



TC04698

**Appeal number: TC/2014/02038
TC/2014/02039**

Excise Duty - importation of tobacco products - goods confiscated - no challenge - deemed forfeiture - appeal against assessment - late application for hardship - financial information not provided - cross application to strike out - no reasonable prospect of the Appellant's case succeeding - appeal struck out.

FIRST-TIER TRIBUNAL

TAX CHAMBER

GERALD and LINDA MEASOR

Appellant

- and -

HM REVENUE & CUSTOMS

Respondents

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER SUSAN STOTT**

Sitting in public at Darlington County Court Coniscliffe Road Darlington 19 May 2015

The Appellants did not attend

Mr Senior of Counsel for the Respondents

© CROWN COPYRIGHT 2015

DECISION

1. These are appeals by Gerald Measor and Linda Measor (“the Appellants”) against an Assessment of Excise Duty against each of them, in the amount of £1,021.00 dated 14 November 2013 issued by the Commissioners for HM Revenue and Customs (“HMRC”) and a penalty in the sum of £204 issued on 21 February 2014.
2. The appeals were formerly stood over pending the release of the decision in *HMRC v Race* [2014] UKUT 0331 (TCC), which was released on 14 July 2014.
3. The Appellants have not paid the assessment and make a (late) hardship application.
4. HMRC make a cross application for the Appellants’ 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 has no jurisdiction to hear the appeal unless the hardship application is granted, or alternatively that there is no reasonable prospect of the Appellants’ appeals succeeding.
5. The Appellants did not attend the appeal hearing but the Tribunal was satisfied that they had been given notice of the time, date and venue of the hearing and that it was in the interests of justice to proceed.

Background

6. On 18 September 2013, at Hull docks, Officers of UK Border Force seized a total of 11kg of Hand Rolling Tobacco and 600 cigarettes (“the goods”) from the Appellants.
7. The goods were seized on the basis that that they were held for a commercial purpose.
8. The UK Border Force Officer issued the Appellants with Public Notice 12A which set out their rights to appeal the seizures. 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 seizures, nor was a Notice of Claim issued within the statutory 30 day deadline.
9. Notice 12A 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.
10. On 14 November 2013, Officer Daniels issued each Appellant with an assessment under s 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 for duty due on 5.5 kilograms of the Hand Rolling Tobacco and 300 cigarettes. Each assessment related to half of the total quantity of goods seized.

11. No response was received to this letter by HMRC and on 21 February 2014 a penalty in the amount of £204 was issued under Schedule 41 of the Finance Act 2008.
12. No further correspondence was received from the Appellants, but undated and unsigned Notices of Appeal were received by the Tribunals Service on 14 April 2014 (out of time), indicating that the Appellants had submitted hardship applications to the Respondents.
13. The Appellants' grounds of appeal were that the tobacco was for their own consumption and gifts for their sons and grandsons. They had paid for the goods using money they had saved and received as birthday presents from friends and family.
14. On 29 May 2014 the Appellants' appeals against the assessments were directed by the Tribunal to be heard together. It was further directed that the conjoined appeals should be stayed until 60 days after the release of the decision in *Race*.
15. HMRC could find no trace of a hardship application by the Appellants and therefore wrote to them on 11 June 2014 requesting further information for HMRC to consider if hardship would be appropriate. The information requested was as follows:
- i. "Please provide a current statement for each and every Bank/Building Society account held in your name(s). This should include all Savings, Deposits and Current accounts with any institution with whom money can be deposited or borrowed.
 - ii. Please provide details of any insurance policies you hold which have surrender values and which are not used as security against other borrowings e.g. mortgage? This may include Endowments or other fixed term insurance schemes.
 - iii. Please provide a copy of the facility letter of any overdraft facility you have with any bank/financial institution.
 - iv. If you have approached your bank or other financial institution for a loan or overdraft facility to cover the amount at issue, what was the response - please provide details.
 - v. Do you own, outright or by mortgage, the property in which you live? If so when was it purchased, what was the cost and what is the approximate value. Please provide details of the mortgage value and repayment details
 - vi. If you are in receipt of any benefit, please provide evidence in support."
16. HMRC explained that s 16 Finance Act 1994 enables the Commissioners to consent to an application for hardship if they are satisfied that the Appellant would suffer hardship if required to pay or deposit tax prior to the hearing of the appeal. It was further explained that hardship in this context normally means financial hardship. HMRC explained that they did not have sufficient information to enable them to decide whether or not it would be proper for them to consent to the hardship applications. HMRC requested a reply by 25 June 2014.
17. HMRC say that there was no response from the Appellants.

18. On 8 August 2014 HMRC lodged an application with the Tribunal to strike out the Appellants' appeals.
19. On 11 August 2014 the Tribunal wrote to the Appellants to inform them that their appeals had been stayed (pending the outcome of the appeal in *Race*). The Tribunal provided information which was intended to assist the Appellants in deciding whether or not they wished to proceed with their appeal. In particular it was advised that in relation to excise duty appeals the Tribunal has no jurisdiction to consider whether or not goods brought into the UK by the Appellant for personal use, and that the Tribunal's lack of jurisdiction applied both to appeals against decisions concerning seizure and restoration of goods and also appeals against excise duty assessments and wrong doing penalties. The Tribunal asked the Appellants to confirm whether they wished to proceed with their appeals and challenge HMRC's application to have the appeals struck out. A reply was requested by 12 September 2014.
20. In a letter dated 12 August 2014, but not received by the Tribunal Service until 12 September 2014, the Appellants confirmed that they wished to proceed with their appeals.
21. On 1 October 2014 HMRC wrote to the Appellants confirming that their application for hardship had been refused because they had failed to provide the financial information requested by HMRC on 11 June 2014.
22. On 1 November 2014 the Tribunal informed the Appellants that their appeals could not proceed without payment of the tax in dispute and that they had not provided the financial information requested by HMRC. The Appellants were sent a further copy of HMRC's letter of 11 June 2014.
23. On 12 November 2014 the Appellants wrote to the Tribunal Service to say that they wished to continue with their appeals. In their letter they said:
- “We have tried to sort some agreement for payment with Glasgow and Liverpool but Liverpool said we cannot afford anything so they said they would sort it out with Glasgow.”
- There was no further explanation from the Appellants or indication as to whether or not they would be providing the financial information requested
24. On 19 March 2015 the Tribunal Service informed the Appellants that their appeals could not proceed unless the tax in dispute was paid or deposited with HMRC or their hardship applications granted by the Tribunal. The Appellants were informed that their late applications for hardship would be set down for hearing by the Tribunal, at which time the Tribunal would also consider whether it had jurisdiction over any other issues relating to the appeal.
25. HMRC oppose the Appellants' applications that the appeal proceeds without payment or deposit of the tax in dispute and applies for the appeals to be struck out.

The Strike Out application

26. 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:

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

27. 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;”

28. HMRC applies for strike out of the appeals on the following grounds:

- 10 i. The Appellant’s appeals are predicated on showing that the tobacco was wrongly seized, i.e. unlawful.
- ii. The Appellant has not challenged the lawfulness of seizure and this is now duly deemed under paragraph 5 schedule 3 of the Customs and Excise Management Act 1979.
- 15 iii. 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).
- iv. The Appellant have not submitted valid hardship applications to the Tribunal and therefore the Tribunal has no jurisdiction to hear the appeals.
- 20 v. In the alternative there is no reasonable prospect of success on this or the other grounds of appeals.

The Law

29. The Finance Act 1994 provides:

12 . Assessments to excise duty.

25 (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,

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

30. The Excise Goods (Holding, Movement & Duty Point) Regulations 2010 provides:

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

5 (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.

(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...

10 31. It was held in *HMRC v Jones & Jones* [2011] EWCA Civ 824 that:

“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.

15 (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.

20 (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.”

35

Conclusion

32. The Appellants were offered the opportunity of condemnation proceedings in the Magistrates Court. They did not exercise that right, and therefore after one calendar month had passed from the date of seizure, the goods were deemed condemned as forfeit to the Crown.

33. Because there was no challenge to the liability of the goods, paragraph 5 of Schedule 3 of CEMA operated to deem the goods as “duly condemned as forfeited”.

That is no different from an order of the court for condemnation as the Court of Appeal decided in the case of *Revenue & Customs Commissioners v Jones & another* [2012] Ch 414.

5 34. Where goods have been condemned by a court the order for condemnation will usually contain explicit reasons for the order (for example, the goods were intended for commercial not personal use and so were liable to duty). In a case of goods, on which the duty has not been paid, being held outside a duty suspension arrangement, it will always be implicit that the goods were released for consumption in the UK, that
10 they were, therefore, liable to duty, that duty had not been paid and that, consequently, the goods were liable to forfeiture.

15 35. In circumstances where there has been a conclusive determination on the question of goods liability to forfeiture (either by means of a court order or by virtue of the deeming provision contained in paragraph 5), it will always follow that a liability to pay duty has arisen. In such circumstances, the Commissioners may assess for the duty and impose penalties under the Finance Act 1994 sections 12 and 13 respectively.

20 36. Having considered all the information, the review officer found that the assessments in the sum of £1,021 and excise wrongdoing penalties in the sum of £204 were correct and have been issued in accordance with the relevant legislation.

25 37. At the hearing, Mr Senior for HMRC submitted that that Appellants' grounds of appeal disclosed no reasonable prospect of success and asked that although the appeals had been listed for late hardship applications, they should be struck out.

38. 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."

35 39. "Reasonable prospects of success" has been subject to case law in the county courts with *International Finance Corp v Uteaxfrica Sprl* [2001] CLC 1361 and *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 which provide helpful guidance:

40 "That prospect must be real, i.e. the court will disregard prospects which are false, fanciful or imaginary. The inclusion of the word real means that the respondent [to the application] has to have a case which is better than merely arguable."

45 40. The Tribunal concluded that the assessments had been correctly raised under s 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 and that the penalties had also been correctly raised.

41. The Appellants have not provided the financial information requested for the purposes of determining their hardship application. The Tribunal does not have any jurisdiction to reopen the issue as to whether the goods were held for personal use. In any event the Appellants' appeals disclose no reasonable prospects of success.

5

42. The appeals are accordingly struck out and the assessments and penalties confirmed.

43. 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.

15

**MICHAEL CONNELL
TRIBUNAL JUDGE**

20

RELEASE DATE: 27 OCTOBER 2015

25