TC04616

Appeal numbers: TC/2013/00738
TC/2013/02769
TC/2013/02771

TYPE OF TAX – Excise duty – hand rolling tobacco - seized as UK duty unpaid - reasonableness of review decision to refuse restoration - HMRC application to strike out - application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

PHILLIP BURTON **Appellants**
STACIE BURTON
TRUDI BROWN

- and -

THE DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE NIGEL POPPLEWELL
MS ELIZABETH BRIDGE

Sitting in public at Bristol on 29 July 2015

Ms Trudi Brown on behalf of the Appellants

Mr Robert Reid, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

Introduction and outline

1. This is an Excise duty, restoration case. There are three appellants Their appeals are joined and were heard together as they relate to the same facts and circumstances and all three appellants seek the same remedy in their substantive appeals; namely, restoration of the excise goods confiscated by the respondents on 11 November 2012.

2. The respondents have applied to strike out the appellants appeals on the basis that the Tribunal has no jurisdiction to hear them and/or the appellants have no reasonable prospects of success.

3. For the reasons given below we refuse the respondents application; as a consequence of this there will be a further hearing. Directions for that hearing are at paragraph 73 below.

Factual background

4. We set out below the factual background, as we understand it, relating to the application. We have to say this has not been terribly easy to establish from the papers submitted at the hearing and the submissions at it. So it is somewhat sketchy. In light, too, of the fact that we are dismissing HMRC's application, so the matter will proceed to substantive appeals, we would emphasise that these are not findings of fact for the purposes of those appeals.

5. At approximately 12:00 on 11 November 2012 at Portsmouth Ferry Port, Mr Burton was intercepted while driving a vehicle (a campervan) with Ms Trudi Brown, his wife/partner and Ms Stacie Burton (his daughter) as passengers.

6. The appellants were interviewed, the vehicle was searched and according to the reviewing officer, a total of approximately 20kg of hand rolling tobacco was being carried in the vehicle.

7. Border Agency Officers then interviewed the three appellants, following which the tobacco was confiscated on the basis that the Officers considered that it was held for commercial purposes. The vehicle was seized too, as being liable for forfeiture, since it was being used for the carriage of goods which were themselves liable to forfeiture.

8. Mr Burton was given, and signed, a seizure information notice dated 11 November 2012.

9. Following seizure of the vehicle, it was offered to Mr Burton for restoration for a fee equal to the excise duty, namely £3347.50.

10. The following day (ie. on 12 November 2012) Ms Brown and Mr Burton returned to Portsmouth and paid £4017 to the Border Agency in order to have the vehicle restored to him. The balance between the £4017 paid and the restoration money of £3347.50 was returned to Mr Burton.

11. The appellants wrote appealing the legality of the seizure and asking for the excise goods to be restored and requested a review of the decision to impose a fee for the restoration of the vehicle.

12. Thereafter, on an indeterminate date, an Officer of the Border Agency wrote to the appellants refusing to restore the excise goods and declining to reimburse the fee paid for the restoration of the vehicle.

13. On 16 November 2012 the appellants requested a review of that decision.

14. A review was carried out by Mr R Brenton and the outcome of that review was given to the appellants in a letter dated 12 December 2012. That review concluded that the excise goods should not be restored, nor should the fee paid by the appellants for the restoration of the vehicle be repaid.

15. Appeals were made by Mr Burton against this review decision on 23 January 2013, and by Ms Burton and Ms Brown on 19 April 2013. Although technically these may have been out of time, the respondents have taken no point on this. The grounds of such appeals were identified in a letter dated 17 January 2013 signed by all three appellants. The appeals was categorised as standard, and held over pending the outcome of the magistrate's decision on condemnation.

16. The magistrate's court hearing was on 30 October 2013. We believe that they came to a decision on that day. That decision was an order for condemnation of the excise goods, but a dismissal of the respondents' complaint in relation to the vehicle. On 5 December 2013 the respondents wrote on a without prejudice basis to Mr Burton indicating that following the magistrate's court's decision to return the restoration fee paid for the return of the vehicle, the respondents wished to repay the £3347.50 This was subsequently paid. This means that the only issue under appeal is the restoration of the excise goods.

17. The appeals were joined, and directed to be heard together, by way of a direction made on 23 December 2014.

18. By way of an application dated 5 January 2015, the respondents applied to strike out the appellants appeals in respect of the excise goods on the grounds mentioned at paragraph 2 above.

19. On or around the date of seizure (ie. 11/12 November 2012), Ms Brown compiled a 11 page statement (described as "a statement of truth from Trudi Brown and Phillip Burton") which deals with her side of the interview with the Border Agency Officers which took place at the time of seizure; and the events which subsequently transpired when she and Mr Burton returned to Portsmouth to pay the restoration fee for the vehicle. Ms Burton and Mr Burton also made statements of truth.

The Relevant Law

Striking out

20. The respondents have applied to strike out the appellants appeals. The relevant law on this point is set out below.

21. Rule 8(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules ("Rules" each a "Rule") provides a mandatory direction that the Tribunal must strike out the whole or a part of the proceedings if it does not have jurisdiction in relation to the proceedings or that part of them.

22. Rule 8(3)(c) gives the Tribunal power to strike out an appeal if it "considers there is no reasonable prospect of the appellant's case, or part of it, succeeding."

23. In *Swain v Hillman* [2001] 1 All ER 91 Lord Woolf MR said, in relation to the similar power at Rule 24.2 of the Civil Procedure Rules:

> "The words 'no real prospect of being successful or succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or…they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

24. In *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2001] UKHL 16 [2001] ("*Three Rivers*") the House of Lords gave further guidance on how a court or tribunal should approach an application made on the basis that a claim has no real prospect of success. Lord Hope said:

> "94…..I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is - what is to be the scope of that inquiry?
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> 95 I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be taking that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in *Swain v Hillman*, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all."

Restoration

25. The relevant statutory framework relating to restoration has been set out and interpreted in the leading case of Jones (a Court of Appeal Decision) *(The*

Commissioners for Her Majesty's Revenue & Customs v Lawrence Jones and Joan Jones) [2011] EWCA Civ 824 ("Jones").

Statutory Framework

> "35. Dutiable goods that are not declared on importation are liable to seizure and forfeiture. If anything is seized as liable to forfeiture any vehicle used for its carriage is also liable to forfeiture. In relation to anything seized as liable to forfeiture section 139(6) provides that Schedule 3 to the [Customs and Excise Management Act 1979] shall have effect.
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> 36. Under paragraph 1 of Schedule 3 HMRC shall give notice of the seizure of anything as liable to forfeiture and of the grounds therefor to the owner.
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> 37. Under paragraph 3 any person claiming that anything seized as liable to forfeiture is not so liable has one month from the date of the notice of seizure in which to give notice of his claim in writing to HMRC.
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> 38. Under paragraph 5, in the absence of a notice of claim under paragraph 3 complying with the requirements of paragraph 4, the seized goods "shall be deemed to have been *duly* condemned as forfeited" [my emphasis].
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> 39. Where notice of claim is duly given in accordance with paragraphs 3 and 4 it is provided in paragraph 6 that HMRC "shall take proceedings for the condemnation of that thing by the court, and if the court finds that the thing was at the time of seizure liable to forfeiture the court shall condemn it as forfeited".
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> 40. The proceedings for condemnation are civil proceedings and may be instituted either in the High Court or in a magistrates' court: paragraph 8. There are provisions as to proof in proceedings of the fact, form and manner of the seizure and of the condemnation of anything as forfeited: paragraphs 13 and 14. For example, HMRC have to prove, on the balance of probability, that the goods were imported for commercial use. Condemnation of the goods vests the property in them in HMRC.
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> 41. Under separate provisions in the [Customs and Excise Management Act 1979] HMRC have an administrative discretionary power to restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under the [Customs and Excise Acts] s152(b).
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> 42. The Finance Act 1994 provides that there is an appeal procedure against a decision on restoration, which proceeds via a request for a review under section 14 and the carrying out of a review under the procedure in section 15 to an appeal under section 16 against the review decision to the FTT.
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> 43. The appeal tribunal on an appeal is confined to a power, where the tribunal are satisfied that the HMRC could not have reasonably arrived at the decision it did, to require HMRC to conduct a further review of the original decision: s16(4)."

Jurisdiction of the Tribunal

26. The interaction between the foregoing statutory provisions and their application to the jurisdiction of this tribunal were then considered in detail in *Jones*.

27. In *Jones*, Mr and Mrs Jones were stopped at Hull and large quantities of tobacco and alcohol were seized. Initially they challenged the legality of the seizure by issuing condemnation proceedings, but were subsequently advised by their solicitors to withdraw from those proceedings. They sought restoration of the car that had been seized along with the goods. The FTT made findings of fact that the goods were for personal use and allowed the restoration. The Upper Tribunal upheld this decision, and HMRC appealed to the Court of Appeal. The ground for this appeal was that the FTT were not entitled to make findings of fact inconsistent with the deemed forfeiture of the goods. It was bound by the deeming provisions that the goods were illegally imported for commercial use.

28. The Court of Appeal agreed. At paragraph 71 of their decision, Mummery LJ said as follows:

> "71. I am in broad agreement with the main submissions of HMRC. For the future guidance of tribunals and their users I will summarise the conclusions that I have reached in this case in the light of the provisions of the 1979 Act, the relevant authorities, the articles of the Convention and the detailed points made by HMRC.
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> (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.
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> (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.
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> (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.
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> (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.
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> (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."

Fact Finding

29. This tribunal is a fact finding tribunal. But *Jones* imposes a limit on the extent with which we can consider facts once goods have been lawfully ceased.

30. As is mentioned in paragraph 71(7) of *Jones* "deeming something to be the case carries with it any fact that forms part of the conclusion".

31. The case of *Gora & Others v Customs & Excise Commissioners* [2003] EWCA Civ 525 (Court of Appeal Decision) ("*Gora*") (another Court of Appeal decision) dealt with a number of points (including those covered by *Jones* regarding the jurisdiction of the tribunal when goods are lawfully seized, and with the fact finding powers of the tribunal.

32. The facts in *Gora* were similar to those in *Jones*. HMRC had seized imported dutiable goods on the ground that duty on them had not been paid. There were proceedings in the tribunal for restoration of the goods which HMRC refused to restore. The question arose on an appeal under section 152(b) of the Customs and Excise Management Act 1979 whether the tribunal had jurisdiction to determine whether duty had been paid and whether the goods were forfeit, even where they were deemed forfeit.

33. Pill LJ at paragraph 38 of his judgment said this:

> "38. In the course of argument, it emerged that the respondents took a broader view of the jurisdiction of the Tribunal than might have at first appeared. They were invited to set out in writing their views upon the jurisdiction of the Tribunal and Mr Parker provided the following written submission:
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> > 3. The Commissioners accept:
> >
> > > (e) Strictly speaking, it appears that under s 16(4) of the 1994 Act, the Tribunal would be limited to considering whether there was sufficient evidence to support the Commissioners' finding of blameworthiness. However, in practice, given the power of the Tribunal to carry out a fact-finding exercise, the Tribunal could decide for itself this primary fact. The Tribunal should then go on to decide whether, in the light of its findings of fact, the decision on restoration was reasonable. The Commissioners would not challenge such an approach and would conduct a further review in accordance with the findings of the Tribunal".
>
> 39. I would accept that view of the jurisdiction of the Tribunal subject to doubting whether, its fact-finding jurisdiction having been accepted, it should be limited even on the "strictly speaking" basis mentioned at the beginning of paragraph 3(e). That difference is not, however, of practical importance because of the concession and statement of practice made by the respondents later in the sub-paragraph."

34. One ratio of *Gora*, therefore, is that when this tribunal is considering whether HMRC's review decision was unreasonable, we can consider (subject to the restrictions set out in *Jones*, mentioned above) facts as at the date of the hearing. We are not restricted to considering only those facts which were either available to, or specifically put before, the reviewing officer, when considering the reasonableness of the decision.

35. As was pointed out by Judge Hellier in the case of *Harris v Director of Border Revenue* [2013] UKFTT 134 (TC)

> "11. There is one other oddity about this procedure. We are required to determine whether or not the UKBA's decision was "unreasonable"; normally such an exercise is performed by looking at the evidence before the decision maker and considering whether he took into account all relevant matters, included none that were irrelevant, made no mistake of law, and came to a decision to which a reasonable Tribunal could have come. But we are a fact finding Tribunal, and in Gora and others v Customs & Excise Commissioners [2003] EWCA Civ 525 Pill LJ approved an approach under which the Tribunal should decide the primary facts and then decide whether, in the light of the Tribunal's findings, the decision on restoration was in that sense reasonable. Thus we may find a decision is "unreasonable" even if the Officer had been, by reference to what was before him, perfectly reasonable in all senses."

36. This tribunal describes the principle set out above as the "Gora principle".

37. Finally on this point, the tribunal's powers and obligations to find facts in the strike out appeal has been considered in the Upper Tribunal case of *HMRC v Race* [2014] UKUT 0331 (TCC). At paragraph 44(b), Warren J:

> "Secondly, the Judge was not obliged to do what he did and to take it that Mr Race would have had a reasonable prospect of establishing that the events referred to by the Judge did happen. It was open to him to make as assessment of the factual position and to test, within reasonable limits, what Mr Race was telling him."

38. And then again at paragraph 50:

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

Discussion of the law

39. The legal principles which we distil from the foregoing legislation and cases are as follows.

(1) We must strike out the appellant's appeals if we have no jurisdiction in relation them.

(2) This will be the case if the only issue raised by the appellants is the legality of the forfeiture.

(3) Where goods have been condemned in the Magistrates Court (or, indeed, deemed to have been so condemned) we have to treat the goods as lawfully seized (ie that the forfeiture is legal).

(4) The tribunal's role in the appeal is to consider whether the Respondent's review decision following its decision not to restore the goods is a reasonable one on judicial review principles.

(5) The role of the tribunal in the strike out application, where it has jurisdiction (and thus a discretion as to whether to strike out), is to carry out a balancing act. The issue is whether the appellants can establish that they have sufficient grounds for a successful claim that the review decision was unreasonable. We must be able to say that their prospects of success at the hearing have substance and are better than fanciful. In a nutshell, do the appellants have an arguable case?

(6) In considering this, we must consider the relevant facts. We can do so at the time of the hearing (we are not restricted to looking at the facts which were before the reviewing officer at the time of his review) but if the goods are

deemed to be legally forfeit, we are bound by (and cannot reopen an inquiry into) any facts which form part of that deemed legal forfeiture.

Respondents' submissions

40. Mr Reid's primary submission was based on his instructions that (given the appeal appears to be based on the sole ground that the goods were for personal use), we had no jurisdiction on the ratio of *Jones*.

41. He went on to embellish this primary submission. The appellants have not provided any further evidence or grounds other than the statements of truth which had been submitted in respect of the condemnation proceedings. Since they had been used in the condemnation proceedings, and the evidence in this restoration case is the same as presented to the magistrates; and so we are precluded from considering this evidence afresh. To put words into his mouth (and paraphrasing the words of *Jones*), the facts on which the appellants rely form part of the conclusion of the magistrates that the goods were unlawful. There is nothing "left over", as it were, on which the appellants can now rely which has not been taken into account by the magistrates.

42. It was Mr Reid's view that the appellants were not disputing the reasonableness or proportionality of the review decision, and emphasised that the tribunal's jurisdiction is limited to deciding (or considering) whether the review decision was one which the reviewing officer could reasonably have arrived at.

43. Mr Reid however made a secondary submission dealing with the reasonableness and proportionality of the reviewing officer's decision. He made the following points.

(1) The reviewing officer had taken his decision based on the behavior of the appellants at their point of entering into the UK.

(2) The appellants had not managed to demonstrate that there were exceptional circumstances. The Border Agency's policy is that goods will be forfeited unless there are exceptional circumstances, and there are none in this case. He emphasised, however, that whilst this is a guideline, it is not a tramline.

(3) The appellants had illicitly brought in tobacco on which duty should have been paid.

(4) There was a serious misleading of the officers of the Border Agency and so it was not reasonable or fair to restore the tobacco.

(5) A further consideration was the effect that the illegally imported tobacco would have on the legal trade carried out by UK licensed traders.

(6) The guidelines for personal use was one kilogram of hand rolling tobacco and the three appellants between them had brought in more than seven times that amount.

(7) There were areas of conflict between the stories of the three appellants.

(8) This was not the first time that members of the Burton family had been caught attempting to import tobacco illegally.

44. In summary, Mr Reid submitted that the respondents based their application to strike out on two principles:

(1) Firstly, the matters put forward by the appellants were outside our jurisdiction since the magistrates had found that the importation of the goods had been illegal; and

(2) Secondly, the decision by the reviewing officer was fair and proportionate and there were no exceptional circumstances. So the reasons given by the reviewing officer not to restore, were reasonable.

Appellants' submissions

45. Ms Brown, on behalf of the three appellants, made the following submissions:

(1) Officer Starnes had not told the truth. He had put things in his log book and altered them in his witness statement. He had also included things in his witness statement that were not in his log book. She gave examples.

(2) One such inaccuracy related to the circumstances in which the packets of tobacco were brought out of the vehicle and disclosed to the Border Agency Officers. It was her submission (and part of this was evidence) that when asked how much tobacco they had, they had replied 12 to 13 packets each, some of which were for their dog sitter and some for their son. The amount of tobacco that had first been taken out of the vehicle on request comprised 24 packets of tobacco. It was Ms Brown's contention then that Officer Starnes had suggested that each of the three appellants had said that they had 8 packets each, and it was her view that this assumption had been made by Officer Starnes because there were 24 packets disclosed initially, and there were three appellants. When asked by Officer Starnes if there were any more, Mr Burton apparently asked how many there were on the table. When told that there were 24, Mr Burton then indicated that there were more in the van because the appellants had told Officer Starnes, originally, that they had imported 12 to 13 packets each. These additional packets were then discovered by Officer Starnes, in the van. The appellant's view is that Officer Starnes had been told by Mr Burton where to find them.

(3) The trip, and the purchase of the tobacco, had been funded, at least in part, by an insurance payment of approximately £15,000 which had been made to Mr Burton.

(4) Ms Brown sought to justify the trips that the family had made after they had left the UK in the vehicle originally (they had been away for about two months and had made trips back to the UK in the meantime) on the basis of looking after business interests, medical reasons, and to look for a caravan for the second appellant.

(5) There was a serious flaw in the Border Agency's calculation of the number of cigarettes that Ms Brown had smoked. She had told the Border Agency Officers that she smoked about 50 cigarettes a day and got between 100 and 150 cigarettes from a pouch. There are 10 pouches in each packet so working that through, it roughs out at about a year's worth of cigarettes. But Officer Taylor, who had calculated Ms Brown's consumption for the purpose of

the magistrates court proceedings suggested that Ms Brown was smoking more per day (71), and so only getting 100 cigarettes out of each pouch. Yet came to the conclusion that the tobacco should last for 22 months. You would expect that if Ms Brown was smoking more per day, the tobacco should last for less than 12 months.

(6) The Officers had not included, in their statements, a number of matters which had actually happened in practice (in respect of the whisky they had seized, an ornamental knife, and misunderstandings regarding the VAT which was paid by Mr Burton to the Border Officers at the time that the vehicle was restored).

(7) The Officers made a number of mistakes in their reports (for example, getting names, dates of birth, etc wrong). It was Ms Brown's submission that this lack of attention to detail was evidence of incompetence on behalf of the Officers and thus made suspect their ability to judge whether goods were for personal use.

(8) Finally, she said that there had been no problem about paying for the release of the vehicle. Initially, she had telephoned a friend to see whether that friend could pay by way of a credit card but the Border Agency do not accept credit cards; hence the reason why they returned the following day with cash in order to secure release of the vehicle.

Discussion

46. As mentioned at paragraph 39(4) above, the role of this tribunal is to consider whether the review of the Border Force decision not to restore the excise goods was reasonable in the judicial review sense. The focus of this enquiry, therefore, is the review letter.

47. Unfortunately, we were not provided with a copy of the relevant review letter as part of the bundle of documents provided for the hearing.

48. We were provided with a review letter dated 12 December 2012. The author of that letter is Mr R Brenton. It starts unimpressively. It is dated 12 December 2012 (which we suspect is correct) but then refers to a letter from Mr Burton "*received 16 November 2012 in which you ask for a review of the decision from the Border Force (BF) dated 20 December 2012 not to restore your excise goods……*". The recited decision from the Border Force dated 20 December 2012 post dates by 8 days Mr Brenton's letter.

49. Furthermore, on page 2, when reciting his understanding of the case, he gets the date wrong. He considered that the appellant's vehicle was intercepted on 11 November 2011 when in fact it was intercepted on 11 November 2012. This error is repeated on page 5.

50. The review letter reviews the decisions not to restore the excise goods and the imposition of a fee for the restoration of the vehicle.

51. As is mentioned at paragraph 16 above, the magistrates ordered that the fee paid by Mr Burton for the restoration of the vehicle be reimbursed to him. And it was so reimbursed.

52. The review letter dated 12 December 2012 contains the decision against which the appellants have appealed. However, we were told by Mr Reid that there had been a subsequent review letter, updated in light of the magistrate's court decision that the restoration fee should be reimbursed to Mr Burton. Mr Reid confirmed that the reasons given in that second review letter for the decision not to restore the excise goods were identical to that given in the letter of 12 December. So we could rely on that letter as comprising the reasons which formed the basis of the officers decision.

53. We would like to have satisfied ourselves that the second review letter was identical as suggested by Mr Reid, but no copy of that second review letter was available. We have however considered the first review letter. We remind ourselves that the appellants in this strike-out application do not have to show that the decision was unreasonable. They have to show that they have an arguable case of establishing that the review decision was unreasonable.

54. We think they do have such an arguable case.

The discovery of the Tobacco

55. It is clear that Officer Brenton considers the circumstances in which the additional pouches of tobacco were taken from the vehicle (these being the additional pouches set at paragraph 45(2) above), as being of considerable significance. He believed that Mr Burton had behaved dishonestly by under declaring goods which were subsequently discovered in the van, and disbelieved Mr Burton's amendments to the officer's notebook, where Mr Burton had written "*I disagree with this, as I said we had about 12 packets each*". Officer Brenton states that "*I believe this assertion to be dis-ingenuous and a further example of Mr Burton's dishonesty*". See page 8 of the review letter.

56. He then goes on to say that "*Mr Burton in the presence of his wife and daughter failed to disclose all of the excise goods thus misleading the officer about the true quantity of them*" (page 9 of the review letter).

57. So what Mr Burton and the other appellants purportedly said to the interviewing officers is clearly an important factor in Mr Brenton's decision.

58. Unfortunately, the interview notes were not available to us.

59. One reason for this, Mr Reid submitted, was that these had been taken into account in the Magistrates Court and it was not open to us to look behind the decision of the magistrates and the evidence presented to it when considering the appellant's application for restoration.

60. We disagree with him. We are of course circumscribed by *Jones* as regards the facts which can be considered by this Tribunal on a restoration appeal. But it seems self-evident that this tribunal, as a fact finding tribunal, must be able to consider whether the extracts from the officer's notebook, transcribed into the review letter,

were accurately transcribed; and also whether relevant aspects of the interview, from the officer's notebook had not been included in the review letter.

61. The Gora principle enables us to consider the facts at the time of the hearing. It is Ms Brown's contention that the interview records of the officers were incorrect, and she has put together a virtually contemporaneous statement of her version of events. It seems to us that there are evidential differences between the parties as to what was said, and the nuances ascribed to the questions and their replies, at the interviews, which are very relevant to the decision this tribunal must make.

62. It is our view that the respondents should be entitled to cross-examine Ms Brown on the evidence that she would give about the circumstances of the discovery of this additional tobacco. The Tribunal hearing that can then come to a finding of fact about the circumstances against which it can test the reviewing officers decision.

Selling the Tobacco

63. Furthermore, Mr Brenton states that it was recorded in the interview notes that Mr Burton had told the interviewing officers that he had funded the purchase from an insurance payout of £15,000 (page 4 of the review letter). However, he then goes on (page 10) to conclude that "*I am satisfied on the evidence before me that these goods were held for profit and should therefore not normally be restored. Non-restoration is fair, reasonable and proportionate in these circumstances. I note there has been no claim that the excise goods were to be passed on to others on a "not for profit" reimbursement basis*".

64. Since we do not have the notes of interview, we do not know whether it was put to the appellants that they were proposing to sell the tobacco in order to fund its purchase. This appears to have been an assumption made by Mr Brenton. It is the appellant's assertion that the money for the purchase of the tobacco came from the insurance payout. And it was for personal use and not for on-sale. Whilst we wholly accept that we cannot conclude that the goods were for personal use rather than commercial use, onward sale is clearly relevant to the review decision given that it is one of the policy guidelines to which Mr Brenton alludes at page 7 of his review letter.

65. Mr Brenton says again at page 10 of the letter that "*as you have not claimed the excise goods were to be passed on to others on a "not for profit" reimbursement basis, I conclude that they were held for profit and should therefore not normally be restored. Non-restoration is fair, reasonable and proportionate in these circumstances*".

66. Yet from the evidence that has been presented to this Tribunal, it is the appellants' case that the goods were for personal consumption, save to the extent that they were gifts to their dog sitter and their son. So the evidence before us appears to contradict the assertion made by Mr Brenton.

67. It is worth saying that Mr Brenton states clearly in the review letter that he had reviewed the decision not to restore on the basis that the seizure of the vehicle was legal and that the excise goods involved were commercial (not for own use).

Notwithstanding that, he then took into account the matters mentioned in the foregoing paragraphs.

68. We draw the conclusion, therefore, that despite Mr Reid's assertion that these were matters which could not be taken into account (because they had been taken into account in the Magistrates Court), Mr Brenton thought they were relevant notwithstanding that he was making the assumption that the seizure of the vehicle was legal and the excise goods involved were commercial.

Officer Taylor's analysis

69. As mentioned at paragraph 45(5) above, an analysis seemed to have been carried out by an Officer Taylor into the number of cigarettes that Ms Brown smoked. And we were told that this was evidence used in the Magistrates Court's proceedings. Other than that, we know little about Officer Taylor's analysis. But it seems to us (and this is a view that we consider was treated sympathetically by Mr Reid) that if Ms Brown's evidence about Officer Taylor's analysis is correct, Officer Taylor may well have got something wrong.

70. The extent to which Officer Taylor's analysis can be considered by this Tribunal is something which we believe the Tribunal should consider in more detail. We suspect that it is the respondent's view that it is something which was taken into account in the Magistrates coming to the conclusion that the goods were for commercial use, and thus cannot be considered by the Tribunal in the restoration proceedings. The appellants may think otherwise. We think they should have the opportunity of arguing this, given the ostensible flaws in Officer Taylor's analysis.

Decision

71. As mentioned above, it is not our role to decide whether the review decision was a reasonable one; it is to decide whether or not the appellants have an arguable case of establishing that the review decision is unreasonable.

72. It is our decision that they have such a case and that the respondent's application that the appellants' appeals should be struck out, is accordingly refused.

Directions

73. We therefore direct as follows:

> (1) The appellants and HMRC's representatives are to inform the Tribunal Service, within 28 days of the date of issue of this Decision, of any dates when they cannot attend the Tribunal Centre in Bristol for the hearing during the period from 30 September 2015 to the end of this calendar year.
>
> (2) The Tribunal Service is then to arrange a further hearing with a time estimate of one day, in Bristol, at the earliest possible date.
>
> (3) The hearing should be listed before either this Tribunal or a completely different Tribunal.

Appeal rights

74. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 9 SEPTEMBER 2015