[2016] UKFTT 0109 (TC)

TC04882

Appeal number: TC/2014/02130

PROCEDURE – application for appeal to be struck out – jurisdiction of Tribunal in "restoration" appeals – application allowed but proceedings stayed to enable appellant to amend its Notice of Appeal

FIRST-TIER TRIBUNAL
TAX CHAMBER

ECOADANA SRO **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS

Sitting in public at The Royal Courts of Justice on 6 January 2016

Andrew Zalewski, instructed by Ardens Solicitors for the Appellant

Will Hays, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The appellant has made an appeal to the Tribunal that relates to HMRC's refusal to restore oil that was seized in 2013. HMRC have applied to the Tribunal for that appeal to be struck out on the basis that the Tribunal has no jurisdiction to deal with it.

Background

2. None of the background set out at [3] to [13] was in dispute.

3. On 24 August 2013, HMRC seized a quantity of oil, and a tractor and trailer unit that was transporting that oil, because they considered that the oil was subject to duty which had not been paid. The International Consignment Note that accompanied the oil showed the "sender" as "Biogenis Sp Z o o Sp. K" ("Biogenis"), the "consignee" as Ekoadana S.R.O ("Ecoadana"[1], the appellant in the appeal that is before the Tribunal) and the carrier as "Tomski Trans" ("Tomski"). Officer G McLuckie of HMRC issued a "Seizure Information Notice" on the same date.

4. On 27 August 2013, HMRC sent a "Notice of Seizure" to Marcin Tomkowicz at Tomski by post to the address in Poland shown on the International Consignment Note referred to at [3] above stating that the oil and vehicles had been seized and explaining that:

> If you claim that the said goods are not liable to forfeiture, you must, within one month from the date of this Notice of Seizure, give notice of your claim in writing in accordance with paragraphs 3 and 4 of Schedule 3 to [The Customs and Excise Management Act 1979].

5. On 9 September 2013, Ms Ewa Klyszewska Daly, of "Pierwssza Pomoc Polscotia" sent Officer Andrene Fallone of HMRC a letter (the "Disputed Notice") containing the following paragraphs:

> My client, Mr Artur Grendysa, CEO HSW Aluminium Sp.z.o.o …owner of the oil in the tanker is anxious to learn what is the time period for holding this product
>
> …
>
> I understand that Mr Grendysa regularly supplies this type of product throughout Europe and it is tested in certified laboratories in Poland.
>
> We would appreciate an indication of what the timeframe is likely to be for the testing being completed by HM Revenue & Customs.
>
> Also, neither Mr Grendysa and Mr Tomkowicz are completely unaware of any irregularities with the oil being supplied to Mr Mustafa Asim of Global Trading (Scotland) Limited, in Glasgow.

[1] Various spellings of the appellant's name have been proposed throughout these proceedings. I will adopt the one that Mr Zalewski used in his written submissions.

6. HMRC deny receiving the Disputed Notice within 30 days of the date of the seizure or the date of the Notice of Seizure.

7. On 31 October 2013 (more than 30 days after both the seizure and the date of the Notice of Seizure), Ardens Solicitors ("Ardens") sent a letter addressed to Andrene Fallone of HMRC. In that letter Ardens noted that they acted for Ecoadana who they described as the owner of the oil that had been seized and for Mr Artur Grendysa "who is appealing the decision of 24 August 2013 signed by Customs Officer G. McLuckie". Ardens referred to the Disputed Notice and asserted that it was "effectively and implicitly challenging the legality of the seizure". Ardens' letter concluded with a request for a Notice of Seizure, an indication of the time frame for testing the oil and copies of further relevant documents.

8. On 7 January 2014, HMRC responded to Ardens' letter of 31 October 2013. And enclosed with that letter a copy of the Notice of Seizure. HMRC's letter made the following points:

> (1) Ardens' letter of 31 October 2013 was received too late to constitute a valid notice of claim under paragraph 6 of Schedule 3 of the Customs and Excise Management Act 1979 ("CEMA").
>
> (2) HMRC having "now had sight of" the Disputed Notice denied that it amounted to a valid notice of claim as the legality of the seizure was not mentioned in that letter.

9. On 23 January, Ardens replied to HMRC's letter of 7 January 2014. In this letter, Ardens expressed the view that since they had only received the Notice of Seizure under cover of HMRC's letter of 7 January, they had 30 days from then (i.e. until 6 February 2014) to submit a notice of claim. They therefore asked HMRC to "review your decision and accept our client's appeal which we submit is effective".

10. Some further correspondence ensued. On 3 March 2014, HMRC brought this to an end by sending a letter re-iterating their view that no notice of claim was made within the applicable time limit and stating they considered the Tribunal had no jurisdiction to consider the matter, but that Ardens could take the matter up in the High Court if they wished.

11. On 22 April 2014, Ecoadana submitted a Notice of Appeal to the Tribunal. It stated that it was appealing against HMRC's decision contained in their letter of 3 March 2014 and asserted that the oil had not been lawfully seized. The Notice of Appeal was accompanied by a separate document (settled by Mr Zalewski). That document was entitled "Application to appeal out of time pursuant to s16(1) Finance Act 1994", but also included points on the merits of Ecoadana's appeal as follows:

> (1) The Notice of Seizure was not valid, as it had been sent only to Tomski (a freight forwarding company) and not to the owner of the oil.
>
> (2) The Disputed Notice was a valid notice of claim for the purposes of Schedule 3 of CEMA and HMRC should have initiated condemnation proceedings in response to that letter.

(3) Alternatively, Ecoadana only received the Notice of Seizure on or around 7 January 2014 and that Ardens' letter of 23 January 2014 should be treated as an in-time notice of claim.

12. HMRC considered that the above grounds of appeal concern the question of whether HMRC were validly required to take condemnation proceedings, a matter that is not within the Tribunal's jurisdiction. There has been a previous hearing to consider whether the Tribunal has jurisdiction, but that was adjourned in the hope that the parties could agree a settlement. In the event, no settlement was possible.

13. Ecoadana has also taken proceedings for judicial review in the High Court. Those proceedings are stayed pending the Tribunal's decision on whether it has jurisdiction to hear Ecoadana's appeal.

Applications to HMRC for restoration

14. There was little evidence during the hearing as to precisely what steps the appellant had taken to request restoration of the oil under s152(b) of CEMA. Mr Hays thought that the position was:

(1) Following the adjournment of the Tribunal hearing referred to at [12], on 17 July 2015, Ardens wrote to HMRC to request restoration of the oil.

(2) On 28 August 2015, HMRC replied to that request refusing to restore the oil (the "Non-restoration Letter").

(3) No review of HMRC's decision had been requested.

15. In his written submissions following the hearing, Mr Zalewski said that the position is as follows:

(1) Requests for restoration were made in September or October 2013.

(2) Ardens have no record of receiving the Non-restoration Letter. Ecoadana only received the Non-restoration letter on 4 January 2016, two days before the Tribunal hearing referred to at [12], when HMRC included that letter in a "Respondents' bundle" of documents. (I note that the only bundle of documents made available to me at the hearing was the "Appellant's bundle" of documents so I have not myself seen a copy of the letter of 28 August 2015).

(3) Having now received the Non-restoration Letter, Ecoadana have applied for a review of that decision. Ecoadana's position is that it is in time to request such a review as, pursuant to s14(3) of the Finance Act 1994 ("FA 1994"), it has 45 days from the date the decision was "first given" to request a review and the relevant date for these purposes is 4 January 2016, the date on which Ecoadana received the Non-restoration Letter.

16. Mr Zalewski submitted that, in the circumstances, the Tribunal had the power to order HMRC to perform a review under s14A of FA 1994.

17. From the above, I have concluded that Mr Zalewski and Mr Hays were agreed that, to date, HMRC have not performed any review of a decision to refuse to restore the oil under s15 of FA 1994.

Relevant law

Provisions relating to forfeiture

18. HMRC's power to seize goods and vehicles is set out in s139 and s141 of CEMA.

19. Schedule 3 of CEMA sets out a number of provisions connected with the seizure of goods which, so far as material, are as follows:

> **Notice of seizure**
>
> 1.--(1) The Commissioners shall, except as provided in sub-paragraph (2) below, give notice of the seizure of any thing as liable to forfeiture and of the grounds therefor to any person who to their knowledge was at the time of the seizure the owner or one of the owners thereof.
>
> (2) Notice need not be given under this paragraph if the seizure was made in the presence of--
>
> (a) the person whose offence or suspected offence occasioned the seizure; or
>
> (b) the owner or any of the owners of the thing seized or any servant or agent of his; or
>
> (c) in the case of anything seized in any ship or aircraft, the master or commander.
>
> 2. Notice under paragraph 1 above shall be given in writing and shall be deemed to have been duly served on the person concerned--
>
> (a) if delivered to him personally; or
>
> (b) if addressed to him and left or forwarded by post to him at his usual or last known place of abode or business or, in the case of a body corporate, at their registered or principal office; or
>
> (c) where he has no address within the United Kingdom or the Isle of Man, or his address is unknown, by publication of notice of the seizure in the London, Edinburgh or Belfast Gazette.
>
> **Notice of claim**
>
> 3. 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 at any office of customs and excise…
>
> **Condemnation**
>
> 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.

6. Where notice of claim in respect of any thing is duly given in accordance with paragraphs 3 and 4 above, the Commissioners shall take proceedings for the condemnation of that thing by the court, and if the court finds that the thing was at the time of seizure liable to forfeiture the court shall condemn it as forfeited.

HMRC's discretionary power to restore goods

20. Section 152 of CEMA gives HMRC a discretionary power to restore goods and vehicles that have been lawfully seized in the following terms:

152 Power of Commissioners to mitigate penalties, etc

The Commissioners may, as they see fit--

(a) ... compound an offence (whether or not proceedings have been instituted in respect of it) and compound proceedings or for the condemnation of any thing as being forfeited under the customs and excise Acts; or

(b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under those Acts.

Reviews of HMRC's discretionary powers

21. Section 14 of the Finance Act 1994 provides so far as material as follows:

14 Requirement for review of a decision under section 152(b) of the Management Act etc

(1) This section applies to the following decisions by HMRC, not being decisions under this section or section 15 below, that is to say--

(a) any decision under section 152(b) of the Management act as to whether or not anything forfeited or seized under the customs and excise acts is to be restored to any person or as to the conditions subject to which any such thing is so restored;

(b) any relevant decision which is linked by its subject matter to such a decision under section 152(b) of the Management Act.

(2) Any person who is--

(a) a person whose liability to pay any relevant duty or penalty is determined by, results from or is or will be affected by any decision to which this section applies,

(b) a person in relation to whom, or on whose application, such a decision has been made, or

(c) a person on or to whom the conditions, limitations, restrictions, prohibitions or other requirements to which such a decision relates are or are to be imposed or applied,

may by notice in writing to the Commissioners require them to review that decision.

…

(3) The Commissioners shall not be required under this section to review any decision unless the notice requiring the review is given before the end of the period of forty-five days beginning with the day on which written notification of the decision, or of the assessment containing the decision, was first given to the person requiring the review.

(4) For the purposes of subsection (3) above it shall be the duty of the Commissioners to give written notification of any decision to which this section applies to any person who--

(a) requests such a notification;

(b) has not previously been given written notification of that decision; and

(c) if given such a notification, will be entitled to require a review of the decision under this section.

22. Section 14A of FA 1994 provides so far as material as follows:

14A Review out of time

(1) This section applies if--

(a) a person may, under section 14(2), require HMRC to review a decision, and

(b) the person gives notice requiring such a review after the end of the 45 day period mentioned in section 14(3).

(2) HMRC are required to carry out a review of the decision in either of the following cases.

(3) The first case is where HMRC are satisfied that--

(a) there was a reasonable excuse for not giving notice requiring a review before the end of that 45 day period, and

(b) the notice given after the end of that period was given without unreasonable delay after that excuse ceased.

(4) The second case is where--

(a) HMRC are not satisfied as mentioned in subsection (3), and

(b) the appeal tribunal, on application made by the person, orders HMRC to carry out a review.

23. Section 15 of FA 1994 sets out the procedure to be followed on a review under s14 or s14A of FA 1994.

24. Section 16 of FA 1994 sets out rights of appeal to the Tribunal in relation to matters connected with a refusal to restore goods and provides, relevantly, as follows:

16 Appeals to a tribunal

(1) An appeal against a decision on a review under section 15 (not including a deemed confirmation under section 15(2)) may be made to an appeal tribunal within the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates.

(1A) An appeal against a deemed confirmation under section 15(2) may be made to an appeal tribunal within the period of 75 days beginning with the date on which the review was required.

(1B) Subject to subsections (1C) to (1E), an appeal against a relevant decision (other than any relevant decision falling within subsection (1) or (1A)) may be made to an appeal tribunal within the period of 30 days beginning with--

(a) in a case where P is the appellant, the date of the document notifying P of the decision to which the appeal relates, or

(b) in a case where a person other than P is the appellant, the date the other person becomes aware of the decision, or

(c) if later, the end of the relevant period (within the meaning of section 15D).

…

(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say--

(a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;

(b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and

(c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a review or further review as appropriate], to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.

The decision in Jones

25. In *HMRC v Jones and Jones* [2011] EWCA Civ 824, the Court of Appeal considered the potential overlap between condemnation proceedings and an appeal to the Tribunal under s16 of FA 1994 against HMRC's refusal to restore seized goods. In that case Mummery LJ said:

> The deeming process [contained in paragraph 5 of Schedule 3 of CEMA] limited the scope of the issues that the respondents 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 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.

The respective arguments of the parties

26. Mr Hays argued that the Tribunal's jurisdiction is not engaged and that, accordingly, the appeal should be struck out, for the following reasons:

(1) HMRC have not performed any review of the decision set out in the Non-restoration Letter under s14 of FA 1994. In the absence of such a review, there is no appeal to the Tribunal under s16 of FA 1994.

(2) The Disputed Notice was not received and, in any event was not a notice of claim under paragraph 3 of Schedule 3 of CEMA. In those circumstances, paragraph 5 of Schedule 3 of CEMA applies and the appellant cannot raise arguments relating to the legality of the seizure before the Tribunal following the decision in *Jones*.

(3) The Tribunal has no jurisdiction to compel HMRC to take condemnation proceedings.

27. Mr Zalewki's argument was as follows:

(1) The decision of the High Court in *Gascoyne v HMRC* [2003] EWHC (Ch) 2003 demonstrated that the Tribunal does have jurisdiction to consider questions relating to the legality of a seizure.

(2) The Disputed Notice was a valid notice of claim under paragraph 3 of Schedule 3 of CEMA. Since a valid notice of claim was served, applying the decision in *Wnek v Director of Border Revenue* [2013] UKFTT 575 (TC), the "statutory deeming" set out in paragraph 5 of Schedule 3 of CEMA is not engaged and the appellant can put forward arguments as to the legality of the seizure in the Tribunal.

(3) HMRC's failure to serve Notice of Seizure on Ecoadana at the time of the original seizure in 2013 vitiated the entire process of seizure and was a further reason why the "statutory deeming" set out in paragraph 5 of Schedule 3 of CEMA is not engaged with the result that there is no prohibition on raising points relating to the legality of the seizure before the Tribunal.

(4) In written submissions submitted after the hearing, Mr Zalewski made additional points based on the appellant's rights under the European Convention on Human Rights, the remedy that it might realistically obtain in judicial review proceedings and matters of EU law.

Discussion

Absence of review

28. Mr Hays is plainly correct to say that, without a review under 15 FA 1994 in a case such as this, there can be no appeal to the Tribunal. That can be seen by considering the rights of appeal to the Tribunal set out in s16 of FA 1994. The only right of appeal that s16 confers which is not linked to a decision on review is that set out in s16(1B) of FA 1994 which envisages that an appeal can be made against a "relevant decision". However, a decision to refuse to restore goods under s152(b) of CEMA is not within the scope of the definition of "relevant decision" set out in s13A(a) to (i) of FA 1994, and is expressly excluded from the scope of s13A(j) of FA 1994.

29. Therefore, since there has to date been no review of the decision in the Non-restoration Letter, the Tribunal has no jurisdiction to hear the appeal in its current form.

30. Mr Zalewski appeared to acknowledge this fundamental difficulty in written submissions that he made following the hearing in which he requested the Tribunal to direct HMRC to confirm whether they accept that the appellant has made an in-time application for a review and, if they do not, to treat the appeal as a request for a review out of time under s14A(4)(b) of FA 1994.

31. Given my conclusion at [29], Rule 8(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 requires that the appeal in its current form be struck out. In those circumstances, I do not consider it would be appropriate to make the case management directions in connection with this appeal that Mr Zalewski requests. However, depending on the conclusion that HMRC come to on whether the application for a review is out of time, and depending on the conclusions that HMRC reach in any review that they do perform, the appellant may wish to bring further proceedings before the Tribunal, for example an application for a late review under s14A(4)(b) of FA 1994 or an appeal against HMRC's review decision. If I simply strike out the appeal with immediate effect, the appellant would need to start proceedings afresh and that would involve additional time and expense. In those circumstances, I have decided to stay these proceedings for a period so that the appellant has the opportunity to make an application to amend its grounds of appeal should it wish to do so. I have made separate case management directions to this effect.

Other issues

32. I have considered whether it is desirable that I should make findings on the other arguments that were made during the hearing. I have decided that I should not. Parliament has directed that an appeal to this Tribunal in a case such as this can be made only when HMRC have performed a review of their original decision. In those circumstances, I would not wish any determinations that I make to be seen as influencing or affecting any decision that HMRC make in connection with the appellant's application for a review.

33. I will, however, say that the normal practice in this Tribunal is for any appeal under s16 of FA 1994 in a case such as this to be heard only after the lawfulness of the seizure has been established. In circumstances where condemnation proceedings are being pursued, the Tribunal would ordinarily stay the appeal under s16 of FA 1994 pending the outcome of those condemnation proceedings. That is for the obvious reason that, if the outcome of the condemnation proceedings is that the goods in question were not lawfully seized, it will be unnecessary for the Tribunal to review the exercise of HMRC's discretionary powers since the goods will have to be returned in any event. By contrast if condemnation proceedings establish that the goods were lawfully seized, then the Tribunal can take account of this when determining the appeal under s16 of FA 1994.

34. If the appellant ultimately does bring an appeal against a decision that HMRC take on review, the appellant will be asking the Tribunal to assess the reasonableness of HMRC's decision in circumstances where the lawfulness of the seizure has not been determined or, on the appellant's argument, deemed to be determined under paragraph 5 of Schedule 3 of CEMA. The appellant's grounds of appeal raise the question of whether the goods were lawfully seized (a matter that is not within the jurisdiction of the Tribunal). Moreover, in order to determine whether the deeming provisions of paragraph 5 of Schedule 3 of CEMA are engaged, the Tribunal would have to determine whether the Disputed Notice validly required HMRC to commence condemnation proceedings even though the condemnation proceedings themselves are outside the Tribunal's jurisdiction.

35. The appellant argues that, since, in its argument, a valid notice of claim was served, the decision in *Wnek* makes it possible for it to make arguments based on the legality of the seizure of the oil. I will not make any decision on this issue since it is not necessary for me to do so. However, I do have doubts about the appellant's proposition. It might be said that it is not just the deeming provisions of paragraph 5 of Schedule 3 of CEMA that restrict a taxpayer's ability to raise the lawfulness of seizure in proceedings before the Tribunal. Indeed, the statutory deeming does not apply if condemnation proceedings are taken but the taxpayer is unsuccessful in those proceedings and yet it cannot be intended that the taxpayer should be able to argue before the Tribunal that those condemnation proceedings were wrongly decided. Moreover, Mummery LJ's statement set out at [25] expresses views on the scope of the Tribunal's jurisdiction generally and is not confined to the effect of the deeming provision in paragraph 5 of Schedule 3 of CEMA.

36. In any event, it does seem to me that it would be much more logical for the parties, before taking the proceedings before the Tribunal much further, to seek to determine (in proceedings otherwise than before the Tribunal) whether condemnation proceedings have been validly initiated or not. If they have, the condemnation proceedings can take their course. If they have not, it will be clear that the deeming provisions of paragraph 5 of Schedule 3 are engaged and, consequently, it will be clear which issues can be raised before the Tribunal and which cannot. That seems to me to lead to a much more satisfactory state of affairs than that the parties are currently in.

Conclusion

37. Since HMRC have not performed a review of the decision set out in the Non-restoration Letter, the Tribunal has no jurisdiction to hear this appeal. The appeal must, therefore, be struck out. However, I have released separate case management directions that offer the appellant the opportunity to amend its grounds of appeal should it wish to.

38. The parties are urged to consider the points made at [33] to [36] above.

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.

JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 12 FEBRUARY 2016