[2015] UKFTT 0360 (TC)

# TC04544

**Appeal number: TC/2013/06314**

***Excise Duty – importation of tobacco products – evasion of duty – appeal against assessment – whether dishonesty – cross application to strike out – no reasonable prospect of the Appellant's case succeeding – appeal struck out***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**ELEANOR BELCHER** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE MICHAEL CONNELL**
**MEMBER ELIZABETH POLLARD**

**Sitting in public at City Exchange, Albion Street, Leeds on 18 February 2015**

**The Appellant did not attend**

**Mr Andrew Scott of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

DECISION

1. This is an appeal by Mrs Eleanor Belcher ("the Appellant") against a decision by HM Revenue and Customs ("HMRC") in a letter dated 2 July 2013, to issue an assessment of excise duty in the amount of £1,036. A wrongdoing penalty in the sum of £207 issued on 9 September 2013 is also appealed.

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

3. The Appellant did not attend the hearing. The Tribunal was satisfied that the Appellant had been given notice of the time, date and venue of the appeal hearing and that it was in the interests of justice to proceed.

**Background**

4. The Appellant was stopped by Officers of UK Border Force at Hull on 17 May 2013 on her return from a trip to Belgium and was found to have twelve packs of hand rolling tobacco, a total of 6.0 kg.

5. A commerciality statement was read to the Appellant, which was confirmed as understood, and the Appellant was then interviewed.

6. In the course of the interview the Appellant told the UKBF officers that the twelve packs of tobacco cost approximately £600 and were for her and her husband and their two daughters.

7. The Appellant advised that she and her husband smoke fifty to sixty cigarettes per day, which equates to more than a pack of tobacco per day. She added that she had travelled abroad, again to Belgium, on two previous occasions that year but said that she had not brought back any tobacco on her previous trips.

8. After questioning, 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 tobacco was seized under s 139 (1) CEMA.

9. He arrived at his decision because the Appellant claimed not to have purchased any tobacco on previous trips, which he considered unlikely given that she and her husband were heavy smokers. The Appellant was also vague about her previous trips abroad and there were inconsistencies with her co-traveller's accounts of trips. The quantity of tobacco that the Appellant brought back from abroad was six times over the guideline limit of 1kg.

10. The UK Border Force Officer issued the Appellant with Public Notice 12A which set out her rights to appeal the seizure. 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 30 day deadline.

11. 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.

12. 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) 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.

13. An assessment was issued by HMRC on 2 July 2013 in the sum of £1,036. This was calculated on the basis that the tobacco was owned by the Appellant in the following manner:

£172.74 (duty per kg) x 6.0kg = £1,036

14. On 27 September 2013, HMRC raised an assessment to wrongdoing penalty under Schedule 41 of the Finance Act 2008 in the sum of £207 and notified the Appellant. The explanation detailed that a reduction of 100% (the maximum) had been given for the quality of disclosure.

15. On 10 September 2013 the Appellant lodged a letter of appeal with the Tribunal appealing the assessment and the penalty, with a request for hardship which was granted on 18 December 2013.

The Strike Out application

16. 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."

17. 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;"

18. 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.

b) The Appellant did not challenge 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),

d) In the alternative there is no reasonable prospect of success on this or the other grounds of appeal.

## The Law

19. The Customs and Excise Management Act 1979 ("CEMA") provides:

> "49(1) Where-
>
> 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.
>
> 139(1) Anything liable to forfeiture under the Customs and Excise Acts may be seized or detained by any officer..."

20. Paragraph 3 Schedule 3 CEMA provides:

> "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 ..."

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

> "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."

22. 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—

(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."

23. 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.

24. 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.

25. 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 excise duty.

26. 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 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 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 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 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 being illegally imported by the owners for commercial use."

**The Appellant's Case**

27. The Appellant appeals on the ground that the tobacco was for her own personal use. She says in her appeal letter:

> "I go to Belgium and France for short breaks, sightseeing and visiting the Commonwealth war graves but cannot always afford tobacco for myself, my husband and my two daughters. I brought the tobacco back for my own use and my family's use and certainly did not intend to sell it, as was presumed by the Border Agency officer. I was in a car accident about 16 months ago and suffer from ligament problems in my shoulder and received a payment for my injuries. I would really appreciate my case looked at because the rest of my compensation has gone and I do not have the resources to pay the fine as well."

**HMRC's Case**

28. HMRC argue that the grounds of appeal, that the goods were intended for own use, are not valid grounds of appeal following the goods having been deemed condemned as forfeited and that the appeal 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. She was made aware that the correct method of challenging the legality of seizure was by instigating proceedings in the Magistrates Court.

30. The Appellant did not challenge the legality of seizure and the goods are therefore deemed to have been 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.

31. In consequence the Tribunal cannot reopen this issue. HMRC relies upon the decision of the Court of Appeal in *HMRC v Jones and Jones* and in particular on the judgment of Mummery LJ (at paragraph 26 above).

32. The decision in *HMRC v Jones and Jones* is applicable to the assessment of duty following the decision in *HMRC v Race* [2014] UKUT 0331 (TCC), per Mr Justice Warren at para 33:

> "Taking those factors in turn, I do not consider it to be arguable that 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 for the reasons explained in Jones and applied in EBT. 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."

33. It is also applicable to penalties, (at para 39):

> "... the First-tier Tribunal could no more re-determine, in the appeal against the Penalty Assessment, a factual issue which was a necessary consequence of the statutory deeming provision than it could re-determine a factual issue decided by a court in condemnation proceedings."

34. The Appellant's grounds of appeal disclose no reasonable prospects of success. There is nothing in the grounds of appeal that suggest that HMRC did not have the power to make the assessment or raise the penalty or that they were improperly calculated.

35. With respect to the penalty it is accepted that the Appellant can challenge the mitigation of a penalty payable under schedule 41 and the Tribunal has jurisdiction to substitute HMRC's decision for another decision that HMRC had power to make, including reducing the penalty. However the maximum discount for disclosure has been given. The Appellant does not put forward any grounds of appeal challenging the calculation of the penalty or any reason for granting a special reduction (F A 2008, schedule 41 paragraph 14).

36. The Appellant has no prospect of succeeding with an argument that the mitigation allowed by the Respondents was not legally or technically correct. The penalty amount has been calculated within the statutory bracket for non-deliberate behaviour where a prompted disclosure was made, in this case after UKBA stopped the Appellant. No other bracket could be applicable to the facts of this case. Within this bracket the lowest possible penalty amount is 20%, which has been awarded to the Appellant. As such, it is submitted that no further reduction could be made under the legislation.

37. The Appellant does not have either special circumstances or a reasonable excuse that allows for further mitigation.

38. The Appellant also appeals on the basis that she cannot afford to pay the assessment. This is not a valid ground of appeal. The goods were lawfully seized as being held for a commercial purpose without the payment of duty. HMRC are therefore entitled to assess the duty amount on the goods.

**Conclusion**

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

40. 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 1979. Thus the legality of the seizure has been deemed a fact.

41. The Tribunal does not have any jurisdiction to reopen the issue as to whether the goods were held for personal use. The Appellant has not put forward any other grounds of appeal other than to say that she will suffer financial hardship and will not

be able to pay the assessment. As HMRC say, that is not a valid ground of appeal. The goods were lawfully seized as being held for a commercial purpose without the payment of duty and in consequence HMRC are therefore entitled to assess the duty amount on the goods, and raise a penalty under schedule 41 paragraph 4 of FA 2008

38. The appeal is accordingly struck out and the assessment and penalty confirmed.

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.

**MICHAEL CONNELL**
**TRIBUNAL JUDGE**

**RELEASE DATE: 17 JULY 2015**