



TC04627

Appeal number: TC/2014/02434

Excise Duty - importation of tobacco products - Appellant convicted of intentional evasion of excise duty and VAT - appeal against assessment - Appeal listed for a pre-trial Review - interim cross application to strike out - whether any reasonable prospect of the Appellant's case succeeding - No - appeal struck out.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

AIDAN SWEENEY HAMILL

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL CONNELL

Sitting in public at Bedford House, 16 - 22 Bedford Street, Belfast on 6 February 2015

Mr Patrick Taggart, Counsel, for the Appellant

Mr Christopher McNall, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by Mr Aidan Sweeney Hamill (“the Appellant”) against an assessment of Excise Duty issued by HM Revenue and Customs (“HMRC”) on 15 May 2013 in the amount of £21,105.

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 (“the Rules”) on the basis there is no reasonable prospect of the Appellant’s case succeeding.

10 **Background**

3. On 17 May 2012, the Appellant was stopped on the A1 dual carriageway in Belfast by a member of the Police Service of Northern Ireland (“PSNI”).

4. The PSNI Officer carried out a search of the Appellant’s vehicle and identified 10 boxes each containing 10,000 cigarettes (“the goods”).

5. The Appellant was arrested and subsequently charged with being knowingly concerned with the intentional evasion of Excise Duty and VAT payable on the goods, contrary to sections 170 (1)(b) and 170(2) of the Customs and Excise Management Act 1979 (“CEMA”).

6. The goods were seized as liable to forfeiture under s 139 CEMA because of a liability to forfeiture under Regulation 88 Excise Goods (Holding, Movement and Duty Point) Regulations 2010, (“the 2010 Regulations”) for 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.

7. At Schedule 3 to CEMA, there is provision of a process that permits the Appellant to challenge the liability of the goods to forfeiture. 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.

8. No Notice of Claim was received by the Director of Border Revenue and the Appellant did not appeal the decision to seize the goods within the statutory 30 day time period.

9. As that is a conclusive determination on the question of the liability to forfeiture of the tobacco, the goods were deemed to have been held for a commercial purpose. As such, a duty point was prompted under Regulation 13(1) of the 2010 Regulations and HMRC may assess for duty under s 12 of the Finance Act 1994.

10. The person liable to pay the duty is the person ‘holding the goods intended for delivery’ as identified in the 2010 Regulations.

11. On 7 March 2013, HMRC issued a letter to the Appellant inviting his comments on a proposed assessment of Excise Duty. No reply was received.
12. On 15 May 2013, HMRC issued an assessment for the amount of £21,105. On 30 May 2013, the Appellant pleaded guilty to the offences at paragraph 5 above and was sentenced at Craigavon Crown Court to a 15 month detention, suspended for 3 years.
13. On 1 October 2013, the Appellant’s representatives wrote to HMRC requesting a review on the basis that they had understood that all matters relating to the seizure had been dealt with at the Crown Court.
14. On 18 November 2013, HMRC wrote to the Appellant’s representatives saying that a duty assessment had not been dealt with at the Crown Court and upheld the assessment.
15. On 18 December 2013, the Appellant’s representatives requested a further review, saying that the Appellant had pleaded guilty at the Crown Court on the basis that he had no proprietary interest in the goods and was merely a courier.
16. On 28 March 2014, HMRC issued their review decision upholding the assessment. HMRC agreed that a discussion had taken place regarding possible confiscation proceedings under the Proceeds of Crime Act, but not regarding an assessment of Excise Duty.
17. On 1 May 2014, the Appellant’s representatives lodged a Notice of Appeal in respect of the assessment, contending that Mr Hamill was merely acting as a courier. The grounds of appeal state “see enclosed letter which refers to the Supreme Court decision in *R-v-Mackle* (UKSC 2012/0044) (which refers to the earlier case of *R v May* [2008] UKHL 28 & 29), in respect of those who act merely as couriers and have no real proprietary interest in the goods in question”.
18. On 15 May 2014, HMRC issued a certificate to the Appellant consenting to Hardship.
19. Following listing directions for a pre-trial Review issued by the Tribunal Service on 28 August 2014, HMRC lodged an application to strike out the Appellant’s appeal under Rule 8(3)(c) of the Rules on the basis there is no reasonable prospect of the Appellant’s case succeeding.
20. At the hearing, it was agreed by the parties that given the strike out application a pre-trial review was procedurally premature and that prior to a substantive hearing, the application to strike out should be determined by the Tribunal.

Relevant Legislation

21. The Finance Act 1994 provides:
- “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

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

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

22. The Excise Goods (Holding, Movement and Duty Point) Regulations 2010 provides:

10 “Goods already released for consumption in another Member State - excise duty point and persons liable to pay

(13) (1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.

15 (2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person —.

(b) Holding the goods intended for delivery...

(3) For the purposes of paragraph (1) excise goods are held for a commercial purpose if they are held—

20 (a) by a person other than a private individual; or

(b) by a private individual (“P”), except in a case where the excise goods are for P’s own use and were acquired in, and transported to the United Kingdom from, another Member State by P.

(5) For the purposes of the exception in paragraph (3)(b)—

25 (b) “own use” includes use as a personal gift but does not include the transfer of the goods to another person for money...”

23. The Tribunal Procedure (First-tier Tribunal) (Tax Chambers) Rules 2009 states:

30 “Striking out a party’s case

8. (3) The Tribunal may strike out the whole or a part of the proceedings if—

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

Case Law Authorities

35 24. HMRC’s case is that the Appellant was ‘holding’ the goods when he was stopped on 17 May 2012 on the A1 dual carriage way in Belfast, and has thereby rendered

himself liable to be assessed for excise duty under Regulation 13(2) (b) of the 2010 Regulations.

25. The Tribunal was referred to a number of authorities as to the meaning of ‘holding’ in Regulation 13 (2)(b). These included *R v White and others* [2010] EWCA Crim 978; *R v Taylor and Wood* [2013] EWCA Crim 1151; the First-tier decision in *Gerald Carlin v HMRC* [2014] UKFTT 782 (TC), *R v Mackle* and *R v May* (referred to above).

26. In *May*, which concerned criminal proceedings and a confiscation order under the Proceeds of Crime Act 2002 it was established that someone evading VAT or duty only ‘obtains’ a pecuniary advantage, for the purposes of s 76 of the Act, where he personally owes (and therefore evades) VAT or duty. This represented a significant change in the law reflected by the case of *Jennings [2005] EWCA Civ 746*, where the Court of Appeal held that in order to ‘obtain’ a pecuniary advantage by smuggling it was only necessary to show that the defendant’s acts contributed to a non-trivial extent. The House of Lords disapproved of the Court of Appeal’s formula, saying (at para. 14):

“14. ... a person benefits from an offence if he obtains property as a result of or in connection with its commission, and his benefit is the value of the property so obtained, which must be read as meaning “obtained by him”.”

27. The case of *May*, dealing as it does with the issue of whether a person ‘obtains’ a pecuniary advantage when evading VAT or duty, is therefore not directly relevant to the question of what amounts to ‘holding’ in the context of the 2010 Regulations.

28. In *White & others* the question of a driver’s liability to Excise Duty was said to be “both complex and does not arise in this case”. However the court in its conclusion said (obiter):

“We say only this. It tentatively seems to us that a lorry driver who knowingly transports smuggled tobacco will, for the purposes of the Regulations, have caused the tobacco to reach an excise duty point and will have the necessary connection with the goods at the excise duty point.

Mere couriers or custodians or other very minor contributors to an offence, rewarded by a specific fee and having no interest in the property or the proceeds of sale, are unlikely to be found to have *obtained* that property.”

29. *Taylor and Wood* is more relevant to this appeal. It was a case where third parties, engaged to transport textile products in which a large quantity of cigarettes were concealed and who were wholly unaware of the concealment, were held not to have been liable to the duty as they were not ‘holding’ the goods for the purposes of Regulation 13 of the Regulations.

30. Kenneth Parker J stated:

“29. [Holding] denotes some concept of possession of the goods.it can broadly be described as control, directly or through another, of the asset, with the intention of

asserting such control against others, whether temporarily or permanently... In a case of bailment, the bailee has actual, or physical, possession and the bailor constructive possession. In other words, if the bailee holds possession not for any interest of his own but exclusively as bailee at will, legal possession will be shared by bailor and bailee.

5 30. If [the Appellants] had known, or perhaps even ought to have known, that it had physical possession of the cigarettes at the excise duty point, its possession might have been sufficient to constitute a “holding” of the cigarettes at that point.....

10 31. Imposing liability on the appellants raises no such questions, because they were the persons who, at the excise duty point, were exercising de facto and legal control over the cigarettes. In short, responsibility for the goods carries responsibility for paying the duty.

15 35. Both appellants rely upon the fact that Ali was the principal conspirator and was the mastermind of the illegal importation. The cigarettes were always the “property” of Ali, meaning that he owned them. The appellant Taylor had no interest, financial, beneficial or otherwise, in the cigarettes themselves. The role of the appellants was to provide a smokescreen to make the importation appear legitimate. However, none of this avails the appellants. In a case of this kind it is necessary to examine the precise and individual conduct of each person to see whether that conduct brings him within the terms of Regulation 13. In this case, for the reasons given, the answer is plain in respect of both appellants.” [That is that they fell within Regulation 13]

20 30. The *Carlin* case is a First-tier decision and not binding on this Tribunal and in any event turned, insofar as the question of ‘holding’ is concerned, on its own particular facts.

25 31. The *Mackle* case concerned appeals to the Supreme Court and two related sets of proceedings, each raising the issue of whether a confiscation order made by consent, on an incorrect legal basis following wrong advice, was binding on a defendant, and therefore could not be quashed on appeal. The Supreme Court also considered whether the Court of Appeal had been right to uphold the decision in any event, on the alternative basis that the defendants might have benefited from their participation.

30 32. The only basis on which the defendants in *Mackle* were said to have obtained a benefit was that they had evaded the duty and VAT payable. No other basis of benefit was put forward. An acceptance that they had obtained a benefit on that account inevitably involved a mistake of law, as it had been subsequently determined that they were not so liable under the relevant Regulations. The Court of Appeal concluded that it was unnecessary and inappropriate for the sentencing judges to examine whether
35 there were alternative bases of liability because of the appellants’ consent to the making of confiscation orders. However, Supreme Court held that the trial judges could not be relieved of their duty to be satisfied that the appellants had in fact obtained a benefit and allowed the appeal.

40 33. It can be seen that the *Mackle* case, for the same reasons as those given in paragraphs 26 and 27 above, is not directly relevant to the question of what amounts to ‘holding’ in the context of the 2010 Regulations.

The Appellant's Case

34. The Appellant's original contentions can be briefly summarised as follows:

- 5 i. The Appellant was merely a courier of the goods and therefore the goods were not for his own use;
- ii. The Appellant had no proprietary interest in the goods.
- 10 iii. The imposition of a duty on the Appellant as a result of condemnation proceedings, is in breach of Article 13 of The European Convention on Human Rights:

15 "Article 13 - Right to an effective remedy - Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

- and contrary to the judgment in *Paulet v The United Kingdom*, (13 May 2014) where in respect of Proceeds of Crime legislation, the test of proportionality was empathised as well as the need to avoid oppression in respect of financial penalties.

20 35. The Appellant no longer pursues his argument that the Public Prosecution Service gave assurances to him that there would be no Proceeds of Crime Act 2002 proceedings.

36. The Appellant therefore pursues his appeal on the basis that:

- 25 i. as a driver with no proprietary interest in the goods he cannot properly be considered to be 'holding' the goods within the meaning of Regulation 13(2)(b). The Appellant disputes HMRC's assertion that because the Appellant accepts he knew the goods being imported and that they were not duty paid, he was therefore the person 'holding' the goods;
- 30 ii. the imposition of Assessment is a breach of the Appellant's rights under Article 13.

The Respondents' Case

37. The person 'holding' the goods is the person with physical possession and/or knowledge of those goods. It is accepted that the Appellant may have had no proprietary interest in the goods; however this does not preclude him from being within Regulation 13 as discussed in *Taylor & Wood*.

38. The Appellant admits smuggling 100,000 cigarettes, which were not UK duty paid, into Northern Ireland from the Republic of Ireland and after pleading guilty to the offence of intentional evasion of excise duty and VAT, was convicted of the offence in Craigavon Crown Court.

39. The Appellant must at law be the person regarded as the person holding the goods at the time of the duty point. The Assessment has therefore properly been raised against the Appellant.

5 40. HMRC's case therefore is that the Appellant's grounds of appeal disclose no reasonable prospect of success.

Conclusion

41. The facts of the matter are not in dispute.

10 42. An Assessment of duty is not penal and therefore not in breach of Article 13 of The European Convention on Human Rights - *Terence Nolan v HMRC* (TC/2013/00202) where it was said:

“42. ...The significant difference is that disciplinary proceedings are intended to punish and deter: tax assessments merely collect tax. However large the assessment, it is not criminal in nature.

15 44. By its very nature, liability to pay tax is not penal. It is just an incident of living in a country with a tax regime. There was nothing penal in raising an assessment.”

20 43. As *Taylor and Wood* makes clear, an entirely innocent agent who does not know and could not have known that he had physical possession of excise goods at the Excise Duty point, does not hold the goods for the purpose of the Regulations imposing duty. However, that is not the position in this appeal. The Appellant was not an innocent party to the transportation of the goods seized.

44. In applying tax legislation, the relevant statutory provisions should be construed purposively and applied realistically.

25 45. The Appellant was ‘holding the goods intended for delivery’ within the meaning of Regulation 13(2)(b) of the 2010 Regulations. The Tribunal does not agree the Appellant's assertion that as a driver with no proprietary interest in the goods he cannot properly be considered to be ‘holding’ the goods within the meaning of Regulation 13 (2)(b). ‘Holding’ goods is not expressed to be conditional on ownership or any other type of interest in the goods. The Appellant accepted that he was in
30 possession of and therefore holding the goods when he pleaded guilty to the intentional evasion of Excise Duty and VAT.

35 46. The expression ‘reasonable prospects of success’ in Rule 8(3)(c) means that the prospect must be real, that is the court or tribunal will disregard prospects which are false, speculative or imaginary. The Appellant must have a case, which is better than merely arguable. On the facts, the Tribunal finds that the Appellant has no prospects of successfully appealing the assessment

47. The appeal is therefore struck out under Rule 8(3)(c) and the assessment to excise duty in the sum of £21,105 is confirmed.

48. 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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**MICHAEL CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 16 SEPTEMBER 2015

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