[2016] UKFTT 0573 (TC)

TC05322

Appeal number: TC/2016/01332

EXCISE DUTY – assessment and penalty in relation to excise goods seized from Appellant – application by HMRC to strike out the appeal – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

JAMIE GARLAND **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER

Sitting in public at Liverpool on 9 August 2016

The Appellant in person

Rebecca Young of HM Revenue & Customs Solicitor's Office for the Respondents

DECISION

1. The Appellant appeals against an assessment to excise duty and a wrongdoing penalty, which were issued by HMRC following the seizure of a quantity of tobacco from the Appellant on her arrival at Gatwick Airport.

2. The Respondent made an application to strike out the appeal. The hearing of the strike out application was held on 9 August 2016. At that hearing, the Tribunal gave an oral decision, refusing the HMRC application. At the hearing, Ms Young on behalf of HMRC requested full written reasons for the decision, which are now provided.

3. The HMRC case is as follows. On 24 July 2014, the Appellant arrived with her mother at Gatwick Airport on a flight from Alicante. She entered the green, nothing to declare, channel. The UK Border Force stopped her and found 21.55 kg of hand rolling tobacco in her luggage. When questioned, the Appellant said that the suitcase did not belong to her, and that it had been given to her by a man she did not know who agreed to pay her £200 for bringing it into the UK. The tobacco was seized. Subsequently, the assessment to excise duty and penalty were issued by HMRC.

4. The Appellant does not dispute that tobacco was seized from her by HMRC, and accepts that she did not challenge the lawfulness of the seizure by bringing proceedings in the magistrates' court.

5. In a letter to HMRC dated 2 February 2015, the Appellant's mother stated that neither she nor her daughter had ever been a "trader", and that she and her daughter had been told by a customs official at Gatwick that they were not in any trouble and that no further action would be taken as the tobacco had been seized.

6. In a letter to HMRC dated 12 February 2015, the Appellant stated that she had been informed by the officer at Gatwick Airport that she could pay the duty and keep the tobacco, "and that was the end of it and nothing more would happen".

7. In an undated letter received by HMRC on 9 April 2015, the Appellant and her mother indicated that they wished to appeal to the Tribunal.

8. The Appellant's notice of appeal sets out the following grounds of appeal:

> I gave the Customs officer the tobacco. I was told I was in no trouble whatsoever. I was asked if I wanted to keep the tobacco if I paid the VAT which I said no I did not have the money to do so and said they could take it all off me. I cooperated with the Customs questions and was [illegible, apparently "told"] there would be no further action. Then around 7 months later received a fine of £3,722 duty and £1,302 penalty. It's very harsh and I was totally unaware I was doing anything wrong. …

9. On 20 May 2016, HMRC made the present application to strike out the appeal. The application is for the appeal against the assessment to be struck out under rule 8(2)(a) of the Tribunal's Rules (on the basis that the Tribunal lacks jurisdiction), or

alternatively under rule 8(3)(c) (on the basis that there is no reasonable prospect of the appeal succeeding), and for the appeal against the penalty to be struck out under rule 8(3)(c).

10. The strike out application contends as follows. The tobacco was seized as liable to forfeiture under s 139 of the Customs and Excise Management Act 1979 ("CEMA") because of a liability to forfeiture under regulation 88 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010. As the Appellant did not challenge the lawfulness of the seizure in proceedings in the magistrates' court, the tobacco is deemed to be duly condemned as forfeited by virtue of paragraph 5 of Schedule 3 to CEMA. This means that it is no longer open to the Appellant to challenge the fact that the tobacco was held for a commercial purpose: HMRC rely on the decisions in *HMRC v Jones* [2012] Ch 414, [2011] EWCA Civ 824 ("*Jones*") and *Revenue & Customs v Race* [2014] UKUT 331 (TCC) ("*Race*"). The Tribunal has no jurisdiction to determine otherwise, and the Appellant's appeal discloses no grounds with any prospect of succeeding.

11. As regards HMRC's reliance on rule 8(2)(a), at the hearing Ms Young said that the reason why HMRC was seeking to strike out the appeal was the point of principle in *Jones* and *Race*. Ms Young accepted that the Tribunal did have jurisdiction to hear an appeal against the assessment and penalty if the grounds of appeal did not involve a challenge to the fact that the tobacco in question was being held for a commercial purpose and was duly condemned as forfeited on that basis.

12. However, it is not apparent that the principles in *Jones* and *Race* have any role to play in this appeal. This is for the simple reason that the Appellant has nowhere suggested that the tobacco was not held for a commercial purpose, or that it was not liable to seizure or forfeiture on that basis. The Appellant's case is that the tobacco did not belong to her. That is said to be the reason why she did not challenge the seizure in the magistrates' court. The HMRC case is that she said in interview that the goods belonged to a third person who paid the Appellant to transport them to the UK. The Appellant's appeal has not been put on the basis that the tobacco was for her own use, or for the personal use of the owner of the tobacco, rather than for a commercial purpose.

13. At the hearing, the Appellant was unrepresented. She indicated that she had no knowledge of the legislation applicable to her case, and no understanding of the decisions in *Jones* and *Race*. The effect of those decisions was explained to her, and she was informed that she would not be able to argue that the tobacco was for her own use or the personal use of the owner, and that her appeal would have to proceed on the basis that the tobacco was imported for a commercial purpose. The Appellant then indicated that she understood this, but that she still wanted to proceed with her appeal.

14. As regards HMRC's reliance on rule 8(3)(c), the Tribunal accepts that if the notice of appeal sets out no grounds of appeal with any reasonable prospect of succeeding, the Appellant risks a successful strike out application being made by HMRC. However, in cases involving unrepresented appellants, it can occur that the

notice of appeal fails to disclose any arguable grounds of appeal, even though there is potential merit in the appeal.

15. In *Aleena Electronics Limited v Revenue and Customs* [2011] UKFTT 608 (TC), it was said at [60]:

> It is the ethos of the Tribunal system and certainly that of the Tax Chamber of the First-tier Tribunal that a taxpayer can bring an appeal to a tax-expert Tribunal without the expense of instructing representatives. The Tribunal hearing a substantive appeal will be expert: it will know the law and will take the legal points at the hearing that an unrepresented appellant may not. Where the Appellant is unrepresented the Tribunal panel will take on a more inquisitorial role and will ask witnesses questions which an unrepresented Appellant may not think to ask.

16. Default paper cases and simple basic cases in particular may involve an unrepresented appellant who wishes to exercise the right of appeal to the Tribunal against a decision that the appellant considers to be harsh and unfair, even though the appellant has no knowledge of the law and is incapable of articulating a legally arguable ground of appeal. It is possible for the Tribunal in such a case to hear the appellant's account of the facts and to consider this together with all of the evidence presented by the parties, and for the Tribunal to satisfy itself as to the facts, and to determine for itself whether the HMRC decision is in accordance with the facts and the law. In such a case, even if it should turn out that the appeal was hopeless, the unrepresented appellant at least has the satisfaction of knowing that his or her case has been considered by an independent judicial body. Furthermore, the appeal may not turn out to be hopeless, and it may ultimately be allowed in whole or in part. In the case of an unrepresented appellant, failure of a notice of appeal to state an arguable ground of appeal should therefore not in every case necessarily lead automatically to a strike out application being granted.

17. That is not to say that the Tribunal should allow every case to proceed, no matter how hopeless it appears, merely because the appellant is unrepresented. Apart from anything else, the Tribunal will always have to have regard to the overriding objective in rule 2 of the Tribunal's Rules. In a case of any complexity, hearing and determining a strike out application may involve less time and fewer resources than the hearing of the substantive appeal. In such a case, if no viable grounds of appeal are set out in the notice of appeal, it may therefore be proportionate and efficient initially to determine at a strike out hearing whether there is any justification for the appeal to proceed to a substantive hearing, and for a strike out application to be granted if no ground of appeal with a reasonable prospect of succeeding has been identified at the strike out hearing. On the other hand, in a default paper case or a simple basic case, the time and resources required for a strike out application may be the same or nearly the same as the time and resources required to hear the substantive appeal. In such a case, the making of a strike out application may be disproportionate, unmeritorious though the appeal may appear to be. Given that there is always the possibility that the strike out application may not be granted, the most efficient way of

disposing of the case may be simply to proceed to hear the substantive appeal, giving the appellant his or her day in court.

18. The Tribunal is satisfied that the present case is such a case. It has been allocated to the standard category, but it appears to be no more complex than a simple basic case. The Appellant indicated that she anticipated presenting no evidence other than her own oral evidence (and possibly that of her mother). For the strike out application hearing, HMRC produced a bundle of documents which appears to contain nearly all of the documents that would be expected in the bundle at a substantive hearing. For the strike out application hearing, HMRC also prepared a skeleton argument. The hearing of the strike out application was listed for half a day. It is difficult to imagine that the substantive hearing of this appeal could take more than half a day. Had the hearing on 9 August 2016 been a hearing of the substantive appeal rather than of a strike out application, this appeal might have been dealt with to finality by now. The Tribunal doubts that the strike out application would have been made in a case such as the present but for the fact that HMRC considered the point of principle in *Jones* and *Race* to be in issue (which for the reasons above, it is not).

19. In its discretion, the Tribunal therefore refuses the HMRC application.

20. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 15 August 2016