Neutral Citation: [2023] UKFTT 00031 (TC)

Case Number: TC08690

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2021/11351

EXCISE – duty assessment – application to strike out appeal against assessment – appeal struck out – penalty assessment – whether deliberate – yes – appeal dismissed and penalty confirmed

Heard on 3 January 2023
Judgment date: 09 January 2023

Before

TRIBUNAL JUDGE ANNE REDSTON
DEREK ROBERTSON

Between

NIKOLA POLAKOVA

Appellant

and

THE COMMISSIONERS FOR
HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: The Appellant did not attend and was not represented

For the Respondents: Mr Thomas Holt, Litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. On 9 September 2017, Ms Polakova arrived at Stanstead on a flight from the Czech Republic. She was stopped at the airport by Officer Jake Lloyd, who seized the 29,800 cigarettes in Ms Polakova's luggage on the basis that they were for a commercial purpose. Ms Polakova did not challenge the seizure in the magistrate's court.

2. HMRC subsequently issued Ms Polakova with an excise duty assessment of £8,533 ("the Assessment") together with a wrongdoing penalty of £3,285 ("the Penalty"). Ms Polakova appealed the Assessment and the Penalty, on the grounds that the cigarettes had been for personal use and/or a gift, and because she could not afford to pay the Assessment or the Penalty.

3. HMRC applied to strike out the appeal against the Assessment under Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules"), on the basis that the Tribunal had no jurisdiction. For the reasons given in the main body of this decision, we agreed with HMRC and struck out that appeal.

4. In relation to the Penalty, we found as a fact that Ms Polakova knew that the cigarettes had not been imported for personal use or as a gift, and had therefore acted deliberately. There is no basis on which an "insufficiency of funds" can reduce or eliminate the Penalty, as we explain at §61. We therefore upheld the Penalty and refused the appeal.

MS POLAKOVA'S FAILURE TO ATTEND

5. The hearing was listed to begin at 10.00am, and the parties had been asked to log onto the hearing platform in good time. Half an hour before the start time for the hearing, the Tribunal noted that Ms Polakova had not connected to the hearing platform. At the Tribunal's direction, the Tribunal clerk emailed Ms Polakova, but received no response. At 9.45 am the clerk called her on the telephone number she had provided, but it was not picked up and there was no message facility.

6. The Tribunal delayed the start time of the hearing until 10.15. We then considered the Tribunal (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules"), and in particular Rule 2 of those Rules, as set out below.

The Tribunal Rules

7. Rules 33 reads:

> "Hearings in a party's absence
>
> If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal--
>
> (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
>
> (b) considers that it is in the interests of justice to proceed with the hearing."

8. It was clear that condition (a) was satisfied. We considered whether it was in the interests of justice to proceed. Rule 2(2) says:

> "Dealing with a case fairly and justly includes--
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues."

Application of Rule 2

9. The relevant factors here are (a), (c) and (e).

(1) In relation to (a), Ms Polakova's appeal concerned the Assessments and the Penalty. The case is important to her because of the amounts involved, but the issues are not complex. Mr Holt had attended the hearing to represent HMRC, and the decision maker Ms Carmichael attended as a witness, so if the hearing were to be postponed and relisted, HMRC would incur further costs.

(2) In relation to (c), Ms Polakova's absence meant she would not be able to tell the Tribunal why she believed she should succeed. However, she had explained her position to the Border Force and to HMRC, and she had filed grounds of appeal with the Tribunal. In addition:

(a) HMRC had repeatedly asked Ms Polakova whether she had any further information she wanted to be considered, but she had not responded; and

(b) on 12 July 2022, HMRC had filed and served a strike out application in relation to the Assessment, and Ms Polakova had similarly not responded.

(3) In relation to (e), a postponement of the hearing would inevitably cause delay. The events with which this appeal were concerned happened in 2017, already over five years ago. Relisting the hearing would further lengthen the gap between the date of the seizure, and the eventual hearing of Ms Polakova's appeal.

(4) In assessing whether we were able properly to consider the issues, we took into account that we had been provided with:

(a) a Document Bundle of 278 pages which included the correspondence between the parties; Ms Polakova's Notice of Appeal and details of the basis for the Penalty; and

(b) a Bundle of Authorities containing extracts from the legislation and various relevant court and tribunal judgments.

10. We also considered the following other factors:

(1) both parties are entitled to have the case dealt with fairly and justly, so we are required to consider the effect of a postponement decision on HMRC as well as on Ms Polakova, see *Transport for London v O'Cathall* [2013] EWCA Civ 21 at [42]. HMRC wanted the case resolved, and Mr Holt and Ms Carmichael had attended and prepared for this hearing;

(2) a postponement would not only cause delay to HMRC and Ms Polakova, but would also affect other Tribunal users. As Davis LJ said in *Chartwell Estate Agents v Fergies Properties* [2014] EWCA Civ 506 at [28], the interests of justice include:

> "the interests of other court users: who themselves stand to be affected in the progress of their own cases by satellite litigation, delays and adjournments occurring in other cases..."

(3) Ms Polakova had not informed the Tribunal in advance that she would be unable to attend, or responded to the email from the Tribunal clerk. The telephone number she had provided appeared not to be functioning.

11. Taking into account all the foregoing, we decided that it was in the interests of justice to proceed with the hearing despite Ms Polakova's failure to attend.

PERMISSION FOR LATE APPEAL

12. HMRC issued their review decision on 11 August 2021. Ms Polakova did not appeal to the Tribunal until 3 November 2021. This was just over seven weeks later than the 30 days allowed by statute.

13. The Tribunal applied the three-stage test set out by the Upper Tribunal ("UT") in *Martland v HMRC* [2018] UKUT 0178 (TCC), which is as follows:

(1) establish the length of the delay and whether it is serious and/or significant;

(2) establish the reason(s) why the delay occurred; and

(3) evaluate all the circumstances of the case, using a balancing exercise to assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission, and in doing so take into account "the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected".

14. The delay of seven weeks was serious. Ms Polakova explained the reasons as follows:

(1) She had received the review decision (which had been sent by post) on 5 September 2021, and she filed an online Notice of Appeal on 27 September 2017.

(2) However, some weeks later, that Notice was returned by the Tribunal for her to provide reasons why it was late.

(3) Ms Polakova filed a new Notice a few days later, on 3 November 2021.

15. The Tribunal decided that the combination of postal delays and the time taken by the Tribunal to return the first Notice of Appeal to Ms Polakova constituted a good reason for the delay. In relation to the third stage, all the circumstances of the case, we gave particular weight to the need for statutory time limits to be respected, but also took into account that there had been a good reason why the time limit had not been met. We decided that the prejudice to Ms Polakova if the appeal was not heard was greater than the prejudice to HMRC if permission was granted; HMRC accepted this was the case, and did not object to the late appeal. Having considered and weighed the factors, we gave permission for Ms Polakova to make her appeal late.

THE EVIDENCE

16. The Tribunal had a Bundle of documents prepared by HMRC, which included:

(1) the relevant pages from the Notebook of Officer Lloyd, who interviewed Ms Polakova and who seized the cigarettes; the seizure information notice (Form BOR 156) signed by Ms Polakova and Officer Lloyd; and the warning letter about seized goods (Form BOR 162), also signed by Ms Polakova and Officer Lloyd;

(2) correspondence between the parties, including the decision letters; Ms Carmichael's penalty explanation letter; Ms Polakova's request for a review and the statutory review letter issued by Ms Shek-Coutts; and

(3) Ms Polakova's Notice of Appeal.

17. Ms Carmichael provided a witness statement with exhibits, and adopted that witness statement as her evidence in chief. The Tribunal found her to be an entirely credible witness.

18. Ms Polakova did not provide a witness statement or attend to give oral evidence. As explained further below, she made contradictory statements to Officer Lloyd. We found her evidence on key issues in dispute to be unreliable,

19. On the basis of that evidence, taking into account our findings on credibility, we make the findings of fact in this decision.

FINDINGS OF FACT

20. We begin with some background facts, we next make findings about the events at Stanstead, and then about the Assessment and the Penalty.

Background facts

21. Ms Polakova lives in the Czech Republic. She was born in 1993, so was 24 at the time of the events in question. She was a teacher earning 15,000 Czech crowns. As this is around £500, we have taken it to represent her weekly salary; her annual salary was therefore around £26,000 per annum. Ms Polakova also worked as a part-time swimming coach earning 500 crowns, or around £18. We have again taken this to be a weekly amount. In total, we find that Ms Polakova earned around £27,000 per annum at time of the events in question.

22. In her letter of 5 March 2019, Ms Polakova told HMRC that she was a student with no income. We accept that it is possible that she gave up her job and subsequently became a student, but we make no finding as to whether or not that is correct. As set out below, much of Ms Polakova's other evidence was unreliable and we do not need to make a finding about whether she was a student in 2019.

The arrival and the seizure

23. Ms Polakova arrived at Stanstead on 9 September 2017 on a flight from Prague, and she entered the blue channel for travellers from within the European Union. She was stopped by Officer Lloyd at 8.15am. She told him she was "visiting a friend"; that the friend lived in London and that she was staying with the friend for three days. Officer Lloyd asked to see her return ticket; this was for a flight which departed from Stanstead at 1pm the same day. Ms Polakova therefore did not tell the truth when she said she was staying in the UK for three days.

24. We also agree with Mr Holt that it is not credible that Ms Polakova could have travelled to London to visit a friend, but still arrived back at Stanstead in time to complete the formalities before her return flight. We find that she was not in the UK in order to visit a friend in London, and her evidence to that effect is not reliable.

25. Officer Lloyd asked Ms Polakova if she had any cigarettes; she said she had 150, and produced a receipt. She confirmed that everything in her luggage was hers and that she knew what was contained within her suitcases. Officer Lloyd then searched her bags and found 29,800 Benson & Hedges cigarettes; these have a UK recommended retail price of £14,155.

26. We find as a fact that Ms Polakova knew she had those cigarettes in her luggage and that when she told Officer Lloyd that she had 150 cigarettes, she was not telling the truth. Given that Ms Polakova was flying back to the Czech Republic the same afternoon, we find as a fact that Ms Polakova intended to hand over the cigarettes to a third party and they were not for her personal use.

27. Ms Polakova then said that the cigarettes were "a gift". Officer Lloyd asked "did your friend give you money for them". Ms Polakova initially replied "yes", but when asked how much money she had been given, she said "no, nothing, it is a gift". When Officer Lloyd questioned why she was giving her friend such a large gift, Ms Polakova said it was "because

she taught me English"; she also said that her friend's job was "to sell cars" and "it's not all for my friend, she'll give some to her friends" and that the money "wasn't all from my job

28. We agree with Mr Holt that it is not credible that Ms Polakova would have spent such a significant percentage of her annual earnings on a gift for a person who had taught her English, especially as part of that "gift" was to be passed on to others. We find as facts that Ms Polakova was provided with funds to purchase the cigarettes for and on behalf of one or more third parties, and that the cigarettes were not a gift.

29. Two men accompanied Ms Polakova to the interview room. When Officer Lloyd asked if she knew them, she initially said "no, we only meet on the plane" but later admitted that one was her boyfriend. We agree with Mr Holt that Ms Polakova's initial statement was not true, and she knew it was not true.

30. Officer Lloyd seized the cigarettes. He issued Ms Polakova with copies of forms BOR162 and BOR 156, and she and Officer Lloyd signed both forms. Ms Polakova did not challenge the legality of the seizure at the magistrate's court.

The Assessment and the Penalty

31. On 21 February 2018, Ms Carmichael sent Ms Polakova a preliminary notice informing her that HMRC were considering issuing her with an excise duty assessment and a wrongdoing penalty; she attached detailed information about the proposed penalty. She asked that Ms Polakova provide HMRC with any information that had not already been taken into account by 29 March 2018. Ms Carmichael sent the letter to the address Ms Polakova had put on the BOR162 and BOR156. Ms Polakova did not respond.

32. On 9 April 2018, Ms Carmichael issued the Assessment and the Penalty. The total payable was £11,818. At some point before 8 November 2018, HMRC contacted the Czech authorities, and they took steps to collect the money from Ms Polakova.

33. HMRC subsequently received a telephone call which they understood to be from Ms Polakova, followed by a letter dated 8 November 2018 seeking to appeal the Assessment and the Penalty on the basis that the cigarettes were "a gift for my friends as I explained to customs".

34. In a further telephone conversation during which HMRC again thought they were talking to Ms Polakova, the caller said she wanted a statutory review of both decisions. HMRC agreed to carry out the review, despite the lateness, and again asked Ms Polakova to provide any further information, but none was provided.

35. HMRC subsequently realised that the caller was not Ms Polakova, but an unauthorised third party, and that the signature on the letter dated 8 November 2018 did not correspond with that on the forms Ms Polakova had signed at Stanstead.

36. HMRC wrote to Ms Polakova on 10 May 2019 asking her to provide documentary evidence of her identity if she wanted a statutory review. Ms Polakova did not provide that information until 8 March 2021. HMRC agreed to carry out the review, and on 11 August 2021, Ms Shek-Coutts issued the review decision, upholding the Assessment and the Penalty. On 3 November 2021, Ms Polakova appealed to the Tribunal.

THE ASSESSMENT

37. We first set out the law and then explain the strike out application.

The law

38. The relevant legislation has been helpfully set out by Warren J in *HMRC v Race* [2014] UKUT 0331 (TCC) ("*Race*") as follows:

"[13] The statutory provisions with which this appeal is concerned are found in the Customs and Excise Management Act 1979 ('CEMA') and the Excise Goods (Holding Movement and Duty Point) Regulations 2010 (SI 2010/593) ('the Regulations').

14. Section 49 CEMA provides for the seizure of goods improperly imported. Goods are liable to forfeiture in a variety of circumstances. In the present case, the relevant provision is section 49(1), which applies (subject to any exceptions under the legislation) in relation to goods which are chargeable with customs or excise duty on their importation but where the duty has not been paid. The power to forfeit such goods arises where the goods are unshipped at a port, unloaded from an aircraft in the UK or removed from their place of importation or from any approved place such as a transit shed.

15. Section 139 provides that anything liable to forfeiture may be seized by a relevant authorised person….

16. Section 139(6) introduced the provisions of Schedule 3 relating to forfeitures and condemnation proceedings. Paragraphs 3, 4, 5 and 6 of that Schedule provided as follows:

> '3. Any person claiming that any thing seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of the date of the seizure, give notice of his claim in writing to the Commissioners at any office of customs and excise.
>
> 4. Any notice under paragraph 3 above shall specify the name and address of the claimant.....
>
> 5. 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.
>
> 6. Where notice of claim in respect of any thing is duly given in accordance with paragraphs 3 and 4 above, the Commissioners shall take proceedings for the condemnation of that thing by the court, and if the court finds that the thing was at the time of seizure liable to forfeiture the court shall condemn it as forfeited.'

17. The scheme of these provisions of Schedule 3 is perfectly clear. A person whose goods have been seized can challenge the seizure. If he does so in the proper form and within the one month time-limit, the goods can only be forfeited under an order of the court in condemnation proceedings. If he fails to serve notice, then there is a statutory deeming under which the goods are deemed "to have been duly condemned as forfeited". Since the only way in which goods can in fact be forfeited is by condemnation by the court, the provisions operate, in effect, by treating the goods as having been condemned as forfeited in condemnation proceedings.

18. As to assessments, these are dealt with in the Finance Act 1994. Section 12(1A) provides, materially, that where it appears to HMRC that any person is a person from whom any amount has become due by way of excise duty and that amount can be ascertained by HMRC, then that person can be assessed to that amount of duty.

19. Regulation 13(1) of the Excise Goods Regulations applies where goods have already been released for consumption in another Member State and

> where they are held for a commercial purpose in the UK 'in order to be delivered or used in' the UK. In such a case, the duty excise point is the time when those goods are first so held. The person liable to pay the duty includes a person to whom the goods are delivered: see Regulation 13(2)(c).
>
> 20. For the purposes of Regulation 13(1), goods are held for a commercial purpose if, among other circumstances, they are held 'by a private individual ('P'), except in a case where the excise goods are for P's own use and were acquired in, and transported to the United Kingdom from, another Member State by P: see Regulation 13(3)(b). And 'own use' includes use as a personal gift but does not include the transfer to another person for money or money's worth: see Regulation 13(5)."

39. As para 17 of *Race* set out above explains, the effect of Sch 3 is that if a person does not challenge the seizure in the magistrate's court within the one month time limit, the goods are deemed to have been condemned. Warren J went on to say at [26], in reliance on *HMRC v Jones and Jones* [2011] EWCA Civ 824 (*"Jones"*) that:

> "*Jones* is clear authority for the proposition that the First-tier Tribunal has no jurisdiction to go behind the deeming provisions of paragraph 5 Schedule 3. If goods are condemned to be forfeited, whether in fact or as the result of the statutory deeming, it follows that, having been bought in a Member State and then imported by Mr and Mrs Jones, they were not held by the taxpayers for their own personal use in a way which exempted the goods from duty. The reasoning and analysis in *Jones* did not turn on the fact that the case concerned restoration of the goods and not assessment to duty."

40. In the context of Mr Race's case, Warren J said at [31]:

> "Mr Race is unable…to go behind the deeming provision of paragraph 5 Schedule 3. It is not open to him to attempt to establish that he held the goods for his own personal use and not for a commercial purpose and at the same time maintain that the goods were acquired in another Member State. In my judgment…there is no room for further fact-finding on the question of whether seized goods were duty paid or not once the Schedule 3 procedure had determined that point."

The strike-out application

41. Ms Polakova's only ground of appeal against the Assessment was that she had imported the cigarettes for personal use. HMRC applied for a strike out on the basis that the Tribunal had no jurisdiction to hear and decide an appeal on that basis.

42. As is clear from *Jones* and *Race*, if a person does not challenge the seizure in the magistrate's court, the goods are deemed to have been imported for a commercial purpose. As a result, the Tribunal has no jurisdiction to go behind that deeming provisions and consider whether Ms Polakova imported the goods for personal use. If the Tribunal has no jurisdiction, Rule 8(2)(a) of the Tribunal Rules provides that it "must" strike out the appeal.

43. Since the Tribunal has no jurisdiction to consider Ms Polakova's only ground of appeal, namely that the cigarettes were for personal use, it follows that we must allow HMRC's strike out application.

Decision on the Assessment

44. Ms Polakova's appeal against the Assessment is struck out under Rule 8(2)(a) of the Tribunal Rules.

THE PENALTY

45. We first set out the legislation relating to the Penalty, then the basis on which the Penalty was charged; the parties' submissions and our view then follow.

The legislation

46. The Penalty was charged under Schedule 41 Finance Act 2008 ("Sch 41"). Para 4(1) of that Schedule provides:

> "A penalty is payable by a person (P) where—
>
> (a) after the excise duty point for any goods which are chargeable with a duty of excise, P acquires possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods, and
>
> (b) at the time when P acquires possession of the goods or is so concerned, a payment of duty on the goods is outstanding and has not been deferred."

47. Under the heading "degrees of culpability", para 5(4) reads:

> "P's acquiring possession of, or being concerned in dealing with, goods on which a payment of duty is outstanding and has not been deferred…is –
>
> 'deliberate and concealed' if it is done deliberately and P makes arrangements to conceal it, and
>
> 'deliberate but not concealed' if it is done deliberately but P does not make arrangements to conceal it."

48. Para 8(10) states that the "potential lost revenue" or "PLR" is "the amount of any tax which is unpaid by reason of the failure".

49. Para 12 provides:

> "(2) P discloses the relevant act or failure by
>
> (a) telling HMRC about it,
>
> (b) giving HMRC reasonable help in quantifying the tax unpaid by reason of it, and
>
> (c) allowing HMRC access to records for the purpose of checking how much tax is so unpaid…
>
> (3) Disclosure of a relevant act or failure
>
> (a) is 'unprompted' if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the relevant act or failure, and
>
> (b) otherwise, is 'prompted'.
>
> (4) In relation to disclosure 'quality' includes timing, nature and extent."

50. The minimum penalties are at para 13, which provides that:

> (1) the minimum penalty for a deliberate and concealed failure is 50% if the disclosure is prompted, and 30% if unprompted;
>
> (2) the minimum penalty for a deliberate and not concealed failure is 35% if prompted, and 20% if unprompted; and
>
> (3) the minimum penalty for any other case is 10% if prompted and 0% if unprompted.

51. Para 20 is headed "reasonable excuse" and provides that liability to a penalty "does not arise in relation to an act or failure which is not deliberate" if there is a reasonable excuse for

the failure; but adds that "an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control."

The basis for the Penalty

52. HMRC's position was that Ms Polakova had acted "deliberately" because she knew she was not bringing in the cigarettes for personal use, as was clear from the very short visit and the inconsistent answers given to Officer Lloyd. The maximum penalty was thus 70% and the minimum 35%. Because Officer Lloyd had only found the cigarettes when he searched Ms Polakova's luggage, the disclosure was "prompted". The PLR was the amount of duty sought to be evaded, so £8,533.

53. HMRC awarded the maximum reduction for quality of disclosure under the categories of "helping" and "giving" because "no further information was required". They allowed 20% out of a maximum of 40% for "telling", as Ms Polakova had not admitted the wrongdoing. The total reduction was thus 90%.

54. That overall reduction was used to mitigate the part of the Penalty which falls within the 35% band between the maximum of 70% and the minimum of 35%, so by 31.5 % (35 x 90) leaving 3.5% in charge; the resulting overall percentage was therefore 38.5% (35 + 3.5) of the PLR. The Penalty was therefore £3,285 (£8,533 x 38.5%).

Submissions and discussion

55. Mr Holt asked the Tribunal to uphold the Penalty on the basis that it was clear on the facts that Ms Polakova had acted deliberately. There was, he submitted, no basis for adjusting the mitigation which had been given. Ms Polakova's only submission was that she had insufficient money to pay the Penalty.

56. The Tribunal considered what was meant by "deliberate". This has recently been considered in *Hare Wines v HMRC* [2023] TC/2020/04235, in which Judge Redston was also the presiding judge. Consistent with the analysis there set out, we find that a person acts "deliberately" within the meaning of Sch 41 if she intentionally brings goods into the UK knowing that the payment of duty is outstanding, and intentionally does not pay that duty.

57. We agree with HMRC that Ms Polakova:

(1) knew that cigarettes were not liable for duty if they were for personal use or were a gift, but

(2) also knew that the cigarettes in her luggage were neither for personal use nor a gift; instead, she knew she had been given money to purchase the cigarettes; that she was to hand them over to a third party, and was then returning the very same day to the Czech Republic.

58. Ms Polakova therefore knew that duty was payable on the cigarettes, and her intention was to evade payment of that duty. She thus acted "deliberately" within the meaning of the statute.

59. There was also no doubt that disclosure was "prompted". We went on to consider the level of mitigation. The only category for which HMRC had not given full mitigation was "telling". The Notes on Clauses, published when Sch 41 was introduced, say that "telling" means "telling HMRC that there is or may be an act or failure". This is also the normal meaning of "disclosure": the Oxford English Dictionary defines "disclosure" as "the action or fact of disclosing or revealing new or secret information".

60. As Ms Polakova never admitted the wrongdoing, there is no basis for any reduction under this heading. Nevertheless, as the meaning of "telling" was not argued before us, and as HMRC

did not ask the Tribunal to increase the Penalty, we decided it would be unfair to remove the 20% reduction.

61. For completeness, we record that Ms Polakova's submission that the Penalty should be reduced or eliminated because she could not afford it is not a relevant consideration, for the following reasons:

(1) the Tribunal is required by Sch 41 to decide whether she acted deliberately, and if she did, the penalties are then fixed by statute;

(2) even had we decided that she acted carelessly rather than deliberately, a lack of funds cannot normally constitute a "reasonable excuse", see §51; and

(3) in any event, Ms Polakova did not submit that a lack of funds was a reason why she had carried out the smuggling; instead, it was a reason why she could not pay the resulting penalty. It was thus not an "excuse" for her failure to comply with the law.

Decision on the Penalty

62. For the reasons set out above, the Tribunal upholds the Penalty and refuses Ms Polakova's appeal against it.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 09th JANUARY 2023