



TC04136

Appeal number: TC/2013/01829

Excise Duty – tobacco imports – whether for private use – condemnation not contested – whether appeal competent – No – Customs and Excise Management Act 1979, Schedule 3 para 5 – Rule 8(2)(a) and (3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 - Strike-out application granted

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DARON MASSEY

Appellant

- and -

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

**TRIBUNAL: JUDGE KENNETH MURE, QC
 MISS SUSAN STOTT, FCA, CTA**

Sitting in public at Liverpool on 24 October 2014

Appellant – appearing in person

Respondents – Miss Eleanor Caine, General Counsel, Solicitor's Office, HMRC

DECISION

1. This appeal relates to Excise Duty of £1,367 and a 20% penalty of £273 in
5 respect of the import of nine kilograms of hand-rolling tobacco. The Appellant
appeared in person. HMRC, the Respondents, were represented by
Miss Eleanor Caine.

2. HMRC had lodged an application for strike-out of the appeal under
Rules 8(2)(a) and 8(3)(c) on the basis that this Tribunal had no jurisdiction to hear the
10 issue under appeal, and in any event, the appeal had no reasonable prospect of
success. The hearing of the application had been stayed pending the decision of the
Upper Tribunal in *Nicholas Race* [2014] UKUT 0331 (TCC).

3. The grounds for appeal were quite simply that the Appellant had imported the
tobacco for his private use and accordingly it was exempt from duty. He explained,
15 both in the appeal papers and in his evidence to us, that the tobacco had been found in
his car and caravan on his return from France at Dover on 11 March 2012. He had
been interviewed by the UK Border Agency, whose officers concluded that the
tobacco had been imported for a commercial purpose and accordingly was liable to
20 duty and was seized. The record in the notebook of the seizing officer had been
signed as accurate by the Appellant. Although the Appellant had had the opportunity
to challenge the seizure within one month, he did not do so. He explained that he had
been discouraged from taking this course by the officer involved, who had warned
him of the expense and poor prospects of success.

4. This account was not challenged in cross-examination by Miss Caine, who
25 founded on the matter of jurisdiction. In any event we found the Appellant a
straightforward and credible witness.

5. In reply Miss Caine submitted that a duty point arose on the import of the
tobacco in terms of Regulation 13 of the Excise Goods (Holding) Movement and
Duty Point, Regulations 2010. She referred us to the decision of the Court of Appeal
30 in *HMRC v Jones* [2011] EWCA 824, which had been followed by Warren J in
HMRC v Race. In particular Miss Caine noted the guidance of Mummery LJ in *Jones*
at para 71. That indicated that where condemnation was not opposed then the deemed
statutory effect of seizure under CEMA Schedule 3, para 5, was that the goods
35 affected were condemned as forfeited and illegally imported. This Tribunal has to
proceed upon that basis. That interpretation had been confirmed by Warren J in *Race*.
Unlike the circumstances in *Race*, in the present case it was not disputed that the
necessary challenge to seizure and condemnation had not been served. Accordingly
in Miss Caine's submission, the Tribunal had no jurisdiction to entertain the present
appeal that the tobacco had been imported for private use.

6. Further, she argued, the proper recourse available to the Appellant in respect of
40 any impropriety on the part of officers of UKBA was by way of Judicial Review in
the High Court and not by any complaint to this Tribunal.

7. Miss Caine noted that the penalty had been imposed at the lowest rate of 20% in
terms of FA 2008, Schedule 41. It was in respect of a non-deliberate action,
45 discovery being prompted following on the Appellant's vehicle having been stopped
at Dover.

8. We consider the submissions of Miss Caine to be well-founded. We agree with her that the powers of this Tribunal are circumscribed by the decision of the Court of Appeal in *Jones*. Where seizure is not challenged, the goods are deemed to have been condemned, and consideration of private use by the importer is not within our jurisdiction. For these reasons we consider that we cannot consider the appeal against imposition of the duty and also the penalty.

9. We have noted that we found the Appellant personally credible in his account. We do have a degree of sympathy for him in his predicament. However, on the basis of the authorities to which we have referred, we consider that we have no alternative but to grant the Strike-out application at the instance of the Respondents.

10. 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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**KENNETH MURE, QC
TRIBUNAL JUDGE**

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RELEASE DATE: 14 November 2014