[2020] UKFTT 0008 (TC)

TC07516

EXCISE DUTY – PENALTY – new evidence after summary decision – refusal to set aside summary decision - jurisdiction of Tribunal – EU Directive – position if cigarettes also subject to excise duty in Hungary – proportionality – appeal refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/05880

BETWEEN

ALEXI FERENC **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE REDSTON

The Tribunal determined the appeal on 22 July 2019 without a hearing under the provisions of Rule 29(1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009

DECISION

INTRODUCTION

1. Mr Ferenc appealed against a decision made by HM Revenue and Customs ("HMRC") to issue him with an excise duty assessment of £4,451 and a "wrongdoing penalty" of £1,112.

2. The appeal was originally listed to be heard as a standard case. However, Mr Ferenc was unable to attend the hearing for medical reasons, and the parties consented to the appeal being decided on the papers under Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules"). On 1 April 2019, Judge Mosedale agreed that it could be so determined, and issued directions relating to the delivery of Bundles and submissions.

3. On 31 July 2019, I issued a summary decision refusing the appeal. On 30 August 2019, the Tribunal received a document from Mr Ferenc headed "Apply for review to First-tier Tribunal Tax Chamber" which opened by saying that that Mr Ferenc was "hereby filing [his] appeal against the Tribunal's Decision".

4. I decided that this document was an application under Rule 38 of the Tribunal Rules to set aside the summary decision, and in the alternative, an application to appeal the decision under Rule 39. For the reasons at §14ff, I decided that the summary decision should not be set aside. As it is not possible to appeal a summary decision, see Rule 35(4) of the Tribunal Rules, I treated Mr Ferenc's application for permission to appeal as an application for a full decision.

5. I decided to refuse Mr Ferenc's appeal because:

   (1) parts of his evidence were inconsistent and lacked credibility;

   (2) the Tribunal has no jurisdiction to consider his submission that he did not intend to import the cigarettes for commercial reasons;

   (3) on the facts as found, the Border Force procedure was fair and in any event that issue would be a matter for judicial review;

   (4) there was no breach of EU Directive 2008/118/EC ("the 2008 Directive"); and

   (5) the assessments were not disproportionate.

6. If Mr Ferenc now wishes to appeal this Full Decision he must do so within the time limit set out at the end of this document.

MR FERENC'S LATE APPLICATIONS

7. The Tribunal received the document from Mr Ferenc referred to above on 30 August 2019. The summary decision was issued on 31 July 2019, and it ended by advising Mr Ferenc that if he wished to appeal, he must first:

> "apply within 28 days of the date of release of this decision to the Tribunal for full written findings and reasons ('a Full Decision')."

8. An application to set aside must also be received "no later than 28 days after the date on which the Tribunal sent notice of the decision to the party", see Rule 38(3). Thus, the application to set aside, and the application for a full decision, were both made late.

9. The Tribunals Service asked Mr Ferenc to provide reasons why his application was late. Mr Ferenc responded on 27 September 2019, saying that "my treatment did not allow me to

reply in time due to limited internet access". The Tribunals Service then asked HMRC for any submissions in relation to the lateness of the application; HMRC replied on 14 November 2019 saying that they had no objection to Mr Ferenc's application being allowed late. On 21 November 2019, the application was referred to me. However, parts of the document were illegible. Mr Ferenc was asked to resend it, which he did on 15 December 2019.

The applications

10. In deciding whether to allow Mr Ferenc to make his applications late, I followed *Martland v HMRC* [2018] UKUT 0178 (TCC), which sets out a three stage test:

> (1) establish the length of the delay and whether it is serious and/or significant;
>
> (2) establish the reason(s) why the delay occurred; and
>
> (3) evaluate all the circumstances of the case, using a balancing exercise to assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

11. In relation to the first stage, Mr Ferenc's application should have been received by 28 August 2019, so was only two days late. This was neither serious nor significant.

12. In relation to the second stage, the reason why the delay occurred was that Mr Ferenc was unable to access the internet for reasons linked to his medical treatment.

13. In relation to the third stage, I take into account the fact that HMRC have not objected to the late application, as well as the outcomes of the first two stages. I decided that I should exercise my discretion to allow the applications to be made late.

APPLICATION FOR SET ASIDE

14. Rule 38 allows decisions to be "set aside" if the conditions in that Rule are satisfied. It reads:

> "(1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision, or the relevant part of it, if—
>
> (a) the Tribunal considers that it is in the interests of justice to do so; and
>
> (b) one or more of the conditions in paragraph (2) is satisfied.
>
> (2) The conditions are—
>
> (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
>
> (b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;
>
> (c) there has been some other procedural irregularity in the proceedings; or
>
> (d) a party, or a party's representative, was not present at a hearing related to the proceedings."

Document not sent to the Tribunal?

15. Mr Ferenc's application contains more evidence about his intentions when coming to the UK, and it also attaches (a) what he said is "a photo of one box of the seized cigarettes" as evidence to support some of his earlier statements and (b) two (untranslated) pages from a Hungarian website and a link to that website. I considered whether these fell within Rule

38(2)(b) as being "document[s] relating to the proceedings…not sent to the Tribunal at an appropriate time".

The procedural background

16. On 14 November 2018, the Tribunal issued directions to the parties. The first direction required that

> "each party shall send or deliver to the other party and the Tribunal a list of documents in its possession or control on which that party intends to rely in connection with the appeal and provide to the other party copies of any documents on that list which have not already been provided to the other party."

17. On 21 December 2018, Mr Ferenc complied with that direction. His Document List is headed "list of the documents which are not indicated in the Respondent's list of documents" and it reads:

(1) the hardship application sent to HMRC;

(2) the hardship application sent to the Tribunal;

(3) the Appeal to the Tribunal; and

(4) documents in connection with the health state of the appellant.

18. There were then discussions about the listing of the case to be heard on the papers, and further directions were issued on 1 April 2019. On 23 May 2019, the Tribunals Service wrote to Mr Ferenc, warning that:

> "if you do not provide any Submissions [sic], the Judge at the hearing may not permit you to use in evidence to support your case other than those produced by the other side, and the bundles at the hearing may not include the documents to which you wish to refer"

19. On 30 May 2019, Mr Ferenc responded, saying:

> "I already sent all the documents which were not indicated on the List of Documents of HMRC…and HMRC already sent this documents to the Tribunal…Herby I declare again that I maintain my previous statements…I respectfully request the Tribunal take into consideration all my previous statements, which are indicated in my list of Documents and in the List of Documents of HMRC meaning that the Tribunal already got all of this documents."

20. I noted that, although the letter of 23 May 2019 to Mr Ferenc from the Tribunal's Service referred to him providing further "submissions", it is clear from the rest of that paragraph that he was being invited to provide any further evidence. It is also evident from his response that he was only seeking to rely on the documents previously provided. These did not include those he is now seeking to adduce. I find that Mr Ferenc was given every opportunity to provide evidence before his case was decided, but failed to supply the new documents.

The case law

21. The normal position is that all relevant evidence is to be provided to the Tribunal at the time of the hearing. This is because it is in the interests of justice for there to be finality in litigation. In *Rosenbaum's Executors* [2013] UKFTT 495 (TC) ("*Rosenbaum*"), albeit in the

context of a "default paper case" in which the set-aside application had been made by HMRC, the Tribunal (Judge Brannan) said at [21]:

> "I do not consider Rule 38 to be a provision which allows a party to an appeal before the Tribunal to have a 'second bite at the cherry'. The whole purpose of the default paper category of tax appeals is to enable simple tax penalty appeals to be dealt with swiftly on the papers put before the Tribunal. If Rule 38 is used to permit a disappointed party (particularly a party with the expertise of HMRC) to produce new evidence after the event when there is no good reason why that evidence could not have been put before the Tribunal in the first place, there would be no finality regarding the Tribunal's decision. The default paper appeals would then involve a decision-making process which was iterative. Plainly, this cannot be what was intended by Rule 38. I decline to interpret or apply Rule 38 in this manner."

22. Although that decision was reached in the context of a "default paper case", it is clear that allowing evidence to be submitted after a decision has been issued invariably results in an iterative process, whatever category of appeal is before the Tribunal.

23. I also noted that in *Rosenbaum*, Judge Brannan referred to the position of "a party with the expertise of HMRC", and of course Mr Ferenc is a litigant in person. However, it is now clear that no different standard applies to litigants in person. Lord Sumption, giving the leading judgment in *Barton v Wright Hassell* [2018] UKSC 12 ("*Barton*") with which Lord Wilson and Lord Carnwarth both agreed, said at [21]:

> "Their lack of representation will often justify making allowances in making case management decisions and in conducting hearings. But it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules…The rules provide a framework within which to balance the interest of both sides. That balance is inevitably disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent."

24. In *Daksha Fraser* [2012] UKFTT 189 (TC) the appellant provided further evidence after the hearing. Judge Poole first decided that, to come within Rule 38, the provision of late evidence had to be a "procedural irregularity" and that this was not the position where a party had simply provided "what turns out to be inadequate evidence" and then sought to adduce further evidence. He said (emphasis in original):

> "35. The conditions in Rule 38(2) which might most obviously be said to be satisfied in this case are those contained in Rule 38(2)(a) or (b) – on the basis that 'a document' (i.e. the new evidence which the appellant now seeks to put forward) 'was 'not sent to a party' (i.e. HMRC) or 'was not sent to the Tribunal at an appropriate time' (i.e. before the Tribunal was making its decision on the appeal).
>
> 36. However, I consider that a failure to send the new evidence would need to be in the nature of a 'procedural irregularity' before it can satisfy the condition in (2)(a) or (b), because of the wording of paragraph (2)(c), which refers to 'some **other** procedural irregularity' in a way which implies that (2)(a) and (2)(b) are considered to be specific examples of procedural irregularity.
>
> 37. It follows that the condition in rule 38(2)(a) or (b) is only satisfied if the representative's failure to submit full evidence in support of the original appeal can be regarded as a 'procedural irregularity'. Whilst his failure to submit full

> evidence at the correct time might certainly be considered procedurally inadequate, I do not consider it to have been a procedural irregularity – the question of what evidence should be submitted in support of an appeal is a matter for each party to decide for himself in conjunction with his advisers, and I do not see how a decision to submit what turns out to be inadequate evidence could be regarded as giving rise to a 'procedural irregularity'.
>
> 38. None of the other conditions in rule 38(2) seem to me to be relevant in this case – no other procedural irregularity is alleged and because this was a default paper case, there was no hearing (and therefore there is no question of any non-attendance at such a hearing). I therefore find that none of the conditions in rule 38(2) is satisfied in this case and therefore there is no question of setting the Summary Decision aside, even if the 'interests of justice' test in rule 38(1)(a) were satisfied..."

25. Judge Poole did, however, also go on to consider the "interests of justice" test in Rule 38(1)(a), saying:

> "41. It might be said that it will always be in the interests of justice to consider new evidence before reaching a final decision, and that argument has some force. It is however only half the story. It could not be right that a party should be permitted to re-litigate the same dispute repeatedly simply on the basis of bringing forward some new evidence every time the result went against him.
>
> 42. The function of the Tribunal is to provide efficient resolution of disputes between taxpayers and HMRC. Whilst some latitude may be allowed for taxpayers who are inexperienced in presenting their case, it would completely undermine the Tribunal's function if it were routinely to allow losing parties (whether taxpayers or HMRC) to re-litigate appeals on the basis that they did not feel they had put sufficient evidence before the Tribunal when it first heard the appeal. Parties should be well aware that an appeal offers a one-off opportunity to put their case as best they can, not an opportunity to hope for a successful outcome on the basis of minimal effort and then make a better second attempt if the first fails, possibly followed by an even better third attempt, and so on. To put it in layman's terms, an appellant must realise that the appeals system gives him one bite at the cherry unless a very good reason can be shown why he should have a second."

26. Again, the reference here to allowing "some latitude…for taxpayers who are inexperienced in presenting their case" cannot be read as allowing litigants in person greater latitude in relation to compliance than represented parties, see *Barton*.

Decision on set aside

27. I respectfully agree with the analyses above. Mr Ferenc had every opportunity to put forward to the Tribunal, before the hearing, the evidence he now seeks to adduce. It is now too late for him to do so. For the reasons set out in *Rosenbaum* and *Daksha Fraser*, his new evidence cannot form the basis for an application to set aside the summary decision under Rule 38.

APPLICATION FOR FULL DECISION

28. It is clear from Mr Ferenc's application that he wants to challenge my refusal of his appeal. As it is not possible to appeal a summary decision, see Rule 35(4) of the Tribunal Rules, I have treated his application as being for a full decision. The rest of this document is that full decision.

THE EVIDENCE

29. I was provided with a helpful Bundle from HMRC, which as already noted, contained the Documents on both parties' Document Lists, being:

(1) Mr Ferenc's Notice of Appeal dated 27 July 2017 (with enclosures);

(2) HMRC's Statement of Case (with enclosures) dated 1 October 2018;

(3) correspondence between the parties and between the parties and the Tribunal;

(4) the witness statement and the Notebook of Officer Downey ("the Notebook"), the Border Force Officer who seized the goods; and

(5) the witness statement of Officer Ashraf, who made the decision which is under appeal[1].

30. The further evidence provided as part of the application (see §15), was of course supplied after the summary decision. For the avoidance of any possible doubt, I confirm that the further evidence has not been taken into account in drafting this full decision.

THE FACTS

31. On the basis of the evidence summarised at §29, I make the findings of fact set out in this part of the decision. I make a further finding of fact at §61.

Mr Ferenc's purpose in coming to the UK and his level of English

32. On 23 September 2015, Mr Ferenc travelled from Budapest to Stansted. He entered the blue channel and was stopped by Officer Downey.

The Notebook

33. Officer Downey made a record in the Notebook and Mr Ferenc signed the relevant pages before he left the airport. Those pages are therefore a contemporaneous signed account of what happened. Officer Downey has also incorporated that record into his witness statement, which Mr Ferenc has not challenged. I accept Officer Downey's evidence and find that he accurately recorded his conversation with Mr Ferenc.

34. It is also clear from the Notebook that Mr Ferenc was able to understand the questions being asked of him: for instance, he was asked for "a boarding pass" and presented it; he was asked if he lived in the UK, and he said "no, I live in Budapest". I find as a fact that Mr Ferenc's English was good enough to communicate with Officer Downey.

Mr Ferenc's purpose

35. It is not in dispute that Mr Ferenc's only luggage was a black holdall and a large purple suitcase, and that both contained cigarettes and nothing else. I find that Mr Ferenc was intending to spend almost no time in the UK, as otherwise he would have had with him at least some personal possessions, such as a change of clothes and toiletries.

36. According to the Notebook, Mr Ferenc told Officer Downey that he was a student, who was coming to the UK for about a week to visit a friend, but had no return ticket. I have already

[1] Mr Ferenc's application says that the summary decision states that it "contains" HMRC's two witness statements, and he complains these are not in the decision. However, the summary decision clearly states at [3] that the witness statements were contained within HMRC's Bundle; it does not say that they were in the summary decision itself. The Bundle had previously been supplied to Mr Ferenc.

found that this was a correct record of what Mr Ferenc said. However, it is not credible: if Mr Ferenc was coming to the UK for a week to visit a friend, he would have had at least some personal possessions with him, and on the balance of probabilities he would also have had a return ticket, which he would have shown to Officer Downey.

37. When Mr Ferenc submitted his request for a statutory review of the decision, he changed his position, and said he was coming to the UK "to learn English and to seek a job as an entrant IT specialist". This evidence both contradicts that previously given to Officer Downey, and is inconsistent with the lack of any personal possessions in his luggage.

38. It follows that neither of the reasons Mr Ferenc has provided for visiting the UK are credible, and I do not accept that he was coming to the UK either:

(1) to learn English and to seek a job as an entrant IT specialist, or

(2) for a week to visit a friend.

39. I instead make the reasonable inference that Mr Ferenc's purpose in coming to the UK was to import the cigarettes.

The seizure

40. After Officer Downey had opened the luggage and found the cigarettes, Mr Ferenc said he did not want to be interviewed and wanted to leave the airport. Officer Downey formally seized the cigarettes and issued Mr Ferenc with a Seizure Information Notice (BOR 156) and a letter headed "warning letter about seized goods" (BOR 162). Both stated that 16,800 cigarettes had been seized, and the Notebook also gives that figure. Mr Ferenc signed the BOR 156 and the BOR 162, as well as the Notebook.

41. Mr Ferenc subsequently said that (a) his English was not good enough to understand the forms he was signing, and (b) the number of cigarettes had been incorrectly recorded by Officer Downey, as in Hungary each pack contains only 19 sticks and not 20.

42. Mr Ferenc had no difficulty conversing with Officer Downey, and the language of the forms is simple and straightforward, as is that used in the Notebook. I also note that the level of English which would be required to take a job in the UK even as an "entrant" IT specialist (as Mr Ferenc subsequently said was the case) is far higher than that required to understand these forms or the conversation with Officer Downey. I find as a fact that Mr Ferenc understood what he was signing.

43. He signed three documents, the BOR 156, the BOR 162, and the Notebook, all of which stated that 16,800 cigarettes had been seized and in reliance on those documents I find that to be a fact.

44. Mr Ferenc has also stated that Hungarian excise duty had already been levied on the cigarettes. However, he provided no supporting evidence – such as information as to where the goods were purchased, copies of invoices etc. Given that I have found his other evidence to be unreliable, I decided to make no finding on whether the cigarettes had previously been charged to duty in Hungary.

The magistrate's court, the assessments, and the appeal process

45. Mr Ferenc did not challenge the seizure in the magistrate's court, as he was entitled to do. On 23 December 2015, Officer Ashraf issued Mr Ferenc with a preliminary notice setting out an assessment to excise duty and a penalty. Mr Ferenc did not respond.

46. On 29 January 2016, Officer Ashraf issued a duty assessment of £4,451 and a penalty assessment of £2,648. Penalties are required by Finance Act 2008, Sch 41 to be calculated based on the "potential lost revenue" or "PLR". This is the amount of duty which would have been lost if the Border Force had not discovered the cigarettes, so the PLR here is £4,451. Officer Ashraf decided that Mr Ferenc's behaviour was deliberate but not concealed. In accordance with Sch 41, para 6B, the maximum penalty was therefore 70% of the PLR. Sch 41, para 13 then requires that the maximum be reduced ("mitigated"), to take into account the "quality" of Mr Ferenc's disclosure, but not below 35% of the PLR. Having carried out that exercise, Officer Ashraf decided that the penalty was £2,648.

47. No response was received from Mr Ferenc to the assessments. It was not until HMRC's Debt Management team made contact to collect the outstanding amounts, that Mr Ferenc asked for a statutory review.

48. HMRC accepted the review request although it was after the statutory time limit. On 29 June 2017, the HMRC review officer, Ms Loughridge, upheld the duty assessment, but reduced the penalty. She said that although "there are indicators of deliberate behaviour" she had insufficient evidence to support a deliberate penalty. The penalty range for a non-deliberate penalty is between 20% and 30% of the PLR. Ms Loughridge also increased the mitigation. As a result, the final penalty was £1,112. On 27 July 2017, Mr Ferenc appealed to the Tribunal.

49. Subsequent to the issues with which this appeal is concerned, Mr Ferenc was diagnosed with leukaemia. He also remains based in Hungary. Taking both those facts into account, the hearing was listed to be decided on the papers (ie, without a hearing) with the agreement of both parties and of the Tribunal, as explained at §2.

MR FERENC'S GROUNDS OF APPEAL

50. Mr Ferenc has appealed on the following grounds:

(1) he brought the cigarettes into the UK for his own use and did not intend to sell them in the UK;

(2) the procedure involved in the seizure was unfair and legally ineffective;

(3) the number of cigarettes used as the basis for the assessments is incorrect.

(4) the assessment are in breach of EU law as:

(a) he paid excise duty on the cigarettes in Hungary, and

(b) the cigarettes have been seized; and

(5) the cost to him of the penalty, duty and seizure, taken together, is disproportionate.

51. I deal with each of those in turn.

PERSONAL USE?

52. Mr Ferenc submitted that:

> "I cannot conceive of any circumstances which would prove that I intended to sell these tobacco products in the UK…I brought the tobacco products with me for my own use, to satisfy my addiction."

53. He said that the seizure had therefore violated his human rights. In order to decide that issue, it is necessary to consider the relevant case law.

The Court of Appeal judgment in *Jones*

54. In *Jones v HMRC* [2011] EWCA Civ 824 Mr and Mrs Jones had appealed against the HMRC's refusal to restore a car in which they had been transporting substantial quantities of alcohol and cigarettes. Mr and Mrs Jones did not challenge the seizure in the magistrate's court. The First-tier Tribunal ("FTT") allowed their appeal, finding that the goods were intended for personal use, not commercial use. The Upper Tribunal ("UT") agreed.

55. In the Court of Appeal, Mummery LJ overturned that decision and found for HMRC. He held at [71] that a person who wishes to challenge a seizure on the basis that he is importing goods for personal use must do so in the magistrate's court. If a person fails to do so, the law deems the goods to have been rightly seized. In other words, the Tribunal must assume and find ("deem") that the Border Force acted lawfully in seizing the goods. Mummery LJ said at [71(5):

> "It was not open to [the Tribunal] to conclude that the goods were legal imports illegally seized by HMRC by finding as a fact that they were being imported for own use. The role of the tribunal, as defined in the 1979 Act, does not extend to deciding as a fact that the goods were, as [Mr and Mrs Jones] argued in the tribunal, being imported legally for personal use."

56. He also held at [71(6)] that this outcome was:

> "compatible with article 1 of the First Protocol to the Convention and with article 6, because the owners were entitled under the 1979 Act to challenge in court, in accordance with Convention-compliant legal procedures, the legality of the seizure of their goods".

57. Finally, he found at [71(7)] that "deeming something to be the case carries with it any fact that forms part of the conclusion". In *European Brand v HMRC* [2016] EWCA Civ 90, Lewison LJ said at [34] that in making that statement, Mummery LJ was following well-established legal principles, citing *East End Dwellings v Finsbury BC* [1952] AC 109 at p 132, where Lord Asquith said:

> "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it."

The subsequent decisions in *Race* and *Jacobson*

58. As noted above, *Jones* concerned restoration – ie whether the seized goods should be returned. Mr Ferenc's appeal is not a restoration case, but is against an excise duty assessment and a penalty.

59. However, in *HMRC v Nicholas Race* [2014] UKUT 0331, the UT held at [33] that the reasoning in *Jones* also applied to appeals against assessments to excise duty. In *HMRC v Jacobson* [2018] UKUT 18 TCC, the UT decided that the same analysis applied to penalty assessments, see [24] of that judgment.

Mr Ferenc's case

60. It follows from the above authorities that I am required by law:

(1) to find that the cigarettes seized from Mr Ferenc were lawfully seized (because he did not challenge the seizure in the magistrate's court); and

(2) to find the facts which must have existed, in order for the seizure to be lawful.

61. If Mr Ferenc had imported the cigarettes for personal use, the seizure would not have been lawful. However, as I am required to find that the seizure was lawful, it follows that I am also required to find as a fact that the cigarettes were not for personal use. This leads inevitably to a finding of fact that they were imported for commercial use, and I so find. As a result, this ground of appeal must be dismissed.

FAIRNESS OF THE PROCEDURE

62. Mr Ferenc said that the procedure used by the Border Force to make the seizure was not fair, because his level of English did not allow him to understand what was happening, or what he signed. I have already found as facts that Mr Ferenc understood the conversation with Officer Downey and the documents that he signed, so there was no unfairness.

63. In any event, a challenge to the fairness of a procedure followed by a government officer normally has to be made by way of judicial review in the High Court. Although the Tribunal can sometimes have a judicial review jurisdiction, see *Birkett v HMRC* [2017] UKUT 0089 at [30], an appellant would need to show that the particular statutory provision(s) in issue gave the Tribunal the necessary jurisdiction. No such submissions have been made, and given that there is no factual basis for this ground of appeal, I have not further explored this point.

NUMBER OF CIGARETTES

64. Mr Ferenc submitted that the assessment was incorrectly calculated because it was based on the number of cigarettes recorded by Officer Downey. He said that in Hungary each pack contains only 19 sticks and Officer Downey's figures assumed there were 20 cigarettes in each pack.

65. I have already found as a fact that 16,800 cigarettes were seized. I came to that finding on the basis of the BOR 156, the BOR 162, and the Notebook, all of which stated that 16,800 cigarettes had been seized and which Mr Ferenc signed. Thus, I reject his submission that the assessment under appeal has been incorrectly calculated.

EUROPEAN LAW

66. Mr Ferenc has argued that the assessment conflicts with European law as he has already paid excise duty on the cigarettes in Hungary, and the cigarettes have been seized. As noted above, I have made no finding on whether excise duty was paid on the cigarettes, but even if it was the case, it does not assist him, for the reasons explained below.

Article 33 of the EU Directive

67. The 2008 Directive is headed "concerning the general arrangements for excise duty". Article 7(1) reads "excise duty shall become chargeable at the time, and in the Member State, of release for consumption". However, Article 33 reads (emphases added):

> "(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…"

68. It is therefore clear that under the Directive the UK is required to impose excise duty on cigarettes imported for commercial purposes, even though they were previously released for consumption in another EU country. Because Mr Ferenc imported the goods for commercial purposes, and not for personal use, he is therefore liable to UK excise duty under Article 33.

Double payment of duty?

69. Article 33 goes on to provide, at (6), that:

> "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"

70. The Member State where "the release for consumption" occurred in this case is Hungary, and "the other Member State" is the UK. Thus, any claim by Mr Ferenc in relation to having paid excise duty twice, once in Hungary and once in the UK, would have had to be addressed to the relevant authorities in Hungary.

The UK regulations

71. Parliament gave effect to the 2008 Directive via the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ("the 2010 Regulations"), for which the *vires* were given by s 1 of the Finance (No 2) Act 1992. Regulation 13 provides that (again, emphases added):

> "(1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.
>
> (2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person—
>
> (a) making the delivery of the goods;
>
> (b) holding the goods intended for delivery; or
>
> (c) to whom the goods are delivered.
>
> (3) For the purposes of paragraph (1) excise goods are held for a commercial purpose if they are held—
>
> (a) by a person other than a private individual; or
>
> (b) by a private individual ("P"), except in a case where the excise goods are for P's own use and were acquired in, and transported to the United Kingdom from, another Member State by P.
>
> (4) For the purposes of determining whether excise goods referred to in the exception in paragraph (3)(b) are for P's own use regard must be taken of—
>
> (a) P's reasons for having possession or control of those goods;
>
> (b) whether or not P is a revenue trader;

(c) P's conduct, including P's intended use of those goods or any refusal to disclose the intended use of those goods;

(d) the location of those goods;

(e) the mode of transport used to convey those goods;

(f) any document or other information relating to those goods;

(g) the nature of those goods including the nature or condition of any package or container;

(h) the quantity of those goods and, in particular, whether the quantity exceeds any of the following quantities—

- …
- 800 cigarettes,
- 1 kilogramme of any other tobacco products;

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

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

72. As already explained, the underlined phrase in Reg 13(3)(b) does not apply to Mr Ferenc, because he is deemed not to have imported the cigarettes for his personal use. The duty point is therefore the time at which the goods "are first so held" ie, the time they are first held for commercial purposes in the UK. That is on importation to the UK from Hungary.

73. The UK has thus implemented the relevant provision of the Directive, allowing it to impose excise duty on cigarettes imported for commercial purposes, even where they have already suffered excise duty in another EU country. There is no provision in UK law for HMRC to reduce the UK duty payable to take into account that paid in another country.

No longer in possession

74. Mr Ferenc also submitted that he was not liable to pay the duty because the goods had been seized and so were no longer in his possession. I considered both Article 7 and Article 37 of the Directive.

Article 7

75. Article 7(4) and (5) provide as follows (emphasis added):

"(4) The total destruction or irretrievable loss of excise goods under a duty suspension arrangement, as a result of the actual nature of the goods, of unforeseeable circumstances or force majeure, or as a consequence of authorisation by the competent authorities of the Member State, shall not be considered a release for consumption.

For the purpose of this Directive, goods shall be considered totally destroyed or irretrievably lost when they are rendered unusable as excise goods.

The total destruction or irretrievable loss of the excise goods in question shall be proven to the satisfaction of the competent authorities of the Member State where the total destruction or irretrievable loss occurred or, when it is not possible to determine where the loss occurred, where it was detected.

(5) Each Member State shall lay down its own rules and conditions under which the losses referred to in paragraph 4 are determined."

76. The meaning of "duty suspension" is helpfully explained in *Halsbury's Laws of England*[2]:

> "Since 1 January 1993 it has been possible to move excise goods between authorised traders in different member states of the Community without stopping at internal frontiers for customs entries or routine formalities. This has been achieved by the use of a Community-wide network of tax warehouses operated by authorised warehouse keepers. Within the United Kingdom, excise goods may be held without payment of excise duty ('in duty suspension') either in a tax warehouse or in other circumstances prescribed by the Commissioners for Revenue and Customs. Correspondingly, only authorised warehouse keepers may dispatch goods in duty suspension, and then only if they are sending such goods to a registered trader or to an occasional importer in the United Kingdom or another member state."

77. Goods can therefore only be held within a "duty suspension arrangement" if the relevant authorities have given advance approval to the procedures, and this normally involves the use of authorised warehouses. Thus, Article 4 does not apply to Mr Ferenc because the cigarettes were not held by him under a duty suspension arrangement.

Article 37

78. Article 37(1) reads:.

> "In the situations referred to in Article 33(1) and Article 36(1), in the event of the total destruction or irretrievable loss of the excise goods during their transport in a Member State other than the Member State in which they were released for consumption, as a result of the actual nature of the goods, or unforeseeable circumstances, or force majeure, or as a consequence of authorisation by the competent authorities of that Member State, the excise duty shall not be chargeable in that Member State.
>
> The total destruction or irretrievable loss of the excise goods in question shall be proven to the satisfaction of the competent authorities of the Member State where the total destruction or irretrievable loss occurred or, when it is not possible to determine where the loss occurred, where it was detected."

79. Article 37 thus applies in the situation referred to in Article 33(1). As already explained at §67-§68, that provision does apply to Mr Ferenc.

80. In *General Transport v HMRC* [2019] UKUT 4, the UT considered whether Article 37 relieved a person from duty if the goods had been seized and destroyed by the Border Force. The UT first found at [62] that the goods in question:

> "cannot have been 'irretrievably lost' until, at the earliest, one month after it was seized since that was when the deadline for challenging the legality of the seizure [in the magistrate's court] expired."

81. They then said at [64]:

> "Article 37 is concerned with the natural hazards of the transportation of goods: for example bottles may be broken in transit and their contents lost or goods may be stolen."

[2] Customs and Excise (Volume 30 (2012), paras 1–606; Volume 31 (2012), paras 607–1256)/2. Excise Duties/(9) Registered Consignees and Consignors and Registered Excise Dealers and Shippers/(i) In General/para 634

82. They concluded at [67] that it would be an "extraordinary result" if:

> "smuggled goods cease to be chargeable with excise duty simply because the vigilance of the competent authorities results in the smuggling attempt being foiled and the goods seized and destroyed."

83. The UT decided that there was no basis on which Article 37 could be understood to have that effect, with the result that seized goods continued to be liable to excise duty and were not relieved by that Article.

84. That decision is binding on me, and in any event, I agree with it. As a result, there is no basis for Mr Ferenc's submission that the seizure of the goods by the Border Force means he cannot be charged to excise duty.

PROPORTIONALITY

85. Mr Ferenc submits that it is disproportionate for him to suffer excise duty, a penalty and the seizure of the cigarettes. Similar issues were raised in *Pilats v HMRC* [2016] UKFTT 193 (TC) and *Denley v HMRC* [2017] UKUT 340 (TCC). Both tribunals concluded that excise duty assessments can never be disproportionate. As explained in *Pilats* at[60]:

> "The assessment is simply the inevitable consequence of an excise duty point having arisen and the appellant, as the person in possession of the goods at the time the excise duty point arose is the person liable to be assessed."

86. It is, however, relevant to consider the seizure and the penalty. The UT explained at [61] of *Denley*:

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

87. The UT then decided at [74(c)] of the judgment (emphasis added):

> "While the cumulative effect on a person of forfeiture without restoration, assessment and penalty might be a relevant factor in an exceptional case, we do not see it as a material consideration in an ordinary case, as this is. Mr Denley lost his goods because they were liable to forfeiture and there was no good reason…why they should be restored to him. He has been assessed to duty because he made himself liable to pay it. He has suffered a penalty because of his wrongdoing. Those are all the consequences prescribed by law of what he did."

88. In other words, the three elements – the seizure and non-restoration, the duty and the penalty, were all separately justifiable, and would only result in a disproportionate outcome in an exceptional case.

89. I considered whether Mr Ferenc's was such an "exceptional case", but have found no facts on which such a conclusion could be based. He arrived in the UK with no luggage other than the 16,800 cigarettes. As HMRC pointed out in their Statement of Case, this was a very significant amount, as illustrated by the "personal use" guideline in the 2010 regulations being 800 cigarettes, see Reg 13(4)(h) at §71. Mr Ferenc had sought to import 21 times that guideline

figure. He has not provided any credible reason for visiting the UK. Although he is now suffering from a serious illness, that does not provide a reason to reduce the penalty, which was charged for his actions at an earlier date.

CONCLUSION

90. For the reasons set out above, Mr Ferenc's appeal is dismissed, and the excise duty assessment of £4,451 and the penalty of £1,112 are both confirmed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

91. This document contains full findings of fact and reasons for the decision. If Mr Ferenc is dissatisfied with this decision, he has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Rules.

92. The application must be received by this Tribunal not later than 56 days after this decision is sent to him. 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 31 DECEMBER 2019