



**TC02237**

**Appeal number: TC/2011/07356, TC2011/07358, TC/2011/07359**

*Excise Duty – S139 and 141 CEMA 1979 – Seizure of Tobacco Products for failure to pay Excise Duty – Decision not to Restore upheld – Appeal Dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MOIRA HARTE, ANTHONY HARTE & FIONA MULLIGAN      Appellant**

**- and -**

**UK BORDER AGENCY      Respondents**

**TRIBUNAL: JUDGE IAN HUDDLESTON**

**Sitting in public in Belfast on 16 May 2012**

**The Appellants did not appear**

**Mr. D. Sharpe BL for UKBA**

## DECISION

### *Appeals*

- 5 1. These appeals have been conjoined on the basis of the factual similarities which arise.
2. Mrs. Harte, Mr. Harte and Miss. Mulligan were apprehended at Belfast International Airport carrying cigarettes and tobacco which normally attract excise duty.
- 10 3. In the case of Mrs. Harte, it was 4,800 cigarettes, and 0.5kg of hand rolling tobacco; in the case of Mr. Harte it was 12,000 cigarettes and 0.5kg of hand rolling tobacco, and the case of Miss. Mulligan it was 10,600 cigarettes and 0.5kg of hand rolling tobacco.
- 15 4. On apprehension, all of the goods (“the Goods”) were seized pursuant to Section 139(1) of the Customs & Excise Management Act 1979 (“CEMA”) as being liable to forfeiture, both under Regulation 88 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 and Section 49(1)(a) of CEMA on the basis that the Goods were held for a commercial purpose, not being for own use, and that excise duty had not been paid.
- 20 5. The actual appeal is against the decision not to restore the Goods subsequent to a review under Section 14 and Schedule 5 of the Finance Act 1994.

### *Background Facts*

6. Each of the Appellants travelled to Malaga on the 15 April 2011 as part of a family arrangement.
- 25 7. It was a day trip, and upon being questioned by UKBA upon their return to Belfast International Airport, it was transparent that the sole purpose of the trip was to acquire cigarettes and tobacco.
8. Upon being stopped by the UKBA and the Goods having been found amongst their luggage, each of the Appellants was interviewed.
- 30 9. It transpired that the Goods had been acquired in Torremolinos at a cost of approximately £2,000 with the intent that they would be distributed amongst various family members.
10. Mr. Harte paid for all of the Goods in cash, but there were no actual receipts.
- 35 11. As part of the interviews, information was given to the UKBA that the intended family recipients had given the Appellants approximately £2,000 to contribute to the purchase of the tobacco products and the costs of the trip.

12. In the case of Mrs. Harte, she confirmed initially at interview that she didn't actually smoke herself, and that she was carrying the goods for other parties.

13. As I have said above, the UKBA took the view that the Goods were held for a commercial purpose, were not for the Appellants own use, and therefore seized them.

5 14. There followed correspondence between the Appellants' representatives, Messrs. Harte Coyle Collins, Solicitors, and UKBA.

15. In their first letter of the 18 May 2011, the Appellants' representatives asked that the Goods to be restored and challenged the legality of the seizure.

10 16. After some debate, it appears to have been established between the parties that that initial application was received outside of the one month time limit which applies and that the Goods had already been forfeit to the Crown.

17. On the 16 June 2011 a UKBA Officer wrote to the Appellant refusing the application for restoration of the Goods.

15 18. The Appellants' representative sought a review of that decision. That too rejected restoration, and it is against that decision in relation to which the Appellants submitted a notice of appeal on the 8 September 2011.

19. Allowing for various factual changes in relation to the nature of the Goods etc, the notice of appeals for each of the Appellants are in exactly the same terms.

#### *The Appellants' Case*

20 20. The Appellants' case (broadly) is that the Appellants consider that the purchase was not "commercial" in the traditional sense of the word.

25 21. The Appellants in each case stated that the family members for whom the cigarettes were intended contributed to the cost of the acquisition of the Goods and the flights to Spain, and that the Appellants may have received some money for the trip, but that in each case this was an entirely separate transaction and that any "profit" (being excess over cost) made on the trip overall is irrelevant.

30 22. The submission was made in writing that any money received for flights, cigarettes and tobacco amount to less than or equal to the total cost to the Appellants and that the overall transaction was as a favour to family members to save on the cost of tobacco products, and therefore was not a business transaction.

23. That being so, this is a non-aggravated case for the purposes of the UKBA restoration policy, and that the Goods should be returned to the Appellants for an associated fee.

*The Respondent's Case*

24. HMRC contends that the review decision not to offer the Goods for restoration was one which was reasonably arrived at for the following reasons:

- 5 (1) the legality of the seizure is not something which can be part of the appeal, and that therefore it is not for the Tribunal to consider “own use” in the context of these proceedings;
- (2) that where excise goods are held for profit – in money or moneys worth – to use the wording of the UKBA standard policy – they should not normally be restored;
- 10 (3) that if the Goods were to be passed on to others on a “not for profit” reimbursement basis where there are aggravating circumstances, then depending on the degree of that aggravation, it is reasonable to refuse restoration;
- (4) that in this case there are aggravating circumstances in that it is UKBA’s position that the Appellants, certainly in the case of Mrs. Moira Harte, initially  
15 claimed when she was interviewed that she was a non-smoker, but that in subsequent correspondence claimed to be a “heavy smoker” – in support of the “own use” argument;
- (5) that where there is a monetary benefit or benefit in kind which is to a value greater than the cost price (ie. the purchase price of the Goods alone) that  
20 that a transaction will be considered smuggling for “profit”;
- (6) that on the facts of this case, the Appellants made the trip solely to purchase the Goods, they were financed by others, and in each case they were receiving, over a combination of flights, expenses etc., an amount greater than the cost price for the Goods;
- 25 (7) that therefore there was a “profit” and that applying the UKBA’s policy the Goods should not normally be restored;
- (8) that non-restoration is fair, reasonable and proportionate in the circumstances.

*The Law*

30 25. Section 139(1) of CEMA provides:

*“Anything liable to forfeiture under the Customs and Excise Acts may be seized or detained by an officer or constable, or any member of Her Majesty’s Armed Forces or Coast Guard.”*

35 26. It is accepted law that where items are subject to forfeiture, then if the legality of the seizure is to be challenged, then that action lies solely to the Magistrates Court – see *HMRC v Jones [2011] EWCA Civ 824*.

27. The question of legality and, therefore, to that extent, “own use” does not therefore come before this Tribunal.

28. What does come before this Tribunal is HMRC's decision not to restore.

29. Section 152 of CEMA establishes that:

*"The Commissioners may, as they see fit ...*

5 *(b) restore subject to such conditions (if any) as they think proper, anything forfeited or seized under the Custom & Excise Acts."*

30. It is trite law that in relation to the question of restoration that the UKBA (in this case) can and do adopt standard policies.

31. The jurisdiction of this Tribunal is merely supervisory as to the application of those policies and decision making processes in individual cases.

10 32. Section 16(4) of the Finance Act 1994 provides as follows:

15 *"In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on appeal under this Section shall be confined to a power, where the Tribunal are satisfied that the Commissioners or other persons making that decision could not reasonably have arrived at it, to do one or more of the following."*

33. As such, therefore, we approach this case on the basis of reviewing what happened upon the review decision to see whether the decision was one which was reasonable in the circumstances.

#### *Decision*

20 34. As I have indicated above, the Appellants did not appear and did not actually produce any evidence to the Tribunal.

35. We have satisfied ourselves that they were given notice of the appeal. We have, therefore, limited ourselves to a review of the appeal notices themselves and to the correspondence passing between the parties.

25 36. As to UKBA's position, we had the benefit of hearing the Review Officer, Mr. D. Ashton, who gave evidence to the Tribunal as to his approach to the review, and the matters which he considered.

37. Primarily the reasons which brought him to his decision appear to be as follows:

30 (1) that where goods are bought and the person who transports them receives money, then that is seen as a commercial transaction;

(2) that where there is a profit (ie. anything over and above the actual cost of the products) that any such transaction is seen as falling within the category of "aggravating circumstances" in terms of the UKBA policy on restoration;

(3) that on the evidence of the Appellants, there was clearly a divergence between the original information provided to the interviewing officer where, for example, Mrs. Harte indicated that she did not smoke, as compared to the paper submissions from the Appellants' representatives where it was alleged that each of the Appellants were heavy smokers.

38. Taking these factors into account and applying them to the factual circumstances described above, Mr. Ashton took the view that aggravating circumstances were at play, that it was a commercial transaction in that the Appellant's derived a profit, and that it was entirely reasonable to refuse the restoration.

39. Having considered the papers submitted by the Appellants, I can quite see that in their mind they were not transacting on a commercial basis nor, in fairness to them, did they consider that they were making a profit in the established sense of that word.

40. That common interpretation, however, is not one which accords with either the law or the UK BA Policy. In reality, and whilst it was comparatively minor, as against a total cost of £2,000 for the Goods (unsubstantiated because of the unavailability of receipts) there was a total contribution by family members for the trip of something in excess of £2,178 (the flight cost being approximately £178). As such, there is technically a profit in money or moneys worth.

41. Equally, the Appellants declared their intention to distribute the Goods amongst family members. That, combined with a profit, then falls within the application of the UKBA policy as of being commercial use where restoration does not arise.

42. For those reasons, I can see why the Review Officer, Mr. Ashton, came to his decision not to restore.

43. I find that he took into account all available circumstances as known to him, and that he did not consider anything which was irrelevant or erroneous in reaching the conclusions which he reached.

44. On the basis, therefore, that this Tribunal's jurisdiction is purely supervisory, I cannot fault him in his approach and clearly have heard nothing contrary from the Appellants to suggest otherwise.

45. On that basis I conclude that the decision was reasonably arrived at and for that reason dismiss the appeal.

46. 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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**IAN HUDDLESTON  
TRIBUNAL JUDGE**

**RELEASE DATE: 3 September 2012**