



TC06184

Appeal number: TC/2015/03021

Excise and Customs Duty - tobacco products seized - appeal against assessment and wrongdoing penalties - no prior challenge of seizure in Magistrates Court - whether Tribunal's jurisdiction extended to considering Appellant's grounds of appeal that the goods were for his personal use - no - whether penalties correctly assessed and reduction for behaviour correctly applied - yes - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

THOMAS MCCALLUM

Appellant

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL

Sitting in public at Taylor House, Rosebery Avenue, London on 21 August 2017

The Appellant in person

**Ms Natasha Barnes, Counsel, instructed by the General Counsel and Solicitor to
HM Revenue and Customs, for the Respondents**

DECISION

1. This is an appeal by Mr Thomas McCallum (“the Appellant”) against a decision
5 dated 7 April 2015 by HM Revenue and Customs (“HMRC”), to raise an assessment
of £2,165 for unpaid excise duty (“the Assessment”), relating to two seizures, one on
2 August 2014 and the other one on 22 November 2014, of Hand Rolling Tobacco
 (“the Goods”) and a penalty for wrongdoing of £833.63 (“the Penalty”).

Background

10 2. On 2 August 2014, the Appellant arrived at Dover where he was returning from
a trip to Belgium. He was stopped and questioned by a UK Border Force Officer. It
was established during interview that the Appellant had travelled to Belgium for the
purposes of purchasing tobacco which he stated was for himself, his wife and his son.
15 He advised the Officer that he had previously travelled in January 2014 for the same
purpose. The goods (7kg of Hand Rolling Tobacco) belonged to him personally and
had been purchased at an approximate cost of £400. The Appellant confirmed that he
had goods seized previously.

3. 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
20 the Customs and Excise Management Act 1979 (“CEMA”) and Regulation 88 of the
Excise Goods (Holding Movement and Duty Point) Regulations 2010 for the
contravention of 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.

25 4. The tobacco was seized under s 139 (1) CEMA. The Appellant was provided
with forms BOR 156 (Seizure Information Notice) and BOR 162 (Warning Letter
about Seized Goods) as well as public notices 1 and 12A.

5. Notice 12A explains that a challenge to the legality of seizure in the
Magistrates’ court should be made within one month of the date of seizure. The
30 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.

6. The Appellant did not challenge the legality of seizure within the permitted one
month period and therefore all of the seized goods are deemed to have been legally
35 seized.

7. 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 regarding the
liability to forfeiture of the goods, and that they were held for a commercial purpose.
40 As such, a duty point was prompted under Regulation 13(1) of the Excise Goods

(Holding & Movement and Duty Point) Regulation 2010 and the Commissioners may assess for duty under s 12 of the Finance Act 1994.

8. Again, on 22 November 2014, the Appellant arrived at Dover where he was returning from a trip to Belgium. Once more he was stopped and questioned by a Border Force Officer. During the interview it was established that the Appellant had travelled to Belgium and purchased Tobacco. He confirmed he had previously travelled about 14 weeks prior to that. The goods (5kg of Hand Rolling Tobacco) had been purchased at an approximate cost of £580.

9. The Officer seized the Goods as they were deemed to have been imported for a commercial purpose. The Appellant was provided with all paperwork including form C156 (seizure Information Notice).

10. The Appellant did not appeal the legality of the seizure within 30 days of it taking place.

11. On 20 March 2015, Officer Hamilton, who had taken over conduct of the matter, wrote to the Appellant to advise him that HMRC would not seek criminal proceedings against him, but excise duty on the seized goods would be due. Officer Hamilton also stated in his letters that a Wrongdoing Penalty would be charged. A penalty explanation was included in relation to the penalties being charged for each of the seizures. The Appellant was given the opportunity to submit any relevant information that may affect Officer Hamilton's view of the matter.

12. From Mr Hamilton's checks using HMRC systems, he established that the Appellant had three previous seizures. These were on 22 October 2011 (2.5 kgs of Hand Rolling Tobacco and 200 cigarettes), 31 May 2012 (2 kg HRT) and 26 July 2012 (3kg of HRT).

13. Having heard nothing from the Appellant, on 7 April 2015, Officer Hamilton issued an Excise Assessment EXA 11333/14 in the amount of £2,165 and Wrongdoing Penalty EXP 6438 in the amount of £833.63. The Penalty Explanation Notice stated a penalty is chargeable for '*handling goods subject to unpaid excise duty. The relevant legislation is Schedule 41 (4) (1) (a) FA2008 which states that a penalty is payable by a person who acquires possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods*'. Officer Hamilton considered that the Appellant had acquired possession of the Goods and physically carried the Goods into the UK for a commercial purpose.

14. Officer Hamilton considered that the behaviour of the Appellant was 'deliberate' as the Appellant took the opportunity to purchase tobacco goods in Europe in quantities higher than the recommended guidelines. UK Border Force systems showed that he had been stopped in the past entering the UK and previously had Hand Rolling Tobacco seized by Border Force Officers. Officer Hamilton believed the Appellant's behaviour to be deliberate because he had been issued with Notice 1 and must therefore have been aware of his responsibility with regard to importing Tobacco. He had not satisfied Border Force Officers that the Goods were

for his own use and as there had been no challenge in the Magistrates' Court, the Goods were deemed to have been brought by him for a commercial purpose.

15. The disclosure was prompted because the Appellant did not tell UKBF about the wrongdoing before he had reason to believe they had discovered it, or were about to discover. For this 'deliberate' wrongdoing, with a prompted disclosure, the minimum penalty percentage is 35% and the maximum penalty percentage is 70%. This means that the penalty range was from 35% to 70%. To assist, Officer Hamilton referred the Appellant to HMRC's factsheet which explains how penalties are calculated. The factsheet states that the penalty percentage "will fall within a range. This range will depend on HMRC's view of the type of behaviour and whether the disclosure was unprompted or prompted. The following table shows the penalty ranges".

Type of behaviour	Unprompted disclosure.	Prompted disclosure
Non-deliberate	10% to 30%	20% to 30%
Deliberate	20% to 70%	35% to 70%
Deliberate and concealed	30% to 100%	50% to 100%

16. The Penalty notice explained that HMRC can reduce the percentage depending on their view of how much assistance the Appellant had given them during their check. This assistance is referred to as 'quality of disclosure' (or as 'telling, helping and giving'). It explained that HMRC work out the difference between the minimum and maximum penalty percentages (Stage 1) and then multiply that figure by the total reduction (Stage 2) to arrive at the percentage reduction.

17. For 'telling': HMRC had given a partial reduction of 20% as the Appellant disclosed the inaccuracy in full but failed to admit there was a wrongdoing and how the wrongdoing arose. For 'helping': a full reduction of 30% had been given as no helping was needed to calculate the excise assessment. For 'giving': a full reduction of 30% had given as no giving of information was needed to calculate the excise assessment. HMRC had therefore given a total of 90%. The maximum penalty was 70% of the duty that would have been payable and that was reduced by 90% of the 35% difference between the maximum and minimum penalties, that is 31.5% leaving a penalty of 38.5% of the potential lost revenue payable. Calculations were provided to the Appellant to show how HMRC had arrived at the assessments and penalties.

18. On 17 April 2015, the Appellant wrote to Officer Hamilton indicating that he would appeal the decision as it was unjust and prejudicial against him. The Appellant reiterated that the goods were for his own personal use.

19. On 5 May 2015, the Appellant sent a Notice of Appeal to the Tribunal.

20. On 10 June 2015, HMRC accepted the Appellant's application for hardship and agreed to the appeal proceedings notwithstanding the fact that the sums due had not been paid.

The law

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

5 “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”

22. 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 -

- 10 (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
- 15 (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
- 20 under a customs suspensive procedure or arrangement; or
- (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
- 25 circulation in the EU at that importation.”

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.

30 (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.”

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

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

- (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.”

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

5 “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 -

those goods shall ...be liable to forfeiture.

10 “139.(1) Anything liable to forfeiture under the Customs and Excise Acts may be seized or detained by any officer...”

25. Paragraph 3 Schedule 3 CEMA provides:

15 “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 ...”

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

20 “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

25 27. 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:

- There was no Court case.
- The tobacco was for himself and his family.
- At the time of seizure, Border Force did not advise him of his right to appeal and that he was given no leaflets about this.
- 30 • The Appellant considered the decision to the issue Assessment and Penalty as unjust and prejudicial against him.

HMRC's Case

28. The Appellant has not formally challenged the seizures. He was made aware in each of the warning letters that the correct method of challenging the legality of seizure was by instigation of proceedings in the Magistrates' Court.

5 29. As the Appellant did not challenge the legality of seizures 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.

10 30. 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 has been finally determined. 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.

15 31. The Appellant is liable to pay the Assessment as he was "holding the Goods intended for commercial use" pursuant to Regulation 13(2)(b) of the 2010 Regulations.

20 32. Pursuant to Schedule 41 of the Finance Act 2008, the Assessment was calculated based on a percentage of the total Potential Lost Revenue ("PLR"), which for the two seizures was £2,165. The penalty of £833 was calculated at 38.5% of the PLR and was based on the Appellant's level of co-operation during the enquiry.

Conclusion

25 33. The facts of the matter are not in dispute, save to the extent that the Appellant maintains that the Goods were for his own personal use. However, as the Appellant did not challenge the legality of the seizure, the Goods were deemed to be duly condemned as forfeit under Paragraph 5 Schedule 3 of CEMA. Thus, the legality of the seizure and that the Goods were held and intended for commercial use, has been deemed a fact.

30 34. 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 improperly seized by HMRC by finding as a fact that they were intended for own use. In brief, the deemed effect of the Appellant's failure to contest condemnation of the Goods was that the Appellant had acquired possession of the Goods and physically carried the Goods into the UK for a commercial purpose.

35 35. The Goods were therefore 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. This also means that the assessment and penalties have been correctly applied.

36. I find as a fact that at the time of seizure on 2 August 2014 the Appellant was advised by an Officer of UK Border Force of his rights and provided with the documentation referred to at paragraph 4 above. He signed form BOR 156, which provides a description of the Goods seized. He also signed form BOR 162 which warns that HMRC may take action by raising an Assessment and issuing a Penalty. He was also given a copy of Public Notice 12A which explains the process of appealing to the Magistrates' Court within 30 days of the seizure.

37. The Tribunal does not have jurisdiction to decide whether the decision to issue the Assessment and Penalty was "unjust and prejudicial" as described by the Appellant. The Assessment and Penalty were raised in accordance with legislation and an appropriate reduction applied to the Penalty, as set out above.

38. The only issue which remains to be decided is whether the correct amount of reduction has been given, and in my view for the reasons set out by Officer Hamilton and included in paragraphs 14 to 17 above, it has. The behaviour was correctly determined as 'deliberate' and 'prompted'. The penalty range was therefore 35% to 70% and a significant, appropriate and in my view correct reduction was applied, thereby reducing the penalty to 38.5% of the PLR, to reflect the extent of the Appellant's 'telling' 'helping' and 'giving'.

39. The appeal is accordingly dismissed and the Duty Assessment of £2,165 and the Penalty Assessment for wrongdoing of £833.63 are confirmed.

40. 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: 26 OCTOBER 2017