



TC05061

Appeal number: TC/2013/07672 and TC/2015/00230

EXCISE DUTY – application to strike out grounds of appeal – Tribunal’s jurisdiction – deeming provisions of paragraph 5 of Schedule 3 to the Customs and Excise Management Act 1979

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Mr Carl Hodson

Appellant

- and -

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

TRIBUNAL: JUDGE Rachel Mainwaring-Taylor

Sitting in public at Fox Court, London on 16th November 2015.

Mr John Shelley, CTA, for the Appellant

Mr Simon Pritchard of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This was an application for strike out by the Respondents, on the basis that the Tribunal had no jurisdiction to hear the Appellant's appeal because it was made on the grounds that goods deemed by statute to have been duly condemned as forfeited were not in fact subject to duty. The Appellant argued that the deeming provisions should be binding only on the owner of the goods, not on the Appellant. The Appellant had not had any opportunity to appeal the seizure and so for him to be bound by the deeming provisions would be contrary to Article 6 of the European Convention on Human Rights ("ECHR").

2. The Appellant applied at the hearing to amend his grounds for Appeal to add that the Appellant was not "holding" the goods at the relevant time within the meaning of regulation 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ("the Regulations"). Since the meaning of "holding" was the subject of a case currently before the Upper Tribunal, it was agreed that the proceedings should be stayed pending the outcome of that case, but that the application to strike out the original ground of appeal and the Appellant's application to amend his grounds for appeal would be heard now.

3. The Tribunal allowed the Respondents' application to strike out the original ground of appeal and the Appellant's application to amend the grounds of Appeal.

Background and facts

4. On 17th May 2012 the Appellant was intercepted at Dover eastern Docks whilst driving vehicle registration number YN55 HOH attached to a trailer containing 15,750 litres of mixed wine. The documents showed the consignor of the goods to be Eurostop SARL with intended delivery to Plutus UK Limited. The goods were accompanied by ARC (Administrative Reference Code) number 12FRG007400003319045.

5. Border Force established that on 15th May 2012 the Appellant had driven the same vehicle with a load of alcoholic beverages using the same ARC number. Border Force seized the goods and issued the Appellant with an information sheet recording the details of the seizure.

6. The seizure was not challenged by the Appellant or anyone else.

7. The goods were deemed to have been duly seized and condemned under paragraph 5 of Schedule 3 to the Customs and Excise Management Act 1979 ("CEMA").

8. On 13th May 2013, the Appellant received a demand to pay excise duty of £39,908 and on 6th May 2014 he received a demand for a penalty in the sum of £7,981, which was later increased to £13,967, in relation to the unpaid excise duty.

9. The Appellant lodged an appeal on 7th June 2013 against the assessment to excise duty and a further appeal against the penalties on 26th August 2014.

Issues before the Tribunal

10. The issues before the Tribunal were:

- 5 (1) Whether to strike out the Appellant’s appeal on the grounds that the Tribunal had no jurisdiction to hear arguments that the goods were not duty payable (the original grounds given in his appeal notice); and
- 10 (2) Whether the Appellant should be allowed to amend his grounds for appeal to include the ground that he was not “holding” the goods at the relevant time within the meaning of regulation 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (“the Regulations”).

Application to amend grounds for appeal

11. The Respondents did not oppose this application and the Appellant’s application to amend his grounds for appeal was allowed.

15 Jurisdiction of the Tribunal

Respondents’ arguments

12. The Respondents outlined the legislative framework as follows:

- (1) Section 54 of the Alcoholic Liquor Duties Act 1979 (“ALDA 1979”) imposes a duty of excise upon wine (defined at section 1 of the ALDA 1979).
- 20 (2) Under section 1 Finance (No. 2) Act 1992 the Commissioners have the power to fix the time when the requirement to pay a duty owed will come into effect (“the duty excise point”), which they have done in the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (“the Regulations”) at regulation 13.
- 25 (3) Regulation 88 provides that where there is a contravention of any provision of or condition or restriction imposed by the Regulations, in relation to any excise goods liable to duty that has not been paid, those goods shall be liable to forfeiture.
- (4) Section 139 of CEMA 1979 permits an officer or constable to seize goods that are liable to forfeiture.
- 30 (5) Schedule 3 to CEMA provides a mechanism for challenging a forfeiture as follows:
- 35 “3. 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 at any office of customs and excise...

5. 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.”

(6) Section 12 of the Finance Act 1994 confers on the Respondents power to assess tax that is due.

13. The Respondents argued that paragraph 5 of Schedule 3 to CEMA deems the goods to have been duly condemned and forfeited. The FTT does not have power to go beyond that deeming provision. The FTT therefore has no jurisdiction to hear an appeal from the Appellant on the grounds that the goods were held in duty suspension and so no duty is payable.

14. The Respondents cited Mummery LJ in *HMRC v Laurence & Jones [2011] EWCA Civ 824 (“Jones”)* on the impact of the deeming provision:

“The deeming process limited the scope of the issues that the respondents 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 their own use....”

15. The Respondents cited three Upper Tribunal cases applying *Jones*: *HMRC v European Bond Trading Ltd [2014] UKUT 0226 (TCC)*, *Race v HMRC [2014] UKUT 0331 (TCC)* and *Slater v HMRC [2013] UKFTT 250 (TC)*.

16. In *European Bond Trading Ltd* Morgan J found that the effect of both an order of the magistrates court (in respect of some goods) and the deeming provisions of paragraph 5 of Schedule 8 of CEMA 1979 (in respect of other goods) was that, in law, as between HMRC and European Bond Trading Ltd, duty was not paid on the respective goods seized. The case concerned whether a review officer for HMRC should have properly based his review on the assumption that the goods had been duly seized and condemned. The court found that it was correct to do so and that HMRC did not need to look for evidence that might counter this assumption or provide the appellant with such documents that might assist it in showing that duty was paid on some or all of the goods. It was also irrelevant to enquire whether HMRC, as some earlier point in time, did sufficient to enquire as to whether duty had been paid. What mattered now was the position that had been established, namely that duty was not paid on the seized goods.

17. In *Race* Mr Justice Warren stated:

“*Jones* is clear authority for the proposition that the First-tier Tribunal has no jurisdiction to go behind the deeming provisions of paragraph 5 Schedule 3. If goods are deemed to be forfeited, whether in fact or as the result of statutory deeming, it follows that, having been bought in a Member State and then

imported by Mr and Mrs Jones, they were not held by the taxpayers for their personal use in a way which exempted the goods from duty. The reasoning and analysis in *Jones* did not turn on the fact that the case concerned restoration of goods and not assessment to duty.”

5 18. The Respondents concluded that *Race* was authority for the reasoning in *Jones* (which concerned restoration) applying equally to cases relating to the assessment of duty.

19. The Respondents cited *Slater* in which Judge Mure QC referred to Mummery LJ in *Jones*, who considered:

10 20. “...that the First Tier Tribunal had no power to re-open and re-determine the question whether or not the seized goods had been legally imported for the taxpayers’ personal use; that question was already the subject of a valid and binding deemed determination under the 1979 Act; the deeming was the consequence of the taxpayers’ own decision to withdraw their notice of claim contesting the condemnation and
15 forfeiture of the goods and the car in the courts; the First Tier Tribunal only had jurisdiction to hear an appeal against a review decision made by HMRC on the deemed basis of the unchallenged process of forfeiture and condemnation; and the appellate jurisdiction of the First Tier Tribunal was confined to the correctness or otherwise of the discretionary review decision not to restore the seized goods and
20 car.”

21. Judge Mure went on to conclude:

“We agree with Mr Artis’ submission that, irrespective of the merits of any argument as to Human Rights or other equitable remedies, the Tribunal’s jurisdiction precludes us from considering them.”

25 22. The Respondents contended that the Appellant’s argument that he was not the owner of the goods and therefore had not been able to appeal against the forfeiture had no relevance since the effect of Schedule 3 was to make a conclusive determination regarding the goods, which determination was unaffected by arguments as to the correct person to challenge forfeiture.

30 23. The Respondents cited *Duggan v HMRC* [2015] UKFTT 0125 (TC):

“The Tribunal accepts that Mr Duggan was legally unable to challenge the seizure of the goods or the vehicle as he was not the owner of either the goods or the vehicle. However, under the legislation as noted in paragraph 17 the goods and the vehicle are deemed to have been validly seized in the absence of
35 any challenge.”

24. The Respondents also cited the case of *Butlers Ship Stores Limited v HMRC* [2013] UKUT 0564 (TCC), which involved a warehouse operator who was made liable for excise duty payable on goods notwithstanding that it was not the person primarily responsible for the liability and had not behaved improperly. The Upper
40 Tribunal noted that there were ways the warehouse operator could have protected

himself from this potential liability (provided for in legislation), including taking out insurance or seeking a guarantee or indemnity or bond from the owner or transporter of the goods as part of its contract for services. The Respondents acknowledged that the Appellant could not assert certain points in appealing the assessment against him, but suggested that *Butlers* provided authority that this did not necessarily prejudice him unfairly since he could have sought to protect himself in other ways.

25. Article 6 of the ECHR does not apply to tax cases and so is not engaged in the appeal against the assessment to duty. The Respondents noted that this did not necessarily mean it was not engaged in the penalty appeal, but that was not before the Tribunal today.

26. Mr Pritchard concluded the Respondents' submissions, stating that:

(1) The deeming provisions were clear and had been upheld in numerous cases.

(2) Once the goods had been deemed to be duly condemned, the FTT could not contradict that state of affairs. That the goods were duly condemned had to be accepted as a fact. The effect of the deeming provisions was absolute and could not depend on the particular circumstances.

(3) If HMRC were wrong in this, the FTT would be able to revisit and re-examine proceedings in the Magistrates Court. It could not be correct that one person (a third party) could question the validity of the condemnation after the deeming provisions took effect but another (the owner) could not.

(4) Therefore, the arguments as to whether duty was payable could not be raised.

(5) The provisions of Article 6 did not alter the position since they did not apply in this case.

Appellant's arguments

27. Mr Shelley presented the Appellant's arguments as follows.

28. The Appellant was not the owner of the goods and therefore it was not open to him to appeal against the forfeiture.

29. The Appellant was faced with an enormous assessment to tax. As far as he was aware at the time, everything was in order with the paperwork and the goods were being transported bond to bond, meaning no duty was payable. The Appellant needed to be able to introduce evidence on this to appeal the assessment against him. It would not be consistent with his human rights to deny him such an important avenue of argument.

30. The Appellant accepted that the deeming provisions applied, but not that they were binding on him. Not being the owner of the goods, it had not been open to him to appeal against the forfeiture. Mr Shelley referred to the notice of seizure dated 17th

May 2012, which was addressed to the owner of the goods, Empire, not to the Appellant.

31. Mr Shelley referred to *Jones*, saying that it did not provide authority that the deemed state of affairs was binding on third parties since the case involved owners.

5 32. Mr Shelley also sought to question what precisely was deemed by paragraph 5 of Schedule 3 CEMA 1979, suggesting that the importation might be deemed to be unlawful without the liability or duty necessarily being deemed to be payable.

33. Alternatively, Mr Shelley argued that the deemed state of affairs might be binding on the owners of the goods (as shown in the cases cited by the Respondents) but not
10 on third parties.

34. As to the Respondents' argument that Article 6 of the European Convention on Human Rights did not apply in tax cases, Mr Shelley said he had not had the opportunity to prepare a response and felt that the Respondents should have raised the point in advance of the hearing.

15 **Discussion**

35. In *Jones Mummery LJ* summarised his conclusions "for the future guidance of tribunals and their users" as follows (emphasis added by the Tribunal):

20 "1. The respondents' goods seized by the customs officers could only be condemned as forfeit pursuant to an order of a court. The FTT and the UTT are statutory appellate bodies that have not been given any such original jurisdiction.

2. The respondents had the right to invoke the notice of claim procedure to oppose condemnation by the court on the ground that they were importing the goods for their personal use, not commercial use.

25 3. The respondents in fact exercised that right by giving HMRC a notice of claim to the goods, but, on legal advice, they later decided to withdraw the notice and not to contest condemnation in the court proceedings that would otherwise have been brought by HMRC.

30 4. The stipulated statutory effect of the respondents' withdrawal...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 of 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.**
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5. The deeming process limited the scope of the issues that the respondents 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 their own use....The FTT's jurisdiction is limited to hearing an appeal against a discretionary decision by HMRC not to restore the condemned goods...the deemed effect of the respondents' failure to contest condemnation of the goods by the court was that the goods were being illegally imported by the respondents for commercial use

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6. The deeming provisions in paragraph 5 and the restoration procedure are compatible with Article 1 of the First Protocol of the Convention and with Article 6, because the respondents were entitled under the 1979 Act to challenge in court, in accordance with Convention compliant legal procedures, the legality of the seizure of their goods...Their Convention rights were not infringed by the limited nature of the issues that they could raise on a subsequent appeal in the different jurisdiction of the tribunal against a refusal to restore the goods.

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7. ...The key to the understanding of the scheme of deeming is that in the legal world created by legislation the deeming of a fact or of a state of affairs is not contrary to 'reality'; it is a commonly used and legitimate legislative device for spelling out a legal state of affairs consequent on the occurrence of a specified act or omission. Deeming something to be the case carries with it any fact that forms part of the conclusion...

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9. ...The Convention concerns expressed in *Gascoyne* are allayed once it has been appreciated, with the benefit of the full argument on the 1979 Act, that there is no question of an owner of goods being deprived of them without having the legal right to have the lawfulness of seizure judicially determined one way or the other by an impartial and independent court or tribunal..."

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36. This Tribunal is bound by the decision in *Jones*. It is not the facts of that case that are relevant here, but the principles decided in it. The key principle is that where the deeming provisions of paragraph 5 of CEMA 1979 take effect, it must be taken as fact that the goods in question have been duly seized and condemned. In this case, it is not disputed that the circumstances required for paragraph 5 of CEMA 1979 to take effect have arisen. Therefore, as a matter of law, the goods were duly seized and condemned.

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37. The Tribunal has not seen any legal authority for the deeming provisions of paragraph 5 of CEMA 1979 to be qualified in particular circumstances or in relation to particular people. The Tribunal must therefore conclude that the deeming is absolute.

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38. As to the Appellant's rights under the ECHR, the reasoning in *Jones* would not apply since the Appellant was not the owner of the goods and therefore could not challenge the legality of the seizure in the Magistrate's Court. However, whilst the Tribunal appreciates the apparent unfairness of the Appellant's position, since Article

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6 of the ECHR does not apply in relation to tax cases, its provisions cannot assist the Appellant here.

39. The Appellant's ground of appeal that the goods were not in fact subject to duty calls into question whether the goods were duly seized and condemned. The effect of the deeming provisions is that the goods were duly seized and condemned. If they were duly seized and condemned then it follows that they were subject to duty which had not been paid. The Tribunal has no jurisdiction to consider this state of affairs as anything other than fact.

40. Accordingly, the Respondents' application to strike out the Appellant's original ground of appeal, that the goods were not duty payable, is allowed.

Further directions

41. The Tribunal directs that the proceedings should be stayed pending the outcome of the Upper Tribunal's decision in the case of Mr Liam Patrick McKeown (reference UT/2015/0048) on the meaning of "holding". Thereafter, the Appellant shall have 30 days to submit amended grounds for appeal and the Respondents shall have 60 days from the submission of the amended grounds of appeal to submit an amended statement of case.

42. The Tribunal directs that the Appellant's penalty appeal (listed separately under reference TC/2015/00230) should be joined to the main appeal under TC/2013/03972.

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.

RACHEL MAINWARING-TAYLOR

TRIBUNAL JUDGE

RELEASE DATE: 26 APRIL 2016