



TC04539

Appeal number: TC/2013/06288

*Excise Duty - importation of tobacco products - appeal against assessment -
- cross application to strike out - whether any reasonable prospect of the
Appellant's case succeeding - no - whether the Tribunal had jurisdiction to
hear an appeal against the assessment - no - appeal struck out.*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

KERRIE HUTCHINSON

Appellant

- and -

HM REVENUE AND CUSTOMS

Respondents

TRIBUNAL: JUDGE MICHAEL CONNELL

Sitting in public at Hull Combined Courts Centre on 8 April 2015

The Appellant Kerrie Hutchinson appeared in person

**Ms Rebecca Young of Counsel instructed by the General Counsel and Solicitor to HM
Revenue and Customs for the Respondents**

DECISION

1. This is an appeal by Ms Kerrie Hutchinson (“the Appellant”) against a decision by HM Revenue and Customs (“HMRC”) in a letter dated 10 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 30 July 2013, is also appealed

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

3. The Appellant also makes an application for an extension of time in which to appeal. Under Rule 20 of the Rules an Appellant is required to bring any appeal within the time limits provided. HMRC’s decision was made on 11 June 2013 and therefore the appeal should have been lodged by no later than 10 July 2013, but was not lodged with the Tribunal until 3 September 2013. HMRC have not objected to the application.

Background

4. The Appellant was stopped by Officers of the UK Border Force on 14 February 2013 at the port of Hull on her return from a day trip to Belgium. The Appellant was found to have a total of 7.5 kg of hand rolled tobacco (“HRT”).

5. The Appellant was interviewed under caution. She advised that she had purchased the tobacco at a cost of £720 for her own use. The main points ascertained during the interview were that the Appellant:

- smokes a pouch every two days and that the 7.5 kg of HRT would last her six or seven months.
- last travelled in October 2012 when she purchased the same amount, 7.5 kg.
- earns £36,000 per year plus overtime.

6. She signed the Officer’s notebook as an indication that the interview had been recorded accurately.

7. The Officer was satisfied that the excise goods were held not for own use but for a commercial purpose, and therefore seized them. HMRC say that the Officer’s main reasons for concluding that the goods were not for ‘own use’ were that the Appellant:

- last travelled in October 2012 and imported the same amount. Those goods, at the Appellant’s consumption rate, should have lasted until July 2013.

- the Appellant initially claimed the goods would last six months then changed it to seven months.
- the goods would in fact have lasted ten months at her consumption rate of one pouch every two days, not six or seven months as initially claimed.

5 7. The Officer was satisfied that the tobacco was held for a commercial purpose and
 seized the goods as liable to forfeiture under the Customs and Excise Management
 Act 1979 (“CEMA”) and Regulation 88 Excise Goods (Holding, Movement and Duty
 Point) Regulations 2010 and the contravention of a provision in the Regulations,
 10 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.

8. Information was handed to the Appellant, namely a Seizure information Notice
 form ENF 156 and Form BOR 162 which includes a warning that HMRC may be
 made aware of the seizure and following this may take action against the Appellant.
 15 The UK Border Force Officer also issued the Appellant with Public Notice 12A
 which set out her rights to appeal the seizure should she 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 to reach HMRC
 within one calendar month of the seizure, that is by 20 March 2013.

20 9. Public Notice 12 A at paragraphs 3.10 and 3.14 says:

“3.10 *Do I need a solicitor for condemnation proceedings?*

No. You do not have to be legally represented at condemnation proceedings but you may
 want to instruct a solicitor to act on your behalf. This is usually at your own expense.

3.14 *Can I change my mind during the process?*

25 Yes. You can withdraw your challenge against the seizure at any stage by writing to
 HMRC or UKBA but you may still have to pay some of their costs if the case is well
 advanced. If you decide to withdraw your challenge, it is important that you write to
 HMRC or UKBA as soon as possible. This is because whenever HMRC or UKBA
 30 receives a Notice of Claim, they must comply with the law by starting and finishing
 condemnation proceedings even where the person challenging a seizure withdraws their
 challenge.”

10. Paragraph 6 of Schedule 3 CEMA state that where a challenge is made, the
 Commissioners shall take condemnation proceedings in the Magistrates’ Court, and if
 the Court finds that the goods were, at the time of seizure, liable to forfeiture the
 35 Court shall condemn them as forfeited. HMRC must bring the proceedings promptly,
 which is generally regarded as being within six months.

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

12. On 24 February 2013 the Appellant wrote to the Border Force National Post Seizure Unit, challenging and appealing the legality of the seizure of the HRT.

13. HMRC acknowledged the Appellant's challenge on 20 March 2013, and on 12 April 2013 confirmed that condemnation proceedings with an application for the goods to be condemned as forfeit would be commenced in the Magistrates' Court.

14. HMRC's letter contained the following information:

10 "No further action is required by you at this stage as BF will start Condemnation proceedings in the Magistrates' Court. In due course you will receive a summons from the Court advising you where and when the Condemnation hearing will take place. It may take several months for the summons to be sent to you. Under Section 10 of Schedule 3 of the Customs and Excise Management Act 1979, you will be required to claim ownership of the seized things on oath in Court, usually at a preliminary hearing.

15 If the Magistrates do not accept your claim that the seizure was unlawful, they will condemn the goods as liable to forfeiture and the goods will remain the property of the BF. BF will also ask the Court to order you to make a contribution towards its costs, which are likely to be not less than £2,500.

20 Alternatively, if the Court were to find in your favour, then the goods would be returned to you and you would be entitled to ask the Court to award costs against the BF. If that were to happen, but the goods had been disposed of, BF would offer you appropriate recompense.

If you do not wish to proceed with your appeal, you must inform this office in writing within 14 days of the date of this letter, otherwise Condemnation proceedings will be started and you may become liable to costs even if you withdraw later.

25 If you withdraw from Condemnation proceedings after they have started, or do not attend Court when summonsed, costs may be awarded against you.

The Magistrates' Court is the only forum for you to challenge the legality of the seizure, including any claim that the goods were for your own use or not commercial. You may not claim that the excise goods were for own use as part of a restoration request, review, appeal to a tribunal, or in a complaint.

30 You should read Customs Notice 12A, given to you at the time of seizure, which also tells you about requesting restoration of the goods. You should also consider seeking legal advice."

15. On 21 April 2013 the Appellant withdrew her challenge to the legality of the seizure of the goods.

35 16. 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 Excise Goods (Holding, Movement and Duty Point) Regulations 2010 and the Commissioners may assess for duty under s 12 of the Finance Act 1994.

17. An excise duty assessment was issued by HMRC on 10 June 2013 in the sum of £1,230.

5 18. The Appellant appealed HMRC's decision by way of two letters, both dated 15 July 2013, to HM Courts and Tribunals service containing a detailed explanation of her grounds of appeal (as also later set out in her Notice of Appeal – see paragraph 39 below).

10 19. The Appellant was notified on 30 July 2013 that HMRC had undertaken a review of their decision and that it was to be upheld. HMRC in the same letter said that that a wrongdoing penalty of £246.00 was to be imposed.

15 20. On 5 September 2013 the Appellant lodged a Notice of Appeal with the Tribunal, which included an application to bring a late appeal. Her grounds of appeal are that the tobacco was for her own personal use. HMRC did not object to the late appeal application.

21. On 23 September 2013 the Appellant made a request for hardship (which was granted on 10 February 2014).

20 22. At the initial hearing of the appeal on 4 December 2013 and on the basis that no evidence has been supplied to the Tribunal by HMRC as to what action, if any, it took arising from the Appellant's challenge of the seizure, the Tribunal issued Directions as follows:

25 1) By 4.30 pm on 3 February 2015 the Respondents will serve on the Appellant and the Tribunal details of all letters, emails and otherwise sent to the Appellant by the Respondents or HM Revenue and Customs in Plymouth between 20 February 2013 and 18 March 2013 (being the 30 days' time limit before the 'deeming' provisions come into force) confirming or otherwise that the Respondents had arranged for this appeal to be heard at a Magistrates Court.

30 2) In the event that no such letters, emails or otherwise were sent to the Appellant, the Respondents shall arrange for the case to be heard at the Magistrates Court, presumably at Hull, and notify the Appellant accordingly.

35 3) Whether or not an application was made to the Magistrates Court by the Respondents, in the event that there is evidence that the Appellant notified HM Revenue and Customs in Plymouth or the Respondents before 18 March 2013 that she wished to withdraw her application to challenge the legality of the seizure in the Magistrates Court then this matter shall be re-listed for hearing before the Tribunal as to the strike out application by the Respondents to the effect that this Tribunal has no jurisdiction to hear the Appeal.

4) Either party may apply at any time for these directions to be amended, suspended or set aside, or for further directions.

23. It appears the directions were issued on the basis that no confirmatory evidence had been provided by either party that a notice of withdrawal of claim had been lodged with HMRC and because it appears to have been assumed that the condemnation proceedings should have been issued by HMRC before the deeming provisions took effect. Once a notice of claim has been lodged by an Appellant, the deeming provisions no longer apply and HMRC have six months in which to start the proceedings provided the claim is not withdrawn in the meantime, which in this case it was.

24. On 4 December 2014, HMRC lodged a strike out application with the Tribunal,

10 The Strike out application

25. 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:

“(c) the Tribunal considers there is no reasonable prospect of the Appellant's case, or part of it, succeeding.”

15 26. 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;”

27. HMRC applies for strike out of the appeal on the following grounds:

20 a) The Appellant's appeal is predicated on showing that the Tobacco was wrongly seized, i.e. unlawful.

b) The Appellant has not challenged the lawfulness of seizure and this is now duly deemed under paragraph 5 Cschedule 3 of CEMA.

25 c) 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).

d) In the alternative there is no reasonable prospect of success on this or the other grounds of appeal.

The Law

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

30 “49(1) Where-

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.

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

29. Paragraph 3 Schedule 3 CEMA provides:

5 "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 ..."

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

10 "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."

15 31. Where a notice of claim is given, Paragraph 6 of Schedule 3 CEMA states:

"Where notice of claim in respect of any thing is duly given in accordance with paragraphs 3 and 4 above, the Commissioners shall take proceedings for the condemnation of that thing by the court, and if the court finds that the thing was at the time of seizure liable to forfeiture the court shall condemn it as forfeited."

20 32. 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—

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

25 (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 33. Under Regulation 13(1) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010, the excise duty point was the time that the goods were first held. Where a duty point is prompted, HMRC may assess for duty under s 12 FA 1994.

34. The Appellant is the person liable for the duty as she was holding the goods, pursuant to regulation 13(2) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010.

35. 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.

36. 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.”

20 30 37. HMRC relies on the decision of the Court of Appeal in *Jones* in which the court made the following findings:

35 a) Goods seized by Customs Officers could only be condemned as forfeit pursuant to an order of a Court. The First-tier Tribunal “FTT” and Upper Tribunal are statutory appellate bodies that have not been given any such original jurisdiction.

40 b) The Respondents (in that case) had the right to invoke the notice of claim procedure to oppose condemnation by the court on the grounds that they were importing the goods for their personal use, not for commercial use. The Respondents did so but later withdrew their notice and did not contest condemnation.

- c) The stipulated statutory effect of the Respondents' withdrawal of their notice of claim under paragraph 3 of Schedule 3 to CEMA 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.
- 5 d) The deeming process limited the scope of the issues that the Respondents were entitled to ventilate at the FTT in their appeal against a decision not to restore the seized goods to them. 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.
- 10 e) The FTT's jurisdiction was limited to hearing an appeal against the discretionary decision by HMRC not to restore the seized goods.
- f) The deeming provision in paragraph 5 and the restoration procedure were compatible with Article 1 of the First Protocol to the Convention on Human Rights and with Article 6, because the Respondents were entitled under CEMA to challenge in court, in accordance with Convention compliant legal procedures, the legality of the seizure of their goods.
- 15

The Appellant's Case

38. The Appellant appeals on the ground that the Tobacco was for her own personal use. The grounds of appeal as stated in her Notice of appeal are:

20

"I wish to appeal against:

The Seizure of 150, 50g Packets of Hand-Rolling-Tobacco purchased for personal use on 14 February 2013 at a cost of (€855/£750) by Customs Officer A Fields 11283.

The Tax Demand of £1,230 for goods that were seized on the incorrect misinterpretation by Customs Officer Fields that I was acting as a Trader.

25

The additional penalty of £246.

When questioned by Officer A Fields regarding the amount of tobacco I had purchased for personal use, I was hungover and could not respond well to his questions. Moreover, at one stage he asked me if I was able to continue with the interview. I feel that had I been in a reasonable state at the time of questioning, I would have been better able to explain why I had purchased such an amount of tobacco. I feel the seizure was unjustified due to the misinterpretation by Customs Officer Fields that I had purchased the amount I had and I was a Trader and as such, restricted by regulations governing EU Traders.

30

However, the tobacco was purchased strictly for my own personal use and the quantity I purchased would have lasted me at least six months with an average saving of approximately £10 per pack in the UK, an estimated saving of £1500. I was of the understanding that as an EU citizen there are no restrictions regarding the volume of tobacco I could purchase for my own personal use on the date of my travel.

35

5 I have and continue to be, employed on a full-time permanent basis with my current employer BP Chemicals, having worked at the Saltend Site as a Process Operator approaching ten years. I receive a very reasonable wage and therefore do not need to supplement my income via the trading or selling of illegal goods. I have also included with this letter a Character Reference from my Supervisor Mr Robert Bourne with whom I have discussed this incident. I would never risk my career by undertaking illegal activities, as a criminal record would result in instant dismissal.

10 Previous to this I worked for Reckitt Benckiser and Smith & Nephew, both world-renowned medical product manufacturers, for a period of ten years combined, prior to being offered my current role.

The reason for my travelling abroad on P&O Ferries (Hull to Zeebrugge) was:

- For a bi annual weekend with girl friends
- To visit my Nephew Mr Adrian Stok who lives in Roeselare, Belgium
- To stock up on my tobacco

15 In addition to the above, at the time of the group trip there was a 2-for-1 Offers that made travel financially viable to us all, and Belgium was my preferred destination to meet my nephew, in Belgium as we meet up and spend the day together in-between his visits home. I have contacted P&O ferry via telephone they are forwarding me the details and evidence of the frequency that I personally travel to Belgium. The time-frame supports that I only travel there twice a year at most and only during the seasonal special offers.

20 Due to financial reasons, I made the decision not to challenge the upheld earlier decision when I appealed against the seizure of my goods and prevent my case being heard in the magistrate courts due to the belief I have, that this may result in escalating unnecessary costs. I therefore find it distressing to have received a letter requesting a rather large amount of money (£1,230) and another letter requesting a further £246 from your department, with several pages of what I can only describe as confusing notes that appear to me to relate to traders and businesses rather than to my case.

25 I have already informed HMRC that I am not self-employed but that I am in full time permanent employment. I do not have or run a business nor am I a trader in any capacity. The tobacco seized in February, was and remains to be, solely for my own personal use.

30 I believe there has been an error in interpreting my case by Officer A Fields and feel that I am being viewed as a trader rather than a passenger purchasing a large quantity of tobacco for my own use which was within the EU Allowances for personal use and which would have lasted me six months at which time I would have travelled again to restock. I therefore believe the excise duty and penalty notices are incorrectly levied against me as a trader.”

35 39. In a later letter the Appellant said she had won a £1,000 at Mecca Bingo, Clough Road in December 2012 and decided that she “would use the winnings to purchase some Samson tobacco for my own use, as this was a little extra money I had left after
40 treating the family”.

HMRC's Case

40. HMRC argue that the Appellant's appeal, which is predicated on the grounds that the goods were intended for own use, should be struck out for lack of jurisdiction.

5 41. The Appellant was made aware in the warning letter that an assessment and wrongdoing penalty may be raised. She was made aware that the correct method of challenging the legality of seizure was by instigation of proceedings in the Magistrates Court.

10 42. The Appellant challenged the legality of seizure but later withdrew her challenge and therefore the goods have now been deemed to be duly condemned as forfeit under paragraph 5 schedule 3 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.

15 43. 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 Mummery LJ (at paragraph 37 above).

44. The Appellant's grounds of appeal also stand no reasonable prospects of success. There is nothing in the grounds of appeal that suggest HMRC did not have the power to make the assessment or that it was improperly calculated.

20 45. The Tribunal would not be allowed (because it would not have jurisdiction) to hear evidence about whether the goods were intended for personal or commercial use because that fact has already been finally determined under paragraph 5 of Schedule 3 CEMA.

25 46. In the light of the decision of the Court of Appeal in the case of *Jones and another*, the Tribunal's jurisdiction is limited to considering whether the Commissioners have correctly identified the Appellant for the purposes of the assessment and whether the assessment meets the statutory requirements.

Conclusion

30 47. The facts of the matter are not in dispute and the assessment has been correctly raised under s 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010.

48. The Appellant withdrew her challenge as to the legality of seizure and the goods were therefore deemed to be duly condemned as forfeit under paragraph 5 schedule 3 CEMA. Thus the legality of the seizure has been deemed a fact.

35 49. A pre-condemnation assurance letter was issued to the Appellant setting out the facts on 12 April 2013. The letter explained that HMRC considered the decision to seize goods was correct. Details were supplied to help the Appellant make an informed decision in respect of continuing or withdrawing the appeal against seizure.

50. The Appellant chose to withdraw her challenge.

51. Public Notice 12A states that an Appellant does not need a solicitor for Condemnation Proceedings. In the Tribunal's view this statement, whilst not incorrect and combined with statement at paragraph 3.14, may lead many Appellants who may have good grounds to appeal a seizure of goods, not to take advice and not challenge the seizure.

52. The Tribunal cannot consider the Appellant's grounds of appeal because of the deeming provisions. Had the Appellant taken legal advice she may have decided to pursue her decision to challenge the legality of the seizure and given what she says in her Statement of Appeal, a Magistrates Court may have decided that the goods were, indeed, for personal use.

53. Following the decision of the Court of Appeal in the case of *Jones and another*, the Tribunal's jurisdiction is limited to considering whether the Commissioners have correctly identified the Appellant for the purposes of the assessment and whether the assessment meets the statutory requirements.

54. The Tribunal does not have any jurisdiction to reopen the issue as to whether the goods were held for personal use. 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 the Finance Act 2008.

55. The appeal was accordingly struck out and the assessment confirmed.

56. 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: 15 JULY 2015