



**TC06906**

**Appeal number: TC/2016/02159**

*EXCISE DUTY – excise duty assessment and excise wrongdoing penalty assessment – tobacco – whether reasonable excuse – no – whether special circumstances – no – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**HARRY JONES**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE ANNE FAIRPO  
MRS SONIA GABLE**

**Sitting in public in Leeds on 15 August 2017**

**The appellant appeared in person  
Mr Simon Charles, Counsel, instructed by the General Counsel and Solicitor to  
Her Majesty's Revenue and Customs for the Respondents**

## DECISION

### Introduction

5 1. This is an appeal against the decision of the respondent (HMRC) to issue an excise duty assessment in the amount of £928.00 and an excise wrongdoing penalty assessment in the amount of £324.00 Both assessments were notified to the appellant, Mr Jones, on 5 February 2015.

10 2. The notice of appeal was received by the Tribunal on 28 June 2016. HMRC did not object to the appeal being made late and so we allowed the appeal to proceed.

15 3. In the course of the hearing it was ascertained that the outcome of two cases then under appeal, *Susan Jacobsen* [2018] UKUT 19 TCC and *NT ADA* [2018] UKUT 59 TCC, might have some bearing on the decision in this matter. It was agreed at the hearing that HMRC would provide Mr Jones with copies of the decisions in these cases within six weeks of the decision being made public and that both parties could make written submissions in respect of those cases at that time. Written submissions were received from HMRC on 16 August 2018; no submissions nor any other response were received from Mr Jones, despite a number of reminders from the Tribunal.

### 20 Background

25 4. On 29 March 2015, Mr Jones arrived at Dover from Belgium. He had been to Belgium on a day trip by coach from his home town of Barnsley, organised by a local bus company. The trip was organised specifically to enable people to purchase tobacco and alcohol, visiting particular retail stores for that purpose. Mr Jones had been on similar trips a number of times before, although he wasn't sure whether it was three or four such trips.

30 5. On arriving back at Dover, those on the coach (including Mr Jones) were asked to leave the bus with their belongings. After a passport check, Mr Jones was asked what goods he had purchased whilst in Belgium. He told the Border Force officer that he had ten sleeves of tobacco, each containing 10 pouches of 50g.

6. The tobacco was seized and Mr Jones was provided with Notices 1 and 12A, and forms BOR 56 (seizure information) and BOR 162 (warning letter about seized goods). These included a warning that further action might be taken by HMRC.

7. The seizure was not challenged by Mr Jones.

### 35 Relevant law

8. Regulation 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 states, as relevant:

- (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.
- 5 (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
- ...
- 10 (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
- 15 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;
- 20 (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;
- 25 (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—
- 30 ...
- 800 cigarettes,
- 400 cigarillos (cigars weighing no more than 3 grammes each),
- 200 cigars,
- 1 kilogramme of any other tobacco products;
- 35 (i) whether P personally financed the purchase of those goods;
- (j) any other circumstance that appears to be relevant.
- (5) For the purposes of the exception in paragraph (3)(b)—
- ...

(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) ...

5 9. Section 12(1A) Finance Act 1994 states, as relevant:

(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

10 (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.

10. Paragraph 4(1) of Schedule 41 of Finance Act 2008 states:

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

15 (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

20 (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.

11. Paragraphs 6B, 12 and 13 of Schedule 41 Finance Act 2008 state:

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

25 (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.

**12**

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

**13**

35 (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

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

- (3) Where the Table shows a different minimum for case A and case B—
- (a) the case A minimum applies if—
- (i) the penalty is one under paragraph 1, and
- (ii) HMRC become aware of the failure less than 12 months after the time when the tax first becomes unpaid by reason of the failure, and
- (b) otherwise, the case B minimum applies.

<i>Standard %</i>	<i>Minimum % for prompted disclosure</i>	<i>Minimum % for unprompted disclosure</i>
70%	35%	20%

12. Paragraph 14 Schedule 41 Finance Act 2008 states:

- (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
- ...
- (3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—
- (a) staying a penalty, and
- (b) agreeing a compromise in relation to proceedings for a penalty.

13. Paragraph 20 Schedule 41 Finance Act 2008 states:

- (1) Liability to a penalty under any of paragraphs 1, 2, 3(1) and 4 does not arise in relation to an act or failure which is not deliberate if P satisfies HMRC or (on an appeal notified to the tribunal) the tribunal that there is a reasonable excuse for the act or failure.
- (2) For the purposes of sub-paragraph (1)—
- (a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,
- ...

**Appellant’s submissions**

14. Mr Jones’ case, in summary, was that:

- (1) the tobacco was for his personal use, and the purpose of the trip was to enable him to buy the tobacco whilst saving money. He had been in a debt

management programme since 2009. He was an unemployed bricklayer and had not been able to find work since 2008 as all sites had shut. He was now on some form of income support, receiving £172 per week. He had also cashed in a private pension, most of which he had spent on holidays although some of the money was still left.

5

(2) He had saved for the tobacco for some period of time, although he could not say exactly how long he had saved for. It might have been over a year, to save up for all of the trips, and the trips were also something for him to do as he was a pensioner and had time;

10

(3) he believed that, as the tobacco was for personal use, there was no limit to the amount which he could bring into the UK. The booklet he had been given by Border Force confirmed this;

15

(4) on previous trips, he had brought back 5 sleeves but had decided to buy twice as much this time because his passport was about to expire, and he could not afford to renew it, and so wanted to buy enough tobacco to last him a long time. He smoked two and a half pouches of tobacco per week at the time, although he has since given up as he cannot afford to smoke any longer. He had also bought a number of boxes of wine, each for about £5, on one trip near to Christmas. He could not remember the exact number, although he was sure it was less than twenty. He had also bought 2 or 3 boxes of wine on the other trips. In addition to the cost of the purchases, each bus trip cost about £40 but it was also something for him to do with his time as he didn't work;

20

(5) he took only the purchased goods with him when he left the coach with the other passengers and left his coat behind on the coach. There was an open tin of tobacco in his coat, with other smoking materials.

25

(6) he did not have an opportunity to make a declaration of the excise goods to Border Force as he was in a queue with everyone else from the coach. He did not consider that he could have telephoned HMRC that he had tobacco for commercial purposes as the queue was being dealt with one by one;

30

(7) he had no reason to look for an opportunity to make a declaration of the goods; he had never been into the customs area in Dover as the coach had gone straight through on previous trips;

35

(8) he did not recall the interview at which the goods were seized very well, other than that he was asked questions and answered them. He was worried that the bus would leave without him, and he had no money to get back home otherwise;

40

(9) he recalled being given a booklet at Dover, although he thought it might have been sent in the post. He accepted that he was told that he could appeal the seizure but the information also said that he could be liable for up to £1,500 in legal costs if the appeal failed. He did not appeal because he did not have that sort of money;

(10) he thought it was unfair that he had been singled out when there were others on the coach with at least as much tobacco;

(11) he believed that, as the tobacco had been seized and there was not much chance of getting it back, that was the end of the story. He had never heard of anyone getting a fine and was shocked when he received the later correspondence from HMRC. He did not understand how he could be fined and made to pay duty for something that he didn't have.

15. Mr Jones agreed that he had, as detailed in the Border Force officer's notes, purchased tobacco from friends who had brought some back with them from holiday trips. He did not accept that this meant that he planned to buy tobacco cheaply in Belgium and resell it at a higher price in the UK, as it would make no sense for him to sell it: if he sold the tobacco, he would have to buy more for himself to smoke.

16. Mr Jones confirmed that he had previously had goods seized by Border Force, when he attempted to bring in four thousand cigarettes from India, when he had been on holiday there and found that cigarettes were very much cheaper than in the UK.

### **HMRC's case**

17. Evidence was given for HMRC by Officer Smith, as follows:

(1) The passengers on Mr Smith's coach were asked to disembark with their goods; they were all questioned briefly and some, including Mr Jones, were selected for further questions on the basis of their responses

(2) There is a single control at Dover, with no red/green channels. There is a declaration telephone before the baggage examination area. The passengers from the coach passed the telephone before the officers spoke to them. The telephone, and the sign next to it, are clearly visible.

(3) Officer Smith considered that Mr Jones was buying more tobacco than he would consume personally: he had purchased 5 sleeves in October, which would last him four months, then another 5 sleeves in January, which would be another four months supply, but Mr Jones had said when stopped in March that he had smoked it all. Mr Jones also had no smoking materials on him.

18. HMRC made the following submissions:

(1) Mr Jones did not challenge the seizure within the statutory time limit and so by due process the tobacco is condemned as forfeit to the Crown because, following the decision in *Jones* [2011] EWCA Civ 824 it is deemed to have been imported for a commercial purpose.

(2) As the tobacco is deemed by law to have been imported for a commercial purpose, it is not open to this Tribunal to find that the goods were imported for personal use. This was confirmed in *Race* [2014] UKUT 0331 (TCC).

(3) With regard to the duty assessment, therefore, the Tribunal's jurisdiction is therefore limited to considering whether HMRC has correctly identified Mr Jones for the purposes of the duty assessment and whether the assessment meets the statutory requirements.

5 (4) With regard to the penalty assessment, it was submitted that the cases of *Jones* and *Race* mean that the deeming effect of the law, that the tobacco was imported for a commercial purpose, means that the facts giving rise to a penalty assessment are made out. HMRC is entitled to issue a penalty to Mr Jones because he was liable for handling goods subject to unpaid excise duty, under para 4(1) Schedule 41 Finance Act 2008.

10 (5) Mr Jones had admitted to travelling to Belgium three times within the six months prior to the seizure, bringing back 5 sleeves of tobacco twice and wine once. The total tobacco brought back to the UK would last him until approximately January 2016, ten months after the date of the seizure. The combined cost of the tobacco and the trips between October 2014 and March 2015 amounted to approximately £1000; Mr Jones has a weekly income of approximately £170. It was submitted that it was not credible that a person on a debt management plan, in receipt only of benefits income, would spend so much of their income on tobacco and travelling to and from Belgium for personal use.

15 (6) The penalty amount is based on the amount of assessed excise duty involved, an amount of £928.00. The behaviour which led to the penalty was deliberate, and the disclosure was prompted. Accordingly, the minimum penalty amount is 35% of the excise duty and that is the amount which has been applied. No further reduction in the penalty can be made under the legislation.

20 (7) The behaviour should be regarded as a deliberate intention to bring in goods for commercial purposes as the seizure was not challenged within the statutory time limit and so the commercial purpose is a deemed fact in law. There was a clear deliberate intention as Mr Jones took the trip specifically to purchase tobacco; he did not “stumble across a deal which was too good to be true” whilst in Belgium.

25 (8) Mr Jones had taken four day trips in a short period of time and so would have been familiar with the import limits and regulations. He clearly knew that there was no limit for personal use and had also previously had cigarettes seized when returning to the UK from India.

30 (9) Considering all of the evidence, even if the deemed commercial purposes was ignored it was not credible that the tobacco was purchased solely for personal use. The amount brought in was 5 times the guideline amount and previous purchases had been more than twice the guideline amount. Mr Jones has admitted to buying tobacco from other people who have purchased tobacco abroad, so it was arguable that he knew he could make a profit on sale. Therefore, even if the deemed commercial purposes did not apply to the penalty, HMRC submitted that the conduct was still deliberate and the penalty should stand.

35 (10) Mr Jones has not provided any information that could be regarded as either a reasonable excuse or special circumstances which would permit a reduction in the amount of the penalty assessment.

40 19. HMRC also submitted that the case of *Jacobson* [2018] UKUT 19 (TCC) made it clear that the duty point at an airport occurred before the appellant entered the green



channel and that “an intending importer of excise goods from another Member State must make arrangements to pay (or defer) excise duty before the goods are dispatched from the other Member State”. HMRC submitted that it was therefore not open to Mr Jones to argue that the penalty was imposed in breach of paragraph 4 of Schedule 41 Finance Act 2008.

In addition, the decision in *NT ADA* [2018] UKUT 59 (TCC) determined that a failure to offer a review does not render an assessment invalid. Further, in this case, HMRC’s letter of 5 February 2016 specifically offered Mr Jones a review in similar words to those considered by the Upper Tribunal in *NT ADA* to provide a clear implication that any review asked for will be carried out.

## Discussion

### *Duty assessment*

20. We consider that it is clear that we are bound by the decision in *Race and Jones* and so cannot consider Mr Jones’ submissions that the goods were imported for personal use when considering the duty assessment. We are required to deem that the goods were imported for a commercial purpose.

21. As Mr Jones has not disputed that he imported the goods we find that the excise duty assessment was correctly imposed.

22. With regard to the duty point, we note and are bound by the Upper Tribunal decision in *Jacobson* which states that “it is clear that a person is holding goods in the UK for the purposes of Regulation 13 at the latest by the time they have carried hand-luggage off the aircraft ... Accordingly, we have no doubt that the excise duty point had occurred in this case before [the appellant] reached the green channel”.

23. In this case, Mr Jones entered the UK on a coach rather than an aircraft, but the point remains the same: following *Jacobson*, we find that the excise duty point occurred before Mr Jones was stopped by Border Force and his disclosure was therefore prompted by HMRC when he had already become liable to the duty.

### *Penalty assessment*

24. As already noted, the *Race* decision is binding on the Tribunal and it makes clear that the Tribunal does not have jurisdiction to reopen the issue of whether the goods are for personal use where this has been determined by the statutory deeming.

25. However, the decision in *Race* did not concern a penalty. Judge Warren, in *Race*, did note that the “Tribunal could no more re-determine, in the appeal against the Penalty Assessment, a factual issue which was a necessary consequence of the statutory deeming provision than it could re-determine a factual issue decided by a court in condemnation proceedings” but, as the decision did not concern a penalty, this passage is *obiter* and not binding on this Tribunal, although it must of course be treated with respect.

26. Judge Warren also noted that the issues raised by appeal against a penalty assessment extend beyond the question of whether duty is payable because of the deemed commercial purpose. For example, the Tribunal must consider culpability and circumstances because this is relevant to the level of penalty imposed, and “to decide  
5 whether the level of mitigation afforded by HMRC for cooperation provided by [the appellant] was sufficient and/or whether there should be further reductions for ‘special circumstances’”.

27. Considering validity, following the decision in *NT ADA* and having reviewed the correspondence in the bundle, we agree that Mr Jones was offered a review. His  
10 evidence in the hearing was that he did not understand that HMRC were offering him a review but we consider that HMRC’s letter of 5 February 2016 is clearly offering a review when it states that “If you want a review, you need to write to tell me ... If you do not want a review, you can appeal to the tribunal”. Accordingly, we do not consider that the assessment can be considered to be invalid for failure to offer a  
15 review.

28. Putting to one side for the moment the deemed commercial purpose, we do not accept that Mr Jones bought the tobacco for personal use because we consider that the amount brought into the UK on 29 March 2015, together with that which he had brought in during the previous six months, was far in excess of his personal smoking  
20 requirements.

29. We noted Mr Jones’ explanation as to the need to stock up because his passport was due to expire but take judicial note that the renewal cost of a passport is substantially less than the extra cost of the tobacco purchased in March 2015 compared to his previous trips. As Mr Jones explained that the trips were also to give  
25 him something to do, and he stated that he had saved more than £1000 in approximately a year for the trips whilst in a debt management programme and on benefits, we are not convinced that this was a credible explanation for the substantial amount of tobacco imported on 29 March 2015.

30. We find, therefore, that Mr Jones acted deliberately in bringing the tobacco into the UK without payment of excise duty and, accordingly, there can be no reduction for “reasonable excuse” as that is only available where the behaviour was not deliberate (per paragraph 20 of Schedule 41 Finance Act 2008).

31. We have considered whether there are any special circumstances that might apply to reduce the penalty under paragraph 14 of Schedule 41 Finance Act 2008.

32. Failure to have considered the exercise of its discretion to reduce a penalty by  
35 virtue of special circumstances, in the first place, or failure to give reasons as to why (if HMRC has made a decision) special circumstances do not apply, can render the “decision” flawed. However, the Tribunal can only allow a taxpayer’s appeal that HMRC has come to a flawed decision if we do not find that HMRC’s decision was an  
40 inevitable one that it would have come to on the evidence before it.

33. “Special circumstances” are not defined, but the courts have determined that for circumstances to be special they must be “exceptional, abnormal or unusual” (*Crabtree v Hinchcliffe* [1971], 3 All ER 967) or “something out of the ordinary run of events” (*Clarks of Hove Ltd v Bakers Union* [1979], 1 All ER 152).

5 34. Mr Jones stated that other people had not had goods seized when they had at least as much tobacco as he did; we do not consider that this amounts to special circumstances.

10 35. Mr Jones also states that he considers it bizarre that he has to pay for goods that were seized and which he therefore no longer has. We find that this is does not amount to special circumstances, as this is not exceptional, abnormal or unusual but is, instead, the anticipated consequence of operation of the relevant law.

36. Mr Jones did not specifically state that he could not pay the penalty assessment but, as he has referred regularly to a lack of funds, we note that we are prohibited by statute from considering inability to pay as special circumstances.

15 37. Accordingly, we do not consider that there are any special circumstances which would merit a reduction in the penalty.

20 38. Therefore we find that the behaviour leading to the penalty was deliberate, and that there are no special circumstances. We agree that the disclosure was prompted as Mr Jones did not disclose the tobacco prior to interview. The penalty assessed by HMRC already provides for the maximum discount available in those circumstances and so we have no power to reduce it further.

25 39. Mr Jones stated that he was singled out when others travelling on the same coach were not stopped or penalised. We have taken that to be a submission that HMRC have acted unfairly. It is well-established that this Tribunal is a statutory construct and has no general, inherent, jurisdiction to consider whether or not HMRC have behaved fairly in any particular circumstances. In addition, this specific point has been dealt with in *Race*, which is binding on this Tribunal, which confirms that we have no jurisdiction to consider whether HMRC have acted fairly in this matter.

### **Decision**

30 40. The appeal is dismissed. The duty assessment and penalty assessment are upheld in full.

35 41. 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.

5

**ANNE FAIRPO  
TRIBUNAL JUDGE**

**RELEASE DATE: 27 DECEMBER 2018**

10