



**TC04546**

Appeal number: TC/2013/05135

*EXCISE DUTY – assessment to excise duty and a non-deliberate wrongdoing penalty following the seizure of goods on their being brought into the UK from an EU Member State – whether the appeal should be struck out following Jones and Another v HMRC and Nicholas Race v HMRC – HMRC’s application for strike-out refused and Directions given to enable the appellant to amend his grounds of appeal if so advised*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**CHARLES FLEMING**

**Appellant**

**- and -**

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

**TRIBUNAL:    JUDGE JOHN WALTERS QC  
                  JOHN WOODMAN**

**Sitting in public at North Shields on 9 February 2015**

**The Appellant in person**

**Anthony Senior, Counsel, instructed by the General Counsel and Solicitor to HM  
Revenue and Customs, for the Respondents**

## DECISION

1. We heard the Application of the Respondents (“HMRC”) to strike out this  
5 appeal. The Application was originally made on 3 February 2014. (There had then  
also been an application to stand over the appeal pending the decision of the Upper  
Tribunal in *Nicholas Race v HM Revenue & Customs* and, following the release of  
that decision, the strike-out application was renewed by a further Application dated 22  
10 August 2014.) HMRC submit that this Tribunal has no jurisdiction to hear the appeal  
and/or that the appeal should be struck out under rule 8(3)(c) of the Tribunal  
procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Rules”) on the basis  
that there is no reasonable prospect of the appeal succeeding.

2. The appeal by the appellant, Mr Fleming, against an assessment to excise duty,  
15 which was confirmed on review by a letter dated 25 July 2013 to Mr Fleming from  
HMRC (Local Compliance Appeals and Reviews), is dated 31 July 2013. It refers to  
an assessment to excise duty of £1,641 dated 20 May 2013 in respect of 9 kilograms  
of hand rolling tobacco and 380 cigarettes seized from him by officers of the UK  
Border Force on 23 April 2013.

3. Mr Fleming’s appeal against a penalty for excise wrongdoing (dated 16 August  
20 2013) in the amount of £328, was dated 24 August 2013. The two appeals were  
consolidated under the reference TC/2013/05135 by a Direction of this Tribunal dated  
16 October 2013.

4. Mr Fleming gave evidence at the hearing of HMRC’s strike-out Application. It  
is clear from the letter dated 31 July 2013 in which he appealed the assessment to  
25 excise duty that he did not at any time seek restoration of the seized goods. In his  
letter he stated that the officer who had seized the goods told him that he could ‘ask  
for the goods back’ but that he would have to go to court and ‘if I lost I could end up  
paying costs of £1,500 plus’. Mr Fleming wrote that after reading the leaflet (which  
the officer had given him) and thinking it over, he decided it was a lot of money to  
30 lose ‘so I never asked for it back and I thought that would be an end of the situation’.

5. The assessment and the penalty have been raised in the following  
circumstances.

6. On 15 April 2013, Mr Fleming was stopped by officers of the UK Border Force  
at Dover Eastern Docks after arriving from Belgium. He was travelling in a Peugeot  
35 206 car, registration BG 53 RTU, with two passengers, a Mr James Gaines and a Mr  
Ernest Dixon. The officers questioned the three of them and they each admitted to  
having with them 150 pouches of hand-rolling tobacco, with receipts.

7. Each of the three men was questioned separately. Mr Fleming said that the  
tobacco he was bringing in was for himself, his wife, his daughter, her boyfriend, his  
40 (Mr Fleming’s) brothers, his cousin and his niece. He admitted to being a fairly  
frequent traveller. He said he was not travelling with another vehicle, although he

knew the passengers of another vehicle which was travelling at the same time from his home town (Blyth).

8. The officer was not satisfied that the tobacco was for the personal use of Mr Fleming and his relations as stated and it was seized. The tobacco being brought in  
5 by the other passengers was also seized. The Peugeot car was also seized but it was immediately exceptionally restored to Mr Fleming free of charge on what were described as humanitarian (health) grounds.

9. Mr Fleming was issued with a Seizure Information Notice, a warning letter  
10 (which warned Mr Fleming specifically about possible assessment to evaded tax or duty and a wrongdoing penalty, and also to possible prosecution), and Notice 12A – a document entitled “What you can do if things are seized by HM Revenue & Customs or UK Border Agency” which gives information about challenging a seizure by sending a Notice of Claim to request condemnation proceedings to be commenced. Notice 12A also states that a Notice of Claim must be received within one calendar  
15 month of the date shown on the Seizure Information notice and warns that if this time limit is not observed “you will not be able to challenge the legality of the seizure”.

10. Mr Fleming did not send a Notice of Claim to request condemnation proceedings to be commenced.

11. On 20 May 2013, Officer Corbishley of HMRC Local Compliance International  
20 Trade & Excise wrote to Mr Fleming informing him that ‘on this occasion [HMRC] has decided not to institute criminal proceedings against you’ in relation to the seized goods, but that ‘by virtue of your actions’ Mr Fleming was liable to pay the excise duty and a financial penalty.

12. The assessment to £1,641 excise duty was also issued on 20 May 2013.

25 13. Mr Fleming responded by requesting a review of the decision to charge excise duty stating that the goods were not intended for sale, the quantity was not excessive, he had cooperated throughout the investigation and he was not a ‘revenue trader’.

14. The review (by Officer Kunderan of HMRC Local Compliance Appeals and  
30 Reviews) was completed and a letter dated 25 July 2013 was sent by the review officer to Mr Fleming. The letter stated that the assessment to excise duty was legally correct and had been issued in line with Departmental policy and that the review officer had concluded that the decision to issue it should be upheld.

15. The penalty charge assessment was issued on 1 August 2013.

35 16. Mr Fleming responded by writing to HMRC on 10 August 2013 stating that he did not really understand the explanation of the penalty which had been given and that he thought it was an unfair penalty as he had fully cooperated with the officer at the time of the seizure.

17. Mr Senior submitted that, following *Revenue and Customs Commissioners v Jones and Another* [2011] EWCA Civ 824, it is clear that this Tribunal does not have

jurisdiction to consider whether the tobacco in issue was duty paid or intended for personal or commercial use because those facts have been finally determined, in HMRC's favour by the deemed condemnation provided for by paragraph 5, Schedule 3, Customs and Excise Management Act 1979 ("CEMA") in the absence of any actual condemnation proceedings.

18. He submitted that the Upper Tribunal's decision in *Nicholas Race v HM Revenue & Customs* (FTC/131/2013) confirmed that *Jones* was clear authority for the proposition that this Tribunal has no jurisdiction to go behind the deeming provisions of paragraph 5, Schedule 3, CEMA and that an appeal against an assessment to duty raised on only one ground of appeal, namely that the goods were acquired for personal use, and in the absence of actual condemnation proceedings, could not succeed and ought to be struck out.

19. Mr Senior submitted that the lowest possible rate of penalty had been charged in respect of non-deliberate behaviour because Mr Fleming had not declared the tobacco, but had made no attempt to hide it, and, in these circumstances Mr Fleming had no prospect of succeeding in challenging the mitigation of the penalty payable under Schedule 41, Finance Act 2008.

20. Mr Fleming contended that he had been discouraged by the UK Border Force officers against requesting condemnation proceedings to be commenced on the basis that it would be a waste of time and would cost him £1,500 and his solicitor's costs to challenge the legality of the seizure. His evidence was that he had been told in effect that he would not get his goods back, and on that basis had not sought to challenge the seizure. When it was suggested that the literature which he had been given by the officers included the advice to go to the Citizens' Advice Bureau or take his own legal advice, his response was that talking to the CAB was like talking to a brick wall and that he did in fact go to a solicitor and was charge £100 for unhelpful advice. He submitted that the facts of *Nicholas Race* were materially different from those of his own case, because Mr Race was selling tobacco, whereas he maintained that he had no intention of selling the tobacco he had brought in.

21. We note that the Upper Tribunal (Warren J) in *Nicholas Race* held that this Tribunal does not have any more jurisdiction to consider the legality of a seizure of goods in a case where there is a deemed condemnation under paragraph 5, Schedule 3, CEMA in an appeal against an assessment to excise duty than it does on an appeal against non-restoration of goods (*ibid.* [33]). That means, as Mr Senior submitted, that an appeal against an assessment to duty raised on only the ground of appeal, that the seizure was illegal because the goods had been intended for Mr Fleming's personal use, would have no prospects of success, and ought to be struck out.

22. The position on the appeal against the penalty is, we consider, different in that it is open to Mr Fleming to argue that the penalty should be reduced or stayed by reason of special circumstances (other than ability to pay or the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another – paragraph 14(2), Sch. 41, FA 2008).

23. We decline, on this basis, to strike out the appeal against the penalty assessment.

24. Turning to the excise duty assessment, we note that in *Dmitrij Fedoruk v HMRC* (TC/2013/02371), in *Andrew Wood v HMRC* (TC/2013/01036) and in *Daron Massey v HMRC* (TC/2013/08129) this Tribunal (Judge Kenneth Mure QC) struck out appeals against excise duty assessments and penalties in cases raising factual circumstances comparable to those raised in this appeal. In *Tina Hammond v HMRC* (TC/2013/00260) this Tribunal (Judge Barbara King) struck out an appeal against an excise duty assessment, but not the appeal against the penalty.

25. We are troubled by this appeal and would respectfully agree with the reported comment of Evan Lombe J in *Weller v Customs and Excise Commrs.* [2006] EWHC 237 (Ch) that a statutory rationalisation of the procedure governing the forfeiture of goods is urgently required as the present system is so confusing to the public and pregnant with the possibility of substantial injustice (see *Jones* [63]). We are also aware that in some cases of seizure of goods HMRC do not raise excise duty assessments or penalty assessments (e.g. *Samuel Ottey* [2015] UKFTT 0246 (TC)) and we are not aware of any rationale or justification for a different approach in some cases, such as the present.

26. We also note that in the appeal of *Jeffrey Williams v HMRC* (TC/2013/05378), the appellant, who was professionally represented, raised two points which did not need to be decided on the facts of that case, but which could be relevant, if raised by or on behalf of Mr Fleming in this case.

27. They were points referred to in that Decision (by a Tribunal in which Judge Walters was sitting) as ‘the Consumption point’ and ‘the Proportionality point’ (see: *ibid.* [65], [66], [106] to [115] and [116] to [120]).

28. Shortly stated, the Consumption point was that the assessment in *Williams* was bad because it was not compliant with the spirit of the Excise Directive (Directive 2008/118/EC). This was said to be because the Directive makes it clear that excise duty is a duty on consumption and should not be charged where goods have been destroyed or irrevocably lost. The suggested importance of consumption being the justification for excise duty to be levied was said not to have been reflected in the Excise Duty (Holding, Movement and Duty Point) Regulations 2010 under which the assessment in *Williams*, as in this case, was raised. It was submitted in *Williams* that HMRC cannot properly act contrary to the aims of the Directive by assessing for excise duty on goods which they have seized and condemned, or, alternatively, even if duty is chargeable, it ought to be remitted back in the circumstances, and so it was not reasonable to raise an assessment to excise duty in the first place.

29. The Proportionality point was that the assessment to excise duty was bad in that to raise it in addition to seizing the goods was a disproportionate response and a duplicated remedy for a perceived wrong (*viz.*: the evasion of duty).

30. We consider that the overriding objective of the Rules, to deal with cases fairly and justly (cf. rule 2 of the Rules) would be served by refusing HMRC's Application to strike out and by making directions allowing for Mr Fleming to reconsider his grounds of appeal in the light of this Decision. We refuse the application and make  
5 Directions accordingly.

31. A similar decision has been made and Directions issued by this Tribunal in the appeal of Marcin Staniszewski (TC/2014/03033).

32. 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  
10 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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**JOHN WALTERS QC  
TRIBUNAL JUDGE**

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**RELEASE DATE: 22 JULY 2015**