**[2018] UKUT 0018 TCC**
**Appeal number: UT/2016/0224**

***EXCISE DUTY – penalty under paragraph 4(1) Schedule 41 Finance Act 2008 – person carrying dutiable goods intercepted in green channel at airport - whether excise duty point occurred before that point - appeal allowed***

**UPPER TRIBUNAL**
**TAX AND CHANCERY CHAMBER**

**BETWEEN:**

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

**Appellants**

**- and –**

**SUSAN JACOBSON**

**Respondent**

**Tribunal: Mr Justice Zacaroli**
**Judge Greg Sinfield**

**Sitting in public in London on 18 December 2017**

**James Puzey, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants**

**The Respondent did not appear and was not represented**

## DECISION

### Introduction

1. Ms Susan Jacobson was stopped by Border Force officials in the green channel at Leeds Bradford airport when she arrived on a flight from Alicante, Spain with 15 kilos of hand rolling tobacco ('HRT') in her baggage. She immediately admitted that she had the tobacco which was seized as liable to forfeiture. Ms Jacobson never challenged the seizure. The Appellants ('HMRC') subsequently assessed Ms Jacobson for excise duty of £2,591 in relation to the tobacco. HMRC also imposed a penalty of £906 on Ms Jacobson under paragraph 4 of Schedule 41 to the Finance Act 2008 ('FA 2008') for being concerned in carrying or otherwise dealing with the tobacco after the excise duty point without the duty having been paid or deferred.

2. Ms Jacobson appealed to the First-tier Tribunal ('FTT') against the assessments for duty and the penalty. In a decision released on 12 August 2016 with neutral citation [2016] UKFTT 570 (TC), the FTT (Judge Thomas and Ms Stott) dismissed Ms Jacobson's appeal against the duty assessment but allowed her appeal against the penalty. The FTT held that Ms Jacobson was not liable to the penalty because they considered that the green channel was the relevant duty point and Ms Jacobson had not been concerned in carrying or otherwise dealing with the tobacco after that point because it had been seized before she left the green channel. Save as otherwise indicated, paragraph references in square brackets in this decision are to paragraphs in the FTT's decision.

3. HMRC now appeals, with permission of the FTT, against the FTT's decision that Ms Jacobson was not liable to the penalty. Ms Jacobson has not appealed against the FTT's decision that she was liable to pay the excise duty of £2,591. Ms Jacobson was unrepresented and, other than to make some comments in a short email, took no part in the proceedings. HMRC agreed in advance of the hearing that, in the circumstances, they would not seek an order for their costs if they were successful in the appeal.

4. For the reasons set out below, we have decided that the FTT erred in law when it concluded that the excise duty point had not occurred before Ms Jacobson entered the green channel and that HMRC's appeal must be allowed. Accordingly, we set aside the Decision insofar as it relates to the penalty and confirm that Ms Jacobson is liable to pay the penalty of £906.

### Factual background

5. There was no challenge to the findings of fact by the FTT. The FTT set out the material facts found as follows at [12] and [13]:

> "12. The matters set out below are undisputed and we find them as facts.
>
> (1) On 10 October 2013 the appellant arrived at [Leeds Bradford Airport] on a Ryanair flight from Alicante, Spain.
>
> (2) After going through the baggage reclaim she entered the green channel carrying two red/orange bags.
>
> (3) When she was asked to go to the desk in the green channel she said 'I've got tobacco, I've no receipts, I've not got a leg to stand on ….' [In her posthearing submission the appellant in effect admits the account of what she said that appears in Officer O'Keeffe's notebook]
>
> (4) Border Force found 15kg of HRT in the bags she was carrying.

> (5) The appellant left the green channel leaving behind the bags with the HRT and her passport. She had been given a number of notices by Border Force relating to seizure.
>
> (6) Officer O'Keeffe seized the HRT and the bags.
>
> (7) On 18 October 2013 Border Force gave a notice of seizure (Form 12A) to the appellant at her address in Hull.
>
> (8) The appellant did not institute condemnation proceedings in the Magistrate's Court. [Although there was a suggestion at the hearing that she had notified Border Force of her intention to institute such proceedings, the documents that Border Force supplied in post-hearing submissions do not bear this out and in her post-hearing submissions the appellant has not suggested that she did.]
>
> (9) On 28 October 2013 the appellant requested the restoration of her goods.
>
> (10) On 26 November 2013 HMRC wrote to the appellant at her address in Hull about the duty to which they said the appellant was liable and sent her a notice of assessment to excise duty (tobacco products duty).
>
> (11) On 18 February 2014 Border Force wrote to the appellant refusing to restore the goods.
>
> (12) This decision was upheld on review in a letter from Border Force of 9 May 2014, in which it is stated that the appellant did not contest the seizure of the goods in a Magistrate's Court.
>
> (13) On 7 March 2014 HMRC sent a notice of their intention to raise a penalty assessment seeking comments.
>
> (14) On 14 March 2014 the appellant wrote to HMRC and to the Border Force.
>
> (15) On 14 May 2014 HMRC raised a penalty assessment.
>
> 13. From these facts, we find that the appellant at no time had any intention of declaring the goods or paying the duty, and did not declare them before she was intercepted in the green channel."

6. At [162], the FTT found that Ms Jacobson made the comments that she did in the green channel because she had been intercepted and knew that "the game was up". At [167], the FTT found that her conduct had been deliberate:

> "However we have no difficulty in agreeing with HMRC that the conduct was deliberate. "I haven't got a leg to stand on" is not the response of someone who has made a careless error."

**Legislation**

7. Excise duty is charged on HRT by section 2 of the Tobacco Products Duty Act 1979. Regulation 14 of the Tobacco Products Regulations 2001 provides that the duty is due at the excise duty point.

8. The relevant legislation in this appeal is contained in Council Directive 2008/118/EC concerning the general arrangements for excise duty (the '2008 Directive') and the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ('the 2010 Regulations').

9. Article 33 of the 2008 Directive says:

> "1. Without prejudice to Article 36(1), where excise goods which have already been released for consumption in one Member State are held for commercial purposes in another Member State in order to be delivered or used there, they shall be subject to excise duty and excise duty shall become chargeable in that other Member State.
>
> For the purposes of this Article, 'holding for commercial purposes' shall mean the holding of excise goods by a person other than a private individual or by a private individual for reasons other than his own use and transported by him, in accordance with Article 32.
>
> 2. The chargeability conditions and rate of excise duty to be applied shall be those in force on the date on which duty becomes chargeable in that other Member State.
>
> 3. The person liable to pay the excise duty which has become chargeable shall be, depending on the cases referred to in paragraph 1, the person making the delivery or holding the goods intended for delivery, or to whom the goods are delivered in the other Member State.
>
> …
>
> 6. The excise duty shall, upon request, be reimbursed or remitted in the Member State where the release for consumption took place where the competent authorities of the other Member State find that excise duty has become chargeable and has been collected in that Member State."

10. The 2010 Regulations implement the 2008 Directive in the UK. Regulation 13 of the 2010 Regulations provides (so far as material):

> "(1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.
>
> (2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person -
>
> (a) making the delivery of the goods;
>
> (b) holding the goods intended for delivery; or
>
> (c) to whom the goods are delivered.
>
> (3) For the purposes of paragraph (1) excise goods are held for a
>
> commercial purpose if they are held –
>
> …
>
> (b) 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.
>
> …
>
> (5) For the purposes of the exception in paragraph (3)(b) -
>
> …
>
> (b) "own use" includes use as a personal gift but does not include the transfer of the goods to another person for money or money's worth (including any reimbursement of expenses incurred in connection with obtaining them)."

11. Regulation 20 of the 2010 Regulations provides for the time of payment of the duty and states:

> "(1) Subject to -

(a) the provisions of these Regulations and any other regulations made under the customs and excise Acts about accounting and payment;

…

duty must be paid at or before an excise duty point."

12. The requirements that must be satisfied when excise goods that have been released for consumption in another Member State are imported into the UK are contained in Part 11 of the 2010 Regulations. Regulation 67 provides that the arrangements in Part 11 do not apply to the importation of goods into the UK by a person for that person's own use. Where Part 11 applies, eg in cases of importation of excise goods other than for own use, regulation 69 sets out the requirements that must be met:

"(1) The person delivering the excise goods, holding the excise goods intended for delivery or receiving the excise goods must -

(a) before the excise goods are dispatched -

(i) inform the Commissioners of the expected dispatch;

(ii) provide a guarantee satisfactory to the Commissioners securing payment of the duty or, subject to regulation 73, pay the UK excise duty chargeable on the goods;

(b) subject to regulation 73, on or before the excise duty point, pay any duty that has not been paid in such manner as the Commissioners may direct;

(c) consent to any check enabling the Commissioners to satisfy themselves that the goods have been received and that the duty has been paid.

(2) A person mentioned in paragraph (1) who is not approved and registered in accordance with regulation 70 shall be known as an unregistered commercial importer."

13. Regulation 88 of the 2010 Regulations provides that, where there is a contravention of the regulations in relation to excise goods that are liable to duty which has not been paid, those goods are liable to forfeiture.

14. The penalty for handling goods subject to excise duty which has not been paid is imposed by paragraph 4 of Schedule 41 to the FA 2008 which states:

"(1) A penalty is payable by a person (P) where -

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

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

(2) In sub-paragraph (1) -

'excise duty point' has the meaning given by section 1 of F(No 2)A 1992, and

'goods' has the meaning given by section 1(1) of CEMA 1979."

15. For the purposes of paragraph 4 of Schedule 41, 'excise duty point' has the meaning given in regulation 13(1) of the 2010 Regulations which were made under section 1 of the Finance (No 2) Act 1992.

16. Paragraph 12(3) of Schedule 41 provides as follows:

> **"**(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'.**"**

17. A 'relevant act or failure' is defined in paragraph 11(2)(d) to include being concerned in dealing with goods the payment of duty on which is outstanding and has not been deferred.

**Case law**

18. Before we discuss the FTT's reasoning and conclusions, it is useful to describe two decisions that are relevant to the issue in this appeal.

19. The first is the decision of the Court of Appeal in *HMRC v Jones & Jones* [2011] EWCA Civ 824 ('*Jones*'). Mr and Mrs Jones were stopped at Hull Ferry Port with a large quantity of tobacco, wine and beer that was seized, together with their car, on the basis that it was for held for a commercial purpose. The seizing officer reached that view following an interview with Mr and Mrs Jones. They were informed of their rights to challenge the legality of the seizure and request restoration of the goods. Initially, they challenged the legality of the seizure by serving a notice of claim pursuant to paragraph 3 of Schedule 3 to the Customs and Excise Management Act 1979. They were also notified by HMRC that if they decided to withdraw from the resulting condemnation proceedings they would have to accept that the goods were legally seized, for example that they were imported for commercial use. Subsequently Mr and Mrs Jones, who at that time were represented by solicitors, withdrew from the condemnation proceedings and pursued restoration of the goods. HMRC refused to restore the goods and Mr and Mrs Jones appealed to the FTT. The FTT made findings of fact that the goods were for personal use and allowed the appeal. The Upper Tribunal upheld this decision on an appeal by HMRC. HMRC appealed again to the Court of Appeal on the ground that the FTT were not entitled to make findings of fact inconsistent with the deemed forfeiture of the goods from which it was implicit that the goods were not for personal use. The Court of Appeal agreed. Mummery LJ's summary of his conclusions at [71] included the following:

> "(4) The stipulated statutory effect of [Mr and Mrs Jones's] withdrawal of their notice of claim under paragraph 3 of Schedule 3 was that the goods were deemed by the express language of paragraph 5 to have been condemned and to have been 'duly' condemned as forfeited as illegally imported goods. The tribunal must give effect to the clear deeming provisions in the 1979 Act: it is impossible to read them in any other way than as requiring the goods to be taken as 'duly condemned' if the owner does not challenge the legality of the seizure in the allocated court by invoking and pursuing the appropriate procedure.
>
> (5) The deeming process limited the scope of the issues that [Mr and Mrs Jones] were entitled to ventilate in the FTT on their restoration appeal. The FTT had to take it that the goods had been 'duly' condemned as illegal

> imports. It was not open to it to conclude that the goods were legal imports illegally seized by HMRC by finding as a fact that they were being imported for own use. The role of the tribunal, as defined in the 1979 Act, does not extend to deciding as a fact that the goods were, as [Mr and Mrs Jones] 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 [Mr and Mrs Jones]. In brief, the deemed effect of [Mr and Mrs Jones's] failure to contest condemnation of the goods by the court was that the goods were being illegally imported by [Mr and Mrs Jones] for commercial use."

20. The *Jones* case was only concerned with an appeal against a refusal to restore seized goods. The question whether a decision not to challenge the seizure of excise goods also prevents the Tribunal from finding that the goods were for personal use in an appeal against an assessment for excise duty was considered by the Upper Tribunal in *HMRC v Nicholas Race* [2014] UKUT 0331 ('*Race*'). In that case, HMRC found just under 11,000 cigarettes, 800 grams of HRT and 24.75 litres of red wine at Mr Race's home. As they were not satisfied that the excise goods were not held for a commercial purpose, HMRC seized the goods and assessed Mr Race for excise duty of £2,317. HMRC later assessed Mr Race for a penalty of £892. Mr Race appealed against both the excise duty assessment and the penalty. His sole ground of appeal was that the goods were purchased for personal consumption and as Christmas gifts for his family. HMRC applied to strike out the appeal against the excise duty assessment (but not the penalty appeal) on the basis that the tribunal did not have jurisdiction and, or alternatively, that there was no reasonable prospect of the appeal succeeding. The FTT refused HMRC's application to strike out the excise duty appeal, holding, among other things, that it was arguable that the *Jones* case did not limit the jurisdiction of the tribunal in relation to an appeal against an assessment to excise duty. HMRC appealed to the Upper Tribunal.

21. In *Race*, Warren J reviewed the decision of the Court of Appeal in the *Jones* case and observed at [26] of the decision in that case:

> "*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."

22. In relation to the First-tier Tribunal's conclusion that the *Jones* case did not prevent the tribunal from considering whether the goods were for personal use, Warren J held at [33] that:

> "I do not consider it to be arguable that *Jones* does not demonstrate the limits of the jurisdiction. It is clearly not open to the tribunal to go behind the deeming effect of paragraph 5 Schedule 3 for the reasons explained in *Jones* ... The fact that the appeal is against an assessment to excise duty rather than an appeal against non-restoration makes no difference because the substantive issue raised by Mr Race is no different from that raised by Mr and Mrs Jones."

23. HMRC had not applied to strike out the appeal against the penalty in *Race* but the FTT had held that it would be able to consider whether the goods were for personal use

in the context of that appeal. On that point, Warren J made the following observation at [39]:

> "… relating to the appeal against the Penalty Assessment, what the Judge was saying was that the issue whether Mr Race held the goods for his own personal use would arise for decision in the appeal against the Penalty Assessment. 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."

24. We respectfully agree with Warren J in *Race* that the reasoning and analysis in *Jones* applies to an appeal against a penalty in exactly the same way as it applies to an appeal against an assessment for excise duty. The deemed effect of Ms Jacobson's failure to contest the seizure of the HRT was that it was duly condemned as forfeited as, in the terms of regulation 88 of the 2010 Regulations, goods liable to excise duty which had not been paid in contravention of the Regulations.

**The Decision**

25. Having set out the facts and the parties' submissions, the FTT discussed the application of *Jones* and *Race* to the assessment for duty at [30] and held that as Ms Jacobson had not challenged the seizure of the HRT:

> "… the goods were irrebuttably presumed to have been brought into the UK for commercial purposes (that is not for 'own use' as that term is defined in regulation 13(5)(b) of the [2010 Regulations])."

26. The FTT set out their conclusion on the issue of whether Ms Jacobson was liable to pay the excise duty on the HRT at [31]:

> "It does not seem to us that there is any escape from the proposition that the appellant became liable to excise duty (in this case Tobacco Products Duty). She has not shown that she paid, on or before the excise duty point, the duty for commercial excise goods that were released for consumption in another member state. The excise duty point in such a case is given by regulation 13(1) of the [2010 Regulations] and the liability of the appellant by regulation 13(2) (even where, as here, it is alleged by the appellant that one of the bags was not hers). We hold that there are no valid grounds for any appeal against the assessment and that it stands."

27. The FTT then turned to consider whether there was a liability to pay a penalty under paragraph 4 of Schedule 41 to the FA 2008 when goods are seized at an airport. Notwithstanding that the FTT had found, at [30] and [31], that a duty point had occurred and duty was owing, the FTT doubted that Ms Jacobson's conduct in taking the HRT into the green channel was conduct that gave rise to a penalty under paragraph 4 of Schedule 41. The FTT stated, at [44], that two conditions must be met for a person to be liable to a penalty under paragraph 4, namely that:

> (1) the action which the paragraph penalises, eg carrying or otherwise dealing with goods chargeable to excise duty, has to take place after the excise duty point; and
>
> (2) when the action takes place, a payment of that excise duty is outstanding.

28. The FTT discussed when the duty point occurred at [50] – [60]. In response to a question from the FTT on the point, HMRC submitted after the hearing that the duty point was defined by regulation 13(1) of the 2010 Regulations as the time when the excise goods are first held for a commercial purpose in the UK. Without identifying what constituted the duty point, HMRC submitted that it had passed before Ms Jacobson entered the green channel. The FTT discussed at what point the goods were first held for a commercial purpose in the UK at [53] – [55]. The FTT identified various possible duty points on a flight to the UK in [53]:

> "… the time when the aircraft first entered UK airspace, the time it touched down at the airport, the time the person penalised picked up their hand luggage on the plane, the time they stepped off the plane with that luggage, and (in the case of the goods having been in hold baggage) the time the person picks the luggage containing the goods off the carousel."

29. The FTT considered that all of the possible duty points would always have occurred before the passenger reached the red and green channels and that led to the surprising result that a person choosing to use the red channel to declare goods held for a commercial purpose and pay the duty would already have incurred a liability to a penalty although HMRC suggested that it would be mitigated by the 'unprompted disclosure'. However, passengers arriving from the EU are supposed to use the blue channel and would thus have no opportunity to declare the goods but would have incurred liability to a penalty without the possibility of reducing it by disclosure. At [60], the FTT stated that they found this "a surprising and to our minds hyper-technical and unrealistic approach to a provision imposing a penalty". The FTT considered that, if it were possible to do so, they should find a way of construing paragraph 4 so that it did not give rise to the problems identified.

30. At [61] – [74], the FTT discussed the meaning of "a payment of duty on the goods is outstanding" in paragraph 4 of Schedule 41. The FTT referred to regulations 20(1)(a) and 69(1)(b) of the 2010 Regulations which both provide that duty must be paid at (or 'on' in the case of regulation 69(1)(b)) or before the duty point. The FTT reasoned, in [66], that as there are no HMRC officers on board aircraft to accept payment of duty when the plane enters UK airspace or even when the passenger picks up their luggage from the carousel, the only place in a UK airport where duty can be paid is the customs control area, ie the red and green channels. The FTT considered, in [67], (emphasis in original):

> "… that it is clearly arguable that where a person attempts to pass through the green channel with dutiable (commercial) excise goods without paying the duty, only *once they have left the channel* has the duty not been paid 'at or before' the duty point."

31. The FTT set out its conclusion on this point at [71]:

> "Our conclusion on this aspect of paragraph 4(1) is that, whether or not 'outstanding' means 'unpaid' or something else, this condition in paragraph 4(1) may well mean that what we should consider is the position at the time the person left the customs area, the various channels. This is because as we say in §66 the only practical time when duty can be paid at the duty point is in that area."

32. That led the FTT to the provisional conclusion in [75] that, applying the principle of "doubtful penalisation" (as expressed in code 271 of Bennion on Statutory Interpretation and approved by Lord Bingham in *R v Z* [2005] UKHL 35 at [16]) that a

person should not be penalised except under clear law, it was open to them to hold that Ms Jacobson was not liable to a penalty under paragraph 4 of Schedule 41 to the FA 2008.

33. The FTT went on to consider a number of other matters at [89] – [145] which were not in themselves determinative but the FTT considered might have some bearing on the interpretation of paragraph 4. HMRC did not address these other matters in the hearing before us because the FTT concluded that they were not determinative. We agree that these matters do not take the matter any further. The FTT concluded in [95] that the terms used in paragraph 4 indicated that it was aimed at revenue traders rather than private individuals. We note that, while accepting that she held the HRT for a commercial purpose, the FTT gave no reasons for stating that Ms Jacobson was not a trader and, more fundamentally, explicitly stated at [93] that they were not saying that paragraph 4 must be construed as limited to traders. The FTT also concluded that the case law, HMRC guidance and consequences of their interpretation of paragraph 4 did not extinguish the penumbra of doubt that the FTT perceived to surround paragraph 4. The FTT's final conclusion at [146] was, therefore, that the existence of the penumbra of doubt meant that Ms Jacobson was not liable to a penalty under paragraph 4 of Schedule 41 to the FA 2008. Having reached that conclusion, the FTT stated that they readily acknowledged that they might be wrong about paragraph 4 and that they expected HMRC to appeal.

34. In case they were wrong and overturned on appeal, the FTT considered whether there were any other possible objections to the penalty. At [162] – [166], the FTT stated:

> "162. We have considered whether the disclosure was in fact prompted or unprompted. A disclosure is unprompted if the person had no reason to believe that HMRC are about to discover the relevant act. The appellant's disclosure started in our view when she told Officer O'Keeffe that she 'hadn't got a leg to stand on' when she was intercepted in the green channel (as we have found). This is because that amounts to 'telling HMRC about' the relevant act (paragraph 12(2)(a)). We do not think she would have said that had she not been intercepted and she must have said it because she knew 'the game was up'.
>
> 163. That at least is clearly the way HMRC saw it. But if HMRC are right about what the relevant act is, it must be the handling of the goods as soon as the appellant disembarked without having paid or secured payment of the duty beforehand. Is that what she told HMRC about? And if it was, did she have reason to believe that HMRC had discovered her handling the goods in her hand luggage?
>
> 164. Had the penalty been chargeable where a person attempts to evade excise duty (as for example is the case with s 8 FA 1994) then we would have unhesitatingly said that the disclosure was prompted. What we are sure was in Officer O'Keeffe's mind when she intercepted the appellant was that the appellant was attempting to bring in to the UK tobacco on which excise duty had not and was not going to be paid, and we are equally sure that that is what the appellant realised that Officer O'Keeffe thought and that she was going to find that the appellant had far too much tobacco for it to be feasible that it was not for commercial use.
>
> 165. In this situation we cannot be sure that the disclosure was prompted by reference to what paragraph 4 seeks to penalise. We would therefore say that the disclosure was unprompted."

35. The FTT found that Ms Jacobson's conduct was deliberate. The FTT stated, in [177], that if they were wrong about the validity of the penalty, they would have reduced the penalty to 20% on the basis that the disclosure was unprompted.

**Grounds of Appeal**

36. The FTT granted HMRC permission to appeal on two grounds, namely that the FTT erred in law in concluding that:

> (1) paragraph 4(1) of Schedule 41 to the FA 2008 did not apply to seizures of excise goods in the customs channels at UK airports and in particular to the seizure which occurred in this case; and
>
> (2) that Ms Jacobson made an unprompted disclosure to HMRC under paragraph 12(3) of Schedule 41.

**Procedural history of the appeal**

37. After HMRC had been granted permission and lodged their notice of appeal with the Upper Tribunal, the Tribunal notified Ms Jacobson. Ms Jacobson wrote a letter, dated 22 December 2016, to the Upper Tribunal in response to the notice of appeal. In the letter, Ms Jacobson stated that she would like to contest the appeal but did not know how to go about it and was unable to afford legal help. The letter then briefly set out the facts of her case, which appeared to contest some of the findings of the FTT, and stated that she would have difficulty paying even the duty. The letter also referred to Article 37 of the 2008 Directive, which was not mentioned in the Decision. In the letter, Ms Jacobson said that she was not sure if Article 37 applied to her. In fact, it is clear that it does not as Article 37 only applies where the excise goods are totally destroyed or irretrievably lost "during their transport in a Member State" and these goods were seized, on HMRC's case, on entry after the duty point and condemned or destroyed thereafter.

38. The Tribunal proceeded to fix a date for a hearing and asked the parties for their dates to avoid. Ms Jacobson did not reply to the original request or to two further requests. Notwithstanding the absence of any dates to avoid and other listing information from Ms Jacobson, the Tribunal continued to attempt to list the case for hearing. There was no further communication from Ms Jacobson.

**Submissions**

39. In summary, Mr James Puzey, who appeared on behalf of HMRC, submitted that paragraph 4 of Schedule 41 to the FA 2008 is not a complex provision and is perfectly clear. He stated that there are three requirements that must be satisfied before a penalty can be imposed under paragraph 4. The three requirements are that:

> (1) an excise duty point has been reached for goods chargeable with duty;
>
> (2) after the duty point, a person is concerned in the carriage, removal, depositing, keeping or dealing with the goods; and
>
> (3) at the time the person is so concerned, payment of duty on the goods is outstanding, i.e. it is owing and not paid or deferred.

40. Mr Puzey contended that the findings of fact by the FTT at [12] and [13] and [30] and [31], in which the FTT accepted that a duty point had occurred and duty was owing, showed that each of the three requirements had been satisfied.

41. Mr Puzey also contended that Ms Jacobson's conduct was deliberate and the disclosure prompted. He submitted that this was shown by the FTT's finding, in [13], that Ms Jacobson had no intention of declaring the goods or paying the duty prior to her interception in the green channel. HMRC's case was that the only reasonable interpretation of the FTT's findings of fact is that the disclosure was prompted and the FTT erred in saying, in [165], that the disclosure was unprompted.

**Discussion**

42. The outcome of both grounds of this appeal turns on a short point, namely when did the excise duty point occur in this case? As the FTT recognised in [19] and [31], the duty point for the HRT was prescribed by regulation 13(1) of the 2010 Regulations:

> "Where excise goods already released for consumption in another member state are held for a commercial purpose in the United Kingdom the excise duty point is the time when those goods are first so held."

43. In this case, there is no dispute that Ms Jacobson held the goods for a commercial purpose, as defined, in the UK. The issue was when were the goods first so held. The foundation of the FTT's decision that Ms Jacobson was not liable to a penalty under paragraph 4 of Schedule 41 to the FA 2008 was the FTT's view that the green channel was the duty point because that was the only practical time when duty could be paid (see [66], [67] and [71]). This mistakenly equates the time at which duty becomes due (the duty point) with the point at which facilities exist for payment. Nothing in the legislation defines the excise duty point by reference to the presence of facilities to pay that duty. The fact that duty can be paid in a customs control area does not make that area the duty point. The FTT's conclusion ignores the fact that an intending importer of excise goods from another Member State must make arrangements to pay (or defer) excise duty before the goods are dispatched from the other Member State.

44. The FTT also seemed to doubt that Ms Jacobson had held the HRT at any time prior to entering the green channel. The meaning of "holding" for the purposes of regulation 13 of the 2010 Regulations was set out by the Court of Appeal in *R v Tatham* [2014] EWCA Crim 226 at [23], referring to its earlier decision in *R v Taylor and Wood* [2013] EWCA Crim 1151, as follows:

> "… 'holding' for the purposes of Regulation 13(1) can be a question of law, and does not require physical possession of the goods, and the test is satisfied by constructive possession. The test for 'holding' is that the person is capable of exercising de jure and/or de facto control over the goods, whether temporarily or permanently, either directly or by acting through an agent."

45. Applying that interpretation, we consider that it is clear that Ms Jacobson was holding the HRT for the purposes of the 2010 Regulations at all relevant times.

46. There is room for debate as to the precise point that a person entering the UK on a commercial flight *first* holds goods for the purposes of Regulation 13 of the 2010 Regulations. Mr Puzey referred to the decision of the Court of Appeal in *R v Bajwa* [2012] 1 WLR 601 which confirmed at [32], [75] and [89] that the time at which the duty becomes chargeable on tobacco is when the ship carrying it enters the limits of the UK port. *Bajwa* shows that the duty point does not require the presence of facilities to make a payment of that duty, for example on board a ship entering the limits of a UK port. Mr Puzey contended that a similar rule applied for aircraft which meant that duty became chargeable when they entered UK air space or, at the latest, when they touched

down at a UK airport. We do not have to decide whether one or other of those two events constitutes the excise duty point, however, because it is clear that a person is holding goods in the UK for the purposes of Regulation 13 at the latest by the time they have carried hand-luggage off the aircraft or collected hold-luggage in the terminal. Accordingly, we have no doubt that the excise duty point had occurred in this case before Ms Jacobson reached the green channel.

47. The FTT's incorrect conclusion that the excise duty point had not already occurred by the time that Ms Jacobson was intercepted in the green channel is also the reason why the FTT's conclusion in [165] that Ms Jacobson's disclosure was unprompted cannot stand. The FTT were clearly concerned, in [164], that Ms Jacobson was intercepted while attempting to bring the HRT into the UK without paying excise duty. As, on the FTT's view, the penalty only arose if duty remained unpaid after the duty point had occurred then the FTT reasoned that a disclosure before that point, i.e. in the attempt, must be unprompted. Once it is appreciated that the excise duty point had passed then the FTT's concerns disappear and it is clear that the disclosure was prompted by HMRC intercepting Ms Jacobson when she had already become liable for the duty.

**Disposition**

48. For the reasons given above, HMRC's appeal against the FTT's decision is allowed. Accordingly, we set aside the FTT's decision insofar as it relates to the penalty and confirm that Ms Jacobson is liable to pay the penalty of £906.

**The Hon Mr Justice Zacaroli**

**Judge Greg Sinfield**
**Upper Tribunal Judge**

**Release date: 24 January 2018**