[2021] UKFTT 0303 (TC)

TC08245

EXCISE – duty assessment – application to strike out appeal for lack of jurisdiction – appeal against assessment struck out – penalty assessment – whether disclosure prompted – yes – whether deliberate – interaction with deeming provisions considered – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/00189

BETWEEN

DONATAS ODINAS **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE REDSTON
MR LESLIE BROWN

The hearing took place on 12 and 13 July 2021 by video. A face to face hearing was not held because of the coronavirus pandemic.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. The hearing was therefore held in public.

Mr Danny McNamee of MMD Solicitors Ltd, instructed by the Appellant, for the Appellant

Ms Charlotte Brown of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction and summary

1. On 23 September 2018, Mr Odinas returned from Lithuania and landed at Belfast. He was stopped at the airport by Officer Liam McCusker, who seized the 10,000 cigarettes in Mr Odinas's luggage on the basis that they were not for personal use. Mr Odinas did not challenge the seizure in the magistrate's court.

2. HMRC subsequently issued Mr Odinas with an excise duty assessment of £3,021 and a wrongdoing penalty of £1,057. Mr Odinas appealed the assessment and the penalty.

The assessment

3. HMRC applied to strike out the appeal against the assessment under Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules"), on the basis that the Tribunal had no jurisdiction. Ms Brown submitted that>

(1) Of the 10,000 cigarettes, 2,000 were Winstons purchased for Mr Odinas's girlfriend Ms Butkeviciute, who had paid for them. Reg 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ("the Excise Goods Regs") provides that "personal use" does not include "the transfer to another person for money or money's worth", and thus the importation of the Winstons was for a commercial purpose.

(2) The remainder of the cigarettes were Marlboros, which Mr Odinas had said were for his personal use. However, these were deemed to have been imported for a commercial purpose because Mr Odinas had not challenged their seizure in the magistrate's court. It was clear from the case law, notably *HMRC v Jones and Jones* [2011] EWCA Civ 824 (*"Jones"*) and *HMRC v Race* [2014] UKUT 0331 (TCC) ("*Race*") that the Tribunal could not go behind that finding of fact.

(3) The only ground of appeal put forward by Mr Odinas was that the goods had been imported for personal use, and where on the facts this was not the position, the Tribunal had no jurisdiction to hear an appeal against the assessment, see *HMRC v Hill* [2018] UKUT 45 (TCC).

4. Mr McNamee submitted that the Tribunal had the relevant jurisdiction, because:

(1) the magistrate's court can only make findings as to whether the goods were forfeit, and thus could not make a finding as to the position of the individual, see *Denton v John Lister Ltd and another* [1971] 3 All ER 669 ("*Denton*");

(2) deeming could not apply in any event where a person had not been given notice of his appeal rights, as Mr McNamee submitted was the position here; and

(3) Finance Act 1994 ("FA 1994"), s 12(1A) gave HMRC a discretion to decide whether to assess the duty, and if that discretion was exercised such that HMRC decided to assess, s 16(5) gave the Tribunal the jurisdiction to quash that decision, and should do so in this case for the reason set out at §67.

5. We rejected Mr McNamee's submissions because:

(1) the case of *Denton* has to be read together with the deeming provisions and did not supplant them, see §59;

(2) we found as a fact that Mr Odinas had been given notice of his appeal rights, see §38; and

(3) Mr McNamee's reasons for asking us to quash HMRC's decision would require us to accept that Mr Odinas had imported the goods for personal use. We instead agreed with Ms Brown that challenges based on "personal use" must be made in the magistrate's court.

6. We allowed HMRC's application and struck out the appeal against the assessment.

The penalty

7. Mr McNamee submitted that Mr Odinas's disclosure had been "unprompted", but the Tribunal disagreed, see §88 and §93. Mr McNamee also submitted that Mr Odinas's disclosure behaviour was not "deliberate".

8. In relation to the Winstons, we found that Mr Odinas had not acted deliberately. This was because he had relied on a conversation with HMRC that importations for family members were not commercial, and he reasonably believed Ms Butkeviciute to be a family member. We reduced the related part of the penalty by £145, so from £202 to £57.

9. As for the Marlboros, these were deemed to have been imported for commercial purposes. When considering deeming provisions, the Tribunal is required to "treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs", see *Marshall v Kerr* [1993] STC 360 at p 366. Mr Odinas imported the cigarettes for a commercial purpose; no-one else was involved, and he must therefore have known why he was importing them; he also knew that duty was payable on commercial importations. We found that he acted deliberately, and confirmed the related penalty.

Overall conclusion

10. Mr Odinas's appeal against the assessment was struck out, and his appeal against the penalty was allowed in part, with the quantum reduced by £145 from £1,057 to £912.

Mr Odinas's attendance

11. Mr Odinas and Ms Butkeviciute attended the first part of the hearing and gave oral evidence. The proceedings were interpreted by a professional interpreter fluent in Lithuanian. When both witnesses had given their evidence, Mr McNamee said Mr Odinas and Ms Butkeviciute wished to leave the hearing and were content to leave the rest of the proceedings in Mr McNamee's hands.

12. Having considered Rule 2 of the Tribunal Rules, we decided that it was in the interests of justice to continue the hearing in the absence of the appellant.

The evidence

13. The Tribunal had a Bundle of documents prepared by MMD Solicitors, which included:

(1) Mr Odinas's Notice of Appeal;

(2) correspondence between the parties, including the decision letters;

(3) the relevant pages from Officer McCusker's Notebooks; a seizure information notice (Form BOR 156) and a warning letter about seized goods (Form BOR 162); and

(4) Directions issued by the Tribunal in the appeal.

14. Mr Odinas provided a witness statement; was cross-examined by Ms Brown, answered questions from the Tribunal and gave further responses on re-examination: all this evidence was given through the interpreter. The Tribunal found Mr Odinas to be an unreliable witness. He made contradictory statements during his interview at the time of the seizure, and further inconsistencies emerged in his witness statement and oral evidence, see §23-27 in relation to his work and his income, and §37 in relation to his appeal rights. In addition, Mr Odinas also said in his witness statement that he did not "understand or speak English", but having considered all the relevant evidence we found as a fact that he had a good command of the language.

15. Ms Butkeviciute provided a witness statement and was cross-examined by Ms Brown. She changed the evidence in her witness statement, but this amendment was not challenged and we accepted it.

16. Mr Gineitis is a friend of Mr Odinas. He provided a witness statement but did not attend the hearing. The Tribunal had previously directed that any party seeking to rely on a witness statement "must call that witness to be available for cross-examination by the other party (unless notified in advance by the other party that the evidence of the witness is not in dispute)". HMRC had not given that notification, and Ms Brown asked the Tribunal to place little weight on Mr Gineitis statement. We agreed. We informed the parties that we would not rely on evidence within his statement unless there was independent confirmation, and then only if that other evidence had not been challenged by Ms Brown.

17. Officer McCusker and Officer Laws (who issued the assessment and the penalty) also provided witness statements, gave oral evidence-in-chief and were cross-examined by Mr McNamee. We found them both to be entirely honest and credible witnesses.

Findings of fact

18. These findings of fact are made on the basis of the evidence summarised above. We make a further finding of fact at §63.

Mr Odinas's knowledge of English

19. Officer McCusker had previously worked with migrants and so was experienced in the issues around communicating with foreign nationals. He interviewed Mr Odinas without an interpreter and recorded his answers in his Notebook. He described Mr Odinas as "fluent" in English, said he had "no linguistic difficulties whatsoever, and had answered the questions without hesitation. At the end of the interview, Mr Odinas signed the Notebook and confirmed it was a "true account" of what he had said.

20. On 20 June 2019 HMRC sent Mr Odinas a pre-assessment and penalty letter. On 27 June 2019, Mr Odinas called HMRC disputing the charge. He told HMRC he was refusing to sign the Human Rights Act page attached to the decision notice as he disagreed with it, and that he was "unemployed and unable to pay". In his oral evidence during the hearing, he confirmed he had called HMRC "to explain the situation". There was no suggestion up to this point that Mr Odinas did not have a good command of English.

21. This changed on 2 July 2019, when Mr Odinas called HMRC again and gave authority for them to speak to a friend. The friend told HMRC that Mr Odinas had not understood what he was being told by Officer McCusker because of the language barrier. On 11 July 2019, Mr Odinas wrote to HMRC, saying his English was "very poor" and that none of the paperwork had been explained to him. On 13 July 2019, MMD Solicitors requested a statutory review, in

which they said Mr Odinas did not have "a good command of English". In his witness statement, Mr Odinas said "I do not understand or speak English".

22. The Tribunal accepts Officer McCusker's evidence, which is supported by the detailed answers given by Mr Odinas to the questions asked during his interview; by his signature on the Notebook and by his subsequent call to HMRC. We find as a fact that Mr Odinas had a good command of English and understood all the questions asked by Officer McCusker.

The work being carried out by Mr Odinas

23. Before Mr Odinas's luggage was searched and the cigarettes found, Mr Odinas told Officer McCusker that he worked for G4S as security for the film set "Game of Thrones"; that he earned around £200 per week for between 12 and 24 hours work and received payslips from G4S. When asked if he had any other income, he said:

> "I organise concerts. I promote music, pop music. I work for myself. I bring groups from Lithuania. I book bars and venues. It depends how much I earn as it depends on how many people turn up"

24. He expanded on this by telling Officer McCusker that:

(1) for a concert on an average night there was "about €1,000 is left for me, profit";

(2) he also ran private events, on which the profit was around €350;

(3) he would run 2-3 concerts a year and 3-4 private events a month;

(4) he had registered as self-employed with HMRC;

(5) he was not on benefits; and

(6) he had completed a tax return saying he earned profits of around £6,000.

25. Mr Odinas confirmed in his oral evidence that this was the position, and also said he was "going backwards and forwards to Lithuania to have meetings with these entertainers".

26. However, at the end of his interview with Officer McCusker, Mr Odinas displayed his bank accounts on his mobile phone, in order to seek to demonstrate that he had sufficient income to purchase the cigarettes. As he did so, he realised that the bank accounts showed that he was receiving state benefits. He then contradicted his earlier statement that he was not on benefits, and told Officer McCusker that every two weeks he received Jobseekers' Allowance ("JSA") of £146.20 and housing benefit of £159.60. Although he had earlier said he received payslips from G4S, he now said he was paid "cash in hand" for that work. During the hearing he changed his evidence again, saying his work for G4S had been "on a training basis"; that he had been "fired" from that training, and had then decided to start his own business.

27. We find as a fact in reliance on Mr Odinas's initial evidence given to Officer McCusker that in the period immediately before the seizure he was working part-time for G4S and was not paid "cash in hand"; that he was also running his own business organising concerts in the UK, and was claiming JSA and housing benefit.

Mr Odinas's income, outgoings and savings

28. On the basis of the same evidence, we find that Mr Odinas's total monthly income was around €1,000 and his expenditure around £700, after taking into account his housing benefit. It was not in dispute that he had savings of £2,000 in the UK and €4,000 in Lithuania.

The call to HMRC

29. It was Mr Odinas's unchallenged evidence that at some point before the flight to Lithuania he had asked Mr Gineitis to call HMRC to establish how many cigarettes he could bring back. Mr Gineitis was told that as long as the cigarettes were for his own use or those of family members, there was no limit, but that the receipts for the purchases should be retained and carried with the cigarettes.

The cigarettes purchased

30. Mr Odinas imported 8,000 Marlboro cigarettes and 2,000 Winston cigarettes. He told Officer McCusker that he had purchased the Marlboros with his own money, and that the Winstons had been purchased on behalf of "a friend" who had provided the money for those cigarettes, and that his sister lent him €200. He said he had taken €1,700 to Lithuania, and the cigarettes had cost €1,368.

31. Ms Butkeviciute's witness statement said that she was the "friend"; that the 2,000 cigarettes were for her and that she had in fact loaned Mr Odinas the money to buy *all* the cigarettes. However, when asked in the hearing by Mr McNamee if there was anything she wanted to change in her witness statement, she said she had meant to say that she had loaned Mr Odinas the money for *her* cigarettes, That evidence was not challenged.

32. We find as a fact that Mr Odinas had purchased the cigarettes using the money he had taken to Lithuania, and that this included the money provided by Ms Butkeviciute for the Winstons.

The seizure

33. On 23 September 2018, Mr Odinas returned from Lithuania to Belfast. Officer McCusker was on duty in the "Blue" channel for EU arrivals. His Notebook records that he "intercepted" Mr Odinas and invited him to place his bags on the X-ray machine, and the scan disclosed a large quantity of cigarettes. Officer McCusker asked Mr Odinas to accompany him to the baggage search area.

34. Before beginning the search, he asked Mr Odinas a number of questions, including "did you purchase anything whilst away which you are bringing into the UK today", to which Mr Odinas answered "yes, cigarettes". Officer McCusker then asked further questions about the cigarettes, Mr Odinas's work, his smoking habits and his income. Having considered the answers, Officer McCusker decided all the cigarettes had been imported for commercial purposes and seized them. He provided Mr Odinas with a seizure information notice (Form BOR 156) and a warning letter about seized goods (Form BOR 162). Mr Odinas signed the former but refused to sign the latter.

35. Officer McCusker's Notebook records that "ROA fully explained", which was an abbreviation for "Rights of Appeal". His Notebook also records that Officer McCusker issued Mr Odinas with Notice 12A, but that Mr Odinas refused to take the Notice 12A. Under cross-examination, Officer McCusker said that he had told Mr Odinas that it was in his interests to accept the Notice.

36. Although we were not provided with a copy of Notice 12A for this hearing, the Tribunal and both parties' counsel were familiar with that document, which includes the following passage:

> "HMRC or Border Force must receive your notice of claim within one calendar month of the date of seizure shown on the seizure information notice

> or the date shown on the notice of seizure. If HMRC or Border Force does not receive a notice of claim within the time limit, you will not be able to challenge the legality of the seizure."

37. Mr Odinas gave inconsistent evidence about Notice 12A and whether he was told about his appeal rights. Under cross-examination he initially said (emphasis added) that at the end of the interview "I tried to ask about my belongings <u>but was told that I can appeal the decision</u> but no document was given". However he later said that "no-one gave me any information or documentations at to how to proceed. I had to go on the internet and make some telephone calls and find out for myself". When shown a copy of Notice 12A by Mr McNamee, Mr Odinas said he had never seen one before.

38. Faced with this conflict in the evidence between (a) that given by Officer McCusker (b) that given by Mr Odinas under cross-examination, and (c) Mr Odinas's other statements, we had no hesitation in preferring the evidence in Officer McCusker's Notebook. This was a contemporaneous record, and Officer McCusker was an entirely reliable witness, unlike Mr Odinas. We find as a fact that Officer McCusker offered Mr Odinas a copy of Notice 12A but he refused to take it. We also find, on the basis of the Notebook and Mr Odinas's own initial evidence, that he was told orally about his appeal rights.

Mr Odinas's signatures

39. It was not in dispute that Mr Odinas had signed both the Notebook as a true record, and Form 156. Mr Odinas's oral evidence was that he did so because Officer McCusker had failed to offer him a chair and he was exhausted. Mr McNamee cross-examined Officer McCusker on this: he replied that he invariably asks those being questioned whether they would prefer to sit, and whether they need refreshments or a break.

40. McNamee asked us to find that Officer McCusker had failed to offer Mr Odinas a chair, but had instead kept him standing, and had failed to offer him refreshments or a comfort break and that Mr Odinas signed both the Notebook and BOR156 because he was exhausted.

41. We again prefer Officer McCusker's evidence for the following reasons:

(1) he was an entirely reliable witness, unlike Mr Odinas; and

(2) Mr Odinas refused to sign BOR 162, so was clearly not so exhausted that he was unable to decide whether or not to sign a document when asked to do so.

42. We find that Mr Odinas signed both the Notebook and the BOR156 because he chose to do so, and that by signing the Notebook he was confirming that he had given the evidence there set out.

The assessment and the appeal

43. Mr Odinas did not appeal the seizure to the magistrate's court. On 20 June 2019, HMRC sent him a pre-assessment and penalty letter. As noted above, Mr Odinas called HMRC on 27 June 2019 and a friend called on 2 July 2019, and this was followed up by letter on 11 July 2019.

44. On 22 July 2019, Ms Laws issued the assessment and the penalty, quantified as follows:

	Excise duty	Penalty at 35%
Marlboros	£2,444	£855
Winstons	£577	£202
Total	£3,021	£1,057

45. On 14 August 2019, MMD Solicitors requested a statutory review. This was issued on 6 December 2019, upholding the decision. On 20 December 2019, Mr Odinas made an in-time appeal to the Tribunal.

The legislation about the duty assessment

46. The relevant legislation has been helpfully set out by Warren J in *Race* as follows:

> "[13] The statutory provisions with which this appeal is concerned are found in the Customs and Excise Management Act 1979 ('CEMA') and the Excise Goods (Holding Movement and Duty Point) Regulations 2010 (SI 2010/593) ('the Regulations').
>
> 14. Section 49 CEMA provides for the seizure of goods improperly imported. Goods are liable to forfeiture in a variety of circumstances. In the present case, the relevant provision is section 49(1), which applies (subject to any exceptions under the legislation) in relation to goods which are chargeable with customs or excise duty on their importation but where the duty has not been paid. The power to forfeit such goods arises where the goods are unshipped at a port, unloaded from an aircraft in the UK or removed from their place of importation or from any approved place such as a transit shed.
>
> 15. Section 139 provides that anything liable to forfeiture may be seized by a relevant authorised person….
>
> 16. Section 139(6) introduced the provisions of Schedule 3 relating to forfeitures and condemnation proceedings. Paragraphs 3, 4, 5 and 6 of that Schedule provided as follows:
>
> > '3. 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 at any office of customs and excise.
> >
> > 4. Any notice under paragraph 3 above shall specify the name and address of the claimant.....
> >
> > 5. 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.
> >
> > 6. Where notice of claim in respect of any thing is duly given in accordance with paragraphs 3 and 4 above, the Commissioners shall take proceedings for the condemnation of that thing by the court, and if the court finds that the thing was at the time of seizure liable to forfeiture the court shall condemn it as forfeited.'

> 17. The scheme of these provisions of Schedule 3 is perfectly clear. A person whose goods have been seized can challenge the seizure. If he does so in the proper form and within the one month time-limit, the goods can only be forfeited under an order of the court in condemnation proceedings. If he fails to serve notice, then there is a statutory deeming under which the goods are deemed "to have been duly condemned as forfeited". Since the only way in which goods can in fact be forfeited is by condemnation by the court, the provisions operate, in effect, by treating the goods as having been condemned as forfeited in condemnation proceedings.
>
> 18. As to assessments, these are dealt with in the Finance Act 1994. Section 12(1A) provides, materially, that where it appears to HMRC that any person is a person from whom any amount has become due by way of excise duty and that amount can be ascertained by HMRC, then that person can be assessed to that amount of duty.
>
> 19. Regulation 13(1) of the Excise Goods Regulations applies where goods have already been released for consumption in another Member State and where they are held for a commercial purpose in the UK 'in order to be delivered or used in' the UK. In such a case, the duty excise point is the time when those goods are first so held. The person liable to pay the duty includes a person to whom the goods are delivered: see Regulation 13(2)(c).
>
> 20. For the purposes of Regulation 13(1), goods are held for a commercial purpose if, among other circumstances, they are held '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: see Regulation 13(3)(b). And 'own use' includes use as a personal gift but does not include the transfer to another person for money or money's worth: see Regulation 13(5)."

47. That final paragraph explains that the effect of Reg 13(1), (3)(b). and (5) is that "own use" does not include goods purchased for another person or transferred to that person for money or money's worth. The effect of those provisions is that the Winstons purchased by Mr Odinas for Ms Butkeviciute, with money provided by her, were not held for Mr Odinas's "own use" as defined, but instead for a commercial purpose.

48. As para 17 of *Race* set out above explains, the effect of Sch 3 is that if a person does not challenge the seizure in the magistrate's court within the one month time limit, the goods are deemed to have been condemned. We next discuss the effect of that deeming provision on the Marlboros..

The case law on the effect of the deeming provision

49. The case of *Jones* concerned Mr and Mrs Jones's appeal following the seizure of their car together with the cigarettes and alcohol they were carrying. Mr and Mrs Jones had withdrawn their claim at the magistrate's court, but asked for restoration on the basis that the goods were for private use. The FTT and UT held that they could raise that argument, relying upon *obiter dicta* of Buxton LJ in *Gascoyne v HMRC* [2005] Ch. 215 at [54]-[56] to the effect that that Sch 3 did not adequately enable the taxpayer to assert his rights under the European Convention on Human Rights.

50. The Court of Appeal unanimously overturned the UT's decision. Mummery LJ gave the only judgment, with which Moore-Bick and Jackson LJJ both agreed. At para 71(5) and (6) he said:

> "(5) The deeming process limited the scope of the issues that the respondents were entitled to ventilate in the FTT on their restoration appeal. The FTT had to take it that the goods had been 'duly' condemned as illegal imports. It was not open to it to conclude that the goods were legal imports illegally seized by HMRC by finding as a fact that they were being imported for own use. The role of the tribunal, as defined in the 1979 Act, does not extend to deciding as a fact that the goods were, as the respondents argued in the tribunal, being imported legally for personal use. That issue could only be decided by the court. The FTT's jurisdiction is limited to hearing an appeal against a discretionary decision by HMRC not to restore the seized goods to the respondents. In brief, the deemed effect of the respondents' failure to contest condemnation of the goods by the court was that the goods were being illegally imported by the respondents for commercial use.
>
> (6) The deeming provisions in paragraph 5 and the restoration procedure are compatible with Article 1 of the First Protocol to the Convention and with Article 6, because the respondents were entitled under the 1979 Act to challenge in court, in accordance with Convention compliant legal procedures, the legality of the seizure of their goods. The notice of claim procedure was initiated but not pursued by the respondents. That was the choice they had made. Their Convention rights were not infringed by the limited nature of the issues that they could raise on a subsequent appeal in the different jurisdiction of the tribunal against a refusal to restore the goods."

51. As noted above, *Jones* was a restoration case. In *Race,* Warren J considered whether the Tribunal had the jurisdiction to hear and decide an appeal against an excise duty assessment, following Mr Race's failure to challenge the seizure in the magistrate's court. He first set out the principles of *Jones,* and then said at [26]:

> "*Jones* is clear authority for the proposition that the First-tier Tribunal has no jurisdiction to go behind the deeming provisions of paragraph 5 Schedule 3. If goods are condemned to be forfeited, whether in fact or as the result of the statutory deeming, it follows that, having been bought in a Member State and then imported by Mr and Mrs Jones, they were not held by the taxpayers for their own personal use in a way which exempted the goods from duty. The reasoning and analysis in *Jones* did not turn on the fact that the case concerned restoration of the goods and not assessment to duty."

52. In the context of Mr Race's case, Warren J said at [31]:

> "Mr Race is unable…to go behind the deeming provision of paragraph 5 Schedule 3. It is not open to him to attempt to establish that he held the goods for his own personal use and not for a commercial purpose and at the same time maintain that the goods were acquired in another Member State. In my judgment, but subject to one point to which I will come, there is no room for further fact-finding on the question of whether seized goods were duty paid or not once the Schedule 3 procedure had determined that point."

53. The reference in the passage above to "one point to which I will come" was whether Mr Race had in fact made a claim to the magistrate's court. That point is not relevant to Mr Odinas's case: it was common ground that no such claim had been made.

The parties' submissions on the duty assessment

54. Mr McNamee put forward the following grounds of appeal:

(1) the magistrate's court can only make findings as to whether the goods were forfeit, and thus could not make a finding as to the position of the individual;

(2) the deeming could not apply in any event where a person had not been given notice of his appeal rights, as Mr McNamee submitted was the position here;

(3) FA 1994, s 12(1A) gave HMRC a discretion to decide whether to assess the duty, and if that discretion was exercised, the Tribunal had the jurisdiction to quash a decision; and

(4) Mr Odinas's position was the same as that of Mr Perfect in *HMRC v Perfect* [2019] EWCA Civ 465. However, on the second day of the hearing, Ms Brown handed up the CJEU judgment in that case, published on 10 June 2021 as *WR v HMRC* (Case C-279/19). Having considered that judgment, Mr McNamee withdrew this ground of appeal. We merely observe that Mr Odinas's position was in any event factually very different from that of Mr Perfect.

55. We consider each of remaining grounds in the next following paragraphs.

The "in rem" argument

56. Mr McNamee submitted that the magistrate's court only had the jurisdiction to condemn the goods, and not to make findings about whether guilt or responsibility attached to any person.

57. He relied on *Denton v John Lister Ltd and another* [1971] 3 All ER 669 ("*Denton*"). Mr Denton was a Customs Officer. He had seized a quantity of postage stamps from Southern Rhodesia on the basis that their importation breached the legislation imposing sanctions on that country. The magistrate refused to order forfeiture, on the grounds that the stamps had been sent to John Lister Ltd on an unsolicited basis and that company was therefore not the importer. Mr Denton appealed by way of case stated to the High Court. Lord Widgery, giving the only judgment with which Lyell and Cook JJ both agreed, held at [7] that:

> "the forfeiture proceedings in Sch 7 are, as counsel for the appellant submits, proceedings *in rem* and not *in personam*, that is to say the issue which is to be dealt with in forfeiture proceedings is whether the goods in question are liable to be forfeited. If they are liable to be forfeited then those proceedings are not interested in the identity of the person who imported them. Forfeiture or no depends on whether the goods were imported contrary to a prohibition. The identity of the importer is not a relevant factor as I see it… the chief magistrate on his own findings of fact should have upheld the claim for forfeiture made by the appellant. I would accordingly allow the appeal, and send the case back with a direction that the order for forfeiture should be made."

58. It is clear from the above is that the issue a magistrate has to decide in a forfeiture case is thus whether the goods were been imported "contrary to a prohibition". The *ratio* of the case is that if such a breach has been shown, the magistrate must order forfeiture.

59. When *Denton* is considered in the context of the deeming provisions explained above:

(1) the Tribunal has to deem that goods have been forfeited following proceedings in the magistrate's court, even though there have been no such proceedings;

(2) that forfeiture is deemed to have been carried out on a legal basis;

(3) for that to be the case, the seizure which preceded the forfeiture must also have been legal − as Mummery J said in *Jones*, it is not open to the Tribunal "to conclude that the goods were legal imports illegally seized by HMRC";

(4) the seizure can only have been legal if there has been a breach of some prohibition, as the Court said in *Denton*;

(5) in other words, the condemnation, the forfeiture, the legal seizure and the preceding breach of a prohibition are all deemed to be facts.

60. The Marlboros in this case were deemed condemned as forfeit, and the only reason given by the Border Force for the seizure (and thus the only basis on which the seizure could be legal) is that the cigarettes had been imported for commercial purposes. All that *Denton* says is that a forfeiture must follow a legal seizure: it does not prevent the deeming provision from operating so as to identify a factual basis for the legal seizure. We thus find that *Denton* does not assist Mr Odinas.

The lack of appeal rights issue

61. Mr McNamee submitted that the deeming could not in any event apply because Mr Odinas had not been offered Notice 12A or told about his appeal rights. However, we have already found as facts that (a) the Notice was offered to Mr Odinas, but he declined to take it, and (b) he was told orally about his appeal rights.

62. The deeming provisions cannot be prevented from applying where a person has been told orally about his appeal rights, and been offered a written document explaining those rights, but refused to take that document. We have thus not needed to consider whether the deeming would have been prevented from applying had Mr Odinas not been told of his appeal rights.

Imported for commercial purposes

63. Having considered Mr McNamee's first two grounds of challenge, we find as a further fact, based on the operation of the deeming provision, that the Marlboros were imported for a commercial purpose.

64. This is in addition to our earlier finding, at §47, that the Winstons were imported for a commercial purpose under Reg 13 of the Excise Duty Regulations, because they were purchased by Mr Odinas for Ms Butkeviciute with money she had provided.

The Tribunal's statutory jurisdiction

65. Mr McNamee's third ground relied on FA 1994, s 12(1A), which was summarised above, but which in full reads (his emphasis):

> "Subject to subsection (4) below, where it appears to the Commissioners--
>
> (a) that any person is a person from whom any amount has become due in respect of any duty of excise; and
>
> (b) at the amount due can be ascertained by the Commissioners,
>
> the Commissioners *may assess the amount of duty due* from that person and notify that amount to that person or his representative."

66. Mr McNamee said that it was clear from the emphasised words that HMRC had a power, but not a duty, to issue the assessment. The Tribunal's jurisdiction in appeals such as this was found at FA 1994, s 16(5), which reads:

> "In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal."

67. Mr McNamee submitted that s 16(5) gave the Tribunal the jurisdiction to quash HMRC's decision to assess the duty, and said that it would be fair and just to do so in this case. This was because Mr Odinas had been told that he could bring back any number of cigarettes as long as they were for personal use, and had done so; he had also been told that cigarettes imported for a family member would not be subject to duty and he reasonably believed Ms Butkeviciute was a family member; and he had retained the receipts as he had been instructed to do. Mr McNamee added that if the Tribunal was unable to take into account those matters and quash the decision on the basis that it had been made unfairly, the Tribunal would be deprived of the jurisdiction granted to it by Parliament under FA 1994.

68. Ms Brown said:

(1) in relation to the Winstons imported for Ms Butkeviciute, this was defined as commercial by the relevant regulations; the duty was plainly due, and there was no basis to set aside the assessment;

(2) in relation to the Marlboros, the Tribunal could not go behind the deeming, and quash the decision on the basis that the goods had been imported for personal use. She relied on *Jones* and *Race*, and also on *HMRC v Hill* [2018] UKUT 45 (TCC). In *Hill* HMRC had applied to the FTT to strike out the appeal for lack of jurisdiction, because the only ground relied on by Mr Hill was that the goods had been held for personal use. The UT found that the personal use issue "had been conclusively determined against Mr Hill by operation of the deeming provision in paragraph 5 of Schedule 3 to CEMA 1979" and went on to allow HMRC's appeal, thus confirming that the FTT had no jurisdiction.

69. We agree with Ms Brown that Mr McNamee's submissions amount to asking the Tribunal to quash the decision on the basis that Mr Odinas was importing the cigarettes for personal use. We find as follows:

(1) in relation to the Winstons, we accept that Mr Odinas had understood from the conversation with HMRC that these could be imported for Ms Butkeviciute without payment of duty, but the Tribunal cannot set aside part of the assessment on the basis that Mr Odinas had misunderstood the correct legal position; and

(2) in relation to the Marlboros, Mr McNamee is asking us to ignore the deemed fact that the goods were imported for commercial purposes. Plainly, we cannot do that.

70. We reject Mr McNamee's submission that our decision demonstrates that the Tribunal is deprived of jurisdiction: there may be other appeals in which the Tribunal would decide to quash or vary an HMRC assessment. But in a case such as this, we could only quash the decision if we had accepted that Mr Odinas had imported the cigarettes for personal use. Had Mr Odinas wished to put forward that ground of appeal, the proper forum was the magistrate's court. The Tribunal has no jurisdiction to revisit that issue: it has already been conclusively determined against Mr Odinas.

The conclusion on the duty assessment–

71. For the reasons set out above, we strike out Mr Odinas's appeal against the duty assessment under Rule 8(3)(a) of the Tribunal Rules.

The penalty: the starting point

72. The issue in *Race* was whether the appeal against the duty assessment should be struck out. One of the points raised at first instance was that the "personal use" issue would arise in any event when the penalty was considered. Warren J said this:

> "39. As to the third of the Judge's reasons, relating to the appeal against the Penalty Assessment, what the Judge was saying was that the issue whether Mr Race held the goods for his own personal use would arise for decision in the appeal against the Penalty Assessment. It is not correct, however, to say that that issue would arise in the appeal against the Penalty Assessment. This is because the First-tier 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. The issue of import for personal use, assuming purchase in a Member State, has been determined by the statutory deeming.
>
> 40. In any case, the issues raised by the appeal against the Penalty Assessment extend beyond the question of whether duty is payable and include, for example, an assessment of culpability because this is relevant to the level of penalty imposed under Schedule 41 of the Finance Act 2008. Further, the First-tier Tribunal will need to decide whether the level of mitigation afforded by HMRC for cooperation provided by Mr Race was sufficient and/or whether there should be further reductions for 'special circumstances'. Thus, even if the issue whether duty was payable may not be reopened there are other aspects of behaviour or conduct or circumstance raised by the penalty provisions which the First-tier Tribunal will be required to consider in respect of the appeal against the Penalty Assessment. It was for this reason that no application was made to strike out that appeal."

73. Warren J thus stated that where goods had been deemed to be imported for commercial purposes, the FTT had to approach a related penalty appeal on the same factual basis, namely that the appellant had imported the goods for commercial purposes. That statement was *obiter* because *Race* was concerned only with a duty assessment.

74. However, in *HMRC v Jacobson* [2018] UKUT 18 (TCC), the UT considered an appeal against the FTT's decision to cancel a penalty. At [23] the UT first set out paragraph 39 of *Race* and then said at [24]:

> "We respectfully agree with Warren J in *Race* that the reasoning and analysis in *Jones* applies to an appeal against a penalty in exactly the same way as it applies to an appeal against an assessment for excise duty."

75. Thus, our starting point for considering Mr Odinas's appeal against the penalty is that he imported all the cigarettes for commercial purposes. However, as Warren J said at [40], there are other issues which the Tribunal may consider.

The legislation on the penalty

76. The penalty was charged under Schedule 41 Finance Act 2008. We have set out below the framework of these statutory provisions, based on the summary in Ms Brown's skeleton argument (albeit with the removal of some commentary and the addition of further detail about para 6):

"Paragraph 4 provides that a penalty is payable by a person who acquires or is concerned in carrying, removing, depositing, keeping or otherwise dealing with excise goods on which duty is outstanding and has not been deferred.

Paragraph 5(4) sets out the 'degrees of culpability' as follows:

> 'P's acquiring possession of, or being concerned in dealing with, goods on which a payment of duty is outstanding and has not been deferred is –
>
> 'deliberate and concealed' if it is done deliberately and P makes arrangements to conceal it, and
>
> 'deliberate but not concealed' if it is done deliberately but P does not make arrangements to conceal it.'

Paragraph 6(2) provides that the penalty is charged as follows:

> (a) for a deliberate and concealed failure, 100% of the potential lost revenue,
>
> (b) for a deliberate but not concealed failure, 70% of the potential lost revenue, and
>
> (c) for any other case, 30% of the potential lost revenue.

Paragraph 10 provides that the potential lost revenue is the amount of excise duty due on the goods.

Paragraphs 12-13 provide for a reduction to the amount of a penalty if disclosure is made by the person liable to the penalty [see further below].

Paragraph 14 provides that HMRC may reduce the penalty if they consider that there are special circumstances. A reduction for special circumstances is not subject to a statutory minimum and can include a reduction to nil. The legislation states that 'special circumstances' does not include the fact that someone is not able to pay the penalty.

Paragraph 20 provides that where an act or failure is not deliberate, a person is not liable to a penalty if there is a reasonable excuse for the act or failure. The legislation states that a lack of funds is not a reasonable excuse, unless attributable to events outside the person's control."

77. In addition to that summary, we set out the relevant parts of para 12 as follows:

> "(2) P discloses the relevant act or failure by
>
> (a) telling HMRC about it,
>
> (b) giving HMRC reasonable help in quantifying the tax unpaid by reason of it, and
>
> (c) allowing HMRC access to records for the purpose of checking how much tax is so unpaid…
>
> (3) Disclosure of a relevant act or failure
>
> (a) is 'unprompted' if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the relevant act or failure, and
>
> (b) otherwise, is 'prompted'.
>
> (4) In relation to disclosure "quality" includes timing, nature and extent.

78. The minimum penalties are at para 13, which provides that:

(1) the minimum penalty for a deliberate and concealed failure is 50% if the disclosure was prompted, and 30% if it is unprompted;

(2) the minimum penalty for deliberate and not concealed failure is 35% if prompted, and 20% if it is unprompted; and

(3) the minimum penalty for any other case is 10% if prompted and 0% if unprompted.

The penalty and its basis

79. The £1,057 penalty under appeal was calculated on the basis that Mr Odinas's behaviour was deliberate and his disclosure was prompted. The maximum penalty was thus 70% and the minimum 35%.

80. HMRC decided to award the maximum reduction for quality of disclosure under the three categories of "telling, helping and giving" because "no further information was required". The penalty was thus 35% of the PLR. The penalty explanation schedule issued to Mr Odinas on 30 June 2019 said that HMRC had also considered special circumstances, but decided that there were none.

81. That penalty explanation schedule also set out why the behaviour had been classified as deliberate, saying:

> "You told Border Force that you know it is illegal to sell cigarettes when UK duty hasn't been paid, but admitted you had received money towards the cigarettes. You misled Border Force regarding your work and benefits and it is my view that this was to make your ability to purchase a large amount of cigarettes more credible because you knew you were committing a wrongdoing."

82. In relation to the disclosure being "prompted", the schedule said:

> "The disclosure was prompted because you did not tell us about the wrongdoing before you had reason to believe we had discovered it, or were about to discover it."

The parties' submissions on the penalty

83. Mr McNamee submitted that the penalty should be reduced or eliminated because:

(1) Mr Odinas was relying on HMRC's advice that he could bring back any amount of cigarettes "as long as they were for his own use or those of family members". The Marlboros were for his personal use, and the Winstons for Ms Butkeviciute, who he reasonably believed was a "family member".

(2) His behaviour should be classified as "unprompted" because he told Officer McCusker when asked, that he was carrying cigarettes. Mr McNamee added that Mr Odinas had "no reason to believe that HMRC have discovered or are about to discover the relevant act or failure" because he did not realise there was any "relevant act or failure".

84. Ms Brown submitted that the penalty should be upheld. The goods had all been imported for commercial purposes and Mr Odinas knew from the telephone conversation with HMRC that they were thus liable to duty. Moreover, 10,000 cigarettes is a substantial number and Mr Odinas had already been given full mitigation, reducing the penalty from the maximum of 70% to 35%. She described this as "extremely generous".

85. In response to Mr McNamee's submission that the disclosure was unprompted, she said this was plainly not the position. Instead Officer McCusker had initiated the conversation about the goods: Mr Odinas did not approach him and volunteer the contents of his luggage.

The Tribunal's view

86. The Tribunal has taken a different view in relation to (a) the Winstons purchased for Ms Butkeviciute, and (b) the Marlboros.

The Winstons

87. The Winstons were purchased for Ms Butkeviciute with her money, and were therefore commercial, see §47. We accept that Mr Odinas did not realise that this importation would be classified as commercial. Instead, in reliance on the conversation with HMRC, he understood that that cigarettes imported for a family member would not be subject to duty, and he reasonably believed Ms Butkeviciute was a family member. We thus agree with Mr McNamee that the failure to declare those cigarettes was not deliberate.

88. However, we agree with Ms Brown that the disclosure was prompted. Mr Odinas did not approach Officer McCusker, but was instead "intercepted" on passing through the Blue channel, and it was after the luggage had been scanned that he told Officer McCusker that he had bought cigarettes in Lithuania. The statutory test is that a disclosure is only 'unprompted' if it is "made at a time when the person making it has no reason to believe HMRC have discovered or are about to discover the relevant act or failure". Telling Officer McCusker that the luggage contained cigarettes after he had been stopped and the luggage scanned was clearly "prompted".

89. The relevant penalty band for non-deliberate prompted behaviour is between 30% and 10%. HMRC accepted that full mitigation should be given for "telling, helping and giving". Although Ms Brown described this as "generous", she did not ask that the Tribunal take a different approach. We therefore find that the penalty in relation to the 2,000 Winston cigarettes is to be recalculated at 10% of the PLR rather than the 35% which was applied by HMRC. The PLR was £577 (see §44) and the penalty is thus £57.

The Marlboros

90. In relation to the other 8,000 cigarettes, we have found as a fact that these were imported for commercial purposes as the result of the deeming provision discussed earlier. Authoritative guidance on the interpretation of deeming provisions is contained in *Marshall v Kerr* [1993] STC 360 at p 366, approved by the Supreme Court in *HMRC v DCC Holdings (UK) Ltd* [2010] UKSC 58 as follows:

> "For my part, I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that, because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so."

91. We must therefore "treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs". Mr Odinas purchased the cigarettes and carried them to the UK in his own luggage; no-one else was involved. He must therefore have known why he was carrying the cigarettes, namely for a commercial purpose.

92. We do not consider this to be an unjust outcome, because Mr Odinas had the opportunity to challenge the seizure in the magistrate's court on the ground that the cigarettes were for his personal use, but did not do so. It is not an absurd outcome, but on the contrary is the logical consequence of our factual finding that these cigarettes were imported for commercial use.

93. A person's behaviour is "deliberate" if he acted with an intention to mislead, see *Tooth v HMRC* [2021] UKSC 21 at [43] in the context of documents. We have taken the same approach here. It follows from what we said in the previous paragraphs that Mr Odinas knew that the goods were for commercial use. He also knew from the conversation with HMRC that duty was payable on commercial importations. However, he told Officer McCusker that the cigarettes were for personal use. He thus acted with an intention to mislead, in other words, deliberately. We also find that the disclosure was prompted, for the same reasons as set out above in relation to the Winstons imported for Ms Butkeviciute. It follows that we uphold the penalty in relation to the Marlboros.

Decision and appeal rights

94. For the reasons set out above:

(1) we dismiss Mr Odinas's appeal against the excise duty assessment of £3,021; and

(2) to the extent that the wrongdoing penalty relates to the importation of the Winstons, we reduce it as show below. The total penalty is thus £912, a reduction of £145, and the appeal is allowed to that extent.

	Excise duty	**Original Penalty at 35%**	**Final position**
Marlboros	£2,444	£855	£855
Winstons	£577	£202	£57
Total	£3,021	£1057	£912

95. 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.

96. 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 31 AUGUST 2021