TC05779

Appeal number: TC/2016/02097

EXCISE DUTY – assessment and penalty following seizure of tobacco and vehicle – appeal against the penalty - strike out application

FIRST-TIER TRIBUNAL
TAX CHAMBER

EGIDIJUS SILAITIS **Appellant**

- and -

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

TRIBUNAL: JUDGE VICTORIA NICHOLL

Sitting in public at Cambridge County Court on 14 March 2017

The Appellant did not appear and was not represented

Ms Walker, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an application of the Respondents ("HMRC") to strike out the appeal by the Appellant ("Mr Silaitis") against the decision of HMRC to impose both an assessment and a wrongdoing penalty following the seizure of goods. The application is made on the grounds that the Tribunal has no jurisdiction to hear the appeal and/or that the appeal should be struck out under rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules") because it has no reasonable prospect of succeeding.

2. Mr Silaitis had asked for a hearing in Cambridgeshire but did not appear and was not represented. The notice of the hearing had been sent on 20 January 2017 to Mr Silaitis by email to the address from which he had previously sent his appeal and which was included in his form of appeal. He has not notified the Tribunal Service of a change of postal or email address. A further email was sent by HMRC on 10 February 2017 to ask Mr Silaitis to confirm whether he wished to continue with his appeal following the withdrawal of his brother's appeal. The email copied in Mr Silaitis's brother and it noted the date and venue for the hearing of HMRC's application. No response was received. In these circumstances I considered rules 2 and 33 of the Tribunal Rules and was satisfied that reasonable steps had been taken to notify Mr Silaitis of the hearing and that it would be in the interests of justice to proceed with the hearing without further delay, particularly given Mr Silaitis's failure to respond to, or since, the Tribunal's directions of 6 September 2016.

Background and facts found

3. On 14 February 2015 Mr Silaitis was stopped after arriving at Dover Eastern Docks on his return from a shopping trip to France and Belgium in his car. His brother was driving a second vehicle that was also stopped and found to contain 51.5kg of tobacco concealed in suitcases. Mr Silaitis was questioned by UK Border Force and said that he had purchased 4kg of tobacco. A search of the vehicle revealed that a total of 45kg of tobacco was in the vehicle in suitcases that contained a small layer of clothing at the top to conceal the tobacco. The tobacco and vehicle were seized and Mr Silaitis was given Notices 1 and 12a and a seizure notice and letter (BOR 156 and BOR 162). Mr Silaitis did not contest the legality of the seizure of the tobacco or the vehicle within 1 month of the seizure, or indeed at all. The matter was referred to HMRC.

4. On 3 December 2015 Officer Beebeejaun issued a pre-assessment penalty notification and excise duty assessment letters to Mr Silaitis and he was asked to provide any further information which he believed should be taken into consideration before the assessment and penalty were issued. Mr Silaitis did not respond to this request.

5. On 7 and 8 January 2016 HMRC issued an excise duty assessment of £8,120 and penalty of £8,120. HMRC received Mr Silaitis's request for an independent review of this decision on 23 February 2016. He said that the tobacco had been

bought in order to make a profit and that he could not afford the assessment and penalty. The conclusion of the review was to uphold the assessment and penalty on the basis of deliberate wrongdoing, prompted disclosure and concealed disclosure. The penalty was however reduced by 50% to £4,060 because Mr Silaitis had co-operated with UK Border Force once the tobacco was discovered. It was noted that he did not fail to provide any help or information as none had been requested.

6. Mr Silaitis signed a form of appeal on 11 April 2016 and lodged it with a letter dated 12 April 2016 which set out the grounds of his appeal. The letter was identical to the letter lodged by Mr Silaitis's brother, other than the addition of the words "I was intending to profit from the goods" and the different sums involved. The letter claimed that as he earns a low salary as a driver and is left with no excess money at the end of the week, the penalty would cause financial hardship. On 4 May 2016 Mr Silaitis wrote to the Tribunal to make a hardship application and this was granted by HMRC.

7. On 15 August 2016 HMRC applied to strike out the appeal. On 6 September 2016 Tribunal Judge Cannan gave directions that the strike out application in relation to Mr Silaitis's appeal should be heard together with HMRC's application in relation to Mr Silaitis's brother's appeal, that Mr Silaitis should set out his response to the application to strike out in writing on or before 23 September 2016 and that HMRC should file a skeleton argument outlining its case, including submissions in relation to the proportionality of the decisions under appeal. Mr Silaitis's brother discontinued his appeal on 26 January 2017 but HMRC has not received a written communication or response from Mr Silaitis since 4 May 2016.

The law

8. Rule 8(2)(a) of the Tribunal Rules provides that the Tribunal must strike out the whole or part of the proceedings if the Tribunal does not have jurisdiction in relation to the proceedings or that part of them. Rule 8(3)(c) provides that the Tribunal may strike the whole or part of the proceedings if it considers there is no reasonable prospect of the appellant's case, or part of it, succeeding. In relation to both these rules, rule 8(4) provides that the Tribunal may not strike out the whole or part of the proceedings without first giving the appellant an opportunity to make representations in relation to the proposed striking out.

9. The following provisions set out the basis on which the tobacco is subject to excise duty, how it and any penalty is assessed, how both the tobacco and the vehicle carrying the tobacco became liable to forfeiture and how this could have been challenged:

10. Tobacco is subject to excise duty under section 2 of the Tobacco Products Duty Act 1979 (and Article 1(1)(c) of the Excise Directive 2008/118/EC).

11. Regulation 13 of the Excise Goods (Holding, Movement, and Duty Point) Regulations 2010 ("the Regulations") sets out when the duty excise point arises on goods and who is liable to pay the duty as follows:

"(1) where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.

(2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person:

(a) making the delivery of the goods; and

(b) holding the goods intended for delivery; or

(c) to whom the goods are delivered.

(3) For the purposes of paragraph (1) excise goods are held for a commercial purpose if they are held --

(a) by a person other than a private individual; or

(b) by a private individual ("P"), except in the case where the excise goods are held for P's own use and were acquired in, and transported to the United Kingdom from, another member State by P.

….

12. Section 12(1A) Finance Act 1994 provides that HMRC may assess any person from whom any amount has become due in respect of any excise duty.

13. Regulation 88 of the Regulations provides that:

"If in relation to any excise goods that are liable to duty that has not been paid there is -

a contravention of any provision of these Regulations, or a contravention of any condition or restriction imposed by or under these Regulations, those goods shall be liable to forfeiture"

14. Section 139 (1) of the Customs and Excise Management Act 1970 ("CEMA 1979") provides as follows:

"Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or constable, or any member of Her Majesty's armed forces or coastguard."

15. Paragraph 1 Schedule 3 CEMA 1979 provides for notice of the seizure to be given in certain circumstances. Paragraph 3 Schedule 3 CEMA 1979 then states:

"Any person claiming that anything 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…"

16. As notice 12A explains, if a notice of claim is given under paragraph 1 Schedule 3 CEMA 1979 condemnation proceedings are heard in the Magistrates' Court. If no notice of claim is given under paragraph 1 Schedule 3 CEMA 1979 then paragraph 5 provides that the legality of the seizure is automatically conceded as the goods are deemed by law to have been liable to forfeiture.

17. Schedule 41 of the Finance Act 2008 ("Schedule 41") provides that HMRC may raise a wrongdoing penalty against any person who holds dutiable goods after a duty point has arisen on which that duty has not been paid or deferred. The schedule sets out the degrees of culpability, the amount of the penalty by reference to the degree of culpability and the reductions permitted for disclosure and special circumstances.

Submissions

18. Mr Silaitis has not made any representations in relation to HMRC's application but the grounds of his appeal are that he admitted the wrongdoing when he was stopped, that the tobacco was confiscated and that he has therefore already suffered great financial loss as he was intending to profit from the goods. He also claims that the penalty and assessment are too high and that it would put him in a position of financial hardship as he has no excess money after paying his regular liabilities.

19. HMRC submits that none of Mr Silaitis's grounds of appeal, nor indeed any part of them, contains a substantive challenge to the issue of the assessment and penalty which is capable of being argued before the Tribunal or has a reasonable prospect of success. HMRC notes that Mr Silaitis did not immediately admit wrongdoing when he was stopped and that there is clear evidence of concealment. Mr Silaitis has since admitted that the tobacco was for commercial purposes and merely pleads that he cannot afford to pay the assessment and the penalty.

20. HMRC submits that the Tribunal has no jurisdiction to consider the proportionality of the assessment and that even if it considers that it has jurisdiction, any argument has no reasonable prospect of success and therefore the appeal would have no reasonable prospect of success. HMRC submits that Mr Silaitis has not in fact made any argument as to the proportionality of the assessment.

21. HMRC submits that the penalty is proportionate. Mr Silaitis was using his vehicle for commercial smuggling in concert with his brother. This falls within Lord Phillips' comments on the proportionality of the restoration of vehicles in the Court of Appeal in *Lindsay v Customs and Excise Commissioners* [2002] 1 WLR 1766 ("*Lindsay*") at paragraphs 63 and 64:

> "Those who deliberately use their cars to further fraudulent commercial ventures in the knowledge that if they are caught their cars will be rendered liable to forfeiture cannot reasonably be heard to complain if they lose those vehicles. …

> But where the importation is not for the purpose of making a profit, I consider that the principle of proportionality requires that each case should be considered on its particular facts, which will include the scale of the importation, whether it is a 'first offence', whether there was an attempt at concealment or dissimulation, the value of the vehicle and the degree of hardship that will be caused by forfeiture."

Discussion

22. HMRC's application is that Mr Silaitis's appeal should be struck out on the basis that the Tribunal does not have jurisdiction to hear this appeal and/or there is no reasonable prospect of any part of the Mr Silaitis's case succeeding.

23. Ms Walker referred me to the cases of *HMRC v Jones and Jones* [2011] EWCA Civ 824 ("*Jones*"), *HMRC v Race* [2014] UKUT 331 (TC), *Neale v HMRC* [2016] UKFTT 0825 (TC), *Marcin Staniszewski v HMRC* [2016] UKFTT 0128 (TC)("*Staniszewski*"), *HMRC v European Brand Trading Limited* [2016] EWCA Civ 90 ("*EBT*") and *Vladimir Pilats v Director of Border Revenu*e [2016] UKFTT 193 (TC) ("*Pilats*"), in addition to *Lindsay* referred to in paragraph 21 above. From these cases I have drawn the following guidance to determine this application:

24. The effect of paragraph 5 of Schedule 3 CEMA 1979 is that if no notice is served to challenge the seizure of goods or a vehicle in condemnation proceedings, the statutory deeming does not only determine that the goods and vehicle are liable to forfeiture, but it also extends to any facts which could have been argued against the seizure of goods or vehicle, such as whether duty was payable. This means that the Tribunal has no jurisdiction to find different facts in relation to the seizure. This was confirmed by Mummery LJ in *Jones* who stated at paragraph 73 that the Tribunal "has no power to re-open and re-determine the question whether or not seized goods had been legally imported for the [respondents'] personal use; that question was already the subject of a valid and binding deemed determination under the 1979 Act".

25. In this case Mr Silaitis has not claimed that the tobacco was for personal use and he has not challenged the calculation of the assessment. Since the seizure he has admitted that the tobacco was imported for commercial purposes. It is not therefore necessary to rely on the statutory deeming provisions as Mr Silaitis has admitted those facts and therefore that excise duty arose under regulation 13 of the Regulations and that HMRC could raise an assessment to excise duty on Mr Silaitis under section 12(1A) Finance Act 1994. There is no scope for the Tribunal to consider this further. In the words of Judge Herrington in paragraph 60 of *Pilats* the assessment is "the inevitable consequence of an excise duty point having arisen" in relation to the admitted smuggling of tobacco into the UK by Mr Silaitis for commercial purposes.

26. There is some uncertainty about whether Mr Silaitis has appealed against the proportionality of the excise duty assessment or only the penalty. His appeal states that he believes the "penalty of wrongdoing of £4,060 and £8,120 assessment EXA are too high for me". I do not consider that Mr Silaitis is appealing against the proportionality of the assessment on its own, but possibly the combined cost to him of

the penalty and the assessment. In case of an appeal that his case was intended to include a claim against the proportionality of the assessment, I have considered whether there is an arguable case in relation to this claim.

27. In relation to the possible argument concerning the proportionality of the assessment, the cases of *Pilats* and *Staniszewski* consider whether it is possible to challenge the proportionality of an assessment to excise duty under section 12 Finance Act 1994. I respectfully follow the reasoning of Judge Herrington in *Pilats* that the assessment power under section 12 is a revenue raising mechanism, but that it is not immune to challenge on the grounds of proportionality. In considering the section I similarly respectfully follow the reasoning of Judge Brooks in paragraphs 48-50 of *Staniszewski* that as the section does not "extend beyond its objective of a revenue raising mechanism and cannot, on any basis, be said to be devoid of reasonable foundation and it therefore follows that its provisions must be proportionate". There is therefore no reasonable prospect of Mr Silaitis succeeding in his appeal on this ground.

28. Turning to the wrongdoing penalty, the guidance in relation to proportionality provided by Lord Phillips in *Lindsay* is relied upon by HMRC (paragraph 21 above). This case concerned an appeal against a refusal to restore a vehicle but did not consider a wrongdoing penalty or the combined effect of the forfeiture, assessment and penalty because at that time it was not policy to impose the additional punishment of the assessment and penalty to deter smuggling. The Court of Appeal's guidance that those who "deliberately use their cars to further fraudulent commercial ventures in the knowledge that if they are caught their cars will be rendered liable to forfeiture cannot reasonably be heard to complain if they lose those vehicles" is authority as regards the weight to be given to the aggravated nature of the smuggling attempt in this case when considering proportionality.

29. Similarly the appeal in *Pilats* concerned the restoration of the vehicle rather than the penalty, but Judge Herrington considered whether in all the circumstances the seizure of the vehicle and the additional imposition of the penalty were disproportionate. Although the Tribunal had no power to address the penalty in that case as it had not been the subject of the appeal and had been paid, it was noted that it reflected the appellant's actions that were deliberate and concealed and that his disclosure of the wrongdoing was prompted. In the Tribunal's view the sanctions imposed "strike a fair balance between the rights of the individual and the public interest, the public interest in deterring deliberate tobacco smuggling being particularly strong".

30. Mr Silaitis was dishonest when he was first questioned. He was smuggling a large amount of tobacco for commercial purposes in concert with his brother. This is a serious wrongdoing that the penalty regime is intended to prevent. The financial hardship claimed by Mr Silaitis simply reflects the seriousness of the smuggling attempt, but I note from his letter of 28 January 2016 that he continues to insure and tax a car and to work as a driver notwithstanding the forfeiture of his vehicle. The fact that the smuggling was admitted after its discovery has reduced the penalty to the minimum permitted under paragraph 13 of Schedule 41 in cases of prompted

disclosure. Mr Silaitis has not claimed any special circumstances that are arguably within paragraph 14 of Schedule 41. Mr Silaitis's claim is based on his inability to pay which is specifically excluded as a special circumstance. In these circumstances I conclude that Mr Silaitis has no reasonable prospect of succeeding in his appeal on the basis of proportionality.

31. I have considered the exercise of the power in rule 8 of the Tribunal Rules to strike out Mr Silaitis's appeal in the light of the overriding objective in rule 2 of the Tribunal Rules and in particular the need to deal with cases fairly and justly for both parties. The Tribunal's directions dated 6 September 2016 gave Mr Silaitis an opportunity to make representations in relation to the strike out application in accordance with rule 8(4) but he has failed to comply with the Tribunal's direction.

Decision

32. On the basis of the reasons set out above, Mr Silaitis's appeal is struck out pursuant to rule 8(3)(c) of the Tribunal Rules because it has no reasonable prospect of succeeding.

33. 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.

VICTORIA NICHOLL
TRIBUNAL JUDGE

RELEASE DATE: 12 APRIL 2017