duty has complied with regulation 69(1)(b) (or regulation 20(1)). It also follows in our view that it is clearly arguable that where a person attempts to pass through the green channel with dutiable (commercial) excise goods without paying the duty, only *once they have left the channel* has the duty not been paid "at or before" the duty point.

68. There is no doubt that, in this case, on HMRC's view of when the duty point is the duty had not been paid, nor was it paid by the appellant in the green channel. But does the undoubted fact that it was not paid mean that it was at the relevant time

(whichever it was) "outstanding"? We note that paragraph 25(b) repealed the predecessor provision which imposed (mostly much smaller) penalties for the conduct now penalised by paragraph 4. That was s 170A CEMA, which we note was not saved by SI 2009/511 in the way s 8 FA 1994 (civil evasion penalty for evasion of excise duty) was.

69. Section 170A also used the term "outstanding", but only as a result of a substitution made by paragraph 13 Schedule 4 FA 1994. Before then the condition for what was previously a criminal offence was that "the duty on the goods has not been paid". We do not know why the wording was changed, or what was intended to be achieved by the change, but changed it was and that was presumably intended to change the law.

70. Non-payment cannot necessarily then be equated with "outstanding". "Outstanding" could mean duty that remains unpaid but only after there has been some kind of demand for, or assessment of, it. (It may – or may not – be a coincidence that when the wording in s 170A CEMA was changed, the same Act (FA 1994) introduced the concept of assessments for excise duty (see s 12 of that Act)).

71. Our conclusion on this aspect of paragraph 4(1) is that, whether or not "outstanding" means "unpaid" or something else, this condition in paragraph 4(1) may well mean that what we should consider is the position at the time the person left the customs area, the various channels. This is because as we say in §66 the only practical time when duty can be paid at the duty point is in that area.

72. And if it is arguable that the duty point is as we have held it to be when judging whether duty is outstanding, then it follows inevitably from the way paragraph 4 is constructed that that is also the duty point *after which* the conduct in question must take place.

73. Returning to the principle against doubtful penalisation, in our view there is a penumbra of doubt here. The phrase "after the duty point" is we consider one which produces on HMRC's view of it a number of practical difficulties and can, in some cases such as that of PX, give an outcome which is bordering on the absurd. The opposite view which we consider to be arguable gives rise to no such difficulties and absurdities.

74. That penumbra extends to the meaning and application, in circumstances like the appellant's, of the term "duty is outstanding". We consider it arguable that it must be construed narrowly so as to give sensible effect to regulation 69(1)(b) of the Movement etc Regulations, as we cannot see how duty can be outstanding before the time at which a person reaches the first place in the United Kingdom at which they can physically pay the duty, given that the law is that the duty may be paid at the latest "on the duty point".

Our provisional view

75. In view of this penumbra of doubt we consider it is open to us to hold that the appellant is not liable to a penalty under paragraph 4 Schedule 41 FA 2008.

76. But before coming to a firm conclusion we have considered a number of other matters which are not in themselves determinative but which we think we should taken into account in case they can narrow or eliminate the penumbra of doubt (or for that matter increase its size).

The Human Rights Convention

77. As we have said (see §6s) we have considered whether Art. 6 of the ECHR has any bearing on this case. But as we sought and received submissions on only one aspect of it we consider it relatively briefly. Art. 6 says relevantly:

> "**ARTICLE 6**
>
> **Right to a fair trial**
>
> 1. In the determination of … any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. …
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

78. The only aspect of Art. 6 that has concerned us is Art. 6(3)(a) and it arose because of doubts about whether paragraph 4 does apply here and whether the appellant was able to understand what she was being accused of. We cannot consider Art. 6(3)(a) however unless the assessment of the penalty here amounts to a "criminal charge".

79. We asked HMRC to make submission on Art. 6(3)(a). HMRC in their submission maintained that an exhibit of Ms Milne did make the accusation clear. But they did not accept that Art. 6 was engaged. They said:

> "Nobody is charged with a criminal offence."

80. On the basis of *Jussila v Finland* [2006] ECHR 73053/01 and *Glantz v Finland* [2014] ECHR 37394/11 we consider that the assessment of the penalty was a "criminal charge" for the purposes of Art. 6. It appears Ms Milne and those responsible for HMRC compliance policy think so too, as in her letter of 26 November 2013 to the appellant Ms Milne included a highlighted passage about the appellant's convention rights under article 6 and enclosed a Factsheet CC/FS9 "Compliance Checks Human Rights Act (HRA)". That Factsheet says at the start:

> "Article 6 rights apply to penalties that are based on a maximum penalty percentage rate of 70% or more of any tax or duty unpaid, understated, over-claimed, under-assessed, or that should have been shown on your tax return."

81. We do not need to decide whether the statement about Art. 6 only applying to certain levels of penalty is correct (we very much doubt it in the light of *Jussila v Finland*) because in the case the appellant's penalty *was* based on 70% of the duty.

82. We are therefore entitled on any view to consider whether what the appellant was told about what she was accused of was adequate to comply with Art. 6(3)(a).

83. After we had drafted the previous paragraphs we became aware of the Upper Tribunal (Tax and Chancery Chamber) decision in *Euro Wines (C & C) Ltd v HMRC* [2016] UKUT 359 (TCC) ("*Euro*") (Birss J and Upper Tribunal Judge Berner). That puts beyond doubt that Art. 6 applies in these circumstances, and that the 70% rule adopted by HMRC has no validity. The case was about a paragraph 4 penalty where after importation dutiable goods were acquired by the appellant who could not show that duty had been paid. The Art. 6 issue in that case was Art. 6(2) on the presumption of innocence and the reverse burden of proof in s 154(2) CEMA (and the compliance of that reverse burden with Art 6.2 was upheld). We add for completeness that HMRC did not suggest, rightly we think, that s 154(2) CEMA has any bearing on this case.

84. *Euro* however throws no light on Art. 6(3)(a), so we have to consider that unaided by authority. In the exhibit referred to in HMRC's submissions in the "Description of the wrongdoing" in the Penalty Explanation Schedule sent to the appellant before the assessment of the penalty, the description of the wrongdoing was this:

> "On 10/10/13 you were stopped at Leeds/Bradford by the UKBF returning from a trip to Alicante. You confirmed you were travelling with another person but asked to be spoken to alone. You asked if you could abandon the goods and you were advised that you had to wait for a search of luggage. You admitted the tobacco. A search uncovered 15kg of Hand Rolling Tobacco. You abandoned the goods and left without taking advice, notices and leaflets available to you."

85. Ms Milne's only suggestion as to what the appellant's wrongdoing was, it seems, was that she "admitted the tobacco" and her abandonment of the goods. The rest of the description is an account of what happened (according to the Border

Force). There is no attempt to link the appellant's actions to the wording of paragraph 4.

86. We consider that what Art. 6(3)(a) requires is something like the information a person gets when charged with an offence by the police or by, say, a local council for a parking infringement. It is something which sets out what the facts are that the prosecutor alleges constitute committing the offence and how.

87. If it were important to do so we would be inclined to hold that the description of the wrongdoing in the Schedule we have quoted from was inadequate to explain to her the case that she had to meet. Had it been the explanation of the reason for condemnation proceedings or for non-restoration or even the duty assessment (assuming that any of these was a "criminal" proceeding for Art. 6 purposes) it may have been adequate.

88. Because it is not necessary to definitively decide this question then we do not need to consider what remedy, if any, is available for inadequate compliance with Art. 6(3)(a). But if the body imposing a penalty cannot articulate the conduct that gives rise to a penalty of up to 70% of the duty assessed and cannot convey to the person accused what it is that they have done wrong, then the penumbra of doubt remains undiminished.

Other relevant matters tending to reinforce or oppose our provisional view

89. We mention five more matters.

1. The verbs describing the conduct

90. First, we have examined (though not comprehensively) excise duty law, that is CEMA and regulations made under it, to get a flavour of the circumstances in which the words of conduct in paragraph 4 are used. What we found is that:

(1) "Depositing" and "keeping" are words used in relation to warehouses – see ss 92ff CEMA and many excise duty regulations.

(2) "Removing" also seems to be a term of art in CEMA (eg ss 39 and 43) and in regulations.

(3) "Carry" by itself, ie when not used a part of a compound verb like eg "carry on", is used in excise duty legislation in relation to objects such as ships or aircraft or motor vehicles as the subject of the verb.

(4) "Dealing in" is used in relation to "revenue traders" which does not, at least in HMRC's eyes, include the appellant.

91. We cannot say that there aren't counter examples. But the general impression we get is that the terms used in paragraph 4 "carrying, removing, depositing, keeping or otherwise dealing" are much more appropriate for a registered commercial importer or someone who handles goods after acquiring them from the importer than for an individual who brings in goods through an airport or port.

92. HMRC's response to this point is that:

> "Paragraph 4 does not only apply to "traders", either explicitly or implicitly, nor is it intended to. On the contrary, paragraph 4 refers to "a person." A person can remove deposit or keep excise goods. Any suggestion that these are activities that can only be carried out by a trader is wrong. Any attempt to restrict the application of paragraph 4 to an arbitrary, limited group of people is wholly artificial. The provision itself is not so restricted. Effect should be give to the actual wording employed by the draftsman."

93. We agree that there is nothing explicit about limiting the case to traders. We do not agree that it is at all obvious that any person, and explicitly a private individual, arriving by plane from the EU will ever be removing, depositing or keeping excise goods in the sense that those terms are used in excise duty law. Nor do we think that to limit the paragraph to traders or to the conduct of a person after goods leaves an airport or port is to restrict its application to any serious degree. Traders are not an arbitrary group for the purposes of excise duty law, they are the main players. But we do not say that paragraph 4 must be construed as limited to traders, merely that the words used in the paragraph are much more apt for traders, and that it does no violence at all to paragraph 4 to say what we have said.

94. On this matter we noted that the assessment forms issued to the appellant referred to "Trader's remittance copy" and to payment being required by s 116 CEMA which is headed "Payment of excise duty by revenue traders". We asked HMRC for their comments on this. HMRC in their submissions made the point that the form of an assessment does not matter. We do not say that the assessment on the appellant is necessarily invalid because it has these references to traders, though we do wonder if giving incorrect information about payment of the duty charged on the assessment has any consequences.

95. But while these references to traders on the assessment are not, as we have admitted, determinative of anything, they do indicate that HMRC excise duty processes and procedures are aimed primarily at revenue traders, which the appellant is not, and that it is reasonable to have some doubts about whether paragraph 4 applies to individuals in the position of the appellant.

2. Is there assistance to be gained from case law?

96. We have not been able to discover any case law in relation to the points we have raised in paragraph 4. Regulation 13(1) of the Movement etc. Regulations is mentioned in *Race* at [19] but the question of when exactly the duty point was was not considered and was not relevant to the issue in the case, which is whether Mr Race's appeal should be struck out.

97. We have however found Court of Appeal authority on an appeal against a conviction for an offence where:

> "(a) after the excise duty point for any goods which are chargeable with a duty of excise, a person acquires possession of those goods or is

> concerned in carrying, removing, depositing, keeping or otherwise dealing with those goods; and
>
> (b) at the time when he acquires possession of those goods or is so concerned, the duty on the goods has not been paid and its payment has not been deferred, …"

The case is *Commissioners of Customs and Excise v Carrier* [1995] 4 All ER 38 (QBD) ("*Carrier*").

98. The provision making the matters set out above a criminal offence was s 170A CEMA as originally enacted. Mr Carrier was interviewed by customs officers when his vehicle was weighed at a weighbridge in Yorkshire and found to contain wines and beer substantially over the guideline amounts for EU imports. He was found not guilty in the Magistrates Court: on appeal by the Commissioners it was held that the magistrates were not entitled to consider whether or not he imported the goods for his private use because of the wording (then) of article 5(3) of the Excise Duties (Personal Reliefs) Order 1992.

99. At [41] Glidewell LJ says:

> "It is submitted by the Customs and Excise that the effect of the provisions in the 1992 order is that if a person brings into the United Kingdom and *goes through a duty point (that is to say in this case the customs control point at Dover)* a quantity of dutiable goods less than the amount described in the schedule, there is no presumption as to whether or not he brings them in for a commercial purpose." [Our emphasis]

100. We do not think that this statement is binding on us for two reasons. Firstly it was not a necessary part of the reasons for the decision. Second, the excise duty point was different then: it was given by the Excise Goods (Holding, Movement, Warehousing and REDS) Regulations 1992 (SI 1992/3135). By regulation 4(1) "the excise duty point in relation to any Community excise goods shall be the time when the goods are charged with duty at importation." These regulations continued in force with this definition after s 170A was amended by FA 1994 to impose a civil penalty instead of a fine for criminal conduct.

101. From 2001 the duty point for tobacco was to be found in Regulation 13 of the Tobacco Products Regulation 2001 (SI 2001/1712) but the definition remained as in the 1992 regulations with the omission of the word "on importation". The 2001 regulations were those still in force after the coming into force of Schedule 41 FA 2008 (which repealed s 170A CEMA) until they were replaced by the Movement etc. Regulations, the ones in this case, from 1 April 2010.

102. It has since been established in cases such as *R v Bajwa* [2011] EWCA Crim 1093 that the excise duty point in the 1992 and 2001 regulations is the time when, in a ship case, the ship "carrying them comes within the limits of a port" (based on the wording in s 5 CEMA). It may be then that what Glidewell LJ said was *per incuriam*. But he may have been taking a practical view of the matter as it was obvious that Mr

Carrier had no intention of paying the duty either at the point that the ship reached the port of Dover or when he drove past the customs control point.

103. A third reason for not relying on *Carrier* is that it was heard before the decisions of the Court of Justice of the European Communities (as it was then called) ("ECJ") in 2010 in Case C-230/08 *Dansk Transport og Logistik v Skatteministeriet* ECR 2010 I-03799 ("*DTL*")

104. The facts in *DTL* involved two distinct types of operation. Goods in both types were physically brought into the EU from a third country. Denmark seized and destroyed the goods in both cases, but in one case Denmark was the first country of arrival by ship and in the other Germany was, with the goods being smuggled past the first German customs post beyond the Poland/Germany "green" border (at the time Poland was not in the EU) border. Those goods were then transported to Denmark where they were seized.

105. DTL argued in the Østre Landsret, the Danish court, that customs duties were not payable in Denmark because the seizure and condemnation had the result that Art. 233(1)(d) of the Community Customs Code (Council Regulation No 2913/92) ("CCC") applied to extinguish the customs duty liability. The Danish Court referred the question to the ECJ. For the purposes of this case, however, the more important point argued before the Danish court and referred to the ECJ was whether as a result of the seizure and condemnation the excise duty liability was also extinguished

106. On the customs duty point the ECJ held at [50] that the customs duty was indeed extinguished but provided that:

> "… the seizure of goods unlawfully introduced into the customs territory of the Community must take place before those goods go beyond the first customs office situated inside that territory (see, to that effect, *Elshani*, paragraph 38)."

107. The rationale for holding that no customs duty is payable in that situation was that the goods, having been seized at the first customs post inside the border, did not pose a threat to the economic networks of the member states, as duty free goods would not compete with local duty paid goods. Thus in the case where the goods had passed the first customs post in Germany without having been seized but were then seized in the country into which they were subsequently introduced, Denmark could still impose a customs duty. But where they were introduced by sea into Denmark as in the other cases DTL could invoke Art. 233(1)(d).

108. The ECJ the went on to consider the excise duty position. It said:

> "70. First, as regards the chargeable event for excise duty, it is apparent from the first subparagraph of Article 5(1) of the Excise Duty Directive that the duty becomes chargeable at the time of the production of the goods subject to excise duty within the territory of the Community or on the importation of such goods into that territory. The second subparagraph of Article 5(1) states that 'importation' is to mean 'the entry of that product into the territory of the Community'.

> 71. In order to ensure a coherent interpretation of the Community legislation at issue, the latter term must be interpreted in the light of the concept of 'introduction' set out in point (d) of the first paragraph of Article 233 of the Customs Code.
>
> 72. Accordingly, goods subject to excise duty must be regarded as having entered the territory of the Community for the purposes of Article 5(1) of the Excise Duty Directive as of the moment they go beyond the area in which the first customs office is situated inside the customs territory of the Community (see, by analogy, *Elshani*, paragraph 25)."

109. Note that Art. 5(1) of the Excise Duty Directive (Council Directive 92/12/EEC) contained the sentence ""[i]mportation of a product subject to excise duty" shall mean the entry of that product into the territory of the Community ..."

110. And Art. 233(1)(d) of the CCC said a customs debt shall be extinguished "where goods in respect of which a customs debt is incurred in accordance with Article 202 are seized upon their unlawful introduction and are simultaneously or subsequently confiscated".

111. The ECJ then decided that in the shipment by sea case direct to Denmark from outside the EU the excise duty charge could not stand for the reasons given. It went on to say:

> "76. Second, it should be noted, as regards the question whether and at what point the excise duty, in respect of which the chargeable event is the introduction of goods into the territory of the Community, becomes chargeable, that it is apparent from Article 6(1) of the Excise Duty Directive that that tax becomes chargeable, inter alia, at the time those goods are released for consumption. Point (c) of the second subparagraph of Article 6(1) states that release for consumption includes 'any importation of those products, including irregular importation, where those products have not been placed under a suspension arrangement'.
>
> 77. As noted in §§71 and 72 above, the concept of 'importation' of goods for the purposes of the Excise Duty Directive presupposes that the goods have gone beyond the area in which the first customs office inside the customs territory of the Community is situated."

112. The clear effect of this decision on UK law is to prevent the charge to, and assessment and collection of, excise duty where goods enter the United Kingdom from outside the EU and are seized and confiscated at the first customs post. It is also clear authority for applying an interpretation of excise duty legislation that coheres with customs legislation where both apply.

113. That the decision applies no matter what the vehicle or point of entry is, whether by sea, air, road, rail or other (eg walking), is apparent from the decision which covers both sea and road entrance without distinction.

114. The decision does not affect civil penalties except to the extent that, if they are based on the need to show that duty is unpaid or outstanding, they cannot apply because it will not be either of those if the charge never arose. This however is not the case with paragraph 4.

115. We do not however consider that we should hold that *DTL* is binding on us so as to nullify a paragraph 4 penalty where the goods have been seized. This is for three reasons.

116. Firstly, we have not had the benefit of argument on what is clearly a difficult area.

117. Second, the case is about importation of goods from outside the EU. In our case goods are not so imported, they are moved from one member state to another in a situation where excise duty, but not customs duty, is potentially due as a result of the movement to another member state. Without full argument we would not wish to express a view on whether *DTL* can be applied by analogy to our situation and how far, and in particular whether the consideration about threats to local economic networks (see §107) has any relevance in a case such as ours.

118. Third, both the CCC and the Excise Duty Directive in force at the time of the decision have been replaced by more modern ones in force at the time of this case, and we do not know whether any of the changes are significant.

119. Nevertheless we take comfort that the ECJ seemed to prefer an interpretation which made a clearly ascertainable point, the passing of the first customs point in the territory of entry into the EU, the point at which liability was to be tested rather than considering whether there were different points and what they were in relation to methods of entry and different vehicles for effecting entry.

120. The case law we have considered does not extinguish the penumbra of doubt.

3. Other material that might help

121. HMRC's Compliance Handbook at CH91550 gives two examples of cases covered by paragraph 4. One is of a revenue trader. The other is as follows:

> "Example 1
>
> Jack goes to France on holiday and buys 3,200 duty paid cigarettes for his own use. He brings them into the UK.
>
> His brother Jim also goes to France on holiday. He also buys 3,200 duty paid cigarettes and brings them back into the UK. However, Jim doesn't smoke. He intends to sell the cigarettes to his workmates at a tidy profit. As the goods were not imported for his own use, Jim should have imported the cigarettes using one of the recognised schemes for commercial goods.
>
> Jim and his workmates may be liable to a penalty for handling goods on which excise duty is unpaid after the excise duty point."

122. This example must assume that Jim came through the blue/green channel and was not stopped, so is not comparable to the facts in this case. Neither of the examples is an airport seizure case, which we would have thought was far more common than the examples given.

123. As Schedule 41 FA 2008 was a product of a general review of HMRC powers, and the Compliance Handbook is HMRC's guidance to its staff on the legislative and policy outcomes of that review, we have looked at the documents produced in that review that refer to paragraph 4. They are not many. In a Consultative Document ("Condoc") issued on 10 January 2008, "Penalties Reform: The Next Stage" the references to para 4 are:

> **"Specific new elements**
>
> 4.16 A small number of specific additional changes are set out below.
>
> …
>
> **Excise duties: handling goods subject to unpaid excise duty**
>
> 4.21 Unpaid excise duty can be discovered, other than through an incorrect return or a failure to notify. One instance of this is where a person handles goods on which excise duty should have been paid but has not. For example goods may be found in a cash and carry outlet, which should have had excise duty paid on them, but have not. It is again suggested that gearing the penalty to the duty that should have been paid and relating the penalty in steps to the underlying behaviour, may be more likely to produce a proportionate response and removing the economic advantage gained, than the current penalties."

124. The example there is akin to the second example in CH91550. There is no mention of airport seizures, although the Condoc does admittedly say it gives only one example (no doubt the most important in the eyes of HMRC).

125. The Explanatory Notes for paragraph 4 Schedule 41 say:

> "Paragraph 4 again relates only to excise duties and provides for a penalty to be payable where a person acquires possession of or deals in goods on which payment of excise duty is outstanding and has not been deferred.
>
> Paragraph 4(2) explains the definition of "excise duty point" and goods."

126. This does not help one way or the other in determining the answer to the question whether paragraph 4 can apply to airport seizures. Had it done so we would have considered whether we could take it into account in accordance with Lord Steyn's judgment in *R (oao Westminster City Council) v National Asylum Support Service* [2002] UKHL 38 at [5].

127. None of this material extinguishes the penumbra of doubt.

4. Will the floodgates open?

128. We consider that our provisional holding on paragraph 4 does not mean that HMRC are powerless to stop smuggling of excise dutiable goods from the EU in aircraft. A civil penalty for dishonest evasion of excise duty remains on the statute book (s 8 FA 1994) and is used in cases where goods are imported from outside the EU in excess of allowances and seized from persons bringing them through the green channel. Section 8 is clearly applicable to green channel cases as the "offence" is simply evasion or attempted evasion of duty, without any need to consider excise duty points or particular acts like carrying etc. Thus HMRC would not be without protection in airport cases like this. It also applies even if the goods have been seized and so no liability to excise duty remains (see §112 above in relation to *DTL*), because successful evasion would not have extinguished the debt and so in seizure cases there must have been an attempt to evade.

129. That s 8 FA 1994 *could* cover EU importation cases seems to be discernible from the fact that although that section was repealed by paragraph 21 Schedule 40 FA 2008 with effect from 1 April 2009, the Finance Act 2008, Schedule 41 (Appointed Day and Transitional Provisions) Order 2009 (SI 2009/511 (c. 35)) included at article 4 certain savings:

> "… paragraph 21 of Schedule 40 to the Finance Act 2008 repeal[s] the following provisions only in so far as those provisions relate to conduct involving dishonesty which gives rise to a penalty under Schedule 41 to the
>
> …
>
> (b) in the Finance Act 1994—
>
> (i) section 8 (penalty for evasion of excise duty), …
>
> …
>
> …"

This is saying that if Schedule 41 applies to particular conduct, it has priority over s 8 FA 1994. Consequently if Schedule 41 does not apply to particular conduct, s 8 can apply.

130. True it is that s 8 FA 1994 can only give rise to a penalty where the conduct is dishonest. It seems to us that it is reasonable to suggest that many penalties imposed under paragraph 4 in the circumstances of this case (seizure of commercial goods in the blue/green channel) would involve dishonesty (we add for the avoidance of doubt that we are making no finding to that effect in this case). If as we have held, paragraph 4 does not apply in airport seizure cases, then s 8 FA 1994 could apply.to all those whether the conduct was dishonest.

131. That leads on to the question: why does HMRC not apply paragraph 4 to non EU cases. It must be simpler not to have to prove dishonesty.

132. In HMRC's Excise Civil Penalty Manual (EXCEP) paragraph 1000 includes this sub-paragraph:

> "Following a ruling in the case of Dansk Transport og Logistik v Skatteministeriet [2010] STC 1711 HMRC has concluded that it is unable to apply Schedule 41 Wrongdoing penalties in cases where goods have been seized at importation from outside the EU prior to the excise duty point. Consequently, we can impose a penalty under S8 Finance Act 1994 for dishonestly evading Excise duties at the same time as applying S25 Finance Act 2003 penalties for dishonestly evading Customs duties."

133. We note that in this paragraph HMRC accept that seizures at an airport or port (no other way of legitimately arriving from outside the EU is possible) are made "prior to the duty point".

134. We have considered *DTL* in §§103 to 112 above. We set out here the second paragraph of the dispositif:

> "The third subparagraph of Article 5(1) and Article 6(1) of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, as amended by Council Directive 96/99/EC of 30 December 1996, must be interpreted as meaning that goods seized by the local customs and tax authorities on their introduction into the territory of the Community and simultaneously or subsequently destroyed by those authorities, without having left their possession, must be regarded as not having been imported into the Community, with the result that the chargeable event for excise duty on them does not occur."

135. Where the UK is the first member state of importation from outside the EU and the goods are seized then excise duty cannot be charged because they have not been imported. But why does that prevent paragraph 4 applying? It seems to us that it is arguable to say the least that it is because after the duty point payment of duty on the goods cannot be outstanding. On HMRC's arguments in this case where goods are seized in the green channel on a non-EU import, duty on the goods is outstanding after a duty point and has not been extinguished, and so paragraph 4 could apply. If however we are right about paragraph 4 there would be a good reason for not applying it to non-EU cases because after the seizure in the green channel no duty is outstanding. Since we do not know why EXCEP 1000 says what it does we cannot take it as determinative of the question we have to decide even if it had the force of law which it does not.

136. None of this material extinguishes the penumbra of doubt.

5. Publicity, or lack of it, about paragraph 4 penalties on travellers

137. In civil evasion penalty cases (eg under s 8 FA 1994) HMRC are keen to stress that there is considerable information and publicity about a traveller's allowances and their responsibilities, and the consequences that might ensue if the allowances are exceeded. It would be surprising if that information and publicity material did not warn of possible paragraph 4 penalties.

138. The particular publicity that HMRC stresses is available is the notices that appear on baggage carousels in a customs airport. Indeed in this case, an intra-EU one, HMRC's Statement of Case makes the point forcefully that despite there being prominent notices about allowances etc in the baggage reclaim areas the appellant chose to enter the green channel.

139. If HMRC are right about when the duty point is in a paragraph 4 airport case, this is too late if the goods are in the person's hand luggage. And even if they are in hold luggage it may be too late depending on when HMRC say the duty point actually is. Even if for hold luggage travellers the duty point is the time when the goods are picked up from the carousel, the notices do not (we say from judicial knowledge) warn travellers that if they do collect their luggage they have become liable to a penalty of any sort.

140. What they do say about excise goods brought in from the EU that are held for a commercial purpose can be seen from a leaflet published by the Border Force "UK Customs Information". This leaflet is available on the "gov.uk" website and so someone in Spain intending to bring in 15kg of HRT or one bottle of rare and interesting wine for a friend to be paid for at cost is able to find out before their journey what Border Force's views are.

> "**Going through Customs**
>
> Most UK ports and airports have three exits or 'channels': the red, green and blue channel.
>
> Some ports and airports only have one exit and a red point phone where you declare goods.
>
> ...
>
> Use the blue channel if you are travelling from a country within the European Union (EU) with no banned or restricted goods (see pages 15 – 19).
>
> Use the green channel if you are travelling from a country outside the European Union (EU) with goods that:
>
> - do not go over your allowances (see pages 5 – 8 for further information)
> - are not banned or restricted
>
> (see pages 15 – 19 for further information).
>
> You must use the red channel or the red point phone if you:
>
> - have goods or cash (pages 12 and 14) to declare;
> - have commercial goods, see 'Notice 6 – Merchandise in baggage' available from the advice service (page 23) for more information;

> • are not sure about what you need to declare.
>
> **Travelling within the European Union (EU)**
>
> You can bring an unlimited amount of most goods into the UK, for example, you can bring in any alcohol, tobacco, meat and dairy products – as long as they are for your own use and transported by you. 'Own use' means for your own consumption or gifts. If you intend to sell or accept any kind of payment for food, alcohol or tobacco products you bring in then this is classed as commercial use. Please contact the advice service (page 23) for more information."

Unfortunately page 23 which is meant to give details of the advice service is blank. There is nothing in this leaflet about penalties. Thus even had PX (see §39) conscientiously studied the booklet and sought to contact the advice serve he would not be able to access it.

141. The "Notice 6" referred to is also available online on the "gov.uk" website. It seems to be primarily aimed at business people bringing goods in their luggage or cars, but does not exclude private travellers in the appellant's or PX's situation. On "Import procedures" it says that "all commercial goods carried in your baggage … must be declared in the red 'Goods to declare' channel".

142. And in answer to question 2.2 "What happens if I fail to go into the Red Channel …" it says "You may lose the goods and be liable to prosecution, or a fine.

143. In answer to question "4.2 When must I pay any Customs charges?" it says:

> "When Custom charges are due you must pay any duties and VAT before the goods are released. If the goods are entered on a form C88/SAD, you must pay any charges at the (air)port. For goods valued at less than £750, that are cleared in the Red Channel or at the Red Point phone, the charges will be assessed and collected and you will be issued with a receipt."

144. There is a qualification to be made in relation to this question. It clearly refers to customs duty and import VAT, but not necessarily to excise duties. Customs duties do not apply to intra-EU movements and in any case the "duty point" for customs duties may be different from that given by the Movement etc Regulations, as indeed it may be for excise duties on non-EU arrivals.

145. But what the answer shows, it seems to us, is that there are procedures for paying duty in cases where a person declares goods in the red channel, but no mention of any other consequences that might arise from this straightforward act. And what the leaflet shows as a whole is that there is nothing in it or in Notice 6 to which it refers which gives any warning that there may be penalties whether a person goes through the blue, green or red channels.

Our final conclusion on whether paragraph 4 applies

146. Nothing in the matters discussed in §§89 to 145 persuades us that the penumbra of doubt is extinguished. We therefore hold that the appellant is not liable to a penalty under paragraph 4.

Other possible objections to the penalty (if we are wrong)

147. We readily acknowledge that we may be wrong about paragraph 4, and we expect HMRC to appeal this decision. So we consider whether, on the hypothesis that the conditions for the imposition of the penalty have been met, there is any other way in which the penalty, or its amount, may be objected to. We do not consider that the deemed condemnation of the goods means that we cannot consider these matters. In *Race* the Upper Tribunal said at [34] of assessments to duty that procedural issues remain open to the appellant, and the same must be true where procedural issues relating to penalty assessments are concerned.

148. We consider that the burden of proof which HMRC readily shouldered in this case applies not only to showing that the facts coincide with the legal description of the penalised conduct, but also to the procedural aspects of the case.

149. As far as procedural issues are concerned the requirements of Schedule 41 FA 2008 are that where a person ("P") is liable for a penalty under Schedule 41, HMRC must assess the penalty and must notify P and state the period in respect of which the penalty is assessed.

150. We have in the bundle a copy of the notice of assessment which is addressed to the appellant at the address used throughout the time of the enquiry. The tax period is stated as running from 10 October 2013 to 10 October 2013, ie the period is that date.

151. A penalty assessment under Schedule 41 is treated in the same way for procedural purposes as an assessment to excise duty (paragraph 16(3)(a)) unless the Schedule provides otherwise. Section 12 FA 1994 which provides for assessments to excise duty does not contain any requirements that are not included in Schedule 41, so we pass to those requirements that are so included.

152. The time limit for an assessment of penalties under Schedule 41 is provided in paragraph 16(4) and is 12 months from one of two dates. The first date, given by sub-paragraph (4)(a), is the end of the "appeal period". This is the period during which, relevantly for this case, an appeal against an assessment has not been determined. Since the hearing before this Tribunal is to determine that appeal, then if the assessment is one to which paragraph 16(4)(a) applies, the time limit has not begun to run.

153. The assessment concerned must be one for the duty "unpaid *by reason of* the relevant act … in respect of which the penalty is imposed". If, contrary to our decision, the appellant carried etc. excise goods *after* the duty point then it is difficult to see how her actions in handling the goods by carrying her hand luggage off the aircraft can have led to the duty being unpaid.

154. It seems to us that even on the HMRC view of paragraph 4 the assessment is not within paragraph 16(4)(a). So the 12 months then runs, by virtue of paragraph 16(4)(b), from the date the unpaid duty is ascertained, which was 26 November 2013. The penalty assessment was issued on 14 May 2014 so is in time.

155. P has a right of appeal against a penalty assessment, both against liability and amount. The appeal procedures applicable are those for excise duty assessments and so are those in Part 1 FA 1994 (this is as a result of paragraph 18(1)).

156. Section 15A FA 1994 requires HMRC to offer a review when they notify the decision (which in Schedule 41 means the assessment). The penalty assessment letter contained a reference to a review being available. The appellant was also told that in the absence of a review she could notify the Tribunal of her appeal within 30 days. The appeal (against both duty and penalty) was notified on 27 November 2014. This was out of time for both the duty assessment (as the review that was conducted had been completed in June 2014) and the penalty assessment. The Tribunal seems to have spotted the issue of lateness with the appellant but we can see no further material on this issue.

157. The lateness issue was not apparently considered by HMRC and was not mentioned by HMRC at the hearing. The appellant is a litigant in person faced with proceedings by two government agencies in relation to the same issue and has obviously been confused by the process. Given that HMRC have acquiesced in the lateness and came to the hearing to argue the issues we consider that the appellant has a reasonable excuse for the lateness and that it is in the interests of justice to give leave and to waive the requirement that permission to notify a late appeal must be in writing.

158. One aspect of the appellant's confusion which has also confused HMRC is that she ticked the box on the Appeal Notice form to the effect that she had not paid the disputed tax. Accordingly on that basis the Tribunal correctly told her that she must apply to HMRC to be granted relief from payment pending the appeal ("hardship"). HMRC then wrote to her about a sum of £3,497 "the subject matter of *the* assessment" [our emphasis – there were two assessments, to duty and later to penalties]. In fact, of the £3,497 only £906 was the penalty. In her Appeal Notice form the appellant had correctly ticked the "yes" box in answer to the question "Is the appeal against a penalty or surcharge?" Immediately below that she had correctly put "£3,497" in answer to the requirement to state "The amount of the tax or penalty or surcharge".

159. Since a penalty is not payable if an appeal is made (paragraph 18(2)(a)) it cannot be the subject of a hardship application, and HMRC should have noticed that the amount which they made their decision on hardship about (which was to grant the application) was the total of the assessment *and* the penalty.

160. Did the penalty assessment state the correct amount? All penalties under paragraph 4 (and any other paragraph) of Schedule 41 are a percentage of "potential lost revenue" ("PLR") (see paragraph 6). For a paragraph 4 penalty the definition of

PLR is found in paragraph 10, which simply provides that the PLR is the amount of duty due on the goods. That was £2,591 the amount of the duty assessment and was so stated in the Penalty Explanation schedule on 7 March 2014. The PLR is therefore correct.

161. The penalty is a percentage of the PLR and is 35%. 35% is the minimum penalty for a prompted disclosure of deliberate action. Because the appellant is a litigant in person we have looked to see what arguments she might have raised that might have led to the penalty being reduced.

162. We have considered whether the disclosure was in fact prompted or unprompted. A disclosure is unprompted if the person had no reason to believe that HMRC are about to discover the relevant act. The appellant's disclosure started in our view when she told Officer O'Keeffe that she "hadn't got a leg to stand on" when she was intercepted in the green channel (as we have found). This is because that amounts to "telling HMRC about" the relevant act (paragraph 12(2)(a)). We do not think she would have said that had she not been intercepted and she must have said it because she knew "the game was up".

163. That at least is clearly the way HMRC saw it. But if HMRC are right about what the relevant act is, it must be the handling of the goods as soon as the appellant disembarked without having paid or secured payment of the duty beforehand. Is that what she told HMRC about? And if it was, did she have reason to believe that HMRC had discovered her handling the goods in her hand luggage?

164. Had the penalty been chargeable where a person attempts to evade excise duty (as for example is the case with s 8 FA 1994) then we would have unhesitatingly said that the disclosure was prompted. What we are sure was in Officer O'Keeffe's mind when she intercepted the appellant was that the appellant was attempting to bring in to the UK tobacco on which excise duty had not and was not going to be paid, and we are equally sure that that is what the appellant realised that Officer O'Keeffe thought and that she was going to find that the appellant had far too much tobacco for it to be feasible that it was not for commercial use.

165. In this situation we cannot be sure that the disclosure was prompted by reference to what paragraph 4 seeks to penalise. We would therefore say that the disclosure was unprompted.

166. The problems we have had with determining whether the disclosure was prompted or unprompted in relation to the precise act that paragraph 4 penalises is perhaps a further reinforcement of our view that paragraph 4 does not catch airport seizures.

167. However we have no difficulty in agreeing with HMRC that the conduct was deliberate. "I haven't got a leg to stand on" is not the response of someone who has made a careless error. It is in fact difficult to think of a way in which a person can bring 15 times as much tobacco as the guideline amount into the UK in a way which is not deliberate.

168. Saying that the disclosure was deliberate but unprompted brings the minimum down to 20%. We are pleased to some extent to find that 20% is also the minimum allowed by HMRC for a penalty for dishonest evasion of excise duty under s 8 FA 1994. It would be odd if the minimum for a not necessarily dishonest act was substantially higher than one for a dishonest evasion of duty. HMRC in response to our directions had argued that deliberate conduct did not have to be dishonest, and we agree.

169. Given that we have found that the conduct of the appellant was deliberate then there cannot be a reasonable excuse defence – paragraph 20.

170. There can however be a special reduction under paragraph 14. In the Penalty schedule attached to the penalty precursor letter of 7 March 2014, Ms Milne said in connection with a special reduction that "[b]ased on the information we have, we do not consider there are any special circumstances which would lead us to further reduce the penalty." There is no further information about what Ms Milne took into account or did not take into account. On appeal we can only substitute our own decision on a special reduction if we think HMRC's decision to be "flawed" in the judicial review sense.

171. We asked Ms Milne if she had taken into account whether the penalty truly reflected the compliance intention of paragraph 4 (as to which notion see HMRC's Compliance Handbook at paragraph 170600). She said she had and that she had concluded that it did.

172. On 14 March 2014 the appellant sent two letters to Ms Milne in response to her request for any further information or reasons that might affect the penalty. One letter requested a review and both made it very clear that the appellant had wanted to give further information to the Border Force about the circumstances of her bringing 15kg of HRT into the country from Spain. The appellant also disputed many of the statements Ms Milne had made in her Penalty Schedule. Ms Milne passed one letter to the Border Force who told her that "a decision had been made" and Ms Milne passed that on to the appellant. She also told the appellant that she had considered the letters and could make no adjustments to the penalty, but without providing any reasons.

173. The question we ask ourselves is whether Ms Milne should have taken into account that the appellant had repeatedly and forcefully said that she not been given an opportunity to explain herself to the Border Force. An officer in the team and with the experience of Ms Milne would surely know that regulation 13(4) of the Movement etc Regulations requires that "regard must be taken" of [the appellant's] reasons for having possession or control of the goods and a large number of other matters when the Border Force are determining whether excise goods are for a person's own use. The appellant's evidence suggests this was not done, or not fully. We also assume, but do not know, that Ms Milne took into account information from the Border Force about the circumstances of the interception.

174. We consider however that it was within the range of reasonable responses to the appellant's letter to prefer the account of the Border Force or to take the view that, if the regulation 13(4) procedure was curtailed or otherwise not carried out, it was the appellant's fault, or, even if not her fault, that it did not justify a reduction in the penalty, and that any remedy for the Border Force's alleged failures lies elsewhere. We cannot see therefore that Ms Milne either took irrelevant matters into account or failed to take relevant matters into account and we agree that the decision about a special reduction by HMRC was not flawed.

175. We add here that by considering this question we do not think we are doing anything that *Jones & Jones* or *Race* says we cannot. The effect of *Jones & Jones* is that the HRT was deemed to be duly condemned as forfeit and therefore is deemed to have been held for commercial use. The appellant cannot therefore attack the duty assessment raised on the grounds that the HRT was not dutiable because it was in fact for private use.

176. But she is not of course doing that in relation to the penalty. We consider that if we had been able to consider whether there were "special circumstances" we could have looked at the actual facts of what happened at the airport, but not to find facts that are contrary to the deemed facts. This means that we could not in such an exercise have found that in fact the appellant was bringing in the HRT for private use, but we could have found that the appellant's statement that she was deprived of an opportunity to explain herself or that the regulation 13(4) procedure was not carried out was correct and considered whether that amounted in itself to special circumstances.

177. If therefore we are wrong about the validity of the paragraph 4 penalty, we would have reduced the penalty to 20% on the basis that it was unprompted.

Decision

178. We uphold the assessment to excise duty in the sum of £2,591.

179. Under paragraph 19(1) Schedule 41 FA 2008 we cancel HMRC's decision to assess a penalty under paragraph 4.

180. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 12 AUGUST 2016

SCHEDULE 41 FA 2008

Amount of penalty: standard amount

6 …

(4) P's acquiring possession of, or being concerned in dealing with, goods on which a payment of duty is outstanding and has not been deferred is—

(a) "deliberate and concealed" if it is done deliberately and P makes arrangements to conceal it, and

(b) "deliberate but not concealed" if it is done deliberately but P does not make arrangements to conceal it.

6B The penalty payable under any of paragraphs 2, 3(1) and 4 is—

(a) for a deliberate and concealed act or failure, 100% of the potential lost revenue,

(b) for a deliberate but not concealed act or failure, 70% of the potential lost revenue, and

(c) for any other case, 30% of the potential lost revenue.

Potential lost revenue

…

10 In the case of acquiring possession of, or being concerned in dealing with, goods the payment of duty on which is outstanding and has not been deferred, the potential lost revenue is an amount equal to the amount of duty due on the goods.

11(1) In calculating potential lost revenue in respect of a relevant act or failure on the part of P no account is to be taken of the fact that a potential loss of revenue from P is or may be balanced by a potential over-payment by another person (except to the extent that an enactment requires or permits a person's tax liability to be adjusted by reference to P's).

(2) In this Schedule "a relevant act or failure" means—

…

(d) acquiring possession of, or being concerned in dealing with, goods the payment of duty on which is outstanding and has not been deferred.

Reductions for disclosure

12(1) Paragraph 13 provides for reductions in penalties under paragraphs 1 to 4 where P discloses a relevant act or failure.

(2) P discloses a relevant act or failure by—

(a) telling HMRC about it,

(b) giving HMRC reasonable help in quantifying the tax unpaid by reason of it, and

(c) allowing HMRC access to records for the purpose of checking how much tax is so unpaid.

(3) Disclosure of a relevant act or failure—

(a) is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the relevant act or failure, and

(b) otherwise, is "prompted".

(4) In relation to disclosure "quality" includes timing, nature and extent.

13(1) If a person who would otherwise be liable to a penalty of a percentage shown in column 1 of the Table (a "standard percentage") has made a disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure.

(2) But the standard percentage may not be reduced to a percentage that is below the minimum shown for it—

(a) for a prompted disclosure, in column 2 of the Table, and

(b) for an unprompted disclosure, in column 3 of the Table.

Standard %	*Minimum % for prompted disclosure*	*Minimum % for unprompted disclosure*
…	…	…
70%	35%	20%
…	…	…

Special reduction

14(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any of paragraphs 1 to 4.

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

(a) ability to pay, or

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

…

Assessment

16(1) Where P becomes liable for a penalty under any of paragraphs 1 to 4 HMRC shall—

(a) assess the penalty,

(b) notify P, and

(c) state in the notice the period in respect of which the penalty is assessed.

(2) A penalty under any of paragraphs 1 to 4 must be paid before the end of the period of 30 days beginning with the day on which notification of the penalty is issued.

(3) An assessment—

(a) shall be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Act),

(b) may be enforced as if it were an assessment to tax, and

(c) may be combined with an assessment to tax.

(4) An assessment of a penalty under any of paragraphs 1 to 4 must be made before the end of the period of 12 months beginning with—

(a) the end of the appeal period for the assessment of tax unpaid by reason of the relevant act or failure in respect of which the penalty is imposed, or

(b) if there is no such assessment, the date on which the amount of tax unpaid by reason of the relevant act or failure is ascertained.

(5) In sub-paragraph (4)(a) "appeal period" means the period during which—

(a) an appeal could be brought, or

(b) an appeal that has been brought has not been determined or withdrawn.

(6) Subject to sub-paragraph (4), a supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of potential lost revenue.

…

Appeal

17(1) P may appeal against a decision of HMRC that a penalty is payable by P.

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

18(1) An appeal shall be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or the Upper Tribunal).

(2) Sub-paragraph (1) does not apply—

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

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

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

(2) On an appeal under paragraph 17(2) the tribunal may—

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 14—

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 14 was flawed.

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

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

…

Interpretation

24(1) This paragraph applies for the construction of this Schedule.

…

(3) "Tax", without more, includes duty.

…

Consequential repeals

25 In consequence of this Schedule the following provisions are omitted—

…

(b) section 170A of CEMA 1979,

…