TC04724

Appeal number: TC/2013/06184

EXCISE DUTY – assessment to excise duty and wrongdoing penalty following the seizure of goods – whether the appeal should be reinstated under rule 17 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 following withdrawal by the appellant – jurisdiction of the tribunal following **Nicholas Race v HMRC** *– application refused*

FIRST-TIER TRIBUNAL
TAX CHAMBER

MARCIN KORONKIEWICZ **Appellant**

- and -

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

TRIBUNAL: JUDGE VICTORIA NICHOLL

Sitting in public at Fox Court on 26 October 2015

The Appellant appeared in person

Michael Paulin, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an application by the Appellant ("Mr Koronkiewicz") under rule 17(3) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 for his appeal to be reinstated following his withdrawal of the appeal.

Background

2. Mr Koronkiewicz's appeal relates to an excise duty assessment of £4,762 and a related excise wrongdoing penalty. The circumstances in which these arose and the procedural history of this appeal which are relevant to this application can be summarised as follows:

2.1 On 10 April 2013 Mr Koronkiewicz was stopped by the police when driving his Mercedes S class car. The police searched the vehicle and found holdalls in the boot containing some 17,740 cigarettes in boxes of 7 different brands, hand rolling tobacco and 22 bottles of vodka ("the goods"). Mr Koronkiewicz was interviewed by the police and then by HMRC. HMRC seized the goods as no duty had been paid, issued factsheets and notices, including notice 12A, and explained the reasons for their issue.

2.2 On 31 May 2013 HMRC issued the assessments under regulation 13(2) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 and notified Mr Koronkiewicz that he was also liable to a wrongdoing penalty. Mr Koronkiewicz did not challenge the legality of the seizure of the goods by bringing proceedings (referred to as condemnation proceedings as noted in paragraph 11 below).

2.3 On 22 June 2013 Mr Koronkiewicz wrote setting out the grounds of his appeal against the assessment and penalty. The grounds of his appeal were that he had bought the goods for personal use from customers of his car repair business. The customers had bought the goods in Poland and Belgium. He claimed that he had not bought the goods for commercial purposes, that he did not know that it was illegal and that he cannot afford to pay the amounts assessed. This letter prompted the formal departmental review of the assessment by HMRC. The review concluded that the assessment should be maintained as explained in HMRC's letter of 5 August 2013. Mr Koronkiewicz replied by letter dated 15 August 2013 that he wished to pursue his appeal and that some of the facts of the case as described are incorrect.

2.4 On 13 December 2013 HMRC applied for the case to be dismissed as the Tribunal has no jurisdiction, or in the alternative, that Mr Koronkiewicz's case has no reasonable prospects of success. As this reflected the arguments in the case of *Nicholas Race v HM Revenue and Customs* (FTC/131/2013) the appeal was stood over by the Tribunal on 31 January 2014 until after the issue of its decision in that case.

2.5 The Tribunal notified Mr Koronkiewicz on 18 August 2014 that the *Nicholas Race* case had been decided and that the Upper Tribunal had decided that the Tribunal has no jurisdiction to consider whether or not goods are for own use when considering appeals like this. The letter asked Mr Koronkiewicz to confirm by 12 September 2014 whether he wished to (a) withdraw his appeal or (b) continue with his appeal on the original grounds or (c) amend the grounds of his appeal.

2.6 Mr Koronkiewicz did not reply to the Tribunal's letter of 18 August 2014 and so it directed on 11 December 2014 that the proceedings may be struck out unless Mr Koronkiewicz notified the Tribunal how he wished to proceed within two weeks. On 22 December 2014 Mr Koronkiewicz notified the Tribunal that he wished to withdraw his appeal. This was acknowledged by the Tribunal in a letter dated 23 December 2014, advising that any further application should be made within 28 days, after which the file would be closed.

2.7 On 12 March 2015 the Tribunal received a letter from Mr Koronkiewicz dated 14 January 2015 asking to reinstate his appeal. The letter was under cover of another letter dated 23 February 2015 that asked the Tribunal what further steps he needed to take to reinstate his appeal.

2.8 On 30 March 2015 a letter was sent to Mr Koronkiewicz asking why his letter of 14 January 2015 had not been received until 12 March 2015.

2.9 On 10 August 2015, as the Tribunal had not received a response from Mr Koronkiewicz, it directed that the case would be struck out automatically unless Mr Koronkiewicz responded to the letter of 30 March 2015 and confirmed in writing whether he intended to pursue his application within 2 weeks.

2.10 On 20 August 2015 the Tribunal received letters dated 18 August 2015 and 31 March 2015 from Mr Koronkiewicz. The 18 August letter enclosed a letter dated 31 March 2015 and noted that it had been sent on 31 March 2015. In his letter of 31 March 2015 Mr Koronkiewicz said that his letter of 14 January had been posted in the normal way.

The Law

3. Rule 17 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules") provides that a party may give notice to the Tribunal of the withdrawal of the case made by it in the Tribunal. It goes on to provide:

"(3) A party who has withdrawn their case may apply to the Tribunal for the case to be reinstated.

(4) An application under paragraph (3) must be made in writing and be received by the Tribunal within 28 days after:

(a) the date that the Tribunal received the notice under paragraph (1)(a); or

> (b) the date of the hearing at which the case was withdrawn orally under paragraph (1)(b)."

4. Rule 5 of the Tribunal Rules gives the Tribunal case management powers that include extending the time for complying with any rule.

5. Rule 2 of the Tribunal Rules sets out their overriding objective of enabling the Tribunal to deal with cases fairly and justly. It provides that this includes avoiding delay, so far as compatible with proper consideration of the issues. The parties must help the Tribunal to further the overriding objective and cooperate with the Tribunal generally.

6. The case law authorities that apply to the substantive appeal in this case concern the following provisions which set out the basis on which the charge to excise duty arises, how goods subject to that duty become subject to forfeiture and seized and how this can be challenged:

7. Regulation 13 of the Excise Goods (Holding, Movement, and Duty Point) Regulations 2010 provides that:

> "(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:
>
> (a) making the delivery of the goods; and
>
> (b) holding the goods intended for delivery; or
>
> (c) to whom the goods are delivered.
>
> (3) For the purposes of paragraph (1) excise goods are held for a commercial purpose if they are held --
>
> (a) by a person other than a private individual; or
>
> (b) by a private individual ("P"), except in the case where the excise goods are held for P's own use and were acquired in, and transported to the United Kingdom from, another member State by P.
>
> (4) For the purpose of determining whether excise goods referred to in the exception in paragraph (3)(b) are for P's own use regard must be taken of:
>
> (a) P's reasons for having possession or control of those goods;
>
> (b) whether or not P is a revenue trader
>
> (c) P's conduct, including P's intended use of those goods or any refusal to disclose the intended use of those goods;
>
> (d) the location of those goods;

> (e) the mode of transport used to convey those goods;
>
> (f) any document or other information relating to those goods;
>
> (g) the nature of those goods including the nature or condition of any package or container;
>
> (h) the quantity of those goods and, in particular, whether the quantity exceeds any of the following quantities –
>
> 10litres of spirits…
>
> 800 cigarettes…
>
> 1 kg of any other tobacco products;
>
> (i) whether P personally financed the purchase of the goods;
>
> (j) any other circumstances that appear to be relevant.
>
> (5) For the purposes of the exception in paragraph (3) (b)-
>
> (a) "excise goods" does not include any goods chargeable with excise duty by virtue of any provision of the Hydrocarbon Oil Duties Act 1979 or of any order made under section 10 of the Finance Act 1993;
>
> (b) "own use" includes use as a personal gift but does not include the transfer of the goods to another person for money or money's worth (including any reimbursement of expenses incurred in connection with obtaining them)."

8. Regulation 88 of the Excise Goods (Holding, Movement, and Duty Point) Regulations 2010 provides that:

> "If in relation to any excise goods that are liable to duty that has not been paid there is -
>
> a contravention of any provision of these Regulations, or
>
> a contravention of any condition or restriction imposed by or under these Regulations,
>
> those goods shall be liable to forfeiture"

9. Section 139 (1) of the Customs and Excise Management Act 1970 ("CEMA 1979") provides as follows:

> "Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or constable, or any member of Her Majesty's armed forces or coastguard."

10. Paragraph 1 Schedule 3 CEMA 1979 provides for notice of the seizure to be given in certain circumstances. Paragraph 3 Schedule 3 CEMA 1979 then states:

> "Any person claiming that anything 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…"

11. As notice 12A explains, if a notice of claim is given under paragraph 1 Schedule 3 CEMA 1979 condemnation proceedings are heard in the Magistrates' Court. If no

notice of claim is given under paragraph 1 Schedule 3 CEMA 1979 then paragraph 5 provides that the legality of the seizure is automatically conceded as the goods are deemed by law to have been liable to forfeiture. The effect of this is that any facts which could have argued against the seizure, such as whether they goods were for personal use and so whether duty was payable, are also deemed to have been conceded. This means that these points cannot be reopened and raised in an appeal before the Tribunal as it has no jurisdiction to find different facts.

12. This lack of jurisdiction was confirmed by Mummery LJ in *HMRC V Jones and Jones [2011] EWCA Civ 824* (the "*Jones*" case) who said at paragraph 73 that the Tribunal "has no power to re-open and re-determine the question whether or not seized goods had been legally imported for the [respondents'] personal use; that question was already the subject of a valid and binding deemed determination under the 1979 Act".

13. In *The Commissioners for HMRC v Nicholas Race* [2014] UKUT 0331 (the "*Nicholas Race*" case)*[2014] UKUT 0331* Mr Nicholas Warren, then Chamber President, found that in the light of the decision in the *Jones* case Mr Race was unable to go behind the deeming provisions of paragraph 5 Schedule 3 in order to argue that the goods were for personal use and not for a commercial purpose in his appeal against an assessment to excise duty. The Tribunal does not have jurisdiction to reopen the issue of whether the goods are for personal use where this has been determined by the statutory deeming.

Submissions by the parties

14. The grounds for Mr Koronkiewicz's appeal are that he bought the goods for personal use and not for commercial purposes. He claimed in correspondence that he has always stayed within the law, that he didn't know that buying the goods cheap in this way was illegal and that he will not accept such purchases in the future as he "does not agree with this sort of behaviour".

15. At the hearing Mr Koronkiewicz gave evidence under oath that he had withdrawn his appeal on 22 December 2014 as he misunderstood a letter from HMRC about the wrongdoing penalty and had believed it to be an offer to reduce the assessment. He spoke to the HMRC officer who wrote the letter and, as soon as he realised that the amount referred in the letter was payable in addition to the amounts assessed, he applied to reinstate his appeal by writing to the Tribunal on 14 January 2015. Mr Koronkiewicz said that his letter of 14 January 2015 to the Tribunal was returned undelivered but that he had left the returned envelope at home. He also failed to bring the letter from HMRC that prompted his withdrawal.

16. Finally Mr Koronkiewicz claims that he cannot afford to pay the amounts assessed and the penalty.

17. HMRC submit that no good reason has been advanced by Mr Koronkiewicz in support of his application and that the appeal has no reasonable prospects of success in any event. The Tribunal has no jurisdiction to consider whether the goods were for

personal use in relation to appeal against the assessment or in relation to the appeal against the wrongdoing penalty following the decisions in the *Jones* and *Nicholas Race* cases.

18. HMRC submit that the Tribunal should take into account the fact that Mr Koronkiewicz has not litigated his case in an efficient or proportionate manner, particularly in the light of the Tribunal's letter of 18 August 2015 setting out the Tribunal's lack of jurisdiction following the decision in the *Nicholas Race* case. The procedural history includes two unless orders and repeated delays by Mr Koronkiewicz in responding to correspondence.

19. HMRC also noted that there is doubt as to whether Mr Koronkiewicz's application to reinstate his appeal was made in time. Further, they have no record of the letter from HMRC to Mr Koronkiewicz which he cites as the reason for his mistaken withdrawal of his appeal.

Discussion

20. Addressing HMRC's last point first, I accept Mr Koronkiewicz's evidence that he wrote to the Tribunal applying to reinstate his appeal as soon as he understood that his assessment had not been reduced. At the hearing Mr Koronkiewicz gave evidence that his letter of 14 January 2015 had been posted to the correct address but returned undelivered. In these circumstances the deeming provisions with regard to the time of service under section 7 of the Interpretation Act 1978 do not apply as there is proof that the letter was not received and so Mr Koronkiewicz's application to reinstate his appeal is out of time.

21. I therefore considered whether to exercise of my discretion under Rule 5 of the Tribunal Rules to extend the time for receipt of the application under Rule 17(4) of the Tribunal Rules. I did not receive argument from either party with regard to extending the time for receipt of the application under Rule 5 of the Tribunal Rules as Mr Koronkiewicz did not understand that this additional application was required and HMRC had not been told that the letter of 14 January 2015 had been returned undelivered. However Mr Paulin for HMRC directed me generally *Former North Wiltshire District Council v HMRC* [2010] UKFTT 449 (TC) and the more recent concise version of CPR 3.9 in relation to the exercise of the Tribunal's discretion in accordance with the overriding objective.

22. Mr Koronkiewicz is a litigant in person who claims that he misunderstood a letter from HMRC and then withdrew his appeal in response to an unless order asking him how he wished to proceed. He acted quickly to reinstate his appeal once he understood the position, but his application was received by the Tribunal on 12 March 2015 and was therefore over 40 days late. The delay was relatively short, particularly when compared to the delay caused by the stay for the decision in the *Nicholas Race* case. I have weighed up this reason for, and length of, the delay against the purpose of the time limit to provide finality and the consequences of an extension on HMRC. An extension of time would put HMRC in the same position as they were in before Mr Koronkiewicz withdrew his appeal, namely arguing that the Tribunal should strike

out the proceedings as it has no jurisdiction to consider whether the goods were for personal use. But a refusal of the extension would prevent Mr Koronkiewicz raising any other arguments in support of his application following the *Nicholas Race* decision.

23. I consider that in these circumstances an extension of time is compatible with the overriding objective and with the guidance provided by Judge Bishopp in *Leeds City Council v Revenue and Customs Commissioners* [2014] UKUT 350 (TCC) that 'mistakes do occur and if they are not egregious – for example when there is a failure to comply without good reason with an 'unless' direction – or are not remedied promptly when discovered, they should not, in my view, lead to satellite litigation' by opposition to short extensions. I should note that while I consider that Mr Koronkiewicz's mistakes in relation to withdrawing his appeal and then applying late to reinstate are not egregious, his conduct since then does raise the points made in paragraph 27 below. I have therefore allowed an extension of time and gone on to consider Mr Koronkiewicz's application to reinstate his appeal.

24. As noted in paragraph 21 above, Mr Paulin has referred me to *Former North Wiltshire District Council v HMRC* [2010] UKFTT 449 (TC) in relation to the exercise of my discretion and I have also considered the more recent comments provided by the Hon Mrs Justice Proudman DBE about the principles to be weighed in the balance in the exercise of a discretion to reinstate at paragraphs 23 and 24 of *Pierhead Publishing v Commissioners for HMRC* [2014] UKUT 0321 (TCC). In respectfully agreeing and following this reasoning, I find the following to be relevant to the application of the overriding objective of fairness in this case:

(1) Mr Koronkiewicz's application to reinstate his appeal is based on the argument that he withdrew his appeal in error as he had not understood HMRC's letter and that the goods the subject of the appeal were for personal use. Mr Koronkiewicz received notice 12 A and factsheets following the seizure of his goods, but he did not challenge the seizure of his goods. In these circumstances I am bound by the authority of the *Jones* and *Nicholas Race* cases as set out in paragraphs 11 to 13 above and I have no jurisdiction to consider Mr Koronkiewicz's argument that he bought the goods for personal use.

(2) In relation to the other arguments raised by Mr Koronkiewicz, I do consider that his lack of knowledge of the law, nor his lack of funds to pay the amounts due, raise any prospect of success. Mr Koronkiewicz has not raised any further arguments since he applied for his appeal to be reinstated, notwithstanding the Tribunal's letter of 18 August 2014 and the time to do so. Therefore, insofar as the arguments in support of the appeal can be ascertained at this stage, they show no reasonable prospects of success and this limits the loss to Mr Koronkiewicz if the application to reinstate is refused.

(3) All parties would be prejudiced by the additional time and costs involved in this case if the reinstatement is allowed and that this would not be in the interests of good administration.

25. In weighing these points in the exercise of the discretion to reinstate I find that it would not be in accordance with the overriding objective to allow the application. In particular, the reason for the mistaken withdrawal and late reinstatement application is outweighed by the lack of merits of the application and appeal.

26. In addition to this finding, I consider that it would not be in accordance with the overriding objective to allow the application given Mr Koronkiewicz's conduct of his appeal.

27. The overriding objective requires the parties to cooperate with the Tribunal in order to ensure that cases are dealt with fairly and justly for both parties. It is unfortunate that Mr Koronkiewicz's letter of 14 January 2015 to the Tribunal was returned undelivered, but his claim that his letter of 31 March 2015 was also sent but undelivered is not credible, especially as it was purportedly sent the day after the date of the Tribunal's letter of 30 March 2015. This delay necessitated the issue of the second 'unless' order in this case by the Tribunal. As noted in paragraph 2.6 above, Mr Koronkiewicz's failure to respond to the Tribunal's letter of 18 August 2014 necessitated the first 'unless' order. Mr Koronkiewicz has not cooperated with the Tribunal in the efficient conduct of this case since he applied for the reinstatement of his appeal and he should not be allowed to benefit from the delays to continue litigation that has no reasonable prospect of success.

Decision

28. For these reasons I have exercised my discretion to extend time for receipt of the application to reinstate the appeal, but Mr Koronkiewicz's application for his appeal to be reinstated is refused.

29. 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.

VICTORIA NICHOLL
TRIBUNAL JUDGE
RELEASE DATE: 17 November 2015