



**TC04556**

**Appeal number: TC/2014/05121**

*Excise Duty – hand-rolling tobacco – seizure as UK duty unpaid – whether assessment out-of-time – No – Section 12(1A) FA 1994 – Appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**SAJID SADDIQ**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE KENNETH MURE QC  
MEMBER: MR LESLIE BROWN LLB**

**Sitting in public at The Eagle Building, 215 Bothwell Street, Glasgow on Tuesday  
30 June 2015**

**Appellant – Mr John O'Donnell, Tax & Forensic Services Limited**

**Respondents – Mr Graham Maciver, Advocate, instructed by Miss L Carlin,  
Office of the Advocate General**

## DECISION

### Introduction

5 1. The issue arising in this appeal is whether an assessment to Excise Duty of £15,546 was out-of-time. The assessment was made by letter dated 5 June 2014 (tab 14) and related, as hereinafter narrated, to the seizure of five boxes of tobacco in June 2013. The assessment was reviewed at the appellant's request and confirmed by the respondents by letter dated 3 September 2014 (tab 19).

### The Law

10 2. Section 12(1A) Finance Act 1994 provides:-

“(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

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

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

3. Subsection (4) thereof further provides—

20 “(4) An assessment of the amount of any duty of excise due from any person shall not be made under this section at any time after whichever is the earlier of the following times, that is to say —

(a) Subject to subsection (5) below, the end of the period of 4 years beginning with the time when his liability to the duty arose; and

25 (b) The end of the period of one year beginning with the day on which evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge;

but this subsection shall be without prejudice, where further evidence comes to the knowledge of the Commissioners at any time after the making of an assessment under this section, to the making of a further assessment within the period applicable by virtue of this subsection in relation to that further assessment.”

30 4. In the course of their submissions Mr O'Donnell and Mr Maciver referred to —

*Pegasus Birds Limited v HMRC* (2000) STC 91;

*Anglo Overseas Limited v HMRC* (E01090);

*TDG (UK) Limited v HMRC* [2015] UKUT 0167 (TCC); and

*Temple Retail Limited v HMRC* [TC03823]

## The Evidence

5. In addition to the documentation provided we heard evidence from only one witness. The respondents called the investigating officer, Peter Bell. He is a higher investigating officer, with 15 years' experience. He confirmed the terms of his  
5 Witness Statement (tab 3), and elaborated upon it. The sequence of dates in his and his colleagues' involvement is critical. On 4 June 2013 his manager directed him to attend at Lockerbie Police Station in relation to a car which had been stopped by the police on 1 June 2013 on suspicion of its carrying tobacco on which no duty had been paid. Together with a colleague, Miss McGeehan, he had unlocked and opened the  
10 vehicle, a Vauxhall Astra, reg no AK10 FVD. In the boot there were two large cardboard boxes and on the back seat there were a further three. The side of one box was torn and he could see that it contained tobacco described as "Filandria". On his rough estimate each box contained about 20 kg of hand rolling tobacco ("HRT"), a total, therefore, of about 100 kg.

15 6. Officer Bell discussed his findings with his manager. It was decided that the matter would proceed as a criminal investigation with a possible prosecution. Accordingly a search warrant under Section 23E Criminal Law (Consolidation) (Scotland) Act 1995 was required. It was explained in evidence that this enabled the seizure of other adminicles of evidence in the car such as hire documents and a  
20 satellite navigation device, to further a prosecution. The car was taken to a secure Customs location to facilitate the search. Miss McGeehan seized the vehicle and tobacco as liable to forfeiture under Sections 139 and 141 Customs & Excise Management Act 1979. Mr Bell confirmed the relevant extract from his Notebook, a copy of which is produced as tab 6. A Search Warrant was duly obtained (tab 7), and  
25 the photographs produced (at tab 9) were confirmed as showing the state of the vehicle and its contents.

7. The appellant was charged and pled guilty to offences relating to defrauding HMRC in respect of excise duty payable on the tobacco of a total of £15,546.60. He was sentenced to carry out 200 hours of Community Service. The tobacco was seized  
30 also by the respondents (tab 12: Notice of Seizure).

8. In his oral evidence Officer Bell explained that initially he had only suspicion of non-payment of duty. He had received the police incident report (tab 5). While that referred to "2 June 2013", he was unaware of the matter until 4 June 2013. He and Officer McGeehan could not then determine whether UK duty had been paid,  
35 although the stamp recording payment of duty in Luxemburg, suggested that it had not. The Section 23E procedure was recommended by the Crown Office in Scotland where a prosecution might result, and it enabled the seizure of other items in addition to the tobacco and the vehicle.

9. Mr Bell confirmed that the record at p27 of tab 9 gave details of date and times  
40 of all of the digital images taken for the respondents. In particular the images on pages 42-45 confirmed that the boxes were opened between 09.42 and 09.44 on 12 June 2014. The contents were 50 gram packets of HRT. The health warnings were in German or Dutch. While duty in Luxemburg seemed to have been paid,

further enquiry then had to be made to ascertain whether UK duty had been paid too. The satellite navigation device found in the vehicle is shown at page 57.

10. As a matter of practice Mr Bell considered that the respondents could not have made an assessment on 4 June 2013. The correct amount of the tobacco had not been  
5 ascertained until 12 June. Only then could an assessment be made satisfactorily. While Mr Bell had calculated an approximate total weight of 100 kg, the police had recorded the correct figure of 90 kg. Mr Bell explained that this was based on the appellant's admissions to them.

11. In cross-examination Mr O'Donnell asked what the minimum level of duty was  
10 to justify criminal investigation. Mr Bell replied that he was unaware of a specific value, but it would have to be commercially significant. On 2 June 2013 Mr Bell considered that the police were unable to look inside the boxes. There was loose blue strapping about them. He confirmed that his manager would have to have known of the quantity involved before committing resources to an investigation. That decision  
15 had to be made at management level.

12. Mr Bell confirmed that an assessment to duty would be made by a separate section of Customs & Excise. He agreed that the Luxemburg duty stamps suggested that no UK duty had been paid. He explained that while an estimate of the value of the duty had to be made to determine whether a criminal investigation was  
20 appropriate, a more precise calculation was required to make an assessment. HMRC would check this themselves rather than rely on others. Mr Bell considered that it would have been unfair to the appellant to take his (Mr Bell's) estimate of 100 kg, which was significantly in excess of the actual amount. He was unaware initially that the police report's figure was based on the appellant's admission. Once HMRC had  
25 control of the goods in question, it did not rely on estimates as an accurate calculation could be made.

13. Mr Bell was then asked about the apparent delays in seeking the Search Warrant. He explained that on and about 4 June 2013 personnel resources were limited as a major operation had been planned.

30 14. Mr Bell was not re-examined.

### **Parties' submissions**

15. We heard in turn from Mr O'Donnell and Mr Maciver. Helpfully they both had lodged written summaries of their arguments in advance. The sequence and timetable of events given by Mr Bell were not challenged.

35 16. On behalf of the appellant Mr O'Donnell invited us to allow the appeal. He adopted the terms of his Outline Submissions. The facts here were not in dispute. The issue was one of interpretation of the time-limit provisions. He criticised the respondents for not leading the evidence of the assessing officer but only that of one investigator.

17. The police became involved early in the morning of 2 June 2013. When they discovered the tobacco they liaised with the respondents. The police incident report (p18) records the correct amount of 90 kg. The report, Mr O'Donnell argued, seemed to suggest that the police had examined the vehicle. The Search Warrant had not been  
5 obtained for about a week thereafter. It was unfair to rely on 10 June 2013 (the date of the Search Warrant) as the start of the one year period.

18. The appellant's vehicle was stopped just before midnight on 1 June 2013 when he himself admitted to transporting 90 kg of HRT. On 4 June 2013 officers of the respondents had attended at Lockerbie Police Station and examined the vehicle and  
10 the boxes. It followed, Mr O'Donnell submitted, that the "one year" period for assessment expired on 31 May or at latest 3 June 2014. It was illogical, he continued, to take as the start the date on which the assessing officer had full knowledge. Such an approach would allow HMRC to delay the commencement of the "year" indefinitely.

19. Mr O'Donnell sought to distinguish *Pegasus Birds* which related to "best judgement", a factor which did not arise for consideration here. That case involved also complexities of calculation unlike the present appeal. The relevant time starts when the respondents, not the assessing officer, obtain the full facts. The warrant search which took place on 12 June 2013 did not produce further information,  
20 Mr O'Donnell suggested. It simply confirmed what the respondents already knew. The police on 2 June 2013 knew of the exact quantity of HRT from the applicant's admission. It was a foreign brand and in the circumstances the obvious inference was that no UK duty had been paid on it. Accordingly the assessment made on 5 June 2014 was too late, and the appeal should be allowed.

20. In reply on behalf of the respondents Mr Maciver urged us to dismiss the appeal. He adopted his Skeleton Argument. This had not been a case of default falling within subsection (2) of Section 12. The assessment properly had been made under subsection (1A) in terms of which the one year time-limit runs from the date on which the amount of duty could be ascertained. That date was 12 June 2013 when the  
30 Search Warrant had been executed. Only then could the boxes be opened and the contents be examined and the non-payment of UK duties confirmed.

21. In elaborating this in his oral submissions Mr Maciver emphasised that this appeal related to the interpretation of subsection (1A), and not subsection (1) of Section 12. Thus it was not a matter of assessing to "best judgement". It was not an  
35 appeal where there had been a default. What is crucial for purposes of subsection (1A), he continued, was the ascertainment of the correct amount of duty. He referred to *TDG (UK) Ltd*, para 29, where Mrs Justice Rose set out the distinction. Subsection (1A) applies where the correct amount of duty can be ascertained. In the present appeal the task of the Tribunal was to ascertain at what point the respondents  
40 had sufficient knowledge to make an assessment. That date, he submitted, was 12 June 2013.

22. Mr Maciver commended the evidence of Officer Bell. He had given a straightforward account. The information obtained from the police gave rise to

suspicious, but fell short of full knowledge. The amount of the tobacco was estimated variously at 90 to 100 kg pending the boxes being opened and their contents examined. The procedure for seeking a search warrant under Section 23E of the 1995 Act was standard HMRC policy. Only with the benefit of it could the correct quantity, viz 90 kg, be cross-checked and confirmed by HMRC. Also, HMRC had to inspect the individual packages to confirm that UK duties had not been paid.

23. Mr Maciver stressed that although the police and HMRC might be viewed as fellow law-enforcers, they were independent agencies. The wording of subsections (1A) and (4) referred to the Commissioners' knowledge and understanding. Whatever knowledge or suspicions the police may have had, it was not until 12 June 2013 that the Commissioners had full information. That accordingly was the crucial date. In the somewhat analogous time-bar issue which arose in *Anglo Overseas Limited* he noted the comments of Judge Bishopp in para 79, that reasonable time should be afforded to HMRC to seek additional evidence rather than have to base assessments on incomplete or limited evidence. Further, he noted in para 18 of the appellant's Outline Submissions anent *Temple Retail Limited* comments of Dyson J in *Pegasus Birds*. These related to the interpretation of Section 73 and the state of knowledge of the Commissioners. Dyson J considered that the time limit should run only from the date on which the last piece of evidence necessary for making the assessment came to the knowledge of the Commissioners.

24. Also in *Temple Retail Limited* reference was made to the right of challenge under the *Wednesbury* rule. However, here there had not been an unreasonable delay in executing the Search Warrant. The interval between Mr Bell's first involvement and the respondents' seeking and executing the Search Warrant had only been about eight days. The Search Warrant was necessary in the circumstances and recommended procedure. Suspicion was insufficient to make the assessment: accurate knowledge was required. The need for accuracy was enhanced given the intention to seek a prosecution.

25. We gave Mr O'Donnell the opportunity to make a final response. He adhered to his earlier stance that the appeal should be allowed. He maintained that the crucial date was 1 June 2013 and the assessment, having been made after 31 May 2014, was accordingly time-barred.

## **Decision**

26. Our decision depends on the correct interpretation of subsections (1A) and (4) of Section 12. We agree with Mr Maciver that subsection (1) is inapplicable: that depends on there having been a default as defined in subsection (2), which is not the case here. The respondents' letter and Notice of Assessment of 5 June 2014 and its subsequent review of 3 September 2014 (tabs 14 and 19) both proceed on the basis of subsection (1A) applying. As we read that and subsection (4) the state of knowledge of the Commissioners and their ability to calculate the appropriate duty is emphasised. We agree that these factors govern the determination of the commencement date of the one year period prescribed by subsection (4)(b).

27. While the police and the respondents collaborated in the enquiry, properly and as a matter of routine, it would not be appropriate to attribute the state of knowledge of the police to the respondents. Moreover, and in any event, the police had only suspicions, albeit very reasonably based and fortified by the appellant's admissions.  
5 We accept Mr Bell's evidence that the respondents before making an assessment would as a matter of practice confirm the material facts independently.

28. A decision was made by the respondents to consider a prosecution in this case. We accept that that required a search warrant to enable the respondents to recover the necessary evidence. That appears to be routine procedure. An extended or  
10 unreasonable delay in completing this might be the subject of challenge under *Wednesbury* principles (that might not fall within this Tribunal's jurisdiction) but in the present case the necessary court procedure was completed with all due expedition. Also, it appears that the respondents had to devote resources to a major operation proceeding at the same time. No culpable delay arose in our view.

15 29. In reaching our decision we have relied on the guidance of Judge Bishopp in *Anglo Overseas Limited*, paras 70-79, in which he considered the interpretation of Section 12 and which refers in turn to *Pegasus Birds Limited*. He lays stress on the state of knowledge of HMRC and its sufficiency for purposes of making an assessment, and that having regard to the wording of subsection (4)(b). The views of  
20 the officer making the assessment should count, and he should be allowed a reasonable margin of discretion. That officer did not in fact give evidence, but Mr Bell confirmed that in particular the quantity and weight of the tobacco could not be checked by the respondents until 12 June 2013 when the warrant search took place. Judge Bishopp's comments at para 79 support the view that reasonable time should be  
25 given to HMRC to seek additional evidence rather than that they should be forced to assess on limited or incomplete evidence. All this supports Mr Maciver's submission that the currency of the one year period under subsection (4)(b) should run from 12 June 2013 and not from an earlier stage of the enquiry.

30 30. On that basis we find that the Notice of Assessment (tab 14) of 5 June 2014 is timeous and, accordingly, the appeal is dismissed.

31. 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  
35 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.

40 **KENNETH MURE**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 29 JULY 2015**