



TC06736

Appeal number: TC/2015/06772

Excise duty – transshipment between two places in Republic of Ireland – stopped in Northern Ireland – acquitted by District Judge of criminal offence – HMRC failed to disprove appellant’s claim of what happened in District Judge’s court – res judicata – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BRENDAN LENNON

Appellant

- and -

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

**TRIBUNAL: JUDGE ALASTAIR J RANKIN
MISS PATRICIA GORDON**

**Sitting in public at Lands Tribunal, 2nd Floor, Royal Courts of Justice,
Chichester Street, Belfast, BT1 3JF on Wednesday 29 August 2018 at 10:30 AM**

Mr Danny McNamee of McNamee McDonnell Solicitors for the Appellant

**Mr Jo Millington BL, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

1. The Tribunal decided the appeal should be allowed.

5 **Background facts**

2. Mr Lennon appeals against a decision of HMRC contained in a letter dated 18 August 2015 to impose upon him an excise duty assessment of £14,233.00 (“the Assessment”) pursuant to section 12(1A) Finance Act 1994 (“FA 1994”) and Regulation 13 of The Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (“the 2010 Regulations”). The decision to impose the Assessment was upheld following a departmental review on 28 October 2015.

3. The Assessment was issued following a seizure of cigarettes on 16 December 2014, on which date officers of the Police Service of Northern Ireland stopped Mr Lennon as he was driving a white Peugeot van registration CK11 FBU (“the Vehicle”) on Foreglen Road, Claudy, County Londonderry. The Vehicle contained 60,000 cigarettes: 30,000 ‘Em@il’ cigarettes, and 30,000 ‘Lambert and Butler’ cigarettes. The Lambert and Butler cigarettes were later confirmed to be counterfeit. There was no evidence of any United Kingdom duty payment for any of the cigarettes. Mr Lennon signed a Seizure Information Notice.

4. At Strand Road police station Mr Lennon was interviewed under caution in the presence of his legal representative. A transcript of the interview was among the papers before the Tribunal and included the following:

“Basically I was driving a van which I got in Dundalk with the purpose of probably doing a run getting in a few pound for Christmas I was getting a hundred pound to drive to Donegal.”

5. When asked where he got the van Mr Lennon answered in Dundalk but answered “No comment” when asked who he got it from and who made arrangements with him for him to go to Dundalk to get it. Mr Lennon did admit that he suspected the van contained cigarettes and confirmed he was offered £100.00 per day and given a van and a phone. Mr Lennon when asked whether he knew that there is duty on cigarettes answered “No”. He answered most of the other questions “No comment”. The interview lasted 20 minutes.

6. Mr Lennon was arrested on suspicion of being concerned in the fraudulent evasion of duty, contrary to section 170 of the Customs and Excise Management Act 1979 (“CEMA”).

7. On 18 December 2014, a Notice of Seizure was sent to Mr Lennon in respect of the Vehicle. The Vehicle has subsequently been condemned as forfeit. In addition, no condemnation proceedings were commenced in respect of the cigarettes, which were liable to forfeiture by Regulation 88 of the 2010 Regulations. The cigarettes were duly condemned as liable to forfeiture (Paragraph 5 Schedule 3 CEMA).

8. Mr Lennon submitted a Notice of Appeal through his solicitors, McNamee McDonnell, on 17 November 2015. The grounds of appeal were as follows:

“Our client is not liable for the duty assessment herein.

5 Our client is not the owner of these goods, had no beneficial interest in same and no power of disposition or control over same. Our client was not holding same for the purpose of the legislation, him not holding the goods for commercial purpose as envisaged under the legislation.”

Arguments on behalf of Mr Lennon

10 9. Mr Lennon was present at the Tribunal but he was not called as a witness. He had submitted a witness statement dated 8 February 2018 which included the following statements:

15 “I state that this assessment related to a quantity of cigarettes which were in a vehicle which I was driving between Dundalk, Co Louth, Republic of Ireland and Donegal, Co Donegal, Republic of Ireland ...

I immediately informed the officers who stopped my vehicle at the time I was transporting a quantity of what transpired to be tobacco from Dundalk to an address in Donegal ...

20 I would state that, as was established before Derry Magistrates Court, I had no dishonest intention in relation to the goods which I was carrying on that day. Further I had no proprietorial control over such goods, I was simply involved in the transshipment of these goods through Northern Ireland.

25 I would state that the Court in Northern Ireland has found as a fact that I was transshipping these goods through Northern Ireland. I would therefore seek to rely on the decision of the Court of Justice of the European Union case c-175/14 Ralph Prankl [2015] STC 1375.”

10. Mr Lennon was prosecuted at Londonderry Magistrates Court under section 170(1)(b) CEMA which states:

“170 Penalty for fraudulent evasion of duty, etc.

30 (1) Without prejudice to any other provision of the Customs and Excise Acts 1979, if any person—

 (b) is in any way knowingly concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with any such goods,

35 and does so with intent to defraud Her Majesty of any duty payable on the goods or to evade any such prohibition or restriction with respect to the goods he shall be guilty of an offence under this section and may be detained.”

11. Mr McNamee stated that Mr Lennon’s defence was that he had been employed to transport these goods from Dundalk, County Louth to County Donegal which was from one location in the Republic of Ireland to another location in the Republic of Ireland. During interview and during his trial Mr Lennon asserted that these goods were not to be delivered to or used in the United Kingdom. The District Justice acquitted Mr Lennon. Accordingly Mr McNamee maintained that these facts established in the Magistrates Court resulted in the matter being res judicata and the appeal should be allowed.

12. If the Tribunal decided not to accept that the matter was res judicata Mr McNamee then referred to Regulation 13(1) of the 2010 Regulations which states:

“Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.”

13. Mr McNamee emphasised the words “in order to be delivered or used in the United Kingdom” and Mr Lennon’s defence was that the cigarettes were not going to be delivered or used in the United Kingdom.

14. At the hearing Mr McNamee referred to the decision of the European Court of Justice in Prankl which held at paragraph 32:

“In the light of all of those considerations, the answer to the question referred is that art 7(1) and (2) and art 9(1) of Directive 92/12 must be interpreted as meaning that, where goods subject to excise duty that have been smuggled into the territory of a member state are transported, without the accompanying document prescribed in art 7(4) of that directive, to another member state, in the territory of which those goods are discovered by the competent authorities, the transit member states are not permitted also to levy excise duty on the driver of the heavy goods vehicle who transported them for having held those goods for commercial purposes in their territory.

15. Mr McNamee asserted that this decision applied to the present case with the result that the United Kingdom, being the transit state, was not permitted to levy excise duty on Mr Lennon.

Arguments on behalf of HMRC

16. The 2010 Regulations implement in the United Kingdom the provisions of Council Directive 2008/118/EC (“the 2008 Directive”) concerning the general arrangements for excise duty.

17. HMRC in their skeleton argument referred to the legal framework and to several Upper Tribunal decisions and also to the Prankl decision of the European Court of Justice. They also produced witness statements from three HMRC Officers who were present but were not called as witnesses.

18. Mr Millington referred to the fact that the goods had been condemned as being liable to forfeiture and no proceedings had been issued by Mr Lennon. He argued that no supporting evidence of what happened in Londonderry Magistrates Court had been produced and as Mr Lennon had been acquitted there was no written judgment.

5 19. Mr Millington asserted that Mr McNamee's argument that the matter was res judicata was misconceived. HMRC had simply failed to prove Mr Lennon's intention to the level required by the criminal law.

Decision

10 20. Mr Lennon had signed his witness statement on 8 February 2018. In this statement he asserted that he was transporting the cigarettes from Dundalk in the Republic of Ireland to Donegal town in the Republic of Ireland. While the Tribunal queried why he was stopped outside Londonderry which would not be on a direct route between the two towns in the Republic we noted that no evidence was produced by HMRC to contradict his statement that he had established before Derry Magistrates Court that he had no dishonest intention in relation to the cigarettes and that the Court had found as
15 a fact that he was transshipping the cigarettes through Northern Ireland. HMRC could have produced evidence from someone present in court to contradict Mr Lennon's statement but failed to do so.

20 21. In order to be acquitted of the criminal offence Mr Lennon must have been able to persuade the District Judge that he was simply transshipping the cigarettes from Dundalk in the Republic of Ireland to Donegal also in the Republic of Ireland.

22. This Tribunal considers that the acquittal of the criminal charge results in the matter being res judicata and the appeal is therefore allowed.

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Alastair J Rankin
TRIBUNAL JUDGE

RELEASE DATE: 26 September 2018

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