



**TC04174**

**Appeal number: TC/2012/08668**

*EXCISE DUTY – assessment in relation to excise goods seized from the appellant – application to strike out – no reasonable prospect of appeal succeeding – appeal against duty assessment struck out*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**NICHOLAS RACE**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE JONATHAN CANNAN**

**Sitting in public in Manchester on 6 October 2014**

**The Appellant appeared in person**

**Mr Richard Shaw of HM Revenue & Customs Solicitor's Office for the  
Respondents**

## DECISION

### *Background*

- 5 1. This decision deals with the remainder of an application to strike out part of the appeal which was remitted to the First-tier Tribunal following HMRC's appeal to the Upper Tribunal (Tax and Chancery Chamber). What is left of the application relates to an assessment to excise duty in the sum of £182.84 on 1,180 JPS Red cigarettes ("the Goods").
- 10 2. The background to the application to strike out is set out in the decision of the Upper Tribunal (Warren J) released on 15 July 2014 and I shall not repeat it here. The issues remitted to this tribunal are set out in the decision of the Upper Tribunal at [52] – [54]. Essentially they are as follows and in the order set out by the Upper Tribunal:
- 15 (1) As matter of fact, is there any real prospect of Mr Race being able to establish that he served a notice of claim on HMRC in the period of one month following seizure of his goods? If so,
- 20 (2) As a matter of law, does the First-tier Tribunal have jurisdiction to determine whether a notice of claim was served. The alternative is that it is a matter for Mr Race to seek judicial review of HMRC's failure to act on a valid notice of claim.
- 25 3. The Upper Tribunal did not determine those issues. As to the first issue it considered that I would be in a better position to assess the evidence already before me and to decide what further evidence might be relevant. As to the second issue it considered that difficult points were raised which it was reluctant to decide without the benefit of fuller argument.
- 30 4. In fact there was very little evidence before me at the time of my decision released on 10 September 2013. The strike out application was dealt with by HMRC on the basis that it was a question of law. I now have the benefit of a witness statement from the seizing officer dated 17 March 2014 served in the Upper Tribunal proceedings. I have also heard further oral evidence from Mr Race directed specifically towards the notice of claim he alleges to have sent to HMRC following the seizure. I set out my findings of fact below.
- 35 5. In relation to the second issue I have not had the benefit of any fuller argument than that which was before the Upper Tribunal. However Mr Shaw on behalf of HMRC suggested that if I were to find in favour of Mr Race on the first issue then I should adjourn the application to give Mr Race the opportunity to decide whether to commence judicial review proceedings. Unsurprisingly I was not attracted by that prospect given the amount of duty in issue. Mr Shaw did also indicate that in those circumstances HMRC would be very unlikely to require Mr Race to commence
- 40 judicial review proceedings.

6. I informed the parties at the hearing that I would deal with the first issue on the evidence and submissions before me. If I were to decide that issue in favour of Mr Race then I would adjourn the second issue for a further hearing should HMRC wish to pursue the point. For the reasons given below I am satisfied that Mr Race did not give HMRC any notice of claim within the period of one month allowed by *Paragraph 1 Schedule 3 CEMA 1979*. In those circumstances the second issue does not arise and I shall say no more about it.

#### *Findings of Fact*

7. The Goods were seized by Officer Hough on 4 August 2011 at Mr Race's home address together with various other excise goods. A "Seizure Information Notice" was issued to Mr Race who was present at the time. On 10 August 2011 Officer Hough wrote to Mr Race with a revised "Notice of Seizure" following a full count of the goods seized. Mr Race was also provided with a copy of Notice 12A "*What you can do if things are seized by HM Revenue and Customs*". The Notice of Seizure and Notice 12A both set out the one month time limit to make a claim that goods are not liable to seizure. Rather confusingly the Notice of Seizure also said that "*if you do not give notice of claim in the proper form, the Commissioners will take legal proceedings for the condemnation of the said goods*".

8. Officer Hough in his witness statement stated that on the date of seizure he told Mr Race how he could appeal the seizure. In particular that he could challenge the legality of the seizure and/or request the return of the seized goods. In order to do this Mr Race would have to write to Officer Hough within 30 days of the seizure at the address on the Seizure Information Notice. It is not clear where Officer Hough got the period of 30 days from, because CEMA 1979 gives a period of one month to challenge the legality of a seizure. There is no time limit to seek restoration of seized goods.

9. HMRC did not seek to adduce oral evidence from Officer Hough or tender him for cross examination. He was not present at the hearing. I do however admit his witness statement in evidence.

10. Officer Hough's witness statement exhibited his handwritten notes of interview with Mr Race at the time of seizure. In relation to the Goods, Mr Race is recorded as having said that "*me lad got them me as a present, he just come back from Benidorm*". In relation to other goods he is recorded as having said that that he bought them off a man in a pub who he refused to identify.

11. Mr Race's oral evidence was that Officer Hough had told him he had one month to make a claim in relation to the goods and gave Mr Race a business card with his details on. He was told he should send a letter to Officer Hough at that address. Whilst there are slight differences in detail, the substance of this evidence was not challenged.

12. Mr Race also said that he asked Officer Hough what his chances would be if he challenged the seizure. Mr Race said he was told by Officer Hough that "*to be*

*truthful, if it was down to me you won't get them back*". In the absence of Officer Hough I am prepared to accept that this is what Mr Race was told.

13. The real issue is what happened after the date of seizure. According to Mr Race he sent a letter to Officer Hough within the one month period stating, amongst other things, that the seized goods had been obtained for personal use. He expected to get a letter back stating whether the seized goods would be returned. According to Mr Race he waited 8 months without chasing Officer Hough for a response. Mr Race had no copy of the letter he claims to have sent.

14. On 27 April 2012 HMRC wrote to Mr Race with an assessment to excise duty of £2,317 in relation to all the seized goods.

15. On 4 May 2012 Mr Race telephoned a Mrs Chidley of HMRC in relation to the excise duty assessment. Initially Mr Race accepted her note as an accurate record of the conversation. Mr Race outlined the circumstances of the seizure to Mrs Chidley who explained to Mr Race that he did have a right of appeal against the seizure and that the letter from Officer Hough dated 10 August 2011 had detailed how to appeal. Mrs Chidley's note records "*He [Mr Race] stated that he had been advised by the officer that he would not get the goods returned so he felt it was not worth appealing*".

16. It is telling that Mr Race did not make any suggestion in this telephone conversation that in fact he had already appealed the seizure. Instead he gave an explanation as to why he hadn't appealed, because of what Officer Hough had told him about the prospects of success. It was only when this inconsistency was put to Mr Race in cross-examination that he suggested the note was not accurate and he had definitely told Mrs Chidley that he had sent a letter. There is no reason for me to doubt the reliability of Mrs Chidley's contemporaneous note and I do not accept Mr Race's evidence in this regard.

17. On 16 May 2012 Mr Race did send a letter effectively appealing the assessment. There was no mention in this letter of Mr Race having previously written to appeal the legality of the seizure and that he was still waiting for a response. There was no complaint that he had challenged the legality of the seizure some 9 months previously but was still without his goods.

18. On 13 June 2012 HMRC wrote to Mr Race acknowledging his appeal against the assessment. The letter asserted that the assessment had been properly raised and also clearly stated "*You did not challenge the seizure*".

19. On 25 June 2012 Mr Race telephones HMRC, stating for the first time that he had appealed against the seizure.

20. On 19 July 2012 Mr Race again telephoned Mrs Chidley and told her that he had appealed against the seizure.

21. On 26 July 2012 Mr Race again telephoned HMRC asserting that he had appealed within the one month period, but he couldn't remember the name of the man

he had sent the appeal to. It is notable that he did not volunteer that he was claiming to have sent the appeal to the officer who had interviewed him on the date of seizure. Mr Race was asked to put into writing everything he had said.

5 22. On 5 August 2012 Mr Race wrote to HMRC setting out his case that the seized goods were for personal use and not liable to seizure. He made no reference to any previous appeal to Officer Hough. HMRC replied confirming the assessments and a penalty that had been issued and giving Mr Race 30 days to appeal to the tribunal. Mr Race lodged his notice of appeal with the tribunal on 12 September 2012 which asserted that he had given a notice of claim to HMRC following the seizure.

10 23. I have not been told what searches, if any, HMRC have carried out to try and identify any notice of claim from Mr Race in the period of one month following the date of seizure. However, in the light of Officer Hough's witness statement, which does not refer to any claim being received by him, and the implausibility Mr Race's account, I am satisfied that no notice of claim was sent by Mr Race in the period of  
15 one month from the date of seizure. If Mr Race had sent a notice of claim to Officer Hough it is wholly incredible that:

(1) He would not have phoned Officer Hough to chase him at any time between sending the letter in or about August 2011 and receiving the assessment at the end of April 2012, and

20 (2) He would not have referred to having sent the claim when he first phoned Mrs Chidley on 4 May 2012 following receipt of the assessment, and

(3) He would not have referred to his previous claim in the letter he sent appealing the assessment on 16 May 2012, and

25 (4) He would not have told the officer on 26 July 2012 that he had sent the notice of claim to the seizing officer. Indeed it was only at the hearing before me on 6 October 2014 that Mr Race said for the first time that his notice of claim had been sent to Officer Hough, the seizing officer.

30 24. I am satisfied that the true explanation is that Mr Race took Officer Hough at his word that he was unlikely to get the seized goods back. He decided in August 2011 that he would not pursue the matter. In doing so he mistakenly thought that would be the end of the matter. He did not realise that HMRC could still issue an assessment to excise duty and a penalty.

35 25. In all the circumstances I am satisfied that Mr Race has no reasonable prospect of establishing that he did give HMRC a notice of claim challenging the legality of the seizure of the Goods. The Goods are therefore deemed to have been imported otherwise than for personal use and Mr Race's sole ground of appeal against the assessment to excise duty must fail. I therefore strike out the appeal in so far as it relates to the excise duty assessment.

40 26. HMRC's application to strike out did not extend to Mr Race's appeal against a penalty of £892. The appeal must therefore continue but solely in relation to the penalty.

27. 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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**JONATHAN CANNAN  
TRIBUNAL JUDGE**

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**RELEASE DATE: 8 December 2014**