[2019] UKFTT 0738 (TC)

TC07496

Appeal number: TC/2018/06764

EXCISE DUTY – assessment and penalties

FIRST-TIER TRIBUNAL
TAX CHAMBER

DANIEL KAMIL GRZYWNOWICZ **Appellant**

- and -

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

TRIBUNAL: JUDGE CHARLES HELLIER
JOHN ROBINSON

Sitting in public at Taylor House EC1N on 31 October 2019

The Appellant was neither present nor represented

Ben Elliott, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

The Absence of the Appellant and the Application for an Adjournment

1. At 6.21 pm on the evening of 30 October 2019, the evening before the date fixed for the hearing, Artur Bogusiewicz of Goscimski & Associates, the solicitors acting for the appellant in this appeal, sent an e-mail to the tribunal attaching a letter asking for an adjournment of the hearing.

2. The letter said that the notice of the hearing from the tribunal dated 13 September 2019 had been sent to their previous address and this had resulted in significant delay in preparation of the appeal, and had meant that Mr Grzywnowicz did not have enough time to travel back from Poland for the hearing.

3. Mr Bogusiewicz' e-mail address was shown on that e-mail as:

ab@ga-law.co.uk

4. On Goscimski & Associates's letterhead two e-mail addresses were shown (referred to below as the "ab" and "ag" addresses):

"Criminal department: ag@ga-law.co.uk

Civil Department: ab@ga-law.co.uk"

5. We concluded that "ab" was Mr Bogusiewicz' e-mail address, and "ag" that of Mr Goscimski.

6. The appellant's notice of appeal to the tribunal gives his, and Mr Bogusiewicz' e-mail address as:

ab@ga-law.co.uk

7. The tribunal's records indicate that on 13 September 2019 an e-mail was sent to the "ab" e-mail address enclosing notice that the hearing would take place on 31 October 2019.

8. That notice attached to that email was addressed to Mr Bogusiewicz at an address in Station Road London E4 (which was the address on the notice of appeal) rather than to an address in Norbreck Parade NW10 which appeared on Mr Bogusiewicz' letter of 30 October 2019 referred to in the opening paragraph.

9. The tribunal's records also indicate that a letter giving notice of the 31 October 2019 hearing date was posted to Mr Grzywnowicz at the address in Poland he had given on his notice of appeal.

10. During the summer of 2019 Mr Bogusiewicz had sent e-mails to the tribunal (copying HMRC) providing: information for an application to appeal without paying

tax at issue; their estimate for the length of the hearing; details of witnesses; dates to avoid for the hearing and their list of documents. In April they served a statement of case and a witness statement on HMRC. The last communication received by the tribunal from Mr Bogusiewicz was received by the tribunal on 22 July 2019.

11. HMRC e-mailed "ag" on 8, 9, and 17 October 2019 asking if Mr Grzywnowicz would be attending the hearing, and enclosing witness statements. They wrote to the firm on 23 October - at Norbreck Parade - with the Authorities bundle. The Royal Mail tracking service indicated that this letter and bundle could not be delivered because there was "no answer".

12. At 11:20 am on the morning of the appeal we attempted to telephone and Goscimski & Associates from the courtroom. We tried both the telephone number on the notepaper and the mobile number given in an e-mail from Mr Bogusiewicz of 14 April 2019. After over one minutes' ringing there was no reply.

Discussion: the absence of the appellant.

13. We found the reason for the requested adjournment unconvincing. The notice of hearing had been e-mailed, so that the use of the old address on the attached letter was not relevant. We concluded that Goscimski & Associates had received the notice of hearing in good time.

14. We also considered it likely that Mr Grzywnowicz had received the notice of hearing sent to him in Poland in good time: slightly later perhaps than that received by Goscimski & Associates, but nevertheless in good time.

15. We also find that it is likely that HMRC's e-mails in October were received by Goscimski & Associates. It seemed unlikely that, if they arrived in the inbox of "ag" they were not forwarded in short order to Mr Bogusiewicz. Therefore the firm had plenty of reminders of the hearing and plenty of time to ask for an adjournment if that was necessary well before the evening of the day before the hearing.

16. Whilst the factual issues in the appeal could potentially have been substantially illuminated by Mr Grzywnowicz's evidence, he had an opportunity to be present and did not take it, and there was no good reason offered for his absence or that of Goscimski & Associates.

17. We concluded that Mr Grzywnowicz had been notified properly of the hearing and that it would be in the interests of justice to continue with the hearing in the absence of Mr Grzywnowicz or representation for him. Rule 33 of the tribunal's rules thus being satisfied, we decided to proceed with the hearing.

18. The Appellant is reminded that under Rule 38 he may apply to set aside this decision, but we note that he would be successful in such an application only if he could show that it was in the interests of justice so to do - and that would require some good explanation of his absence and his representatives' conduct.

The appeal

19. On 3 December 2017 Mr Grzywnowicz was stopped by Border Force Officers on his arrival from Dunkirk at Dover Eastern docks. He was driving a lorry with a trailer. After questioning Mr Grzywnowicz the officers found 80 kg of tobacco in the lorry. The officers seized the lorry, the trailer and the tobacco. They offered to restore the vehicle in return for an amount equal to the excise duty on tobacco. This was paid by Mr Grzywnowicz's employer and the truck and trailer restored. Mr Grzywnowicz later drove the truck and trailer back to Poland.

20. The appellant did not give notice challenging the seizure or otherwise require the seizure of the tobacco to be addressed in condemnation proceedings.

21. On 22 August 2018 HMRC made an excise duty assessment on Mr Grzywnowicz for £17,694. (This of course was the same as the amount which was required, and had been paid, for restoration of the vehicle.)

22. On 12 September 2018 HMRC assessed the penalty of £8,847, being 50% of the duty, on Mr Grzywnowicz. Against that penalty Mr Grzywnowicz now appeals.

23. The grounds of appeal are that no duty applies to goods acquired in another member state and brought into the UK for personal use (and thus not for a commercial purpose) and that Mr Grzywnowicz did not bring the tobacco into the UK for a commercial purpose. Thus it is said no duty arose and no liability to a penalty could arise.

24. It was not initially clear whether the appeal was made against the penalty only or the penalty and the assessment. The notice of appeal said in response to the question "What is your appeal about?", "penalty or surcharge", but the Grounds of Appeal address the question whether or not excise duty was also payable. The notice of appeal attaches a review letter from HMRC which relates only to the penalty. But that letter refers to a letter from Goscimski & Associates of 21 September 2018. That letter is headed "excise duty charge and excise wrongdoing penalty - an appeal". It refers to HMRC's letter assessing the duty and a penalty. The main thrust of the argument in that letter is that the tobacco was not brought into the UK for a commercial purpose but the letter finishes with a request to "cancel any outstanding penalty at this time". It was thus not wholly clear from the notice of appeal and correspondence whether the appeal was being made only against the penalty or against the penalty and the assessment to duty.

25. It may be that, because the payment required for the restoration of the lorry was equal to the duty, Mr Grzywnowicz, or his advisers, thought that the duty had been paid and did not initially realise that the assessment of the duty was a separate charge being assessed on Mr Grzywnowicz.

26. However, the appellant's statement of case seeks permission to amend the appeal to include an appeal against the duty assessment. HMRC did not object to this

– sensibly, as any decision on the penalty would necessarily involve (because the penalty is computed by reference to duty) consideration of the issues which would arise in relation to the assessment.

27. We have therefore taken this as an appeal both against the assessment and the penalty.

The relevant statutory provisions.

(i) Liability to duty and its assessment

(1) Excise duty is charged on tobacco products imported into the UK (section 2 Tobacco Products Duty Act 1979).

(2) HMRC can, by regulation, fix the excise duty point, that is to say the point at which duty becomes payable (section 1 Finance (No 2 Act 1992).

(3) Regulation 13 of The Excise Goods (Holding, Movement and Duty Point) Regulations 2010 provides that:

(a) where goods already released for consumption elsewhere in the EU are held for a commercial purpose in the UK in order to be delivered or used in the UK, the excise duty point is the time when those goods are first so held;

(b) the person liable to pay the duty is the person making delivery of the goods, holding the goods or to whom the goods are delivered; and

(c) where tobacco is brought into the UK by a private individual for his or her own use from another EU state they are not treated as held for a commercial purpose.

(4) Where it appears to HMRC that an amount of duty has become payable and that amount can be ascertained, they may assess it (s 12(1A) Finance Act 1994).

(ii) seizure, forfeiture and condemnation

(5) Goods imported into the UK without payment of duty are liable to forfeiture (s 49 Customs & Excise Management Act 1979 ("CEMA")).

(6) Anything liable to forfeiture may be seized by HMRC (s 139 CEMA).

(7) Para 3 Sch 3 CEMA provides that any person who claims that something seized is not liable to forfeiture shall within one month of the seizure, or of being given notice of the seizure, give notice of his claim to HMRC, and para 6 provides in that case HMRC shall take proceedings ("condemnation proceedings") for the testing of the forfeiture in court;

(8) Paragraph 5 Sch 3 provides that if after the expiration of the one month period in para 3 no notice of claim has been given to HMRC

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

(iii) penalties

(9) A penalty is payable by a person who is concerned in carrying goods chargeable with excise duty at a time when the duty has not been paid (para 4(1) Sch 41 Finance Act 2008).

(10) The penalty payable for a deliberate and concealed act is 100% of the potential lost revenue (para 6B Sch 41 Finance Act 2008), which, by para 9 is the amount of duty assessed as due.

(11) A 100% penalty may be reduced where the person liable makes disclosure by up to 50% for unprompted disclosure and up to 30% for prompted disclosure (para 13).

(12) Liability to a penalty does not arise in the case of a non deliberate act or failure where the person has a reasonable excuse for his act or failure (para 20).

(13) HMRC may reduce a penalty because of special circumstances (para 14) and the tribunal may do so but only if it considers that HMRC's decision in this respect is flawed.

The effect of the deeming provisions in paragraph 5 schedule 3 TMA

28. The cases of *Jones v HMRC* [2011] EWCA Civ 824, *Race v HMRC* [2014] UK UT 331 (TC), *HMRC v Jacobsen* [2018] UKUT 18 TCC and *Denley v* HMRC [2017] UKUT 340 (TC), establish that where the deeeming in paragraph 5 schedule 3 applies, this tribunal cannot, whether in the context of restoration, assessment of duty or in relation to a penalty, make findings which are inconsistent with the deeming. The tribunal is required to work on the basis that the goods were "duly condemned".

29. Mr Elliott accepted that that it was not necessarily the case that such deeming carried with it that the conclusion that the goods were not for personal use - so that, for example, if goods were seized on the basis that they were mixed and packed with goods which were dutiable and on which duty had not been paid, the effect of paragraph 5 Schedule 3 was, not that the seized goods must be found to have been held for a commercial purpose, but that it must be found that they were mixed and packed with dutiable goods on which duty had not been paid. Thus he says that the detail of what was is to be deemed to be the case depends upon the factual circumstances of the seizure and reasons for it. We agree.

The evidence.

30. We heard oral evidence from Mark Brazier, an officer of HM Border Force involved in the stopping and the seizure, and from Craig Murray the officer of HMRC who had made the excise duty assessment and the penalty assessment. We also had a bundle of copy documentation including the appellant's statement of case and a witness statement from Mr Grzywnowicz.

Our findings of fact.

31. In addition to the summary findings at paragraphs 19 to 21 above we find as follows.

32. In making these findings we have taken into consideration both that Mr Brazier told us that Mr Grzywnowicz did not appear to have difficulties in understanding him, and that English was clearly not Mr Grzywnowicz's first language (as was evident from the nature of his recorded replies to the questions asked of him when his lorry was seized and his witness statement).

33. When Mr Grzywnowicz was stopped he was asked what was in his load. He replied: "half foil and aluminium and the other half is other stuff" and said that it had all come from Teningen in Germany. Asked if he had any cigarettes or tobacco, he said he had three small packets for himself.

34. The lorry was searched and, on cutting the green binding on a crate at the front of the lorry, 70 kg (seven bags of 10 kg each) of "The Turner" handrolling tobacco was found in the crate. When Mr Grzywnowicz was asked about this he acknowledged that he had put it there.

35. A further 10 kg of the same tobacco was found in the cab of the lorry under the seats and under an overhead locker.

36. Mr Grzywnowicz was then interviewed. He said that he had taken metal strips out of the crate in order to put the tobacco in. Asked where he had bought the tobacco he said that he had found it under a bush, but he did not remember where.

37. Mr Brazier told Mr Grzywnowicz that he considered that the tobacco was being held for a commercial purpose and as a result that he was seizing it, the lorry and the trailer. He told Mr Grzywnowicz that the trailer would be restored on payment of £17,694.

38. In the appellant's statement of case it is said that following an ‘obligatory stop’ (for the purpose of rest on a long-distance lorry journeys) Mr Grzywnowicz found the bags of tobacco in a bush near the parking area. He said that he had decided to take it back to Poland for his own and his family's use.

39. So far as concerns the circumstances of his acquisition of the tobacco we make no findings: we were not able to question Mr Grzywnowicz about the details and it seemed to us unlikely that such a large amount of tobacco should be found in this way. So far as Mr Grzywnowicz's intentions are concerned, they can be relevant only to the question of whether or not the tobacco was for his personal use, but because of the deeming provisions of paragraph 5 schedules 3 we are not in the circumstances of the seizure permitted to come to any other conclusion than that the tobacco was not for his personal use.

Discussion

(1) Were the goods for the personal use of Mr Grzywnowicz? - The liability to duty.

40. If the issue of whether the tobacco had been for Mr Grzywnowicz' personal use was one on which we had the power to adjudicate, we would not have so held. It was clear to us that this particular quantity of tobacco, acquired and treated in the way it had been was not held for Mr Grzywnowicz's own use.

41. Officer Brazier seized the goods on the basis that they were for commercial use and thus dutiable. Since no application was made to contest of the seizure under para 3 Sch 3 CEMA, the effect of paragraph 5 schedules 3 is that the tobacco must be treated as having been held for a commercial purpose on its import into the UK in the lorry driven by Mr Grzywnowicz.

42. As a result an excise duty point arose at the time of entry into the UK, and so, if Mr Grzywnowicz was the person "holding" the tobacco at that time for the purposes of Regulation 13 (2) (b) HMDP Regulations, he become became liable to duty.

(2) Was Mr Grzywnowicz a person "holding" the tobacco.

43. In *HMRC v Perfect* [2017] UKUT 476 (TCC) the Upper Tribunal considered an argument that a person does not "hold" or make delivery of goods as if he was an innocent in possession of the goods - for example as a transporter who had no knowledge of any attempt to avoid duty.

44. In summary the Upper Tribunal found:

> (1) holding and delivery are words which represented independent concepts of EU law [50];
>
> (2) these concepts had been held by the Court of Appeal to be such that a person who exercised de jure or de facto control of the goods "held" them, but a person who lacked actual and constructive knowledge would not "hold" goods: that recognised an exception for an innocent agent [51];
>
> (3) an "innocent agent" for these purposes was a person who lacked actual or constructive knowledge of the attempt to evade tax on the goods [53 - 55].

45. In the current case Mr Grzywnowicz's answers to the questions put to him by Mr Brazier indicated that he was aware that he had possession of the tobacco. Those answers, and the fact that the tobacco was concealed in crates in the lorry indicates that he knew duty should have been paid. He was not an innocent agent.

46. As a person with control over the goods he was thus their "holder" for the purposes of Regulation 13, and so liable to the duty on the goods.

47. As a result Mr Grzywnowicz was liable to be assessed if the assessments were made in time (see(6) below).

(3) Were the conditions in schedule 41 for liability to a penalty for deliberate and concealed acts satisfied?

48. Mr Grzywnowicz was concerned with the carrying of goods in respect of which duty should have been paid but had not been. He was therefore liable to a penalty.

49. Mr Grzywnowicz knew that he was carrying the goods. He deliberately brought them into the UK. He put 70 kg of tobacco in a crate in the lorry and 10 kg under the seats and lockers in the cab. He did not say when first asked by Mr Brazier that he had any such a quantity of tobacco. Those actions were in our view concealment of his action of carrying the goods. Therefore the penalty falls be assessed at 100% of the potential lost revenue subject to questions of proportionality and the reliefs for reasonable excuse, special circumstances and disclosure discussed below.

(4) Reasonable excuse, special circumstances and disclosure.

50. No excuse for Mr Grzywnowicz's actions were suggested in the appellant's statement of case. We could see none on the evidence before us. Even if an excuse were shown, our finding that Mr Grzywnowicz's actions were deliberate means that the relief afforded by paragraph 20 is not available.

51. The facts we have found did not in our view include any which could be special circumstances justifying a reduction in the penalty. Mr Grzywnowicz's statement of case does not refer to the special circumstances provision. To our minds the only assertion in it which could count as special circumstances was that Mr Grzywnowicz intended to take the tobacco back to Poland rather than sell or deliver it in the UK. We found the fact that the tobacco been put in a crate with the other items fitted ill with that assertion and were unable to find that such was the case. As a result we find that there were no factual special circumstances which justified a reduction on in the penalty under paragraph 14.

52. We considered also whether the fact that the restoration of the lorry had been made in return for a fee equal to the duty which was assessed was a special circumstance justifying a reduction in the penalty. We concluded it was not. The restoration fee was borne by the owner of the lorry, not the appellant.

53. Paragraph 12 and 13 require a penalty to be reduced to reflect disclosure. They set out the maximum such reduction. HMRC applied that maximum in calculating the penalty. We cannot therefore increase it and consider that the reduction was correctly applied.

(5) time limit.

54. Section 12 (4) Finance Act 1994 requires any assessment to excise duty to be made before the earlier of (a) 4 years from the date liability arose, and (b) one year after HMRC had evidence sufficient to justify the assessment.

55. Mr Grzywnowicz's arrived in Dover on 3 December 2017. The assessment was sent to him at the latest on 12 September 2018. That was within the applicable time limit.

(6) Proportionality

56. In the appellant's statement of case it is said that the appeal is about fairness. The fairness of imposing both excise duty charge and a penalty. We take that as an argument that the penalty was disproportionate in all circumstances. We consider that those circumstances include the requirement for a payment equal to the duty for the restoration of lorry and trailer.

57. In *HMRC v Trinity Mirror* [2015] UKUT 421 (TCC) the Upper Tribunal described the application of the doctrines of proportionality in relation to the VAT default surcharge. It said:

> 25. The tribunal in Total Technology undertook a thorough examination of the jurisprudence on the principle of proportionality, both from the perspective of EU law and of the European Convention on Human Rights("the Convention"). It concluded …first, that penalties must not go beyond what is strictly necessary for the objectives pursued, and secondly, that a penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the underlying aims of the VAT directive. In that regard, and in connection with the issue whether proportionality is to be tested by reference to the scheme as a whole or in an individual case, the tribunal stated that an excessive penalty would impose a disproportionate burden on a defaulting trader and distort the VAT system as it applies to him.
>
> 26. The tribunal went on to conclude, at [78], in common with what Judge Bishopp had decided in Enersys, that it is open to a tribunal both to find that a penalty system as a whole is disproportionate, in which case a flaw which offends against the principle of proportionality may be relied upon by any affected person, and as well to consider an individual penalty without having first concluded that the system as a whole is disproportionate

58. And later in setting out its decision on proportionality in that case it said:

> 56.In respect of penalties the principle of proportionality, according to EU law, is concerned with two objectives. One is the objective of the penalty itself; the other the underlying aims of the directive. But more broadly, the objective of the penalty in enforcing collection of tax is itself a natural consequence of the essential aim of the directive to ensure the neutrality of taxation of economic activities.
>
> 57.In Total Technology the Upper Tribunal rightly focused not only on the general aim of the default surcharge regime to ensure compliance with a

> taxpayer's obligations to file returns and to pay tax, but on the specifics of that regime. It did so because questions of proportionality can only be judged against the aim of the legislation (Total Technology, at [79]). But the tribunal did not examine in detail the other relevant objective, namely the underlying aim of the directive, which we consider to be the more fundamental question.
>
> 58. That question is in our view fundamental because the way the principle of proportionality has been expressed in the case law is not confined to an examination of the penalty simply by reference to the gravity of the infringement. It is not enough for a penalty simply to be found to be disproportionate to the gravity of the default; it must be "so disproportionate to the gravity of the infringement that it becomes an obstacle to [the underlying aims of the directive"]…
>
> …63.The correct approach is to determine whether the penalty goes beyond what is strictly necessary for the objectives pursued by the default surcharge regime, as discussed in detail in Total Technology and whether the penalty is so disproportionate to the gravity of the infringement that it becomes an obstacle to the achievement of the underlying aim of the directive which, in this context, we have identified as that of fiscal neutrality. To those tests we would add that derived from Roth in the context of a challenge under the Convention to certain penalties, namely "is the scheme not merely harsh but plainly unfair, so that, however effectively that unfairness may assist in achieving the social goal, it simply cannot be permitted?"

59. We conclude that we should ask first whether the assessment and penalty regimes go beyond what is strictly necessary for the objectives pursued , and second, whether the actual penalty was so disproportionate to the gravity of the infringement that it was an obstacle to the underlying aims of the Directive under which duty was to be collected. Those aims are we think simpler than those of the VAT Directive for the principal of neutrality is not applicable.

60. Mr Elliott referred us to *Staniszewski v HMRC*[2016] UKFTT 128 (TC). In that cse Judge Brooks considered the application of the doctrines of proportionality in a case where tobacco had been seized and assessments to duty and to a penalty had been made.

61. The tribunal considered first an argument that it was disproportionate to assess the duty where the goods had been seized. It held that section 12 Finance Act 1994 which permitted the assessment was not devoid of reasonable foundation and accordingly that the provision was not disproportionate.

62. In relation to the penalty regime the tribunal held that the excise penalty regime, like the VAT default surcharge regime, had been arrived at by the application of a rational scheme which was not devoid of reasonable foundation and so complied with proportionality.

63. We agree with Judge Brooks in relation to the question of whether the regimes for assessment and the penalty are proportionate. That leaves the question of whether the penalty assessed on Mr Grzywnowicz was disproportionate in the relevant sense. We do not consider that it was. It was harsh having regard to his income but it could not be said that it was so plainly unfair that having regard to the legislative aim of ensuring that duty was paid it was an obstacle to the aim of the Directive under which duty was to be collected.

Conclusion

64. We dismiss the appeals against the assessment and the penalty.

Rights of Appeal

65. 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.

CHARLES HELLIER

TRIBUNAL JUDGE

RELEASE DATE: 06 DECEMBER 2019