TC04791

Appeal number: TC/2013/00685

Excise Duty - importation of tobacco products - appeal against assessment - - cross application to strike out - whether any reasonable prospect of the Appellant's case succeeding - merits of appeal considered - appeal dismissed.

FIRST-TIER TRIBUNAL

TAX CHAMBER

KEVAN DENLEY **Appellant**

- and -

HM REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER LIZ POLLARD

Sitting in public at Kings Court, Royal Quays, Earl Grey Way, North Shields on 18 August 2015

The Appellant in person

Mr Rupert Davies, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by Mr Kevan Denley ("the Appellant") against a decision by HM Revenue and Customs ("HMRC ") in a letter dated 9 January 2013, to refuse restoration of 18 kg of tobacco seized on 25 March 2012 ("the goods").

2. The Appellant also appeals a decision of HMRC on 8 August 2012 to issue an assessment to excise duty in the amount of £2,734 and a decision on 13 December 2012 to raise a wrongdoing penalty in the sum of £546.

3. HMRC make a cross application for the Appellant's appeal be struck out under rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on the basis that the Tribunal does not have jurisdiction to hear the matter or, in the alternative, on the basis that there is no reasonable prospect of the Appellant's case succeeding..

Background

4. On 25 March 2012 the Appellant was stopped by a Border Force Officer in the UK Control Zone at Coquelles whilst returning to the UK as a Eurolines Coach passenger.

5. The Officer explained the regulations relating to restrictions on the importation of certain goods and asked the Appellant if he had any. The Appellant replied that he was aware of the regulations and had no such goods. However, on further enquiry, he declared that he had six lots of six one kg packs, totalling 36 kg tobacco (in fact it totalled 18kg, as each pack contained 500g).

6. The Appellant stated that the tobacco was for members of his family, but that six packs were for him. He had received £200 from each of five members of his family. He was travelling with his girlfriend and they had been to Lille and Brussels.

7. The Appellant confirmed that he had purchased tobacco six weeks previously, which consisted of eight packs of 500g (4kg).

8. After questioning, the Officer was satisfied that the tobacco was held for a commercial purpose and that it was therefore liable to forfeiture under s 49(1)(a)(i) of the Customs and Excise Management Act 1979 ("CEMA") and regulation 88 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 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. The tobacco was seized under s 139 (1) CEMA.

9. As time with the Appellant was restricted because his coach was about to leave, Seizure Information Notice form BOR156, a Warning Notice about seized goods BOR162 and Notice 12A were posted to the Appellant. The Notices were posted to the Appellant on the same date as the seizure, 25 March 2012. The copy of Notices BOR 156 and BOR 162 produced in evidence by HMRC and which would have

accompanied Notice 12, both show the Appellant's correct address and post code. Notice 12A explains that a challenge to the legality of the seizure in the Magistrates' Court should be made within one month of the date of seizure. The warning letter made it clear that the seizure was without prejudice to any other action that could be taken and that this included HMRC issuing an assessment for evaded excise duty and a wrongdoing penalty.

10. The Appellant did not challenge the legality of seizure within the permitted one month period.

11. 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. That is a conclusive determination regarding the liability to forfeiture of the goods, and that they were held for a commercial purpose. As such, a duty point was prompted under Regulation 13(1) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 and the Commissioners may assess for duty under s 12 of the Finance Act 1994.

12. On 8 August 2012 an assessment was issued by HMRC in the sum of £2,734 calculated in the following manner:

£151.90 (duty per kg) x 18 = £2,734.20

13. On 17 August 2012, the Appellant responded as follows:

> "I was of the opinion that the amount of tobacco purchased related to my own use and that of my family and friends without prejudice nor profit making by myself.
>
> At the time of checking at Border Control I was questioned by officials as to the quantity purchased by me and willingly agreed to the goods being forfeited owing to my foolishness in not making myself fully aware of rules and regulations. I was of the opinion that this matter, following the seizure of the goods, was concluded and that punishment due to my naivety was done. In effect seizure and financial costs were the conclusion in this matter.
>
> I wish to add that since the seizure on 25th March 2012 I have received no subsequent correspondence, as I stated previously, and I accepted the explanation given by the officer and never considered an appeal.
>
> The whole incident is hugely regretted by me personally and my financial position has degenerated as a consequence. In effect I am not in a position to pay the total duty sum requested as my financial position has been severely compromised by this most unfortunate matter."

14. On 29 August 2012, HMRC provided a further copy of the Seizure Information Notice sent to the Appellant on 25 March 2012.

15. By letter dated 17 September 2012 the Appellant wrote to HMRC asking for the goods to be restored. He stated that they were for members of his family.

16. On 10 October 2012 HMRC wrote to the Appellant to inform him that his challenge to the legality of seizure was out of time.

17. On 26 November 2012 HMRC wrote to explain their decision to refuse restoration. HMRC's letter reached the Appellant but bore an incorrect postcode.

18. A review of HMRC's decision was requested by the Appellant on 4 December 2012.

19. On 10 December 2012 HMRC acknowledged the Appellant's request for a review and advised the Appellant that any further information which he wanted to be taken into account had to be submitted to HMRC before 18 January 2013. HMRC's letter reached the Appellant but again bore an incorrect postcode.

20. On 13 December 2012, HMRC raised a wrongdoing penalty in the sum of £546 under Schedule 41 of the Finance Act 2008. The accompanying explanation detailed that a reduction of 100% (the maximum) had been given for the quality of disclosure.

21. On review, the assessment was upheld in a decision letter dated 9 January 2013. A summary of the Border Force Restoration Policy for Excise Goods was provided:

> "The general policy is that seized excise goods should not normally be restored. However, each case is examined on its merits to determine whether or not restoration may be offered exceptionally.
>
> 'Not for profit'
>
> For *non-aggravated* cases only the policy for seized excise goods which are not for own use, but are to be passed on to others on a 'not for profit' reimbursement basis is that the excise goods will normally be restored for a fee equal to the total of the duty evaded, plus VAT on the duty, plus a penalty of 15% of the duty and VAT. The meaning of *'aggravated'* is explained below.
>
> Aggravating circumstances include:-
>
> - Any previous offence by the individual
> - Large quantities, for example more than:
>
> 5kg of hand rolling tobacco or
> 6,000 cigarettes or
> 20 litres of spirits or 200 litres of wine or 225 litres of beer.
>
> Any other circumstances that would result in restoration not being appropriate."

22. The reviewing officer said that the Appellant had told the Officer he had already been paid for 15 kg of tobacco and this was not the first occasion he had received payment for tobacco that he had imported. The Officer concluded that the excise goods were to be passed on to others on a 'not for profit' reimbursement basis but should not be restored because of the following aggravated circumstances:

- A large quantity of excise goods were involved, that is 18 kg (more than 5kg) of hand rolling tobacco.
- Non-restoration was fair, reasonable and proportionate in those circumstances.

On 21 January 2013 the Appellant lodged a Notice of Appeal with the Tribunal, appealing the penalty and the assessment with a request that his appeal could proceed without payment of the assessment and penalty, which was granted by HMRC.

The Strike out application

23. 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:

> "(c) The Tribunal considers there is no reasonable prospect of the Appellant's case, or part of it, succeeding."

24. 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;"

25. HMRC applies for strike out of the appeal on the following grounds:

a) The Appellant's appeal is predicated on showing that the goods were wrongly seized, i.e. unlawfully seized.

b) The Appellant did not challenge the lawfulness of seizure which is now duly deemed under paragraph 5 schedule 3 of CEMA.

c) 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),

d) In the alternative there is no reasonable prospect of success on this or the other grounds of appeal.

The Law

26. The Customs and Excise Management Act 1979 ("CEMA") provides:

> "49(1) Where-
>
> a) except as provided by or under the Customs and Excise Acts 1979, any imported goods, being chargeable on their importation with customs or excise duty, are, without payment of that duty-
>
> (i) unshipped in any port,
>
> those goods shall ...be liable to forfeiture.
>
> 139(1) Anything liable to forfeiture under the Customs and Excise Acts may be seized or detained by any officer..."

27. Paragraph 3 Schedule 3 CEMA provides:

"Any person claiming that any thing 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 ..."

28. Where notice of a claim is not given, Paragraph 5 Schedule 3 CEMA states:

"If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of any thing no such notice has been given to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with the thing in question shall be deemed to have been duly condemned as forfeited."

29. HMRC may assess for duty under s 12 Finance Act 1994 ("FA 1994"):

"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,

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

30. Under regulation 13(1) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 the excise duty point was the time that the goods were first held. Where a duty point is prompted, HMRC may assess for duty under s 12 FA 1994.

31. The Appellant is the person liable for the duty as he was holding the goods, pursuant to regulation 13(2) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010.

32. The penalty was raised under schedule 41 paragraph 4 of the Finance Act 2008 ("FA 2008") on the basis that the Appellant had handled goods subject to unpaid excise duty.

33. In *HMRC v Jones & Jones* [2011] EWCA Civ 824 Mummery LJ said :

"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.

(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.

(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."

The Appellant's Case

34. The Appellant appeals on the grounds that:

i. The goods were not for resale. He had purchased them for his own personal use and for family members. The goods were therefore were not held for a commercial purpose.

ii. He cannot afford to pay the assessment and penalty. Receiving a tax levy/charge in addition to having the goods seized is wrong;

iii. Another passenger had goods seized but was not assessed for duty. It is harsh to receive an assessment and penalty when others get away with it.

35. At the hearing the Appellant said that he had not received the papers, that is the seizure information notice BOR156, the warning information notice BOR162 and Notice12A which HMRC had sent to him on 25 March 2012. He suggested that they could have been addressed to an incorrect postcode as were HMRC's letters of 26 November and 10 December 2012. He acknowledged however that he had "probably" been told by the Officer who interviewed him that he had thirty days within which to appeal the seizure of his goods to the Magistrates' Court

HMRC's Case

36. Mr Davies for HMRC argues that the ground of appeal, that the goods were intended for own use, should be struck out for lack of jurisdiction.

37. Mr Davies accepts that the goods were to be passed on, on a "not-for-profit" basis. However, because the quantity was more than 5kg the exception to the policy of restoration for a fee where goods are imported on a not-for-profit basis was not applied. Large quantities of goods are an aggravating feature, which justifies this aspect of the policy.

38. In any event, it is noted that 15kg were admitted (albeit unknowingly) to be commercial (i.e. not fulfilling the criteria of own use under regulation 13(5)(b) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010:

> ""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)."

39. The seizure is not disproportionate. The non-payment of excise duty is endemic despite attempts to reduce it. The imposition of seizures and penalties prevents non-UK duty paid goods reaching the UK market and is intended to discourage importers.

40. The Appellant was made aware in the warning letter that an assessment and wrongdoing penalty may be raised. He was made aware that the correct method of challenging the legality of seizure was by instigation of proceedings in the Magistrates' Court but he did not do this.

41. The Appellant did not challenge the legality of seizure and the goods have therefore now been deemed to be duly condemned as forfeit under paragraph 5 schedule 3 of the Customs and Excise Management Act 1979. Thus the legality of the seizure and the underlying reason for this - that the goods were for a commercial purpose and not for own use - has been deemed a fact.

42. The seizure information notice and assessment warning information notice sent with HMRC's letter of 25 March 2012 each bore the correct postcode and therefore there is no reason why they should not have reached the Appellant. Even if they did not, that was a red herring given that on the Appellant's own admission he had been advised at the time of seizure that he had thirty days within which to appeal to the Magistrates' Court. Furthermore, given the facts of the matter, 15kg would have been deemed to be held on a commercial basis based on the Appellant's admission that he had purchased that amount for relatives and family. Personal 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).

43. In consequence, the Tribunal cannot reopen this issue. HMRC relies upon the decision of the Court of Appeal in *Jones* and in particular on the judgment of Mummery LJ (at paragraph 33 above).

44. The decision in *Jones* is applicable to the assessment of duty following the decision in *HMRC v Race* [2014] UKUT 0331 (TCC), per Mr Justice Warren at para 33:

> "Taking those factors in turn, I do not consider it to be arguable that *Jones* does not demonstrate the limits of the jurisdiction. It is clearly not open to the tribunal to go behind the deeming effect of paragraph 5 Schedule 3 for the reasons explained in *Jones* and applied in EBT. The fact that the appeal is against an assessment to excise duty rather than an appeal against non-restoration makes no difference because the substantive issue raised by Mr Race is no different from that raised by Mr and Mrs Jones."

45. It is also applicable to penalties, see para 39:

> "... the First-tier Tribunal could no more re-determine, in the appeal against the Penalty Assessment, a factual issue which was a necessary consequence of the statutory deeming provision than it could re-determine a factual issue decided by a court in condemnation proceedings."

46. Mr Davies says that the Appellant's grounds of appeal stand no reasonable prospects of success. There is nothing in the grounds of appeal that suggest that HMRC did not have the power to raise the assessment or penalty or that they were improperly calculated.

47. The penalty was raised under schedule 41 paragraph 4 of FA 2008 on the basis that the Appellant was carrying and dealing with goods subject to unpaid excise duty.

48. Such penalty is payable if a person has "acquired possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods." (Paragraph 4(1)(a) schedule 41 FA 2008).

49. The penalty was calculated in accordance with paragraph 6 schedule 41 FA 2008 as a percentage of the potential lost revenue.

50. The failure to pay the duty was not considered to be "deliberate" and therefore the maximum penalty was 30% of the revenue (paragraph 6B(c) schedule 41 FA 2008). From this 30% maximum penalty, deductions were made to take into account the quality of the Appellant's disclosure pursuant to paragraph 13 schedule 41 FA 2008. The Appellant's disclosure was prompted (he disclosed the cigarettes only after being stopped) and therefore the minimum penalty was determined by column 1 in the table in paragraph 13 schedule 41 FA 2008.

51. The appropriate reduction was determined by the quality of the disclosure as determined by the degree of "telling, helping and giving". The Appellant was determined to have done all three and so the maximum reduction was applied, i.e. the penalty was calculated as being 20% of the potential lost revenue.

52. The calculation was thus £2734.20 x 20% = £546 (rounded down).

53. The Appellant does not put forward any grounds of appeal challenging the calculation of the penalty or any reason for granting a special reduction (FA 2008, schedule 41 paragraph 14).

54. The Appellant's statement that he cannot afford to pay the assessment and penalty is not a valid ground of appeal.

Conclusion

55. The facts of the matter are not in dispute. The Tribunal does not have any jurisdiction to reopen the issue as to whether the goods were held for personal use.

56. There is no reason why the Appellant should not have received the seizure information notice and other notices sent to him by HMRC on 25 March 2012. In any event he was advised that he had thirty days within which to appeal the seizure to the Magistrates' Court failing which the seizure will be deemed lawful.

57. The Appellant did not challenge the legality of seizure and the goods were therefore deemed to be duly condemned as forfeit under paragraph 5 schedule 3 of CEMA. Thus the legality of the seizure has been deemed a fact.

58. The Appellant has not put forward any other grounds of appeal apart from saying that he will suffer financial hardship and will not be able to pay the assessment. As HMRC say, this is not a valid ground of appeal. The goods were lawfully seized as being held for a commercial purpose without the payment of duty and in consequence HMRC are entitled to assess the duty amount on the goods, and raise a penalty under schedule 41 paragraph 4 of the FA 2008.

59. The assessment has been correctly raised under s 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010.

38. The appeal is accordingly dismissed and the assessment and penalty confirmed.

39. 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.

MICHAEL CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 14 DECEMBER 2015