TC06144

Appeal number: TC/2017/00631

EXCISE DUTY – 8,000 cigarettes brought in from another Member State - Excise assessment - Excise wrongdoing penalty

Application to strike-out the appeal against the excise assessment - Issues relating to personal use - Jones and Race applied - Tribunal has no jurisdiction - Rule 8 - Appeal against the excise assessment struck-out

Excise wrongdoing penalty - Appeal against the excise wrongdoing penalty stayed on terms

FIRST-TIER TRIBUNAL
TAX CHAMBER

MS MAŁGORZATA JAGŁA **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL

Sitting in public at The Law Courts / Y Llysoedd Barn, Civic Centre / Canolfan Dinesig, Mold / Yr Wyddgrug CH7 1AE on 28 September 2017

The Appellant appeared in person (assisted by Mr Tadeusz Prochacki)

Mr Alexander Williams, of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. The Notice of Appeal dated 5 January 2017 challenges HMRC's decisions, made on 29 April 2016 (and upheld on departmental review on 8 December 2016):

5 (1) To assess the Appellant under section 12(1A) of the *Finance Act 1994* in the amount of £2,120 in respect of the excise duty due on 8,000 cigarettes seized from the Appellant on 21 October 2015; and

(2) To impose a civil excise wrongdoing penalty under Schedule 41 of the *Finance Act 2008* in the sum of £964 (but subsequently amended to £424).

10 2. This is my decision in relation to two applications by HMRC, both dated 3 April 2017:

(1) To strike-out that part of this appeal which relates to the excise duty assessment (£2,120) pursuant to Rules 8(2) or 8(3) of the Tribunal's Rules;

(2) To stay the remaining part of this appeal, which relates to the excise
15 wrongdoing penalty (£424) until after the determination of the case of *HMRC v Susan Jacobson* (presently listed to be heard by the Upper Tribunal in mid December 2017).

3. It is important that I make it clear that the hearing before me on 28 September 2017 was not a full hearing of the appeal, but rather was mainly a hearing to deal with
20 HMRC's application to strike-out part of the appeal which, if successful, would have the effect (in the absence of any successful application for permission to appeal my decision) of preventing Ms Jagła's appeal going to a full hearing.

4. Given the narrow scope of the hearing before me, I did not hear any evidence in a formal sense, but I did hear and have taken full consideration of the representations
25 made by Ms Jagła, through a Polish-language interpreter, and also made on Ms Jagła's behalf by Mr Prochacki, who accompanied her to the hearing.

5. I have also carefully considered all the documents in the hearing bundle.

6. The hearing took about two and a half hours to complete. Much of this time was taken up by the need to make sure that Ms Jagła, who is a litigant in person,
30 understood what my powers are, what I was being asked to do, and why. To my eyes, she was obviously troubled by the fact that this appeal, which has already been hanging over her for a long time, was not in fact a hearing which would dispose of all the matters together, and at one time. She was also concerned that there could be another hearing, some months in the future, to deal with the wrongdoing penalty.

35 7. I have some sympathy with her concerns. I can only add my voice to those of other Tribunal judges who have expressed reservations about applications to strike-out appeals against penalty assessments wherever condemnation proceedings in the Magistrates' Court had not been brought, relying on the 'deeming' provisions in Schedule 3 of the *Customs and Excise Management Act 1979* and the decision of the
40 Court of Appeal in *Jones*: see, for example, *John Patrick Lewis v HMRC [2015]*

UKFTT 640 (TC) (Judge Charles Hellier); *Liam Hill v HMRC [2017] UKFTT 018 (TC)* (Judge Richard Thomas); *Sunday Adewale v HMRC [2017] UKFTT 103 (TC)* (Judge Nicholas Aleksander).

8. In my view, the hearing before me - which was listed for a day, and which was attended by the Appellant as well as Counsel for HMRC - and the way in which it unfolded (including new issues emerging, or becoming clearer) does raise the question whether such applications to strike-out can always be said to genuinely serve the overriding objective in the Tribunal Rules of dealing with cases fairly and justly. I consider there to be considerable force in the remarks of Judge Christopher Staker in *Jamie Garland v HMRC [2016] UKFTT 0573 (TC)* at Para [17]:

> "...in a simple basic case, the time and resources required for a strike out application may be the same or nearly the same as the time and resources required to hear the substantive appeal. In such a case, the making of a strike out application may be disproportionate, unmeritorious though the appeal may appear to be. Given that there is always the possibility that the strike out application may not be granted, the most efficient way of disposing of the case may be simply to proceed to hear the substantive appeal, giving the appellant his or her day in court."

9. For present purposes, it is sufficient for me to make the following findings of fact:

(1) On 20 October 2015, Ms Jagła flew from Poland to Liverpool, arriving just before midnight;

(2) She was stopped. A search of her baggage revealed 8,000 Marlboro cigarettes;

(3) The Appellant told the Officer that the cigarettes were all for her;

(4) A commerciality statement was read to her;

(5) Ms Jagła was co-operative, and stayed to answer questions even though she was anxious to get home to see her daughter;

(6) For various reasons, recorded in the notebook, the Officer was not satisfied that the cigarettes were all for Ms Jagła's personal use, and seized them;

(7) Ms Jagła was issued with forms BOR 156 (Seizure Information Notice), BOR 162 (Warning Letter about Seized Goods) and Public Notices 1 and 12A;

(8) She signed and acknowledged receipt of form BOR 156.

10. It is a very important feature of this appeal that, although Ms Jagła (or someone on her behalf, it makes no difference) wrote to HMRC making a claim to the cigarettes, that was not done until December 2015: see Ms Jagła's letter of 17 May 2016 at page 80 of the bundle.

11. Even if her letter of December 2015 (which is at page 82 of the bundle) had been written on 1st December 2015, it was still sent outside the strict one-month time

period which the law gives a person from whom goods have been seized to contact HMRC to start condemnation proceedings in the Magistrates' Court. The law is Schedule 3 Paragraph 3 of the *Customs and Excise Management Act 1979*, which is to be found at page 102 of the bundle:

> "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"

12. That one month period allowed by the law would have ended on 21 November 2015. Before me, Ms Jagła suggested that her first letter might have been written sooner than December 2015, but she did not have any documents available at the hearing to prove it.

13. In this case, HMRC has insisted on strict application of the one-month time period, although the first letter was not significantly late. I have no power or jurisdiction to compel HMRC to consider the first letter and to initiate condemnation proceedings in the Magistrates' Court. That court, to all practical intents and purposes, was the only forum in which Ms Jagła's claim that the cigarettes were bought for personal use could be heard and determined.

14. I have no jurisdiction to consider or express any view as to whether, looked at in the round, it would have been better for HMRC to have considered what Ms Jagła wrote in her letter on the merits, even though out of time.

15. There was a question, which emerged at the hearing before me, as to whether Ms Jagła had been advised of her rights, and in particular whether she had been advised that a Notice of Claim must be brought within one month. She was not certain what documents she had been given at the airport. She said that she remembered being given some documents at the airport, but did not remember exactly what they were. That is understandable, given the passage of time - almost two years. She had not kept those documents.

16. Despite this uncertainty, and despite the practical and procedural constraints of a strike-out application, I consider that there is sufficient information before me to find as a fact that she was given Notice 12A (**'What you can do if things are seized by HM Revenue and Customs'**) which, at §3.4 sets out **'Is there a time limit for challenging the seizure'**.

17. This is for three reasons:

(1) Firstly, it is recorded on the Seizure Information Notice (Form BOR 156, at page 28 of the bundle) that Ms Jagła received Notice 12A;

(2) Secondly, the letter at page 82 is addressed to HMRC Specialist Investigations in Glasgow. That is the address which is given in Notice 12A (and which is not given anywhere else in the standard suite of documents). Part of the doubt and confusion which emerged at the hearing before me may well

have flowed from the fact that the Notice 12A in the Bundle is printed off from the web, and is not in the form (even photocopied) of Notice 12A in the form of a leaflet;

(3) Thirdly, Ms Jagła told me, and I take this as truthful, that she was afraid of going to court since she thought that she had no chance of defending herself without help from a lawyer, which she could not afford. I took that as a reference to the Magistrates' Court, which in turn is strongly suggestive that she knew the right avenue of challenge, but chose, for the reason explained (which I do not criticise) not to pursue it.

18. As such, I find that Ms Jagła had been given information telling her what to do and the time within which it had to be done.

19. Her December 2015 letter raises issues as to her knowledge of English. I make no findings about this. Ms Jagła spoke Polish at the hearing before me, but the Officer's notebook records her answering simple questions in English as to how long she had been away, and why. She is recorded as having chosen to stay to answer further questions, and is recorded as having understood. I do not doubt that what she said in her Notice of Appeal - that she had tried to be as helpful as she could - is right.

20. But, and even if her knowledge of English was not adequate to fully understand what she was being told at the airport, she was nonetheless provided with information in writing as to what had happened, why it had happened, and what she needed to do, and when, if she wanted to claim the cigarettes back. Given my findings above, it is clear that the Notice 12A came into the hands of someone who did understand it, and who was able to help Ms Jagła in writing a letter to HMRC, albeit that, unfortunately, it came too late in the day to be treated as Notice of Claim.

The Excise Assessment

21. Ms Jagła did not dispute the amount of duty nor HMRC's right to raise the assessment.

22. The duty assessment applied the correct Tax Code for cigarettes (irrespective of brand, as long as they are less than 9cm long): Tax Code 611. It was not argued that the RRP applied or the ad valorem calculation were wrong. In my view, and I so find, there is no difference for these purposes whether the cigarettes were Marlboro Gold KSF (as recorded on the Seizure Information Notice, BOR 156, signed by Ms Jagła) or 'Marlboro Gold' (as set out on the Excise Duty Schedule).

23. Duty has been charged on 8,000 cigarettes and not on 9,000 cigarettes. There was apparently a counting error which was put right at the airport, and the correct figure was applied in the duty assessment.

24. Whilst the duty assessment mis-spelt Ms Jagła's surname (transposing two of the letters) I did not consider this meant that the duty assessment had been levied against the wrong person. It was an unfortunate and careless spelling error. But the

assessment had the right address, and had not caused any confusion in the mind of Ms Jagła as its recipient.

25. HMRC relied heavily on the decisions of the Court of Appeal in *HMRC v Lawrence Jones and Joan Jones [2011] EWCA Civ 824* and the Upper Tribunal in *Race v HMRC [2014] UKUT 331 (TCC*). Both of those decisions come down to me from higher courts or Tribunals, and they bind me. I have to apply and follow them.

26. In *Jones*, the Court of Appeal held unanimously (at Paragraph 71 of its decision) that:

> (1) The Appellant has the right to invoke the Notice of Claim procedure to oppose condemnation by the court on the ground that the Appellant was importing the goods for her personal use, and not for commercial use;
>
> (2) In the scheme of legislation governing the procedures relating to imported goods seized by HMRC, Parliament has provided different avenues for challenging condemnation and forfeiture (via the Magistrates courts) on the one hand, and the restoration procedure (via an appeal to the FTT) on the other hand;
>
> (3) The question of personal use was for the Magistrates' courts in condemnation proceedings and not for this Tribunal. The Tribunal has to take it that the goods had been 'duly' condemned as illegal imports. It is not open to the Tribunal to conclude that the goods were legal imports illegally seized by HMRC by finding as a fact that they were being imported for personal use.

27. In *Race*, then then-President of the Tax and Chancery Chamber of the Upper Tribunal, Mr Justice Warren, was clear that the reasoning of the Court of Appeal in the *Jones* case meant that the First-tier Tribunal cannot go behind the 'deeming effect' of Paragraph 5 of Schedule 3 of the *Customs and Excise Management Act 1979* when it comes to an assessment to excise duty: see Paragraphs [26] and [33] of his decision.

28. Hence, the fact that no Notice of Claim was made in one month, means that the cigarettes are now 'deemed' to be (that is, conclusively treated as being) for commercial use, and, at the end of that month, were treated as being lawfully seized, and forfeit to the Crown.

29. That is the law. Schedule 3 Paragraph 5 of the *Customs and Excise Management Act 1979* (page 103 of the bundle) says:

> "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 ... the thing in question shall be deemed to be duly condemned as forfeited"

30. Since there was no Notice of Claim in the one month, then that means that the issue of personal use cannot now be raised in this Tribunal. The Tribunal has no jurisdiction. The issue can only have been dealt with in the Magistrates' Court.

31. The result is that excise duty assessment cannot be challenged in this Tribunal.

32. Rule 8(2) of *The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 SI 2009/273* says that the Tribunal must strike out the whole or any part of proceedings if the Tribunal *'does not have jurisdiction in relation to the proceedings or that part of them'* and does not exercise its power to transfer to another court or tribunal.

33. I have concluded that this Tribunal, in this case, has no jurisdiction in relation to the excise duty assessment of £2,120 and therefore the appeal in that regard must be struck-out pursuant to Rule 8(2).

The excise wrongdoing penalty

34. HMRC has applied to stay the remainder of the appeal pending determination of the case of *Susan Jacobson v HMRC*. This is due to be heard by the Upper Tribunal in December 2017. Until then, it is arguable that the position in relation to whether a person apprehended with dutiable goods in the 'channels' at the airport has passed an 'Excise Duty Point' or not.

35. In the circumstances, and as part of my general powers of case management, I have decided that is the right course of action.

36. Hence, I stay this aspect of the appeal until the Upper Tribunal determines *Jacobson*, and I direct that, within 28 days of the issue of the Decision of the Upper Tribunal, HMRC shall inform the Tribunal in writing, copied to the Appellant, informing the Tribunal whether the appeal in relation to the excise wrongdoing penalty is still resisted.

37. I also direct that, in default of compliance by HMRC with that direction, the appeal against the excise wrongdoing penalty will be allowed, without further order.

Outcome

38. The appeal against the excise duty assessment is struck-out under Rule 8(2). I uphold the excise duty assessment in the sum of £2,120.

39. The appeal against the excise wrongdoing penalty is stayed on the above terms.

Further comments

40. Two further points need to be mentioned in this Decision.

41. Firstly, the fact that I have upheld the duty assessment is **not** a criminal conviction. This Tribunal is not a criminal court and this is not a criminal matter. The duty assessment is entirely a civil matter. Ms Jagła has **not** been convicted by me of anything. I have made no findings at all that Ms Jagła has engaged in any criminal or dishonest conduct. I have upheld the duty assessment for the simple reason that Ms Jagła did not contact HMRC within one month of the seizure to claim the cigarettes and that they are conclusively deemed to be lawfully seized. She has not been arrested or charged in connection with any crime related to this seizure.

42. Secondly, I was troubled to learn, during the course of the hearing, that Ms Jagła, had tried to settle this assessment and penalty on several occasions with HMRC, without any admissions of liability, and on terms of payment by instalments, but that she had struggled to find anyone in HMRC to discuss the matter with her or to agree to accept payment by instalments until after this application had been heard and determined. Promises had been made that she would receive information through the post, but then nothing came. There may well have been some breakdown in communication or misunderstanding.

43. Whilst I cannot make any findings on this, since there is no evidence before me, it would be disappointing if this were true and this hearing had gone ahead when perhaps it did not need to.

44. Moreover, and as I explained to Ms Jagła, I have no power to order payment by instalments, and I have no power or jurisdiction to control HMRC's exercise of what are known as its 'Care and Management Powers'.

45. 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.

Dr Christopher McNall
TRIBUNAL JUDGE

RELEASE DATE: 3 October 2017