



**TC04399**

Appeal number: TC/2013/02317  
TC/2014/03735

*EXCISE DUTY - seizure and condemnation of imported tobacco and vehicle - seizure of excise goods and vehicle not contested – tobacco and vehicle deemed condemned as forfeit – request for restoration of vehicle refused – duty assessed and penalties imposed - appeals against assessments for duty struck out previously - appeals against refusal to restore vehicle and penalties - whether decision to refuse restoration reasonable – no - whether reasonable excuse or special circumstances - no - appeal allowed in part*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MICHAEL KEARY**

**First Appellant**

**SHARON LAKIN**

**Second Appellant**

**- and -**

**THE DIRECTOR OF BORDER REVENUE**

**First Respondent**

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

**Second Respondents**

**TRIBUNAL: JUDGE GREG SINFIELD**

**Sitting in public at Fox Court, Gray's Inn Road, London WC1 on 13 March 2015**

**The First and Second Appellants in person**

**David Griffiths, counsel, instructed by the Home Office for the First Respondent and by the General Counsel and Solicitor to HM Revenue and Customs, for the Second Respondents**

## DECISION

### Introduction

1. The First Appellant (“Mr Keary”) appeals against a decision of the First Respondent (“the Border Force”) that Mr Keary’s car, which had been seized and condemned as forfeited, should not be restored. Mr Keary and the Second Appellant (“Ms Lakin”) also appeal against two decisions by the Second Respondents (“HMRC”) to impose a penalty of £176 on each of them.

2. For the reasons set out below, I have decided that Mr Keary’s appeal against the refusal to restore his car is allowed and the Border Force must conduct a further review of the decision not to restore the vehicle in accordance with the directions set out at the end of this decision. I have also decided that the appeals of Mr Keary and Ms Lakin in relation to the penalties are dismissed.

### Facts

3. At the hearing, HMRC and the Border Force produced a bundle that contained notes of interviews with Mr Keary and Ms Lakin at the time of seizure of the car, subsequent correspondence between the parties and a witness statement by Ms Deborah Hodge, the Border Force officer who carried out the review and determined that the car should not be restored to Mr Keary. Ms Hodge attended the hearing and answered some questions from me about the Border Force policy. Mr Keary and Ms Lakin did not provide any witness statements but gave evidence orally at the hearing. On the basis of the documents and witness evidence, I find the facts to be as set out below.

4. Between 8 and 9 am UK time on 31 October 2012, Mr Keary and Ms Lakin, with their two year old son, travelled by Eurotunnel to France. From the Eurotunnel terminal at Coquelles, Mr Keary and Ms Lakin drove to Adinkerke in Belgium. At 12:04 local time, Mr Keary bought 10.5 kilos of hand-rolling tobacco (“HRT”) in two lots from Smokey River at Dijk 11, Adinkerke. One lot was 10 x 500g packs of Golden Virginia HRT which cost £450. The other lot was 11 x 500g packs of Golden Virginia HRT which cost £495. At 12:05, Ms Lakin bought a carton of 200 Mayfair cigarettes from P & J Tobacco at Dijk 3, Adinkerke for £36.50.

5. At around 15:20 on 31 October 2012, officers of the Border Force stopped a Mercedes C180 Komp Classic SE car with a 2005/06 registration number in the UK Control Zone at Coquelles. The car belonged to Mr Keary. Inside the car were Mr Keary, his partner Ms Lakin and their two year old son. Ms Lakin was driving the car. Mr Keary and Ms Lakin said that they were on their way back from Dunkirk and Belgium. When asked what was in the boot of the car, they said that they had 20 packs of tobacco with them. When the boot was opened, the officers saw the tobacco in four black plastic bags behind a pushchair and some other shopping. Two of the bags contained receipts for the tobacco.

6. Mr Keary and Ms Lakin were interviewed separately from around 16:00 until 17:30. Mr Keary said that the cigarettes were for a friend, who had paid for them, and the HRT was for him and Ms Lakin. He said that there were 20-odd packs of HRT which, together with the cigarettes and some chocolate, had cost nearly £1,000 which he had paid in cash. Mr Keary also stated that the ticket on Eurotunnel had cost £58 and he estimated that petrol for the trip would cost £40 or £45. Mr Keary said that the

cash came from savings that he had saved over five months on and off. He also said that he had won some money on the horses. Mr Keary told the officers that he was self-employed but had been out of work for some six weeks. Mr Keary was asked about previous trips and he said that there had been two previous trips to France and Belgium. Records show that the car had travelled between Dover and Calais on the mornings of 23 June and 23 August 2012 and, in each case, returned in the late afternoon of the same day. Mr Keary said that he had not bought tobacco on either previous occasion because he had not had the money and wanted to see how much it was. He said that he had gone into a shop and asked the price. Mr Keary said that he and Ms Lakin consumed two or, maybe, three packets of HRT each week. Mr Keary said that he did not know how many cigarettes he rolled from a packet of HRT but he used a packet every two or three days. He thought that the HRT would last him and Ms Lakin at least 9 – 11 months.

7. In her interview, Ms Lakin said that she had bought the cigarettes and Mr Keary had bought the HRT with their joint money. She said that people in the tobacco shop on a previous trip had told them they could have a year's supply of tobacco and they had saved up for it for months. When asked how much she smoked, Ms Lakin said that she could use anything from three pouches of HRT in a week. She said that the question was difficult to answer as it depended what she was doing but it was between one and four pouches per week. Ms Lakin said that she did not know how many roll ups could be obtained from a pouch of tobacco but it was a few days' worth. Ms Lakin said that they had gone to the beach on a previous trip in August/September because it was a cheaper day out than going to the beach in the UK. She said that they had not bought tobacco on the previous trip because they did not have any money.

8. Mr Keary and Ms Lakin both signed the records of their interviews as accurate. HMRC gave Mr Keary and Ms Lakin a Seizure Information Notice (BOR156), warning letter (BOR162), Notice 1 and Public Notice 12A. The Border Force seized the car and the tobacco as liable to forfeiture. The warning letter (BOR162) stated that the Border Force may share information with HMRC who might take action including issuing an assessment for duty and a penalty. Mr Keary said (and it was not disputed) that the car was worth £6,500 or £7,000 at the time that it was seized.

9. Mr Keary and Ms Lakin did not challenge the seizure of the tobacco but, soon after the seizure, they wrote to the Border Force and said that they would like to challenge the seizure of the car. The letter stated that Mr Keary relied on the vehicle to travel to work early in the morning and that the car was also required to take their son to nursery and playgroup. In addition, the letter stated that Ms Lakin's father relied on them to do his shopping and they also had to take the father and Ms Lakin's elderly grandparents to hospital appointments. The Border Force treated the letter as a claim that the car was not liable to seizure and initiated condemnation proceedings. On 26 November 2012, however, Mr Keary and Ms Lakin jointly wrote to the Border Force and stated that they did not wish to continue with their "appeal against the legality of the seizure and of the vehicle". Accordingly, the car and the tobacco were treated as duly condemned as forfeited by paragraph 5 of Schedule 3 to the Customs and Excise Management Act 1979 ("CEMA 1979").

10. It appears that the Border Force then treated the first letter from Mr Keary and Ms Lakin as a request for restoration. On 10 December 2012, an unidentified officer of the Border Force wrote to Mr Keary and Ms Lakin refusing to restore the car. The

letter set out a summary of the Border Force's policy in relation to restoration of vehicles as follows:

"The general policy is that private vehicles should not normally be restored. The policy is intended to be robust so as to protect legitimate UK trade and revenue and prevent illicit trade in excise goods. However vehicles may be restored subject to conditions (if any) (e.g. for a fee) in the following circumstances:–

- If the excise goods were destined for a supply on a "not for profit" basis, for example, for reimbursement at the cost of purchase but not including any contribution to the cost of the journey.
- If the excise goods were destined for supply for profit, the quantity of excise goods is small, and it is a first occurrence.
- If the vehicle was owned by a third party who was not present at the time of the seizure and was either innocent or had taken reasonable steps to prevent smuggling in the vehicle.

In all cases any other relevant circumstances will be taken into account in deciding whether restoration is appropriate."

11. The letter did not set out how the Border Force's policy related to the case of Mr Keary and Ms Lakin. The letter said that the officer had paid particular attention to the degree of hardship that Mr Keary and Ms Lakin would experience by the loss of the car but that there were no exceptional circumstances to justify departing from the policy that private vehicles should not normally be restored. The letter stated that only exceptional hardship could be considered and that Mr Keary and Ms Lakin had not provided any evidence to support their claim of hardship. The letter did not state what was meant by exceptional hardship. The letter stated that the officer had concluded that there were no exceptional circumstances that would justify a departure from the policy and that, on this occasion, the vehicle would not be restored.

12. On 22 January 2013, the Border Force received a letter from Mr Keary and Ms Lakin asking for a review of the decision not to restore the car. In the letter, they stated that the seizure of the car was causing them to suffer exceptional hardship because:

- (1) Mr Keary had to stop working as a porter because there was no public transport and they had had to start claiming benefits.
- (2) Public transport was too expensive.
- (3) Their two-year-old son was unwell and had to go to hospital for appointments which was difficult by bus.
- (4) Ms Lakin's father was having an operation in March.
- (5) The two other vehicles at their home address belonged to Ms Lakin's father and brother and they did not have access to these vehicles.
- (6) They had no savings.

13. On 1 March 2013, Ms Hodge wrote to Mr Keary and confirmed the original decision, contained in the letter dated 10 December 2012, not to restore the vehicle. The review letter set out in the background to the seizure of the vehicle and also summarised the interviews with Mr Keary and Ms Lakin and the subsequent

correspondence in relation to the request for restoration. The letter then set out the Border Force Policy on the restoration of private vehicles used for the improper importation or transportation of excise goods that have been seized in greater detail than the letter dated 10 December. In particular, Ms Hodge explained what was meant by the term “not for profit” when used in the Border Force policy on restoration as follows:

“‘Not for Profit’

The policy for seized vehicles involved in smuggling excise goods which are not for own use, but are to be passed on to others on a ‘not for profit’ reimbursement basis, is:–

In *non-aggravated* cases vehicles will not normally be seized (but a warning letter will be issued). The meaning of “aggravated” is explained below.

*Aggravated* cases depend on how many aggravated offences had occurred within the previous 12 months:

For a first aggravated detection vehicles will normally be seized and restored for 100% of the revenue involved.

For a second aggravated detection vehicles will normally be seized and restored for 200% of the revenue involved.

For a third or subsequent aggravated detection vehicles will normally be seized and not restored unless there are exceptional circumstances.

The 100% and 200% restoration fees are subject to a maximum of the trade buying price of the vehicle in Glass’ guide.

In all cases any other relevant circumstances will be taken into account in deciding whether restoration is appropriate.

The meaning of “Aggravated” in ‘not for profit’ cases

Aggravating circumstances include:–

Any previous offence by the individual

Large quantities, for example more than

- 5 kg of handrolling tobacco or
- 6000 cigarettes or

...

Any other circumstances that would result in restoration not being appropriate.”

14. Ms Hodge stated that Mr Keary and Ms Lakin had been invited to provide further information in support of their request for a review but nothing had been received and so Ms Hodge had to make her decision based on the evidence that she already had. Ms Hodge stated that, in considering the request for restoration, she had looked at all the circumstances surrounding the seizure but had not considered the legality or correctness of the seizure itself. Ms Hodge said that she had taken the following points into account:

(1) Based on the vagueness and inconsistencies of their answers in the interviews on 31 October 2012, Ms Hodge doubted that either Mr Keary or Ms Lakin smoked.

(2) It was ridiculous to claim that it was cheaper to drive to Belgium to go to the beach than to go to the beach in the UK.

(3) The statement by both Mr Keary and Ms Lakin that they had gone into a tobacco shop on a previous trip and made enquiries about buying tobacco but not bought any was not plausible. This led Ms Hodge to suspect that they had bought tobacco on both of their previous trips.

(4) With over 10 kg of HRT, Mr Keary and Ms Lakin had imported 10 times the guide level of 1 kg specified in the Excise Goods (Holding, Movement and Duty Point) Regulations 2010.

(5) On the basis that, as was widely accepted, a 50 g pouch of HRT produces some 90 cigarettes and an average smoker smokes 14 cigarettes a day, the 10 kg of HRT imported by Mr Keary and Ms Lakin would produce 18,000 cigarettes which would last the average smoker over three years.

(6) Mr Keary and Ms Lakin were unemployed and living on benefits and it was not credible that they would spend £1,000 on tobacco in those circumstances unless they intended to sell it to make a profit.

(7) Mr Keary and Ms Lakin had not provided any plausible explanation for the source of the £1000 to pay for the tobacco and trip.

(8) Mr Keary and Ms Lakin had paid for the HRT in cash. Ms Hodge considered that carrying large amounts of cash was inconvenient and risky but purchasers of excise goods for commercial sale frequently paid in cash because they themselves had been paid cash in advance and it left no evidence of the transaction in their bank accounts and credit card statements.

(9) The amount of HRT imported was worth more than £3,000 in the UK shops and was likely to damage legitimate UK trade.

15. No doubt having in mind the *Jones* case (see below), Ms Hodge stated that her starting point was that the seizure of the vehicle was legal and the excise goods involved, ie the HRT, were commercial and not for own use. Ms Hodge then stated:

“As you have not claimed that the excise goods were to be passed on to others on a ‘not for profit’ reimbursement basis I have concluded that they were held for profit and the vehicle should therefore not normally be restored. Non-restoration is fair, reasonable and proportionate in the circumstances.

...

For first offences involving small quantities of excise goods the Border Force policy is to consider restoring vehicles even if the goods were held for profit. However, because 10 kg of tobacco does not qualify as a small quantity, I have not applied the provision.”

16. Ms Hodge also set out various factors that had been put forward by Mr Keary and Ms Lakin as showing that they suffered exceptional hardship as a result of the loss of the vehicle. She did not consider that the hardship caused by loss of the car was exceptional hardship over and above what one should expect and, as such, there was no reason to disapply the policy of not restoring the car in the circumstances.

17. After the decision not to restore was confirmed on review, Mr Keary submitted a notice of appeal, dated 24 March 2013, to the Tribunal appealing against the refusal to restore the car. The notice of appeal did not contain any grounds for appeal but a letter attached to the notice of appeal set out Mr Keary's case. The letter stated that:

- (1) the HRT was for their own use;
- (2) a shop owner in Belgium had told them they could bring back a year's worth of tobacco, which they had done;
- (3) they were tired and concerned for their young son, who was running from room to room unsupervised while they were being separately interviewed, and also worried how they would get home without a car during the interviews; and
- (4) Mr Keary needed the car, which had been left to him by his late father, to travel to work and, as a result of not having it, he was unemployed and claiming benefits.

18. On 24 June 2013, HMRC raised two assessments for the duty due in relation to the tobacco under section 12 of the Finance Act 1994. As Mr Keary and Ms Lakin had indicated, when they were stopped, that they owned the goods in equal shares, HMRC decided to issue an assessment for half the duty, ie £883, to each of them.

19. On 5 July 2013, Mr Keary wrote to HMRC and asked them to review the assessments on the grounds that the tobacco was for personal use. Mr Keary also stated that he was unemployed and had no savings other than the car that had been left to him by his late father, which had now been seized, so he could not afford to pay the duty. Following a review, HMRC notified Mr Keary and Ms Lakin by letter dated 19 July that the assessments were upheld. The basis of that decision was the decision of the Court of Appeal in *HMRC v Jones and Jones* [2011] EWCA Civ 824. The *Jones* case showed that the fact that the seizure of the HRT had not been challenged meant that it was deemed to be duly condemned as forfeited. As a consequence, the HRT must be regarded as having been imported illegally and Mr Keary and Ms Lakin could not now argue that the HRT had been imported legally for personal use.

20. On 29 July 2013, HMRC informed Mr Keary and Ms Lakin that they were each to be charged with a penalty of £176 under Schedule 41 to the Finance Act 2008. The penalty explanation letter stated that the behaviour that led to the penalty was considered to be non-deliberate with a prompted disclosure. HMRC allowed the maximum reduction (10%) for disclosure which gave a penalty of 20% of the potential lost duty. The penalty notices were issued to Mr Keary and Ms Lakin on 7 August.

21. On 9 August 2013, the Tribunal received a notice of appeal against the assessment for duty from Mr Keary. In the notice of appeal, Mr Keary referred to the appeal against the refusal to restore the car and wrote:

“We cannot afford this amount. When they seized our car they took my saving what was the car and now I'm out of work. We live with my father in law because we can't afford anywhere else. They took the tobacco and now want £833.

We have nothing.

I don't feel I should have to pay the duty when they have taken all the tobacco including my vehicle.”

22. In a letter received by HMRC on 27 August 2013, Mr Keary asked HMRC to review the imposition of the penalties on the grounds that they could not afford to pay the penalties and felt that they had not done anything wrong as the tobacco was for their personal use. In a letter dated 10 October, having undertaken a review, HMRC upheld the penalties imposed on Mr Keary and Ms Lakin. The letter stated that the reduction in the penalty was the maximum possible under the legislation.

23. In September 2014, HMRC and the Border Force sought a direction of the Tribunal that the appeals by Mr Keary and Ms Lakin should be struck out. The background to the application and my reasons for striking out the appeals against the assessments for duty but not the appeals in relation to the decision not to restore the car and the penalties are set out in my decision released on 23 December 2014 with neutral citation [2014] UKFTT 1114 (TC). The legislation relevant to the appeals was set out in an Appendix to that decision and I do not propose to set it out in full again in this decision.

24. The two issues to be decided in this appeal are:

- (1) Was the Border Force's decision not to restore Mr Keary's car reasonable?
- (2) Should the penalty be reduced because of special circumstances or reasonable excuse?

**Was the Border Force's decision not to restore Mr Keary's car reasonable?**

25. Where goods have been condemned as forfeited and the relevant authority (the Border Force in this case) has refused to restore the goods, the person who asked for restoration can appeal against that decision to the First-tier Tribunal (Tax Chamber). Section 16(1) of the Finance Act 1994 provides that where there is an appeal against a decision such as the one in this case, the Tribunal can only consider whether the authority's decision not to restore was reasonable. The Tribunal cannot make its own decision or remake the authority's decision. If the owner does not challenge the seizure of the goods, then the Tribunal must address the reasonableness or otherwise of the decision not to restore on the basis that the goods were duly condemned as forfeited. If the Tribunal decides that the decision could not reasonably have been arrived at, it can only direct that the decision be considered again by the authority, subject to any directions the Tribunal considers appropriate.

26. Mr Griffiths, relying on the *Jones* case, submitted that it is a deemed fact that Mr Keary and Ms Lakin had not imported the HRT for their own use. He contended that the Border Force (and the Tribunal) had to considering the issue of whether to restore the car on the basis that it had been lawfully seized because it was being used in connection with the smuggling of tobacco. I agree. The *Jones* case is a decision of the Court of Appeal which is binding on the First-tier Tribunal. It follows from the *Jones* case that, where the seizure of excise goods is not challenged, it is not possible to argue in later proceedings that the goods were not liable to forfeiture because they were in fact held for personal use. I consider that Ms Hodge was right to approach the question of whether to restore Mr Keary's car on the basis that the tobacco was not for personal use. However, the fact that Mr Keary and Ms Lakin are deemed to have imported the HRT in order to supply it commercially and not for their own use does not mean that Mr Keary's appeal in relation to this issue must be dismissed. I must now consider whether, assuming the HRT was imported for a commercial purpose,

the refusal to restore the car was a decision that HMRC could reasonably have arrived at, taking account of other considerations, such as the quality of the decision-making process and proportionality.

27. In considering the reasonableness of the Border Force's decision to refuse to restore the car to Mr Keary, I adopt the approach summarised by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 as follows:

“The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it.”

28. Mr Griffiths submitted that, when all the circumstances of the matter were taken into account, the decision not to restore the car to Mr Keary was reasonable and proportionate. In support of that submission, Mr Griffiths referred to the following factors that Ms Hodge took into account when making the decision:

- (1) the HRT was concealed in four black bags in the boot of the car behind a baby buggy;
- (2) the quantity of HRT was ten times the guideline limit and would last an average smoker over three years;
- (3) the HRT would be stale after 12 months when stored in ordinary living conditions;
- (4) Mr Keary and Ms Lakin paid cash for the HRT;
- (5) Mr Keary and Ms Lakin had made other trips to France and Belgium in June and August for reasons that were not credible and it was reasonable to conclude that tobacco was smuggled on those trips.

29. In this case, Ms Hodge concluded that the HRT was held by Mr Keary and Ms Lakin with a view to selling it for a profit. The significance of the point is that a different policy applies to requests for restoration of vehicles used to smuggle excise goods which are to be passed on to others on a 'not for profit' basis. In short, where excise goods were held for profit the vehicle will not normally be restored but where goods were to be passed on to others on a 'not for profit' reimbursement basis then the vehicle may be restored depending on certain criteria set out in the policy.

30. It seems from the review letter, that Ms Hodge reached her conclusion that the HRT was held for profit primarily because Mr Keary and Ms Lakin had not claimed that the excise goods were to be passed on to others on a 'not for profit' reimbursement basis. They maintained throughout the interviews, in correspondence and before me at both hearings that the HRT was for their personal use. Mr Keary said in interview that the carton of 200 cigarettes was for a friend who had paid for them. At no point were Mr Keary and Ms Lakin asked whether they intended to sell the HRT at a profit. Although the decision in the *Jones* case means that Mr Keary and

Ms Lakin are deemed to have imported the HRT commercially, that does not mean that they must be regarded as intending to sell it at a profit. In my view, Ms Hodge was not entitled to conclude that Mr Keary and Ms Lakin intended to sell the HRT to others at a profit on the basis that neither of them had claimed that they intended to sell the HRT to others on a not for profit reimbursement basis.

31. The Border Force's restoration policy distinguishes between smuggling with a view to a profit and smuggling other than for a profit. Determining whether a person intends to sell smuggled goods for a profit is, therefore, an important part of the decision making process. If the Border Force wrongly concluded that Mr Keary and Ms Lakin intended to sell the HRT at a profit then the policy on restoration would not have been applied correctly in their case. I now consider whether any other factors might have entitled Ms Hodge to conclude that Mr Keary and Ms Lakin had imported the HRT with a view to selling it at a profit.

32. Based on the records of the interviews, Ms Hodge doubted that either Mr Keary or Ms Lakin smoked. Clearly, if neither Mr Keary nor Ms Lakin smoked then that would cast doubt on their story that they intended to smoke the HRT themselves and lend support to Ms Hodge's conclusion that they intended to sell the HRT at a profit. Ms Hodge was right to point out that the answers given in the interviews were sometimes vague or inconsistent. Ms Lakin explained that her small son was running between the interview rooms and she was concerned about him. The interviewing officer properly records asking Ms Lakin if the child will be alright at the beginning of the interview and recording a break while Ms Lakin checked on her son. Ms Lakin said that, during the interviews, she and her partner were worried about their son and how they would get home. I accept that interviews are stressful situations and that the presence of a young child running around unsupervised would have been a distraction. In such circumstances, I consider that vague and sometimes inconsistent answers to questions are not surprising. Having read the notes of the interviews and bearing in mind the circumstances of the interviews, it does not seem to me that the answers in relation to the numbers of roll ups that can be obtained from a standard pouch of tobacco or the amounts smoked by Mr Keary and Ms Lakin were such as to suggest that neither of them smoked. I consider that Ms Hodge was not entitled to entertain any doubts about whether Mr Keary and Ms Lakin smoked on the basis of answers given in the interviews. At both hearings, Ms Lakin said that both she and Mr Keary had smoked in front of Border Force officers when they were stopped. That statement was never challenged. On the evidence that I have seen, I accept that both Mr Keary and Ms Lakin are smokers.

33. Ms Hodge also suspected that Mr Keary and Ms Lakin had bought tobacco on both of their previous trips. Clearly, if that were so then a third trip would not necessarily mean that Mr Keary and Ms Lakin intended to sell the HRT at a profit but it would indicate a pattern of importing HRT other than for personal use. That would undermine Mr Keary's and Ms Lakin's evidence and lend support to Ms Hodge's conclusion that they intended to sell the HRT at a profit. Ms Hodge considered that the reasons given for the trips lacked credibility given the circumstances of Mr Keary and Ms Lakin. They said that it was cheaper to go for a day out across the channel than in the UK. They also said that they had taken a previous trip to enquire about the price of tobacco but had not taken money with them to buy tobacco on that occasion. Ms Hodge took into account that Mr Keary worked only intermittently at the relevant time and Ms Lakin did not have a job. That led Ms Hodge to conclude that they had not provided a plausible explanation for having £1,000 to pay for the journey and the

HRT purely for their own use. In the interviews, Mr Keary and Ms Lakin both said that they had saved up to buy the HRT. At the hearing, they told me that Mr Keary's father had died and left him some money and the car that was subsequently seized. That meant that they had some cash to spend on the tobacco.

34. It seems to me that whatever the source of the cash used for the trip, £1,000 was a significant amount for Mr Keary and Ms Lakin when, by their own admission, they had no valuable assets other than the car. Like Ms Hodge, I do not find it credible that going to the beach in France or Belgium would be a cheaper day out than driving to a beach or similar attraction in the UK. I agree that these are factors that suggest that one motive for the trip might have been to make some money by selling the HRT at a profit. Another possible explanation for spending almost £1,000 on HRT is that it was substantially cheaper than they could buy it in the UK and the motive for the trip was to purchase a large quantity of HRT for themselves which would save them money over a period of time. I accept that Mr Keary and Ms Lakin made enquiries on an earlier trip about the cost of HRT but that is equally consistent with an intention to smuggle goods to sell at a profit as it is with an intention not to do so. I consider that it was reasonable of Ms Hodge to conclude that the circumstances of Mr Keary and Ms Lakin undermined the reasons they had given for the trips. However, I do not consider that the only reasonable explanation for the trip was to smuggle HRT with a view to selling it at a profit. In my view, the issue of whether Mr Keary and Ms Lakin intended to smuggle the HRT to make a profit must be considered in the context of all the facts and the explanation is merely one factor.

35. Mr Griffiths referred to the case of *Lakhibir Khatkar v HM Customs and Excise* [2005] UKVAT (Excise) E00865 in which the VAT and Duties Tribunal drew an inference that excise goods (in that case, beer) had been smuggled on previous trips. I consider that the facts of *Khatkar* were very different to the facts of this case and do not support a similar inference being drawn in this case. As the decision makes clear, Mr Khatkar had a history of importing large quantities of beer. He had been stopped on numerous occasions and had had goods seized several times. On that basis, the Tribunal considered that it was reasonable to conclude that Mr Khatkar had been importing large quantities on other occasions when he had not been stopped. In this case, Mr Keary and Ms Lakin had not been stopped on either of their two previous trips. I was not told of any previous occasion when either of them had been found to have been smuggling. In those circumstances, I do not consider that it would be reasonable to infer that they had smuggled excise goods on either of their two previous trips.

36. Ms Hodge also considered how long it would take to consume the quantity of HRT imported by Mr Keary and Ms Lakin. Ms Hodge used average figures for the number of cigarettes that can be produced from a 50 g pouch of HRT and the number of cigarettes smoked by the average smoker. She concluded that the amount of HRT imported by Mr Keary and Ms Lakin would produce 18,000 cigarettes which would last the average smoker over three years. That is, of course, mathematically correct but I do not regard it as evidence that Mr Keary and Ms Lakin intended to sell the HRT at a profit. Accepting that it is not open to Mr Keary and Ms Lakin to argue that the HRT was imported for personal use, it is relevant to test Ms Hodge's conclusion that they intended to sell it at a profit by looking at their claim that they would consume the HRT within a period of one year or so. As Ms Hodge considered that the average smoker would take over three years (in fact three and a half) to smoke the quantity of HRT, it follows that two average smokers would do so in half the time, ie

one year and a quarter. Mr Keary and Ms Lakin both claimed in their interviews that they smoked a lot, ie more than the average smoker. It appears to me that there was some confusion in the interviews about whether, when talking about how long a pouch of HRT would last, Mr Keary and Ms Lakin were answering as individuals or together. Before me, Ms Lakin said that she could smoke 40 or 50 cigarettes on a Friday or Saturday if she went out, but that did not happen now she had children, and she would smoke less on other days. Mr Keary smoked more than she did. I accept that Mr Keary and Ms Lakin smoke more than the average smoker. If, between them, they smoked four pouches each week, that would mean that they smoked an average of 25 cigarettes each per day and the HRT that they imported would last them 52.5 weeks, which is what they claimed. Ms Hodge also relied on the fact that the HRT would become stale after 12 months if stored in ordinary living conditions. In relation to the question of whether the HRT would become stale after 12 months, Ms Lakin said that she did not know that and Mr Keary maintained that HRT did not go off if the packet was sealed. I consider that the fact that the quantity of HRT would last an average smoker three and a half years was an irrelevant consideration. It appeared to me to be credible and, indeed, likely that Mr Keary and Ms Lakin would consume the quantity of HRT that they imported in approximately one year. In any event, I accept that they did not know or believe that the HRT would become stale if not consumed within 12 months. I do not regard the quantity of HRT imported by Mr Keary and Ms Lakin as evidence that they intended to sell it at a profit. It is equally consistent with an intention not to do so.

37. Mr Griffiths also urged me to consider that the HRT was concealed in four black bags in the boot of the car behind a baby buggy. I did not hear any evidence from the officers who stopped the car but the contemporaneous note states “tobacco behind pushchair for baby boy and other shopping in 4 black bags”. The pushchair was clearly on top but that does not suggest to me that the HRT was concealed but rather that the pushchair had been put in the boot of the car after the tobacco and other shopping. Further, there was no attempt by Mr Keary and Ms Lakin to deny that they had the HRT or pretend that they had less than they did when they were stopped by the Border Force officers. I do not accept that the HRT was deliberately concealed.

38. Mr Griffiths submitted that the fact that the HRT had a UK retail value of £3,000 showed that the decision not to restore the car in this case was proportionate. He also referred to comments in *Lindsay v Customs and Excise Commissioners* [2002] STC 508. In that case, Lord Phillips MR said at [63]:

“Those who deliberately use their cars to further fraudulent commercial ventures in the knowledge that if they are caught their cars would be rendered liable to forfeiture cannot reasonably be heard to complain if they lose their vehicles. Nor does it seem to me that, in such circumstances, the value of the car used needs to be taken into consideration. Those circumstances will normally take the case beyond the threshold where that factor can carry significant weight in the balance. Cases of exceptional hardship must always of course be given due consideration.”

39. Also in *Lindsay*, Lord Justice Judge stated at [72] that;

“Given the extent of the damage caused to the public interest, it is, in my judgement, acceptable and proportionate that subject to exceptional individual considerations, whatever they are worth the vehicles of

those who smuggle for a profit, even for a small profit, should be seized as a matter of policy.”

40. I respectfully agree with the comments made in *Lindsay* which, as it is a decision of the Court of Appeal, are binding on me. It seems to me that the value of the vehicle used to attempt to smuggle goods for a profit is not a relevant consideration in deciding whether it should be restored. To hold otherwise might lead those who intend to smuggle on a commercial scale to do so in very expensive vehicles in the hope that they might be able to argue that a refusal to restore the vehicle was disproportionate. In any event, it seems to me that a decision not to restore Mr Keary’s car, which was worth £6,500 to £7,000, would not be disproportionate in this case given the value of the goods (£981.50) and duty (£1,766) involved and the need to protect legitimate trade. Different considerations apply if Mr Keary was not bringing the tobacco into the UK with a view to selling it at a profit. Lord Phillips made this clear in *Lindsay* at, [64], when he said:

“... where the importation is not for the purpose of making a profit, I consider that the principle of proportionality requires that each case should be considered on its particular facts, which will include the scale of importation, whether it is a ‘first offence’, whether there was an attempt at concealment or dissimulation, the value of the vehicle and the degree of hardship that will be caused by forfeiture. There is open to the Commissioners a wide range of lesser sanctions that will enable them to impose a sanction that is proportionate where forfeiture of the vehicle is not justified.”

41. In conclusion, Ms Hodge’s decision that Mr Keary’s car should not be restored was based on her conclusion that Mr Keary and Ms Lakin intended to sell the HRT to others at a profit. I consider that, in reaching her conclusion, Ms Hodge was wrong to take account of the fact that Mr Keary and Ms Lakin did not claim that they intended to sell the HRT to others on a not for profit reimbursement basis when it had never been put to them. In addition, I consider that the conclusion was flawed because it was based on certain inferences or assumptions that were not supported by the evidence, namely that:

- (1) Mr Keary and Ms Lakin did not smoke;
- (2) Mr Keary and Ms Lakin had bought and smuggled tobacco on both of their previous trips;
- (3) Mr Keary and Ms Lakin could not consume the quantity of HRT imported by them within the period of one year they claimed it would last them;
- (4) Mr Keary and Ms Lakin must have known that the HRT would become stale before they could consume it; and
- (5) the HRT was deliberately concealed behind a pushchair.

42. For the reasons given above, I have concluded that the Border Force’s decision not to restore Mr Keary’s car was not reasonable and his appeal should be allowed. As explained above, I cannot remake the authority’s decision or decide whether the car should be restored to Mr Keary. Section 16(1) of the Finance Act 1994 provides that, if I am satisfied that the person making the decision could not reasonably have arrived at it, I can only direct that the review decision cease to have effect and the Border Force conduct a further review, subject to any directions that I consider appropriate. I set out those directions at the end of this decision.

### **Should the penalty be reduced because of special circumstances or reasonable excuse?**

43. The provisions relating to the penalties are found in Schedule 41 to the Finance Act 2008. The penalty in this case was payable under paragraph 4 of Schedule 41 which relates to handling goods that are subject to unpaid excise duty. Paragraph 6B of Schedule 41 provides that the penalty under paragraph 4 for a non-deliberate handling of goods in respect of which excise duty has not been paid is 30% of the duty that would have been lost. Paragraphs 12 and 13 of Schedule 41 provide for reductions in penalties where there is disclosure. The amount of the reduction depends on the level of the penalty and whether the disclosure is prompted or unprompted. In the case of a 30% penalty, the maximum reduction for disclosure is 10%, ie reducing the penalty from 30% to 20%. Paragraph 14 of Schedule 41 provides that a penalty may also be reduced if HMRC consider that there are special circumstances. A reduction for special circumstances is not subject to a statutory minimum and can include a reduction to nil. The legislation states that “special circumstances” does not include the fact that someone is not able to pay the penalty. Paragraph 20 of Schedule 41 provides that, where an act or failure is not deliberate, a person is not liable to a penalty if there is a reasonable excuse for the act or failure.

44. The First-tier Tribunal in *Bluu Solutions Ltd v HMRC* [2015] UKFTT 95 (TC) gave a useful summary of the cases on the meaning of “special circumstances” at [103]:

“The Court of Appeal in *Clarks of Hove v Bakers’ Union* [1978] 1 WLR 1207 held (at page 1216) that in the context of “special circumstances, the word ‘special’ means “something out of the ordinary, something uncommon. In *Crabtree v Hinchcliffe* [1971] 3 All ER 967 Lord Reid said (at page 976) that “‘special’ must mean unusual or uncommon – perhaps the nearest word to it in this context is ‘abnormal.’” In the same case, Viscount Dilhorne said (at page 983) that “for circumstances to be special they must be exceptional, abnormal or unusual...” The tribunal has generally accepted that these meanings apply to the same term used in Sch 56, para 9, and we take the same approach.”

45. In *Wayne Pendle v HMRC* [2015] UKFTT 0027, the Tribunal said:

“... the ‘circumstances’ are normally something external to the person doing the action in question, in contrast to something within his control. So an illness, a burglary or ... where incorrect information is provided to the taxpayer by HMRC – may all constitute ‘circumstances.’”

46. Mr Griffiths submitted, correctly, that HMRC had allowed the maximum reduction for prompted disclosure so that the penalty was the minimum allowed by statute. He contended that there was no evidence that would support a finding of special circumstances or reasonable excuse to reduce the penalty further. The Tribunal in *Bluu Solutions* concluded (and I respectfully agree) that HMRC may reduce a penalty on the ground that there are special circumstances at any point up to the conclusion of a hearing of an appeal against the penalty. Mr Griffiths indicated that Ms Hodge had listened to everything that Mr Keary and Ms Lakin had said at the hearing but she had not heard anything that would amount to special circumstances.

47. Mr Keary and Ms Lakin were unrepresented and admitted that they did not understand the penalty legislation or the concepts of special circumstances and reasonable excuse. They concentrated on explaining their version of events and their personal circumstances. Mr Keary and Ms Lakin maintained that the tobacco was for their personal use. They also stated, as they had in correspondence with HMRC and the Tribunal, that they did not have the money to pay the duty or penalties and it was unfair to expect them to do so when they had already lost the tobacco and the car. Mr Keary and Ms Lakin did not suggest that there were any other potential special circumstances or excuses.

48. I am bound by the decision of the Upper Tribunal in *HMRC v Nicholas Race* [2014] UKUT 033. That decision shows that the *Jones* case applies to an appeal against a penalty in exactly the same way as it applies to an appeal against an assessment for excise duty. That means that, as they did not challenge the seizure of the tobacco, Mr Keary and Ms Lakin cannot argue that the HRT was for their personal use in their appeals against the penalties.

49. I have considered, in the light of their evidence, whether there are any special circumstances that HMRC should have taken into account and that might have justified a reduction in the penalty. While I accept that Mr Keary and Ms Lakin have little or no financial resources, the legislation provides that “special circumstances” does not include an inability to pay and so HMRC could not take Mr Keary’s and Ms Lakin’s financial circumstances into account. On the evidence that I have seen, I cannot find any other circumstances that are exceptional, abnormal or unusual so as to justify a reduction in the penalty. In my view, HMRC’s decision not to reduce the penalties on the ground of special circumstances cannot be said to be unreasonable in this case.

50. I have also considered whether Mr Keary and Ms Lakin could have a reasonable excuse for their conduct that would mean that liability for the penalties did not arise. The legislation refers to a reasonable excuse for the conduct that gave rise to the penalty. Mr Keary and Ms Lakin have never denied that they knew that they were bringing a large quantity of tobacco into the UK. Their consistent position was that it was for their own use. Following *Race*, Mr Keary and Ms Lakin must be regarded as having imported the HRT other than for their own use. On that basis, I cannot see that there can be any excuse, reasonable or otherwise, for the importation of the tobacco that would mean that the penalty did not apply.

51. Accordingly, I have concluded that Mr Keary and Ms Lakin do not have a reasonable excuse and there are no special circumstances that would remove or reduce the penalties. As the penalty is already at the lowest level allowed by the legislation for a prompted disclosure, it follows that the penalty appeals must be dismissed.

52. Although it was not a ground of appeal, I have also considered whether the penalties are disproportionate. I am bound by the decision of the Upper Tribunal (“the UT”) in *HMRC v Total Technology* [2012] UKUT 418 (TCC) which confirmed that the test when considering issues of the proportionality of a penalty is not whether the penalty is “harsh” but whether it is “plainly unfair” or “without reasonable foundation”. I apply that test to the facts of this particular case. In my view, the proportionality of the penalties, which it is appropriate to consider together in the circumstances of this case, must be considered in the context of the value of the goods and the amount of the duty that was potentially unpaid. I do not regard a penalty of

£352 as plainly unfair in the context of the potentially lost UK duty (£1,766) and the UK retail price of the tobacco (£3,000 approximately) and the need to protect legitimate trade in the UK.

53. For the reasons set out above, I have concluded that the appeals of Mr Keary and Ms Lakin in relation to the penalties should be dismissed.

### **Decision**

54. Mr Keary's appeal against the refusal to restore his car is allowed. I direct, in accordance with section 16(4) Finance Act 1994, that:

(1) the Border Force's review decision dated 1 March 2013 shall cease to have effect from the date of release of this decision; and

(2) the Border Force shall conduct a further review of the decision not to restore the vehicle disregarding the fact that Mr Keary and Ms Lakin did not claim that they intended to sell the HRT to others on a not for profit reimbursement basis and on the basis that, as I have found, Mr Keary and Ms Lakin:

- (a) were smokers;
- (b) had not bought and smuggled tobacco on their previous trips;
- (c) could consume the quantity of HRT imported by them within approximately 12 months;
- (d) did not know or believe that the HRT would become stale before they could consume all of it; and
- (e) did not deliberately conceal the HRT behind a pushchair.

55. The appeals of Mr Keary and Ms Lakin in relation to the penalties are dismissed.

### **Right to apply for permission to appeal**

56. 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.

**JUDGE GREG SINFIELD  
TRIBUNAL JUDGE**

**RELEASE DATE: 31 March 2015**