TC05194

Appeal number: TC/2015/01804

CUSTOMS DUTY – EXCISE DUTY – IMPORT VAT – penalty imposed on basis that Appellant travelled from a third country with duty free goods – Appellant departed from Euroairport ticketed from Basel – whether HMRC met burden of proof – if not, whether non-EU location of Euroairport and/or duty free status of goods deemed to be facts – whether Appellant dishonest – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

INGE VAN DRIESSCHE **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON
MR JULIAN STAFFORD

Sitting in public at the Tribunal Service, Ashford, Kent on 14 April 2016

The Appellant in person

Mr Ben Lloyd, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction and summary

1. On 9 February 2014, Mrs Van Driessche travelled from Euroairport to Gatwick. Euroairport is located in France, near the city of Mulhouse. It is also very close to Basel in Switzerland. Flights to and from Euroairport are either ticketed "BSL" for Basel or "MHL" for Mulhouse. Mrs Van Driessche's ticket had the code BSL.

2. Mrs Van Driessche was stopped at Gatwick and the cigarettes and tobacco in her luggage were seized, on the basis that:

(1) she had travelled from Basel in Switzerland, which was outside the EU. She was therefore subject to the import limitations which apply to those who arrive in the UK from a non-EU location ("a third country"); and

(2) the goods had been purchased free of duty and VAT ("duty free").

3. On 9 March 2014 Mrs Van Driessche repeated the journey and the tobacco and wine she was carrying were seized.

4. Mrs Van Driessche asked for the seized goods to be restored, but did not challenge the seizures in the magistrate's court. HMRC imposed penalties totalling £2,181 on Mrs Van Driessche. The Penalty Notice stated that penalties were being charged because she had dishonestly imported goods on 9 February 2014. However, the quantum of the penalties also took into account the tobacco imported on 9 March 2014. We address that briefly at §56.

5. Mrs Van Driessche appealed to the Tribunal against the penalties. HMRC failed to respond to her request for restoration, and there was no appeal before us in relation to that issue. Her grounds of appeal were that:

(1) Euroairport was inside the EU;

(2) she had purchased the goods at a price which included duty and VAT ("duty paid"); and

(3) she had not acted dishonestly.

6. The burden of proof was on HMRC. We found that HMRC had not met the burden of proving that Mrs Van Driessche had travelled from a third country, and had failed to make a positive case in relation to the duty status of the goods.

7. Although HMRC did not submit that they should be *deemed* to have met their burden of proof in relation to Euroairport and/or the duty status of the goods, we thought it right to consider whether the position for penalty appeals was the same as that for restoration cases, where certain facts are deemed to be true and do not need to be proved by HMRC. We set out our analysis at §140ff. In our view, deeming is unlikely to apply to penalty appeals. However, we accepted the alternative view was arguable.

8. If deeming did apply to penalty appeals, we found that it was not in any event permissible to deem part of Euroairport to be outside the EU, because as a matter of fact and law it is entirely within the EU. However, it would be possible to deem the goods to have been purchased duty free.

9. We did not need to come to a firm conclusion on whether or not deeming applied to penalty cases generally, because it was absolutely clear to us that Mrs Van Driessche had not acted dishonestly, for the reasons given at §241ff. As a result, her appeal is **ALLOWED** and the penalties cancelled.

The evidence

10. HMRC provided the Tribunal and Mrs Van Driessche with a bundle of documents in advance of the hearing. This included the correspondence between the parties and between the parties and the Tribunal. It also contained:

(1) extracts from the Notebooks of Officer Jenny Trinick and Officer Richard Lines, the Border Force Officers who seized Mrs Van Driessche's goods on 9 February 2014 and 9 March 2014 respectively;

(2) Seizure Information Notices with the same dates;

(3) receipts for purchases at Euroairport on 9 February 2014;

(4) various photographs provided by Mrs Van Driessche; two credit card statements and emails between Mrs Van Driessche and a shop in Belgium; and

(5) copies of Mrs Van Driessche's boarding passes for 6 February and 9 February 2014.

11. At the beginning of the hearing, Mr Lloyd provided a copy of the duty calculation which underpinned the penalties ("the Duty Calculation"). Mrs Van Driessche did not object to its late inclusion in evidence and the Tribunal accepted it.

12. Mrs Van Driessche gave oral evidence-in-chief, was cross-examined by Mr Lloyd and answered questions from the Tribunal. Officers Trinick and Lines both provided witness statements, gave oral evidence-in chief, were cross-examined by Mrs Van Driessche and answered questions from the Tribunal.

13. We found Mrs Van Driessche and Officer Lines to be credible witnesses. Officer Trinick relied heavily on her Officer's Notebook and was unable to remember some of the details. We found that her Notebook was not a complete record of what had occurred, see §222 ; she also changed her evidence on one minor point, see §227-§228. Where there was a conflict between Mrs Van Driessche's evidence and that of Officer Trinick we preferred that of Mrs Van Driessche, as we explain in more detail at §233.

14. From the evidence before us we find the following facts, which are not in dispute. We also identify a number of points about which the facts are disputed, and we deal with those later in our decision.

The facts not in dispute

Background

15. Mrs Van Driessche is of Belgian origin. She and her husband own one or more properties in Switzerland which are rented out, sometimes on a monthly basis. Mrs Van Driessche often takes on the task of dealing with hand-over between tenancies.

16. She and her husband also own three companies in Belgium, where they have a flat; she travels frequently to Belgium to manage the companies. However, her family home is in Kent where she lives with her children.

17. Some years ago, Mrs Van Driessche was diagnosed with a life-threatening disease for which she is having ongoing regular treatment at a specialist hospital. This was the case throughout the period with which the appeal is concerned, and continued to be the position as at the date of the hearing.

Gatwick airport and Mrs Van Driessche's first two emails

18. On 6 February 2014, Mrs Van Driessche left Gatwick for Euroairport. She went on to visit one or more of the properties she and her husband owned in Switzerland.

19. On 9 February 2014 she returned to Euroairport, and travelled from there to Gatwick on Easyjet Flight EZY 8438. We make further findings of fact about Euroairport at §§104-106 and about what happened there at §§201ff.

20. On arrival at Gatwick, she went through the green channel. Although there is a blue channel for EU arrivals, Officer Lines told us, and we accept, that "a lot of EU passengers come through the green channel" and both channels "end up at the same point."

21. Mrs Van Driessche was stopped in the green channel by Officer Trinick. Some of the details of that stop are in dispute, and we return to this at §217ff. Her luggage contained 600 Embassy cigarettes and 14kg of Amber Leaf hand rolling tobacco, which was seized. Mrs Van Driessche told Officer Trinick that she was unhappy about the seizure because she understood that Euroairport was in France.

22. Officer Trinick issued Mrs Van Driessche with a seizure information notice, a warning letter about seized goods, and Notices 1 and 12A. Notice 1 sets out the allowances and restrictions when entering the UK, and Notice 12A is entitled "what you can do if things are seized by HMRC.

23. On 9 March 2014 Mrs Van Driessche again flew from Euroairport to Gatwick, this time on Easyjet flight EZY8434. She entered the green channel and was stopped by Officer Lines. He asked if she was aware of her duty free allowances; she confirmed that she was, and said she had travelled from a location within the EU.

24. Officer Lines asked Mrs Van Driessche what she had in her bags; she said she had 500g of tobacco and some wine. Officer Lines searched her luggage and confirmed that it contained 500g of Amber Leaf tobacco and three bottles of sparkling wine, totalling 2.24 litres. Officer Lines seized the tobacco and the wine, and gave

Mrs Van Driessche a seizure information notice, a warning letter and Notices 1 and 12A.

25. On 18 March 2014, Mrs Van Driessche complained about the seizures by email ("the first email"). She used an email address provided on the documentation she had been given. On 25 March 2014 she received an automated response saying "this mailbox is no longer in use and will not be monitored. Your email will not be forwarded." It provided an alternative email address.

26. Before she re-sent her email, Mrs Van Driessche made another journey to and from Euroairport. She arrived at Gatwick with a pouch of 500g of Amber Leaf tobacco in her luggage. However, because she had been stopped on the last two occasions, and because she knew the Border Force did not agree with her that Euroairport was within the EU, she thought there was a high probability she would be stopped again. If that happened, she would lose all the tobacco. She opened the package and placed half its contents in a bin, before entering the red channel where she was stopped by a Border Force officer. As she was carrying only 250g of tobacco (the permitted quantity for travellers from outside the EU) there was no seizure.

27. On 31 March 2014 Mrs Van Driessche resent the first email to the new address, with some additional comments ("the second email"). Extracts from those emails are at §72(1)-(2). For the reasons set out in both emails, Mrs Van Driessche said she was "requesting the return of the seized goods." She has had no response to this request for restoration.

The penalties

28. On 5 September 2014, Mr Scopelliti of HMRC wrote to Mrs Van Driessche saying that HMRC were considering imposing civil evasion penalties and that his enquiry "originates from when your goods were seized on 9 February 2014" but he was "also interested in any other journeys where you may have exceeded your personal allowances over the period 9 February 2013 to 5 September 2014."

29. Mrs Van Driessche replied on 19 September 2014. She attached copies of the first and second emails, and reiterated the points she made in both emails. Extracts from that letter are at §72(3).

30. On 9 October 2014, Mr Scopelliti issued Mrs Van Driessche with a Penalty Notice charging civil evasion penalties of £4,585, with no mitigation for disclosure or co-operation. The reason for the penalties was given as:

> "because on 9 February 2014 you entered the green channel at London Gatwick Airport falsely claiming you had nothing to declare when in fact, you were carrying excise goods in excess of your allowances."

31. There is no mention of the second seizure, and no reference to the goods or to the duties/VAT which underpinned the penalty calculation.

32. On 16 October 2014 Mrs Van Driessche telephoned Mr Scopelliti, who confirmed he had received her letter of 19 September 2014. Mr Scopelliti asked her to ignore the Notice dated 9 October 2014, which he subsequently cancelled.

33. On the same day, Mr Scopelliti issued a new Penalty Notice, reducing the amount charged by 50% by taking into account both disclosure and co-operation, so that the penalties were now £2,292,50. The wording on the Notice is otherwise the same as that issued earlier: it refers only to the seizure on 9 February 2014, and does not set out the goods or the duty/VAT which underpinned the calculation.

34. On 4 November 2014 Mrs Van Driessche emailed Mr Scopelliti ("the third email"). She asked for a statutory review of the penalty decision.

35. On 15 January 2014, Mr Christopher Dakers of HMRC's Appeals and Reviews Unit carried out the statutory review. He reduced the penalties to £2,181 "due to calculation errors" although he did not explain the errors. Like Mr Scopelliti, he provided no information as to the goods which had been seized or the duty/VAT on those goods which underpinned the penalties.

36. It is the penalties as amended by Mr Dakers which are under appeal to the Tribunal. Mr Dakers' review letter said that they were made up as follows:

	Duty liable to penalty	Reduction allowed	Penalty charged	Amount of penalty	Total penalty
Customs civil evasion penalty	£1,804	50%	50%	£902	£2,181
Excise civil evasion penalty	£2,559	50%	50%	£1,279	

37. The Duty Calculation handed up by Mr Lloyd at the beginning of the hearing states that the penalty was calculated on the basis that Mrs Van Driessche had evaded £879 of customs duty and £925 of import VAT; these together total the £1,804 set out on the Penalty Notice.

38. The Duty Calculation also shows that the penalties were calculated on the excise duty, customs duty and import VAT which HMRC said was due on 400 Embassy cigarettes and 14.25kg of Amber Leaf tobacco. The cigarettes were 400 of the 600 imported on 9 February 2014, with no penalty being levied on the remaining 200, being Mrs Van Driessche's allowance if, as HMRC said was the case, she had been travelling from a third country. We infer that the 14.25kg of tobacco is the 14kg imported on 9 February 2014, together with 250g of the 500g imported on 9 March 2014, with no penalty being levied on the other 250g, again because travellers from outside the EU are allowed to import 250g of tobacco duty free.

39. The quantum of the penalties therefore appears to take into account the tobacco seized on both occasions, despite the fact that the Penalty Notices issued by Mr Scopelliti both state that they were being issued because of the seizure on 9 February 2014, and make no mention of the March seizure. We return to this at §56 below.

40. It is also clear from the Duty Calculation that no part of the penalties relate to the wine seized on 9 March 2014. Officer Lines confirmed in his oral evidence that this was the position.

The appeal to the Tribunal

41. On 11 February 2015, Mrs Van Driessche notified her appeal to the Tribunal. Extracts from her Notice of Appeal are at §72(5). She attached 50 pages of documents, including the correspondence with HMRC; pictures she had already sent to Mr Scopelliti; two credit card statements and her email exchange with the Belgian shop.

42. On 27 April 2015 HMRC provided their Statement of Case and on 10 June 2015, the Tribunal issued directions for the future conduct of the appeal ("the Directions").

43. Direction 2 required the parties to provide, by 17 July 2015, details of their witnesses and dates to avoid. On that date HMRC applied for a two week extension "to allow us to submit information regarding the attendance of witnesses and dates to avoid."

44. On 30 July 2015, HMRC informed the Tribunal and Mrs Van Driessche that their two witnesses would be Officer Trinick and Officer Jeff Daly.

45. Direction 3 required HMRC to provide the Bundles by 14 August 2015. On 13 August 2015, HMRC asked that the date for compliance with that direction be extended to the end of September 2015. On 3 September 2015, the Tribunal consented to the extension, but gave Mrs Van Driessche 14 days within which to object.

46. On 4 September 2015, Mrs Van Driessche emailed the Tribunal saying:

> "I am unhappy with the continued extensions to HMRC. They have been aware of the time frames and have had ample time to prepare. HMRC indicated to me that they have an open and shut case back last winter so I do not see why they cannot prepare within he time frames set…I was fully expecting a 'date' mid July 2015. These delays have a negative effect on my health as I hardly sleep.
>
> May I remind the court of my request to have the case heard locally to me in Kent as I look after two disabled people on a daily basis besides struggling with my [serious illness] for many years and attending hospital."

47. On 16 September 2015 the Tribunal replied to Mrs Van Driessche, saying that HMRC's application for an extension had been allowed, as the hearing date had not yet been set.

48. On 12 October 2015 the hearing was listed for 17 November 2015 in Ashford.

49. On 21 October 2015, HMRC applied for the hearing to be postponed as they had realised that Officer Daly's witness statement was not relevant to the penalties; instead they needed to call Officer Lines, but he was unavailable on the hearing date.

50. On 1 November 2015, Mrs Van Driessche emailed the Tribunal, saying:

> "this is the second time that I ask for no more postponements, no more changes to be added to this case. HMRC has had plenty of time to prepare, contact witnesses etc. The postponements have had a detrimental effect on my health and I must ask for everything to go forward as planned."

51. On 9 November 2015, HMRC's application was refused by a Tribunal judge.

52. On 16 November 2015, the day before the scheduled hearing, the parties received a letter from the Tribunal, postponing the hearing. The letter said that a number of appellants in other appeals about "assessments for excise duty, import VAT and/or penalties" had raised arguments about whether excise duty is a tax on consumption and about the proportionality of the assessments. As one of those appeals was now listed to be heard by a judge and because "the outcome of the judge's consideration of those questions could affect these appeals, the Tribunal had decided to stay the appeals pending the outcome of the hearing of the other case." The letter goes on to say that "the hearing of the strike out application is therefore cancelled and you are no longer required to attend." The reference to a strike-out application was erroneous, as no such application had been made. The date was vacated. This was very stressful for Mrs Driessche, as it was on the very eve of the hearing.

53. On 16 December 2014, the Tribunal wrote again, saying that the "consumption" and "proportionality" arguments:

> "arise in cases where the Appellant arrives in the UK after travelling within the EU, non EU appeals, such as this one, are not connected with [those issues]…and therefore the appeal does not need to be stayed."

54. The letter from the Tribunal went on to ask the parties to provide new dates to avoid. Mrs Van Driessche's response began: "I wish to put forward that Euroairport is a French airport and therefore inside the EU."

55. On 18 January 2016, Mrs Van Driessche's appeal was relisted for Fox Court in central London. She contacted the Tribunal, reminding them that she had asked for the case to be heard in Ashford because of her health and family issues. The hearing was cancelled and relisted for 14 April 2016, in Ashford.

The quantum of the penalties

56. As we have already noted at §39, the penalties appear to have been calculated taking into account both the seizure on 9 February 2014 and that on 9 March 2014. However, the wording on the Penalty Notices issued by Mr Scopelliti on 9 October

2014 and 16 October 2014 state that the penalties arise because of the seizure on 9 February 2014.

57. This indicates a mismatch between the basis on which the penalties were calculated, and the wording on the Notice of Assessment. Unfortunately, the Tribunal did not identify this issue until after the hearing, perhaps because we were only provided with the Duty Calculation on that morning. As far as we are aware, that was also the first time that Mrs Van Driessche received information as to how the penalties had been calculated. In any event, neither party made submissions in relation to the discrepancy between the Notice and the Duty Calculation.

58. Had we decided the substantive point in this appeal in favour of HMRC, we would have gone on to consider whether, as a matter of law, HMRC were able to charge penalties for both seizures, even though the Notice of Assessment refers only to the first. However, in the light of our decision, we have not thought it necessary to explore that issue.

59. In the rest of this decision we have referred to both seizures, as it was HMRC's case that both were in issue. This should not be taken as acceptance that it was correct to include in the penalty, a sum relating the 250g of tobacco seized on the second stop.

The law

60. The legislation relevant to this appeal is set out in the Appendix.

The test for dishonesty

61. In *Krubally N'Diaye v HMRC* [2015] UKFTT 0380 at [42]-[49] the Tribunal (on which Judge Redston also sat, with Mrs Hunter) set out its understanding of the test for dishonesty. We have followed the same approach in this case, and have extracted the relevant passages from *Krubally N'Diaye* for ease of reference

62. In *Abou-Ramah v Abacha* [2006] EWCA Civ 1492 ("*Abou-Ramah*"), the Court of Appeal clarified the test for dishonesty in civil breach of trust cases. Arden LJ, giving the leading judgment, first considered the Privy Council decisions in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 and *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476 ("*Barlow Clowes*"), as well as the House of Lords' decision in *Twinsectra Ltd v Yardley* [2002] UKHL 12.

63. At [59] Arden LJ said that in *Barlow Clowes* the Privy Council had considered the authorities and found that:

> "it is unnecessary to show subjective dishonesty in the sense of consciousness that the transaction is dishonest. It is sufficient if the defendant knows of the elements of the transaction which make it dishonest according to normally accepted standards of behaviour."

64. Although *Barlow Clowes* was a decision of the Privy Council, Arden LJ said it "gave guidance on" the earlier decision of the House of Lords in *Twinsectra*, which had been interpreted as requiring that a person needed to realise that his conduct was

dishonest. She then endorsed the *Barlow Clowes* approach, see [68]-[69] of the decision.

65. However, the subjective is not entirely banished. In *Abou-Ramah* at [66], Arden LJ first summarises *Barlow Clowes* and then says:

> "On the basis of this interpretation, the test of dishonesty is predominantly objective: did the conduct of the defendant fall below the normally acceptable standard? But there are also subjective aspects of dishonesty. As Lord Nicholls said in the *Royal Brunei* case, honesty has 'a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated.'"

66. At [68(iv)] she said that the test as formulated in *Abou-Ramah* applied "in the context of civil liability (as opposed to criminal responsibility)."

67. The test for dishonesty is therefore primarily objective, namely whether Mrs Van Driessche's behaviour was dishonest according to normally accepted standards of behaviour – in other words, would a reasonable and honest person have considered that what she did was dishonest. We also need to consider what Mrs Van Driessche actually knew at the time, not what a reasonable person in her position would have known or appreciated.

68. Although in his skeleton argument Mr Lloyd had relied on different case law, he said he had subsequently read *Krubally N'Diaye* and now accepted the analysis set out above. Like HMRC's Counsel in that case, he submitted that "it was important not to overstate the subjective element."

The standard and burden of proof

69. In *Krubally N'Diaye*, the appellant had argued that the standard of proof was the criminal standard, namely "beyond reasonable doubt." For the reasons discussed and explained at [53]-[83] of that case, which we do not repeat here, we find that the standard of proof is the balance of probabilities. Neither party sought to argue otherwise.

70. Mr Lloyd accepted that the burden of proof in this appeal lay on HMRC. As a result, he opened the case before the Tribunal.

The issues in the case

71. The Tribunal's preliminary view from the documents provided in advance of the hearing was that Mrs Van Driessche had appealed on three grounds, namely that:

(1) Euroairport was within the EU, so she was not travelling from a third country;

(2) she had purchased the goods duty paid, not duty free; and

(3) she had not acted dishonestly.

72. After Mr Lloyd had concluded his opening, it was clear to us that HMRC were not intending to address the first or second of those grounds, other than in the most cursory manner. We asked Mrs Van Driessche to state what she considered to be her grounds of appeal, and she confirmed our understanding. We took Mr Lloyd to Mrs Van Driessche's Notice of Appeal and the documents she had attached to that Notice, which we summarise below:

(1) In the first email, Mrs Van Driessche stated that Euroairport "is based in the EU as it officially is French, based in the town of St Louis in France" and gave detailed reasons. She also said that it was not possible to purchase 250g pouches of tobacco at Euroairport: in other words, it is not possible to buy tobacco which is packaged so as to comply with the "third country" import limitation.

(2) Mrs Van Driessche's second email begins by saying she said that, following her most recent arrival at Gatwick, she had binned half of the smallest 500g package before going through customs, but "I should not have to be forced in doing this should your people understand where products come from. France is in the EU." She stated that the goods sold at Euroairport were not labelled "duty free," in contrast for example to the labelling which is used at Gatwick.

(3) In her letter of 19 September 2014, she reiterated much of what had been said in her first and second emails, and added (emphasis in original) that Euroairport:

> "to the best of my knowledge and belief is a <u>French</u> airport offering a range of <u>duty paid goods</u> as the goods do not say 'duty free' and [this] was confirmed to me by the person on the till…
>
> <u>Wikipedia clearly states that this airport is in France</u>. The items were seized for the reason that I came from Switzerland…Customs ignored my view that I came from France and that they would not have sold this to me unless I came from Switzerland.
>
> Goods taken from me are identical to items purchased at Eurotunnel, in Coquelles in France where you can buy any items for personal use. In euro, French writing, French company details on the bills.
>
> My understanding is that one can bring from an EU country such as France items for personal use within the guidelines specified by HMRC; any quantity as long as you carry it yourself and is for personal use…I cannot understand why you are writing to me about smuggling."

(4) In her third email, requesting the statutory review, Mrs Van Driessche began by saying:

> "I would like an internal review as I do not think that the points raised by myself regarding airport location, entrapment as one cannot buy the alleged legal quantity for entering the UK from this airport…have been taken into account when words such as dishonest are used, a penalty has been applied. I have never brought anything into the UK which was not for personal use."

(5) In her Notice of Appeal to the Tribunal, under the heading "Grounds of Appeal" she said:

> "Throughout my visits to Euroairport (and to this day) I believe that it is a French Airport and I would like the opportunity to give the tribunal my valid reasons for my understanding of this status…It gave a total impression (via location, language, currency, policing, administration, invoicing, signage etc) of being a FRENCH airport. Why, in view of all appearances (and the fact that even the shop staff said it was a French airport) would any ordinary traveller think it was Swiss?"

(6) Under "Result" she says:

> "The goods should not have been seized nor should a penalty have been imposed as the goods were purchased in the EU and have been seized because HMRC decided the goods were purchased in Switzerland."

73. The Tribunal asked Mr Lloyd to consider, in the light of the Grounds of Appeal and Mrs Van Driessche's oral confirmation of her position, whether he accepted she had put forward three grounds of appeal to be considered by the Tribunal.

74. Mr Lloyd said that HMRC had assumed that Mrs Van Driessche was simply wrong in her submissions on the first two grounds and he was therefore not in a position to give a response on those issues. He asked for the opportunity to take instructions from his solicitor, who was not in attendance.

75. The Tribunal made the following points:

(1) The burden of proof in this appeal was on HMRC. We drew Mr Lloyd's attention to *Burgess and Brimheath v HMRC* [2015] UKUT 578 (TCC) ("*Burgess*"). The Upper Tribunal (Judges Berner and Scott) allowed the appellants' appeal because HMRC had failed to put a positive case or to meet their burden of proof. The appeal had not been remitted to the First-tier Tribunal because that "would allow HMRC to have a second bite of the cherry [which]… would not be in the interest of justice and fairness."

(2) It was plain on the face of all the documents that Mrs Van Driessche had put forward three grounds of appeal.

(3) HMRC's skeleton argument did not contain any submissions to the effect that Mrs Van Driessche's first two grounds should not be considered by the Tribunal because we are required to deem the goods to have been imported duty free from a third country, and no such submissions had been made in the course of Mr Lloyd's opening.

(4) Mrs Van Driessche was suffering from a very serious illness and her health had already been adversely affected by the delays which had bedevilled this appeal.

(5) Although HMRC's requests for extensions had been stressful for Mrs Van Driessche, we accepted that the delays which had actually occurred were caused by the Tribunals Service.

76. Taking into account the factors set out above, we said that we were unlikely to allow the case to be adjourned so that Mr Lloyd could make further submissions on

Mrs Van Driessche's first two grounds of appeal. However, we added that this was a preliminary view and we fully accepted that he should consult with his instructing solicitor. Mr Lloyd said he would be able to do this over the lunch adjournment.

77. Having taken instructions, Mr Lloyd made an application for HMRC to be allowed to provide supplementary submissions after the hearing; Mrs Van Driessche would respond to those submissions, and HMRC would make further submissions in reply. Mr Lloyd said that the application should be allowed because "the repercussions [of the Tribunal deciding in Mrs Van Driessche's favour on the first two grounds] would affect all people travelling to and from Euroairport."

78. We asked Mrs Van Driessche if she agreed that HMRC should be able to make post-hearing submissions on her first two grounds of appeal. She said:

> "HMRC have known my view right from the start – at every stage I have made the same case…I am not happy at all that they should now have time to go and research what they couldn't be bothered to do in the first place. They have had two years to do this…Please stop all the delays. And I don't have a legal person or a barrister."

79. We considered Mr Lloyd's application and Mrs Van Driessche's response in the context of the overriding objective at Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, which is to deal with cases "fairly and justly."

80. We agreed with Mrs Van Driessche that she had made her position clear "right from the start." The first email was sent on 19 March 2014, over two years before this hearing.

81. We did not accept Mr Lloyd's submission that a decision in Mrs Van Driessche's favour on the first two grounds of appeal "would affect all people travelling to and from Euroairport." A decision at first instance binds the parties, but does not create a precedent. If we were to decide the appeal in Mrs Van Driessche's favour on one or both of her first two grounds, and if there were to be a future appeal involving Euroairport, the Tribunal hearing that subsequent appeal would make its decision in the light of the evidence and submissions put to it by the parties. That Tribunal could consider this judgment, but would not have to follow it.

82. Our task is to decide the dispute between the parties in the interests of justice. Taking into account the views of both parties and the factors set out at §75, we decided that it was not in the interests of justice to delay resolution of the case so as to allow HMRC to make further submissions. We emphasised in particular that Mrs Van Driessche is a litigant in person with a very serious health condition, who had made her position crystal clear from inception.

HMRC's position and the burden of proof

83. The excise duty penalty was charged under Finance Act 1994 ("FA94"), s 8. Subsection (1) reads:

> "Subject to the following provisions of this section, in any case where—

> (a) any person engages in any conduct for the purpose of evading any duty of excise, and
>
> (b) his conduct involves dishonesty (whether or not such as to give rise to any criminal liability),
>
> that person shall be liable to a penalty of an amount equal to the amount of duty evaded or, as the case may be, sought to be evaded."

84. FA94 s 16(6) provides that the burden of proof "as to the matters mentioned in subsection (1)(a) and (b) of section 8" rests upon HMRC. The customs duty and import VAT penalty charged under Finance Act 2003 contains almost identical provisions.

85. HMRC thus have the burden of proving both that (a) Mrs Van Driessche engaged in conduct for the purposes of evading excise duty, customs duty and VAT; and (b) that her conduct involved dishonesty.

86. In *Burgess* the Upper Tribunal considered the consequences of HMRC failing to meet their burden of proving the "the competence and time limit" conditions for a discovery assessment. At [14] the Upper Tribunal discussed the meaning of "the burden of proof":

> "We were not referred to any authority on the meaning of burden of proof, but that is so well-established as to be uncontroversial. According to *Phipson on Evidence* (18th edition), at 6-01, that expression is used to describe the duty which lies on a party either to establish a case or to establish the facts upon a particular issue. At 6-03, *Phipson* says that one effect of the burden of proof is that if the party bearing the burden has not pleaded a positive case, the other party need not plead and prove that alternative states of affairs do not exist. The case of *Seashore Marine SA v Phoenix Assurance Plc* (The Vergina) (No.1) [2001] 2 Lloyd's Rep 719 is cited as authority for that proposition."

87. The judgment continues at [53]:

> "…in the absence of a positive case put by HMRC in relation to the competence and time limit issues, the FTT erred in law in not finding that HMRC had failed to discharge the burden of proof in those respects such that the assessments could not be regarded as having been validly made and the appeals must accordingly be allowed."

88. That point is then reiterated at [54], which says "in the absence of HMRC having put a positive case to the FTT on the competence and time limit issues, the only course open to the FTT was to allow the appellants' appeals."

89. HMRC must therefore put a positive case that Mrs Van Driessche engaged in conduct for the purposes of evading excise duty, customs duty and VAT.

90. By her first two grounds of appeal, Mrs Van Driessche submits that she did not engage in such conduct, because she did not travel from a third country and therefore

bought the goods duty paid. As we have noted, Mr Lloyd's position at the hearing was that Mrs Van Driessche was simply wrong in relation to these points because she had departed from an airport in a non-EU country and bought the goods duty free.

91. However, the requirement to put a positive case requires more than an assertion that the appellant is wrong. We therefore carefully considered HMRC's submissions on the third country and duty free points to see if they amounted to a positive case, and if so, whether HMRC had met their burden of proof.

The third country point: a positive case?

92. HMRC's position was that Mrs Van Driessche had begun her journey in Switzerland and so had arrived in the UK from a third country.

93. Judge Redston informed the parties that she knew that Euroairport was physically located in France rather than in Switzerland. Mr Lloyd said he accepted that the geographical location of places such as airports was a matter of judicial knowledge and that HMRC did not dispute that the Euroairport was physically situated on the French side of the Franco-Swiss Border, with the nearest city on the Swiss side being Basel, and the nearest city on the French side being Mulhouse.

94. Mr Lloyd's skeleton argument stated that Euroairport consisted of two sides: a "Swiss side" and a "French side", and that Mrs Van Driessche had arrived from the Swiss side, as shown by her air ticket which used the airport code BSL. Had she travelled from the French side, he said the ticket would have shown MLH for "Mulhouse."

95. Mr Lloyd's skeleton argument also relied on the receipts for the goods which had been purchased at a shop called "*Dufry*" within Euroairport. These are headed:

> "BASEL MULHOUSE
>
> Euroairport CH 4030 Basel
>
> Main shop."

96. They included the words:

> "La reimportation des presents articles par les voyageurs de retour d'un pays tiers à la communauté européenne doit être declarée au services des douanes en fonction de la réglementation en vigeur."

97. Mr Lloyd's skeleton argument translated this as follows:

> "that the reimportation of these articles by returning travellers from third countries to the European community must be declared to the customs accordingly [sic] to the regulations in force."

98. Both members of the Tribunal are competent in the French language and we agreed that the words on the *Dufry* receipts had been correctly translated. Mrs Van Driessche, who also speaks French, did not dissent from this. HMRC's position was that this wording supported their case that the goods had been purchased in a third country.

99. In his opening, Mr Lloyd said that "it was beyond doubt that this was travel from Switzerland including [reliance on] the flight documents and the receipts."

100. The above submissions, taken together with the evidence of the ticket and the wording on the receipts, is in our judgment sufficient to amount to a positive case. As a result, we went on to consider whether HMRC had met their burden of proof on the third country point.

The third country point: burden of proof

101. Apart from Mrs Van Driessche's ticket and the *Dufry* receipts, HMRC put forward no other evidence. In particular, neither Officer Trinick nor Officer Lines had visited Euroairport, although Officer Trinick said it was her belief that it was split into a Swiss side and a French side and Officer Lines told us he had visited Geneva airport.

102. HMRC also did not put forward any submissions that, although situated in France, Euroairport was nevertheless outside the EU as a matter of law.

103. Mrs Van Driessche provided extensive evidence from many sources, including photographs, an email from EasyJet's customer services department, credit card statements and her oral testimony. We found her evidence to be consistent and reliable and accepted it.

104. On the basis of the evidence provided, we find the following facts:

(1) Euroairport is not far from the Swiss city of Basel, but it is located well inside the French border. It has a French postal address and a French telephone number, but also a Swiss postal address, as shown on the *Dufry* receipts.

(2) A person who drives from Switzerland to Euroairport passes a sign saying "France" surrounded by the stars symbolising the EU. All subsequent road signs are in French.

(3) Euroairport does not have a separate entrance for those with tickets marked BSL as distinct from those with tickets marked MHL.

(4) There is no separate immigration or customs procedure for those with tickets marked BSL.

(5) Once inside the departure area, there is no visible separation into a "French side" and a "Swiss side." Instead, it is a single space.

(6) That space contains a number of shops. All prices in the shops are in Euros, not Swiss francs.

(7) Receipts given by the shops are in French (with some English); no German is used. German is the dominant language in Basel.

(8) Credit card statements for purchases made at Euroairport show the transactions as having taken place in France, not Switzerland,

105. We set out in full one piece of evidence provided by Mrs Van Driessche, being the email from Easyjet. This is dated 11 January 2016, so after the events in issue

here, but it refers to the same flight that Mrs Van Driessche took on 9 February 2014, namely Easyjet 8434. The email says:

> "IMPORTANT INFORMATION ABOUT YOUR FLIGHT 8434
>
> Dear Inge Van Driessche
>
> The French Authorities have notified us of their intention to impose border controls on all flights to and from Basel, including between Schengen states.
>
> It is therefore important that all our customer travel with either their EU National ID card or their passport and where applicable a visa for Schengen
>
> Customers without the required documentation will be refused travel…"

106. Mrs Van Driessche said that this showed that in January 2016 the French authorities were exercising border controls over arriving and departing passengers, including those leaving from "Basel", the supposed "Swiss" side of the airport. We agree, and find that to be a fact.

107. Mrs Van Driessche said that the wording on the receipts on which HMRC had relied, in fact supported her argument that the goods had been sold from a shop in the EU: otherwise, they could not be "reimported" into the EU. Again, we agree: the message warns those who take articles purchased in the airport to a third country, and subsequently re-import them back to the EU, to declare them at the point of re-importation.

108. We find that the facts overwhelmingly support Mrs Van Driessche's case that she began her journey from an airport on French soil which was not separated into "French" and "Swiss" departure areas. We make a further finding of fact that this was the position.

109. It follows that although HMRC put a positive case, they failed to meet the burden of showing that Mrs Van Driessche departed from an airport which was in a third country either as a matter of fact or of law.

The third country point: a matter of law?

110. However, we remained concerned. Despite HMRC's failure to meet their burden of proof, it seemed to us that part of the airport might nevertheless be outside the EU as a matter of law, and that if this was the case, the Tribunal had a duty to consider the legal position.

111. Although neither party's written submissions referred to any relevant legal provisions, we thought that it was possible that these might be handed up at the hearing. We nevertheless had thought it prudent, as part of our pre-hearing preparation, to carry out some brief research into the airport's legal status.

112. At the conclusion of Mr Lloyd's opening it was clear that he was not citing any legal material in support of HMRC's argument that Mrs Van Driessche had departed

from a third country. Mrs Van Driessche, unsurprisingly given that she is a litigant in person, said she was not relying on any law to make her case. However, she told us that she had looked on the Euroairport website and found legal material which supported her position, although that was some two years ago and she had not looked at it since.

113. We explained that we thought the legal status of the airport was an arguably relevant consideration. We said we had considered Directive 2007/74/EC ("the Directive") which is headed: "on the exemption from value added tax and excise duty of goods imported by persons travelling from third countries." We had also identified that the airport was governed by a Franco-Swiss "Convention" dated 4 July 1949 ("the Airport Convention"). Mrs Van Driessche said that this was the document she had viewed on the Euroairport website. We gave copies of the Directive and the Airport Convention to the parties in advance of the lunch adjournment.

The Directive: import VAT and excise duties

114. Article 1 of the Directive provides as follows:

> "This Directive lays down rules relating to the exemption from value added tax (VAT) and excise duty of goods imported in the personal luggage of persons travelling from a third country or from a territory where the Community provisions on VAT or excise duty, or both, as defined in Article 3, do not apply."

115. Article 3(1) defines "third country" as "any country which is not a Member State of the European Union" but then provides that San Marino is not regarded as a third country. There is no reference to the "Swiss side" of Euroairport.

116. Article 3(2) defines "a territory where the Community provisions on VAT or excise duty, or both, do not apply" as excluding the Isle of Man and also:

> "any territory, other than the territory of a third country where Directives 2006/112/EC [the Principal VAT Directive] or 92/12/EEC, or both do not apply."

117. In order to decide whether part of Euroairport is such a territory, we are therefore required to consider both the Principal VAT Directive ("PVD") and Directive 92/12/EEC, which provides for the holding and movement of excise goods.

118. Article 5 of the PVD provides that the following definitions apply for the purposes of that Directive:

> "(1) Community and territory of the Community mean the territories of the Member States as defined in point (2);
>
> (2) Member State and territory of a Member State mean the territory of each Member State of the Community to which the Treaty establishing the European Community is applicable, in accordance with Article 299 of that Treaty, with the exception of any territory referred to in Article 6 of this Directive;
>
> (3) third territories means those territories referred to in Article 6;

> (4) third country means any State or territory to which the Treaty is not applicable."

119. Article 6(1) of the PVD says that it does not apply to Mount Athos, the Canary Islands, the French overseas departments, the Åland Islands or the Channel Islands, all of which form part of the EU Customs Union; Article 6(2) provides that it also does not apply to the following territories, which fall outside that customs territory: the Island of Heligoland; the territory of Bsingen; Ceuta; Melilla; Livigno; Campione d'Italia or the Italian waters of Lake Lugano.

120. Directive 92/12/EEC, as amended, applies to all EU territories other than the Canary Islands, the French overseas departments, the Åland Islands and the Channel Islands.

121. In none of these lists of exceptions and exclusions is there any reference to Euroairport. We were therefore unable to identify any provision which provides that part of Euroairport is a "third country" or "a territory where the Community provisions on VAT or excise duty, or both, do not apply" for the purposes of excise duty or VAT.

Customs duty

122. Council Regulation (EC) No 1186/2009 set up the Community system of reliefs from customs duty, and Article 1 provides that they apply "when goods are released for free circulation or are exported from the customs territory of the Community." Article 2(2) provides that:

> "Save as otherwise provided in this Regulation for the purpose of applying Title II, 'third countries' also includes those parts of Member States' territories excluded from the customs territory of the Community by virtue of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code."

123. Article 3(1) of Regulation (EEC) No 2913/92 states that the customs territory of the EU includes "the territory of the French Republic, except the overseas territories and Saint Pierre and Miquelon and Mayotte."

124. There is no reference in these provisions to any part of Euroairport. We again can see no legal basis which would allow us to hold that part of the airport is a third country for the purposes of customs duties.

The Airport Convention

125. The copy of the Airport Convention which we had located was the French original. Both members of the Tribunal and Mrs Van Driessche were able to read that document, but Mr Lloyd was in more difficulty. However, he obtained an electronic version of an English translation from his instructing solicitor in the course of the proceedings, and the Tribunal also translated extracts from the Airport Convention for his benefit.

126. Mr Lloyd protested that he had not had adequate time to consider the parts of the Airport Convention which had not been translated by the Tribunal. He renewed his application that HMRC ought to be allowed to make further submissions on Mrs Van Driessche's first two grounds of appeal. We refused that application, because:

(1) it remained our view that further delay was not in the interests of justice, for the reasons already given; and

(2) although the Airport Convention was relevant, we thought it was likely to be much less significant than EU law, see further §134.

127. The Airport Convention came into force on 25 November 1952, before the airport had been constructed; it has been amended several times. A consolidated version incorporating the amendments was published on 1 October 2006. It consists of 21 Articles and three Annexes.

128. In citing from the Airport Convention we have relied on the French original but also referred to the English version provided by Mr Lloyd. The following provisions were translated during the hearing:

(1) Article 1(3) provides that the Airport is regulated by French law, unless it has been derogated from by the Airport Convention and its Annexes. This is repeated at Article 6.

(2) Article 2(6) provides that, to facilitate the exercise of police and customs controls, there will be three "sectors." One of these is assigned to the French authorities, to allow them to check travellers and goods coming from or going to France; one is assigned to the Swiss authorities for the equivalent purposes, and the third consists of the runways and service areas.

(3) Article 7 is headed "the customs road" and provides that the airport will be directly linked to the Swiss frontier by a road which will be separated by a fence from the rest of France, and that there would be no Franco-Swiss border control at the actual frontier.

(4) Article 8 reads (so far as relevant to a person departing from the airport):

> "1. In conformity with Article 2, there will be created within the airport a clearly defined zone within which the Swiss authorities will have the right to control, from all points of view, travellers and goods coming from or going to Switzerland.
>
> 2. In exercising those controls, the Swiss authorities will apply their laws and national rules….
>
> 4. The Swiss laws and national rules will be applied…to goods or people leaving Switzerland, up to the moment when the Swiss control ends."

129. The Tribunal also considered the other Articles and the Annexes but found nothing which shed further light on the relative positions of the French and Swiss authorities.

130. From the Airport Convention it is clear that the airport is governed generally by French law. When signed in 1949, it was intended that Swiss customs controls would take place at the airport rather than on the actual frontier; that people entering and leaving Switzerland would do so via the "customs road" and that there would be a segregated part within the airport where these controls would take place.

131. We pause to remind ourselves that we have accepted Mrs Van Driessche's evidence, and found as a fact that, when she departed from Euroairport there were no separate "French" and "Swiss" areas, at least in relation to departures (we heard no evidence about arrivals). We also found, based on the Easyjet email, that in January 2016 the French were currently exercising border controls over arriving and departing passengers, including those ticketed to or from "Basel."

132. We asked ourselves whether those findings conflicted with the Airport Convention, but found that they did not, because the Airport Convention gives the Swiss authorities "the right" to control the movement of people and goods into and out of Switzerland; there is no obligation on them to carry out these controls, no prohibition on the two countries sharing that task, and nothing to prevent customs controls being delegated to the French. Moreover, the Airport Convention was signed over sixty years ago, and expressed both countries' intentions before the airport was constructed. How the two countries work together will inevitably have changed during that long period.

133. Moreover, nothing within the Airport Convention allows us to find that part of Euroairport is to be treated as being within Switzerland. No Article cedes French sovereignty over part of the airport to Switzerland, or deem the "Swiss part" of the airport to be Switzerland. The Swiss have only the "the right to control, from all points of view, travellers and goods coming from or going to Switzerland." That is a limited right.

134. In any event, it is simply not possible for an agreement between France and Switzerland to deem part of France to be outside the EU. Any such exception would need to be provided for by EU legislation, and as we have already found, that is not the position.

The third country point: matter of law - conclusion

135. It follows from the above legal provisions that, as a matter of law, Euroairport is within the EU for excise duty, import VAT and customs duty.

The third country point: conclusion

136. We therefore find that:

(1) HMRC have failed to meet their burden of proof on the third country point; and

(2) both as matter of fact and as a matter of law, Euroairport is within the EU, so Mrs Van Driessche did not travel from a third country.

137. We move on to considering her second ground of appeal, being the duty free/duty paid point.

The duty free/duty paid point: a positive case?

138. HMRC's position was that the goods had been purchased duty free. Mr Lloyd's skeleton argument says only that "if the goods had been duty paid, they would have cost significantly more."

139. No evidence was provided to support that statement. HMRC did not, for example, provide documentation setting out the prices of the goods in France, or witness statements from those operating the shops at Euroairport. All we have, therefore, is an assertion with no probative value. We find that HMRC has failed to put a positive case on the duty free/duty paid point.

Whether deeming applies

140. Given that HMRC have not met the burden of proof on the third country point, and have failed to put a positive case on the duty free/duty paid point, it follows that they have not shown that Mrs Van Driessche did "engage in conduct for the purpose of evading" customs duty, excise duty and import VAT.

141. We asked ourselves whether we should end our deliberations at this point, and simply set aside the penalties.

142. However, we are aware that in cases involving restoration of goods, where there has been no challenge to the seizure, the Tribunal does not have the jurisdiction to make certain findings of fact.

143. Although HMRC did not submit, in either written or oral submissions, that the same approach applies to penalty cases, we nevertheless thought it appropriate to consider whether this was the position. In other words, are we required to *deem* part of Euroairport to be outside the EU and/or the goods to be duty free?

The position had this been a restoration case

144. Mrs Van Driessche did not challenge, in the magistrate's court, the seizure of the goods she brought into the UK on 9 February and 9 March 2014. Had this been a restoration case, where she was seeking to have the goods restored, we would have had to deem the seizures to be lawful.

145. We would also be required to deem to be true any fact which underpinned that conclusion. In Mrs Van Driessche's case, the goods were seized because the Border Force believed she had travelled from a "third country" with duty free goods. If she had travelled from within the EU with duty paid goods, the seizure would not have been legal.

146. Were this a restoration case, we would therefore be required to find that the goods had been imported from a third country, and/or that they had been purchased duty free. We would be unable to make findings of fact which had the effect of undermining the legal basis for the seizure.

Our approach

147. We are not aware of any binding authority on whether the deeming which applies to restoration cases also applies to penalty cases. We therefore considered the question afresh. We begin by setting out the general law on deeming provisions.

The law on deeming

148. In *DV3 RS Ltd Partnership v HMRC* [2013] STC 2150 ("*DV3*") at [13], a decision of the Court of Appeal, Lewison LJ said that the correct approach to construing a deeming provision had been expounded by Gibson J in *Marshall v Kerr* [1993] STC 360 at 366:

> "For my part I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so."

149. Lewison LJ went on to say that, although Gibson J's decision was subsequently reversed by the House of Lords, both parties had accepted the correctness of the principles he had set out, albeit not the application of those principles to the facts of that case, see [1994] STC 638 at 649.

Schedule 3 of CEMA

150. The deeming provision relevant to restoration cases is found in Schedule 3(5) of the Customs and Excise Management Act 1979 ("CEMA"). That Schedule has effect by virtue of CEMA s 139, which is headed "Provisions as to detention, seizure and condemnation of goods, etc." The section sets out the powers of the Commissioners to detain, seize and condemn goods, and subsection 6 provides:

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

151. Schedule 3 is headed "provisions relating to forfeiture" and paragraph 3 provides that a person seeking to challenge the seizure of goods must give notice to the Commissioners within one month of the seizure. Paragraph 5 then says:

> "If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of any thing no such notice has been given to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with, the thing in question shall be deemed to have been duly condemned as forfeited."

152. In *HMRC v Jones and Jones* [2011] EWCA Civ 824 ("*Jones*") Mr and Mrs Jones had entered the UK in a car with 6 kg of Golden Virginia hand rolling tobacco, 228 litres of wine and 187.5 litres of beer which they said were for their personal use. Customs officers seized the car along with the cigarettes, tobacco and wine, on the basis that Mr and Mrs Jones were importing the goods for commercial purposes. At the First-tier and Upper Tribunals the appellants successfully argued that both the car and the goods should be restored, because the goods had been imported for personal use. However, the Court of Appeal unanimously allowed HMRC's appeal. Mummery LJ gave the only judgment, with which Moore-Bick and Jackson LJJ both agreed. Paragraph [71(5)] reads:

> "The deeming process limited the scope of the issues that the owners 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.…In brief, the deemed effect of the owners' failure to contest condemnation of the goods by the [magistrate's] court was that the goods were being illegally imported by the owners for commercial use."

153. At [71(7)], Mummery LJ said that "deeming something to be the case carries with it any fact that forms part of the conclusion."

In favour of deeming applying

154. We identified the following arguments in favour of the Schedule 3 deeming provision also applying to penalty cases such as this.

155. First, the penalties have only been levied because of the importation of the goods, so the facts which underpin the seizure and those which underpin the penalty must be the same. It would be logical and consistent for those facts to be deemed to be true for a penalty case, in the same way as they are in a restoration case.

156. Second, were the Tribunal able to consider afresh the factual basis behind the seizure, it could in effect conclude that the seizure was illegal. That could undermine the purpose of the statutory deeming provision.

157. Third, in *HMRC v Race* [2014] UKUT 0331 (TCC) ("*Race*"), the Upper Tribunal (Warren J) said, albeit *obiter*, that deeming did apply to penalty cases. In *Race* goods had been seized from Mr Race's home on the basis that they had been released for consumption without the payment of excise duty. Mr Race did not challenge the seizure in the magistrate's court. HMRC subsequently raised an assessment to excise duty and a penalty assessment. Mr Race appealed against both assessments.

158. HMRC applied to strike out his appeal against the excise duty assessment (but not the penalty assessment) on the basis that there was no reasonable prospect of that appeal succeeding because the goods were deemed to have been imported without payment of excise duty by virtue of Schedule 3.

159. When HMRC's application was heard by the First-tier Tribunal (*Race v HMRC* [2013] UKFTT 489 (TC)), Judge Cannan refused to strike out the appeal. He gave four reasons, one of which was that the same factual issues would in any event arguably arise at the hearing of the penalty appeal. At the Upper Tribunal, Warren J allowed HMRC's appeal, saying at [39]:

> "It is not correct, however, to say that that issue would arise in the appeal against the Penalty Assessment. This is because the First-tier Tribunal could no more re-determine, in the appeal against the Penalty Assessment, a factual issue which was a necessary consequence of the statutory deeming provision than it could re-determine a factual issue decided by a court in condemnation proceedings. The issue of import for personal use, assuming purchase in a Member State, has been determined by the statutory deeming."

160. As we have noted, HMRC's appeal to the Upper Tribunal was against a refusal to strike out an excise duty appeal, so *Race* did not concern a penalty. As a result, the passage cited above is *obiter* and not binding on this Tribunal, although it must of course be treated with respect.

161. We also note that *Race* makes no reference to any submissions having being made on the penalty point; if submissions were in fact made, they could only have been put on behalf of HMRC, as Mr Race did not appear and was not represented. It follows that none of the points set out in the next following part of this decision were considered by the Upper Tribunal.

Against deeming applying

162. We identified the following arguments against finding that the deeming required by Schedule 3 applies to the penalty provisions in issue here.

The scope of Schedule 3

163. CEMA s 139(6) expressly states that Schedule 3 has "effect for the purpose of forfeitures, and of proceedings for the condemnation of any thing as being forfeited." CEMA s 152(b) gives the Border Force the discretion to return forfeited goods, so restoration reverses the forfeiture. Extending the Schedule 3 deeming provision to restoration cases is, to borrow the words of Gibson J, "consistent…with the policy of the Act and the purposes of the provisions." That it does so apply has been confirmed by the Court of Appeal in *Jones*.

164. There is, however, no statutory basis for extending that deeming provision to a penalty appeal, the purpose of which is not forfeiture or condemnation. In other words, in penalty appeals the appellants are not seeking to obtain the forfeited goods, but defending themselves against penalties. Extending deeming to penalty appeals is arguably not "consistent…with the policy of the Act and the purposes of the provisions" but instead goes beyond the purposes for which CEMA expressly states that deeming applies, namely forfeiture.

The jurisdiction of the Tribunal

165. The Tribunal's jurisdiction in restoration appeals is limited. If the Border Force does not exercise their discretion to return the goods, an appeal can be made to the Tribunal. But if the Tribunal finds that the Border Force could not have reasonably arrived at their decision, it can only require that the decision be reviewed. In other words, it has a limited, judicial-review type supervisory jurisdiction, and not a full appellate jurisdiction. In *Jones* HMRC made these submissions about the limited nature of the jurisdiction, see [69] of the judgment:

> "The legislation does not provide for a right of appeal to the FTT against forfeiture and condemnation. The FTT has no express jurisdiction to determine that issue on appeal. It is not just a question whether there is abuse of process by relitigation: a more fundamental question is whether the FTT had any jurisdiction to determine such an issue on a restoration appeal at all. It does not."

166. At [71] Mummery LJ said that he was in broad agreement with HMRC's main submissions, and at [71(5)] gave as one of his reasons for allowing HMRC's appeal that:

> "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 owners 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 owners..."

167. In contrast, in relation to appeals against the imposition of a penalty the Tribunal has full appellate jurisdiction.

HMRC's burden of proof

168. The penalty provisions place on HMRC the burden of proving *both* that the person has engaged in conduct for the purpose of evading any duty of excise *and* that the conduct involves dishonesty. In all or almost all cases where a penalty has been imposed under these provisions, goods will have been seized, and the seizure will not have been challenged at the magistrate's court. As a result, the evidence will never have been considered or tested.

169. It follows that allowing HMRC to rely on Schedule 3 in a penalty appeal means that it does not have to prove the facts of the conduct engaged in by the appellant, and this in turn could be said to undermine the burden of proof explicitly placed on HMRC by Parliament.

The principle that facts are not admissible in other proceedings

170. Schedule 3 deems goods to be legally seized, together with any facts which formed part of that conclusion. However, as a matter of general principle, facts found in one case are not admissible in other proceedings. In *Secretary of State for Trade and Industry v Bairstow* [2003] EWCA Civ 321 Morritt LJ, giving the leading judgment with which Hutchison and Hale LJJ both agreed, said at [26] that this was a principle which had stood for over 60 years. At [27] he concluded:

> "…the factual findings and conclusions of Nelson J in the earlier proceedings are not admissible as evidence of the facts so found in these proceedings. Counsel for the Secretary of State accepted that he could not rely on any statutory or common law exception to render those conclusions admissible for the purpose of proving those facts."

171. It is therefore only possible to rely on facts from earlier proceedings if there is a statutory or common law exception allowing them to be so treated. Here CEMA s 139 provides that Schedule 3 only applies "for the purpose of forfeitures, and of proceedings for the condemnation of any thing as being forfeited." Proceedings challenging the imposition of a penalty are neither "for the purpose of forfeitures" nor "proceedings for the condemnation of any thing forfeited."

172. Facts which are found for the purposes of one case are therefore not imported into other proceedings, even where the same event, incident etc gave rise to both sets of proceedings. Thus, while it would be more consistent for facts which are deemed to be true for the purposes of restoration proceedings to be imported into penalty proceedings, that would run counter to this established legal principle, and require clear statutory or common law authority, which is not present here.

Article 6(2) of the Convention

173. The penalties in issue are "criminal" within the meaning of Article 6 of the European Convention on Human Rights ("the Convention"), see *Engel v. Netherlands (No. 1)* (1976) ECHR 5100/71; *Öztürk v. Germany* [1984] ECHR 8544/79; *Jussila v Finland* [2006] ECHR 73053/01 and *Glantz v Finland* [2014] ECHR 37394/11). As a result, Article 6(2) gives the person charged with the penalty the right "to be presumed innocent until proved guilty according to the law."

174. In *Barberà and others v Spain* [1988] ECHR 10588/83, the European Court of Human Rights ("ECHR") set out its understanding of the scope of Article 6(2):

> "Paragraph 2 embodies the principle of the presumption of innocence. It requires, *inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him."

175. Deeming the underlying facts of a criminal charge to be proved because an appellant had not challenged the seizure of the goods in a different court would mean that (a) the respondent has no need to prove the underlying facts of the criminal act, and (b) the Tribunal has no right to consider either whether the act in question had happened, or the way in which it had happened.

176. We considered the case law authorities on whether, and if so when, a deeming provision might be allowed to operate, despite a person's Article 6(2) rights.

177. The most frequently cited authority is *Salabiaku v France* [1988] ECHR 10589/83 ("*Salabiaku*"). Mr Salabiaku had travelled to Roissy airport and taken possession of a trunk which had recently arrived from Zaire. When he was subsequently stopped by customs officers, the trunk was found to contain 10kg of cannabis.

178. At the relevant time, Article 392(1) of the French Customs Code provided that, where the fact of possession is established by a report provided by the customs authorities, "the person in possession…is deemed liable for the offence." Mr Salabiaku submitted that this deeming provision breached Article 6(2).

179. However, when the Paris Court of Appeal decided his case, it did not rely on Article 392(1). Instead, the members of that court "exercised their power of assessment "on the basis of the evidence adduced by the parties before [them]" see [30] of the ECHR judgment. When the case came before the ECHR, Mr Salabiaku's appeal was dismissed. The ECHR found that "in this instance the French courts did not apply Article 392(1) of the Customs Code in a way which conflicted with the presumption of innocence."

180. It can be seen that in *Salabiaku* the ECHR did not in fact consider the deeming provision in Article 392(1), because it had not been relied on by the French Court of Appeal. The ECHR nevertheless made some general comments at [28] of its judgment, which have been frequently cited in subsequent cases:

> "Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law…Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence."

181. In *Sheldrake v DPP AG's ref (No 4 of 2002)* [2004] UKHL 43 ("*Sheldrake*") Lord Bingham, giving the leading judgment, first considered *Salabiaku* and other case law and then said (our emphases):

> "From this body of authority certain principles may be derived. The overriding concern is that a trial should be fair, and the presumption of innocence is a fundamental right directed to that end. The Convention does not outlaw presumptions of fact or law but requires that these should be kept within reasonable limits and should not be arbitrary. It is open to states to define the constituent elements of a criminal offence, excluding the requirement of *mens rea*. But the substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the <u>opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption.</u>

> Security concerns do not absolve member states from their duty to observe basic standards of fairness. The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case."

182. In order to decide whether reliance on the Schedule 3 deeming provision in Mrs Van Driessche's penalty appeal would be a breach of Article 6(2), we must therefore consider the factors underlined in the middle of this passage:

(1) *Whether an appellant such as Mrs Van Driessche has the opportunity of rebutting the deeming*. If the Schedule 3 deeming provision were to be applied on the same automatic basis as happens in restoration cases, Mrs Van Driessche's failure to challenge the seizure in the magistrate's court would mean she has lost her only opportunity to rebut the facts underpinning the deeming.

(2) *Whether her right to defend her position has been maintained*. Mrs Van Driessche would now be unable to put forward, as a key part of her defence in these proceedings, that she did not in fact engage in "the conduct" for which she is being penalised.

(3) *Whether the deeming provision can be applied flexibly*. Again, if the same approach were to be taken as in restoration cases, there is no flexibility. The basis on which the seizure was made is deemed to be true.

(4) *Whether the Tribunal has retained a power to assess the evidence*. The Tribunal has no power to find facts which would conflict with the deemed facts underpinning the seizure.

(5) *The importance of what is at stake*. Although the amount of the penalty is not large in absolute terms, it carries with it the very severe and reputationally damaging stigma of dishonesty.

(6) *The difficulty HMRC may face if it were to be unable to rely on the deeming provision*. We could not see that HMRC would face any difficulty in explaining the evidential basis for their own position, were there to be no deeming.

183. The emphasised words at the end of the passage from *Sheldrake* show that we need to consider, in relation to each appellant, whether or not a deeming provision should be applied.

184. Having considered the above factors, we would find that the deeming provision should not be applied in Mrs Van Driessche's case.

Assessing these arguments

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

186. However, we accept that the position is not beyond doubt, taking into account in particular Warren J's *obiter dicta* in *Race.*

187. We therefore went on to consider briefly what the position would be if deeming did apply generally to penalty cases. Would the Tribunal be required to find that Mrs Van Driessche was travelling from a third country, and/or that the goods were purchased duty free?

If deeming applies generally, can Mrs Van Driessche be deemed to have travelled from a third country?

188. We answered this question in the negative, for the following three reasons.

(1) As we have already noted, in *Jones* at [71(7)], Mummery LJ said that (our emphasis) "deeming something to be the case carries with it <u>any fact</u> that forms part of the conclusion." However, as Euroairport is physically situated within France, treating part of the airport as within Switzerland must be a question of law, not a question of fact.

(2) In Gibson J's authoritative statement on the scope of deeming provisions (see §148), he said (again, our emphasis):

> "…because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, <u>unless prohibited from doing so</u>."

From our analysis of the legal provisions at §110ff, we concluded that Euroairport is in the EU as a matter of European law. Assuming that is correct, a provision in CEMA Schedule 3 cannot deem a place to be outside the EU. That would be to allow a UK deeming provision to displace EU law.

(3) Third, Gibson J also said that constructions which lead to absurdity should be avoided. We find that it would be "absurd" for a place to be deemed to be in Switzerland when as a matter of fact and law it is in France.

189. Therefore, even if deeming applies generally to penalty appeals, it cannot extend to deeming a person to have arrived from a third country if she actually arrived from a place within the EU.

If deeming applies generally, can the goods to be deemed purchased duty free?

190. Mrs Van Driessche said that her understanding of the position was that staff at EU airports are only allowed to sell duty free goods to those travelling to non-EU destinations and that "At Euroairport they asked me for my boarding pass and so should have refused to sell [the goods to] me in the event that goods were duty free as I was travelling to the UK."

191. Mr Lloyd did not put forward any alternative submission as to the normal position at EU airports, or challenge in cross-examination Mrs Van Driessche's evidence about being asked for her boarding pass.

192. On the basis that Mrs Van Driessche is correct, a person travelling within the EU would be able to purchase goods duty free at an EU airport which (a) had flights to non-EU destinations, and (b) did not operate the ticket check procedure properly or at all.

193. We had no evidence as to whether, at the relevant time, there were flights from Euroairport to non-EU destinations. If there were no such flights, it would be surprising for a Tribunal to be required to hold that a third party, such as an airline, must be deemed to be operating flights which it is not in fact operating; that, too, may meet the threshold of being "absurd."

194. Assuming that there were such flights, it would be possible to deem the airport staff to have failed to follow proper procedures, so that the goods were wrongly sold duty free to a person travelling within the EU. No legal provision would prevent the deeming, and there would be no absurdity.

195. It follows that if deeming applies to penalty cases generally, it would be possible for Mrs Van Driessche's goods to be deemed to have been imported duty free from an EU country. That would satisfy the statutory deeming required by Schedule 3, because it provides a basis for the legal seizure of the goods.

Overall conclusions on matters other than honesty

196. We pause at this point to summarise the position so far:

(1) HMRC have failed to show that Mrs Van Driessche engaged "in any conduct for the purpose of evading" customs duty, excise duty or import VAT.

(2) It is arguable that CEMA Schedule 3 applies to penalty appeals generally, so as to deem a person who has failed to challenge the seizure of the goods at the magistrate's court to have engaged in the conduct which underlies the penalty, although we are inclined to the view that deeming does not apply to penalty appeals.

(3) Even if deeming does apply to penalty appeals generally, it cannot operate so as to deem part of Euroairport to be outside the EU. That would be both absurd and a breach of EU law.

(4) However, goods bought at Euroairport could be deemed to have been purchased duty free.

197. Because it is arguable that deeming could apply so as to treat the goods as having been purchased duty free, and because we can decide this case without expressing a final view on that point, we moved on to considering whether Mrs Van Driessche was dishonest.

Whether Mrs Van Driessche was dishonest

198. We first make further findings of fact about what happened at Euroairport on 9 February 2014, about Mrs Van Driessche's experience when she arrived at Gatwick, and about the two subsequent occasions she was stopped by customs.

199. In carrying out this exercise we have been careful to exclude any findings of fact which we would be prevented from making, if we had to deem the goods to have been imported duty free.

200. For completeness, we would have come to the same conclusion on honesty, even had we been required to deem Euroairport to be outside the EU. That is because we have to take into account what Mrs Van Driessche actually knew at the time about the airport.

At Euroairport

201. On 9 February and 9 March 2014:

(1) Mrs Van Driessche arrived in Euroairport from Switzerland. She passed a sign saying "France" surrounded by the stars symbolising the EU and she noted that all subsequent road signs were in French.

(2) Her ticket used the airport code BSL for Basel.

(3) When she entered Euroairport there was no separate door, check-in or security procedure for persons who had BSL tickets as distinct from those who had tickets with the prefix MHL.

(4) When Mrs Van Driessche had completed check-in and security procedures she entered the departure area of the airport. There were no separate shops for those with BSL tickets.

202. On both dates the goods on offer within the *Dufry* shop were similar in packaging and size to those on sale at Eurotunnel. In particular, the smallest pouch size for tobacco was 500g. All goods were priced in Euros. None of the packaging on the goods carried the message that they were "duty free" or "for export." All the goods were labelled in French, none in German. In Switzerland goods are normally labelled in German, together with one or more other languages.

203. On 9 February 2014, Mrs Van Driessche initially purchased a carton of 200 Embassy No 1 cigarettes for €39. With her receipt she was offered "22% off your next purchase" of *Dufry* goods, up to a maximum of €150.

204. Mrs Van Driessche used the voucher to buy 14 pouches of Amber Leaf tobacco, with each pouch being 500g. The normal *Dufry* price was €48.50 per pouch, so 14kg would have cost €679; with the discount the price reduced to €529.62 (€37.83 per pouch), a reduction of €149.38.

205. When Mrs Van Driessche received her receipt for these purchases, she realised it included another discount voucher on the same terms. She checked with the cashier whether she could repeat her transaction using that voucher, so as to obtain a further discount of almost €150, and was told she could, so she bought exactly the same goods a second time, a couple of minutes later.

206. With her third receipt Mrs Van Driessche was given a further discount voucher. Before boarding her flight, she decided to use this voucher to purchase two more

cartons of Embassy, each containing 200 cigarettes. The discount reduced the price for each carton to €30.42 instead of the €39 she had paid for her first purchase, so the cost of two cartons was €60.84.

207. Mrs Van Driessche told us, and we accepted, that she asked the salesperson at *Dufry* if the goods were duty paid, and was told that they were.

208. She also told us, and again we accepted, that she regularly buys cigarettes and tobacco for personal use, so is familiar with the prices charged by shops and outlets in the EU. She said that the prices on offer at *Dufry*, before the discount, were little different in her experience from those for which goods could be bought at shops in the EU.

209. She supported her oral evidence by providing an email exchange with a tobacconist in Belgium. She said that Belgium and France both imposed VAT and duties on tobacco and cigarettes and the prices were broadly comparable. This was unchallenged. Her email to the Belgian shop reads:

> "Further to our telephone conversation, could you please give me the euro price of Amberleaf and Embassy no 1 at the end of 2013/January 2014 sold in your shop, so normal tax included"

210. The shop owner responded:

> "Prijzen [price] April 2014:
>
> Amber Leaf Eur5.40
>
> Embassy No1: Eur47"

211. The price given by the shop owner for Amber Leaf was for 50g not the 500g on sale at *Dufry*.

212. Mrs Van Driessche's evidence was that between January 2014 and April 2014 there had been a duty increase in Belgium, and added that larger pouches cost less per gram than smaller pouches. Even without taking those factors into account, the price of 500g of Amber Leaf would be €54, which was comparable to the €48.50 per pouch at which the tobacco was on sale at *Dufry*.

213. We agree with Mrs Van Driessche that the undiscounted *Dufry* price for the Amber Leaf was similar to the price at which it was sold in Belgium, being only 10% different.

214. In relation to the cigarettes, the price of a carton at the Belgian shop was €47 compared to the €39 at *Dufry*. Mrs Van Driessche said that the difference could be explained by the Belgian duty increase, and in any event it was only €8. Given that French VAT is set at 20%, the combined VAT and duties on a supposedly duty free price of €39 would have been considerably more than €8.

215. Her shopping completed, Mrs Van Driessche left the departure hall to go to the flight gate, where she was asked by a border official to show her passport or Identity Document. The official was French, with French insignia on his uniform.

216. On 9 March 2014, when Mrs Van Driessche repeated her journey, the facts were the same other than that, on this occasion, she only purchased one 500g pouch of Amber Leaf tobacco. She was also carrying three bottles of wine in her luggage, which were a present from a friend.

Arriving in the UK on 9 February 2014

217. Mrs Van Driessche said that when she arrived at Gatwick she showed her identity card to the passport officer; he signalled to Officer Trinick who was standing nearby. Officer Trinick followed "just one step behind" Mrs Van Driessche as she went from the passport area, down the escalator and into the baggage hall. When Mrs Van Driessche entered the green channel at 22.45, Ms Trinick tapped her on the shoulder.

218. Under cross-examination Officer Trinick accepted that she had followed Mrs Van Driessche into the green channel but said she couldn't remember any other details. We accept Mrs Van Driessche's evidence and find as a fact that Officer Trinick followed her from the passport area to the customs area before stopping her in the green channel.

219. Mrs Van Driessche told the Tribunal that Officer Trinick was "very aggressive" and asked her to produce all her different ID cards in her other names. In cross-examination she asked Officer Trinick "do you recall that you accused me of having multiple IDs and that I had to produce all of them." Officer Trinick said she did not remember this conversation. It is not recorded in her Notebook.

220. Both before the Tribunal and in her earlier correspondence, Mrs Van Driessche vehemently denied having multiple identities. She told the Tribunal she had not even changed her name when she got married, saying "Belgian women do not change names on marriage."

221. Mrs Van Driessche's evidence about this part of her encounter with Officer Trinick was vivid and particularised, and we find that it occurred and that Officer Trinick accused her of having multiple IDs.

222. Officer Trinick wrote up her Notebook at 01.52 hours on 10 February 2014, so some three hours after the stop. Mrs Van Driessche did not sign the Notebook. She told the Tribunal "nothing happened the way it was written down." We observe at this stage that we have already found that the Notebook did not record Officer Trinick's accusations that Mrs Van Driessche held multiple identity documents, or the fact that she followed Mrs Van Driessche from passport control into the green channel.

223. The Notebook records that "when questioned about her Customs allowance of excise goods she stated that she didn't have any." After the search, Officer Trinick

asked Mrs Van Driessche why she had not declared the cigarettes and tobacco. Mrs Van Driessche said she did not think she had to. The implications of this exchange were disputed, see §235 and §238(8).

224. Officer Trinick's Notebook then says:

> "when asked for a receipt for the goods she stated that she had paid for the goods using her credit card but had since thrown the receipt away. Search of the [indecipherable] handbag produced 3 receipts. One for the cigarettes and 2 for the tobacco."

225. Mrs Van Driessche cross-examined Officer Trinick on this part of her Notebook. The exchange was as follows:

> Mrs Van Driessche: You asked for receipts and I did not say that I did not have them – what did I say?
>
> Officer Trinick: I go by the Notebook that was made at the time.
>
> Mrs Van Driessche: the Notebook is wrong compared to what actually happened, isn't it?
>
> Officer Trinick: No
>
> Mrs Van Driessche: You asked me for receipts and I said I have no idea if I still have the receipts, didn't I?
>
> Officer Trinick: I have to rely on my Notebook and witness statement.
>
> Mrs Van Driessche: That [the Notebook] says I have thrown them away.
>
> Officer Trinick: I can't recall that you said you didn't have the receipts or not."

226. We prefer Mrs Van Driessche's evidence and find that she said she didn't know if she had kept the receipts or not, and that Officer Trinick subsequently found the receipts in her handbag. We also note that there were in fact four, not three, receipts.

227. We asked Officer Trinick what she had done with these receipts, and she initially said that she sent them to HMRC "within that shift." When she was reminded that Mr Scopelliti did not write to Mrs Van Driessche until September 2014, more than six months after the stop, she changed her evidence and said "I sent them when they [HMRC] requested them." We asked Officer Trinick where the receipts had been held in the meantime, and she responded: "In my bag. In my possession. Or in my locker."

228. We find it surprising that documentary evidence of this nature would be kept by an individual Officer, whether in her bag or in her locker. We also find that Officer Trinick's changing evidence about what she did with the receipts casts some doubt on her reliability as a witness.

229. Mrs Van Driessche asked several times in the course of the HMRC enquiry for copies of the receipts, and at the hearing suggested they might have been tampered with. However, the detail on the receipts exactly matches the goods purchased on her

four visits to the *Dufry* shop. We find as facts that the receipts produced in evidence for this hearing were those Officer Trinick found in Mrs Van Driessche's handbag, and that they were for the goods she had purchased.

230. HMRC also relied on the following extracts from Officer Trinick's Notebook to support their submission that Mrs Van Driessche was dishonest:

> "She stated…that she was here until Wednesday. She stated she would be visiting a friend. Said that she lived in Belgium with her husband and children…she also stated that she hadn't been to the UK for a long time."

231. When Mrs Van Driessche cross-examined Officer Trinick, the exchange was as follows:

> "Mrs Van Driessche: You looked through my handbag?
>
> Officer Trinick: Yes.
>
> Mrs Van Driessche: You came across my wallet?
>
> Officer Trinick: I would have done this, yes.
>
> Mrs Van Driessche: You examined it?
>
> Officer Trinick: I would have done this yes…
>
> Mrs Van Driessche: In the wallet was my driving licence.
>
> Officer Trinick: I don't recall.
>
> Mrs Van Driessche: You asked me a question – when are you leaving the country? Is that correct?
>
> Officer Trinick: I can't recall. I would have asked how long you were staying in the country and the purpose of your visit so probably I would have asked you when you were leaving.
>
> Mrs Van Driessche: I said I was leaving the country in a few days' time by Eurotunnel by car.
>
> Officer Trinick: Not from my recollection."

232. When Mr Lloyd cross-examined Mrs Van Driessche, the exchange was as follows:

> "Mr Lloyd: You said you were here to visit a friend.
>
> Mrs Van Driessche: No I was picked up by a friend.
>
> Mr Lloyd: You said you lived in Belgium.
>
> Mrs Van Driessche: No, she asked me when I was leaving the country. She asked me for the address I was going to in Belgium.
>
> Mr Lloyd: You said you hadn't been to the UK for a long time.
>
> Mrs Van Driessche: I didn't say that. The woman went through my whole wallet – it had a UK driving licence with my UK address on it.
>
> Mr Lloyd: You said you lived both in Belgium and in this country.

> Mrs Van Driessche: She asked me when I was leaving the country…I gave her the answer to the questions she asked.
>
> Mr Lloyd: Is it not correct that you were coming here to visit a friend for a couple of days?
>
> Mrs Van Driessche: I was asked how long I was going to be in the country and where I was going and I answered these questions."

233. From that evidence we make the following findings of fact:

(1) Officer Trinick asked Mrs Van Driessche when she was leaving the UK, as accepted by Officer Trinick under cross-examination.

(2) In reply, Mrs Van Driessche said she said was leaving in three days' time, being on the following Wednesday. This is not in dispute.

(3) Officer Trinick checked all the documents in Mrs Van Driessche's wallet. This too is not in dispute.

(4) The wallet included Mrs Van Driessche's driving licence, with a UK address. On this, we accept Mrs Van Driessche's evidence.

(5) Mrs Van Driessche did not say that she lived with her family in Belgium. This would have been inconsistent with the address on her driving licence which Officer Trinick had already seen. It follows that she also did not say that she had not been in the UK for a long time.

(6) Mrs Van Driessche did not state that she was in the UK to visit a friend. We prefer her evidence here to that of Officer Trinick. This is because the latter is inconsistent with the other findings set out above, and also because we have not been entirely satisfied as to the reliability of Officer Trinick's evidence.

HMRC's submissions on dishonesty

234. HMRC's case was that Mrs Van Driessche acted dishonestly by entering the green channel when she was carrying more than the legal limit for passengers arriving from a non-EU country. She did this on two occasions. On the first stop, HMRC submitted that Mrs Van Driessche "wrongly stated that she was not carrying any dutiable goods."

235. HMRC also submitted that Mrs Van Driessche had not been honest when she made statements to Officer Trinick as to her place of residence, her receipts and the purpose of her visit. The HMRC review letter describes these as "false representations." The skeleton argument says that Mrs Van Driessche "wrongly stated that she was not carrying dutiable goods [and] wrongly stated that she did not have receipts."

236. In oral submissions, Mr Lloyd said:

> "The second stop was a month after the first. HMRC don't accept that ignorance is a defence. I cannot envisage how someone can be stopped the second time and say that they were not aware of allowances. That fact alone is sufficient to establish requisite dishonesty, especially when information we have is that she did know what the allowance is."

237. In relation to the prices paid for the goods, as we have already noted, Mr Lloyd's skeleton argument stated that "had the goods been duty paid, they would have cost significantly more."

Mrs Van Driessche's submissions on dishonesty

238. Mrs Van Driessche said she had not been dishonest. She did not accept at the time, and still did not accept, that part of Euroairport was outside the EU, and all the evidence suggested that the goods she had bought were duty paid, not duty free, and she had no reason to think otherwise. Specifically:

(1) in relation to the location of the airport, she relied on the evidence which we used to make our findings of fact at §104 and §201;

(2) within the airport she encountered no Swiss customs or border officials;

(3) the goods she purchased were not labelled "export only" or "duty free";

(4) the sales assistant at *Dufry* told her the goods were duty paid;

(5) the minimum amount of Amber Leaf tobacco which could be purchased at Euroairport was 500 grams, twice the legal limit for importations into the EU from a third country;

(6) the message on the receipts about "reimportation" to the EU supported her understanding that Euroairport was in the EU;

(7) the prices charged for the goods, before the discount, were comparable with those for goods sold within the EU and she was familiar with those prices. She had no reason to think that they were duty free; and

(8) she honestly answered Officer Trinick's questions. Although she had told Officer Trinick that she was not carrying any dutiable goods, this was because she genuinely believed that she had travelled from within the EU and the goods were for her personal use; there was no dishonesty.

239. Mrs Van Driessche emphasised that it was the 22% discount that made the goods so attractive when compared to normal EU prices. In her second email, she said:

> "I, like many people, love a bargain. So when I am offered items, that our household uses a lot, cheaply, I buy in bulk if possible as in the long run this saves us money. I recently bought 180 rolls of toilet paper as they were a bargain."

240. In relation to the second stop, Mrs Van Driessche said that she told Officer Lines what she was carrying as soon as she was stopped. The fact that she remained of the view that she was allowed to import 500g of Amber Leaf and three bottles of French wine from Euroairport because it was within the EU, did not make her dishonest.

Discussion on dishonesty

241. As we have already found at §67, we must decide whether, according to the ordinary standards of reasonable and honest people, what Mrs Van Driessche did was

dishonest, taking into account what she actually knew at the time, as distinct from what a reasonable person would have known or appreciated.

242. We have no hesitation in finding that reasonable and honest people, taking into account what Mrs Van Driessche actually knew at the time, would consider that she had acted entirely honestly, for the reasons she gives.

243. In summary, Mrs Van Driessche was, and remains, convinced that Euroairport is within the EU on the basis of her experience, as set out at §201. She bought goods which carried no statement that they were duty free, and she asked the sales assistant to confirm this was the position. The tobacco was packaged so that the minimum size was 500g, twice the legal limit for UK imports, which further confirmed her understanding. She was familiar with duty paid prices within the EU, and the differences between those prices and the *Dufry* prices (before discounts) was relatively small, and certainly much less than would be expected if the *Dufry* goods were duty free.

244. Mrs Van Driessche told Officer Trinick that she was not carrying any dutiable goods because, as Officer Trinick recorded at the time "Mrs Van Driessche said she did not think she had to [tell her]." Far from being an indicator of dishonesty, this was because she genuinely believed she was travelling from within the EU. It is clear from our findings of fact at §233 that Mrs Van Driessche was also not dishonest in her replies to any of Officer Trinick's other questions.

245. HMRC have submitted that we should take into account Mrs Van Driessche's behaviour on the second occasion. As we have noted at §56ff, it is not clear whether the penalties relating to the second seizure were validly imposed, because there is no reference to that seizure in the Penalty Notice. In any event, we find nothing dishonest in Mrs Van Driessche seeking to import 500g of tobacco and three bottles of wine on 9 March 2014 when she remained of the view, having done her own research, that Euroairport was in the EU.

Overall conclusions and appeal rights

246. HMRC have not met the burden of proving that Mrs Van Driessche engaged in conduct which would make her potentially liable to penalties.

247. It is however arguable that HMRC do not need to prove conduct in a penalty case such as this, where Mrs Van Driessche did not challenge the seizure of the goods at the magistrate's court, statutory deeming may apply here in the same way as it does in restoration appeals. If that is the position, the goods could be deemed to have been imported duty free, but deeming would not extend to treating Euroairport as outside the EU.

248. However, we did not need to come to a conclusion on whether deeming applies to penalty cases as it does to restoration cases. That is because we found that Mrs Van Driessche was in any event not dishonest when she imported the goods into the UK.

249. As a result, her appeal is allowed and the penalties cancelled.

250. 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 Rules. 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.

Anne Redston
TRIBUNAL JUDGE

RELEASE DATE: 21 June 2016

APPENDIX: LEGISLATION

Finance Act 1994

Section 8: Penalty for evasion of excise duty

(1) Subject to the following provisions of this section, in any case where—

(a) any person engages in any conduct for the purpose of evading any duty of excise, and

(b) his conduct involves dishonesty (whether or not such as to give rise to any criminal liability),

that person shall be liable to a penalty of an amount equal to the amount of duty evaded or, as the case may be, sought to be evaded.

(2)-(3)…

(4) Where a person is liable to a penalty under this section—

(a) the Commissioners or, on appeal, an appeal tribunal may reduce the penalty to such amount (including nil) as they think proper; and

(b) an appeal tribunal, on an appeal relating to a penalty reduced by the Commissioners under this subsection, may cancel the whole or any part of the reduction made by the Commissioners.

Section 16: Appeals to a Tribunal

(1)-(5)…

(6) On an appeal under this section the burden of proof as to--

(a) the matters mentioned in subsection (1)(a) and (b) of section 8 above,

(b)-(c)….

shall lie upon the Commissioners; but it shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established.

(7) An appeal tribunal shall not, by virtue of anything contained in this section, have any power, apart from their power in pursuance of section 8(4) above, to mitigate the amount of any penalty imposed under this Chapter.

Finance Act 2003

Section 24: Introductory

(1) This Part makes provision for and in connection with the imposition of liability to a penalty where a person—

(a) engages in any conduct for the purpose of evading any relevant tax or duty, or

(b) engages in any conduct by which he contravenes a duty, obligation, requirement or condition imposed by or under legislation relating to any relevant tax or duty.

(2) For the purposes of this Part "relevant tax or duty" means any of the following—

(a) customs duty;

(b) community export duty;

(c) community import duty;

(d) import VAT;

(e) customs duty of a preferential tariff country.

Section 25: Penalty for evasion

(1) In any case where—

(a) a person engages in any conduct for the purpose of evading any relevant tax or duty, and

(b) his conduct involves dishonesty (whether or not such as to give rise to any criminal liability),

that person is liable to a penalty of an amount equal to the amount of the tax or duty evaded or, as the case may be, sought to be evaded.

Section 29: Reduction of penalty under section 25 or 26

(1) Where a person is liable to a penalty under section 25 or 26–

(a) the Commissioners (whether originally or on review) or, on appeal, an appeal tribunal may reduce the penalty to such amount (including nil) as they think proper; and

(b) the Commissioners on a review, or an appeal tribunal on an appeal, relating to a penalty reduced by the Commissioners under this subsection may cancel the whole or any part of the reduction previously made by the Commissioners…

(2) In exercising their powers under subsection (1), neither the Commissioners nor an appeal tribunal are entitled to take into account any of the matters specified in subsection (3).

(3) Those matters are–

(a) the insufficiency of the funds available to any person for paying any relevant tax or duty or the amount of the penalty,

(b) the fact that there has, in the case in question or in that case taken with any other cases, been no or no significant loss of any relevant tax or duty,

(c) the fact that the person liable to the penalty, or a person acting on his behalf, has acted in good faith.

Section 33: Right to appeal against certain decisions

(1) …

(2) Where HMRC give a demand notice to a person or his representative, the person or his representative may make an appeal to an appeal tribunal in respect of–

(a) their decision that the person is liable to a penalty under section 25 or 26, or

(b) their decision as to the amount of the liability.

(3)-(5)…

(6) The powers of an appeal tribunal on an appeal under this section include–

(a) power to quash or vary a decision; and

(b) power to substitute the tribunal's own decision for any decision so quashed.

(7) On an appeal under this section–

(a) the burden of proof as to the matters mentioned in section 25(1) or 26(1) lies on HMRC; but

(b) it is otherwise for the appellant to show that the grounds on which any such appeal is brought have been established