2014] UKUT 0331 (TCC)
Appeal number FTC/131/2013

EXCISE DUTY – assessment in relation to excise goods seized from respondent – appeal from refusal to strike out statutory appeal – appeal allowed in part – ground of appeal struck out in part –application remitted

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and –

NICHOLAS RACE

Respondent

Tribunal: Mr Justice Warren, Chamber President

Sitting in public in London in the Rolls Building on 3 June 2014

James Puzey, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, on behalf of the Appellants
The Respondent did not appear and was not represented

DECISION

Introduction

1. This is an appeal by the Appellants ("**HMRC**") against a decision of Judge Cannan ("**the Judge**") released on 10 September 2013 ("**the Decision**"). The Judge refused an application by HMRC to strike out the appeal of the taxpayer ("**Mr Race**") holding, contrary to HMRC's case, that the First-tier Tribunal had, arguably, jurisdiction to determine whether Mr Race had been wrongly assessed to excise duty in respect of goods seized at his property on 4 August 2011. HMRC's position was, and remains that, on Mr Race's sole ground of appeal, the First-tier Tribunal cannot, as a matter of law, allow the appeal. Mr James Puzey appeared for HMRC. Mr Race was not represented and did not attend the hearing.
2. As appears from [2] of the Decision, the appeal before the Judge related to an assessment to excise duty in the sum of £2,317 made on 27 April 2012 ("**the Assessment**"). The Assessment was made following the seizure of a quantity of cigarettes, tobacco and wine at Mr Race's home. It was made on the basis that the goods seized had been released for consumption without payment of excise duty. On the appeal, Mr Race seeks to contend that the goods were purchased legitimately by way of cross border shopping.
3. It is to be noted that there was also a penalty assessment ("**the Penalty Assessment**") on Mr Race. He had appealed against that assessment too. HMRC have not sought to strike out the appeal against the Penalty Assessment.
4. HMRC's contention, assuming that Mr Race had imported the goods, was that the decision in *HMRC v Jones* [2011] EWCA 824, [2012] Ch 414 ("***Jones***") precluded Mr Race from asserting that the seized goods were purchased

legitimately. If Mr Race had wished to make that assertion, he should have challenged the legality of the seizure in condemnation proceedings.

The facts

5. Judge Cannan was dealing, as I have mentioned, with a strike-out application; he was not involved in a fact-finding exercise. HMRC contended, however, that whatever the underlying factual dispute surrounding the circumstances in which Mr Race obtained the goods, the appeal against the Assessment (although not against the Penalty Assessment) should be struck out. Thus, even assuming the facts to be as Mr Race had stated them, Mr Race could not succeed in his appeal against the Assessment.

6. What is clear, however, is as follows:

    a. On 4 August 2011, a search was carried out of Mr Race's home where just under 11,000 cigarettes, 800g of hand rolling tobacco and 24.75 litres of red wine were seized.

    b. On 27 April 2012, an assessment for excise duty in the sum of £2,317 (*ie* the Assessment) was sent to Mr Race.

    c. An internal HMRC memo dated 4 May 2012 shows that Mr Race phoned HMRC and spoke to an officer, Mrs Chidley, regarding the Assessment. The note records that during the course of the phone call, Mr Race stated that he had been advised by an HMRC officer that he would not get his goods returned so he felt that it was not worthwhile appealing.

d. There is a note of a further conversation on the phone between Mr Race and another officer on 25 June 2012. Mr Race, for the first time, stated that he had appealed against the seizure. It is not apparent whether Mr Race indicated when or how he had appealed; certainly the note reveals nothing.

e. On 16 July 2012, a notice of intention to charge an excise penalty of £892 was sent to Mr Race.

f. On 19 July 2012 there was a further conversation between Mr Race and Mrs Chidley. Mr Race again claimed that he had appealed against the seizure but said that he had not kept a copy of the letter making the claim. It is not apparent whether Mr Race indicated when he had sent the letter.

g. On 5 August 2012, Mr Race wrote to HMRC stating that the goods had been purchased by way of "cross border shopping" as gifts for other people and for his own consumption.

h. On 7 September 2012, Mr Race issued his Notice of Appeal in the First-tier Tribunal against the Assessment and the Penalty Assessment. The sole ground of appeal was that the goods were purchased for personal consumption and as Christmas Gifts for his family. The claim that a letter had been sent disputing the seizure was repeated.

i. On 6 March 2013, HMRC made an application to strike out the appeal against the Assessment (but not the Penalty Assessment) on the basis that the sole ground of appeal mentioned above was one on which the First-tier

Tribunal had no jurisdiction to rule, alternatively that there was no reasonable prospect of the appeal succeeding. Reliance was placed on Rules 8(2)(a) and 8(3)(c) of the Upper Tribunal Rules.

7. The Judge did not record in the Decision any detail about what occurred on the occasion when the goods were seized. Although his function was not to determine disputed issues of fact, he nonetheless had to make his decision against a background of fact which was either agreed or could not sensibly be disputed. In that respect, there was before the Judge the Notebook of the officer, Mr Hough, who effected the seizure on 4 August 2011. Mr Hough interviewed Mr Race and it was on the basis of that interview that he concluded that the goods were held for a commercial purpose. His contemporaneous note of the interview appears at pages 8 to 10 of the Notebook. It took place between 3.00 pm and about 3.20 pm. At page 10, Mr Hough wrote "I have read the above record of interview on pages 8 – 10 and agree it to be an accurate record" after which Mr Race's signature appears. Mr Race's account was that some of the cigarettes (9,820 CK Canary), the tobacco and the wine were acquired by someone to whom he had given some money for the purpose; they were acquired from a man in a local pub. Some of the cigarettes (1,100 JPS Red) were given to him: "me lad got me them as a present, he just come back from Benidorm".

8. In his Notice of Appeal, Mr Race claimed that the goods were purchased for his own personal use and as Christmas gifts. This is not, of course, inconsistent with the goods (other than the JP Reds) having been acquired in the manner recorded in Mr Hough's note. However, if the goods were acquired in that manner, then the relief for personal use is not available (as I explain below). The position may be

different in relation to the JPS Reds if they were bought by Mr Race's son in Benidorm as a present for him.

9. Mr Puzey, who appears on behalf of HMRC, tells me that at the hearing before Judge Cannan, Mr Race denied that Mr Hough's note was correct and specifically denied having said that he bought any goods from a man in the pub. No further details were given to elaborate upon his written grounds of appeal. In those circumstances, Mr Puzey is told by the solicitor instructing him, who appeared before the Judge for HMRC, that the hearing proceeded on the basis that *Jones* was relevant because it was being denied by Mr Race that HMRC had any lawful basis for the seizure or for the condemnation of the goods, the goods having been acquired for personal use. I propose to look at the matter of the alternative bases (i) that the goods were acquired from a man in the local pub and (ii) that the goods were purchased by Mr Race or his son in another Member State and imported by the relevant one of them.

10. Mr Hough's note records that he told Mr Race that he was not satisfied that the goods were not held for a commercial purpose and that they were to be seized; and it records that he told Mr Race that the seizure was made without prejudice to any other action HMRC might take against him. He recorded the issue of a Form C156 and explained the appeals procedure.

11. Form C156 was an HM Customs and Excise form headed "Seizure Information Notice (This is not a Notice of Seizure)". The notice given to Mr Race set out the goods seized and the time, date and place of seizure. Mr Race signed a copy acknowledging receipt of the notice and the correctness of the description of the

goods seized.

12. On HMRC's file appears a letter dated 10 August 2011 addressed to Mr Race enclosing a formal Notice of Seizure (specifying the statutory provisions pursuant to which the seizure had been effected) and HMRC's Notice 12A "What you can do if things are seized by HMRC Revenue and Customs". It has not been suggested, so far as I am aware, that this letter and its enclosures were not received by Mr Race. Note 12A, in its then current form, gave information, at section 2, about what a taxpayer should do if an objection was made to the seizure:

    a. Paragraph 2.1 stated that if the taxpayer believed that the thing seized was not liable to seizure "you must challenge the legality of the seizure". One example given of a situation in which the taxpayer might believe that HMRC had no legal right to seize the thing was because "excise goods were for your own use or to be given away".

    b. Paragraph 2.1 also explained that a challenge could be made by sending HMRC a Notice of Claim setting out the reasons for the appeal. At a more technical level it was explained that, by sending a Notice of Claim, the taxpayer was asking HMRC to start condemnation proceedings in a court.

    c. Paragraph 2.4 made clear the consequence of missing the time limit, one month, within which a Notice of Claim was to be received by HMRC:

> "If a valid Notice of Claim is not received within one calendar month of the date of the seizure or the Notice of Seizure then the legality of the seizure is confirmed. This is a matter of law. **You will no longer be able to challenge the legality of the seizure**." [emphasis in

original]

The statutory provisions

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; Mr Hough was such a 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).

21. If Mr Race in fact acquired the goods (other than the JPS Reds) from a man in the pub, then the exception under Regulation 13(3)(b) does not apply. This is because the goods were clearly held by the man who sold them to Mr Race for a commercial purpose by the time he sold them to Mr Race; there was therefore an excise point under Regulation 13(1) before delivery to Mr Race and Mr Race is liable for the duty under Regulation 13(2). Further, if Mr Race in fact acquired those goods from a man in the pub, he did not acquire them in another Member State or transport them to the UK. The sole ground of appeal on which Mr Race relies (that he acquired the goods for personal use) would be of no relevance in relation to any of the goods other than the JP Reds and reliance would not need to be placed on *Jones*. On the basis of the facts recorded by Mr Hough in his note, Mr Race's appeal against the Assessment could not succeed in relation to any of the goods other than the JP Reds on the basis of that sole ground of appeal.

22. However, Mr Race claims relief on the basis that he acquired the goods for his own use. Although Mr Race told the Judge that Mr Hough's interview record was incorrect (notwithstanding that he had, by signing it, accepted that it was correct), and although he expressly denied that he bought any goods from a man in the pub, no further details appear in the Decision about how the goods were acquired and there is nothing to suggest to me that there was any evidence before the Judge about it. In particular, there is nothing at all to suggest that Mr Race himself acquired the goods in another Member State, importing them for his own personal use. This is clearly important in the context of HMRC's strike-out application since the relief from duty would only be available to Mr Race if he can show that he himself acquired them in another Member State and imported them himself for his own personal use. I will return to this aspect later.

23. In relation to the JPS Reds, it may be that Mr Race would be absolved from duty if they had been given to him, having been acquired by his son in Spain and brought to the UK as a present for him. It is necessary, therefore to see what the legal position would be on the hypothesis that goods were acquired in a Member State either by him or as a present for him.

The authorities

24. The way in which the provisions of Schedule 3 operate has been explained in the authorities. The first authority I mention is the Court of Appeal decision in "***Jones***". In this case the owners of the seized excise goods, Mr and Mrs Jones, had initially sought to appeal the seizure by means of the notice of claim procedure set out in Schedule 3 CEMA. On legal advice they withdrew their

notice but sought restoration of the goods pursuant to HMRC's discretionary power of restoration under Section 152(b) CEMA. When that was refused, Mr and Mrs Jones appealed to the Tribunal citing the claim that the goods were for their own use. The First-tier Tribunal and Upper Tribunal ruled that they could raise such arguments before the tribunal, relying upon the *obiter dicta* of Buxton LJ in *Gascoyne v Commissioners of Customs and Excise* [2005] Ch. 215 at [54]-[56]. Buxton LJ had expressed the view that paragraph 5 Schedule 3 did not adequately enable the taxpayer to assert his rights under the European Convention on Human Rights ("**the Convention**"); he took the view, accordingly, that the tribunal could reopen the issue deemed to have been decided against him.

25. However, on HMRC's appeal in *Jones*, the Court of Appeal held unanimously that the tribunal could not entertain such arguments and this was so whether there had been a notice of claim served or whether the forfeiture had occurred by means of the deeming provision in paragraph 5 Schedule 3 CEMA. At [71] of his judgement, Mummery LJ said as follows:

> 71. I am in broad agreement with the main submissions of HMRC. For the future guidance of tribunals and their users I will summarise the conclusions that I have reached in this case in the light of the provisions of the 1979 Act, the relevant authorities, the articles of the Convention and the detailed points made by HMRC.
>
> > (1) The respondents' goods seized by the customs officers could only be condemned as forfeit pursuant to an order of a court. The FTT and the UTT are statutory appellate bodies that have not been given any such original jurisdiction.
> >
> > (2) The respondents had the right to invoke the notice of claim procedure to oppose condemnation by the court on the ground that they were importing the goods for their personal use, not for commercial use.
> >
> > (3) The respondents in fact exercised that right by giving to HMRC a notice of claim to the goods, but, on legal advice, they later decided to withdraw the notice and not to contest condemnation in the court

proceedings that would otherwise have been brought by HMRC.

(4) The stipulated statutory effect of the respondents' withdrawal of their notice of claim under paragraph 3 of Schedule 3 was that the goods were deemed by the express language of paragraph 5 to have been condemned and to have been "duly" condemned as forfeited as illegally imported goods. The tribunal must give effect to the clear deeming provisions in the 1979 Act: it is impossible to read them in any other way than as requiring the goods to be taken as "duly condemned" if the owner does not challenge the legality of the seizure in the allocated court by invoking and pursuing the appropriate procedure.

(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.

(7) I completely agree with the analysis of the domestic law jurisdiction position by Pill LJ in *Gora* and as approved by the Court of Appeal in *Gascoyne*. The key to the understanding of the scheme of deeming is that in the legal world created by legislation the deeming of a fact or of a state of affairs is not contrary to "reality"; it is a commonly used and legitimate legislative device for spelling out a legal state of affairs consequent on the occurrence of a specified act or omission. Deeming something to be the case carries with it any fact that forms part of the conclusion.

(8) The tentative *obiter dicta* of Buxton LJ in *Gascoyne* on the possible impact of the Convention on the interpretation and application of the 1979 Act procedures and the potential application of the abuse of

process doctrine do not prevent this court from reaching the above conclusions. That case is not binding authority for the proposition that paragraph 5 of Schedule 3 is ineffective as infringing Article 1 of the First Protocol or Article 6 where it is not an abuse to reopen the condemnation issue; nor is it binding authority for the propositions that paragraph 5 should be construed other than according to its clear terms, or that it should be disapplied judicially, or that the respondents are entitled to argue in the tribunal that the goods ought not to be condemned as forfeited.

(9) It is fortunate that Buxton LJ flagged up potential Convention concerns on Article 1 of the First Protocol and Article 6, which the court in *Gora* did not expressly address, and also considered the doctrine of abuse of process. The Convention concerns expressed in *Gascoyne* are allayed once it has been appreciated, with the benefit of the full argument on the 1979 Act, that there is no question of an owner of goods being deprived of them without having the legal right to have the lawfulness of seizure judicially determined one way or other by an impartial and independent court or tribunal: either through the courts on the issue of the legality of the seizure and/or through the FTT on the application of the principles of judicial review, such as reasonableness and proportionality, to the review decision of HMRC not to restore the goods to the owner.

(10) As for the doctrine of abuse of process, it prevents the owner from litigating a particular issue about the goods otherwise than in the allocated court, but strictly speaking it is unnecessary to have recourse to that common law doctrine in this case, because, according to its own terms, the 1979 Act itself stipulates a deemed state of affairs which the FTT had no power to contradict and the respondents were not entitled to contest. The deeming does not offend against the Convention, because it will only arise if the owner has not taken the available option of challenging the legality of the seizure in the allocated forum.

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.

27. The effect of paragraphs 5 and 6 Schedule 3 has recently been considered by Morgan J in *HMRC v European Brand Trading Ltd* [2014] UKUT 0226 (TCC) ("***EBT***") where he applied the decision in *Jones*.

28. In *EBT* there had been two seizures, the first of which became subject to condemnation proceedings, the second of which did not. The appeal concerned directions made by the First-tier Tribunal against a review decision under section 16(4) FA 1994 and directed a re-review of a decision not to restore the seized excise goods. HMRC appealed the directions because those directions required that the duty status of the goods should be considered by the reviewing officer notwithstanding that issue of that status had already been settled under the Schedule 3 procedure by the operation of the deeming provision under Schedule 3 paragraph 5 so that the goods were deemed not to be duty paid.

29. At [57] Morgan J held as follows:

> "The effect of the order of the magistrates' court on 13 May 2010 is that in law, as between HMRC and EBT, duty was not paid on the goods seized on 20 August 2009. The effect of paragraph 5 of schedule 3 to the 1979 Act is that in law, as between HMRC and EBT, duty was not paid on the goods seized on 16 February 2010.

30. Then, at [63], Morgan J held as follows:

> "….. I am unable to accept the submission made by counsel for EBT …. to the effect that the review officer is required to consider "that material relevant to the duty paid status of the seized goods which was available to and considered by the relevant officer at the relevant time". As at the time of the further review decision, the duty paid status of the seized goods is established to be that duty was not paid. It is irrelevant to inquire as to what might have been argued to have been the apparent position at an earlier time."

Discussion

31. Applying these statutory provisions, it is clear that Mr Race could be free from liability (and from assessment) for excise duty in relation to the goods only if they were acquired in another Member State either (i) by Mr Race himself or (ii) by his son as a present for Mr Race. However, in the light of the decisions in *Jones* and *EBT,* the clear conclusion, in my judgment, is that Mr Race is unable, even in those cases, 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.

32. It is against that analysis that I turn to the Judge's reasons for refusing to strike out the appeal against the main assessment. His reasons were, in essence, the four particular factors which he summarised in [35] of the Decision:

    a. It was arguable that *Jones* did not limit the jurisdiction of the tribunal in relation to an appeal against an assessment to excise duty.

    b. If Mr Race were to satisfy the tribunal that he was frustrated in a genuine attempt to challenge the legality of the seizure, then the tribunal must arguably give him a remedy in order to vindicate his rights under Article 1 of the Convention which includes the right to a fair hearing.

c. The same factual issues would in any event arise at the hearing of the appeal against the Penalty Assessment.

d. Insofar as the strike-out application raised issues of law, the Judge did not consider it appropriate to determine those issues without a full investigation of the facts, referring to *Barratt v Enfield LB* [1999] UKHL 25.

33. Taking those factors in turn, I do not consider it to be arguable that *Jones* does not demonstrate the limits of the jurisdiction. It is clearly not open to the tribunal to go behind the deeming effect of paragraph 5 Schedule 3 for the reasons explained in *Jones* and applied in *EBT*. The fact that the appeal is against an assessment to excise duty rather than an appeal against non-restoration makes no difference because the substantive issue raised by Mr Race is no different from that raised by Mr and Mrs Jones.

34. The Judge supported his contrary conclusion by referring to the period between the expiry of the one month time-limit for challenging seizure and the point at which the assessment to excise duty was issued. The Judge commented that the owner of seized goods should not be forced to seek condemnation proceedings simply to guard against the possibility of a future tax or penalty assessment: see at [31] of the Decision. But that is precisely what he must do if he wishes to assert, if he were to be assessed, that the goods were not subject to forfeiture. The effect of the deeming provisions is that the goods are legally forfeit. Notice 12A is clear that, unless the seizure is challenged, it is not possible subsequently to argue that the goods were not liable to forfeiture because they were in fact held for personal

use. I agree with Mr Puzey that it is not surprising or a cause for complaint that HMRC are entitled to assess for unpaid duty in respect of such goods. In any event, it remains open to a person subject to such an assessment to argue that it is wrongly calculated, is out of time, is raised against the wrong person or is otherwise deficient so that the factual issues in relation to an assessment and penalty assessment are likely to be different.

35. As to the second of the Judge's reasons, concerning procedural unfairness, it is clear that paragraphs 5 and 6 of Schedule 3 are Convention compliant. That is not to say that HMRC could escape the consequences of any unfairness on their part in relation to the application of those statutory provisions. The remedy for that sort of unfairness, however, is judicial review, which itself gives a Convention-compliant remedy to a taxpayer alleging the sort of unfairness about which the Judge was concerned. The First-tier Tribunal has no inherent power to review decisions of HMRC; although it does have certain statutory powers in relation to certain decisions, it has no power to review, or to provide any remedy, in relation to procedural unfairness of the sort which concerned the Judge. It is not, in any case, immediately obvious that there is anything in the point concerning procedural unfairness in the light of the fact that Mr Race was provided with Notice 12A which set out clearly what he needed to do.

36. Although Mr Race has said to HMRC on a number of occasions that he had made an appeal against the seizure, the first time he did this was on 25 June 2012: see paragraph 6d. above. He has never given any detail of when he says that he made such an appeal; at least, if he did tell the Judge, it is not recorded in the Decision. Further, by his own admission, he has not retained a copy of any relevant letter

and HMRC have no such letter on file. Moreover, the contents of the note of the phone call on 4 May 2012 with Mrs Chidley are inconsistent with an appeal having been made before that date: Mrs Chidley has recorded that she explained to Mr Race the right to appeal against the seizure and that he had been informed about that in the letter of 10 August 2011. His response to her, assuming the accuracy of her note, was not that he had indeed made such an appeal but was that he was not going to appeal since he did not consider it was worth appealing. This was because he had been told, on his version of events, that he would not get the goods returned.

37. The Judge has something to say about this in [23] of the Decision when referring to his earlier decision in *B&G Liquor Store Ltd*. He said this:

> "…. [Mr Race] says in support of the present appeal that he was told by the seizing officer that he could appeal the seizure of the goods. If he wished to do so he should put it in writing and the appeal would come to the seizing officer but that he would not be getting the goods back. [Mr Race] says that he did write to the seizing officer but nothing happened and at the time of the assessment [HMRC] told him that they had no record of any appeal against the legality of the seizure. Whether or not these exchanges ever happened is not a question I am invited to resolve on this application. I must therefore take it that [Mr Race] would have a reasonable prospect of establishing that these events did happen."

38. I will return to this aspect of the case later in this Decision.

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 behavior 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.

41. As to the fourth reason, the need for a full investigation of the facts, it is no doubt, a sound general approach that a claim should be struck out only with a proper understanding of the facts. But as Lord Woolf MR put it in *Kent v Griffiths* [2001] QB 36 at [38] (in a factual context far removed from the present case):

> "Courts are now encouraged, where an issue or issue can be identified which will resolve or help to resolve litigation, to take that issue or those issues at an early stage of the proceedings so as to achieve expedition and save expense. ……..Defendants as well as claimants are entitled to a fair trial and it is an important part of the case management function to bring proceedings to an end as expeditiously as possible. Although strike out may appear to be a summary remedy, it is in fact indistinguishable from deciding a case on a preliminary point of law."

42. In the present case, the application to strike out was dealt with on the basis that Mr Race's factual contentions could be established. The basis for the application to strike out was a matter of law that did not require further factual determination. The question whether the First-tier Tribunal possessed a jurisdiction to reopen the issue of duty payment is one of law; the answer is, in my judgment, that it does not have such a jurisdiction. This conclusion means Mr Race's appeal against the Assessment cannot succeed even if the goods were acquired in another Member State by Mr Race or his son.

43. That conclusion is subject to one other point (and it is the same point as the one to which I said, at paragraph 38 above, I would return). It is whether what Mr Race told the Judge, and what the Judge said at [23] of the Decision, about having made an appeal against the seizure is sufficient to save Mr Race's appeal against the Assessment from being struck out. The argument is that, if Mr Race were able to establish that he had, in fact, served an appeal against the seizure, then the case would fall within paragraph 6 Schedule 3 and not within paragraph 5. HMRC should thus have commenced condemnation proceedings under paragraph 6 of Schedule. In those circumstances, Mr Race has a case for saying that there is no statutory deeming at all so that, on his appeal against the Assessment, he is not prevented from raising the question of whether he held the goods for his own personal use.

44. Mr Race's appeal to the First-tier Tribunal did not include a ground of appeal to the effect that he had appealed against the seizure within the time-limit provided for in paragraphs 3 and 5 Schedule 3. The Judge approached the strike-out application on the basis that he was not being asked to resolve disputed matters of

fact and that he would therefore take it that Mr Race "would have a reasonable prospect of establishing that these events did happen". What the Judge said is not an entirely satisfactory approach, for at least three reasons:

a. First, the events referred to are not set out in any detail. It is unclear whether the Judge was accepting for the purposes of the application before him that Mr Race wrote to HMRC in a form sufficient to constitute a notice falling within paragraph 3 Schedule 3. It is also unclear whether he was accepting that Mr Race wrote such a letter within the one month time limit, although it is possible to infer from [32] of the Decision that he was accepting that proposition.

b. Secondly, the Judge was not obliged to do what he did and to take it that Mr Race would have had a reasonable prospect of establishing that the events referred to by the Judge did happen. It was open to him to make as assessment of the factual position and to test, within reasonable limits, what Mr Race was telling him. In particular, the Judge could reasonably have expected Mr Race to explain how it is that he could have made an appeal within the one-month time limit and yet say to Mrs Chidley, long after the expiry of that time limit, that he felt it was not worth appealing.

c. Thirdly, the Judge did not address what the position would be even if Mr Race were able to establish that he held the goods for his personal use. In particular, he did not give any consideration to the requirement for the goods to have been acquired in another Member State.

45. As to the issue whether a Notice of Claim was served, if at all, within the one

month time-limit, this was not dealt with at the hearing before me and it was only in the course of preparing my decision that I came to realise its significance and that it had not been dealt with in any depth by the Judge. I have communicated with the parties about it since the hearing. Mr Puzey has provided written submissions; Mr Race has not made any submissions or commented on Mr Puzey's submissions, continuing his stance of total non-engagement with this appeal.

46. As part of his submissions, Mr Puzey has addressed what should be done if HMRC have failed to act on a valid Notice of Claim under paragraph 3 Schedule 3 CEMA. He submits that the tribunal has no power to rule on the validity or timeliness of a Notice of Claim and, consequently, may not investigate matters going to the legality of a forfeiture or potential forfeiture. Mr Race's remedy was to seek judicial review of HMRC's failure to act on a valid Notice of Claim served in time. His submissions raise some difficult issues which I am very reluctant to decide without the benefit of rather fuller argument. Not the least of my concerns is the impact on the Assessment if he is right that the tribunal has no power to rule on whether a Notice of Claim was served. In that case, it is at least arguable, I would have thought, that HMRC could not properly raise an assessment until it had been decided by the appropriate court whether a valid notice had been served. I can also see that the appropriate court might be surprised that it was being asked to determine an issue which, in practice, would be relevant only to the determination of a tax liability.

47. This aspect of the case was not debated before the Judge. That is not entirely surprising. HMRC had raised the Assessment without any inkling that Mr Race

would say that he had served a Notice of Appeal. They relied initially on Mr Hough's note as accurately reflecting what had occurred which would have made the question of personal use wholly irrelevant to the goods other than the JPS Reds. When it became apparent at the hearing that Mr Race denied the account recorded in Mr Hough's note (which, it is worth reminding oneself, Mr Race had at the time acknowledged, by his signature, was accurate), reliance was then placed on the deeming provisions. As to the JPS Reds, HMRC had needed all along to rely on the deeming provisions but they had not come prepared to meet the new suggestion that a letter sufficient to amount to a Notice of Claim had been served.

48. What, then, is the just and fair way of dealing with HMRC's appeal in accordance with the overriding objective? HMRC applied, after all, to strike out Mr Race's appeal against the Assessment which, as it stood at the time of the application and as it stands today, raises only one ground of appeal namely that the goods were acquired for personal use. For reasons which I have given, and assuming that Mr Race did not serve a valid Notice of Claim, Mr Race cannot succeed on that ground whichever factual scenario is adopted and none of the reasons given by the Judge justified his refusal to strike out the claim. In my judgment, under the scenario where there was no Notice of Claim, the approach adopted by the Judge was not correct. It is open to me, as an appellate judge, to revisit the exercise of the discretion whether or not to strike out the appeal. I would without hesitation strike out the appeal.

49. The position is not so straightforward if Mr Race did serve a Notice of Claim. Three of the four factors referred to at paragraph 32 above (factors a, c and d) do

not, as already explained, amount to reasons which justify the refusal to strike out the appeal. Further, it seems to me that the second factor does not provide a good reason either, since the Judge was here concerned with the sort of procedural unfairness giving rise to a breach of Convention rights: if there is a case which Mr Race could run (which I very much doubt) it would be by way of judicial review not as a point within a statutory tax appeal. Under the scenario where there was a Notice of Claim, the approach adopted by Judge was no more correct than it was under the first scenario. It is, again, open to me to revisit the exercise of the discretion whether or not to strike out the appeal. The position here is not, however, so straightforward, and it differs as between the JPS Reds and the other goods.

50. Mr Race has not, as I have said, engaged with this appeal either by attending the hearing or by involving himself in the issues which I have raised since the hearing. I appreciate, of course, the difficulties faced by Mr Race as a litigant in person and that it is appropriate for me to raise points in his favour which he has not thought of, giving HMRC a proper opportunity to respond to them. But there are limits. I consider that I am entitled to take account of the prospects of his being able to establish the facts on which he would need to rely to have even an arguable case.

51. Taking the goods other than the JPS Reds first, Mr Race can have no defence to the Assessment unless he is able show that he himself purchased those goods in another Member State and brought them to the UK. There was, so far as I am aware, no evidence before the Judge that Mr Race purchased those other goods in another Member State or, indeed, any evidence about how and where precisely he

says he did acquire those goods. I am wholly unconvinced, in the light of the way in which his story has changed, that in relation to those other goods he has any prospect of showing that they were acquired by him in another Member State. It is not apparent whether the Judge approached the matter on the basis that those goods were acquired by Mr Race in another Member State: if he did so, he should not, in my view, have done so uncritically and in failing even to consider whether there was any material which supported that approach, I consider that he was in error. In contrast, if he approached the matter on the basis that those goods were acquired by Mr Race in the UK, he should have held that Mr Race had no arguable case to be entitled to relief. It follows, in my judgment, that Mr Race should not be entitled to rely on his sole ground of appeal insofar as it relates to those other goods.

52. So far as the JPS Reds are concerned, let me assume, for the moment, that the tribunal does have jurisdiction to determine whether a Notice of Appeal was served in time or at all. I have described at paragraphs 44 a. and b. above what I see as the shortcomings in how the Judge dealt with this. In my view, in exercising afresh the discretion whether or not to strike out the appeal, I must consider whether or not there is a real prospect of Mr Race being able to establish that a Notice of Appeal was served and in particular I must take account of the matters which I have identified at paragraph 36 above.

53. The question then (continuing to leave aside the issue of jurisdiction) is whether I should deal with the point myself (either on the evidence available or after receiving further evidence) or remit it to the Judge. It is tempting to adopt the former course in order to produce certainty at an earlier stage. But on balance, I

think I should remit the matter to the Judge. He will be in a better position than me to assess the evidence already before the tribunal and to decide whether he should receive further evidence from each side about what, if any, communications were sent to or received by HMRC. If he does receive further evidence, HMRC's evidence will no doubt be straightforward, namely that nothing was received (although the Judge might find it useful to know what searches have been made). Mr Race's evidence will need to explain what he produced and when, even though he cannot produce a copy of any letter; he will need to explain why he signed Mr Hough's record when he now says it was incorrect; and he will need to explain why he told Mrs Chidley that he was not going to appeal or to say that her record, too is incorrect.

54. I need to say a little more about the issue of jurisdiction: whether or not the First-tier Tribunal has jurisdiction to decide the issue of service of a Notice of Claim is a matter which I consider should be remitted for it to deal with at it sees appropriate. It may turn out to be an issue which does not actually need to be decided: it is clearly arguable, and is my own current view without the benefit of argument, that it is open to the First-tier Tribunal to decide whether or not there is a reasonable prospect of Mr Race establishing that he served a Notice of Claim even if it is the court, rather than the tribunal, which would ultimately decide the issue. I see no reason why the tribunal should not be able to decide that Mr Race has, or does not have, such a reasonable prospect. If it decides that he does not have such a prospect, the appeal can be struck out without the tribunal needing an answer to an issue which it not within its jurisdiction to decide.

Disposition

55. HMRC's appeal is allowed. The appeal is not struck out in its entirety at the present time. However, Mr Race may not raise his sole ground of appeal in relation to the goods with the possible exception of the JPS Reds. HMRC's application is remitted to the First-tier Tribunal (to be dealt with by the Judge if possible) to determine whether Mr Race is to be allowed to rely on his sole ground of appeal in relation to the JPS Red. In deciding that question, the tribunal will need to address the jurisdiction issue. Subject to that issue, the tribunal will determine whether the appeal is to be struck out in its entirety or is to be allowed to continue so far as the JPS Reds are concerned, with whatever effect on the Assessment that may eventually have.

56. So far as concerns the Penalty Assessment, this is not the subject matter of any appeal or other application to the Upper Tribunal and I say nothing about it.

Mr Justice Warren

Chamber President

Release Date: 15 July 2014