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TC04095

Appeal number: TC/2014/01405

Excise Duty - importation of tobacco products - appeal against assessment - Appeal listed for a pre-trial Review - cross application to strike out - no reasonable prospect of the Appellant's case succeeding - appeal struck out.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MICHELLE NELSON

Appellant

- and -

DIRECTOR OF BORDER REVENUE

Respondents

TRIBUNAL: JUDGE MICHAEL S CONNELL

**Sitting in public at The Immigration Appellate Authority, Kings Court, Royal Quays,
Earl Grey Way, North Shields on 19 August 2014**

The Appellant did not attend, but was represented by her father Mr Ronald Nelson

Mr Collins of counsel for the Respondents

DECISION

1. This is an appeal by Ms Michelle Nelson (“the Appellant”) against an
5 Assessment of Excise Duty dated 8 April 2013 issued by The Director of Border
Revenue (“the Respondents”) in the amount of £2,264.

2. The Respondents make a cross application for the Appellant's Notice of Appeal
be struck out under rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax
Chambers) Rules 2009 Rules on the basis there is no reasonable prospect of the
10 Appellant's case succeeding.

3. The Appellant did not attend but was represented by her father Mr Ronald
Nelson.

BACKGROUND

4. The Appellant lives in Spain. On 5 January 2013, the Appellant was stopped by a
15 member of the UK Border Force at Manchester Airport. The Appellant was found to
be carrying 13.8kg of Cutters Choice Hand Rolling Tobacco (“the Goods”).

5. The Appellant declined to stay for questioning when asked by the Border Force
agents and as such, in the absence of any other evidence from the Appellant, the
goods were seized on the basis that that they were held for a commercial purpose.

6. The UK Border Force officer issued the Appellant with Public Notice 12A which
20 set out her rights to appeal the seizure should she wish to. No letter was received
appealing the seizure, nor was a Notice of Claim issued within the statutory 30 day
deadline (5 February 2013).

7. On 10 March 2013 the Appellant provided a written authority that her father, who
25 lives in the England, was to represent her in the matter.

8. On 8 April 2013, Officer Scopelliti of the Respondents issued an Assessment to
the Appellant in the total amount of £2,264 under s 13 of the Excise Goods (Holding,
Movement and Duty Point) Regulations 2010.

9. No response was received to this letter and on 4 June 2013, a penalty in the
30 amount of £452 was issued under Schedule 41 of the Finance Act 2008.

10. No correspondence was received from the Appellant or her representative until a
letter dated 22 January 2014 was received from her father which made the following
points:

a) His daughter (the Appellant) had only recently been made aware of the
35 existence of the assessment letter as she does not live at the address in Spain
that she had given to the UKBF. He had picked the letter up at an address
where he used to live in Spain when he had visited there recently. As such she
had not been able to challenge the decision.

b) His daughter has no income, other than what the father of her new baby can give her, when he has money, and she is not entitled to any benefits from the Spanish welfare system.

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c) His daughter had brought the tobacco to the UK in exchange for a small sum of money and a flight to the UK. Her partner had been approached first and had suggested that she might wish to do a 'run' too and get to see her friends and family.

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d) It was agreed that the Appellant would try one or two 'dry runs' through Liverpool Airport before a 'live run' to Manchester. This suited the Appellant as she would have the opportunity to see friends and relatives that she would not otherwise have seen.

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e) The Appellant was not aware of the size of the operation or that others were involved and was also unaware that she would be committing any offence. She unwittingly allowed herself to be coerced into a situation which, had she realised the gravity, she would never have entered into.

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f) He believes that his daughter was an entirely innocent pawn in this case.

11. The Appellant submitted an Appeal to the Tribunal dated 11 March 2014. The Notice of Appeal refers only to the Assessment amount of £2,254. No Notice of Appeal has been lodged against the penalty. As such, the penalty is not under appeal.

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12. Following listing directions issued by the Tribunal Service on 28 February 2014, the Respondents lodged an application to strike out the Appellant's appeal on the basis there is no reasonable prospect of the Appellant's case succeeding, following which the Appeal was listed for a pre-trial review.

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13. At the hearing, it was agreed by the parties that a pre-trial review was procedurally unnecessary and that the appeal and cross application to strike out should be determined by the Tribunal.

THE LAW

14. The Finance Act 1994 provides:

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“12 Assessments to excise duty.

(1A) Subject to subsection (4) below, where it appears to the Commissioners—

(a) that any person is a person from whom any amount has become due in respect of any duty of excise; and

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(b) that the amount due can be ascertained by the Commissioners,

the Commissioners may assess the amount of duty due from that person and notify that amount to that person or his representative.”

15. The Excise Goods (Holding, Movement & Duty Point) Regulations 2010 provides:

5 “Goods already released for consumption in another Member State-excise duty point and persons liable to pay

10 (13) (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...”

16. It was held in *HMRC v Jones & Jones* [2011] EWCA Civ 824 that:

15 “71... For the future guidance of tribunals and their users I will summarise the conclusions that I have reached in this case in the light of the provisions of the 1979 Act, the relevant authorities, the articles of the Convention and the detailed points made by HMRC.

20 (4) The stipulated statutory effect of the owners' withdrawal of their notice of claim under paragraph 3 of Schedule 3 was that the goods were deemed by the express language of paragraph 5 to have been condemned and to have been "duly" condemned as forfeited as illegally imported goods. The tribunal must give effect to the clear deeming provisions in the 1979 Act: it is impossible to read them in any other way than as requiring the goods to be taken as "duly condemned" if the owner does not challenge the legality of the seizure in the allocated court by invoking and pursuing the appropriate procedure.

25 (5) The deeming process limited the scope of the issues that the owners 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 as a 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 owners 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 owners. In brief, the deemed effect of the owners' failure to contest condemnation of the goods by the court was that the goods were being illegally imported by the owners for commercial use.”

30 35 40 17. In *HMRC v Mr. Nicholas Race* (TC/2012/08668), the following was held at para 35:

“(1) It is arguable that Jones & Jones does not limit the jurisdiction of the Tribunal in relation to an appeal against an assessment to excise duty.

5 (2) If the Appellant satisfies the tribunal that he was frustrated in a genuine attempt to challenge the legality of the seizure then the Tribunal arguably must give him a remedy in order to vindicate his rights under Article 5(1) which include the right to a procedurally fair hearing.”

18. The Respondents are currently in the process of appealing *Race* to the Upper Tribunal and a hearing is listed for 3 June 2014.

THE APPELLANT’S CASE

10 19. In her Notice of Appeal, the Appellant says that the decision letter was not received until 10 months after it was sent. She was therefore not afforded the opportunity to appeal the seizure of the goods.

20. Not only does she not have the goods to try and recoup some of her losses but she is being asked to pay duty on them as well, a sort of ‘double-whammy’.

15 21. She stood to gain nothing from the misadventure, save for a single flight on a budget airline to visit friends and relatives.

20 22. The penalty is hugely disproportionate to the "crime" and as a single mother of a 6 month old baby daughter, she has not, and never will have, the resources to pay the penalty. She lives a hand to mouth existence relying on hand-outs from family and friends and the occasional contribution from the baby's father when he has any money.

23. She is in severe financial hardship and the demand is only adding to her problems.

25 24. At the hearing, the Appellant’s father confirmed that his daughter did not wish to appeal the penalty of £452 and did not contest the amount of the Assessment. He said that his daughter had not realised the seriousness of what she had done. He acknowledged that the facts of the matter were not in dispute, that his daughter had been paid to bring tobacco into the UK. Also that apart from arguing issues of hardship and proportionality, the Appellant had not put forward any substantive grounds of appeal.

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THE RESPONDENTS’ CASE

35 25. The Appellant chose not to stay for an interview with the UKBF officers regarding the goods seized and therefore the officers seized the goods on the grounds that they were held for a commercial purpose in the absence of any other evidence.

26. The Appellant decided not to challenge the legality of the seizure within the statutory time limit. The Tribunal is prevented from considering arguments and

evidence which may render the seizure unlawful; this is for a Magistrates' Court to determine in condemnation proceedings.

5 27. The goods are therefore deemed forfeited to the Crown and the question on whether the seized goods were or were not held for a commercial purpose has been finally determined.

10 28. The Appellant was given a copy of Public Notice 12A which stipulated how she could challenge the seizure. If the Appellant had challenged the seizure and won, the Assessment would not have been issued and she would have been entitled to the return of her goods, or compensation thereof.

29. By electing not to challenge the seizure, the Appellant has accepted that the seized goods were held for a commercial purpose and a duty point was created. The delay in issuing the Assessment has no bearing on whether or not the Appellant could have challenged the seizure.

15 30. In any event, the Appellant's father's letter of 22 January 2014 states that the Appellant was paid to bring tobacco into the UK. Therefore, the Appellant has admitted that the tobacco was not imported for "personal use".

20 31. The Respondents contend that the assertion that the Appellant would suffer a 'double whammy' is not a valid ground of appeal. In any event, due to the admissions in the letter of 22 January 2014, the Respondents contend that the Appellant did not pay for the goods in the first place, but appears to have been "given" them to transport across the border.

25 32. The Appellant further appeals on the basis that she cannot afford to pay the Assessment. The Respondents submit that the Appellant is not challenging the Assessment and as such is not a valid ground of appeal. The goods were lawfully seized as being held for a commercial purpose without the payment of duty in the absence of any other explanation. The Respondents are therefore entitled to assess the duty amount on the goods.

30 33. Mr Collins for HMRC submitted that that Appellant's grounds of appeal disclosed no reasonable prospect of success and asked that although the matter had been listed for a pre-trial review, the appeal should be struck out.

34. The Tribunal Procedure (First-tier Tribunal) (Tax Chambers) Rules 2009 states:

“Striking out a party's case

35 8. (3) The Tribunal may strike out the whole or a part of the proceedings if—
(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.”

40 35. 'Reasonable prospects of success' has been subject to case law in the county courts with *International Finance Corp v Utexafrica Spri* [2001] CLC 1361 and

ED&F Man Liquid Products Ltd v Patel 12003] EWCA Civ 472 providing helpful guidance:

5 "That prospect must be real, i.e. the court will disregard prospects which are false, fanciful or imaginary. The inclusion of the word real means that the respondent [to the application] has to have a case which is better than merely arguable."

CONCLUSION

10 36. The facts of the matter are not in dispute. The Appellant's father's letter of 22 January 2014 states that the Appellant was paid to bring tobacco into the UK. Therefore, the Appellant's representative has admitted that the tobacco was for commercial use. The Appellant's father has further admitted that his daughter was the person holding the goods at the point of seizure and so the Assessment has been issued to the correct person. The Respondents were therefore entitled to issue an assessment for the duty.

15 37. The Appellant argues that the assessment is disproportionate. However the assessment has been correctly raised under s 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010. The penalty has not been appealed.

20 38. The Appellant has not put forward any grounds of appeal other than to say that she will suffer financial hardship and will not be able to pay the assessment. However, the Appellant chose to become involved in a smuggling attempt and the consequences following from this should have been apparent to her.

39. The Appellant's case contains no prospect of successfully appealing the Assessment and therefore is struck out.

25 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.

35 **MICHAEL S CONNELL**
TRIBUNAL JUDGE

RELEASE DATE: 24 October 14

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