



TC07946

Appeal number: TC/2018/06279

Excise and Customs Duty - tobacco products seized - two separate seizures - appeal against assessments and wrongdoing penalties - no prior challenge of seizures in Magistrates Court - whether Tribunal's jurisdiction extended to considering appellant's grounds of appeal that the goods were for his personal use - no - whether penalties correctly assessed and reduction for behaviour correctly applied - no - special circumstances considered - appeal allowed in part against the penalties

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ROBERT IAN READER

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL CONNELL
 MARYVONNE HANDS**

**Sitting in public at Nottingham Justice Centre Carrington Street Nottingham on
6 March 2020**

The Appellant in person

Mr Thomas Nicholson, Officer of HMRC, for the Respondents

DECISION

1. This is an appeal by Mr Robert Ian Reader (“the appellant”) against a decision by the Respondents (‘HMRC’) to issue the appellant with Excise Duty Assessments in the total amount of £1,118 (“the Assessment”) on 25 April 2018 and a Wrongdoing Penalty in the total amount of £430 (“the Penalty”) issued on 11 May 2018.

Background

2. On 22 April 2017, the appellant was stopped by Border Force Officer, C Whyte at Dover Port having arrived from France. Officer Whyte asked the appellant what goods he had purchased and brought back from France. The appellant responded that he had purchased two sleeves of Super King cigarettes (400 cigarettes) and 2.5 kg of rolling tobacco (five packs of 10 x 50g pouches) (“the goods”), which he added were all for his own use.

3. Officer Whyte read and explained the commerciality statement to the appellant and advised that he needed to establish if the goods were for personal or commercial purposes.

4. The appellant said that he paid approximately £110 for the cigarettes and £225 for the tobacco. He said that he smoked about four or five 50g pouches of tobacco per week. A 50g pouch of tobacco would be sufficient for the production of 65 cigarettes. He expected the tobacco to last him a couple of months.

5. Officer Whyte asked the appellant how many trips he had made to France that year. The appellant replied, “about three or four”, but the last time he had purchased and brought back tobacco was in December 2016. The Officer noted that the appellant did not have any hand rolling tobacco machines/materials with him. The appellant explained that his daughter rolled the cigarettes for him because he suffered from arthritis.

6. When asked whether he had been stopped by Border Force previously the appellant said that he had been stopped in November 2016, when tobacco he was carrying was confiscated on the basis that it was for a commercial purpose, although the appellant said that he felt that the amount of tobacco he was carrying was relatively insignificant and within the guidelines. He had not been stopped since. In December 2016 he had travelled back from France with 800 cigarettes and 2 kg of hand rolling tobacco but on that occasion was not stopped. He confirmed to Officer Whyte that he was aware it was illegal to sell imported tobacco.

7. Officer Whyte asked the appellant to read and countersign his notebook entries. The appellant signed the Officer’s notebook, agreeing that he understood.

8. Because the Officer was satisfied that the tobacco was held for a commercial purpose they were therefore liable to forfeiture under s 49(1)(a)(i) of the Customs and Excise Management Act 1979 (“CEMA”) and Regulation 88 of the Excise Goods (Holding Movement and Duty Point) Regulations 2010 for the contravention of the Regulations, including the non-payment of duty which arose as a result of goods

already released for consumption in another Member State being held for a commercial purpose in the UK, in order to be delivered or used in the UK.

9. The goods were then seized under s 139 CEMA as Officer Whyte was not satisfied that the goods were for the appellant's personal use.

10. Officer Whyte did not attend the hearing or provide a witness statement, but his notebook entries state that the reasons he confiscated the goods was because:

- The appellant was a regular traveller with the opportunity of purchasing cigarettes and tobacco.
- He had no smoking materials with him despite saying that he was a heavy smoker.
- He had previously been stopped and tobacco and cigarettes seized from him.
- He had previously received warning letters about importing tobacco for commercial purposes.

11. The appellant was issued with forms BOR156 (seizure information notice), BOR162 (warning letter about seized goods) and Notice 12A (explains what you can and cannot bring into the UK and what you must declare). Notice 12A explains that a challenge to the legality of seizure in the Magistrates' Court should be made within one month of the date of seizure. The warning letter makes it clear that a seizure is without prejudice to other action that could be taken and that this includes HMRC issuing an assessment for evaded excise duty and a wrongdoing penalty.

12. The appellant signed the BOR156 but declined to sign the BOR162.

13. The appellant did not challenge the legality of the seizure within the permitted one month period.

14. Where an appellant fails to challenge the liability to forfeiture, paragraph 5 of Schedule 3 to CEMA provides that the goods in question shall be deemed to have been duly condemned as forfeited. That is a conclusive determination regarding the liability to forfeiture of the goods, and that they were held for a commercial purpose. As such, a duty point was prompted under Regulation 13(1) of the Excise Goods (Holding Movement and Duty Point) Regulations 2010 and the Commissioners may assess for duty under s 12 of the Finance Act 1994.

15. On 26 April 2017, Border Force referred the details of the seizure to HMRC to consider taking further action.

16. On 24 February 2018, the appellant was stopped by Border Force Officer T Sweetman at Dover Port arriving from Belgium.

17. The appellant was asked what he had purchased and brought back from Belgium. He replied three x 500g packs of hand rolling tobacco [1.5 kg] and 400 cigarettes, saying that they were all for his own use. He told Officer Sweetman that he smokes about five pouches a week and that his daughter rolls the cigarettes for him. He said that he smokes about 65 cigarettes a day.

18. When asked when he had last travelled back from Europe, he replied that he had been on a trip earlier that week. On that occasion he bought some brandy, wine, chocolates and 200 cigarettes. He added that he had travelled abroad about a month earlier and brought back cigarettes.

19. Officer Sweetman said that he would have to ask the appellant further questions and read out the commerciality statement. The appellant said that he would have to return to his coach but that he would stay for the interview as long as it could. When asked if he was carrying anything else on his person the appellant said that he had two more 50 g pouches of gold leaf tobacco in his pockets. At that stage the appellant said that he had to leave for his coach and the Officer replied that, in that event, the goods would have to be seized. The appellant left his address with the Officer so that any paperwork could be sent on to him and left for his coach. Officer Sweetman then seized the goods under s 139 of CEMA as he was not satisfied that the goods were for the appellant's personal use. Border Force posted forms BOR 156, BOR162 and Notices 1 and 12A to the appellant.

20. Officer Sweetman did not attend the hearing and did not provide a witness statement. There was nothing in his notebook entries to explain why he considered the goods to be for a commercial purpose.

21. On 10 April 2018, Border Force referred the details of the seizure to HMRC to consider taking further action

22. On 25 April 2018, Officer Lawrence wrote to the appellant to inform him that following Border Force seizures of the appellant's 2.5kg of hand rolling tobacco and 400 cigarettes (seized on 22 April 2017) 1.5kg of hand rolling tobacco and 400 cigarettes (seized on 24 February 2018), HMRC were considering assessing the appellant for an excise duty assessment and a wrongdoing penalty.

23. The letter confirmed that HMRC would not be taking criminal action against the appellant but would be treating it as a civil matter. The appellant was informed that such civil action may include an assessment to recover the duty that is due on the seized goods and the imposition of a financial penalty. He was previously notified of this when he was issued with form BOR162 from Border Force,

24. The letter informed the appellant that as set out in the information contained within Notices 12A previously sent to him, he had one calendar month from the date of seizures to make a claim that the goods were not liable for forfeiture. As the appellant did not make any such claim the goods are duly condemned as forfeited

25. The letter confirmed that the seized excise goods were found to have been released for consumption in another Member State and the appellant was the person found to be holding the goods for a commercial purpose in the United Kingdom. This created a duty point under Regulations 13(1) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ("HMDP"). As the appellant was found to be making delivery of the goods and/or holding the goods intended for delivery, the appellant is liable to pay the excise duty under Regulation 13(2) (a) and/or 13(2) (b) of the HMDP regulations.

26. The letter confirmed that because the appellant handled excise goods beyond the duty point, on which excise duty had not been paid, HMRC would be considering charging the appellant with an excise wrongdoing penalty.

27. The letter was accompanied with copies of:

- CC/FS9 Human Rights Act and penalties
- CC/FS1d General information about compliance checks into Excise matters
- CC/FS12 Penalties for VAT and Excise wrongdoings
- NPPS 100 Penalty Explanation
- NPPS100(S) Penalty explanation - Schedule 1
- Excise Duty Schedule

28. Officer Lawrence referred the appellant to HMRC's fact sheet which explains how penalties are calculated. The fact sheet states that the penalty percentage "will fall within a range. This range will depend on HMRC's view of the type of behaviour and whether the disclosure was unprompted or prompted. The following table shows the penalty ranges".

<u>Type of behaviour</u>	<u>Un-prompted disclosure.</u>	<u>Prompted disclosure</u>
Non-deliberate	10% to 30%	20% to 30%
Deliberate	20% to 70%	35% to 70%
Deliberate and concealed	30% to 100%	50% to 100%

29. The Penalty notice explained that HMRC can reduce the percentage depending on their view of how much assistance the appellant had given them during their check. This assistance is referred to as the 'quality of disclosure' (or as 'telling, helping and giving'). It explained that HMRC work out the difference between the minimum and maximum penalty percentages (Stage 1) and then multiply that figure by the total reduction (Stage 2) to get the percentage reduction.

30. Officer Lawrence informed the appellant that the intended excise wrongdoing penalty had been calculated and that for both seizures he considered the appellant's behaviour was 'deliberate but not concealed' and his disclosure was considered to be 'prompted'. The penalty information schedule explained that the penalty range for 'deliberate but not concealed' behaviour and 'prompted' disclosure was between 35% and 70% of the potential lost revenue ("PLR"), which in this case was the £1,118 excise duty.

31. Based on the information disclosed by the appellant during the seizures, Officer Lawrence awarded a total reduction of 90% (20% for 'telling'. The full reduction of 30% for this element was not awarded as the appellant had not admitted any wrongdoing, plus the maximum reduction of 40% for 'helping' and 30% for 'giving') which calculated the penalty at 38.5% of the PLR [35% + (10% x 35%)]. Officer Lawrence advised the appellant that he should provide him with any information that may impact his consideration of the wrongdoing penalty by 25 May 2018.

32. The letter confirmed that, based on the information HMRC had received regarding the two seizures, the appellant was being issued with an excise duty assessment of £1,118 and an intended excise wrongdoing penalty of £430 was also being considered.

33. On 3 May 2018, the appellant responded to the Officer's letter, outlining his position. The appellant returned and signed the Human Rights Act factsheet letter. The appellant confirmed the following:

- He denied the goods were for a commercial purpose and stated that they were for his own personal use.
- He confirmed that after leaving the interview on 24 February 2018, he found that his coach had gone and so he went back to the Customs Suite to request an interview but was told that his goods had already been seized.
- To charge for the excise duty when the goods were seized is wrong and he would ask for a review or lodge an appeal with the Tribunal if necessary. He would also send a copy of the letter to his lawyer, contact his MP, and possibly notify the press as he feels HMRC are acting inappropriately.
- He has been to court in Canterbury sometime in June 2017, Folkestone in August 2017 and would be going to Canterbury again on 5 June 2018 to argue his case.
- He has been a smoker for 50 years

34. On 11 May 2018, Officer Lawrence issued the appellant with a Notice of Duty assessment, confirming the excise wrongdoing penalty of £430. Officer Lawrence issued a covering letter addressing the points raised in the appellant's letter of 3 May 2018. The letter confirmed the following:

- i. The Officer had considered the additional information provided by the appellant but felt it did not affect his view of the assessed amount.
- ii. The appellant chose not to stay for an interview with Border Force to satisfy the Officer that the goods were for personal use.
- iii. The appellant did not appeal the seizures by submitting a notice of claim within one month of each seizure, therefore he can no longer challenge the legality of either seizure. The goods are deemed as liable for forfeiture.
- iv. The Officer provided the appellant with contact details to issue a complaint against Border Force.
- v. The statement from the appellant advising that he will ask for a review or a Tribunal if necessary, had not been accepted as an official review request, however if he would like a review of the duty assessment and/or penalty he could now request this in writing.

35. Nothing further was heard from the appellant until 13 August 2018, when he submitted a review request. The request was incorrectly sent to HMRC's Debt Management and Banking department ("DMB") and in the form of hand-written notes on a DMB demand notice dated 3 August 2018. The appellant's letter referred to an earlier letter from him dated 20 May 2018 (that had not been received by Officer Lawrence) requesting a review of the decision.

36. On 20 August 2018, Officer Lawrence issued a letter accepting the appellant's review request. The letter advised the appellant that Officer Lawrence had not received the appellant's earlier letter of 20 May 2018.

37. On 24 August 2018, the appellant acknowledged the letter from Officer Lawrence and enclosed a further letter saying:

- The goods were not for commercial purposes.
- He was tricked into surrendering his tobacco as he was told the coach was leaving. He returned to the Customs Suite when he found out that his coach had left but was told "that was the end of the matter". He asked if the CCTV could be reviewed to prove that he returned to the Customs Suite.
- The fine is unfair as he is an honest taxpayer.
- He enclosed a copy of a letter to him from Border Force dated 26 June 2018 regarding his complaint dated 20 May 2018, which advised that his complaint was not upheld as the CCTV did not show the appellant returning to Custom controls to request an interview after he had left.
- A copy of the appellant's letter of reply to Border Force's letter dated 26 June 2018 stating that he was tricked into surrendering his tobacco and requested that they check the CCTV again as he did in fact return to the Customs Suite with a different Officer.

38. On 21 September 2018, Officer Danks of the HMRC's Reviews & Litigation Team, upheld Officer Lawrence's decision. Officer Danks said:

"There are numerous indicators of deliberate behaviour, the fact that you chose not to appeal either seizure meaning that the goods have been deemed as imported for commercial purposes, the fact that you have been stopped numerous times by Border Force and had goods seized, the fact that you have knowledge of the indicative limits that would have been explained to you previously and is explained in Public Notice 1, finally during the Border Force interview you stated an unrealistic consumption rate."

39. On 2 October 2018, the appellant submitted a Notice of Appeal to the Tribunal

Relevant legislation

40. Regulation 5 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 states:

"5. Subject to Regulation 7(2), there is an excise duty point at the time when excise goods are released for consumption in the United Kingdom"

41. Regulation 6 (1), (2), (3) and 10 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 provide that:

“6. (1) Excise goods are released for consumption in the United Kingdom at the time when the goods -

- (1) leave a duty suspension arrangement;
- (2) are held outside a duty suspension arrangement and UK excise duty on those goods has not been paid, relieved, remitted or deferred under a duty deferment arrangement;
- (3) are produced outside a duty suspension arrangement; or
- (4) are charged with duty at importation unless they are placed, immediately upon importation, under a duty suspension arrangement.

(2) In paragraph (1)(d) “importation” means -

- (a) the entry into the United Kingdom of excise goods other than EU excise goods, unless the goods upon their entry into the United Kingdom are immediately placed under a customs suspensive procedure or arrangement; or
- (b) the release in the United Kingdom of excise goods from a customs suspensive procedure or arrangement.

(3) In paragraph (2)(a) “EU excise goods” means excise goods imported into the United Kingdom from another Member State which have been produced or are in free circulation in the EU at that importation.”

10.(1) The person liable to pay the duty when excise goods are released for consumption by virtue of regulation 6(1)(b) (holding of excise goods outside a duty suspension arrangement) is the person holding the excise goods at that time.

(2) Any other person involved in the holding of the excise goods is jointly and severally liable to pay the duty with the person specified in paragraph (1).

(b) in the case of chewing tobacco.”

42. Regulation 88 of the Excise Goods (Holding Movement and Duty Point) Regulations 2010 states:

“88. If in relation to any excise goods that are liable to duty that has not been paid there is -

- (a) a contravention of any provision of these Regulations, or
- (b) a contravention of any condition or restriction imposed by or under these Regulations,

Those goods shall be liable to forfeiture.”

43. The Customs and Excise Management Act 1979 (“CEMA”) provides:

“49.(1) Where -

- a) except as provided by or under the Customs and Excise Acts 1979, any imported goods, being chargeable on their importation with customs or excise duty, are, without payment of that duty -

those goods shall ...be liable to forfeiture.

“139.(1) Anything liable to forfeiture under the Customs and Excise Acts may be seized or detained by any officer...”

44. Paragraph 3 Schedule 3 CEMA provides:

“Any person claiming that any thing seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of the date of the seizure, give notice of his claim in writing to the Commissioners ...”

45. Where notice of a claim is not given, Paragraph 5 Schedule 3 CEMA states:

“If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of any thing no such notice has been given to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with the thing in question shall be deemed to have been duly condemned as forfeited.”

The burden and standard of proof

46. The burden of proof is on HMRC to prove that the assessment and penalty were validly and lawfully raised. Should HMRC discharge that burden, it would be for the appellant to show that his grounds of appeal are established. The standard of proof is the civil standard of the balance of probabilities.

The Appellant's Case

47. The appellant's grounds of appeal can be summarised from the Notice of Appeal and appellant's letter dated 23 January 2019, as follows:

- i. The tobacco products were for his own personal use and not a commercial purpose.
- ii. Border Force altered the Guidelines in October 2012 from 3,200 to 800 cigarettes and 3kg to 1kg of HRT. Therefore the appellant has to travel more frequently to satisfy his requirements.
- iii. The appellant has lost enough money and therefore should not have to pay the excise wrongdoing or duty.
- iv. Duty was paid for the goods when purchased.

At the hearing, the appellant reiterated the grounds of appeal i and ii above. He added that he had been a smoker for 50 years. He often travelled to France and Belgium to visit war memorials and festivals. The guidelines for importing tobacco and cigarettes had changed quite significantly in October 2012, and so he now found himself making more frequent trips. 800 cigarettes would only last him three weeks. One kg of hand rolling tobacco would only last him a similar period. Under the previous guidelines 3kg or 3,200 cigarettes would last him twelve weeks. They were only guidelines and he never greatly exceeded them and frequently purchased less than the guidelines if he was bringing in hand rolling tobacco. On the two trips where he had his goods seized, he had only brought in 400 cigarettes. He said that he was entirely open and

honest about the goods he was bringing into the UK and the frequency of his trips. There had never been any intention to deliberately contravene the regulations.

HMRC's Case

The assessment

48. Border Force seized the goods on both occasions as it was determined that they had been imported for a commercial purpose. Border Force issued the appellant with forms BOR156, BOR162, Notice 1 and 12a at the time of seizure. The documentation informed the appellant on how to challenge the seizure.

49. The appellant was entitled to challenge the legality of the seizure to the Magistrates' Court by lodging a notice of claim within 30 days of the seizure. As no challenge was made, paragraph 5 of Schedule 3 to CEMA provides that the goods in question shall be deemed to have been duly condemned as forfeited.

50. The appellant has appealed on the basis that the cigarettes were for personal use. The Court of Appeal judgment in *Revenue and Customs Commissioners v Jones & another* [2011] EWCA Civ 824 held that the Tribunal has no jurisdiction to go beyond the deeming provisions of paragraph 5 Schedule 3 of CEMA. That approach was confirmed by the Upper Tribunal in the case of *The Commissioners for Her Majesty's Revenue and Customs v Nicholas Race* [2014] UKUT 0331 (TCC), *European Brand Trading v HMRC* [2016] EWCA Civ 90 and more recently in *The Commissioners for HM Revenue and Customs v Liam Hill*: [2018] UKUT 0045 (TCC).

51. In consequence the Tribunal cannot reopen this issue and has no jurisdiction to hear evidence about whether the goods were intended for personal use because that fact has been finally determined by the Magistrates or Paragraph 5 of Schedule 3.

52. UK duty was due on the goods held by the appellant pursuant to s 13 of the Excise Duty (Holding Movement and Duty Point) Regulations 2010, and HMRC are entitled to recover that duty pursuant to s 12(1A) of the Finance Act 1994.

53. HMRC issued the excise duty assessment under Regulations 13(1) and 13(2) of the Excise Goods (Holding Movement and Duty Point) Regulations 2010. Regulation 13(1) provides the duty point and Regulation 13(2) identifies the person liable for the duty as the person making delivery of the goods, holding the goods intended for delivery or the person the goods were delivered to. The appellant was holding the goods and therefore he is liable for the excise duty assessment.

The penalty

54. The appellant attempted to deceive Border Force by bringing into the UK an amount of tobacco which was over the guideline amounts on two separate occasions and claimed the goods were for personal use. Any reasonable person would check the guidelines before bringing an amount of tobacco products into the UK which exceeded the guideline, above which they may be regarded as held for a commercial purpose, especially when their goods have been seized on a previous occasion.

55. Officer Lawrence informed the appellant that his wrongdoing penalty had been calculated on the basis that his behaviour had been ‘deliberate but not concealed’ behaviour and for ‘prompted’, which offers a penalty range from 35% to 70% of the PLR. Based on the information disclosed by the appellant during the seizures, Officer Lawrence offered a total reduction of 90% (20% for ‘telling’, as the full reduction of 30% for this element was not awarded as the appellant had not admitted any wrongdoing, plus the maximum reduction of 40% for ‘helping’ and 30% for ‘giving’) and calculated the penalty at 38.5% of the PLR totalling £430.

56. Notice 1, which is freely available online, and was also provided to the appellant at both seizures, states that travellers are more likely to be questioned if they have more than 800 cigarettes or 1kg of HRT. The appellant, at the first seizure, had 400 cigarettes and 2.5kg of HRT and at the second seizure had 400 cigarettes and 1.5kg HRT. Furthermore, the appellant at both seizures was issued with BOR162 warning letter about seized goods. BOR162 clearly explains any further action that may be taken by HMRC.

57. Pursuant to Schedule 41 of the Finance Act 2008 HMRC are entitled to impose a penalty on a person who, after the excise duty point for any goods which are chargeable with a duty of excise, acquires possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods, and at that time payment of duty on the goods is outstanding and has not been deferred.

58. The penalty is based on a percentage of the PLR, depending on whether HMRC viewed the behaviour as deliberate or non-deliberate and whether the disclosure was prompted or unprompted.

59. HMRC contend that the appellant’s wrongdoing was deliberate but not concealed as the appellant did not challenge the seizure, meaning the goods are deemed as imported for a commercial purpose. The appellant is a frequent traveller and has been stopped by Border Force on two occasions and had goods seized. The appellant would have knowledge of the indicative limits which would have been explained to him at his previous seizure. It is also documented in Public Notice 1 which is freely available online and was given to the appellant at both seizures. The Respondents contend that the appellant’s asserted consumption rate of 5 pouches a week (which he confirmed is 65 cigarettes per pouch) is an unrealistic consumption rate. Therefore, HMRC contend the tobacco was for commercial purposes.

60. HMRC contend that the appellant’s disclosure was ‘prompted’ as the appellant did not tell Border Force or the Respondents about the wrongdoing before he had reason to believe it had been discovered or was about to be discovered.

61. There is nothing to warrant a special reduction pursuant to paragraph 14 of Schedule 41 Finance Act 2008.

62. As the penalty relates to a deliberate wrongdoing there is no provision under paragraph 20(1) of Schedule 41 Finance Act 2008 to consider whether there is reasonable excuse for wrongdoing.

Conclusion

The Excise Duty assessment

63. The appellant did not challenge the legality of seizure and the goods were therefore deemed to be duly condemned as forfeit under Paragraph 5 Schedule 3 of CEMA. Thus, the legality of the seizure has been deemed a fact.

64. The deeming process limits the scope of the issues that the appellant is entitled to ventilate with regard to the seizure. It is not open to the Tribunal to consider whether the goods were legal imports improperly seized by HMRC, by finding as a fact that they were intended for own use. In brief, the deemed effect of the appellant's failure to contest condemnation of the goods was that the appellant had acquired possession of the goods and physically carried the goods into the UK for a commercial purpose.

65. The goods were therefore lawfully seized as being held for a commercial purpose without the payment of duty and therefore the Tribunal does not have any jurisdiction to re-open the issue as to whether the goods were held for personal use. This means that the assessment has been correctly applied.

The Penalty

66. An excise wrongdoing penalty was issued to the appellant in accordance with Finance Act 2008 Schedule 41, s 4 (1) which states that a penalty is payable by a person where that person acquires possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods after the excise duty point.

67. Because the goods were deemed to have been held for a commercial purpose a wrongdoing penalty would automatically follow under Schedule 41.

68. However, there are two issues to consider.

69. Firstly, we consider that the amount of reduction has not been correctly determined. The behaviour was in our view erroneously determined as 'deliberate' whereas we consider the appellant's behaviour to have been non-deliberate.

70. With regard to the 22 April 2017 seizure, the Border Force Officer's reasons, as set out in paragraph 10 above, do not either individually or collectively lead to a reasonably held conclusion that the goods were held for a commercial purpose. Nor do the 'indicators' referred to by Officer Danks in his review letter of 21 September 2018 (paragraph 38 above).

71. With regard to the 24 February seizure the appellant was carrying more, but only marginally more than the guideline amount (and well within the pre-2012 guideline amounts). Taking that into account, the manner of seizure was somewhat questionable as the appellant should have been given an opportunity of returning for interview or providing a written response to the Border Force Officer's questions.

72. Officer Sweetman said that he would have to conclude that the goods were held for a commercial purpose if the appellant did not stay for interview. It would have

been more accurate for him to say that he may have to arrive at that conclusion if the appellant did not stay for interview. The Officer appears to have arrived at his conclusion without giving the matter reasonable consideration. This led to no reasons being given for the seizure, other than that the appellant had not stayed for interview, which the appellant disputes in any event, having returned to the Customs Suite once he realised that the coach had left without him.

73. In our view, the appellant's behaviour was non deliberate for both seizures. The penalty range is therefore 20% to 30%.

74. Officer Lawrence did not offer a full reduction of 100%. He allowed 20% for 'telling', (and not the full reduction of 30% as the appellant had not admitted any wrongdoing), plus the maximum reduction of 40% for 'helping' and 30% for 'giving'.

75. It is difficult to see how the appellant could accept wrongdoing on his part if, (disregarding, the deeming provisions relating to an assessment), he asserts that he held the goods for personal use.

76. If a full 100% reduction was applied, the penalty is reduced to 20% of the PLR, to reflect the extent of the appellant's 'telling' 'helping' and 'giving.' The penalty is therefore reduced to £128.20 for the first seizure [£641 PLR x 20%].

77. Secondly, Schedule 41 provides that the penalty may be reduced if there are special circumstances that make it right to reduce the penalty or if there is a reasonable excuse for the act or failure.

78. HMRC's review of the penalty states that: "Special circumstances are either; uncommon or exceptional, or where the strict application of the penalty law produces a result that is contrary to the clear compliance intention of that penalty law." It found that no special circumstances arose in this case.

79. However, had the appellant been interviewed, Officer Sweetman may have come to the conclusion that the goods were for personal use and not held for a commercial purpose. Although that particular issue is now a deemed fact for the purposes of the assessment it has resulted in an outcome which appears disproportionate, unfair and contrary to the compliance intention of the penalty laws. We therefore conclude that special circumstances exist in the particular circumstances of this case to justify a cancellation of that part of the penalty which relates to the 24 February 2018 seizure.

80. Accordingly, the appeal against the assessment of £1,118 is dismissed, but the appeal against the penalty for wrongdoing of £430 is allowed in part. The penalty for the first seizure is reduced to £128.20 and the penalty for the second seizure is cancelled.

81. 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.

MICHAEL CONNELL

TRIBUNAL JUDGE

RELEASE DATE: 18 NOVEMBER 2020