TC05599

Appeal number: TC/2016/02491

EXCISE DUTY – assessments for duty and a penalty in relation to excise goods (cigarettes) seized from the appellant – jurisdiction of the tribunal – Jones and Jones and Race considered – application by HMRC to strike out the appeal or have it dismissed as a preliminary matter – application granted on the basis that the Tribunal considered that there was no reasonable prospect of the appeal succeeding – appeal struck out

FIRST-TIER TRIBUNAL
TAX CHAMBER

JAROSLAVAS RUZICKIS **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN WALTERS QC

Sitting in public at Fox Court, London on 9 January 2017

There was no appearance by or on behalf of the Appellant

Richard Evans, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. There was no appearance by or on behalf of the Appellant, Mr Ruzickis, when the appeal, and the Application of the Respondents ("HMRC") for the appeal to be struck out or dismissed on the basis that Mr Ruzickis's case has no reasonable prospects of success, were called on for hearing on 9 January 2017.

2. At the request of the Tribunal, a clerk telephoned Mr Ruzickis before the appeal and the application were called on for hearing to ascertain whether he would be attending. He told the clerk he would not be attending because, as there was a tube strike that day, he would not be able to get to the hearing.

3. When the appeal and the application were called on for hearing the Tribunal asked Mr Evans, who appeared for HMRC whether his clients wished the Tribunal to continue to hear their application in the absence of Mr Ruzickis. His submission was that the Tribunal should hear the application in the exercise of its powers under rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules"). The Tribunal proceeded on the assumption that Mr Ruzickis would wish the hearing to be adjourned to a later date.

4. Rule 33 of the Rules permits the Tribunal to proceed with a hearing in the absence of a party provided that it is satisfied that the party has been notified on the hearing or that reasonable steps have been taken to notify the party of the hearing, and provided also that the Tribunal considers that it is in the interests of justice to proceed with the hearing.

5. Mr Ruzickis had been notified of the hearing and so it remained for the Tribunal to consider whether it was in the interests of justice to proceed with the hearing.

6. Mr Evans submitted that Mr Ruzickis had not put forward a good reason for his non-attendance at the hearing. He told the Tribunal that trains were running on the Metropolitan Line, which connected Uxbridge, where Mr Ruzickis lives, with central London. He also submitted that as Mr Ruzickis worked for Transport for London (as an assistant route manager for London Transport), he should have been aware of the strike in time to give much more notice of his ability to attend – he submitted that because Mr Ruzickis had given such short notice, that was another reason not to adjourn the hearing. He submitted generally that, particularly as the hearing was listed for 2 p.m., Mr Ruzickis ought to have been able to make, and should have made, appropriate arrangements to be present at the hearing.

7. The Tribunal is in principle reluctant to adjourn the hearing of an application or an appeal at short notice unless there is a compellingly good reason to do so. However, rather than decide in advance of hearing the application whether or not to adjourn the hearing, the Tribunal took the view that whether the appeal had any reasonable prospects of success, or not, was a relevant factor in considering whether or not to adjourn the hearing. The Tribunal therefore decided to reserve its decision

on whether or not to proceed with the hearing in the absence of Mr Ruzickis until it had heard and considered Mr Evans's submissions (for HMRC) on the merits of the appeal.

8. The appeal was brought by Mr Ruzickis against a decision of HMRC issued initially on 16 December 2015 and amended on 31 March 2016 to require payment of excise duty of £1,643 and impose a penalty of £328.60 in relation to 6,200 cigarettes which he brought into the UK (at Luton) from Lithuania on 27 April 2015. The cigarettes were seized by the Border Force under section 139 Customs and Excise Management Act 1979 ("CEMA") as liable to forfeiture under regulation 88 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 on the basis that they were considered by the Border Force officer(s) concerned to have been brought into the UK for a commercial purpose (although this was denied by Mr Ruzickis).

9. At the time the cigarettes were seized, Mr Ruzickis was given a Seizure Information Notice (Form BOR 156), a warning letter about seized goods (Form BOR 162) and Notice 12A ("What you can do if things are seized by HM Revenue and Customs"). Notice 12A gives information (under section 3) of how HMRC's or Border Force's legal right to seize things can be challenged. In brief, it explains that a challenge can be brought by asking HMRC or Border Force to start court action known as condemnation proceedings (see: paragraph 3.3). It also explains that in England and Wales condemnation proceedings are usually held in a magistrates court (paragraph 3.7). The notice also explains that where a challenge against a seizure is withdrawn, that amounts to acceptance that the seizure was lawful and that the seized things ought to be condemned (paragraph 3.14). It is stated that this 'will not affect any request for restoration … but you will not be able to challenge the legality of the seizure as part of a request for restoration. Similarly, if you later appeal against a duty assessment or a wrongdoing penalty issued to you after a seizure of excise goods, you will not be able to do that on the grounds that Excise Duty was not payable on them or had already been paid unless you have challenged the legality of the seizure by submitting a Notice of Claim' (which would initiate a challenge to the legality of the seizure).

10. There is a time limit of one calendar month from the date of seizure for a Notice of Claim to be received by HMRC or Border Force. No such Notice of Claim was received from Mr Ruzickis and accordingly, on 27 May 2015 (one month after the seizure), the cigarettes were condemned as forfeit.

11. On 17 November 2015, HMRC sent a pre-assessment letter to Mr Ruzickis, stating that they would not bring criminal proceedings, but that excise duty on the seized goods would be due and a wrongdoing penalty may be charged. Mr Ruzickis was invited to provide any relevant information by 16 December 2015. Enclosed with the letter was general information about compliance checks into excise matters (Form CC/FS1d) and notices about penalties for VAT on excise wrongdoings (Form CC/FS12) and the Human Rights Act and penalties (Form CC/FS9).

12. In response, Mr Ruzickis wrote to HMRC on 14 December 2015. In that letter, Mr Ruzickis stated that the cigarettes were for his personal use and added a further narrative in an attempt to convince HMRC that this was the case. He stated in the letter that he was not advised that he had only one month to appeal 'or I will lose my items'. However, the Notice 12A referred to above contained relevant information about making a Notice of Claim and the time limit for doing so.

13. It appears, therefore, that Mr Ruzickis's case that he is not liable to the excise duty charged or to the penalty is based on his assertion that the cigarettes were for his personal use, that is, that they were not brought into the UK for a commercial purpose, which is an argument going to the legality of the seizure. No other grounds for appealing the excise duty charge or the penalty have been advanced by Mr Ruzickis either in his notice of appeal or in his letter of 14 December 2015.

14. Although HMRC issued an assessment for the excise duty and a wrongdoing penalty on 16 December 2015 without reference to Mr Ruzickis's letter of 14 December 2015, they later considered that letter and wrote to Mr Ruzickis on 25 January 2016 stating that they had done so but that it did not provide any new facts or evidence for HMRC to reconsider their decision. The penalty charged was reduced following a formal review by HMRC (on the basis that the wrongdoing was not, as had initially been considered, deliberate) but the assessment was upheld on the review. The letter from HMRC to Mr Ruzickis setting out the findings and conclusion of the review was dated 31 March 2016. Mr Ruzickis appealed to the Tribunal against the assessment and the penalty charge as reduced.

15. By paragraph 5 of Schedule 3 to CEMA, where no notice of claim, that a seized thing is not liable to forfeiture, has been given, the thing (goods seized) are deemed to have been duly condemned as forfeited, with effect from the expiry of the period of one month in which such a notice of claim has to be given.

16. It was held by the Court of Appeal in *HMRC v Jones and Jones* [2011] EWCA Civ 824 that the effect of the deeming process provided for by paragraph 5 of Schedule 3 to CEMA was that, on an appeal under section 16, Finance Act 1994, against a refusal to restore seized goods, it was not open to the First-tier Tribunal to conclude, by a finding of fact, that goods seized and deemed to have been duly condemned as forfeited had been illegally seized because they had been imported for personal use rather than for a commercial purpose. Mummery LJ said, at paragraph 71(5) of the judgment in that case, as follows (Moore-Bick and Jackson LJJ indicated their agreement with Mummery LJ – see paragraphs 74 and 75 of the judgment):

> 'The deeming process limited the scope of the issues that the respondents [Mr and Mrs Jones] 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 good were legal imports illegally seized by HMRC by finding as a fact that they were being imported for own use. The role of the tribunal, as defined in the 1979 Act [CEMA], does not extend to deciding as a fact that the goods were, as the respondents 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 goods to the respondents. In brief, 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.'

17. This reasoning was followed in relation to an assessment of excise duty and a penalty charge in the Upper Tribunal case of *Commissioners of HMRC v Nicholas Race* [2014] UKUT 0331 (TCC). In the decision in that case, Warren J said (at paragraph 33):

> ' … I do not consider it to be arguable that [*Jones and 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 [of CEMA] for the reasons explained in [*Jones and Jones*] and applied in [*HMRC v European Brand Trading Limited* [2014] UKUT 0226 (TCC)]. 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.'

18. Mr Evans also referred the Tribunal to the decision of the First-tier Tribunal (Judge Nigel Popplewell and Ms Elizabeth Bridge) in *Matthew Lane v Commissioners for HMRC* [2015] UKFTT 0423 (TC).

19. The Tribunal in *Lane* held that it was bound by *Race* to disregard the appellant's submission that his appeal against the excise duty assessment should succeed on the basis that the goods concerned were for personal use (see paragraph 59). The Tribunal held that he appellant had no reasonable prospect of succeeding in his appeal on any of the grounds put forward (see paragraph 67).

20. The Tribunal in *Lane* also held that the appellant's submission that the goods were for personal use was no more effective in relation to his appeal against the penalty charge than in the appeal against the excise duty assessment and that the Tribunal could not consider it (see paragraph 69).

21. However, it held that there were other issues which are raised by an appeal against a penalty which the Tribunal can take into account. These include special circumstances and reasonable excuse. The Tribunal decided that Mr Lane should be permitted to proceed with his substantive appeal against the penalty assessment, but only on the basis that his submissions might establish special circumstances or a reasonable excuse (see paragraph 87).

22. Mr Evans also referred the Tribunal to the decision of the First-tier Tribunal (Judge John Brooks) in *Marcin Staniszewski v Commissioners for HMRC* [2016] UKFTT 0128 (TC).

23. In *Staniszewski*, the Tribunal considered two points, called the 'Consumption Point' and the 'Proportionality Point', in the context of excise goods seized and deemed by virtue of paragraph 5 of Schedule 3 to CEMA to be held for commercial purposes and liable to forfeiture.

24. The 'Consumption Point' was an argument that an assessment to excise duty, and the regulations under which it was made, in circumstances where excise goods are seized and deemed to be held for commercial purposes and liable to forfeiture are not

compliant with the spirit of the Excise Directive (Directive 2008/118/EC), in particular, paragraph 9 of the preamble, which states:

> 'Since excise duty is a tax on consumption of certain goods, duty should not be charged in respect of excise goods which, under certain circumstances, have been destroyed or irretrievably lost'

25. Reference was made in particular to article 37 of the Excise Directive which provides that:

> '[i]n the situations referred to in Article 33(1) and Article 36(1), in the event of the total destruction or irretrievable loss of the excise goods during their transport in a Member State other than the Member State in which they were released for consumption … as a consequence of authorisation by the competent authorities of that Member State, the excise duty shall not be chargeable in that Member State.'

26. That reference to destruction or irretrievable loss of excise goods during their transport in a Member State other than the Member State in which they were released for consumption (in this case, the UK, the cigarettes having been released for consumption in Lithuania) was held by the FTT in *Staniszewski* to be a reference to such destruction or loss at a point prior to that at which liability to excise duty would otherwise arise. The FTT also held that (in accordance with article 33(1) of the Excise Directive) excise goods which are seized and deemed to be held for commercial purposes and liable to forfeiture are liable to excise duty in the UK at any time when they are held for commercial purposes in the UK. In this case, that reasoning would show that the cigarettes brought into the UK by Mr Ruzickis were liable to excise duty from the moment he arrived in the UK. The point of consumption for excise duty purposes was that moment rather than the moment when the goods are actually consumed, as envisaged by the argument supporting the 'Consumption Point' (see: *Staniszewski* paragraph 41).

27. The 'Proportionality Point' argued in *Staniszewski* was that it is disproportionate for HMRC to assess to excise duty when the excise goods concerned have been seized and forfeited. The Tribunal in *Staniszewski*, having considered authorities relevant to the issue of proportionality in the context of taxes derived from EU Directives, concluded (at paragraph 49) that section 12 of the Finance Act 1994 (which provides for assessments to excise duty):

> 'clearly does not extend beyond its objective of a revenue raising mechanism and cannot, on any basis, be said to be devoid of reasonable foundation.'

28. It followed, in the Tribunal's judgment that the provisions under which the excise duty assessments in that case (which are the same provisions as those applicable in this appeal) are proportionate. In this, the Tribunal agreed with the FTT in *Lane* which decided that 'the doctrine of proportionality is relevant to the penalties, but not to the duty itself'.

29. Similarly, in relation to the excise duty penalty regime, the Tribunal in *Staniszewski* concluded that it did not suffer from any flaw which renders it non-compliant with the principle of proportionality. This was principally because of the

provisions in paragraphs 14 and 20 of Schedule 41 to the Finance Act 2008 which provide, respectively, for a reduction or stay in the penalty by reason of special circumstances and for the quashing of a penalty where a reasonable excuse for the default is shown. The Tribunal did, however, go on to say (see paragraph 52):

> 'However, that is not to say that a penalty could never be disproportionate if it were plainly unfair, with a possible example being a penalty issued after the seizure and forfeiture of a vehicles (in accordance with s. 141 CEMA) which was not restored.'

30. In the review letter dated 31 March 2016 referred to above, the review officer stated that she had considered whether or not Mr Ruzickis had a reasonable excuse for the wrongdoing (viz: the failure to declare the cigarettes for the purposes of assessment to excise duty) and had concluded that there was no evidence of any reasonable excuse. Likewise, she stated that she had considered whether any special circumstances were applicable and could find no evidence for any special circumstances.

31. Neither the grounds of appeal included in Mr Ruzickis's Notice of Appeal, nor his letter dated 14 December 2015, referred to above, includes any matters that might amount to a reasonable excuse or special circumstances.

32. The legal position that the cigarettes must be regarded by the Tribunal as having been legally seized and forfeited on the ground that they were held or commercial purposes (notwithstanding Mr Ruzickis's submissions to this Tribunal that they were held for personal use) has the consequence that this Tribunal must regard the cigarettes as liable to excise duty and the fact that they were not declared as such by Mr Ruzickis as a wrongdoing for which a penalty is appropriate. As there is no dispute as to the amount of the duty or of the penalty, I conclude that Mr Ruzickis has no reasonable prospects of success in the appeal.

33. This being the position, I also conclude that it was in the interests of justice to proceed with the hearing in the absence of Mr Ruzickis, as, on undertaking a balancing exercise, it appears to me that the preponderant advantage was to deal with the matter in Mr Ruzickis's absence (HMRC being prepared by Counsel to present their application and defend the assessment and penalty charge) rather than adjourn the matter to a later date.

34. For the reasons set out above, I grant HMRC's Application and strike out the appeal on the basis that there is no reasonable prospect of Mr Ruzickis's case succeeding, pursuant to the Tribunal's power in that regard under rule 8(3)(c) of the Rules. I note, for the purposes of rule 8(4), that Mr Ruzickis has been given an opportunity to make representations in relation to the proposed striking out, being the notice of the hearing of the Application which he did not attend.

35. 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.

JOHN WALTERS QC
TRIBUNAL JUDGE

RELEASE DATE: 16 JANUARY 2017