[2018] UKFTT 769 (TC)

TC06903

Appeal number: TC/2017/03875

Excise Duty – cigarettes and rolling tobacco - paragraph 5 of Schedule 3 to the Customs and Excise Management Act 1979 – whether appellant was the owner of the goods seized – wrongdoing penalty

FIRST-TIER TRIBUNAL
TAX CHAMBER

BRENDAN McCANN **Appellant**

- and -

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

TRIBUNAL: JUDGE ALASTAIR J RANKIN
DAVID MOORE

Sitting in public at Lands Tribunal, Royal Courts of Justice, Chichester Street, Belfast, BT1 3JF on Monday 17 December 2018 at 10:30 AM

Ms Colleen McCreesh of McNamee McDonnell Solicitors for the Appellant

Ms Charlotte Brown BL, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by the appellant against an excise duty assessment of £5,270.00 and a wrongdoing penalty of £1,054.00. The Tribunal decided that the appeal should be dismissed.

2. At the start of the hearing HMRC indicated that they objected to the appeal in connection with the excise duty assessment proceeding as the Notice of Appeal dated 9 May 2017 indicated that the amount being appealed was £1,054.00 – the wrongdoing penalty. Ms McCreesh informed the Tribunal that the Notice of Appeal had been lodged by the appellant's previous solicitors, he wished to appeal both the excise duty assessment and the wrongdoing penalty and elsewhere in the Notice of Appeal reference was made to both the excise duty assessment and wrongdoing penalty.

3. After retiring to consider the matter the Tribunal decided that the clear intention of the appellant was to appeal both the excise duty assessment and the wrongdoing penalty as the Notice of Appeal referred to both in several places and only in one place was the financial amount incorrectly stated. In addition in the first paragraph of its Statement of Case HMRC stated that the appeal was against both the excise duty assessment and the wrongdoing penalty. The Tribunal therefore allowed the appellant to proceed with his appeal against both the excise duty assessment and the wrongdoing penalty.

Background

4. On 8 June 2015 during a search of the appellant's house, 103 Dermot Hill Road, Belfast, BT12 7BG (the house) by the Police Service of Northern Ireland (PSNI) for matters unrelated to HMRC 2,600 mixed band cigarettes and 25kg of hand rolling tobacco (the goods) was found within the property upon which UK duty had not been paid. PSNI referred the matter to HMRC.

5. The cigarettes were found within a black bin bag under the stairs and the tobacco was found in four large plastic bags in a shed to the rear of the house. The cigarettes consisted of seven boxes of M&J, three boxes of Black Mount and three boxes of Jin Ling, each box containing 200 cigarettes. The goods were removed by PSNI to Ardmore police station from where they were collected by HMRC Officer Cormican on 9 June 2015.

6. Officer Eoghan Martin Cormican, who gave evidence to the Tribunal, in his witness statement stated that the goods were sealed in five tamper evidence bags. When he opened the bags at his office in Carne House, Belfast one bag contained 10kgs Eastender HRT, three bags contained 5kgs each of Eastender HRT and the fifth bag contained 2,600 mixed brand cigarettes.

7. On 9 June 2015 at 12:50 hours Officer Cormican seized all the excise goods under section 139 of the Customs and Excise Management Act 1979 (CEMA 1979) as they were liable to forfeiture under section 49 of CEMA 1979.

8. On 10 June 2015 Officer Cormican posted a Notice of Seizure addressed to the appellant at the house. The letter clearly stated that 2,600 various brands of cigarettes and 25kgs Eastenders hand rolling tobacco had been seized as being liable to forfeiture by force of section 49(1)(a) and section 141(1) of CEMA 1979. The letter continued:

> "If you claim that the goods were 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 the Schedule 3 to the Customs and Excise Management Act 1979.
>
> If you do not give notice of claim within the said period of one month or, if any requirement of the above mentioned paragraph 4 is not complied with, the goods will be deemed to have been duly condemned as forfeit."

9. The appellant made no appeal against the seizure.

10. By letter dated 7 June 2016 HMRC Officer Ingham wrote to the appellant to inform him that HMRC considered he was liable to pay unpaid excise duty and a financial penalty. Enclosed with the letter was an explanation as to how HMRC calculated the amount of excise duty, £5,270.00 and details of how they calculated the penalty, £1,054.00. The letter further requested the appellant to let HMRC have any further information by 7 July 2016 to enable HMRC to consider whether there was any reasonable excuse or grounds for a special reduction.

11. As the appellant did not write to HMRC, a Notice of penalty assessment for £1,054.00 was issued on 7 July 2016.

12. On 25 July 2016 the appellant's previous solicitors, Breen Rankin Lenzi Limited wrote to HMRC and after acknowledging receipt of HMRC's letters dated 7 June 2016 and 7 July 2016 stated:

> "When our client was arrested at his home on June 8th 2015 on no occasion was he informed of any cigarettes or tobacco seized by the police. We would be grateful if you could check your records and confirm to us where these items were seized and any comments our client may have made after caution of the matters were put to him."

13. HMRC replied by letter dated 12 August 2016 advising that the information passed to HMRC from PSNI was that on 8 June 2015 2,600 mixed brand cigarettes and 25kgs of hand rolling tobacco was seized from the appellant's house. The solicitors were advised to contact PSNI for further details of where the goods were found and any comments the appellant may have made.

14. The solicitors wrote to HMRC on 8 September 2016 requesting a

> "history of this new fine which totals £5,270.00. Previously the fine was £1,054.00".

HMRC responded by letter dated 27 September 2016 advising that £5,270.00 referred to the excise duty assessment issued on 7 June 2016 and £1,054.00 referred to the excise wrongdoing penalty issued on 7 July 2016.

15. Nothing further appears to have happened until the solicitors wrote to HMRC on 28 February 2017 stating

> "In our frustration and in our client's frustration we left the matter and can understand that you are now seeking recovery of the debt but our client is adamant that he was not in possession of the said materials namely cigarettes and tobacco, was never interviewed in relation to same and knows nothing about same.
>
> He has considerable distrust of the PSNI and there has been a number of extremely dubious arrests of him in the past as well as attempts to put pressure on him to act and work for the police in this jurisdiction and has concerns that perhaps they have forwarded the wrong information to yourselves."

16. Breen Rankin Lenzi wrote to HMRC on 28 March 2017 stating that at no time was the appellant asked to account for the hand rolled tobacco and that he had no knowledge of same. The letter continued:

> "This is entirely different from the situation involving the cigarettes where again he was arrested in relation to an unrelated matter but was also interviewed in relation to those cigarettes giving an explanation for same."

17. HMRC accepted the letter dated 28 February 2017 as a late request for a review which was carried out by Appeals and Review Officer Christopher Dakers. Officer Dakers in his Review findings dated 12 April 2017 stated:

> "There appears to be conflicting representations made relating to whether you were interviewed in relation to the cigarettes discovered. It was represented throughout the enquiry and in the review request that you were not interviewed in relation to the cigarettes or tobacco, however in the subsequent representations (received 29 March 2017), it's stated that you were interviewed by PSNI about the cigarettes and gave an explanation. In any case, the matter is now being dealt with civilly by HMRC. You have stated your mistrust of PSNI and this is a matter that can only be addressed with them. It's otherwise clear from information supplied by PSNI that a quantity of excise goods, namely 2,600 cigarettes and 25kg of HRT, was found at your home address (103 Dermot Hill Road, Belfast, BT12 7GB). No assertions were made to HMRC that this was not correct, at least not until an assessment to duty was raised."

Review Officer Dakers continued by stating that the excise duty assessment was arithmetically and technically correct and based on the duty rates applicable at the time of seizure. He also confirmed that the wrongdoing was non-deliberate and not

concealed with a disclosure prompted by HMRC with the result that the penalty was calculated at 20% of the potential lost revenue.

18. By Notice of Appeal dated 9 May 2017 the appellant's then solicitors appealed to this Tribunal stating the grounds of appeal as:

> "We emphasise again that at no time was Mr McCann ever ask (sic) to account for the items in question for which the excise duty assessment has arisen and the wrongdoing penalty has arisen. His case quite simply is that he knows nothing about these items. He has been prosecuted at Belfast Magistrates Court in relation to cigarettes but believes that this is an entirely separate matter. If it is not can you please let us know because despite our efforts we have been unable to find this out and do not have access to his record."

Evidence of the appellant

19. Mr McCann signed a statement dated 1 May 2018 which says:

> "I state that I know nothing about the cigarettes and tobacco found at 103 Dermot Hill Road, Belfast I was unaware of their existence and have no liability in relation to any duty that may be owing in these cigarettes."

20. After asking the appellant to confirm that his statement was true, Ms McCreesh had no further questions.

21. Ms Brown asked the appellant to confirm that he was present when the PSNI carried out their search on 8 June 2015 to which he replied that he was present but was not aware that they had found the goods. He believes the goods were found after he had been taken to Ardmore police station. He claimed that he had not received HMRC's Notice of seizure dated 10 June 2015 until about a year later. He further stated that Donna Leckey from HMRC had called with him about six months ago and she had confirmed that he had not received the letter.

22. Ms Brown asked the appellant why at no point in the subsequent correspondence between HMRC and his then solicitors was it alleged that he had not received the initial Notice of seizure. The appellant confirmed that he had received the excise duty notice dated 7 June 2016 and the wrongdoing penalty notice dated 7 July 2016 but at no time had he been given the opportunity to explain why the cigarettes were in the house. The appellant maintained he knew nothing about the goods. The house had been the family home and after his parents had died he became the sole owner and sole occupier but his brother and sisters had keys and came and went frequently even though they had homes of their own. His brother was in the house every day and he now knows the goods belonged to his brother but he had never been given the opportunity to explain this. On being questioned by the Chair he maintained that he had only recently become aware that the good belonged to his brother.

Evidence of HMRC

23. Ms Brown informed the Tribunal that HMRC Officer Susan Ingham was unable to be present but asked that her witness statement dated 8 January 2018 be accepted by the Tribunal. Ms McCreesh confirmed that she had no issue with the contents of the statement which stated that Officer Ingham had checked the seizure papers on 7 June 2016 and then issued the Excise Duty Assessment and penalty – preliminary notice.

24. Officer Ingham's statement continued by stating that she had considered the appellant's behaviour was non-deliberate and as this was the first such occasion on which referral to HMRC had been made gave the maximum discount available for "Telling", "Helping" and "Giving". The rest of her statement referred to the subsequent history of correspondence outlined above.

25. Ms Brown then called Officer Cormican who confirmed his statement dated 6 January 2018 which detailed his involvement on 9 and 10 June 2015. Ms McCreesh did not cross-examine him.

Legislation and Case Law

26. Regulation 5 of the Excise Goods (Holding Movement and Duty Point) Regulations 2010 SI No 593 (the Regulations) is transposed from EC Directive 2008/118 (the Directive). It provides that there is an excise duty point at the time when excise goods are released for consumption within the United Kingdom. Regulation 6(1) states:

> "Excise goods are released for consumption in the UK at the time when the goods –
>
> > (b) 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 …"

27. The Regulations go on to provide definitions, including the rules on the person liable to the excise duty if there is a release under Regulation 6. Regulation 10 deals with release under Regulation 6(1)(b) as follows:

> "(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.
>
> (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)."

28. Regulation 13 states:

> "(1) 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.
>
> (2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person—
>
> (b) holding the goods intended for delivery;"

29. There is no definition of "holding" but in *Revenue and Customs Commissioners v B&M Retail Ltd* [2016] UKUT 429 the Upper Tribunal upheld an assessment by HMRC where they had assessed the person in physical possession of the goods even though HMRC could have issued an assessment at an earlier duty point.

30. *McKeown, Duggan and McPolin v Revenue and Customs Commissioners* [2016] UKUT 479 the Upper Tribunal stated at paragraph 65

> "There is no question that the Appellants had physical possession of the goods but that is neither necessary nor, by itself, enough to constitute 'holding' for the purposes of reg 13. In order to be 'holding the goods', a person must be capable of exercising de jure and/or de facto control over the goods, whether temporarily or permanently, either directly or by acting through an agent."

31. Section 49 of CEMA 1979 provides that any goods imported without payment of duty are liable to forfeiture while s 139 provides that anything liable to forfeiture may be seized by HMRC.

32. Regulation 88 of the Regulations states:

> "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."

33. Section 12(1A) of the Finance Act 1994 (FA 1994) provides that where it appears to HMRC that an amount of excise duty has become due from a person that person may be assessed to that amount of duty by HMRC. Section 16 of FA 1994 provides a right of appeal against the assessment to this Tribunal.

34. Paragraph 3 of Schedule 3 of CEMA 1979 states:

> "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."

35. Paragraph 5 of Schedule 3 of CEMA 1979 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.

36. In *Revenue and Customs Commissioners v Jones and another* [2011] EWCA Civ 824 Mummery LJ in the Court of Appeal included the following at paragraph 71:

> "The deeming process 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 in 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."

37. In *The Commissioners for Her Majesty's Revenue and Customs v Nicholas Race* [2014] UKUT 0331 (TCC) the Upper Tribunal stated at paragraph 26:

> "Jones is clear authority for the proposition that the First-tier Tribunal has no jurisdiction to go behind the deeming provisions of paragraph 5 of Schedule 3. If goods are condemned to be forfeited, whether in fact or as the result of the statutory deeming, it follows that, having been bought in a Member State and then imported by Mr and Mrs Jones, they were not held by the taxpayers for their own personal use in a way which exempted the goods from duty. The reasoning and analysis in *Jones* did not turn on the fact that the case concerned restoration of the goods and not assessment to duty."

38. The Upper Tribunal went on to state at paragraph 33

> "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 Rice is no different from that raised by Mr and Mrs Junes."

39. Finally as regards case law the Upper Tribunal in *Carl Hodson v The Commissioners for Her Majesty's Revenue and Customs* [2017] UKUT 0439 (TCC) stated at paragraph 22:

> "So far as paragraph 3 [of Schedule 3] is concerned, we consider that the words "any person claiming that any thing seized as liable to forfeiture is not so liable" in paragraph 3 mean exactly what they say. It is clear from the remainder of paragraph 3 that there is no requirement that the person in question should have been served with a notice of seizure, because the paragraph provides that, where no such notice has been served on the person, time runs from the date of the seizure. Nor is there any requirement in paragraph 3 that the person should be, or even claim to be, the owner of the thing which has been seized. "

40. Schedule 41 of the Finance Act 2008 (FA 2008) provides for a penalty to be payable by a person who has failed to pay excise duty in the circumstances outlined in this appeal. The penalty is calculated as a percentage of the potential lost duty. The Schedule provides for an appeal against the penalty to this Tribunal which may reduce the penalty if it considers there are special circumstances. While the term 'special circumstances" is not defined in *Crabtree v Hinchliffe* [1971 3 All ER 967 the judge said they must be "exceptional, abnormal or unusual" while in *Clarks of Howe Ltd v Bakers Union* [1979] 1 All ER 152 the judge said they must be "something out of the ordinary run of events".

41. The Schedule also states that a penalty is not payable if there is a reasonable excuse. In *The Clean Car Company Ltd v The Commissioners of Customs & Excise* [1991] VATTR 234 the judge stated

> "It has been said before in cases arising from default surcharges that the test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?"

42. Section 16 FA 1994 gives the appellant the right to appeal to this Tribunal. The question of onus of proof falls to be determined by sub-section (6) which states:

> "(6) On an appeal under this section the burden of proof as
> (a) [not relevant to the current appeal]

(b) [not relevant to the current appeal] and
(c) [not relevant to the current appeal

shall lie upon the Commissioners; but it shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established."

Decision

43. As a result of section 16 FA 1994 the burden of proof lies with the appellant. It is the civil burden of proof – on the balance of probabilities.

44. The Tribunal found the appellant to be an unreliable witness. At no point during the correspondence between the appellant's solicitors and HMRC was it claimed that he had not received the Notice of Seizure yet this is what he claimed at the hearing. He claimed that he did not know that the goods belonged to his brother until after the Notice of Appeal to this Tribunal had been lodged. In other words his brother only asked him for the whereabouts of the goods over three years after they had been seized. As his brother was in the house every day the Tribunal is unable to accept this claim. Further the appellant alleged that Donna Leckey from HMRC had confirmed to him about six months ago that he had not received the initial Notice of Seizure dated 10 June 2015. While it is doubtful if anyone from HMRC would have made such a statement it would not have been possible for anyone to confirm such a fact.

45. In any case following the wording of paragraph 5 of Schedule 3 of CEMA 1979 as explained in *Carl Hodson* it does not matter whether or not the appellant received the Notice of Seizure as the goods were deemed forfeit as there was no application to the Magistrates Court.

46. The Tribunal is bound by the various decisions of the Upper Tribunal already referred to above. At the very least the appellant had de facto control of the goods as they were under the stairs in his house and in his shed. As the Tribunal is unable to accept the appellant's claim that he did not know that they belonged to his brother the Tribunal also finds that he had de jure control of the goods. In accordance with the decision in *McKeown and others* this satisfies the requirements of "holding" in Regulation 13.

47. In her skeleton argument Ms McCreesh stated that there had been no appeal against the seizure first because the appellant was unaware of their existence and secondly because he was not the owner of the goods. The first point is incorrect as according to the letter from his then solicitors dated 28 March 2017 he was "interviewed in relation to those cigarettes giving an explanation for same." The appellant therefore knew of the existence of the cigarettes when interviewed at the time of his arrest. As the Tribunal has held that the appellant was both the de jure and de facto holder of the goods he could have applied to the Magistrates Court for their restoration.

48. Ms McCreesh further submitted that the argument that the deeming provisions of Schedule 3 Paragraph 5 operate to fix the appellant with liability for tax as being

entirely misconceived and that the various cases cited above are only relevant if the appellant was attempting to rely upon the duty paid status of the goods as a ground of his appeal. The appellant was basing his appeal on the fact that he had no knowledge of the goods and was not holding them as required by the Regulations. The Tribunal is unable to accept this argument as it is not based on either the facts, the regulations or the case law.

49. The appeal against the excise duty assessment is therefore dismissed.

50. The Tribunal is satisfied that the requirements of the legislation to impose a wrongdoing penalty have been met and considers HMRC has been generous in allowing the maximum permitted reduction. The appellant has not put forward any reasonable excuse or special circumstances and accordingly the appeal against the wrongdoing penalty is also dismissed.

51. 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.

ALASTAIR J RANKIN
TRIBUNAL JUDGE

RELEASE DATE: 21 DECEMBER 2018