



TC05489

Appeal number: TC/2015/02280

EXCISE DUTY – Hand-rolling tobacco brought in from another Member State - Assessment to duty - Jones and Race applied - Duty payable - Appeal against duty assessment dismissed - Excise wrongdoing penalty - Appeal against penalty allowed in part - Further reduction to take account of 'telling'

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JANET MOORE

Appellant

- and -

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

**TRIBUNAL: JUDGE CHRISTOPHER MCNALL
MR DEREK ROBERTSON**

**Sitting in public at Liverpool Civil and Family Court, 35 Vernon Street,
Liverpool L2 2BX on 12 October 2016**

The Appellant appeared in person

**Ms Joanna Vicary, of Counsel, instructed by the General Counsel and Solicitor
to HM Revenue and Customs, for the Respondents**

DECISION

1. This is our decision in relation to Ms Moore's appeal against two decisions:
 - (1) a decision dated 16 February 2015 to issue an excise duty assessment in the sum of £3,392; and
 - (2) a decision of that same date to issue an excise wrongdoing penalty in the sum of £1,543, varied by HMRC on 10 July 2015 to £780.
2. We heard evidence from Ms Moore, and also from Officer Griffiths and Officer Newbigging.
3. We make the following findings of fact:
 - (1) On 22 August 2014 Ms Moore flew from Alicante to Gatwick;
 - (2) She was stopped by Officer Griffiths in the Green Channel;
 - (3) A search of her baggage revealed 18.8 kg of hand-rolling tobacco;
 - (4) Ms Moore was asked some questions, and she answered them. We accept the account of those exchanges which is contained in Officer Griffiths' note book;
 - (5) A commerciality statement was read to Ms Moore;
 - (6) The tobacco was seized and Ms Moore was issued with forms BOR 156 (Seizure Information Notice), BOR 162 (Warning Letter about Seized Goods), both of which she signed, and Public Notices 1 and 12A.
4. On 11 February 2015 Ms Moore wrote to HMRC that she was of the opinion that 'as we are part of the European Union, a free European Trade Agreement was applicable', and that taxes had already been paid.
5. However, a different picture emerges from the Notice of Appeal, dated shortly thereafter - 24 February 2015. The Notice of Appeal is consistent with what Ms Moore told the Officer at the airport. Ms Moore was bringing the tobacco over for a friend who said he would give her £100 towards her flight 'as a goodwill gesture for doing him a favour. I did ask him if it was OK to bring it over, he told me that as it was bought in an EU country, the duty was paid so there is nothing to worry about ... I was duped by this so-called friend.'
6. In her letter, although not in her Notice of Appeal, Ms Moore sought to challenge the decisions on the basis that she had been told by Officer Griffiths that no further action would be taken. Officer Griffiths denied that she had said this. Upon hearing the evidence of Ms Moore and Officer Griffiths, it was clear to us that the parties in reality agreed that Officer Griffiths had not made any definite promise that there would be no further action, but had merely remarked that there 'may' not be any further action. That is also consistent with the Officer's notebook, which we find to be accurate, when it said that 'customs may decide to charge you the excise duty that had been evaded' and 'as I say, they might ... levy a fine'. The Warning Letter about seized

goods (BOR 162) which Ms Moore received and signed makes the same point. We find that no definite promise had been made.

Excise Duty Assessment

5 7. When it comes to the excise duty assessment, the tobacco was never claimed. We find that Ms Moore was a courier and had been paid to carry the tobacco to the UK. Ms Moore was always very clear that the tobacco was not hers, but belonged to somebody else, and we find this as a fact. No claim was ever made by the owner of the seized tobacco.

10 8. Ms Moore did not dispute the amount of duty nor HMRC's right to raise the assessment.

9. The effect of this is that this Tribunal, in this case, has no jurisdiction in relation to the excise duty assessment of £3,392.

15 10. This requires explanation since it may come as somewhat of a surprise to Ms Moore. It is the result of the decisions of the Court of Appeal in *HMRC v Lawrence Jones and Joan Jones [2011] EWCA Civ 824* and of the Upper Tribunal in *Race v HMRC [2014] UKUT 331 (TCC)*. Both of those decisions come down to us from higher courts or Tribunals, and they bind us. We have to apply and follow them.

20 11. The fact that no claim was made to the tobacco in the Magistrates' Court means that the tobacco is deemed to be for commercial use, and is forfeit to the Crown. Indeed, it was never asserted (or even suggested), whether by Ms Moore or by anyone else, that the tobacco was for anyone's personal use (as opposed to it being sold on). Ms Moore never asked for the tobacco to be restored to her. That is unsurprising. Such a claim would have been almost impossible to sustain given that Ms Moore was not the owner of the tobacco, and was not going to smoke it herself.

25 12. In *Jones*, the Court of Appeal held unanimously (at Paragraphs 66 to 71) of its decision that:

(1) The legality of seizure was for decision by the Magistrates' courts in condemnation proceedings and not for this Tribunal;

30 (2) In the scheme of the legislation governing the procedures relating to imported goods seized by HMRC, Parliament has provided different avenues for challenging condemnation and forfeiture on the other hand (via the courts), and the restoration procedure on the other (via an appeal to this Tribunal against the refusal of HMRC to restore goods).

35 13. In *Race*, Mr Justice Warren was clear that the reasoning of the Court of Appeal in the *Jones* case meant that the First-tier Tribunal cannot go behind the deeming effect of Paragraph 5 of Schedule 3 of the *Customs and Excise Management Act 1979* when it comes to an assessment to excise duty: see Paragraphs [26] and [33] of the decision. If no challenge is made in the Magistrates' Court to the seizure, in the limited time-window for such a challenge, then the goods are deemed to be for

commercial use, and the excise duty assessment raised on that basis cannot be challenged in this Tribunal.

14. In this case, the tobacco was deemed not to be held by Ms Moore for her own personal use.

5 15. Accordingly, we are bound, on the basis of the decisions of the Court of Appeal in *Jones*, and the Upper Tribunal in *Race*, to dismiss the appeal against the excise duty assessment.

Excise duty wrongdoing penalty

10 16. However, we take a different view on the excise duty wrongdoing penalty.

17. We note that HMRC had revised its view of the wrongdoing from 'deliberate' to 'non-deliberate', and 'prompted', and had already applied discounts for 'helping' and 'giving'. Ms Vicary laconically observed that these discounts appeared 'generous' but we were not invited to adjust the characterisation of the wrongdoing or the discounts.

15 18. No discount at all had been applied in relation to 'telling'. Ms Vicary drew our attention to the penalty explanation, which said that this was because Ms Moore had not stayed for further questions at the airport. However, on the facts of this appeal, we consider that to be an unduly narrow view. We do not accept that 'telling' was accounted for under the other heads.

20 19. During the interview at the airport, Ms Moore was answering the questions she was being asked, even though she was not under arrest and she was free to leave at any time. In our view, she was, within the practical limits of an interview conducted at the customs bench, candid and co-operative.

25 20. She was asked if had a large quantity of cigarettes or tobacco, and she immediately said that she did. There was no apparent hesitation, or any apparent attempt to obfuscate, mislead, or evade. She volunteered the information, without being specifically asked, that the tobacco was not hers. She volunteered the information that she was being paid to bring it in. This was unprompted and, again, candid. She decided to leave only after she had been told she was free to do so, but, 30 when she did so, she again explained that this was because the tobacco was not hers, but that she was simply being paid to bring it over.

21. Given the above, we consider that the wrongdoing penalty should be varied so as to give the maximum available discount for 'telling'. That penalty should be adjusted accordingly.

35 ***Jacobson v HMRC***

22. During the hearing, Ms Vicary properly drew our attention to the recently-issued decision of the First-tier Tribunal in *Susan Jacobson v HMRC [2016] UKFTT 570 (TC)*. In that case, the Tribunal (Judge Richard Thomas and Miss Stott) upheld an 40 excise duty assessment imposed in relation to tobacco seized in the green channel (on

a wholly conventional application of the decisions in *Jones* and *Race*) but allowed the appeal in relation to the excise duty wrongdoing penalty.

23. We are told by Ms Vicary that the decision in *Jacobson* is presently subject to an application by HMRC to Judge Thomas for permission to appeal. But Ms Vicary
5 did not know and could not say how far HMRC would pursue that appeal.

24. During the hearing, we considered whether we should, of our own initiative, stay Ms Moore's appeal against the wrongdoing penalty pending determination of any appeal in *Jacobson*. Ms Moore wanted us to deal with everything at once. For reasons which we understand, she did not want a stay.

10 25. We were told by Ms Vicary that Ms Moore's was the first appeal against a wrongdoing penalty to be heard after *Jacobson* and that HMRC was not aware of any other appeal in which a stay had been requested or granted.

15 26. We decided not to stay any part of the appeal. This was a case management decision, made of our own initiative, supported by both parties (or, at least, not opposed by either of them) at a full hearing, with both parties present together with (in the case of HMRC) their witnesses.

27. In the circumstances, this chimed with our obligation to deal with cases fairly and justly, which includes 'dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs, and the
20 resources of the parties', as well as 'avoiding delay, so far as compatible with proper consideration of the issues': Rule 2(2)(a) and (e) of *The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009: SI 2009/273 (L.1)*

28. It could be many months before any appeal in relation to *Jacobson* is heard. Permission to appeal may be refused or HMRC may even decide to withdraw its
25 appeal. Such delay would be not be fair to the parties to this appeal. Staying the appeal would simply lead to a further hearing when we were in fact in a position to deal with everything together.

29. In terms of substance, *Jacobson* is a decision of a tribunal of equivalent jurisdiction and so it does not bind us. In the present appeal, no point was ever taken
30 by Ms Moore that her apprehension in the green channel meant that no excise duty point had been passed. If it should ultimately turn out that persons apprehended in the green channel have not passed an excise duty point, so as to make them liable to a wrongdoing penalty, then Ms Moore will be able, if she is so minded, to issue a further appeal. Although any such fresh appeal would be out of time, Ms Moore
35 would be able to point to the fact that, at the time her appeal was heard, *Jacobson* had only been heard at first instance.

Decision

30. The appeal against the excise duty assessment is dismissed. We uphold the
40 excise duty assessment in the sum of £3,392.

31. The appeal against the excise duty wrongdoing penalty is allowed in part. We vary the penalty in the way set out above, with HMRC to perform the arithmetic.

32. 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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**Dr CHRISTOPHER McNALL
TRIBUNAL JUDGE**

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RELEASE DATE: 15 NOVEMBER 2016