[2017] UKFTT 0843 (TC)

TC05568

Appeal number: TC/2014/03033

EXCISE DUTY – Article 6 EHCR in relation to assessments to excise duty – no infringement – minimum penalties— strike-out application – no prospects of success in appeal – application granted

FIRST-TIER TRIBUNAL
TAX CHAMBER

MARCIN STANISZEWSKI **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT

Sitting in public at North Shields on 12 October 2016

Tomasz Krause, for the Appellant

Anthony Senior, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

Submissions from Respondents dated 25 November 2016

DECISION

Background

1. This is the third hearing in this appeal. In the first hearing, cited at 2015 UKFTT 349 (TC) ("the first Decision"), the Tribunal (Judge Walters QC and Ms Pollard) dismissed an application by the respondents ("HMRC") to strike out the appellant's appeal against an assessment to excise duty (in the sum of £799) and a non-deliberate wrong doing penalty (in the sum of £159) imposed on him following the seizure of 3,560 cigarettes brought into the United Kingdom from Poland.

2. On 18 November 2015, perhaps not surprisingly in the light of the Tribunal's decision, amended grounds of appeal incorporating the issues of consumption and proportionality were served on behalf of the appellant.

3. There then followed a number of interlocutory applications. Ultimately the second hearing, which was described as a preliminary hearing on the consumption and proportionality issues, was heard by Judge Brooks on 4 February 2016 and is cited at 2016 UKFTT 0128 (TC) ("the second Decision").

4. In summary Judge Brooks ruled that the Tribunal did not have jurisdiction to hear the arguments about consumption or proportionality. He referred to and relied upon the decision of the Upper Tribunal in *Revenue & Customs v Nicholas Race*[1] ("Race") to the effect that in the absence of any timeous challenge to the seizure of the cigarettes the appellant could not challenge the assessment on the basis that the goods were acquired for personal use.

5. No appeal against that decision was lodged and the time limits have lapsed.

6. On 1 June 2016 HMRC made a further application to strike out the remaining element of the appeal being the penalty. No response to that application has been received.

7. On 2 June 2016, the Tribunal issued Directions of consent. In particular those Directions indicated that by no later than 29 July 2016 both parties should serve on each other witness statements on which they intended to rely on at this hearing and that seven days prior to this hearing skeleton arguments should be served on each other. The appellant has never complied with any of those Directions. HMRC did.

8. Accordingly at the outset of this hearing it was by no means clear what the stance of the appellant might be and therefore what issues were in contention.

9. Mr Krause intimated to the Tribunal that there had been no compliance with those Directions since the appellant, on advice, had decided that there were no "special circumstances" in relation to the penalty and that therefore no witness

[1] 2014 UKUT 0331 (TCC)

statement was required. The appellant intended to rely on the arguments advanced at previous hearings and therefore had not lodged a skeleton argument.

The Issues

10. After some debate it became clear that the issues in contention were:-

(a) *Validity of assessment*

Mr Krause wished to argue that the "deeming provisions" in paragraph 5 of Schedule 3 to Customs & Excise Management Act 1979 ("CEMA") should not apply and that therefore the assessment was invalid.

(b) *Article 6 EHCR*

Initially it seemed that there was an argument from Mr Krause that this was engaged in regard to both the assessment and the penalty but it was conceded that it related only to the assessment.

(c) *The penalty*

Both parties were agreed that the minimum possible penalty had been applied so the only other potential reduction related to special circumstances. Accordingly since the appellant was advancing no arguments on special circumstances, if the assessment was upheld then the penalty stood as unchallenged.

Discussion

Validity of assessment

11. As far as the said "deeming provision" is concerned, Judge Brooks made it absolutely explicit at paragraphs 23 and 24 of the second Decision that the said deeming provision had been clarified by the Court of Appeal in *HMRC v Jones & Jones*[2] ("Jones") and the Upper Tribunal in *Race*. At the outset Mr Krause endeavoured to argue that this hearing should consider the validity of the assessment and should distinguish this case on the facts generally from the case of *Jones*. I was simply not prepared to entertain any argument on that point. In the second hearing Judge Brooks made it entirely explicit at paragraph 27 of his decision that:-

> "… These issues, as is clear from *Jones* and *Race*, like that of liability to seizure and forfeiture have been conclusively determined by reason of the deeming provision in paragraph 5 of Schedule 3 to the Finance Act 1994 and, as such, the Tribunal does not have the jurisdiction to determine them. As Warren J said at [26] of *Race*:
>
> > 'Jones is clear authority for the proposition that the First-tier Tribunal has no jurisdiction behind the deeming provisions of paragraph 5 Schedule 3'."

At paragraph 71(7) of *Jones*, Mummery LJ stated:

> "Deeming something to be the case carries with it any fact which forms part of that conclusion".

[2] 2011 STC 2206

That remains the case. I cannot distinguish *Jones* on the facts generally.

Article 6 EHCR

12. Judge Brooks then went on to say in paragraph 28:-

> "Also, I appreciate that Mr Krause sought to distinguish *Jones* on the facts. However, this was in relation to an Article 6 EHCR argument about which, as it is not before me in this hearing, I need not say anything more."

13. I rejected HMRC's argument that this was *res judicata*. An argument based on Article 6 EHCR, in relation to the assessment, had never been decided. I therefore went on to consider the argument.

14. At the heart of the argument for the appellant was the fact that it was alleged that the appellant did not speak good English. When stopped by the Officer the "Initial Questions" form was completed in both English and Polish and is to be found at documents 69 and 70 in the Bundle. It was argued that those documents were unbalanced and directed at providing information for the State to "charge" the appellant with a crime. I simply do not accept that. They are straightforward questions relating to the factual context.

15. A copy of the excerpt from the Officer's Notebook was also produced. It can be seen from that that those Initial Questions were introduced part of the way through the interview (document 67) and that the appellant answered a number of other questions before and after the form was completed. The answers to those questions are appropriate and evidence an understanding of what was being said to him.

16. The supplementary argument was that the Seizure Information Notice, the warning letter about the seized goods and Public Notice 12A which were furnished to the appellant were in English and that therefore the appellant had not received appropriate notice and had not understood that his right to appeal was limited to a period of 30 days.

17. It was argued that this Tribunal should say that it was wrong of the Officer to have given the information in English and that the Tribunal should ignore the 30 day time limit and effectively "start it running" from the date of issue of this decision. I pointed out quite unequivocally that I had absolutely no power to do that. It was further argued that the English law in this regard was wrong. I pointed out that I had to deal with the law as enacted by Parliament.

18. Mr Krause had in fact advanced some of this argument at the first hearing. At paragraph 17 of the first Decision Judge Walters stated:-

> "17. We consider (without deciding) that the answer to this point may well be that it was open to Mr Staniszewski to take legal advice immediately following the seizure (as he had, apparently, immediately following receipt of HMRC's letter dated 30 April 2014) and on this basis his Convention rights cannot be said to have been materially infringed".

I agree entirely with that assessment and so find.

19. The appellant knew that his goods had been seized. He knew that he had been given warnings. He has been living and working in this country for some time. He could have accessed assistance. Like so many other appellants involved in similar seizures, he chose not to do so.

20. I referred both Counsel to *Richard Lissack v HMRC*[3] ("Lissack") which, although not binding on me and relating to different penalty provisions, rehearses in commendable detail a discussion and conclusions on Article 6 EHCR in relation to penalties. Mr Krause confirmed that he advanced the Article 6 argument only in relation to the assessment. The point is that, as Lissack states at paragraph 57 "… Article 6 will only be engaged if the penalty amounts to a 'criminal charge'". The reason for that is because Article 6(3) specifies the minimum rights applicable to anyone charged with a criminal offence. It is blindingly obvious that an assessment to duty is not a criminal offence.

21. The only application of Article 6 to civil matters is to be found in Article 6(1) which reads:-

> "In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law …".

The appellant has had precisely that. He has had three full hearings and three reasoned decisions.

22. Lastly, for completeness, I refer to *Euro Brand Trading Ltd v HMRC*[4] at paragraphs 36 and 41 where it is made entirely explicit that the provisions of Schedule 3 CEMA do not infringe Article 6 rights and that the "duty" of the courts is to apply *Jones*. The natural and inevitable sequitur to the application of *Jones* is the assessment.

23. I find that Article 6 has no application whatsoever to the validity of the assessment. Accordingly the penalty then stands. There was no argument on quantum.

24. The only other possible argument on the penalty might conceivably lie in *Susan Jacobson v HMRC*[5] ("Jacobson") and I therefore issued directions allowing the parties the opportunity to lodge submissions in that regard, albeit the point had not been argued at the hearing. No submissions were lodged by or for the appellant.

25. I am not bound by the decision in *Jacobson* and am aware that it is the subject matter of an appeal to the Upper Tribunal. Rather more pertinently I agree with the argument advanced by HMRC at paragraph 7 of their Submission that "Of the facts deemed, and therefore found by the tribunal when they concluded that the goods had been forfeited and were liable to forfeiture, was the fact that the duty point had arisen.

---

[3] 2015 UKFTT 0612 (TC)

[4] 2016 EWCA Civ 90

[5] 2016 UKFTT 570 (TC)

26. In terms of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 where goods are held for a commercial purpose (which is the impact of the deeming provisions) then the excise duty point is the time when those goods are first so held (Regulation 13(1)). Accordingly at the point at which the appellant was stopped by Border Force the excise duty point had passed. The duty was due and payable before he was stopped. The penalty follows from that.

Decision

27. I find that Article 6 EHCR has no application to the validity of the assessment and therefore it is not in dispute that the penalty is unchallenged.

28. Accordingly I grant the application for strike out of the appeal since there is no reasonable prospect of the appellant's case, or any part of it succeeding.

29. 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.

TRIBUNAL JUDGE

RELEASE DATE: 20 December 2016