



**TC04802**

**Appeal number: TC/2014/06318**

*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**

**CHRISTOPHER GRAY**

**Appellant**

**- and -**

**HM REVENUE AND CUSTOMS**

**Respondents**

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

**Sitting in public at Kings Court, Royal Quays, Earl Grey Way, North Shields on 19  
August 2015**

**Robert Gray on behalf of the Appellant**

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

## DECISION

1. This is an appeal by Mr Christopher Gray (“the Appellant”) against a decision by HM Revenue and Customs (“HMRC”) in a letter dated 9 September 2013, to issue an assessment to excise duty in the amount of £1,727 in respect of goods held for a commercial purpose, seized as liable to forfeiture and a decision on 12 December 2012 to raise a wrongdoing penalty in the sum of £345.
2. 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**

3. On 28 July 2013 the Appellant was returning via Calais as a coach passenger from a day trip to Belgium. He was challenged at Dover Eastern Docks by Officers of the UK Border Force.
4. The Appellant was interviewed by Officer 11909 when it was established that he was in possession of twenty packets of tobacco equating to 10kg of Hand Rolling Tobacco (“the goods”). This is in excess of the 1kg (guidance limit) published by the UK Border Force (“Travelling to the UK”) guidance.
5. The Appellant confirmed ownership of the goods and produced a receipt. He said that he had paid 940 Euros in cash for the goods. He said that he had purchased the tobacco for his own personal use and that he intended to gift 2.5kg to his brother and 2.5kg to his father.
6. The Appellant told the interviewing Officer that he was not in work but that he had paid for the goods himself. He confirmed that he was aware of the guidelines and added that he had paid duty on the goods in the EU.
7. Taking into account the amount expended on the goods by the Appellant and the fact that he was not working, the Officer formed the view that the goods were held for a commercial purpose and that they were 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 arising 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.
8. As time with the Appellant was restricted because his coach was about to leave, Seizure Information Notice form BOR 156, 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, 28 July 2013.

5 9. Notice BOR 162 explains that the seizure was without prejudice to any further action that the Border Force may decide to take and that HMRC may raise an assessment and a wrongdoing penalty for any evaded tax. Notice 12A explains that a challenge to the legality of seizure in the Magistrates' Court must be made within one month of the date of seizure.

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

10 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.

15 12. On 9 September 2013 an assessment was issued by HMRC in the sum of £1,727 calculated in the following manner:

$$£172.70 \text{ (duty per kg)} \times 10 = £1,727.00$$

20 13. On 11 September 2013, the Appellant's father wrote to HMRC to offer further information as he wanted the decision to be reconsidered. He advised he would be corresponding on behalf of his son, as the Appellant suffers from ME. He said that the goods were for personal use and that the Appellant intended to gift some of the goods to his brother and his father.

25 14. HMRC requested signed confirmation from the Appellant that his father could act on his behalf, which he provided on 14 October 2013. His father then asked for a formal review of the decision.

30 15. On 2 December 2013, HMRC wrote to the Appellant to confirm an independent Officer had reviewed his case. The decision of 12 December 2012 was upheld and a full explanation of the review was given to the Appellant. He was advised that if he didn't agree with the decision he could appeal to the Tribunal within thirty days. 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.

35 'Not for profit'

40 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.”

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16. The reviewing Officer explained that the excise goods should not be restored because of the following aggravated circumstances:

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- A large quantity of excise goods were involved, 10 kg (more than 5kg) of hand rolling tobacco.
- Non-restoration was fair, reasonable and proportionate in those circumstances.

17. On 12 December 2013, HMRC raised a wrongdoing penalty in the sum of £345.40 under Schedule 41 of the Finance Act 2008. The penalty represented 20% of the assessment sum because a reduction of 80% (that is 100% of the maximum) had been given for the quality of disclosure.

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18. On 21 November 2014 the Appellant lodged an out of time Notice of Appeal with the Tribunal, appealing the assessment. His request that his appeal could proceed without payment of the assessment and penalty, was granted by HMRC on 18 December 2014.

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19. On 31 December 2014 HMRC confirmed that they did not oppose the Appellant’s application for an extension of time within which to appeal, and lodged 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.

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### **The Strike Out Application**

20. 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:

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

21. 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;”

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

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- 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

23. 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...”

24. 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 ...”

25. 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.”

26. 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.”

27. 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.

5 28. 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.

29. 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  
10 excise duty.

30. 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  
15 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  
20 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  
30 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  
35 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**

31. The Appellant appeals on the ground that:

40 i. The goods were not for resale. He had purchased them for his own personal use and family members. He had checked the guidance provided by UK

Border Force which states that there is no limit on goods brought into the UK if they are for personal use. It had taken him a long time to save up to buy the goods. The goods were not held for a commercial purpose.

- 5           ii. He suffers from chronic fatigue syndrome, anxiety and depression and felt under pressure and at a disadvantage when being interviewed by the Border Force Officer. He had not fully understood his rights to challenge the seizure.
- iii. He cannot afford to pay the Assessment. Receiving a tax levy/charge in addition to having the goods seized is wrong.

10       32. The Appellant did not attend the hearing but was represented by his father Robert Gray who reiterated the above grounds of appeal.

### **HMRC's Case**

15       33. Mr McKee for HMRC argues that the grounds of appeal, that the goods were intended for own use should be struck out for lack of jurisdiction. He accepts that some of the goods were to be gifted on a "not-for-profit" basis. However, because the quantity of the goods 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.

20       34. 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.

25       35. 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.

30       36. 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 CEMA. 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.

35       37. The seizure information notice and assessment warning information notice were sent with HMRC's letter of 28 July 2013 and therefore there is no reason why they should not have reached the Appellant. The Appellant was also advised at the time of seizure that he had thirty days within which to appeal to the Magistrate's Court. 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 30 above). The Appellant stated at the time of seizure that he was aware of the restrictions on the importation of tobacco and applicable allowances.

38. 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:

5 “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.

10 39. 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.”

15 40. Mr McKee says that the Appellant’s grounds of appeal stand no reasonable prospects of success. There is nothing in the grounds of appeal that suggest HMRC did not have the power to make the assessment or penalty or that they were improperly calculated.

20 41. 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.

42. 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).

25 43. The penalty is not under appeal but for the avoidance of doubt it should be stated that it was calculated in accordance with paragraph 6 schedule 41 FA 2008 as a percentage of the potential lost revenue.

30 44. 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. The minimum was therefore 20% of the potential lost revenue.

35 45. The appropriate penalty range was therefore 20-30% of the potential lost revenue. 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. The Appellant was  
40 therefore given the maximum mitigation of 80%.

46. The calculation was thus £1,726 x 20% = £345 (rounded down).

47. The Appellant does not put forward any special circumstances whereby the penalty could be reduced under paragraph 14 schedule 41 FA 2008.

5 **Conclusion**

48. The facts of the matter are not in dispute. The Appellant argues that the goods were for his own and his family's use and were not held for a commercial purpose. However the Tribunal does not have any jurisdiction to reopen these issues.

10 49. The Appellant was advised that he had thirty days within which to appeal the seizure of the goods to the Magistrates' Court, failing which the seizure would be deemed lawful. He 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.

15 50. The Appellant has not put forward any other valid grounds of appeal. Although he may have been recovering from chronic fatigue syndrome, anxiety and depression, this had not affected his ability to visit Belgium and purchase the goods. He informed the interviewing Officer that he was aware of applicable allowances and restrictions. There is no indication that he did not understand his rights of appeal to the Magistrates' Court, which in any event were clearly set out in HMRC's letter and  
20 Seizure Information Notice.

51. 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 FA 2008.

25 52. 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.

30 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.  
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**MICHAEL CONNELL**

**TRIBUNAL JUDGE**

**RELEASE DATE: 21 DECEMBER 2015**

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