[2015] UKFTT 0640 (TC)

**Appeal numbers: TC/2013/7329; 2014/612 & 627**

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

| | |
|---|---|
| **JOHN PATRICK LEWIS** | **Appellant** |
| **- and -** | |
| **THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS** | **Respondents in the main appeal and Applicant in the First Application** |
| **JOHN PATRICK LEWIS** | **Appellant** |
| **- and -** | |
| **THE DIRECTOR OF BORDER REVENUE (THE HOME OFFICE)** | **Respondents in the main appeal and Applicant in theSecond Application** |

**TRIBUNAL: JUDGE CHARLES HELLIER**
**DAVID EARLE**

**Decision made following a hearing in public in Exeter on 19 April 2015 at which we heard Mr Lewis in person, and Nicholas Bradley, counsel, instructed by HMRC and the Home Office,**
**and the receipt of a Joint Response to Directions given by the tribunal released on 28 May 2015 and a reply from the Appellant.**

## DECISION

1. This is a decision in relation to applications by HMRC and The Director of Border Revenue to strike out three appeals made by Mr Lewis. The appeals relate to the seizure of Mr Lewis's goods and car at Coquelles on 16 March 2013, and concern:

    (1) a decision taken by the Home Office not to restore Mr Lewis's car (the "restoration appeal"),

    (2) an assessment to duty in respect of the goods made by HMRC (the "assessment appeal") , and

    (3) a penalty assessed by HMRC (the "penalty appeal") .

2. On 28 May 2015, following a hearing on 19 April 2015 the Tribunal made directions relating to the applications (the "Directions"). The Directions are annexed to this Decision as an Appendix and should be read with this Decision. They set out the background to the appeals, the facts which were not disputed at the hearing of the application, the relevant statutory provisions and the arguments of the parties. They also contain a number of issues raised by the tribunal to which the Respondents were asked to respond. In compliance with those directions the Respondents provided a joint response to the tribunal; following this Mr Lewis made a reply.

3. The Respondents argue that the appeals should be struck out because (a) the tribunal does not have jurisdiction to consider the grounds of appeal advanced by Mr Lewis, or (b) Mr Lewis has no reasonable prospect of success. These are grounds on which the tribunal is given power by Rule 8 of its rules to strike out an appeal.

**(a) Does the tribunal have jurisdiction to consider the grounds of appeal advanced by Mr Lewis?**

4. The Respondents argue that the effect of paragraph 5 Sch 3 CEMA is that this tribunal must assume that Mr Lewis's goods were lawfully seized because they were dutiable goods imported otherwise than for his own use, and that Mr Lewis's grounds of appeal in relation to all three appeals are that his goods were for his own use. They say that as a result the tribunal does not have power to consider Mr Lewis's grounds of appeal. There are three points to make in relation to this contention.

5. *First*, to the extent that Mr Lewis's grounds of appeal are that the seizure of his goods was unlawful, we agree with the Respondents that the tribunal does not have power to consider those grounds.

6. *Second*, to the extent that the effect of the statutory deeming in paragraph 5 carries with it the conclusion that Mr Lewis did not import the goods for his own use, any argument Mr Lewis may have that the goods in fact were for his own use cannot be considered by this tribunal. We deal with this issue under the heading "Own Use" below, after considering the following issue.

7. *Third*, even if this tribunal cannot entertain any argument that the seizure was lawful or that Mr Lewis's goods were for his own use, if there are other grounds apparent in Mr Lewis's appeal or grounds on which the tribunal considers that the appeal could succeed, the tribunal remains possessed of jurisdiction to hear and determine the appeals by reference to those grounds.

8. In the case of an unrepresented appellant the tribunal should be slow to conclude that all the relevant arguments can be ascertained by a semantic or legalistic view of the pleadings. Rule 2 of the tribunal's Rules requires the tribunal to avoid unnecessary formality and to seek flexibility. That to our minds requires us in the interests of justice and fairness to consider whether the facts as represented by such an appellant give rise to arguments which could be put in a more formal legalistic manner. Further, where the tribunal is aware of a legal argument which such an appellant has not made but which could be relevant to his or her case, it is incumbent on the tribunal to consider and determine that argument.

9. As we noted in para [43] of the Directions, Mr Lewis's complaints were not limited to arguing that the seizures were illegal or that the goods were for his own use. In his notice of appeal and before us Mr Lewis gave his account of the circumstances of his arrival in the UK and surrounding the seizure and related his own personal and financial circumstances. Those issues could be relevant to the reasonableness or otherwise of the decision not to restore his car and to the adjudication of the level of any penalty. The consideration of those issues is not outside the jurisdiction of the tribunal.

10. Further, in relation to the assessment to duty, we note that in *Murray v HMRC* [2015] UKFTT 371 (TC), *Fleming v HMRC* [2015] UKFTT 362 (TC) and *Staniszewski v HMRC* [2015] UKFTT 349 (TC), cases relating to duty assessments, Judge Walters QC declined to strike out appeals and gave the appellant an opportunity to reconsider the grounds of appeal in relation to the "Consumption point" and the "Proportionality point". These were explained by Judge Walters in *Staniszewski* as follows:

> "25 … the Consumption point was that the assessment in *Williams* was bad because it was not compliant with the spirit of the Excise Directive (Directive 2008/118/EC). This was said to be because the Directive makes it clear that excise duty is a duty on consumption and should not be charged where goods have been destroyed or irrevocably lost. The suggested importance of consumption being the justification for excise duty to be levied was said not to have been reflected in the Excise Duty (Holding, Movement and Duty Point) Regulations 2010 under which the assessment in *Williams*, as in this case, was raised. It was submitted in *Williams* that HMRC cannot properly act contrary to the aims of the Directive by assessing for excise duty on goods which they have seized and condemned, or, alternatively, even if duty is chargeable, it ought to be remitted back in the circumstances, and so it was not reasonable to raise an assessment to excise duty in the first place.
>
> 26. The Proportionality point was that the assessment to excise duty was bad in that to raise it in addition to seizing the goods was a disproportionate response and a duplicated remedy for a perceived wrong (*viz:* the evasion of duty)."

11. These are issues of law in relation to the Mr Lewis's assessment appeal which are within the jurisdiction of this tribunal. An issue affecting the assessment may also affect Mr Lewis's liability to a penalty. We understand that appeals are to be heard by the tribunal in which these issues may be ventilated. In these circumstances it would not be right to strike out Mr Lewis's appeal against the assessment or the penalty.

12. As a result we conclude that, whatever the proper conclusion in relation to Own Use, the tribunal has jurisdiction to hear Mr Lewis's appeals and that they should not be struck out on the grounds of lack of jurisdiction.

**(b) No reasonable prospect of success.**

*(i) The assessment appeal and the penalty appeal*

13. Given Judge Walters' refusal to strike out the appeals cited above, we cannot say that Mr Lewis has no prospect of success in his appeals against the assessments and the penalty.

14. We note however that, if the issues on which Judge Walters stayed the cited appeals were determined against Mr Lewis, either as a result of the decision of a higher tribunal or by a decision of the First tier tribunal which bound Mr Lewis or we decided to follow, it appears to us that there would be no grounds of appeal disclosed by Mr Lewis either in his formal grounds of appeal or in his representation to us in relation to the assessment appeal open to Mr Lewis other than the Own Use ground discussed below.

*(ii) the penalty appeal*

15. In relation to the penalty appeal, the only other ground of appeal evident to us from Mr Lewis's representations appears to be that the manner and circumstances of his disclosure of the goods was such that any penalty (assuming that duty is in fact due) should be assessed on the basis that his disclosure was unprompted, that the goods were not concealed and that there was no deliberate dealing in goods on which duty was outstanding.

16. In this context, Mr Lewis asserted that the arrangements for cars at Coquelles were such that the only opportunity given to him to declare that he had the goods was when he was asked by a Officer if he had anything to declare. It seems to us that *depending on the precise circumstances*, a tribunal might, if Mr Lewis's account were proved, conclude that his declaration was unprompted because his declaration caused the Officer to become aware of the goods and was therefore not made when Mr Lewis had any reason to believe that HMRC were otherwise about to discover his possession of the goods. (It would be different of course if it were shown that Mr Lewis had reason to believe that the officer was about to search his car.)

17. In this context the nature of the arrangements at Coquelles enabling a person to declare goods may be significant. Our experience of entry points into the UK has been of green and red channels and we have understood that by offering two channels HMRC/Border Force ask whether the entrant has anything to declare. By walking into the red channel we have understood that the entrant answers that

question “yes” and awaits the question “what?”. If the arrangements at Coquelles are such that the only place where that question is asked and may be answered is at the passport barrier, then we find it difficult to see a difference between the person who goes into a red channel at the kind of entry point we are used to and the person who answers “yes” at the passport barrier. Unless a person entering the red channel or saying “yes” to the question at the passport barrier had reason to believe that HMRC were, otherwise than as a result of his or her declaration (by conduct or words), already about to discover the goods on which duty should be paid, it seems to us to be arguable that that the declaration was unprompted.

18. We also had no evidence as to whether the person who asked Mr Lewis was in fact an officer of HMRC, and no evidence from HMRC/The Border Force as to the detail of the arrangements at Coquelles.

19. In their response to the Directions HMRC make a number of assertions about the circumstances of the seizure, and it may be that a tribunal would regard those circumstances, if proved, as indicating that the goods were concealed or that any disclosure was prompted. But we did not hear the evidence of the officers involved, nor did we see a plan or photograph of the area, or a photographic evidence of the alleged concealment of the goods, or hear from any of those travelling with Mr Lewis. We cannot say that merely because HMRC and The Director of Border Revenue make assertions as to what occurred that Mr Lewis would have no reasonable prospect of proving that their account was wrong.

20. Accordingly for this reason too we would not strike out Mr Lewis’s appeal in relation to the penalty appeal.

*(iii) the restoration appeal.*

21. In the Directions we suggested six issues which arose from Mr Lewis’s representations, and which, if proved by Mr Lewis, might potentially be relevant to the reasonableness or otherwise of the decision not to restore Mr Lewis’s car. In their response HMRC and The Director of Border Revenue addressed these issues. These issues were the following.

(1) If Mr Lewis declared the goods openly and without prompting.

The Respondents say:

(a) that it was clear from the officer’s notes that this was not the case.

This is an issue of fact on which we heard no evidence from the officers. We could not conclude that Mr Lewis had no reasonable prospect of showing that the Respondents’ assertion was wrong; and

(b) that whether a disclosure is “prompted” is an objective test being not what the person believed but what the facts gave him reason to believe.

We accept that for the purposes of the penalty provisions that this is correct, but in the context of the characterisation of the circumstances of seizure for the purpose of testing the reasonableness of the decision the strict approach to “prompted” is not relevant – the point is that Mr Lewis could assert that he made his declaration as soon as he could or without having reasons for believing that the officer was or would be of a different view; and that such could be a relevant consideration.

(2) If Mr Lewis truly thought that the goods were not dutiable.

The Respondents say that this is another way of looking at the Own Use question. We disagree: there is a difference between whether something is true and whether a person believes it is true. Even if the goods are, as the Respondents claim, deemed not to have been for own use, that does not carry with it the consequence that the appellant *thought* that they were dutiable. The appellant's mindset is about culpability rather than chargeability. That is a matter for the tribunal hearing the evidence.

(3) If the actions of the border officers were less than impartial,

The Respondents say that this would be a serious allegation and the appellant had an opportunity to take up a complaint with the Border Force. It does not seem to us that the ability to take up such a complaint with another body is a reason for saying that the complaint could not be established by evidence before the tribunal. Mr Lewis asserts that his discussion with the officer was heated. If the asserted record of the events which the Respondents say suggests that the goods were concealed or that Mr Lewis gave inconsistent accounts was inaccurate as a result of proven animosity or lack of impartiality in the dealings with Mr Lewis, the tribunal might find that the picture obtained of the seizure by the person deciding on restoration would have been relevantly different.

(4) If his own financial and personal circumstances were such as made the loss of the car burdensome; in particular if he had to borrow money from his family to provide a replacement car to transport his sick wife (rather than already having a second car as the decision letter might be read as suggesting).

The Respondents say that only exceptional hardship would be a reason to restore a vehicle, and cite Edge LJ in *Lindsay*, " …it is acceptable and proportionate that, subject to exceptional individual considerations, …the vehicles of those who smuggle for profit...should be seized as a matter of policy". We note that Edge LJ makes clear that individual circumstances may be relevant. Whether the circumstances of Mr Lewis were exceptional is not a matter we could decide without further evidence.

(5) If Mr Lewis could show that the goods or some of them were destined for others on a not for profit basis so that the terms of the Home Office policy quoted above relating to the restoration of cars for a fee might apply.

The Respondents say that this position cannot be established. In this submission they appear to us to be concerned, not with deemed Own Use, but with the records of the statements made by Mr Lewis as they assert are recorded in the officers' notebooks. There was no basis on which we could say that Mr Lewis had no reasonable prospect of showing that any such records were misleading or false. We cannot therefore say that Mr Lewis has no reasonable prospect of showing that this policy was applicable and that it was unreasonable not to have regard to it.

(6) If the addition of a duty assessment and a financial penalty to the penalty of losing his car made the effect of non-restoration more than plainly harsh.

> The Respondents say that non restoration and the imposition of a penalty is reasonable. The question of the proportionality of the combination of the assessment and non restoration was one of Judge Walters' reasons for refusing to strike out the assessment appeals in the cases cited earlier. It may be that the decision not to restore was made before and in ignorance of the decision to assess Mr Lewis, but witout more detailed evidence we could not say that Mr Lewis has no reasonable prospect of succeeding on this ground.

22. In paragraph [15] of the Directions we suggested that a relevant consideration in relation to any argument made by the Respondents that by failing to seek condemnation proceedings Mr Lewis had admitted wrongdoing could be that Mr Lewis had been told that such proceedings exposed him to potential costs of £2,500. The Respondents disagree. They say (i) Mr Lewis only found out from the internet at a later time about the costs, and (ii) suggest that such a conclusion was contrary to the view expressed by Richards J in *Dawkin v HMRC*. In reply Mr Lewis says that he obtained this information from Plymouth Border control when he rang to ask about his car.

23. It seems to us quite clear that the risk of cost in litigation is a sensible commercial reason for not undertaking it. It is widely accepted that litigation is an expensive and sometimes uncertain activity. Many cases are settled because of such concerns. A person may act wholly reasonably in deciding not to pursue a claim or not to defend a claim if he or she considers that the risk of costs is too great to bear. There is a difference between accepting a financial loss by not pursing or defending a claim, and accepting guilt. We do not consider that the failure to bring condemnation proceedings can be taken as indicative of acceptance of wrongdoing.

24. Given that the circumstances in which Mr Lewis failed to bring proceedings are disputed, we cannot say that Mr Lewis has no reasonable prospect of rebutting an argument that he admitted wrongdoing because he failed to bring such proceedings.

25. Whether or not items should be restored is a matter of discretion. Where the discretion is exercised reasonably this tribunal cannot interfere with it even if it would have exercised the discretion differently. In order to succeed in challenging the decision not to restore his car, Mr Lewis would have to show that the officer making the decision took into account irrelevant matters, failed to take into account relevant matters, made a relevant mistake of law or reached a decision which no reasonable officer could have made.

26. Taking all these considerations together, whilst we cannot say that Mr Lewis has a strong case or is likely to succeed, we cannot say that he has no reasonable prospect of showing that the decision was unreasonable.

27. On these grounds we dismiss the application to strike out the restoration appeal and allow Mr Lewis's appeal to proceed.

**Own Use**

28. In our Directions we raised the issue of whether or not Mr Lewis was by virtue of paragraph 5 Sch 3 deemed to have imported the goods otherwise than

for his own use. At paragraph [45] we suggested that Mr Lewis's goods might have been deemed to have been legally seized because they were mixed or packed with goods belonging to Mr Knight, and not because they were goods liable to duty.

29. We expanded that argument in [51] to [57] of the Directions and sought the Respondents' comments on the argument.

30. The Respondents say that it would be an incorrect statement of fact and law to say that the goods were seized as they were mixed or packed with those of Mr Knight. They say that the statement does not accord with the seizing officer's reasons for seizure.

31. The Respondents say that it cannot be said that the goods were seized for no particular reason. There must be some reason for the seizure, and they must be deemed forfeit for that reason.

32. We agree that if goods are legally forfeit the legality of the seizure carries with it "any fact that forms part of the conclusion". The question however is what fact is relevant? Goods may be legally seized for a number of different reasons: they may be prohibited weapons, illegal drugs, goods used in the carriage of dutiable forfeitable goods, goods mixed or packed with forfeitable goods, or goods on which duty should have been paid but has not been. Which of these factors is to be taken as a fact which is a necessary component of the legality of their forfeiture?

33. There is nothing to our minds in the quotations from *Jones* in the Respondents' reply which answers this question. In that case there was no other reason suggested for the seizure by the officer or in the circumstances of the seizure.

34. Contrary to the remarks in [34] and [35] of the Directions, (and perhaps the logic of paragraph [26] in *Race*) the Respondents suggest that it is the opinion of the officer making the seizure of the reasons for her seizing the goods which is deemed to be part of the conclusion that the goods were legally seized. The alternative, set out in those paragraphs of the Directions, being that it is to be determined objectively from the circumstances of the seizure. The two bases may have different consequences in some cases: if tobacco containers were be seized because the officer considered they contained prohibited drugs, then, if paragraph 5 applied and the Respondents are correct, duty might not be collectable on the tobacco.

35. However, even if the Respondents are correct, we did not have any evidence from the seizing officer. The officer did not give evidence and was not cross examined. We cannot say what the seizing officer's reasons were. Further, Mr Lewis's account of the seizure indicates some friction between him and the officer which a tribunal might find has a bearing on the decision to make the seizure or its reasons. We cannot assume that there is no reasonable prospect of showing that the reasons for the seizure were not as stated by the officer or by the Respondents.

36. As a result we cannot conclude that the tribunal would have to assume that the goods were not for Mr Lewis's own use.

**Conclusion**

37. The appeals are not struck out.

38. Finally we should note that many of our reasons derive from the fact that the strike out application was not a hearing at which we heard evidence. In any hearing of the appeals the nature and quality of the evidence of Mr Lewis, those who travelled with him and the officers involved may be very significant.

**Rights of Appeal**

39. 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

**CHARLES HELLIER**

**TRIBUNAL JUDGE**
**RELEASE DATE:**



**Appendix: The Directions Issued on 28 May 2015**

1. These directions concern three appeals arising from the seizure of goods and Mr Lewis's car at Coquelles on 16 March 2013 and applications by the Home Office and HMRC that they should be struck out. The appeals concern:

(1) a decision taken by the Home Office not to restore Mr Lewis's car,

(2) an assessment to duty in respect of the goods made by HMRC, and

(3) a penalty assessed by HMRC.

2. The tribunal had in 2014 considered whether the appeals should be consolidated but, on representations for HMRC and the Home Office, they had

not been consolidated but had been set down for hearing on the same day. There is considerable overlap between the facts and the matters of law which are relevant to both appeals, and it is clear that they should be dealt with together.

3. At the start of the hearing Mr Bradley was present to represent the Home Office but no one was present to represent HMRC. We were very grateful for Mr Bradley's actions in obtaining instructions from HMRC to act for them at the hearing, and in putting HMRC's case without having had time to prepare for it. Mr Bradley's valour meant that there were aspects of the argument for which he was not prepared and in part these Directions are intended to permit a considered response to issues which arose during the hearing.

2. The hearing was set to consider the applications to strike out the appeals, but it is first necessary to say something about the facts, the relevant law and the separate appeals.

**The Facts**

3. The detail of the facts and the evidence will be a matter for any tribunal which hears the appeals if they are not struck out.

4. It was plain from Mr Lewis's evidence to us that there were areas in which Mr Lewis disputed the factual basis assumed by both respondents. Mr Lewis showed us a statement from his daughter which supported his account of some of the events. If the appeals proceed to a hearing the tribunal may need to consider the evidence of the officers and the evidence of Mr Lewis, his daughter and whomever else he wishes to bring to the tribunal hearing to offer evidence of relevant matters in order to resolve any differences which are relevant to the tribunal's decision.

5. The statements of fact made below are those which were undisputed. Where we say we were told something or recount something in a document we do not thereby mean to accept or refute what was said.

6. Mr Lewis was driving his car through the checkpoint at Coquelles on 16 March 2013. He was accompanied by his daughter and Barry Knight, a colleague. He told us that there was not a particular channel through which those wishing to declare items liable to duty could proceed. As he drove through Mr Lewis was asked whether he had anything to declare. He made a declaration and was asked to pull to one side. His car was searched and a quantity of cigarettes, tobacco and cigarillos was found. Mr Lewis told us it was not concealed: whether or not it was would be a matter for the tribunal hearing the appeal.

7. Mr Lewis and Mr Knight were interviewed. Mr Lewis refused to sign the account of the interview written by the officer who interviewed him because he said it was inaccurate. It appears that Mr Knight said that some of the tobacco was his.

8. Mr Lewis told us that he had travelled abroad for about 20 years in connection with his work, but his circumstances changed and this trip would be his last for some time. He therefore bought a larger quantity than usual for use by four smoking family members. Mr Lewis did not tell us whether or not these family members would reimburse him for the cost incurred.

9. HMRC's application states that the officers formed the opinion that the cigarettes and the tobacco had been imported for a commercial purpose (we take this to mean both the tobacco which Mr Knight said he had purchased and the items belonging to Mr Lewis). They seized them and Mr Lewis's car.

10. That application says that Mr Lewis was given a Notice 1 and a Notice 12A which explained what actions could be taken if items were seized.

11. Mr Lewis, his daughter and Mr Knight had then to find their way back to Devon. Mr Lewis says that the cost of their transport from Dover was some £450.

12. Neither Mr Knight nor Mr Lewis appear to have made any application for the legality of the seizure to be determined by the Magistrates.

13. Mr Lewis told us that he had found out through the internet that Customs were warning people that they would have to put up £2,500 in costs if they went to the Magistrates. He could not afford that risk. A tribunal might consider this relevant in relation to an argument that by failing to seek determination by the Magistrates Mr Lewis had admitted wrongdoing.

14. It appears that Mr Lewis made a request for the restoration of his car. In a letter of 9 July 2013 the Home Office refused that request.

15. That letter summarises the Home Office policy for the restoration of seized private vehicles. The writer says that under that policy such vehicles may be restored subject to conditions (if any) e.g. on payment of a fee if, inter alia,

> "…the excise goods were destined for a supply on a "not for profit basis", for example for reimbursement of the cost of purchase not including any contribution to the cost of the journey."

16. The officer then says that he has considered the request and the Home Office policy and, although he did not consider the legality of the seizure (by which we understand him to mean that he assumed that the car was legally seized), looked at all the circumstances (although save as quoted below no particular circumstances are specified). He concludes:

> "I conclude that there are no exceptional circumstances that would justify a departure from the Commissioner's policy as checks indicate that there is another vehicle registered at your address".

17. Mr Lewis told us that some time after the seizure he had family help to buy a car to transport his wife, who was ill, to attend her regular hospital appointments.

18. One of Mr Lewis's notices of appeal says that he has a low income (a state pension). There is no indication that Mr Lewis's financial circumstances or the state of his wife's health were considered by the officer who refused restoration.

19. Mr Lewis asked for a review. The review was not conducted within the statutory time limit. The Home Office wrote to Mr Lewis on 1 October 2013 saying that "the original decision remains in effect".

20. On 26 April HMRC issued a duty assessment to Mr Lewis for £2,118, and on 8 July 2013 a penalty notice for £423. In the determination of the penalty HMRC

said that Mr Lewis's actions were not considered deliberate so that the maximum penalty would be 30% of the duty, and that it would be further reduced to 20%, but no further because Mr Lewis's behaviour was considered to have been prompted.

**The Relevant Law**

*(a) In relation to restoration and seizure*

21. Section 49 Customs and Excise Management Act 1979 ("CEMA") provides that if goods which are liable to excise duty are imported into the UK without payment of duty they shall be liable to forfeiture. Section 139 permits anything liable to forfeiture to be seized by an officer of the Respondents.

22. Section 141 (1) of that Act provides:

> "Without prejudice to any other provision of the Customs and Excise Acts 1979 were any thing has become liable to forfeiture under the Customs and Excise acts --
>
> (a) any ... vehicle ... or other thing whatsoever which has been used for the carriage handling, deposit or concealment of the thing so liable to forfeiture ...; and
>
> (b) any other thing <u>mixed, packed or found</u> with the thing so liable,[our emphasis]"
>
> is liable to forfeiture

23. If the Respondent's officers seize anything, Schedule 3 CEMA provides a means for the owner to require the legality of the seizure to be adjudicated by a Court in the UK (usually the Magistrates' Court) . Paragraphs 3 and 4 of that Schedule set out the procedure for instigating that process:

> "3. Any person claiming that anything seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of the date of the seizure, give notice of his claim in writing to the Commissioners at any office of customs and excise."

24. Paragraph 5 of the schedule provides that if the owner does not give such notice, "the thing in question shall be deemed to have been duly condemned as forfeited." We discuss the effect of this statutory deeming later.

25. Section 152 CEMA gives the Respondent a power to restore, subject to any conditions it thinks proper, things which have been forfeited or seized.

26. Section 14 Finance Act 1994 requires the Respondent to conduct a review of any decision in relation to that restoration power if the owner so requires.

27. Section 15 provides:

> "15. Review procedure

(1) Where the Commissioners are required in accordance with this Chapter to review any decision, it shall be their duty to do so and they may, on that review, either–

(a) confirm the decision; or

(b) withdraw or vary the decision and take such further steps (if any) in consequence of the withdrawal or variation as they may consider appropriate.

(2) Where–

(a) it is the duty of the Commissioners in pursuance of a requirement by any person under section 14 above to review any decision; and

(b) they do not, within the period of forty-five days beginning with the day on which the review was required, give notice to that person of their determination on the review,

they shall be assumed for the purposes of this Chapter to have confirmed the decision.

Section 16 of that Act permits the owner to appeal to this tribunal against any decision made (or deemed to have been made) on that review:

16 Appeals to a tribunal

(1) Subject to the following provisions of this section, an appeal shall lie to an appeal tribunal with respect to any of the following decisions, that is to say–

(a) any decision by the Commissioners on a review under section 15 above (including a deemed confirmation under subsection (2) of that section); and …

…

(4) In relation to any decision as to an ancillary matter [an expression defined to include an appeal of this nature] , or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say–

(a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;

(b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a further review of the original decision; and

(c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a further review, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.

28. It will be seen that section 16(4) FA 1994 limits this tribunal's powers and duties on such an appeal to a consideration of whether or not the Respondent's decision was reasonable, and also limits the tribunal's powers, if it decides that the decision was not reasonable, to direct that the decision be remade, or remade subject to particular directions.

*The effect of paragraph 5 Schedule 3.*

29. If no claim is made that something is not liable to forfeiture, paragraph 5 Schedule 3 deems that thing to have been duly forfeited.

30. Mr Lewis made no claim disputing forfeiture.

31. Thus, because no claim disputing forfeiture was made, the vehicle is to be treated as duly forfeited. We understand that no claim was made in relation to the tobacco products and concluded that they too must be treated as duly forfeited.

32. The deeming of paragraph 5 carries with it such deemed factual findings as would have been necessary in the circumstances to find that the relevant items were duly forfeited. In the case of the car that means that it must be treated as having carried tobacco products on which duty should have been paid but was not. We discuss below the situation in relation to the tobacco.

33. It is clear that where the factual evidence indicates that the only reason for the seizure could have been that the item seized was liable to duty which had not been paid, the effect of the deeming is that it must be assumed that such is the case. By contrast, in the case of the car, the statutory deeming means that it is duly forfeit, and because on the actual facts it was not purchased outside the UK the only way it can have been duly forfeit is because it was carrying goods on which duty had not been paid – the actual facts mean that it cannot be treated as if it was a dutiable item on which duty had not been paid.

*(b) Penalties*

34. Schedule 41 Finance Act 2008 (a provision which neither we nor Mr Bradley had before us at the time of the hearing provides for penalties) paragraphs 4, 5, 12, 13 and 14 provide:

*Handling goods subject to unpaid excise duty*

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

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

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

(2) In sub-paragraph (1)–

- "excise duty point" has the meaning given by section 1 of F(No.2)A 1992, and
- "goods" has the meaning given by section 1(1) of CEMA 1979

*Degrees of culpability*

5 (1) A failure by P to comply with a relevant obligation is–

(a) "deliberate and concealed" if the failure is deliberate and P makes arrangements to conceal the situation giving rise to the obligation, and

(b) "deliberate but not concealed" if the failure is deliberate but P does not make arrangements to conceal the situation giving rise to the obligation.

(2) [Irrelevant]

(3) The doing by P of an act which enables HMRC to assess an amount of duty as due from P under a relevant excise provision is–

(a) "deliberate and concealed" if it is done deliberately and P makes arrangements to conceal it, and

(b) "deliberate but not concealed" if it is done deliberately but P does not make arrangements to conceal it.

(4) P´s acquiring possession of, or being concerned in dealing with, goods on which a payment of duty is outstanding and has not been deferred is–

(a) "deliberate and concealed" if it is done deliberately and P makes arrangements to conceal it, and

(b) "deliberate but not concealed" if it is done deliberately but P does not make arrangements to conceal it.

*Reductions for disclosure*

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

(2) P discloses a relevant act or failure by–

(a) telling HMRC about it,

(b) giving HMRC reasonable help in quantifying the tax unpaid by reason of it, and

(c) allowing HMRC access to records for the purpose of checking how much tax is so unpaid.

(3) Disclosure of a relevant act or failure–

(a) is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the relevant act or failure, and

(b) otherwise, is "prompted".

(4) In relation to disclosure "quality" includes timing, nature and extent.

13 (1) Where a person who would otherwise be liable to a 100% penalty has made an unprompted disclosure, HMRC shall reduce the 100% to a percentage, not below 30%, which reflects the quality of the disclosure.

(2) …

(5) Where a person who would otherwise be liable to a 30% penalty has made an unprompted disclosure, HMRC shall reduce the 30%–

> (a) if the penalty is under paragraph 1 and HMRC become aware of the failure less than 12 months after the time when tax first becomes unpaid by reason of the failure, to a percentage (which may be 0%), or
>
> (b) in any other case, to a percentage not below 10%,

which reflects the quality of the disclosure.

(6) Where a person who would otherwise be liable to a 30% penalty has made a prompted disclosure, HMRC shall reduce the 30% –

> (a) if the penalty is under paragraph 1 and HMRC become aware of the failure less than 12 months after the time when tax first becomes unpaid by reason of the failure, to a percentage not below 10%, or
>
> (b) in any other case, to a percentage not below 20%,

which reflects the quality of the disclosure.

*Special reduction*

14 (1) If HMRC think it right because of special circumstances, they may reduce a penalty under any of paragraphs 1 to 4.

(2) In sub-paragraph (1) "special circumstances" does not include–

> (a) ability to pay, or
>
> (b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to–

> (a) staying a penalty, and
>
> (b) agreeing a compromise in relation to proceedings for a penalty.

**The Appeals and the Applications**

*(a) restoration*

35. Mr Lewis appeals against the decision not to restore his car. In this appeal the function of the tribunal would be to determine whether the deemed decision which confirmed the decision of 9 July 2013 was unreasonable. It would be unreasonable if it took into account irrelevant matters, failed to take into account relevant matters, or otherwise was a decision which no reasonable officer could

have made (see eg *HMRC v Mark Mills* [2007] EWHC 2241 (Ch) per Mann J at [4])

36. An exercise to determine whether or not a decision is "unreasonable" is usually performed by looking at the evidence before the decision maker. But the tribunal is a fact finding tribunal, and in *Gora and Others v Customs and 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 it may find that a decision is "unreasonable" even if the officer had been, by reference to what was before him, perfectly reasonable in all senses.

37. Particularly in the case of an unrepresented appellant, this means that the tribunal should be slow to assume that the relevant facts can be ascertained from a legalistic or semantic review of the pleadings

38. In his grounds of appeal Mr Lewis says "I declared my goods openly and they were not "hidden". The seizure of my goods and vehicle were I believe illegal. It is my right to purchase goods for my own use in an EU country and pay their taxes and import my goods into the UK. The seizure of my vehicle was nothing to do with the importation of my goods and was done to maximise the stress to myself and family."

39. Mr Bradley says that the essence of this ground of appeal is that Mr Lewis disputes the legality of the seizure of the goods and the car. That ground he says is not open to Mr Lewis because of the statutory deeming. The appeal should therefore be struck out.

40. We agree with Mr Bradley that to the extent that Mr Lewis disputes that the seizure was legal, Mr Lewis has no case. The statutory deeming in para 5 Sch 3 is final. Mr Lewis cannot argue and the tribunal cannot countenance an argument that the seizure was illegal. That part of his argument must be struck out.

41. But, listening to Mr Lewis, his complaint also related to the circumstance of the seizure and his own circumstances. These to our minds are matters which are potentially relevant to a decision whether or not, or on what conditions, to restore his car. It seems to us that:

    a. if Mr Lewis declared the goods openly and without prompting,

    b. if he truly thought that they were not dutiable,

    c. if the actions of the border officers were less than impartial,

    d. if his own financial and personal circumstances were such as made the loss of the car burdensome; in particular if he had to borrow money from his family to provide a replacement car to transport his sick wife (rather than already having a second car as the decision letter might be read as suggesting),

    e. if he could show that the goods or some of them were destined for others on a not for profit basis so that the terms of the Home Office policy quoted above relating to the restoration of cars for a fee might apply, or

f. if the addition of a duty assessment and a financial penalty to the penalty of losing his car made the effect of non-restoration more than plainly harsh,

those factors would be relevant considerations in deciding whether, or on what terms, to restore the car.

42. It seems to us therefore that whilst Mr Lewis has no hope of success in relation to any argument that the goods or the car were illegally seized, there may be grounds for adducing facts which could arguably mean that the tribunal might find that the decision not to restore the car was not reasonable.

43. There is also an argument, developed in the following section that Mr Lewis's goods may have been liable to forfeiture only because they were mixed packed or found with Mr Knight's goods. In other words that it was the actions of a third party which caused Mr Lewis's car to be liable to forfeiture, and that accordingly Mr Lewis may be able to argue that whilst his car and goods were properly forfeit his goods were, nevertheless imported for his own use and not dutiable. If that argument is right, then the tribunal may wish to consider whether that would be a relevant circumstance in relation to a decision on restoration. It may of course turn on the facts. We have made directions in relation to this argument below.

*(b) the assessment to duty of £2,118.*

44. Mr Lewis appeals against this assessment. In his grounds of appeal he says: "I was doing nothing wrong. I declared my goods at Coquelles. I dispute the facts that the customs have made concerning my declaration of the goods that I was importing for my own use. I used my own car and money for the goods which were not concealed." He goes on to speak of the seizure as being vindictive and of his personal circumstances.

45. If the goods were liable to duty then much of this is irrelevant to the assessment. Duty is payable and may be assessed even if goods are declared and not concealed, even if the seizure was vindictive, even if paying the duty is beyond the means of the taxpayer. The question is simply: were the goods liable to duty?

46. Mr Lewis relied on EC Directive 2008/118 as authority for the proposition that goods imported from the EU were not liable to duty. Article 32 of that Directive provides:

> 1. Excise duty on excise goods acquired by a private individual for his own use, and transported from one Member State to another by him, shall be charged only in the Member State in which the excise goods are acquired.
>
> 2. To determine whether the excise goods referred to in paragraph 1 are intended for the own use of a private individual, Member States shall take account at least of the following:
>
> (a) the commercial status of the holder of the excise goods and his reasons for holding them;

(b) the place where the excise goods are located or, if appropriate, the mode of transport used;

(c) any document relating to the excise goods;

(d) the nature of the excise goods;

(e) the quantity of the excise goods.

47. Thus the question of whether the goods were liable to duty turns on whether the goods were imported for the personal use of Mr Lewis for the purposes of para 1 Article 32. If they were not, duty is exigible; if they were, it may not be. Thus this question is potentially relevant to the assessment.

48. But Mr Bradley says that the effect of para 5 sch3 CEMA is to deem the goods not to have been imported for personal use. He relies on *HMRC v Jones* [2011 EWCA Civ 824 and on *EBT*. As a result he says that Article 32 does not apply.

49. If condemnation proceedings are taken in the Magistrates' Court, and the magistrates find goods forfeit they will make prior factual findings which permit the conclusion that the goods are forfeit under a particular provision. That finding could be that they were not- for–own-use and dutiable, and thus forfeit under section 49, or that they were used for the carriage of forfeitable goods, or were mixed, packed or found with goods liable to forfeiture, and thus forfeit under section 141(1). The factual finding necessary for the conclusion that the particular section of CEMA applied would bind this tribunal. It would be an abuse of process for the tribunal to permit the issue to be reopened.

50. But para 5 merely deems the goods to have been legally forfeit; it does not deem them to have been forfeit for any particular reason.

51. Where para 5 applies the background facts may mean that there is only one way in which the goods could have been forfeit; if so the tribunal will be bound to work on the basis that the facts necessary for that one way have been proved. Thus a car driven to France and brought back with dutiable goods which is deemed by para 5 to be legally forfeit, must be forfeit because it carried forfeitable goods within section 141(1)(a), not because the car itself was liable to duty which had not been paid on import, and that result will be binding on the tribunal. Para 5 will deem the seizure of the car to have been legal, and the tribunal will be bound by a conclusion that it was used for the carriage of forfeitable goods. But the necessary prior condition for the deeming effect of para 4 must depend on the circumstances of the seizure

52. In Mr Lewis's case the car carried goods belonging to Mr Knight as well as goods belonging to Mr Lewis. The papers did not relate whether Mr Knight had sought to challenge the seizure of his goods in the magistrates' court. Thus it may be the case either (a) that Mr Knight had actually imported the goods for a commercial purpose, or (b) that the Magistrates had decided he had, or (c) that he had not

sought to go to the Magistrates' court and para 5 deemed his goods to have been legally forfeit.

53. Section 141(1)(b), quoted above, provides that goods which are "mixed, packed or found" with the thing liable to forfeiture are also liable to forfeiture.

54. If Mr Knight's goods were, or are to be treated as having been, liable to forfeiture then it may be that Mr Lewis's goods were packed with or found with them. If that is the case then Mr Lewis's goods might have been liable to forfeiture because of their association with Mr Knight's goods. Thus Mr Lewis's goods could have been liable to seizure for one (or both) of two possible reasons: (i) that they were themselves imported for a commercial purpose, or (ii) that they were packed with Mr Knight's goods.

55. It seemed to us that in these circumstances it could not be said (unless the goods were not in fact packed or found together) that the deeming of para 5 required that Mr Lewis's goods were duly forfeit because they were imported for a commercial purpose – ie not for Mr Lewis's own use. If that was right then the goods might not be dutiable and Mr Lewis would have a valid ground to dispute the assessment.

56. Mr Bradley, having this question sprung on him at very short notice, did not feel able fully to respond. We have therefore made the directions at the end of this document.

*(c) the penalty*

57. Mr Lewis appeals against the penalty. His formal grounds of appeal are the same as those for the appeal against the assessment. One of those grounds, and one which was emphasised by Mr Lewis before us, was that he did not conceal the goods and that he had volunteered that he had goods to declare.

58. As we have said, we did not have Sch 41 before us at the hearing, but with the advantage of having it now, it seems to us that Mr Lewis may have an argument that his disclosure was "unprompted" and that as a result the penalty percentage could be reduced to 10%. If that was right then the appeal should not be struck out.

59. Not having the detail of Sch 41 available Mr Bradley was unable to respond to the tribunal's questions on this issue. We have therefore made the directions set out below.

**DIRECTIONS**

60. For the reasons above, we direct as follows:

    A. Within 21 days of the release of these directions:

        a. HMRC write to the tribunal with a copy to Mr Lewis:

            i. setting out their views and arguments on the issue raised in relation to the assessment at para 51-57 above; and

ii. setting out their views and argument in relation to the issue raised in relation to the penalty at para 60 above; and

b. the Home Office write to the tribunal with a copy to Mr Lewis setting out their views and arguments in relation to the issue raised in relation to restoration at para 51-57 above**;**

B. Mr Lewis may write to the tribunal (with a copy to HMRC) setting out any response he may have to the replies of HMRC and the Home Office: if he does so within 21 days of his receipt of those responses the tribunal will take his response into consideration in reaching a final decision on the applications. If he does not so write the tribunal will make its decision on the applications nevertheless.