



TC05960

Appeal number: TC/2016/04327

Excise and Customs Duty – third party purchased and imported from Belgium tobacco products for sale to the Appellant – whether commercial transaction rendering goods liable to seizure and forfeiture – yes – whether the Tribunal had jurisdiction to hear the appeal against seizure – no – whether decision not to restore unreasonable – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DERRICK WATERFIELD

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL CONNELL
 MEMBER MOHAMMED FAROOQ**

Sitting in public at Nottingham Justice Centre on 18 April 2017

The Appellant in person

Mr Paul Joseph, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by Mr Derrick Waterfield (“the Appellant”) against a decision
5 by HM Revenue and Customs (“HMRC”) in a letter dated 17 May 2016, to refuse to
restore to him 19 kilos of hand tobacco products, seized from him on 4 May 2014 as
liable to forfeiture, as they were goods chargeable on their importation with customs
or excise duty and were, without payment of that duty, removed from their place of
importation.

10 **Background**

2. On 15 April 2016, Nottinghamshire Police searched the Appellant’s home at 71
Pepper Street, Sutton in Ashfield, NG17 5GD under a PACE warrant in relation to a
police matter. During this search the police found 19 kilos of “The Turner Blue” hand
rolling tobacco, 180 NZ Gold cigarettes and 140 Email cigarettes. After HMRC being
15 notified, the goods were collected from the Police by HMRC Fraud Investigation
Service Officers based in Nottingham.

3. On 4 May 2016, Officer Michael Kelly sent a Notice of Seizure letter to the
Appellant explaining that the tobacco goods were liable to forfeiture under s 49
Customs and Management Act 1979 (“CEMA”) and had been seized. Public Notices
20 1 and 12 were enclosed with this letter. Public Notice 12 sets out the Appellant’s
rights to appeal the seizure and explains that the seizure (including any claim that
goods were for personal use) may be challenged in the Magistrates’ court by sending
a notice of claim to reach HMRC within one calendar month of the seizure.

4. On 13 May 2016, Officer Kelly met with the Appellant at his home. He was
25 read the ‘commerciality statement,’ to ensure that he understood the reasons for the
questions he was being asked and provided Officer Kelly with information about how
the tobacco goods came into his possession and how they were paid for.

5. The Appellant stated that the cigarettes had been bought in Spain by his wife in
January 2016, but was not able to provide any evidence to support his statement.
30 There were no labels, tax stamps, writings or warnings to indicate they were from
Spain. With regard to the other tobacco goods, he said that he had not travelled to the
continent personally; a man called Dean Nuthall had brought the goods back from
Belgium on his behalf on 22 January 2016. The Appellant had paid Mr Nuthall £2,000
for the goods and £30 towards his fare and expenses, but he did not possess any
35 receipts for the payments. He said that he had then gifted the tobacco to friends and
family.

6. On 17 May 2016, Officer Kelly telephoned the Appellant and explained that the
Commissioners had seized the tobacco products. He told the Appellant that, based on
the explanations given during the interview on 13 May 2016, he believed that a
40 commercial transaction had taken place between Mr Nuthall and the Appellant.
Officer Kelly wrote to the Appellant confirming his decision refusing to restore the

tobacco and cigarettes as being subject to forfeiture and that they would not be restored.

7. No Notice of Claim was submitted to the Commissioners by the Appellant within the one month timescale from the date of the seizure of the tobacco and cigarettes. As a result, the seized goods are deemed to be forfeit to the Crown by the passage of time.

8. On 3 August 2016, following a request for a review, Officer Donnachie reviewed Officer Kelly's decision not to restore the seized tobacco and cigarettes. He explained to the Appellant:

10 "...it is not necessary for the Commissioners to prove your intentions, the commerciality occurred when you paid Mr Nuthall to bring the cigarettes back into the UK for you. The only person allowed to bring goods into the UK from another EU Member State without payment of UK duties and taxes is a traveller who returns to the UK from that other EU Member State. By having a third party purchase the tobacco for you, they were not for the personal use of that person and the goods were smuggled into the UK. You are not entitled to hold them without payment of UK duties and taxes..."

9. The Appellant submitted a Notice of Appeal to the Tribunal on 10 August 2016.

The law

10. Regulation 5 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 states:

"5. Subject to Regulation 7(2), there is an excise duty point at the time when excise goods are released for consumption in the United Kingdom"

11. Regulation 6 (1), (2), (3) and 10 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 provide that:

"6.(1) Excise goods are released for consumption in the United Kingdom at the time when the goods -

(1) leave a duty suspension arrangement;

(2) are held outside a duty suspension arrangement and UK excise duty on those goods has not been paid, relieved, remitted or deferred under a duty deferment arrangement;

(3) are produced outside a duty suspension arrangement; or

(4) are charged with duty at importation unless they are placed, immediately upon importation, under a duty suspension arrangement.

(2) In paragraph (1)(d) "importation" means -

(a) the entry into the United Kingdom of excise goods other than EU excise goods, unless the goods upon their entry into the United Kingdom are immediately placed under a customs suspensive procedure or arrangement; or

5 (b) the release in the United Kingdom of excise goods from a customs suspensive procedure or arrangement.

(3) In paragraph (2)(a) “EU excise goods” means excise goods imported into the United Kingdom from another Member State which have been produced or are in free circulation in the EU at that importation.”

10 10.(1) The person liable to pay the duty when excise goods are released for consumption by virtue of regulation 6(1)(b) (holding of excise goods outside a duty suspension arrangement) is the person holding the excise goods at that time.

(2) Any other person involved in the holding of the excise goods is jointly and severally liable to pay the duty with the person specified in paragraph (1).

(b) in the case of chewing tobacco.”

15 12. Regulation 88 of the Excise Goods (Holding Movement and Duty Point) Regulations 2010 states:

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

- 20 (a) a contravention of any provision of these Regulations, or
(b) a contravention of any condition or restriction imposed by or under these Regulations,

Those goods shall be liable to forfeiture.”

13. The Customs and Excise Management Act 1979 (“CEMA”) provides:

“49.(1) Where -

- 25 a) except as provided by or under the Customs and Excise Acts 1979, any imported goods, being chargeable on their importation with customs or excise duty, are, without payment of that duty -

those goods shall ...be liable to forfeiture.

30 “139.(1) Anything liable to forfeiture under the Customs and Excise Acts may be seized or detained by any officer...”

14. Paragraph 3 Schedule 3 CEMA provides:

35 “Any person claiming that any thing 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 ...”

15. Where notice of a claim is not given, Paragraph 5 Schedule 3 CEMA states:

5 “If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of any thing no such notice has been given to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with the thing in question shall be deemed to have been duly condemned as forfeited.”

The Appellant’s Case

16. The Appellant appeals on the ground that the tobacco was for his own personal use. The grounds of appeal as stated in his Notice of appeal are:

10 “I am appealing against the seizure of my tobacco that was seized by Notts Police and then handed to Customs & Excise. It is my belief that Customs cannot prove it’s for commercial use. The tobacco that was seized was for my own personal use along with members of my family and one friend.”

15 17. The Appellant cites a seizure at Dover when he returned from a trip to the continent in 2003. The Appellant says that on that occasion he disputed the seizure and won on appeal at Maidstone Crown Court, when the Court made an order that his goods should be restored. He says:

20 “In 2003 I won a case in Maidstone Crown Court against Customs. The Judge along with the European Courts of Human Rights said Customs could not prove it was for commercial use the Customs just said they assumed it was and again they assuming it again regarding this case, Customs said they had no record of my appeal but I can prove different.”

HMRC’s Case

18. The Appellant has not formally appealed the seizure. His appeal is against HMRC’s decision not to restore the goods.

25 19. The Appellant has admitted that the goods were brought into the UK by Mr Nuthall and that he paid his travel expenses. This constituted a commercial transaction between the Appellant and Mr Nuthall and related to goods on which duty had not been paid.

30 20. The Appellant was made aware in the warning letter that the correct method of challenging the legality of seizure was by instigation of proceedings in the Magistrates Court.

35 21. The Appellant did not challenge the legality of seizure and therefore the goods were deemed to be duly condemned as forfeit under Paragraph 5 Schedule 3 of CEMA. Thus the legality of the seizure and the underlying reason for this - that the goods were for a commercial purpose and not for own use - has been deemed a fact.

22. In consequence the Tribunal cannot reopen this issue and has no jurisdiction to hear evidence about whether the goods were intended for personal use because that

fact would have been finally determined by the Magistrates or Paragraph 5 of Schedule 3.

23. The only issue which the Tribunal may consider is whether HMRC were reasonable in reaching the decision not to restore the goods.

5 24. The alleged Crown Court case in 2003 is completely immaterial to this Appeal.

25. HMRC's policy for the restoration of seized goods is that tobacco seized as liable to forfeiture must not generally be restored. This policy must be applied firmly but not rigidly.

10 26. The policy allows for each case to be considered on its merits to determine whether restoration may be offered and under what terms. It offers restoration exceptionally but not a matter of course. It does not allow for restoration where fiscal marking and/or duty stamp legal requirements would be breached.

15 27. It is therefore for the Appellant to show that Officer Donnachie, acting on behalf of HMRC, could not have reasonably arrived at the decision not to overturn Officer Kelly's decision not to restore the goods to the Appellant.

28. In practice this means that the Appellant would have to show that:

(1) the tobacco was not purchased by him pursuant to a commercial transaction; and/or

20 (2) the cigarettes were lawfully imported into the UK by him or his wife and that the applicable duty and VAT had been paid on them in Spain.

29. The burden of proof is on the Appellant. Given the admissions made by the Appellant in relation to the tobacco, it is impossible for the Appellant to discharge the burden of proof.

25 30. Whether or not the Appellant might have afterwards given the goods to friends and family and/or not sold any of the goods himself, is wholly immaterial. There only has to be one commercial transaction to deem the goods to be for commercial use.

Conclusion

31. The facts of the matter are not in dispute.

30 32. The Appellant did not challenge the legality of seizure and the goods were therefore deemed to be duly condemned as forfeit under Paragraph 5 Schedule 3 of CEMA. Thus, the legality of the seizure has been deemed a fact.

35 33. The deeming process limits the scope of the issues that the Appellant is entitled to ventilate with regard to his restoration appeal. It is not open to the Tribunal to consider whether the goods were legal imports improperly seized by HMRC by finding as a fact that they were intended for own use. The role of the Tribunal is

5 limited to hearing an appeal against a discretionary decision by HMRC not to restore the seized goods to the Appellant. In brief, the deemed effect of the Appellant's failure to contest condemnation of the goods was that the goods had been illegally imported by Mr Nuthall for commercial use. The Appellant admits that he purchased the goods from Mr Nuthall.

34. The goods were lawfully seized as being held for a commercial purpose without the payment of duty and therefore the Tribunal does not have any jurisdiction to re-open the issue as to whether the goods were held for personal use.

10 35. The Maidstone case to which the Appellant refers relates to the issue of seizure and is wholly immaterial to this appeal. In any event given the Appellant's admission that he purchased the cigarettes from Mr Nuthall, he cannot show that the tobacco was not purchased by him pursuant to a commercial transaction. He is also unable to show that the cigarettes were lawfully imported into the UK by him or his wife and that the applicable duty and VAT had been paid on them in Spain.

15 36. The test for deciding whether a decision maker could not reasonably have arrived at a decision is the "*Wednesbury*" unreasonableness test. A reasoning or decision is *Wednesbury* unreasonable (or irrational) if it is so unreasonable that no reasonable person acting reasonably could have made it (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1947) 2 All ER 680). HMRC's
20 decision not to restore was not unreasonable and the Appellant has not produced any evidence or argument to suggest otherwise. Whether or not the Appellant might have afterwards given the goods to friends and family and/or not sold any of the goods himself, is wholly immaterial. Mr Donnachie was properly entitled to refuse to overturn Officer Kelly's decision. The decision not to restore was, in all the
25 circumstances, not *Wednesbury* unreasonable.

37. The only issue before the Tribunal is whether HMRC's decision not to restore the goods was reasonable. The burden of proof is on the Appellant and he has failed to discharge that burden.

38. The appeal is accordingly dismissed.

30 39. 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
35 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**MICHAEL CONNELL
TRIBUNAL JUDGE**

40 **RELEASE DATE: 20 JUNE 2017**