



TC01801

Appeal number TC/2011/2615

EXCISE DUTY – RESTORATION OF EXCISE GOODS – *the Appellant failed to declare 32,000 cigarettes imported from Pakistan – the duty free allowance was 200 – was the decision not to restore the cigarettes reasonable? – Yes – Appeal dismissed.*

FIRST-TIER TRIBUNAL

TAX

NASIR MAHMOOD

Appellant

- and -

DIRECTOR OF BORDER REVENUE

Respondents

**TRIBUNAL: Michael Tildesley OBE (Tribunal Judge)
Philip Jolly**

Sitting in public at 3rd Floor Alexandra House, 14-22 The Parsonage, Manchester M3 2JA on 30 January 2012

The Appellant appeared in person

Alison Graham-Wells, counsel, for the Respondents

DECISION

The Appeal

1. The Appellant appealed against the Respondents' decision on review dated 8
5 March 2011 refusing restoration of 32,000 cigarettes.

2. The Appellant requested return of the seized cigarettes because he did not know
that he was doing something wrong. He had purchased the cigarettes in Pakistan as
presents for family and friends. On his return to the UK, the Appellant was in an
agitated state. His flight to the UK had been delayed by seven hours and on entry he
10 had to look after his two children, aged four and six, and two trolleys of luggage. As a
result the Appellant's attention was elsewhere, and he did not realise that he was in
the green channel. The Appellant denied that he had deliberately misled the Customs
Officer about the cigarettes. The Appellant stated that he was unable to pay the full
amount of excise duty on the cigarettes.

3. The Respondents disagreed with the Appellant's version of events. The
Respondents considered that the Appellant's actions amounted to a flagrant attempt to
avoid the payment of excise duty on an enormous quantity of cigarettes, some 160
times the permitted allowance of 200 from a third country. The Respondents
contended that the Tribunal had no power to order return of the cigarettes and or
20 reduce the excise duty on the cigarettes. The Tribunal was restricted to considering
whether the decision of the review officer, Mrs Hodge, to refuse restoration of the
cigarettes was reasonable.

4. The issue for the Tribunal was whether Mrs Hodge's refusal of restoration of the
cigarettes was a decision which no reasonable body of Commissioners could have
25 arrived at. In order for the decision to have been reasonable Mrs Hodge must have
considered all relevant matters and must not have taken into consideration irrelevant
matters.

5. The Tribunal heard evidence from the Appellant and Mrs Hodge, the review
officer. The Respondents supplied a bundle of documents which were admitted in
evidence. The Tribunal had engaged the services of an interpreter, Miss Khan,
30 because the Appellant had a poor grasp of the English Language.

Legislation

6. Section 78 of the Customs and Excise Management Act 1979 (1979 Act)
provides that

- 35 (1) Any person entering the UK, shall at such place and in such manner
as the Commissioners direct, declare any such thing contained in his
baggage or carried with him which
- (a) he has obtained outside the UK or
 - (b) Not applicable

And in respect of which he is not entitled to exemption from duty and tax by virtue of any order under section 13 of the Customs and Excise Duties (General Reliefs) Act 1979 (personal reliefs).

(2) Not applicable

5 (3) Any person failing to declare any thing or produce any baggage or thing as required by this section shall be liable on summary conviction to a penalty of three times the value of the thing not declared or of the baggage or thing not produced, as the case may be, or [level 3 on the standard scale] whichever is the greater.

10 (4) Any thing chargeable with any duty or tax which is found concealed, or is not declared --- shall be liable to forfeiture.

7. The duty free allowance for travellers entering the UK from Pakistan (referred to as a third country for the purpose of Customs and Excise duties) is 200 cigarettes.

15 8. Section 139 of the 1979 Act empowers a Customs Officer to seize anything liable to forfeiture. Section 141 extends the power of seizure to any other thing, mixed, packed or found with the thing liable to forfeiture.

The Jurisdiction of the Tribunal

20 9. The Respondents' power regarding restoration of goods and vehicles which have been forfeited or seized is set out under section 152(b) of the 1979 Act. Once the power is exercised whether in the form of a positive decision to restore on terms or a refusal to restore, the person affected has a right of appeal to the Tribunal. The powers of the Tribunal are limited in the terms set out in section 16(4) of Finance Act 1994 which provides that:

25 "confined to a power, where the Tribunal are satisfied that the Commissioners or other person making the decision could not reasonably have arrived at it, to do one or more of the following, that is to say –

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

30 b) to require the Commissioners to conduct, in accordance with the directions of the Tribunal, a further review of the original decision;

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

40 10. The precondition to the Tribunal's exercise of one or more of its three powers, namely, that the person making a decision could not reasonably have arrived at it, falls within the guidance given by Lord Lane in the decision in *Customs and Excise v JH Corbitt (Numismatists) Ltd* [1980] STC 231 at page 239:

“.....if it were shown the Commissioners had acted in a way in which no reasonable panel of commissioners could have acted; if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight”.

5 11. The Tribunal is entitled to make its own findings on the primary facts which are to be taken into account by the Respondents when exercising their powers regarding restoration of goods. The findings of fact include blameworthiness and the proportionality of the penalty imposed to the policy aims pursued having full regard to the individual circumstances of the case. The Tribunal, however, has no fact
10 finding jurisdiction for the purpose of challenging the legality of the seizure and forfeiture of the goods. The Tribunal will then apply its findings of fact to determine whether the Respondents acted reasonably in refusing restoration.

The Facts Found

15 12. On 9 January 2011 at Manchester Airport the Appellant was stopped by a Customs Officer in the green channel (nothing to declare for persons arriving from third countries). The Appellant had arrived on a flight from Pakistan with his two children, having visited his father. The Appellant claimed he did not speak English and was given a sheet of initial questions in Urdu dealing with illegal goods, allowances for cigarettes and alcohol, and the powers of Customs Officers. The
20 Officer with the assistance of gesticulations established that the Appellant had nothing to declare. The Officer then conducted a search of the Appellant’s baggage and discovered 160 cartons containing 32,000 John Player gold leaf cigarettes.

13. The Appellant was obliged to declare the quantity of cigarettes in excess of the personal allowance of 200 cigarettes.

25 14. The Officer seized the 32,000 cigarettes, and advised the Appellant of the seizure by pointing to the relevant paragraph in the Urdu crib sheet. The Officer provided him with a C156 (Notification of the Seizure) and C12a which explained the Appellant’s rights of Appeal. The purposes of these documents were described on the Urdu crib sheet.

30 15. On 1 February 2011 the Appellant requested restoration of the cigarettes which was refused on 8 February 2011. On 14 February 2011 the Appellant requested a review of the decision which was conducted by Mrs Hodge who confirmed the decision to refuse on the 8 March 2011.

35 16. The Appellant did not exercise his right of Appeal to the magistrates’ court challenging the legality of the seizure. The Appellant made no suggestion during the course of the proceedings that he did not understand his rights to challenge the seizure of the excise goods by the Respondents. The Tribunal was satisfied that the Appellant had received a copy of C12a. The fact that he had taken action to request restoration suggested that he had understood the various options open to him.

40 17. Since there was no appeal to the magistrates’ court, the Tribunal was obliged as a matter of law to proceed on the basis that the seizure of the cigarettes was lawful, and

that the underlying facts supporting the seizure, namely, that the Appellant had failed to declare the 32,000 cigarettes, as a given. The Appellant for the first time at the hearing suggested that he had been manoeuvred into the green channel without his knowledge. The Appellant also stated that he did not know the legal requirements associated with the importation of the cigarettes. Whatever the truth of the Appellant's assertions, they were not relevant to the issue before the Tribunal. The assertions were directed at the question of the legality of the seizure, which for the reasons given above the Tribunal was not entitled to disentangle (see *HMRC v Jones & Jones* [2011] EWCA Civ 824).

18. The importation involved an enormous quantity of cigarettes (32,000) which was 160 times the duty free allowance of 200 cigarettes permitted to travellers from third countries. The excise duty payable on the cigarettes was £6,571.26.

19. The Tribunal was satisfied that the Appellant did not put forward exceptional grounds for such a large importation of excise goods. The Appellant stated that he had purchased the cigarettes to give as presents to friends and family, and that he had lost by the seizure, his purchase monies of around £900. The Tribunal doubts that the enormous quantity of cigarettes was solely for gifts. In any event the Appellant was obliged to declare the amount of cigarettes in excess of the £200 allowance imported from a third country regardless of the purpose of the purchase. The hardship caused to the Appellant by the loss of his purchase monies was a consequence of his failure to declare. It would also appear that he did not have the necessary wherewithal to pay the required amount of duty (£6,571.26) had he so declared which would have meant that he would have lost his purchase monies whatever the outcome of his dealings with the Customs Officer at Manchester airport.

20. The Tribunal was circumspect about whether the Appellant consciously decided to lie to the Customs Officer about the importation of cigarettes. Mrs Hodge acknowledged that she had concerns about the quality of the note-book entries kept by the Officer about his conversation with the Appellant. Mrs Hodge pointed out that there was no record of the time of the intervention, and that the Appellant had not signed the notebook. Also the Tribunal was bemused by the Officer's reference to communicating with the Appellant by means of gesticulations. On the other hand, the Appellant's version of events had been one of a developing picture with new issues being raised at the hearing. Further the Appellant in his Notice of Appeal stated that he had said "No" to the question put to him by the Officer about whether he had cigarettes. According to the Appellant, he gave a negative response because he and his children were very tired after having a harrowing journey. The Appellant pointed out that the Officer asked his son about the cigarettes who said "yes in the suitcase". The Tribunal concludes that the communications between the Appellant and the Officer were hampered by language difficulties, and that the Appellant's negative response was not done with the intention of compounding his misdemeanour of failing to declare the cigarettes.

Consideration

21. The Appellant's case was principally against the legality of the seizure, which is not a matter for the Tribunal. As a matter of law it is not open to the Tribunal to conclude that the cigarettes were legal imports illegally seized by the Respondents by finding as a fact that the Appellant had done nothing wrong. The Tribunal is obliged to proceed on the basis that the Appellant had failed to declare the cigarettes and as a result were lawfully seized by the Respondents. The issue for the Tribunal was whether Mrs Hodge's decision to refuse restoration was reasonable. The Tribunal has no power to order the Respondents to restore the cigarettes to the Appellant. If the Tribunal decides that Mrs Hodge's refusal was unreasonable the Tribunal can only refer the matter back to the Respondents for further consideration.

22. Mrs Hodge's starting point was the Respondent's policy for the restoration of excise goods which was that seized goods should not normally be restored, however, each case was examined on its merits to determine whether or not restoration may be offered exceptionally. Mrs Hodge decided that in the Appellant's case there were no exceptional circumstances to justify restoration and that there were additional positive reasons for concluding that the cigarettes should not be restored. The additional reasons included the enormous quantity of cigarettes, his entry into the green channel and deliberately misleading the Officer about the importation of cigarettes.

23. The Tribunal is satisfied that Mrs Hodge took account of relevant considerations and disregarded irrelevant matters in reaching her decision. The Tribunal in its findings agreed with Mrs Hodge's assessment that the Appellant had put forward no exceptional circumstances to justify restoration. The Tribunal considers that Mrs Hodge was correct to place weight on the enormous quantity of cigarettes imported, some 160 times the allowance of 200 cigarettes. The fact that the Appellant had failed to declare the cigarettes was a given being an underlying fact supporting the legality of the seizure. The Tribunal's difference with Mrs Hodge's interpretation of the Appellant's negative response to the Customs Officer was a matter of emphasis rather than one of substance. The Tribunal considers that Mrs Hodges' findings on the absence of exceptional circumstances and the enormous quantity of cigarettes in the context of a lawful seizure were more than sufficient to justify the conclusion that non-restoration of the cigarettes was reasonable and proportionate.

Decision

24. The Tribunal is satisfied for the reasons set out above that the Respondents' decision on review dated 8 March 2011 refusing restoration of 32,000 cigarettes was reasonably arrived at within the meaning of section 16(4) of the Finance Act 1994. The Tribunal, therefore, dismisses the Appeal.

25. 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.

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TRIBUNAL JUDGE
RELEASE DATE: 7 February 2012

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