



TC02012

Appeal number: TC 2008/8127

Excise Duty – tobacco – Goods condemned by magistrates- HMRC decision not to restore – application to set aside direction to strike out appeal.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ROB LEWIS

Appellant

- and -

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

**TRIBUNAL: JUDGE CHARLES HELLIER
 DAVID EARLE**

Sitting in public in Plymouth on 5 December 2011 and on consideration after that date of Mr Lewis's representations.

The Appellant did not appear and was not represented at the hearing.

Miss Vahib instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. “When [HMRC] seize goods on the grounds that they have been illegally
5 imported two procedures are available under the Customs and Excise Management
Act 1979 (the 1979 Act) for resolving legal disputes about whether the owner can get
his goods back:

(a) original proceedings by HMRC, to whom notice of claim has been
10 given by the owner of the goods. Those proceedings are brought in a
magistrates’ court or in the High Court for the condemnation and
forfeiture of the goods.

(b) Appellate proceedings in the First-tier Tribunal (the FTT), ... by the
15 owner of the imported goods. An appeal to the FTT lies against the review
decision on HMRC refusing the owners application to restore the seized
goods.”

2. Thus said Mummery LJ in *HMRC V Jones* [2011] EWCA Civ 824.

3. This Decision relates to the second type of those proceedings. Tobacco which
Mr Lewis had sent from France was seized by the respondents. He required HMRC to
instigate condemnation proceedings in a magistrates’ court. HMRC instigated such
20 proceedings; at the hearing he did not turn up. The magistrates condemned the goods
as duly forfeit on 1 June 2009. Mr. Lewis then appealed against that decision to the
Crown Court in December 2010. He did not attend the hearing. The appeal was
dismissed.

4. Mr. Lewis sought restoration of the goods from HMRC. They refused. He asked
25 for a review of that decision. On review by HMRC the decision was upheld. He now
wishes to appeal to the FTT against the decision not to restore the goods. The grounds
of his appeal are effectively that the goods were for his own use and were therefore
not illegally imported. In his letter of 16 August 2011 he says:

30 "I, together with Mr. Jason Aughton, Mr. Sean Aughton and Mr. Jamie
Griffiths, sent a quantity of hand rolling tobacco from France to the United
Kingdom.

"As there is no limit to the amount of tobacco sent from within the EU for
personal use, or as gifts, I do not see how I broke the law?

35 "I'm a disabled person, and receive £65 per week I cannot afford the fine
imposed, furthermore, I did not know of the date of the first court date, and did
not attend because [of] this. As soon as I realised I asked the court to re-list for
me."

5. In July 2010 there was a preliminary hearing in this appeal. Mr. Lewis did not
attend. Judge Wallace directed that Mr. Lewis's appeal be struck out.

40 6. Mr. Lewis then applied for Judge Wallace's decision to be set aside. A hearing
was set for 5 December 2011 to consider that application.

7. Before the hearing HMRC applied to have Mr. Lewis' application struck out because in the light of the decision of the Court of Appeal in *HMRC v Jones* his appeal was hopeless, and he had failed to cooperate with the tribunal. They sought the vacation of the hearing on 5 December. That application however, was not made
5 within the period required by rule 32(1) of the Tribunal's Rules and Judge Wallace directed that the hearing on 5 December should proceed.

8. Mr. Lewis did not attend the hearing. He e-mailed the tribunal two days beforehand seeking postponement because of an unavoidable family crisis. We decided to continue with the hearing in his absence.

10 9. At the hearing we did not strike out his application. We directed that Mr. Lewis provide further information about his reasons for not attending the hearing before us, and that he should set out any arguments he had that his appeal was not hopeless. We said that we would then determine the application.

15 10. Mr. Lewis responded to that direction in good time. He explained that his daughter was in a precarious mental condition and had attempted to harm herself: he had found it necessary to take speedy action. Despite the lack of any corroborative evidence we accept that this was the case and that it could have been difficult for Mr. Lewis to attend or to obtain representation at the hearing on 5 December 2011.

20 11. Lewis also set out his argument in relation to the restoration of the tobacco. He said

"My argument has always been that the tobacco I sent from France, a member of the EU to the UK was not only to me but also my other travelling companions. Only 3 kg of the tobacco was mine although we all had some in the package. The others with me were Jason Aughton Sean Aughton Jamie Griffiths, I believe that between us we did not breach any importation laws. Because I have spent much time in Thailand I had missed the court hearings, not having been in the UK to receive the summonses. The original magistrates hearing should have been set aside in my opinion as I was unable to attend and did not receive notification of the hearing."

30 The Relevant Law

12. Mummery LJ explained the statutory framework which applies in cases such as these in *HMRC v Jones*. He said --

35 "[35] Dutiable goods that are not declared on importation are liable to seizure and forfeiture. ... in relation to anything seized as liable to forfeiture section 139(6) provides that schedule 3 to 1979 act shall have effect.

"[36] Under paragraph 1 of schedule 3 HMRC are required to give notice of the seizure of anything as liable to forfeiture of the grounds therefor to the owner.

40 "[37] Under paragraph 3 any person claiming that anything seized is liable to forfeiture is not so liable has one month from the date of the notice of seizure in which to give notice of his claim in writing to HMRC....

"[39] When notice of claim is duly given in accordance with paragraph 3 and 4 it is provided in paragraph 6 that HMRC "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."

5 "[40] The proceedings for condemnation are civil proceedings and maybe instituted either in the High Court or in a magistrates court: paragraph 8. ...

"[41] Under separate provisions in the 1979 Act HMRC have an administrative discretionary power to restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under the Acts: section 152 (b).

10 "[42] The Finance Act 1994 provides that there is an appeal procedure against a decision on restoration, which proceeds via a request for a review under section 14 and the carrying out a review under the procedure in section 15 to an appeal under section 16 against a review decision to the FTT.

15 "[43] The appeal tribunal on an appeal is confined to a power, where the tribunal are satisfied that HMRC could not reasonably have arrived at the decision indeed, to require HMRC to conduct a further review of the decision: section 16 (4)."

13. If a Magistrate's Court condemns goods as forfeit its finding is binding on other courts in the absence of a successful appeal against that magistrates court's decision. That result follows as a matter of ordinary principles of English law. It is not disturbed by the Human Rights Convention. As Buxton LJ said in *Gascoyne v CCE* [2004] EWCA Civ 1162.

25 "There is no Convention objection to holding that an actual finding in condemnation proceedings binds in a tribunal application be it binding as to the decision as to the lawfulness of seizure, or binding as the underlying facts."

14. *HMRC v Jones* related to the situation in which an individual had goods seized but did not require HMRC to instigate condemnation proceedings. In that case the goods were deemed by statute to have been duly condemned as forfeit. It is thus related to the case where there had been no actual hearing before magistrates. In that case the Court of Appeal held that the tribunal, when considering an appeal against a decision not to restore goods, was nevertheless bound by the deemed conclusion that the goods were forfeit even though the individual had not had his day in Court. Mummery LJ said:

35 "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 seizure in the allocated court by invoking in pursuing the appropriate procedure.

15. The Court of Appeal thus found that there was no Human Rights Convention argument which required or permitted the tribunal to reopen the question which had been deemed by statute to be answered by the Magistrates court.

16. In a case where the individual does instigate proceedings, and the magistrates actually condemn the goods, the argument that the tribunal should not have power to

reopen the question is even stronger. It is in our view absolutely plain that the tribunal must proceed on the basis that the goods were legally forfeit. That is the case even though Mr. Jones did not appear in the relevant proceedings. If the proceedings were inadequate the proper place to challenge them is not in this tribunal.

5 17. Thus this tribunal is bound to proceed on the basis that the tobacco was duly condemned as forfeit. That is what the Magistrate's Court decided.

10 18. However a decision that goods were lawfully seized is not always the same as a decision that the goods were not for the individual's own use. For example, if an individual's goods were mixed with those of another person whose goods were not for that person's own use, then the taxpayer's goods, even if they were for his own use, would have been lawfully seized and would be duly condemned. But there is no hint of such an argument in the taxpayer's grounds of appeal in this case. That would be the case only if the magistrates had found that his goods were for his own use but those of his travelling companions were not for their own use. That Mr Lewis does
15 not suggest.

19. Mr. Lewis speaks of the tobacco being legally imported. In the context of restoration that must be taken to mean either that it was not lawfully condemned or that it was for his own use notwithstanding its condemnation. But neither of those contentions can survive before this tribunal: it is bound to respect the magistrates'
20 decision that the goods were lawfully condemned, and that decision in these circumstances must carry with it the underlying factual finding that the goods were for his own use.

20. Mr. Lewis also speaks in a passage quoted at [4] above of a fine being imposed. The matter before this tribunal is the decision of HMRC not to restore the goods. If
25 that decision is what Mr. Lewis means by a fine, then it may be that Mr. Lewis is arguing that the failure to restore is in his circumstances a disproportionate action. In our view it is not: if Mr. Lewis could afford the tobacco the failure to restore it could not be disproportionate.

21. Since the only other grounds of Mr Lewis's appeal are that the goods were for
30 his own use (or for gifts), and that the goods were legally imported, and because neither of those contentions can be entertained by the tribunal, his appeal is hopeless. It should therefore remain struck out: it would not be just to permit the appeal to be pursued.

22. We decide that Judge Wallace's direction to strike out Mr Lewis's appeal
35 should not be set aside.

23. This decision is not an excluded decision within section 11(5) Tribunals Courts
and Enforcement Act; as a result an appeal may be made against it on a point of law if
permission is given. This document contains full findings of fact and reasons for the
5 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)”
10 which accompanies and forms part of this decision notice.

CHARLES HELLIER
TRIBUNAL JUDGE

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RELEASE DATE: 24 April 2012