



**TC03304**

**Appeal number: TC/2012/09469**

*Excise Duty Tobacco – imported goods – excise duty not paid – goods seized – seizure not challenged – goods forfeit – restoration request refused – decision not to restore the goods not unreasonable – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**DAVID WARD**

**Appellant**

**- and -**

**DIRECTOR OF BORDER REVENUE**

**Respondent**

**TRIBUNAL: JUDGE JENNIFER TRIGGER**

**The Tribunal determined the appeal on 14 October 2013 without a hearing under the provisions of Rule 23 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 18 September 2012, letter dated 31 August 2012 to the Appellant, letter dated 18 September 2012 to HMCTS and the Respondent's Statement of Case submitted on 4 April 2013.**

## DECISION

1. This appeal was against the Respondent's refusal following a re-review to  
5 restore 250gm Cigars ("the Goods") to the Appellant.

### **The Background**

2. On 30 August 2011 at Mount Pleasant Parcel Post Depot London, a parcel from Portugal addressed to the Appellant was intercepted by officers of the Respondent ("the Officers"). The Officers examined the parcel and found the Goods.

10 3. The Respondent considered that the provisions for importing excise goods for own use from Member States of the EU did not apply to postal importations. Further that the provisions did not apply to any importation for which the traveller did not accompany the goods. The Goods was seized by the Officers under s.139 of the Customs & Excise Management Act 1979 ("CEMA") as being liable to forfeiture  
15 under Regulation 88 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010.

4. On seizure of the Goods the Officers issued to the Appellant a Notice of Seizure and Customs Notice 12A ("Goods and/or vehicles seized by Customs"). The Notice informed the Appellant that the legality of the seizure could be challenged in writing  
20 within one month of the date of the Notice of Seizure and Customs Notice.

5. The Appellant did not challenge the seizure of the Goods. The Goods were accordingly condemned as forfeit by the passage of time under paragraph 5 of Schedule 3 of CEMA and the ownership of the Goods passed to the Crown.

6. By letter dated 31 August 2011 the Appellant wrote to the Respondent  
25 requesting that the Goods be restored.

7. The Respondent replied, by letter dated 6 September 2011 refusing restoration of the Goods.

8. By letter dated 6 September 2011, received by the Respondent on 2 October 2011, the Appellant requested a review of the Respondent's decision not to restore the  
30 Goods.

9. The Respondent upheld its decision not to restore the Goods by letter dated 3 November 2011.

10. The Appellant appealed the decision not to restore the Goods to the First-Tier Tribunal, Tax Chamber.

35 11. On 13 July 2012 the appeal came before Judge Staker who directed that the Respondent conduct a re-review of its decision not to restore the Goods to the Appellant.

12. On 31 August 2012 the Respondent notified the Appellant that following the re-review the original decision of the Respondent that the Goods should not be restored was upheld.

### **The relevant legislation**

5 13. Section 49(1) of CEMA provides so far as is relevant:

*“Where –*

*(a) except as provided by or under the Customs & Excise 1979, any imported goods, being chargeable on their importation with customs or excise duty, are, without payment of that duty -*

10 *(i) unshipped in any port,*

*those goods shall...be liable to forfeiture.*

*(f) any imported goods, concealed or packed in any manner appearing to be intended to deceive an officer, those goods shall, subject to subsection (2) below, be liable to forfeiture...”*

15 Section 139(1) of CEMA provides so far as is relevant:

*“Anything liable to forfeiture under the customs & excise Acts may be seized or detained by any officer or constable or any member of Her Majesty’s armed forces or coastguard ...”*

Section 141(1) of CEMA provides so far as is relevant:

20 *“... where anything has become liable to forfeiture under the customs & excise Acts –*

*(a) any ship, aircraft, vehicle, animal, container (including any article of passenger’s baggage) or any other thing whatsoever which has been used for the carriage, handling and deposit or concealment of the thing so liable to forfeiture, either at a time when it was so liable*  
25 *or for the purposes of the commission of the offence for which it later became so liable; and*

*(b) any other thing mixed, packed or found with the thing so liable, ... shall also be liable to forfeiture.”*

30 Section 14 to section 16 of the Finance Act 1994 provides so far as is relevant:

Section 14(2):

*“(2) Any person who is –*

- (a) *a person whose liability to pay any relevant duty or penalty is determined by, results from or is or will be affected by any decision to which this section applies,*
  - 5 (b) *a person in relation to whom, or on whose application, such a decision has been made, or*
  - (c) *a person on or to whom the conditions, limitations, restrictions, prohibitions or other requirements to which such a decision relates are or are to be imposed or applied,*
- 10 *may by notice in writing to the Commissioners require them to review that decision.”*

Section 15(1):

- “Where the Commissioners are required in accordance with this Chapter to review any decision it shall be their duty to do so and they may, on that review, either –*
- 15 (a) *confirm the decision; or*
  - (b) *withdraw or vary the decision and take such further steps (if any) in consequence of the withdrawal or variation as they may consider appropriate.”*

...

20 Sections 16(4) to (6) inclusive provides so far as is relevant:

- (4) *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 an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following things, 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; and*
  - (c) *In the case of a decision which has already been acted on or taken effect and cannot be remedied by further review, to declare the decision to have been unreasonable and to give*
  - 35 *directions to the Commissioners as to the steps to be taken for*

*securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in the future.*

5 (5) *In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal.*

(6) *On an appeal under this section the burden of proof as to –*

(a) *the matters mentioned in subsection (1)(a) and (b) of section 8 above,*

10 (b) *the question whether any person has acted knowingly in using any substance or liquor in contravention of section 114(2) the Management Act, and*

15 (c) *the question whether any person had such knowledge or reasonable cause for belief as is required for liability to a penalty to arise under section 22(1) of 23(1) of the Hydrocarbon Oil Duties Act 1979 (use of fuel substitute or road fuel gas on which duty not paid),*

20 *shall lie upon the Commissioners; but it shall be otherwise for the appellant to show that the grounds on which any such appeal is brought have been established.”*

### **The Appellant’s case**

14. In the notice of appeal dated 18 September 2012 the Appellant’s ground for appealing was stated as follows:

25 *“This entire appeal hangs entirely on the fact that I committed a minor misdemeanour, which I was not aware, and when being informed of this wish to put to rights, and pay my dues. I was rewarded for this with a blunt and uncaring rebuff which seemed to criminalise me out of hand, and humiliate me for tax avoidance which was not the case. This id (sic) my undying reason for the pesuance(sic) of fairness, after offering my apologies and payment due,*  
30 *which was rebuffed. Alas I was also appalled by the presumptuous attempt to give the tribunal a lesson in punctuation... I was “unwittingly” wrong. I believe their decision to be wrong and as we know two wrongs do not make a right.”*

### **The Respondent’s case**

35 15. The Respondent’s maintained that the decision not to restore the Goods was one that could have reasonably been arrived at. The Respondent stated that there were four reasons for its decision. Firstly, that the Appellant had not provided satisfactory

evidence to show that UK duty had been prepaid. Secondly, that the Appellant in his grounds of appeal had admitted that he had committed “a minor misdemeanour” and that he had been “unwittingly wrong”. Furthermore, the Goods were imported improperly through the postal system with the aggravating factor of being purchased from an internet supplier. Finally, the Appellant had not presented evidence that justified the Respondent in disapplying its policy.

### **The facts**

16. The goods had been imported without prepayment of UK duty from an internet supplier in Portugal. The Goods had been seized by the Respondent. The Appellant had not challenged the seizure. The Goods were forfeit by the Respondent. The Respondent refused to restore the Goods to the Appellant. The Respondent relied on the UK Border Agency Restoration Policy for Excuse Goods (“the Policy”). The Policy could not be said to be unreasonable. The Respondent examined the circumstances of the importation of the Goods and whether there were any aggravating features. The decision of the Respondent was fair, reasonable and proportionate in all the circumstances.

### **The decision**

17. The decision of the Respondent not to restore the Goods to the Appellant was not unreasonable.

### **20 The reasons for the Tribunal decision**

18. UK Excise Duty had not been paid on the importation of the Goods. The Policy provided that the Goods would not normally be restored. There was, therefore, a presumption against restoration but, before reaching the decision, the Respondent was obliged to examine each case on its merits to determine whether restoration could be offered. The Respondent considered the facts of the importation of the Goods. The Respondent reached the conclusion that there were no exceptional circumstances which would warrant the restoration of the Goods and that there were aggravating circumstances which justified the refusal to restore the Goods.

19. The Goods had been purchased from an internet supplier. This transaction would not ordinarily come to the attention of the Respondent. There would be no audit trail to assist the Respondent. The ability to purchase any goods via the internet from a vendor in another Member State of the EU placed on any purchaser in the United Kingdom a responsibility, in my opinion, to make enquiries to ensure that the goods were imported properly, and excise duty paid before the goods arrived in the United Kingdom. The Appellant had acted in ignorance and there was no suggestion that he had attempted to avoid the payment of excise duty. Nevertheless he had not apparently made any requisite enquiries to satisfy himself as to his responsibility when buying goods from an individual trading in Portugal. This was in my opinion an aggravating feature which was rightly taken into account by the Respondent.

20. The Respondent had been guided by the Policy which applied to all taxpayers, the underlying purpose of which was to act as a deterrent to the importation of goods without the payment of excise duty. The aim of the Policy could not be said to be unreasonable and in applying the Policy to the particular circumstances of the Appellant's case, the Respondent's decision could not be said to be unreasonable because the Respondent had considered all the circumstances in accordance with the Policy. It had decided that there was an aggravating feature which combined with the general presumption that the goods should not normally be restored determined the decision made by the Respondent.

21. Accordingly the appeal was unsuccessful and the Goods are forfeit.

22. 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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**JUDGE JENNIFER TRIGGER  
TRIBUNAL JUDGE**

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**RELEASE DATE: 30 January 2014**