TC03794

Appeal number: TC/2013/07969

CUSTOMS DUTY- restoration cigarettes and vehicle – 'deeming provisions' apply – restoration properly refused by The Director of Border Revenue – appeal dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

TOMASZ CHRUSZCZ **Appellant**

- and -

THE DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE DAVID S PORTER
MR PETER WHITEHEAD

Sitting in public at Alexandra House, Manchester, 26 June 2014

The Appellant in person

Mr Robert Davis, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.

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DECISION

1. Mr Thomasz Chruszcz (Mr Chruszcz) appealed against the Respondent's (Border Revenue) refusal to restore 8800 cigarettes, attracting a total unpaid excise duty of £2,319.48, and a Vauxhall Insignia motor vehicle, registration number FP12 YWA (the vehicle). He said that he had purchased the cigarettes for himself and his wife and that the loss of the vehicle caused hardship. Border Revenue says that he had hidden the cigarettes and that he had not told the truth to the officers when he was stopped at Dover. He had acquired the cigarettes for commercial purposes. As he had not applied to the Magistrates Court to claim that he had purchased the cigarettes for his own use, the cigarettes were deemed 'forfeit' and the vehicle would not be restored.

2. Mr Robert Davis, (Mr Davis) of counsel, appeared for Border Revenue with Mr David Harris an Officer of Border Revenue. Mr Chruszcz was unrepresented and appeared with the assistance of Mrs Mamola Bala, an interpreter. We were referred to the following cases.

HMRC v Jones [2001] EWCA Civ 824 [2012]2 WLR

Lindsay v Commissioners of Customs and Excise [2002 EWCA Civ 267

Towers & Towers v Commissioners of Customs and Excise [2004] E00723.

The Law

3.The relevant legal provisions are as follows:

a. Section 2 of the Tobacco Products Duty Act 1979 provides:

(1) There shall be charged on tobacco products imported into or manufactured in the United Kingdom a duty of excise at the rates shown in the Table in Schedule 1 to this Act.

b. Regulation 13 of the Excise Goods (Holding, Movement and Duty Point) Regulation 2010 (the Regulations) provides:

(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 were first so held.

(3) For the purpose of paragraph (1) excise goods are held for a commercial purpose if they are held-

(a) By a person other than a private individual; or

(b) By a private individual ("P"), except in a case where the excise goods are for P's own use and were acquired in, and transported to the United Kingdom from another Member State by P.

(4) For the purposes of determining whether excise goods referred to in the exception in paragraph (3) (b) are for P's own use regard must be taken of –

(a) P's reasons for having possession or control of those products;
(b) whether or not P is a revenue trader;
(c) P's conduct, including P's intended use of those goods or any refusal to disclose the intended use of those goods;
(d) the location of those goods;
(e) the mode of transport used to convey those goods;
(f) any document or other information relating to those goods;
(g) the nature of those goods including the nature and condition of any package or container
(h) the quantity of those goods and in particular, whether the quantity exceeds any of the following quantities-

- 10 litres of spirit
- 20 litres of intermediate products (as defined in Article 17(1) of Council Directive 92/83/EEC)
- 90 litres of wine
- 110 litres of beer
- 800 cigarettes
- 400 cigarillos (cigars weighing no more than 3 grams each)
- 200 cigars
- 1 Kilograms of any other tobacco product

(i) Whether P personally financed the purchase of those goods;
(j) Any other circumstance that appears to be relevant

(5) For the purposes of the exception in paragraph (3) (b) –

(a) ……

(b) "own use" includes use as a personal gift but does not include the transfer of goods to another person for money or money's worth (including any reimbursement of the expenses incurred in connection with obtaining them).

4. Regulation 88 of the Regulations provides:

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 of the provisions of these Regulations; or

(b) a contravention of any conditions or restrictions imposed by or under these regulations, those goods shall be liable to forfeiture.

5. Section 88 Customs and Excise Management Act 1979 (the Act) provides as follows-

88. Forfeiture of ship, aircraft or vehicle constructed, etc for concealing goods.
Where-
(a)…

(b)…

(c) A vehicle is or has been within the limits of any port ..

While constructed, adapted, altered or fitted in a manner for the purpose of concealing goods, that….vehicle shall be liable to forfeiture.

6. Section 141 of the Act provides as follows-

(1)…where anything has become liable to forfeiture under the Customs and Excise Acts –
(a) any ship, aircraft, vehicle…which has been used for the carriage handling, deposit….of the thing so liable for forfeiture…and
(b) ..any other thing mixed, packed or found with the thing so liable
Shall also be liable to forfeiture.

Condemnation proceedings

7. Schedule 3 of the Act provides
Notice of seizure

1. — (1) The Commissioners shall, except as provided in sub-paragraph (2) below, give notice of the seizure of any thing as liable to forfeiture, and of the grounds therefore, to any person who to their knowledge was at the time of the seizure the owner or one of the owners thereof.

(2) Notice need not be given under this paragraph if the seizure was made in the presence of—

(a) the person whose offence or suspected offence occasioned the seizure; or

(b) the owner or any of the owners of the thing seized or any servant or agent of his; or

(c) in the case of any thing seized in any ship or aircraft, the master or commander.

2. Notice under paragraph 1 above shall be given in writing and shall be deemed to have been duly served on the person concerned—

(a) if delivered to him personally; or

(b) …….

3**.** 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.

4. **……**

5**.** 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.

Restoration

8.The Border Revenue's general policy in relation to the restoration of private vehicles used for the improper importation or transport of excise goods states that the vehicle should not normally be restored. The policy is intended to be robust in order to protect legitimate UK trade and revenue and prevent illicit trade in excise goods. However vehicles may be restored at the discretion of the Border Revenue, subject to such conditions (if any), as it thinks proper (e.g. fees) in circumstances such as the following:

- If the excise goods were destined for supply on a " not for profit" basis, for example, for re-imbursement
- If the excise goods were destined for supply for profit, the quantity of excise goods is small, and it is a first occurrence
- If the vehicle was owned by a third party, who was not present at the time of the seizure, and can show that they were both *innocent* of and *blameless* for the smuggling attempt, then consideration may be given for restoring the vehicle for a fee: if, in addition to being both *innocent* and *blameless*, the third party demonstrates that they have taken *reasonable steps to prevent the smuggling in the vehicle* then consideration may be given to restoring it free of charge.

"Not for profit"

From 28 March 2006 the Commissioners' policy for seized vehicles involved in smuggling excise goods which are not for own use, but are to be passed onto others on a "not for profit" reimbursement basis, has changed:

In *non-aggravated* cases vehicles will not normally be seized (but a warning letter will be issued). The meaning of "aggravated" is explained below.

Aggravated cases depend on how many aggravated offences have occurred within the previous 12 months:

> (6) For a first aggravated detection vehicles will normally be seized and restored for 100% of the revenue involved

(7) For a second aggravated detection vehicles will normally be seized and restored for 200% of the revenue involved

(8) For a third aggravated detection vehicles will normally be seized and not restored unless there are *exceptional circumstances.*

The 100% and 200% restoration fees are subject to a maximum of the trade buying price of the vehicle in Glass' Guide.

In all cases any other relevant circumstances will be taken into account in deciding whether restoration is appropriate. A vehicle will not normally be restored to a third party in a situation where that would be tantamount to restoring it to a person responsible for the smuggling.

The meaning of "Aggravated" in "Not for profit" cases

Aggravating circumstances include-

- Any previous offence by the individual
- Large quantities, for example more than:

6kg of hand rolling tobacco or

6,000 cigarettes or

20 litres of spirits or 200 litres of wine or 225 litres of beer.

- Any other circumstances that would result in restoration not being appropriate

Preliminary issue.

9. Mr Chruszcz, who is Polish, had requested that an interpreter be provided. Mrs Bala was provided by the Tribunal and the entire hearing was conducted through Mrs Bala. Judge Porter found Mrs Bala to be both efficient and succinct as she was able to interpret almost simultaneously, which assisted greatly in maintaining the momentum of the hearing. Judge Porter was concerned that as Mr Chruszcz had asked for an interpreter there may have been misunderstandings at the time of the seizure due to his inability to speak English.

(a) We were advised that Mr Chruszcz worked for an engineering company and that he had been in the United Kingdom for 6 years. In spite of his comments through the interpreter that there were other Polish workers who could speak English and assist him, we did not believe that an engineering business would employ an individual, who was totally unable to speak any English.

(b) When Mr Davis initially referred to the bundle Mr Chruszcz bent down and took it out of his brief case before being spoken to by Mrs Bala.

(c) Judge Porter asked if the blue Notice 12 A held up by Mr Harris on behalf of the Border Revenue was the one that he

had been given at the Port and he replied 'yes' without being prompted by Mrs Bala.

(d) There was substantial correspondence in English and in some detail after the seizure, which he had signed and appeared to have understood.

We found that Mr Chruszcz could speak English adequately.

The facts

10. Mr Chruszcz told us, through the interpreter, that he had visited Poland with his wife and child. On his return to the United Kingdom on 28 August 2013, he had been intercepted by UK Border Force Officers while driving the vehicle at Eastern Docks, Dover. When initially questioned Mrs Chruszcz stated that the driver had 5 cartons of cigarettes in total. The Officer noticed that Mr Chruszcz was physically shaking, When the Officer asked him why he was so nervous Mr Chruszcz said that it was probably stress. At the hearing Mr Chruszcz said that he had driven for 25 hours from Poland and that he was tired.

11.The Officers searched the vehicle and found 12 cartons of cigarettes concealed under a layer of food in a cool-box. The Officer asked if there were any more cigarettes and Mr Chruszcvz replied that there were 40 cartons in the baggage. Some of these were found hidden in boxed children's toys and some were hidden in the centre of packs of nappies. When asked in cross-examination why he had put the cartons inside the nappies plastic cover, Mr Chruszcz replied that he was "putting them where ever he could". The cigarettes were of mixed brands (at least two) and the Officer explained that that indicated that they were not for their personal use. We are satisfied from the evidence that Mr Chruszcz had deliberately concealed the cigarettes.

12. Assisted by a friend Mr Chruszcz wrote to the Border Revenue on 16 October 2013 indicating that he wished to challenge the legality of the seizure and that the cigarettes had been purchased for his own use. In the letter he said that he had consulted the HMRC's website to check how many cigarettes he could purchase and discovered that there were no limits if the cigarettes were to be purchased for his own use. Mr Chruszcz said that he had purchased Marlboro for himself and LM for his wife. He also indicated the number of cigarettes that they both smoked and that he thought the cartoons would last about 7 months.

13. In cross-examination He was asked if he had been handed Notice 12 A which appeared at pages 44 to 60 in the bundle. He appeared to be unclear whether he had or not as the pages in the bundle bore little relationship to the Notice. It was at this point that Judge Porter noticed that Mr Harris appeared to have a copy of the actual blue Notice. Judge Porter asked Mr Harris to hold up the Notice and pointing to it asked Mr Chruszcz if this was the Notice he had received and he said 'Yes'. We are satisfied that Mr Chruszcz had received the Notice 12A and had had ample opportunity to read it. If he had been unclear as to its meaning he had had adequate

opportunity to ask those people who had helped him with the letters to explain it to him.

14. In the letter of 16 October 2013, Mr Chruszcz also stated that he was devastated at the loss of the vehicle. We note that the vehicle was purchased on hire purchase and was almost new and valued at £16,429.75. He said that he needed the vehicle to get to work and without it he might lose his job. In cross-examination it became clear that his wife also had a vehicle although of substantially less quality. We were also supplied with copies of some of his bank statements from June 2013 to 14 August 2013. The balance ran from £6,600 on 3 June, £11,910.94 by 12 July and £2,369.55 by 14 August. He purchased the vehicle with a down payment of £9,700 on 17 July 2013. It appeared form the evidence that he had sufficient monies to rent another vehicle.

The submissions

15. Mr Davis submitted that Mr Chruszcz knew very well the amount of goods he could bring into the country because he had checked the position on the website. Nor was he in any doubt that Mr Chruszcz spoke sufficient English to understand what the Officers were saying to him and his wife at Dover. As a result, he knew from the contents of Notice 12 A that he needed to apply to the Magistrates Court if he wished to have his goods and the vehicle returned. Since he had not done so, the Tribunal is not in a position to adjudicate as to whether the cigarettes had been purchased for his own use and were bound by the 'deeming provisions', which effectively means that the goods and the vehicle had been forfeited. The vehicle had been forfeited because the cigarettes were in the vehicle when they were found to have been purchased for commercial purposes.

In *HMRC v Jones* [2001] EWCA Civ 824 [2012]2 WLR Lord Justice Mummery has stated that:

> "The deeming process limits the scope of the issues that the respondents (the importer traveller) were entitled to ventilate in the FFT on their restoration appeal. The FFT had to take it that the goods had been 'duly' condemned as illegal imports It was not open for it to conclude that the goods were legal imports illegally seized by HMRC by finding as a fact that they were being imported for own use. The role of the tribunal, as defined by the 1979 Act, does not extend to deciding as a fact that the goods were, as the respondents argued in the tribunal, imported legally for personal use. That issue could only be decided by the (Magistrates) Court. The FTT's jurisdiction is limited to hearing an appeal against 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 for commercial use."

16. Mr Chruszcz could only recover his vehicle if restoration would be allowed under the general policy of the Border Revenue. As the goods had been concealed and they exceeded 6000 in number, the reviewing officer had acted properly in confirming that

the vehicle would not be returned. In any event Mr Chruszcz appears to have another vehicle available so there can be no exceptional hardship. In *Lindsay v Commissioners of Customs and Excise* [2002 EWCA Civ 267 Lord Phillips stated at paragraph 63:

> "63…….. Those who deliberately use their cars to further fraudulent commercial ventures in the knowledge that if they get caught their cars will be rendered liable to forfeiture cannot reasonably be heard to complain if they lose their vehicles. Nor does it seem to me, in such circumstances, the value of the car used need be taken into consideration. Those circumstances will normally take the case beyond the threshold where that factor can carry any significant weight in the balance. Cases of exceptional hardship must always, of course, be given due consideration."

17. In the circumstances Mr Davis submitted that the appeal should be dismissed.

18. Mr Chruszcz, through the interpreter, submitted that the vehicle was of great value to him compared to the value of the cigarettes and he would appreciate it if the Tribunal would see its way to return it to him. This is the first time that he has been in trouble and he was still having to insure and pay for the vehicle.

The decision

19. We have considered the law and the facts and we dismiss the appeal. We are satisfied from the evidence that Mr Chruszcz has an adequate understanding of English. He has confirmed that he checked the internet to see what amount of goods he could bring into the United Kingdom from Poland. 8,800 cigarettes, whilst over the limit, might well have been justifiable for him and his wife's use. In those circumstances, he only needed to tell the Officers that he had been on the internet, that he had bought the cigarettes for himself and his wife and that he had had to put them all round the vehicle because their belongings took up the available space in the boot. He has not chosen to that action, instead he lied about the amount of cigarettes he had purchased. We are satisfied that the cigarettes were deliberately concealed in the car because of the locations in which they were detected..

20. We are also satisfied that he understood the contents of Notice 12A. The fact that he lied about the cigarettes has not been helped by the suggestion that he cannot speak English, necessitating the instructing of an interpreter for the hearing. We are satisfied from his behavioural evidence at the hearing that he can speak English quite adequately. He has not applied to the Magistrates Court and as a result the 'deeming provisions' apply and he cannot now ask this Tribunal to consider whether he purchased the goods for his own use. Our only jurisdiction is to decide whether the Officers acted properly in refusing to return his car.

21. The facts do not fall within the general terms for the vehicle to be return and we refer to the comments of Lord Phillips in *Lindsay v Commissioners of Customs and Excise* [2002

> "Those who deliberately use their cars to further fraudulent commercial ventures in the knowledge that if they get caught their cars will be rendered liable to forfeiture cannot reasonably be heard to complain if they lose their vehicles."

We therefore dismiss the appeal and confirm that the Officer acted reasonably in refusing to return the vehicle. We note, however, that the duty of £2,319.48 is still outstanding and it is our understanding that that amount might be claimed at some time after this decisions. We would suggest that in view of the fact that Mr Chruszcz has forfeited a car worth over £16,000 that it would be inappropriate to seek payment of the duty.

22. 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.

DAVID S PORTER
TRIBUNAL JUDGE

RELEASE DATE: 9 July 2014