



**TC04403**

Appeal number: TC/2013/04985

*Excise Duty - importation of tobacco products - appeal against assessment -  
- cross application to strike out - no reasonable prospect of the Appellant's  
case succeeding - appeal struck out.*

**FIRST-TIER TRIBUNAL**

**TAX CHAMBER**

**STEPHEN MCINERNEY**

**Appellant**

**- and -**

**HM REVENUE AND CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE MICHAEL CONNELL  
MEMBER ALBAN HOLDEN**

**Sitting in public at Alexandra House, 14 – 22 The Parsonage, Manchester on 17  
December 2014**

**The Appellant did not attend.**

**Mr Rupert Davies of Counsel instructed by the General Counsel and Solicitor for  
HMRC**

## DECISION

1. This is an appeal by Mr Stephen McInerney (“the Appellant”) against a decision by HM Revenue and Customs (“HMRC”) in a letter dated 18 June 2013, to issue an assessment of excise duty in the amount of £1,230. A wrongdoing penalty in the sum of £246 issued on 21 June 2013 is also appealed.

2. HMRC make a cross application for the Appellant’s Notice of Appeal to be struck out under Rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chambers) Rules 2009 on the basis that the Tribunal does not have jurisdiction to hear the matter or, in the alternative, on the basis that there is no reasonable prospect of the Appellant’s case succeeding.

3. The Appellant did not attend the hearing. The Tribunal was satisfied that the Appellant had been given notice of the time, date and venue of the appeal hearing and that it was in the interests of justice to proceed.

### 15 **Background**

4. The Appellant was stopped by Officers of UK Border Force on 5 March 2013 on his return from a trip to Belgium and was found to have 7.5 kg of hand rolling tobacco.

5. After questioning, the Officer was satisfied that the tobacco was held for a commercial purpose and that it was therefore liable to forfeiture under s 49(1)(a)(i) of the Customs and Excise Management Act 1979 (“CEMA”) and Regulation 88 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (“the Regulations”). The tobacco was seized under s 139(1) CEMA.

6. The UK Border Force Officer issued the Appellant with Public Notice 12A which set out his rights to appeal the seizure should he wish to. The notice explained that the seizure (including any claim that goods were for personal use) could be challenged in the magistrates’ court by sending a notice of claim within one month of the seizure. No letter was received appealing the seizure, nor was a Notice of Claim issued within the statutory 30 day deadline.

7. The warning letter made it clear that the seizure was without prejudice to other action that could be taken and that this included HMRC issuing an assessment for evaded excise duty and a wrongdoing penalty.

8. The goods were seized as liable to forfeiture under s 139 CEMA because of a liability to forfeiture under Regulation 88 of the Regulations, there having been a contravention of the Regulations, including the non-payment of duty which arose as a result of goods already released for consumption in another member State being held for a commercial purpose in the UK, in order to be delivered or used in the UK.

9. Where an Appellant fails to challenge the liability to forfeiture, paragraph 5 of Schedule 3 to CEMA provides that the goods in question shall be deemed to have been duly condemned as forfeited. That is a conclusive determination on the question

of the liability to forfeiture of the tobacco, and that the goods were held for a commercial purpose. As such a duty point has been prompted under Regulation 13(1) of the Regulations and the Commissioners may assess for duty under s 12 of the Finance Act 1994.

- 5 10. An assessment was issued by HMRC on 16 April 2013 in the sum of £1,230. This was calculated on the basis that the tobacco was owned by the Appellant in the following manner:

$$£164.11 \text{ (duty per kg)} \times 7.5\text{kg} = £1,230.83$$

- 10 11. A review was requested and the assessment was upheld in a decision letter dated 21 June 2013. On the same date, HMRC raised a wrongdoing penalty under Schedule 41 of the Finance Act 2008 in the sum of £246 and notified the Appellant. The explanation detailed that a reduction of 100% (the maximum) had been given for the quality of disclosure.

- 15 12. On 30 July 2013 the Appellant lodged a notice of appeal with the Tribunal appealing the assessment and the penalty, with a request for hardship which was granted on 13 September 2013.

### **The Strike Out Application**

13. Under Rule 8(3) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 the Tribunal may strike out the whole or part of the proceedings if:

- 20 “(c) the Tribunal considers there is no reasonable prospect of the appellant’s case, or part of it, succeeding.”

14. Under Rule 8(2) the Tribunal must strike out the whole or a part of the proceedings if the Tribunal:

“(a) does not have jurisdiction in relation to the proceedings or that part of them;”

- 25 15. HMRC applies for strike out of the appeal on the following grounds:

- a) The Appellant’s appeal is predicated on the basis that the tobacco was wrongly seized which is not correct and in any event he did not challenge the lawfulness of seizure which has therefore been duly deemed under paragraph 5 schedule 3 of CEMA.
- 30 b) The Tribunal lacks jurisdiction to consider arguments relating to the legality of the seizure following *HMRC v Jones and Jones* [2011] EWCA Civ 824 and *HMRC v Race* [2014] UKUT 0331 (TCC),
- c) There is no reasonable prospect of success on this or the other grounds of appeal.

35

## The Law

16. The Customs and Excise Management Act 1979 (“CEMA”) provides:

“49(1) Where-

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

(i) unshipped in any port,

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

10 139(1) Anything liable to forfeiture under the Customs and Excise Acts may be seized or detained by any officer...”

17. Paragraph 3 Schedule 3 CEMA provides:

15 “Any person claiming that any thing seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of the date of the seizure, give notice of his claim in writing to the Commissioners ...”

18. Where notice of a claim is not given, Paragraph 5 Schedule 3 CEMA states:

20 “If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of any thing no such notice has been given to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with the thing in question shall be deemed to have been duly condemned as forfeited.”

19. HMRC may assess for duty under s 12 Finance Act 1994 (“FA 1994”):

“12 Assessments to excise duty.

(1A) Subject to subsection (4) below, where it appears to the Commissioners -

25 (a) that any person is a person from whom any amount has become due in respect of any duty of excise; and

(b) that the amount due can be ascertained by the Commissioners,

the Commissioners may assess the amount of duty due from that person and notify that amount to that person or his representative.”

30 20. Under Regulation 13(1) of the Regulations the excise duty point was the time that the goods were first held. Where a duty point is created, HMRC may assess for duty under s 12 FA 1994.

21. The Appellant is the person liable for the duty as he was holding the goods, pursuant to Regulation 13(2) of the Regulations.

22. The penalty was raised under schedule 41 paragraph 4 of the Finance Act 2008 (“FA 2008”) on the basis that the Appellant had handled goods subject to unpaid excise duty.

23. In *HMRC v Jones & Jones* [2011] EWCA Civ 824 Mummery LJ said :

5 “71... For the future guidance of tribunals and their users I will summarise the conclusions that I have reached in this case in the light of the provisions of the 1979 Act, the relevant authorities, the articles of the Convention and the detailed points made by HMRC.

10 (4) The stipulated statutory effect of the owners’ withdrawal of their notice of claim under paragraph 3 of Schedule 3 was that the goods were deemed by the express language of paragraph 5 to have been condemned and to have been “duly condemned” as forfeited as illegally imported goods. The tribunal must give effect to the clear deeming provisions in the 1979 Act: it is impossible to read them in any other way than as requiring the goods to be taken as “duly condemned” if the owner does not challenge the legality of the seizure in the allocated court by invoking and pursuing the appropriate procedure.

15 (5) The deeming process limited the scope of the issues that the owners were entitled to ventilate in the FTT on their restoration appeal. The FTT had to take it that the goods had been “duly condemned” as illegal imports. It was not open to it to conclude that the goods were legal imports illegally seized by HMRC by finding as a fact that they were being imported for own use. The role of the tribunal, as defined in the 1979 Act, does not extend to deciding as a fact that the goods were, as the owners argued in the tribunal, being imported legally for personal use. That issue could only be decided by the court. The FTT's jurisdiction is limited to hearing an appeal against a discretionary decision by HMRC not to restore the seized goods to the owners. In brief, the deemed effect of the owners’ failure to contest condemnation of the goods by the court was that the goods were being illegally imported by the owners for commercial use.

### **The Appellant’s Case**

24. The Appellant appeals on the ground that the tobacco was for his own personal use. He says in correspondence that he should not have to pay duty on goods that he does not have and that he was not given the opportunity to pay the duty. He also pleads inability to pay.

### **HMRC’s Case**

25. HMRC argue that the ground of appeal that the goods were intended for own use should be struck out for lack of jurisdiction.

26. The Appellant was made aware in the warning letter that an assessment and wrongdoing penalty may be raised. He was made aware that the correct method of

challenging the legality of seizure was by instigation of proceedings in the Magistrates Court but he did not do this.

27. The Appellant did not challenge the legality of seizure and the goods have therefore now been deemed to be duly condemned as forfeit under paragraph 5  
5 schedule 3 of CEMA. Thus the legality of the seizure and the underlying reason for this - that the goods were for a commercial purpose and not for own use - has been deemed a fact.

28. In consequence the Tribunal cannot reopen this issue. HMRC relies upon the decision of the Court of Appeal in *Jones* and in particular on the judgment of  
10 Mummery LJ (at paragraph 23 above).

29. The decision in *Jones* is applicable to the assessment of duty following the decision in *Race*, per Mr Justice Warren at para 33:

15 “Taking those factors in turn, I do not consider it to be arguable that *Jones* does not demonstrate the limits of the jurisdiction. It is clearly not open to the tribunal to go behind the deeming effect of paragraph 5 Schedule 3 for the reasons explained in *Jones*.... The fact that the appeal is against an assessment to excise duty rather than an appeal against non-restoration makes no difference because the substantive issue raised by Mr Race is no different from that raised by Mr and Mrs Jones.”

30. It is also applicable to penalties, see para 39:

20 “... the First-tier Tribunal could no more re-determine, in the appeal against the Penalty Assessment, a factual issue which was a necessary consequence of the statutory deeming provision than it could re-determine a factual issue decided by a court in condemnation proceedings.”

31. The Appellant’s grounds of appeal stand no reasonable prospects of success.  
25 There is nothing in the grounds of appeal that suggest that HMRC did not have the power to make the assessment or penalty or that they were improperly calculated.

32. With respect to the penalty the maximum discount for disclosure has been given. The Appellant does not put forward any grounds of appeal challenging the calculation of the penalty or any reason for granting a special reduction (FA 2008, schedule 41  
30 paragraph 14).

33. The Appellant appeals on the basis that he cannot afford to pay the Assessment. This is not a valid ground of appeal. The goods were lawfully seized as being held for a commercial purpose without the payment of duty. HMRC are therefore entitled to assess the duty amount on the goods.

### 35 **Conclusion**

34. The Appellant did not challenge the legality of seizure and the goods were therefore deemed to be duly condemned as forfeit under paragraph 5 schedule 3 of CEMA. Thus the legality of the seizure has been deemed a fact.

35. The Tribunal does not have any jurisdiction to reopen the issue as to whether the goods were held for personal use. The Appellant has not put forward any other grounds of appeal save to say that he will suffer financial hardship and will not be able to pay the assessment. As HMRC say, this is not a valid ground of appeal. The goods were lawfully seized as being held for a commercial purpose without the payment of duty and in consequence HMRC are therefore entitled to assess the duty amount on the goods, and raise a penalty under schedule 41 paragraph 4 of FA 2008.

36. The appeal is accordingly struck out and the assessment and penalty confirmed.

37. 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 CONNELL  
TRIBUNAL JUDGE**

**RELEASE DATE: 13 May 2015**