EXCISE DUTY – seizure of cigarettes – whether assessment of excise duty and penalty notified in time – yes – whether assessment and penalty properly imposed – yes – whether reasonable excuse or special circumstances - no

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/09404

BETWEEN

MIROSLAV CIRKO **Appellant**

-and-

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

TRIBUNAL: JUDGE JEANETTE ZAMAN

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 10 June 2019, with additional written submissions received from the Respondents on 12 June 2019 and from the Appellant on 2 July 2019

The Appellant did not attend and was not represented

Ben Elliott, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. HMRC issued to Mr Cirko:

   (1) an excise duty assessment on 2 September 2015 for £1,768 under section 12 Finance Act 1994 ("FA 1994"); and

   (2) a penalty of £388 on 2 October 2015 under paragraph 4 of Schedule 41 Finance Act 2008 ("FA 2008"), reduced on reconsideration to £353 on 10 May 2017.

2. The assessment and penalty relate to Mr Cirko having been stopped by UK Border Force ("UKBF") at London Luton Airport on 16 September 2014 with 6,900 cigarettes (the "Cigarettes") which were seized by UKBF.

3. Mr Cirko gave Notice of appeal to the Tribunal on 21 November 2017.

4. The appeal to the Tribunal was late. In his Notice of appeal Mr Cirko stated that the reason was that he'd only got the message from the Lithuanian tax office that these assessments had been made after one year. HMRC initially objected to late notice, but on 24 May 2018 they informed the Tribunal that they were withdrawing their objection.

5. In correspondence with the Tribunal, Mr Cirko had explained that he was living in Lithuania and would not be travelling to the UK to attend the hearing.

6. I decided that it was in the interests of fairness and justice that the late notice of appeal be accepted, and that the hearing proceed in Mr Cirko's absence. Mr Cirko had made various statements as to his position in his Notice of appeal and in his subsequent correspondence with the Tribunal, as referred to below, and Mr Elliott drew these to my attention and responded to them at the hearing.

RELEVANT FACTS

7. HMRC prepared a bundle of papers for the hearing, which included the witness statement of Officer Steve Wilmer of UKBF (relating to the seizure) and the witness statement of Officer Sophie Carmichael of HMRC (relating to the assessment and penalty). Officers Wilmer and Carmichael attended the hearing and gave sworn evidence. I note that the assessment and penalty had been issued by Office Vicker of HMRC but Officer Vicker was not able to attend the hearing. I have set out below my findings of fact based on this evidence. Additional findings are contained in the Discussion.

8. On 16 September 2014, Mr Cirko arrived in the UK at London Luton Airport from Vilnius, Lithuania. He was stopped by Officer Wilmer, and confirmed his identity.

9. Mr Cirko was in possession of flight ticket from Luton to Vilnius the next day (17 September 2014).

10. Mr Cirko's luggage (a black soft-sided suitcase with a 'Fashion' logo) was searched by Officer Wilmer and was found to contain 6,900 Marlboro Gold KSF cigarettes (the Cigarettes). Officer Wilmer informed Mr Cirko that he had in his possession excise goods that did not appear to have borne UK excise duty and that he wanted to ask him some questions to establish whether the goods were held for a commercial purpose, but he was free to leave at any time. Mr Cirko chose to leave without being interviewed.

11. Given that Mr Cirko was only staying in the UK for one day, Officer Wilmer inferred that the cigarettes were not for personal consumption but were being imported for a commercial purpose. He was also travelling with two other passengers carrying identical bags and containing similar amounts of cigarettes.

12. Officer Wilmer formally seized the Cigarettes on behalf of UKBF and recorded the seizure in his notebook. Mr Cirko was asked to write his address in that notebook. The handwriting is not clear and whilst Vilnius and Strut 13 are legible, the other part could be taken as Mechanizatoriu, Mechanizatoriy or Mechanizatorius. Later in that same entry, this time in Officer Wilmer's handwriting, the address is written as "VILNIUS, MECHANIZATORIO, STRUT 13".

13. Mr Cirko was issued with forms BOR162 and BOR156, as well as Notices 1 and 12A:

(1) Form BOR162, the warning letter about seized goods, sets out the name and address of the taxpayer. Officer Wilmer confirmed that he filled in this information, and the handwriting reads "MIROSLAV CIRKO, VILNIUS, MECHANIZATORIO, STRUT 13".

(2) Notice 12A explains that if the person does not challenge the legality of seizure by submitting a notice of claim then they will not be able to do so before the Tribunal.

14. Mr Cirko did not contest the legality of the seizure within one month.

15. On 2 September 2015, HMRC (Officer Vicker) sent a letter to Mr Cirko, addressed as "Miroslau Cirko, Strut 13, Mechanizatorius, Vilnius, Lithuania":

(1) noting that no challenge had been made to seizure and, accordingly, the goods were deemed to have been duly condemned as forfeit and Mr Cirko had no right to challenge the lawfulness of seizure or the liability of the goods to forfeiture;

(2) enclosing an excise duty assessment for £1,768;

(3) enclosing a penalty explanation sheet setting out the proposed penalty of £388 and inviting Mr Cirko to provide further information. The proposed penalty was on the basis that the failure was non-deliberate and an 80% reduction was given for cooperation.

16. Officer Carmichael gave evidence to confirm that the assessment of the amount of the duty would have been based on the retail price of the Cigarettes, using information supplied by the manufacturer and applying the rate of ad valorem duty thereto.

17. On 2 October 2015, Officer Vicker wrote to Mr Cirko noting that there had been no response to the letter of 2 September 2015 and enclosing a penalty assessment for £388. That letter was also sent to "Miroslau Cirko, Strut 13, Mechanizatorius, Vilnius, Lithuania".

18. On 9 November 2015 HMRC's debt management team sent a reminder of the amount due to "Miroslau Cirko, Strut 13, Mechanizatorius, Vilnius, Lithuania".

19. On 27 November 2015 the letter of 2 September 2015 was returned undelivered: the delivery service sticker on the envelope records the reason for return as being an "insufficient address". The letter of 2 October 2015 was similarly returned to HMRC on 26 May 2017.

20. On 9 May 2017, Officer Vicker received an email from Mr Cirko that had been forwarded from HMRC's Debt Management team. Officer Vicker treated this as a request for reconsideration of the assessment and penalty.

21. On 10 May 2017, Officer Vicker issued a decision upholding the assessment and reducing the penalty to £353 (giving the maximum reduction for disclosure). That letter was sent to ""Miroslav Cirko, Strut 13, Mechanizatorius, Vinius, Lithuania", and was accompanied by an amended notice of penalty assessment. That amended notice was addressed to "Miroslau Cirko, Strut 13, Mechanizatorius, Vilnius, Lithuania", ie the same form of name and address and used for the duty assessment and original penalty.

22. Mr Cirko's (typed) Notice of appeal to the Tribunal of 21 November 2017 gives his address as Vilnius, Avizieniai, postcode 14013. Mr Cirko asked the Tribunal to communicate with him by email and provided his email address.

23. Subsequent correspondence from the Tribunal to Mr Cirko in respect of this hearing has been sent by email (including sending letters as attachments to emails).

24. On 5 April 2018 Mr Cirko sent an email to the Tribunal explaining why his appeal was late, and that includes "When I started my case in 2015, I did not know it, and I learned only in 2017, when my country's tax inspection wrote me a letter saying that there was a recovery from the UK and the case started." He explained that he was unable to pay the tax in various emails.

25. HMRC treated Mr Cirko's explanation as to his inability to pay the tax as an application for hardship in respect of the duty assessed and granted that application on 12 June 2018. This decision (and accompanying certificate) was addressed to Mr Cirko at "Strut 13, Mechanizatorious, Vilnius, 14013, Lithuania". This appears to have been posted to Mr Cirko, but was also sent by HMRC by email to the Tribunal and that email was copied to Mr Cirko.

RELEVANT LEGISLATION

26. Regulation 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ("HMDP Regulations 2010"), states that where excise goods (which include cigarettes) have been released for consumption in another Member State and are held for a commercial purpose (i.e. not for the taxpayer's own use) in the UK, the excise duty point is the point in time when the goods are first so held and the person liable is the person holding the goods or making the delivery:

> "**Regulation 13 - Goods already released for consumption in another Member State – excise duty point and persons liable to pay**
>
> (1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.
>
> (2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person—
>
> (a) making the delivery of the goods;
>
> (b) holding the goods intended for delivery; or
>
> (c) to whom the goods are delivered.
>
> (3) For the purposes of paragraph (1) excise goods are held for a commercial purpose if they are held—
>
> (a) by a person other than a private individual; or
>
> (b) by a private individual ("P"), except in a case where the excise goods are for P's own use and were acquired in, and transported to the United Kingdom from, another Member State by P.
>
> (4) For the purposes of determining whether excise goods referred to in the exception in paragraph (3)(b) are for P's own use regard must be taken of—
>
> (a) P's reasons for having possession or control of those goods;
>
> (b) whether or not P is a revenue trader;
>
> (c) P's conduct, including P's intended use of those goods or any refusal to disclose the intended use of those goods;

(d) the location of those goods;

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

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

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

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

10 litres of spirits,

20 litres of intermediate products (as defined in article 17(1) of Council Directive 92/83/EEC),

90 litres of wine (including a maximum of 60 litres of sparkling wine),

110 litres of beer,

800 cigarettes,

400 cigarillos (cigars weighing no more than 3 grammes each),

200 cigars,

1 kilogramme of any other tobacco products;

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

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

(5) For the purposes of the exception in paragraph (3)(b)—

(a) "excise goods" does not include any goods chargeable with excise duty by virtue of any provision of the Hydrocarbon Oil Duties Act 1979 or of any order made under section 10 of the Finance Act 1993 3;

(b) "own use" includes use as a personal gift but does not include the transfer of the goods to another person for money or money's worth (including any reimbursement of expenses incurred in connection with obtaining them). …"

27. HMRC may assess any duty from that person and notify that amount to them pursuant to section 12(1A) Finance Act 1994:

"**Section 12 - Assessments to excise duty**

...

(1A) Subject to subsection (4) below, where it appears to the Commissioners—

(a) that any person is a person from whom any amount has become due in respect of any duty of excise; and

(b) that 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.

...

(3) Where an amount has been assessed as due from any person and notified in accordance with this section, it shall, subject to any appeal under section 16 below, be deemed to be an amount of the duty in question due from that person and may be recovered accordingly, unless, or except to the extent that, the assessment has subsequently been withdrawn or reduced.

(4) An assessment of the amount of any duty of excise due from any person shall not be made under this section at any time after whichever is the earlier of the following times, that is to say—

(a) subject to subsection (5) below, the end of the period of 4 years beginning with the time when his liability to the duty arose; and

(b) the end of the period of one year beginning with the day on which evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge;

but this subsection shall be without prejudice, where further evidence comes to the knowledge of the Commissioners at any time after the making of an assessment under this section, to the making of a further assessment within the period applicable by virtue of this subsection in relation to that further assessment.

...

(6) The reference in subsection (4) above to the time when a person's liability to a duty of excise arose are references—

(a) in the case of a duty of excise on goods, to the excise duty point; and

(b) in any other case, to the time when the duty was charged.

...

(8) In this section "representative" , in relation to a person appearing to the Commissioners to be a person from whom any amount has become due in respect of any duty of excise, means his personal representative or trustee in bankruptcy or interim or permanent trustee, any receiver or liquidator appointed in relation to that person or any of his property or any other person acting in a representative capacity in relation to that person."

28. Where duty has not been paid in relation to any unloaded excise goods, those goods are liable to forfeiture pursuant to section 49 Customs and Excise Management Act 1979 ("CEMA 1979") and regulation 88 HMDP Regulations 1979:

"**Section 49 - Forfeiture of goods improperly imported**

(1) Where—

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

… (ii) unloaded from any aircraft in the United Kingdom, …

those goods shall, subject to subsection (2) below, be liable to forfeiture. …"

"**Regulation 88 - Forfeiture of excise goods on which the duty has not been paid**

If in relation to any excise goods that are liable to duty that has not been paid there is—

(a) a contravention of any provision of these Regulations, or

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

those goods shall be liable to forfeiture."

29. Section 139 CEMA 1979 provides that any goods liable to forfeiture may be seized:

"**Section 139 - Provisions as to detention, seizure and condemnation of goods, etc.**

(1) Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard. …

(6) Schedule 3 to this Act shall have effect for the purpose of forfeitures, and of proceedings for the condemnation of any thing as being forfeited, under the customs and excise Acts. …"

30. Paragraph 3 of Schedule 3 CEMA 1979 provides that a person claiming that the goods seized are not liable to forfeiture must give notice of that claim within one month of the date of seizure. If such notice is not given then, under paragraph 5, the goods are deemed to have been duly condemned:

"**Paragraph 3 - Notice of claim**

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."

"**Paragraph 5 - Condemnation**

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."

31. Paragraph 4(1) of Schedule 41 FA 2008 provides that a person in possession of excise duty goods is liable to a penalty. Such a penalty must be assessed under paragraph 16:

"**Paragraph 4 - Handling goods subject to unpaid excise duty etc**

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

(a) after the excise duty point for any goods which are chargeable with a duty of excise, P acquires possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods, and

(b) at the time when P acquires possession of the goods or is so concerned, a payment of duty on the goods is outstanding and has not been deferred. …"

"**Paragraph 16 - Assessment**

(1) Where P becomes liable for a penalty under any of paragraphs 1 to 4 HMRC shall–

(a) assess the penalty,

(b) notify P, and

(c) state in the notice the period in respect of which the penalty is assessed. …"

32. The standard penalty payable under paragraph 4 for a non-deliberate act or failure is 30% of the potential lost revenue in accordance with paragraph 6B:

"**Paragraph 6B**

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

(a) for a deliberate and concealed act or failure, 100% of the potential lost revenue,

(b) for a deliberate but not concealed act or failure, 70% of the potential lost revenue, and

(c) for any other case, 30% of the potential lost revenue."

33. HMRC must reduce the standard percentage to take account of the taxpayer's disclosure:

"**Reductions for disclosure**

Paragraph 12

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

(2) P discloses a 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.

Paragraph 13

(1) If a person who would otherwise be liable to a penalty of a percentage shown in column 1 of the Table (a "standard percentage") has made a disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure.

(2) But the standard percentage may not be reduced to a percentage that is below the minimum shown for it—

(a) for a prompted disclosure, in column 2 of the Table, and

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

(3) Where the Table shows a different minimum for case A and case B—

(a) the case A minimum applies if—

(i) the penalty is one under paragraph 1, and

(ii) HMRC become aware of the failure less than 12 months after the time when the tax first becomes unpaid by reason of the failure, and

(b) otherwise, the case B minimum applies.

Standard %	Minimum % for prompted disclosure	Minimum % for unprompted disclosure
30%	case A: 10% case B: 20%	case A: 0% case B: 10%

…"

34. If there are special circumstances HMRC may reduce the penalty and, if the taxpayer has a reasonable excuse for the failure, then they are not liable to a penalty:

> "**Paragraph 14 - Special reduction**
>
> (1) If HMRC think it right because of special circumstances, they may reduce a penalty under any of paragraphs 1 to 4.
>
> (2) In sub-paragraph (1) "special circumstances" does not include–
>
> (a) ability to pay, or
>
> (b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.
>
> (3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to– (a) staying a penalty, and (b) agreeing a compromise in relation to proceedings for a penalty."
>
> "**Paragraph 20 - Reasonable excuse**
>
> (1) Liability to a penalty under any of paragraphs 1, 2, 3(1) and 4 does not arise in relation to an act or failure which is not deliberate if P satisfies HMRC or (on an appeal notified to the tribunal) the tribunal that there is a reasonable excuse for the act or failure.
>
> (2) For the purposes of sub-paragraph (1)–
>
> (a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,
>
> (b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the relevant act or failure, and (c) where P had a reasonable excuse for the relevant act or failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the relevant act or failure is remedied without unreasonable delay after the excuse ceased."

35. Any notice that is required to be served under the Taxes Acts may be delivered or sent to that person at their last known address pursuant to s115 Taxes Management Act 1970 ("TMA 1970"):

> "**Section 115 - Delivery and service of documents**
>
> (1) A notice or form which is to be served under the Taxes Acts on a person may be either delivered to him or left at his usual or last known place of residence:
>
> (2) Any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post, and, if to be given, sent, served or delivered to or on any person by HMRC may be so served addressed to that person—
>
> (a) at his usual or last known place of residence, or his place of business or employment,…"

36. Section 114 TMA 1970 sets out the slip rule for want of form or errors:

> "**114 - Want of form or errors not to invalidate assessments, etc.**
>
> (1) An assessment or determination, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the

Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding.

(2) An assessment or determination shall not be impeached or affected—

(a) by reason of a mistake therein as to—

(i) the name or surname of a person liable, or

(ii) the description of any profits or property, or

(iii) the amount of the tax charged, or

(b) by reason of any variance between the notice and the assessment or determination.

SUBMISSIONS

37. Mr Cirko notified his appeal to the Tribunal on or around 21 November 2017. The grounds of appeal, and his subsequent correspondence with the Tribunal, state (in summary) that:

(1) the Cigarettes were for his personal use and he thought he was allowed to bring 6,900 cigarettes into the UK for his own use;

(2) he was told at the time of seizure that he was not required to pay any additional tax – the situation was closed at the airport when the Cigarettes were seized;

(3) he was informed of the taxes owed by the Lithuanian tax office later; and

(4) he is unable to pay the excise duty and penalties.

38. It is not clear from Mr Cirko's submissions when he was informed of the amounts owed by the Lithuanian tax office. This is addressed in the Discussion.

39. HMRC's position is that the excise duty assessment and penalty were correctly issued and should be upheld. Mr Elliott dealt with the following:

(1) Is it open to this Tribunal to consider whether the Cigarettes were for Mr Cirko's personal use, and is there any relevant difference in this regard as between the assessment and the penalty? Mr Elliott submitted that in the light of the binding authority in *Race*, *Denley* and *Jacobson*, since Mr Cirko did not challenge seizure it is not open to the Tribunal to consider whether or not the Cigarettes were liable to forfeiture on the basis that an excise duty point had arisen under regulation 13 HMDP Regulations 2010. Specifically, it is not open to the Tribunal to consider whether or not the goods were for Mr Cirko's personal use. On this basis, the assessment must be upheld. Similarly, on the basis of the binding authority in *Jacobson* and *Denley*, the Tribunal cannot reconsider whether the goods were for Mr Cirko's personal use in the context of an appeal against a penalty.

(2) Even if it were open to this Tribunal to consider whether the Cigarettes were for personal use, the evidence strongly suggests that the Cigarettes were properly liable to forfeiture; in particular, the Cigarettes were held for a commercial purpose, being other than for Mr Cirko's personal use (regulation 13(3)(b) HMDP Regulations 2010) and, accordingly, an excise duty point and liability had arisen at the time that the Cigarettes were seized. The burden of proof is on Mr Cirko and the evidence suggests that the goods were not held for personal use, for example:

(a) the quantity of cigarettes (6,900) is more than can reasonably be expected to be for personal use. That amount greatly exceeds the limit stated in the legislation (800);

(b) Mr Cirko was only staying in the UK for one day; and

(c) Mr Cirko was accompanied by two other passengers with identical luggage carrying similar numbers of cigarettes.

(3) Mr Cirko further argues that Officer Wilmer informed him that there would be no further duty to pay. This is disputed and in any event this point amounts to an argument that HMRC have breached Mr Cirko's legitimate expectation, which is not within the jurisdiction of the Tribunal.

(4) Is there any basis for a reduction in the amount of the penalty? Mr Elliott drew attention to the fact that HMRC have imposed the minimum penalty permitted by the legislation – being 20% for a non-deliberate act or failure where there has been prompted disclosure, and the maximum reduction has been granted for disclosure. Accordingly, the only arguments available to Mr Cirko to reduce the penalty are reasonable excuse or special circumstances (neither of which include inability to pay). In the present case, given the quantity of Cigarettes and the fact that Mr Cirko was only visiting the UK for one day, there is a very strong inference that Mr Cirko was not importing the Cigarettes for personal use and there is no suggestion or evidence that he had any reasonable belief that he was not obliged to pay excise duty on those goods. Similarly, there are no special circumstances in the case.

(5) Was the assessment validly made under s12 FA 1994? Mr Elliott submitted that s12(4) does not impose a requirement to notify the making of an assessment within 12 months, or, alternatively that the assessment had been validly notified to Mr Cirko's last known address, relying on s115 TMA 1970.

DISCUSSION

Making and notifying the assessment and penalty

40. Mr Cirko was stopped at London Luton Airport on 16 September 2014 and the goods were seized on that date. HMRC gave notice of the assessment of excise duty on 2 September 2015 and accept that this assessment was not actually received by Mr Cirko. The information as to when Mr Cirko found out about the assessment and penalty is not clear or consistent:

(1) The grounds for appeal state that "After 1 year I've got a [message] from LT taxes organization that I must to pay taxes to HMRC...", which leaves open the possibility that this could be a year after the seizure or a year after the date of assessment (or something else);

(2) HMRC sent a UK tax demand/reminder to Mr Cirko dated 9 November 2015 to the same address as used for the assessment and the penalty. There is no evidence before me that this was returned, but given that it was to the same address as the returned post I struggle to conclude that this would actually have been received; and

(3) Mr Cirko's emails to the Tribunal explaining the reasons for making a late appeal contain clear statements that he only found out about the UK tax demand in 2017 from the Lithuanian tax authority.

41. Mr Elliott submitted that s12(4) FA 1994 does not require notification of an assessment within a particular time limit or, alternatively, that the assessment of excise duty was properly made and notified to Mr Cirko's last known address (relying on s115 TMA 1970).

42. As a preliminary point, I note that the excise duty assessment was addressed to Mr Cirko as "Miroslau Cirko" rather than "Miroslav Cirko". I consider that this error in the spelling of Mr Cirko's first name does not affect the validity of the assessment. Mr Elliott drew my attention to s114(2) TMA 1970 which provides that an assessment shall not be impeached or affected by reason of a mistake therein as to the name of a person liable. Section 114(1) refers to an assessment which purports to be made in pursuance of any provision of the Taxes Acts, and I consider that the reference in s114(2) to any assessment is similarly so limited. Accordingly, s114(2) cannot directly apply to the assessment of excise duty under s12 FA 1994 as that is not an assessment raised under the Taxes Acts, but I nevertheless conclude that the use of one incorrect letter in a name cannot of itself invalidate an assessment.

43. The assessment was addressed to Mr Cirko at "Strut 13, Mechanizatorius, Vilnius, Lithuania" but was returned to HMRC as undelivered, with "insufficient address". The address details provided by Mr Cirko were not clear –his handwriting in Officer Wilmer's notebook is hard to decipher, with different word endings being plausible, including, in my opinion "iu", "iy" and "ius".

44. I am satisfied that HMRC sought to address correctly the assessment on the basis of the information before them. However, I need to consider whether the failure of the actual notification of the assessment to Mr Cirko has rendered the assessment out of time.

45. Section 12(1A) FA 1994 provides that, subject to s12(4), where it appears to HMRC that any person is a person from whom any amount has become due in respect of any duty of excise and that the amount due can be ascertained by the Commissioners, HMRC may assess the amount of duty due from that person to the best of their judgement and notify that amount to that person or his representative. Section 12(4) then provides that an assessment shall not be made at any time after the earlier of (1) the end of the period of 4 years beginning with the time when the liability to tax arose, and (2) the end of the period of one year beginning with the day on which evidence of facts, sufficient in the opinion of HMRC to justify the making of the assessment, comes to their knowledge.

46. I have no basis for finding that it would have taken any longer than a few days after 16 September 2014 for evidence of the facts to be brought to HMRC's knowledge. Accordingly, the relevant time limit for the purpose of s12(4) would be one year thereafter, expiring at some point in September 2015. On the evidence, I find that Mr Cirko did not actually receive notice of the assessment within one year of HMRC receiving sufficient evidence of the facts to justify the making of the assessment. On balance I have concluded that Mr Cirko became aware of the assessment and penalty during 2017.

47. Mr Elliott argued that s12(4) does not require that notice of an assessment is given within this one year period – s12(4) refers only to an assessment being made within that time. He draws attention to the language used in s12(1) to illustrate that a distinction is drawn in the legislation between the making of an assessment and the notification thereof, submitting that the time limit only applies to the former. I find this argument unappealing as regards its potential consequences - as Mr Elliott acknowledged, it would leave open the possibility that HMRC could "make" an assessment within a few months of the information being provided to them and then, deliberately or otherwise, do nothing with it for several years before then informing or notifying the taxpayer that this assessment had been made. I would prefer to be able to treat the making of the assessment and the notification thereof as a single obligation, to which the time limit in s12(4) applies.

48. However, I have concluded that I am bound to accept Mr Elliott's submissions on this point. In *Honig v Sarsfield* [1986] STC 246 the Court of Appeal considered whether a discovery assessment (to income tax) which had been made before the time limit but only

notified afterwards (as the initial notifications had been returned undelivered) was in time. The Court of Appeal held:

> "In my view the result of these provisions is that the court is not concerned here with the question of the date when the notices of assessment were served. The court is concerned with a totally different question, namely: when were the assessments made? The giving of notice has nothing to do with the making of a valid and effective assessment. The statute clearly distinguishes between the assessment and notice of it and contains no provision which makes the validity of the assessment in any way conditional on the notice.
>
> I revert to s 34(1), which provides:
>
> 'Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to tax may be made at any time not later than six years after the end of the chargeable period to which the assessment relates.'
>
> That imposes the basic time limit for the making of assessments, and it is only in relation to the *making* of assessments that there is any statutory restriction on time at all.
>
> The provisions of s 40(1) (on which Mr Honig relied before us) do not alter that position at all. To reiterate, that subsection says:
>
> 'For the purpose of the charge of tax on the executors or administrators of a deceased person in respect of the income, or chargeable gains, which arose or accrued to him before his death, the time allowed by section 34, 35 or 36 above shall in no case extend beyond the end of the third year next following the year of assessment in which the deceased died.'
>
> In his address to us Mr Honig attached significance to the word 'charge'. He submits that the taxpayer cannot be charged with anything until he has been told that he has to pay, that is to say for practical purposes, until he has received the notice of assessment.
>
> With respect to his argument, that is a complete misunderstanding of the statutory provisions. The purpose of s 40(1), together with sub-s (2), is to indicate the time limit for the *making* of assessments under s 34. The basic provision is contained in s 34, and s 40 places certain limitations on the making of assessments in relation to personal representatives. Nevertheless, it is dealing with the making of assessments, and the word 'charge' does not alter that position. The charge to tax arises, not in consequence of the notice, but in consequence of the provisions of the statute, together with the making of the assessment.
>
> Therefore the position seems to me to be this, that the only time limitation on the making of assessments in the present case is the requirement that they must be made by the end of the third year next following the year of assessment in which the deceased died. In my view, on the facts found in the present case, the assessments were made when the inspector, who was authorised to make the assessments, signed the certificate in Volume 1, to which I have referred. That was on 16 March 1970 and was well within the statutory time limit. The holding of the Special Commissioners and of the judge that the assessments were made on 16 March 1970 was therefore, in my view, justified, and the result is that the assessments were made before 5 April 1970.
>
> For the reasons which I have indicated, the time limit imposed by the statute relates only to the making of assessments, and not to the service of assessments; and the statute draws a very clear distinction between the making

> of assessments and the giving of notices for the making of those assessments. Mr Honig referred to the possible dangers of giving notice of assessment long after the assessment itself was made. No such situation arises in this case."

49. Whilst the decision of the Court of Appeal in *Honig* concerned different statutory provisions to those at issue in this appeal, I cannot see any basis for concluding that the decision should be distinguished on that ground. I have considered whether the length of time between the making of the assessment and Mr Cirko receiving notice thereof might be a basis for distinguishing *Honig* (given that in *Honig* the gap was a few weeks and notice was received by the taxpayer within a month of expiry of the statutory time limit) as Fox LJ expressly observed that he had been referred to the dangers of giving notice long after the assessment was made and commented that no such situation arose in that case. However, whilst in the present instance the delay does illustrate the potential unfairness for taxpayers who are entitled to certainty in their tax affairs, I cannot see how, logically, I can reach a different conclusion in principle having regard to this delay.

50. I therefore conclude that the excise duty assessment was made within the statutory time limit and the delay in Mr Cirko receiving notification thereof has no bearing on the validity of that assessment or on the duty having become due.

51. I have also (for completeness) considered whether Mr Elliott's alternative submission, that relies on s115 TMA 1970, could apply to treat an assessment which was sent but not received as having been notified within time. Section 115(2) provides that any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post and may be served on a person by HMRC if addressed to that person at his usual or last known place of residence. I do not consider that s115(2) can be of direct application to an assessment made under s12 FA 1994 as that is not a Taxes Act. Furthermore, I am not satisfied that addressing a letter to a best attempt at deciphering handwriting constitutes a person's "last known place of residence". I doubt that the address used can be said to have ever be known as Mr Cirko's residence. Accordingly, I do not accept Mr Elliott's submission on s115 (albeit that this is of no consequence given my conclusion above on s12(4)).

52. I have also considered whether the penalty which has been imposed, and which was sent to the same address as the assessment, was imposed within the statutory time limit.

53. Paragraph 16 of Schedule 41 FA 2008 requires that where a person becomes liable for a penalty under paragraph 4, HMRC shall assess the penalty, notify the person and state in the notice the period in respect of which the penalty is assessed. That assessment must be made before the end of the period of 12 months beginning with the end of the appeal period for the assessment of tax unpaid by reason of the relevant act in respect of which the penalty is imposed. The appeal period is the period during which an appeal could be brought or an appeal that has been brought has not been determined or withdrawn.

54. Whilst HMRC assessed the penalty in October 2015, and I have found that Mr Cirko (on balance) was only informed of that penalty in 2017, the assessment and notification obligations have been satisfied by HMRC as the appeal period for the assessment has not ended (as evidenced by these proceedings). It is not necessary to rely on the reasoning in *Honig* for this purpose. The penalty of £353 has been properly assessed and notified within paragraph 16 of Schedule 41 FA 2008.

Case law on the Tribunal's Jurisdiction

55. I agree with Mr Elliott's clear and helpful submissions that it is now well established that, where a person has not challenged the seizure of the relevant goods, paragraph 5 of Schedule 3 CEMA 1979 deems that the goods were liable to forfeiture and the Tribunal has no jurisdiction to go behind that deeming in an appeal against either an excise duty assessment or

a penalty. In particular, if a person fails to challenge seizure then they are precluded from arguing in any subsequent proceedings (and the Tribunal has no jurisdiction to consider) that the goods were for personal use.

56. The primary case is *Jones v Revenue and Customs Commissioners* [2011] EWCA Civ 824: the appellant had failed to challenge the seizure of the relevant goods but sought their restoration arguing that they were for personal use. Mummery LJ held that the effect of paragraph 5 of Schedule 3 CEMA was that the goods were deemed to have been imported for a commercial use and Tribunal's jurisdiction was limited such that it could not reconsider that issue, at [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."

57. The decision in *Jones* was considered and applied by the Upper Tribunal in *Race v Revenue and Customs Commissioners* [2014] UKUT 331 (TCC). In that case the appellant had not challenged the seizure of the relevant goods but appealed against the excise duty assessment and penalty on the basis that the goods were purchased for his own personal use (and therefore had not been released for consumption). HMRC applied to strike out the appeal against the assessment (but did not apply to strike out the appeal against the penalty). The Upper Tribunal considered *Jones* and held that, on an appeal against an excise duty assessment, the Tribunal

could not go behind the deeming provisions of paragraph 5 of Schedule 3 and had no jurisdiction to consider whether or not the goods were held for personal use:

> "[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. …
>
> [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. …
>
> [33]…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 [FTT] 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."

58. The Upper Tribunal also stated that the same statutory deeming applies in relation to an appeal against a penalty assessment, at [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."

59. Whilst *Race* was obiter on this particular issue (since the appeal to the Upper Tribunal did not concern the penalty), the Upper Tribunal has subsequently confirmed in two other cases that the deeming also applies to limit the Tribunal's jurisdiction in appeals against penalties:

(1) *Revenue and Customs Commissioners v Jacobson* [2018] UKUT 18 TCC 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. The deemed effect of Ms Jacobson's failure to contest the seizure of the HRT was that it was duly condemned as forfeited as, in the terms of regulation 88 of the 2010 Regulations, goods liable to excise duty which had not been paid in contravention of the Regulations."

(2) *Denley v HMRC* [2017] UKUT 340 (TCC) concerned appeals against both an assessment and a penalty. The Upper Tribunal held that the appellant was precluded from arguing that no duty point had arisen (the "Coquelles Point") at [47]:

> "In our view, the Coquelles Point cannot be taken in the present proceedings. Our reasons include these:
>
> (a) Mr Denley having given no notice of claim pursuant to paragraph 3 of schedule 3 to CEMA, the tobacco is to be "deemed to have been duly condemned as forfeited" under paragraph 5 of the schedule. We are, accordingly, required to take the tobacco as "duly condemned";
>
> (b) The tobacco would not have been "duly condemned" if, as Mr Denley seeks to argue, the application of regulation 13 of the 2010 Regulations to the Coquelles Control Zone were incompatible with the Excise Directive and so invalid. On that basis, no excise duty point could have arisen by the time the tobacco was seized and, hence, the tobacco could not have been liable to forfeiture or seizure. The contention that Mr Denley is trying to advance is thus inconsistent with the assumption that the tobacco was "duly condemned";
>
> (c) In the *Jones* case, Mr and Mrs Jones wanted to challenge the factual basis for the relevant seizure. It was in that context that Mummery LJ said that "[d]eeming something to be the case carries with it any fact that forms part of the conclusion" (emphasis added). His logic applies equally to legal points implicit in the deemed conclusion;
>
> (d) The fact that Mr Denley is relying on EU rather than domestic law makes no difference. We agree with Mr Beal that there can be no EU law objection to requiring the Coquelles Point to be determined in condemnation proceedings;
>
> (e) Miss Choudhury's arguments, if right, would suggest that someone from whom goods had been seized could dispute the lawfulness of the seizure before the FTT even though it had already been held to be lawful in condemnation proceedings. That would make no sense;
>
> (f) We doubt, with respect, the correctness of the views expressed by the FTT in paragraphs 188 and 189 of its decision in the *Van Driessche* case."

60. Mr Elliott drew my attention to a decision of this Tribunal in the case of *Van Driessche v Revenue and Customs Commissioners* [2016] UKFTT 441 (TC). In that case, the Tribunal had formed no final view but noted that it thought that the deeming provision did not apply in penalty appeals, at [185]:

> "We are more persuaded by the points against extending the Schedule 3 deeming provision to penalty appeals in general, and to Mrs Van Driessche's case in particular, than by those in favour."

61. The Tribunal further held the effect of the deeming could not be that an airport that was within the EU was treated as if it were not within the EU (at [189]). However, the correctness of this part of the Tribunal's decision was doubted by the Upper Tribunal in *Denley* at [47(f)]. The decision in *Van Driessche* is also inconsistent with the Upper Tribunal's more recent decision in *Jacobson*.

62. On the basis of the above, the relevant principles in relation to the Tribunal's jurisdiction are as follows (conveniently summarised in *Lane v The Commissioners for Her Majesty's Revenue & Customs* [2015] UKFTT 0423 (TC) at [43]):

> "The legal principles which these cases illustrate, and which are relevant to this appeal are:
>
> (1) Goods are duly condemned as illegally imported if the appellant fails to invoke the Notice of Claim procedure to oppose condemnation (or, having so invoked that procedure, he subsequently withdraws from it).
>
> (2) In these circumstances the goods are deemed to have been condemned as illegally imported goods (ie. held for a commercial purpose). And since they have been deemed to be held for a commercial purpose, the FTT cannot consider whether the goods were for the appellant's personal use.
>
> (3) Nor can the FTT consider any facts which the appellant submits are relevant to any assertion that the goods were for personal use. I have no power to reopen the factual basis on which the goods were condemned.
>
> (4) The foregoing principles apply to cases concerning restoration of the goods, to assessments for excise duty, and to assessments for penalties.
>
> (5) Where an appellant complains of procedural unfairness, his remedy is judicial review. The FTT has no inherent power to review decisions of HMRC. (See *Race* at paragraph 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 ….""

63. I accept Mr Elliott's submission that, in the light of the authorities, I am bound to conclude that I cannot consider whether the Cigarettes were for Mr Cirko's personal use.

Assurance that following seizure no further amount due

64. Mr Cirko has stated that at the time the Cigarettes were seized he was told this was the end of the matter and he would not have to pay any additional tax. Mr Cirko was not present to be cross-examined on this assertion.

65. Officer Wilmer gave sworn evidence, and neither his notebook (completed at the time of the seizure) nor his witness statement dated 10 October 2018 refer to any such statement or assurance having been given. Mr Elliott asked him if this was the kind of statement he might have made, and Officer Wilmer, acknowledging that he did not remember this particular passenger, stated that it was not something he would have said as this was not his decision to make.

66. Officer Wilmer's evidence was credible and he is an experienced officer of UKBF. I accept his clear evidence that he did not give an assurance to Mr Cirko that he would not have to pay any additional tax.

67. Even if I had not reached this conclusion, such an assurance would not provide a valid ground for challenging the assessment or the penalty before this Tribunal.

Amount of penalty

68. The penalty of £353 has been imposed at the lowest amount permitted by statute, at 20% of the duty. The only basis for reducing the penalty further would be under paragraph 20 (reasonable excuse) of Schedule 41 FA 2008 or paragraph 14 (special reduction) of Schedule 41.

69. Paragraph 20 of Schedule 41 provides that liability to a penalty does not arise in relation to a non-deliberate act if a person satisfies HMRC or the Tribunal that there is a reasonable excuse for the act. However, paragraph 20(1)(a) states that an insufficiency of funds is not a reasonable excuse, unless attributable to events outside the person's control.

70. In the present case, the only remaining grounds which might be relevant here are that Mr Cirko thought he was allowed to bring the Cigarettes into the UK for his personal use, and that he had been told at the time of seizure that there would be no additional taxes to pay. I have found that he was not given the latter assurance. As to whether Mr Cirko thought he was allowed to bring 6,900 cigarettes into the UK without duty, we have not heard evidence from him on this point. However, he has given no basis for this assertion, and I do not consider it to be an objectively reasonable belief to have given the value of the Cigarettes and the quantity of them. I therefore conclude that Mr Cirko did not have a reasonable excuse.

71. Paragraph 14 of Schedule 41 enables HMRC to reduce a penalty if there are "special circumstances", but paragraph 14(2)(a) provides that this does not include ability to pay. I can only re-make HMRC's decision not to reduce the penalty if I consider that their decision was "flawed" in the judicial review sense, and that is not the case here.

CONCLUSION

72. The assessment of excise duty of £1,768 imposed under s12 FA 1994 and the penalty of £353 imposed under paragraph 4 of Schedule 41 FA 2008 are confirmed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

73. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JEANETTE ZAMAN
TRIBUNAL JUDGE

Release date: 26 July 2019