



TC04518

Appeal number: TC/2013/01270

*Excise Duty - importation of tobacco products - appeal against assessment -
- cross application to strike out - whether any reasonable prospect of the
Appellant's case succeeding - no - whether the Tribunal had jurisdiction to
hear an appeal against the assessment - no - appeal struck out.*

FIRST-TIER TRIBUNAL

TAX CHAMBER

EDWARD PHILIP LAYTON

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL CONNELL

**Sitting in public at Nottingham Justice Centre, Carrington Street, Nottingham on 1
April 2015**

The Appellant Edward Philip Layton appeared in person

**Mr Alex Davies of Counsel instructed by the General Counsel and Solicitor to HM
Revenue and Customs for the Respondents**

DECISION

1. This is an appeal by Mr Edward Philip Layton (“the Appellant”), against a decision by HM Revenue and Customs (“HMRC”) in a letter dated 29 August 2012, confirmed on review on 17 January 2013, to issue the Appellant with an assessment of excise duty in the amount of £1,822.

2. HMRC make a cross application for the Appellant’s Notice of Appeal be struck out under rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 on the basis that the Tribunal does not have jurisdiction to hear the matter and, therefore, is obliged to strike the matter out; or, in the alternative, the appeal be struck out under rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on the basis there is no reasonable prospect of the Appellant’s case succeeding.

3. The Appellant’s appeal was dismissed for the reasons set out below.

15 **Background**

4. The Appellant was stopped by Officers of the UK Border Force on 5 January 2013 at the port of Dover on his return from a day trip to Belgium. The Appellant was travelling in a vehicle with two other occupants. The UK Border Force found a total of 36kg of hand rolled tobacco in the vehicle of which the Appellant claimed ownership of 12kg.

5. The Appellant was interviewed under caution. He advised that he had purchased the tobacco at a cost of £720 for his own use, saying that he, his wife and daughter all smoked. He said that it would last them about nine months, he, his wife and daughter all smoking about two and a half pouches per week. He said that he had last imported about 400 pouches two years previously. He had travelled across the Channel by ferry the previous week but said that he did not purchase any tobacco because he did not have the money. He had travelled three times in the last six months, but not purchased any tobacco on any of those trips. He said he was able to afford the £720 because he had been paid the previous Friday and his wife had given him £250.

6. The Officer was satisfied that the tobacco was held for a commercial purpose and that it was therefore liable to forfeiture under s 49(1)(a)(i) of the Customs and Excise Management Act 1979 (“CEMA”) and Regulation 88 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010. The Appellant signed the Officer’s notebook to confirm that the interview had been recorded accurately.

7. The Officer seized the goods as liable to forfeiture under s 139 CEMA because of a liability to forfeiture under Regulation 88 Excise Goods (Holding, Movement and Duty Point) Regulations 2010 for the contravention of a provision in the Regulations, including the non-payment of duty which arose as a result of goods already released for consumption in another member State being held for a commercial purpose in the UK, in order to be delivered or used in the UK.

5 8. The UK Border Force Officer issued the Appellant with Public Notice 12A which set out his rights to appeal the seizure should he wish to. The Notice explained that the seizure (including any claim that goods were for personal use) could be challenged in the Magistrates' Court by sending a Notice of Claim within one month of the seizure. No letter was received appealing the seizure, nor was a Notice of Claim issued within the statutory thirty day deadline

9. The warning letter made it clear that the seizure was without prejudice to other action that could be taken and that this included HMRC issuing an assessment for evaded excise duty and a wrongdoing penalty.

10 10. Where an Appellant fails to challenge the liability to forfeiture, paragraph 5 of Schedule 3 to CEMA provides that the goods in question shall be deemed to have been duly condemned as forfeited. That is a conclusive determination on the question of the liability to forfeiture of the tobacco, and that the goods were held for a commercial purpose. As such, a duty point has been prompted under Regulation 13(1)
15 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010, and the Commissioners may assess for duty under s 12 of the Finance Act 1994.

11. An assessment was issued by HMRC on 29 August 2012 in the sum of £1,822.

12. A review was requested and the assessment was upheld in a decision letter dated 17 January 2013.

20 13. On 11 March 2013 the Appellant made a request for hardship, which was pending at the date of the hearing.

14. On 15 February 2013 the Appellant appealed to the First-tier Tribunal. His grounds of appeal are that the tobacco was for his own and family's personal use.

The Strike Out Application

25 15. Under Rule 8(3) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 the Tribunal may strike out the whole or part of the proceedings if:

“(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.”

30 16. Under Rule 8(2) the Tribunal must strike out the whole or a part of the proceedings if the Tribunal:

“(a) does not have jurisdiction in relation to the proceedings or that part of them;”

17. HMRC applies for strike out of the appeal on the following grounds:

a) The Appellant's appeal is predicated on showing that the tobacco was wrongly seized, i.e. unlawful.

35 b) The Appellant has not challenged the lawfulness of seizure and this is now duly deemed under Paragraph 5 Schedule 3 of CEMA.

- c) The Tribunal lacks jurisdiction to consider arguments relating to the legality of the seizure following *HMRC v Jones and Jones* [2011] EWCA Civ 824 and *HMRC v Race* [2014] UKUT 0331 (TCC).
- 5 d) In the alternative there is no reasonable prospect of success on this or the other grounds of appeal.

The Law

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

“49(1) Where-

10 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-

(i) unshipped in any port,

those goods shall ...be liable to forfeiture.

15 139(1) Anything liable to forfeiture under the Customs and Excise Acts may be seized or detained by any officer...”

19. Paragraph 3 Schedule 3 CEMA provides:

20 “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 ...”

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

25 “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.”

21. HMRC may assess for duty under s 12 Finance Act 1994 (“FA 1994”).

“12 Assessments to excise duty.

(1A) Subject to subsection (4) below, where it appears to the Commissioners—

30 (a) that any person is a person from whom any amount has become due in respect of any duty of excise; and

(b) that the amount due can be ascertained by the Commissioners,

the Commissioners may assess the amount of duty due from that person and notify that amount to that person or his representative.”

22. Under Regulation 13(1) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 the excise duty point was the time that the goods were first held. Where a duty point is prompted, HMRC may assess for duty under s 12 FA 1994.

5 23. The Appellant is the person liable for the duty as he was holding the goods, pursuant to Regulation 13(2) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010.

24. The penalty was raised under Schedule 41 Paragraph 4 of the Finance Act 2008 (“FA 2008”) on the basis that the Appellant had handled goods subject to unpaid
10 excise duty.

25. In *HMRC v Jones & Jones* [2011] EWCA Civ 824 Mummery LJ said :

“71... For the future guidance of tribunals and their users I will summarise the conclusions that I have reached in this case in the light of the provisions of the 1979 Act, the relevant authorities, the articles of the Convention and the detailed
15 points made by HMRC.

(4) The stipulated statutory effect of the owners’ withdrawal of their notice of claim under paragraph 3 of Schedule 3 was that the goods were deemed by the express language of paragraph 5 to have been condemned and to have been “duly” condemned as forfeited as illegally imported goods. The
20 tribunal must give effect to the clear deeming provisions in the 1979 Act: it is impossible to read them in any other way than as requiring the goods to be taken as “duly condemned” if the owner does not challenge the legality of the seizure in the allocated court by invoking and pursuing the appropriate procedure.

(5) The deeming process limited the scope of the issues that the owners 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 goods were legal imports illegally
25 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, does not extend to deciding as a fact that the goods were, as the owners argued in the tribunal, being imported legally for personal use. That issue could only
30 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 owners. In brief, the deemed effect of the owners’ failure to contest condemnation of the goods by the court was that the goods were
35 being illegally imported by the owners for commercial use.”

26. HMRC relies on the decision of the Court of Appeal in *Jones* in which the court made the following findings:

40 a) Goods seized by customs officers could only be condemned as forfeit pursuant to an order of a Court. The First-tier Tribunal “FTT” and Upper Tribunal are

statutory appellate bodies that have not been given any such original jurisdiction.

- 5 b) The Respondents (in that case) had the right to invoke the notice of claim procedure to oppose condemnation by the court on the grounds that they were importing the goods for their personal use, not for commercial use. The Respondents did so but later withdrew their notice and did not contest condemnation.
- 10 c) The stipulated statutory effect of the Respondents' withdrawal of their notice of claim under paragraph 3 of Schedule 3 to CEMA was that the goods were deemed by the express language of paragraph 5 to have been condemned and to have been "duly" condemned as forfeited as illegally imported goods.
- 15 d) The deeming process limited the scope of the issues that the Respondents were entitled to ventilate at the FTT in their appeal against a decision not to restore the seized goods to them. 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 goods were legal imports illegally seized by HMRC by finding as a fact that they were being imported for own use.
- e) The FTT's jurisdiction was limited to hearing an appeal against the discretionary decision by HMRC not to restore the seized goods.
- 20 f) The deeming provision in paragraph 5 and the restoration procedure were compatible with Article 1 of the First Protocol to the Convention on Human Rights and with Article 6, because the Respondents were entitled under CEMA to challenge in court, in accordance with Convention compliant legal procedures, the legality of the seizure of their goods.

25 **The Appellant's Case**

27. The Appellant appeals on the ground that the tobacco was for his own personal use. He said in his Notice of Appeal:

"I wish to appeal the decision taken against me.

30 Just over two years ago I flew into East Midlands airport from mainland Spain. I had on myself 12 kilograms of hand rolling tobacco plus three thousand six hundred cigarettes. I was asked "do you have any tobacco or cigarettes?" My reply was "yes" being totally honest with the officer. At interview I was forthright and honest with the officer. After deliberating my case he came to the conclusion that I was being totally honest and allowed me to pass through with my tobacco and cigarettes.

35 I do not understand how the UK Border Agency at Dover came to their decision. They gave me a booklet at Dover stating my allowances which conflicts with what the UK Border Agency officer said.

At East Midlands airport they told me there is no limit as long as it is for personal use. That's why I was dumfounded and surprised at receiving this letter demanding £1822 Excise duty for something that I feel is unjustified as I have done nothing wrong."

HMRC' s Case

5 28. HMRC argue that the Appellant's ground of appeal that the goods were intended for own use should be struck out for lack of jurisdiction.

29. The Appellant was made aware in the warning letter that an assessment and wrongdoing penalty may be raised. He was made aware that the correct method of challenging the legality of seizure was by instigation of proceedings in the
10 Magistrates' Court, but he did not do this.

30. The Appellant did not challenge the legality of seizure and the goods have therefore now been 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
15 deemed a fact.

31. In consequence, the Tribunal cannot reopen this issue. HMRC relies upon the decision of the Court of Appeal in *Jones* and in particular on the judgment of Mummery LJ (at paragraph 25 above).

32. The Appellant's ground of appeal also stands no reasonable prospect of success.
20 There is nothing in the ground of appeal that suggests HMRC did not have the power to make the assessment or that it was improperly calculated.

Conclusion

33. The facts of the matter are not in dispute and the assessment has been correctly
25 raised under s 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010.

34. 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.

30 35. Following the decision of the Court of Appeal in the case of *Jones*, the Tribunal's jurisdiction is limited to considering whether the Commissioners have correctly identified the Appellant for the purposes of the assessment and whether the assessment meets the statutory requirements

35 36. The Tribunal does not have any jurisdiction to reopen the issue as to whether the goods were held for personal use. The goods were lawfully seized as being held for a commercial purpose without the payment of duty and in consequence HMRC are entitled to assess the duty amount on the goods, and raise a penalty under schedule 41 Paragraph 4 of FA 2008.

38. The appeal was accordingly struck out and the assessment confirmed.

5 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 “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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**MICHAEL CONNELL
TRIBUNAL JUDGE**

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RELEASE DATE: 9 July 2015

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