



TC02257

Appeal number: LON/2005/7079

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Excise duty – civil liability arising from unlawful removal and diversion from Customs’ supervision of excise goods subject to import and other duties – Article 203 of Community Customs Code – Excise Duty Point (External and Internal Community Transit Procedure) Regulations 1998 – Appellant one of a number of individuals convicted of conspiracy to defraud – whether unjust or unfair to enforce whole debt against Appellant – No. Whether an abuse of process following overturning of confiscation order in criminal proceedings - No.

GRAHAM ALAN SMITH

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: JUDGE MICHAEL S CONNELL
CAROLINE DE ALBERQUEQUE**

Sitting in public at 45 Bedford Square, London on 24 April 2012

**Mr Graham Alan Smith, the Appellant, attended in person
Mr Kieron Beale, QC, for the Respondents**

DECISION

The Appeal

1. This is an appeal by Graham Alan Smith (“the Appellant”) against a decision of the Commissioners for Her Majesty’s Revenue and Customs (“HMRC”), on review dated 23.09.05, to uphold their decision to raise a C18 post-clearance demand note in the sum of £13,149,898.00 (“the debt”) representing £10,512,456.00 excise duty, £2,097,987.00 import VAT and £539,459.00 customs duty. The sums represented an underlying civil liability arising from an excise diversion fraud involving a number of consignments of cigarettes diverted from a duty-suspended export procedure between August 2003 and January 2004. The Appellant was convicted at Maidstone Crown Court of charges of conspiracy to evade, fraudulently, excise duty contrary to section 1(1) of the Criminal Law Act of 1977. He was sentenced to a substantial term of imprisonment. HMRC contend that the Appellant, as one of the key perpetrators of the fraud and responsible for overseeing the diversion operation, is jointly and severally liable, with others, for payment of the debt.

2. The Appellant does not seek to challenge the factual basis underlying HMRC’s case. He does not wish to re-litigate the facts of his original conviction, but rather bases his appeal on legal argument that, for various reasons, he should not have any civil liability for payment of the debt.

Factual Background

3. Between August 2003 and January 2004, 52 consignments of cigarettes were brought into the United Kingdom from the Netherlands. The consignments in question were brought into the UK under what purported to be a duty-suspended movement and/or an external transit procedure and on the basis that the cigarettes were destined for immediate export from the EC to Dubai in the United Arab Emirates or Togo. The external transit was intended to take place with the goods arriving in the UK from The Netherlands at Felixstowe and being transported by lorry to Southampton for onward shipment.

4. The vast majority of the cigarettes were not exported to Dubai or Togo. Instead, they were unloaded at warehouses or other premises in the South of England and diverted for sale on the domestic market.

5. Those perpetrating the fraud and/or their associates replaced the cigarettes with low value photocopying paper, put into cigarette packaging. The replacement consignments were then transported to Southampton or Felixstowe docks for onward shipment, thus creating a false audit trail to conceal the underlying fraud. There was a total loss of revenue of approximately £14.9 million, with lost excise duty accounting for £11.8 million. Over 84 million cigarettes were involved.

6. The cigarettes in question were purchased from a company based in Nicosia, Cyprus called the Middle Eastern Tobacco Company (‘METCO’). They were purchased by a company called Elridge Marketing Inc (‘Elridge’), a company registered in the British Virgin Islands, with an office address in Luxembourg. The cigarettes purchased from the Cypriot

company (which was not at that time a Member State of the European Community) were held in the Netherlands in duty suspense in a bonded warehouse called Loendersloot. They were held there pending completion of a duty suspense arrangement, intended to see the cigarettes shipped to the United Kingdom for onward export to Dubai or Togo.

7. The Appellant was the fleet manager of TXT International Logistics Limited (“TXT”), a freight forwarding company based in the United Kingdom. It had a sister company, TXT International BV (“TXT BV”) based in The Netherlands which assumed responsibility for the shipment of the cigarettes from the Loendersloot bonded warehouse to Southampton or Felixstowe docks for purported onward shipment to Dubai or Togo. The shipment was arranged with TXT who, in turn, sub-contracted the transportation of the excise goods to a number of different haulage companies. The Appellant was in charge of security and vehicles for TXT and oversaw the physical act of diversion of the cigarette consignments to the domestic market. Of the 52 consignments referred to above, 45 consignments were unlawfully diverted to the domestic market which infringed the requirements of the duty-suspended movement and/or the external transit procedure. Four consignments were accepted by HMRC to have been properly exported to Dubai and three consignments were detained and seized by HMRC.

8. In February 2004 Mr Smith was arrested and charged with conspiracy to fraudulently evade excise duty on 84.61 million cigarettes between October 2002 and 01 May 2004, contrary to section 1(1) Criminal Law Act 1977 and/or section 170(2) of the Customs and Excise Management Act 1979 (“CEMA 1979”).

9. In December 2005 a number of the main perpetrators, including the Appellant, were found guilty of the offence.

10. On 31 July 2006 the Appellant was made subject to a Confiscation Order for £105,501.00 under the provisions of the Criminal Justice Act 1988. The Appellant appealed the Confiscation Order, which was overturned by the Court of Appeal in October 2008: see *R v. Graham Alan Smith* [2008] EWCA Crim 3253, CA. The Court of Appeal nonetheless noted that there was direct evidence that the Appellant “was present and masterminded the slaughtering operation on three occasions. The judge inferred that he must have done so also on the other occasions about which there was no direct evidence”.

11. In July 2005 a number of the individuals involved in the fraud, including the Appellant, had C18 demand notes issued against them by HMRC for non-payment of excise duty, import VAT and customs duties. Enforcement of the C18 demand notes had been suspended pending conclusion of the criminal proceedings.

12. The decision to issue the C18 demand note against the Appellant was based on the provisions of Council Regulation (EEC) No. 2913/92 of 12 October 1992 establishing the Community Customs Code (“the Code”) and in particular Article 202 (which relates to the imposition of a customs debt on persons liable to import duties into the community. Article 202.3 defines persons regarded as debtors under 202.3) (see para 17 below).

13. C18 demand notes issued to some of the individuals involved in the fraud took into account the fact that they had participated in the diversion of a fewer number of consignments than the main participants. The Appellant was regarded as a main participant in the excise diversion fraud and therefore his debt liability in respect of the debt was not reduced.

14. The Appellant filed a Notice of Appeal on 23 October 2005.

Relevant Legal Provisions

(1) Community Customs Code

15. The Code provides for a Community-wide system of rules governing *inter alia* goods imported from third countries. Article 20 of the Code provides for the establishment of a Customs Tariff which in turn provides for certain customs duties to be applied to the importation of goods falling within a given nomenclature.

16. The external transit procedure is governed by Articles 91 to 97 of the Code and articles 341 to 380 and 382 to 388 of Commission Regulation (EEC) No. 2454/93 of 2 July 1993 laying down provisions for the implementation of regulations allowing excise goods to be imported into the Community and moved between Member States without the goods becoming subject to import duties and other charges.

17. Article 202 of the Code provides that :

“1. A customs debt on importation shall be incurred through :

(a) the unlawful introduction into the customs territory of the Community of goods liable to import duties ...

2. The debtors shall be –

- the person who introduced such goods unlawfully,
- any persons who participated in the unlawful introduction of the goods and who were aware or should reasonably have been aware that such introduction was unlawful, and
- any persons who acquired or held the goods in question and who were aware or should reasonable have been aware at the time of acquiring or receiving the goods that they had been introduced unlawfully”.

18. Article 203 of the Code provides that:

“1. A customs debt on importation shall be incurred through –

The unlawful removal from customs supervision of goods liable to import duties.

2. The customs debt shall be incurred at the moment when the goods are removed from customs supervision.

3. The debtors shall be –

- the person who removed the goods from customs supervision,

- any persons who participated in such removal and who were aware or reasonably should have been aware that the goods were being removed from customs supervision,
- any persons who acquired or held the goods in question and who were aware or reasonably should have been aware at the time of acquiring or receiving the goods that they had been removed from customs supervision;
- where appropriate, the person required to fulfil the obligations arising from temporary storage of the goods or from the use of the customs procedure under which those goods are placed.”

19. Article 213 of the Code states :

“where several persons are liable for the payment of one customs debt, they shall be jointly and severally liable for such debt”.

20. Articles 217 to 221 impose obligations on Member States to ensure that customs debts are accounted for and paid within certain time periods and that the amount of the customs debt is communicated to the debtor.

(2) Domestic provisions

21. The Tobacco Products Duty Act 1979 imposes a duty of excise on tobacco products imported into or manufactured in the United Kingdom.

22. The Excise Duty Point (External and Internal Community Transit Procedure) Regulations 1998 provide for an excise duty point (i.e. the time when excise duty is payable by a person) in respect of excise goods subject to the external Community transit procedure where, because of a breach of that procedure, there is incurred in the United Kingdom a customs debt (i.e. the Community customs duty charged on those goods becomes payable), by virtue of article 203 or 204 of the Community Customs Code.

23. This is achieved through Regulations 4 and 6 of the 1998 Regulations. Regulation 4 states:

- “(1) Paragraph (2) below applies if:
- (a) excise goods are subject to the external Community transit procedure; and
 - (b) in respect of those goods;
 - (i) a customs debt is incurred, as determined by article 203 or, in cases other than those referred to in that article, 204 of the Community Customs Code; and
 - (ii) the place where the events from which that customs debt arises occur is in the United Kingdom, as determined by article 215 of that Code and article 378 of the Implementing Regulation.

(2) The excise duty point shall be the time, as determined by article 203, or, as the case may be, article 204, specified by paragraph (1)(b)(i) above and which governs

the time of the incurrance of the customs debt, when the customs debt mentioned in that paragraph is incurred.”

24. Regulation 6 reads as follows:

“(1) This regulation applies if there is an excise duty point by virtue of regulation 4 above
(2) A person specified by subparagraph (a) or (b) of paragraph (3) below, having the specified connection with the excise goods, shall be liable to pay the excise duty relating to the excise duty point.
(3) For the purposes of paragraph (2) above, the person is:
(a) any person who is a debtor in respect of the customs debt, giving rise to the excise duty point, as determined by the article of the Community Customs Code specified by regulation 4(1)(b)(i) above which governs that customs debt;
(b) any other person who, in relation to the excise goods that are the subject of the excise duty point, at any time in the period:
(i) starting with the charging of those goods with excise duty; and
(ii) ending with the incurrance of the customs debt specified by subparagraph (a) above,
brings about, or assists in bringing about, that customs debt.”

25. Regulation 8 provides that where more than one person is liable to pay the excise duty by virtue of Regulation 6, each person shall be jointly and severally liable to pay the excise duty with the other person or, as the case may be, with each of the others.

26. Section 1(4) of the Value Added Tax Act 1994 (‘VATA 1994’) imposes VAT on the importation of goods from places outside of the Member States and requires it to be charged and payable as if it were a duty of customs.

27. Section 15 of the VATA 1994 states:

“(1) For the purposes of this Act goods are imported from a place outside the member States where—
...
(c) the circumstances are such that it is on their removal to the United Kingdom or subsequently while they are in the United Kingdom that any Community customs debt in respect of duty on their entry into the territory of the Community would be incurred.
(2) Accordingly—
(a) goods shall not be treated for the purposes of this Act as imported at any time before a Community customs debt in respect of duty on their entry into the territory of the Community would be incurred, and
(b) the person who is to be treated for the purposes of this Act as importing any goods from a place outside the member States is the person who would be liable to discharge any such Community customs debt.”

28. Section 16 VATA 1994 provides:

“(1) Subject to such exceptions and adaptations as the Commissioners may by regulations prescribe and except where the contrary intention appears—

(a) the provision made by or under the Customs and Excise Acts 1979 and the other enactments and subordinate legislation for the time being having effect generally in relation to duties of customs and excise charged on the importation of goods into the United Kingdom; and

(b) the Community legislation for the time being having effect in relation to Community customs duties charged on goods entering the territory of the Community, shall apply (so far as relevant) in relation to any VAT chargeable on the importation of goods from places outside the member States as they apply in relation to any such duty of customs or excise or, as the case may be, Community customs duties.”

29. The provisions governing appeals against formal departmental reviews are found in sections 14 to 16 of the Finance Act 1994. The burden of proof is established by section 16(5) of the Finance Act 1994. It is for the Appellant to show that the contested decision is wrong. The standard of proof will be the ordinary civil standard, namely the “balance of probabilities”.

The Appellant’s case

30. The Appellant does not wish to dispute the fact of his conviction or “re-litigate the matter” but contends that :

1. Unjust enrichment of HMRC

HMRC should not be unjustly enriched and therefore any sums paid by the other individuals involved in the fraud under the terms of any confiscation order should be offset against the debt claimed from the Appellant.

2. Abuse of process

In the light of the findings of the Court of Appeal when the Confiscation Order was overturned in R v. Graham Alan Smith (*supra*) the imposition of a civil liability on the Appellant is an abuse of process. The Appellant says that the essence of the ruling made by the Court of Appeal is that there was no basis upon which it could find that he had benefited from his involvement in the conspiracy. The Appellant refers to paragraph 16 where *Toulson L J* encapsulated the ruling as follows :

“The appellant was not presented by the prosecution as the mastermind of the scheme but as a lieutenant. Of course, a lieutenant may in fact profit to the same extent as the mastermind. But that, again, is a question of fact. There was no such finding in this case and the basis on which the judge found that the appellant benefited in the sums is unsustainable.”

The Appellant therefore argues that he must be treated as a person who, whatever his role within the conspiracy, did not benefit as a result of his criminal conduct. The Appellant contends that no adequate notice has been taken by HMRC of the outcome of the criminal proceedings and in particular that there was no evidence that the Appellant had in fact benefited financially from the fraud. The Appellant says that HMRC should have adjusted their position with regard to the C18 notice in a fair or reasonable way to reflect the findings of the Court of Appeal.

3. Difference between departmental review decision and HMRC's case

The Appellant says that the Respondents' statement of case purporting to support the assessment and departmental review of the earlier decision does not accurately state the basis upon which the original C18 is now said to have been validly served. He submits that the Respondents' statement of case relies upon the legal provisions contained in Article 203 of the Customs Code (and not Article 202 as referred to in the departmental review decision). He adds that the "copy" of the C18 notice produced by HMRC in its list of documents is not the same document as the original notified to the Appellant and differs in material respects. The Appellant argues that there has been no acknowledgement on the part of HMRC in its statement of case or elsewhere that HMRC's case as to the validity/basis of the C18 notice has changed. He says no explanation has been proffered as to the reasons for the change of position and it would be wrong for the Tribunal in the circumstances to permit the decision of HMRC to be upheld on grounds that are different to those relied upon when the notice was issued.

4. Definition of person responsible for debt should have narrow meaning

The Appellant relies upon the judgment of the Court of Appeal in R (oao Revenue and Customs Prosecution Office) v. M [2009] EWCA Crim 214, CA in support of the proposition that the interpretation of "any person who caused the tobacco products to reach an excise duty point" should be given a narrow construction and will limit liability for any duty evaded to a narrow class of persons.

5. Enforcement of the debt is unfair

The Appellant says that the enforcement of the C18 notice is draconian and has a greater disproportionate effect compared to that of the Confiscation Order. In confiscation proceedings, the aim is to recover no more than that which the offender has available to him by way of assets to meet the benefit that has accrued to him as a result of his criminal conduct. The court, in confiscating sums from an individual, will therefore stop short of making an order against him that will force bankruptcy. In these proceedings a C18 notice, if upheld, will result in a debt which bears no relation to what the Appellant has and what he received. More importantly, he submits that it is a debt that he cannot conceivably meet and would therefore result in bankruptcy.

6. Imposition of whole debt on Appellant is unjust

The Appellant contends that it would be unfair and unjust to uphold the decision to issue a C18 Notice against him in circumstances where he says it is, at best, unclear which of the other individuals involved in the fraud have been pursued, what recoveries had been made and why (if any) persons with potential liability have not been pursued. The Appellant says that he has not been informed how much has been recovered from the individuals and/or what enforcement action has been taken. He says that he also does not know whether recovery action has been taken against the companies involved (TXT and TXT BV).

HMRC's response to the Appellant's case

(1) HMRC will not be unjustly enriched

31. HMRC say that they do not seek double-recovery of the sums due under the customs debt from the Appellant and all other persons against whom assessments have been raised in respect of the same consignments. HMRC will give credit against the debts due for any sums paid by any of the individuals under the terms of a confiscation order. In this way they say that there will be no double-recovery of any customs or excise duty or VAT due.

(2) Enforcement and recovery of the debt is not an abuse of process

32. HMRC say that the imposition of civil liability on the Appellant in this case is not an abuse of process. The focus of confiscation proceedings, at least in part, as the Court of Appeal in *R v. Graham Alan Smith* (*supra*) acknowledged in [12] was on the benefit that the offender has received from his criminal activity. The provisions governing confiscation proceedings are criminal in nature governed by the Criminal Justice Act 1988.

33. In contrast, the imposition of civil liability arises as a result of directly applicable European Union law and domestic legislation that is predicated upon it. The civil assessment seeks to hold the Appellant accountable for the customs debt which is due. It does not investigate or depend upon the extent to which the Appellant has personally benefited from the fraud in question.

34. Liability is based on the Appellant's wrongful participation in the fraud. That involvement is put by the Commissioners on two bases:

- (i) The Appellant was a person who removed the goods from customs supervision; or
- (ii) He was a person who participated in such removal and who was aware or should reasonably have been aware that the goods were being removed from customs supervision.

35. There has been no need for the Commissioners to adjust the Appellant's liability in the light of the Court of Appeal's judgment in *R v. Graham Alan Smith* (*supra*). At [5], the

Court of Appeal (per Toulson LJ) accepted without comment the conclusion of the judge at first instance that the Appellant had masterminded the slaughtering operations in respect of the consignments which were the subject of the fraud. At [18], the Court of Appeal expressly declined to rule on the personal liability of the Appellant as a matter of civil law.

(3) Alleged differences between the first departmental review decision

36. HMRC accepts that the departmental review decision of the Commissioners wrongly referred to Article 202 of the Community Customs Code, rather than Article 203. HMRC says that nothing turns on this, as the appeal is a full appeal on the merits and the customs debt is properly due under the directly applicable provisions of Article 203, for the reasons set out above. HMRC assert that the Tribunal is obliged to give effect to the directly applicable provisions of EU law pursuant to section 2 of the European Communities Act 1972.

37. HMRC observes that in *Commissioners of Customs and Excise v Alzitrans SL* [2003] EWHC 75 (Ch); [2003] V & DR 369, Blackburne J held at [38] and [39] that it was open to the Commissioners to advance a different case in their Statement of Case from that articulated in the contested decision. It must therefore be equally open to the Commissioners to correct a clerical error in the review decision which wrongly states the specific Article of the Community Customs Code under which the Appellant's liability arises.

(4) Judgment of the Court of Appeal in Revenue and Customs Prosecution Office v M 2009

38. HMRC deny that the Court of Appeal decision in *R (RCPO) v. M* [2009] EWCA Crim 214, CA assists the Appellant's case. The case simply emphasised the need to keep separate any civil liability arising and the criminal liability under section 170 of CEMA 1979 which might trigger confiscation proceedings under either the Criminal Justice Act 1988 or the Proceeds of Crime Act 2002. It is submitted that the Appellant does not put forward any argument as to why M should assist his case. Furthermore, HMRC say the decision in M in any event must be read in the light of the more recent guidance given by the Court of Appeal in *White, Dennard, Perry and Rowbotham v. R* [2010] EWCA Crim 978, CA, in particular at [82] and [83] and [91] to [99]. The full force of any conclusions in M must also reflect concerns about their accuracy expressed in [115] of the judgment.

(5) Enforcement of debt not unfair

39. HMRC submits that the sum due forms part of "Community own resources". Pursuant to Article 232 of the Code, where the amount of the duty due has not been paid within the prescribed period, the customs authorities shall avail themselves "of all options open to them under the legislation in force, including enforcement, to secure payment of that amount." The Article permits waiver of *interest* in certain circumstances, including hardship, but does not permit the *underlying debt* to be waived. Articles 233 and 234 of the Community Customs Code provide the only lawful basis for the extinction of a customs debt established under the Code and their provisions do not apply in this case.

40. HMRC submit that, by virtue of the provisions of the Community Customs Code and the Implementing Regulations governing the external transit procedure as set out above, HMRC is obliged - as a matter of EU law - to enforce a customs debt against those persons who are responsible for the removal of duty suspended goods from a supervised customs procedure. The recovery of post-clearance payment of customs duties complies with the principles of proportionality and respects the legitimate expectations of traders by virtue of the mechanism for waiver and/or remission of the duty if certain conditions are met. Those conditions have not been met here and no suggestion has been made that they are.

(6) Imposition of whole debt on Appellant not unjust

41. HMRC say that Article 213 of the Code clearly states that, where several persons are liable for the payment of one customs' debt, they shall be jointly and severally liable for such debt. HMRC submit that the question of whether or not the Appellant will be able to discharge the entire debt is a matter for enforcement, not liability, the issue of enforcement is outside the jurisdiction of the Tribunal.

Conclusion

42. The Tribunal agrees with the submissions of HMRC. HMRC will not be unjustly enriched in the event that the Appellant is the first to settle the debt, he will have a claim against the other debtors for contribution on the usual equitable basis. The imposition of a civil liability is based on the European Union law and domestic law as set out in paragraphs 15 to 29 above. The provisions are clear and unequivocal. HMRC is obliged to secure payment of the debt pursuant to Articles 217 to 223 of the Community Customs Code. Enforcement of the debt is therefore not an abuse of process. Nor is it unjust or unfair for the reasons argued by HMRC above. The findings of the Court of Appeal in the criminal proceedings where a confiscation order was overturned are not relevant to the imposition and enforcement of a civil liability against the Appellant. Civil liability operates entirely separately from any findings of the criminal court. The Court of Appeal expressly declined to rule on the personal liability of the Appellant as a matter of civil law. The case in the confiscation proceedings had not been articulated on the basis that the Appellant had sought to evade a personal liability to pay the customs duty which was otherwise due. The civil liability is not dependent upon whether or not the Appellant personally benefited from the fraud.

43. For the above reasons the appeal is dismissed.

44. HMRC said that they would ask for an order for costs if the appeal was dismissed. These proceedings began before the VAT and Duties Tribunal and therefore the Tribunal has power to award costs pursuant to the transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009, schedule 3, paragraph 7(2). We direct that the Tribunal Procedure (First-tier) (Tax Chamber) Rules 2009 do not apply in respect of costs and that the Appellant pay HMRC's costs of and incidental to the appeal, to be determined in default of agreement on the standard basis by a costs Judge.

45. 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.

**MICHAEL S CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 12 September 2012

