TC04533

Appeal number: TC/2014/03033

EXCISE DUTY – assessment to excise duty and a non-deliberate wrongdoing penalty following the seizure of goods on their being brought into the UK from an EU Member State – whether the appeal should be struck out following* Jones and Another v HMRC *and* Nicholas Race v HMRC *– HMRC's application for strike-out refused and Directions given to enable the appellant to amend his grounds of appeal if so advised

FIRST-TIER TRIBUNAL
TAX CHAMBER

MARCIN STANISZEWSKI **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN WALTERS QC
ELIZABETH POLLARD

Sitting in public at North Shields on 21 January 2015

Tomasz Krause for the Appellant

Anthony Senior, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. We heard the Application of the Respondents ("HMRC") to strike out this appeal. The Application was first made on 2 September 2014 and amended on 23 December 2014. HMRC submit that this Tribunal has no jurisdiction to hear the appeal and/or that the appeal should be struck out under rule 8(3)(c) of the Tribunal procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") on the basis that there is no reasonable prospect of the appeal succeeding.

2. The appeal by the appellant, Mr Staniszewski, is dated 31 May 2014. It refers to an assessment to excise duty of £799 dated 2 May 2014 in respect of 3,560 cigarettes of various brands seized from him by officers of the UK Border Force on 1 April 2013, and a penalty for excise wrongdoing, also dated 2 May 2014, in the amount of £159. It appears from Mr Staniszewski's Notice of Appeal that he also asks for the return of the seized cigarettes or for compensation for their seizure. However, there appears to have been no application by Mr Staniszewski for restoration of the cigarettes and therefore no refusal of such restoration. There is no basis therefore for us to consider further the question of restoration.

3. The assessment and the penalty have been raised in the following circumstances.

4. On 1 April 2013, Mr Staniszewski was stopped by officers of the UK Border Force at Doncaster Sheffield Airport after arriving on a flight from Warsaw, Poland. He had with him the 3,560 cigarettes and he filled out a questionnaire prepared for Polish-speaking passengers, in which he stated that he lived in the UK and had brought with him cigarettes, and other goods, which he had purchased abroad. He stated that he was a smoker and smoked 30 to 40 cigarettes a day, and that he intended to smoke all the cigarettes that he had brought with him. He estimated that it would take him 6 months to do so. He stated that he was not receiving any money for the cigarettes. He also stated that he worked as a 'printman'.

5. The officer (Officer Morton) was not satisfied that the cigarettes were for Mr Staniszewski's personal use and they were seized. Mr Staniszewski was issued with a Seizure Information Notice, a warning letter (which warned Mr Staniszewski specifically about possible assessment to evaded tax or duty and a wrongdoing penalty, and also to possible prosecution), and Notice 12A – a document entitled "What you can do if things are seized by HM Revenue & Customs or UK Border Agency" which gives information about challenging a seizure by sending a Notice of Claim to request condemnation proceedings to be commenced. Notice 12A also states that a Notice of Claim must be received within one calendar month of the date shown on the Seizure Information notice and warns that if this time limit is not observed "you will not be able to challenge the legality of the seizure".

6. We heard no witness evidence, but it is clear that Mr Staniszewski did not send a Notice of Claim to request condemnation proceedings to be commenced. He was apparently offered an interview at the time of the seizure of the goods but did not

attend. Mr Krause, who appeared on his behalf, suggested that he had not been able to wait for the interview because he would have been late for his train. He also suggested that Mr Staniszewski, a native Pole, and Polish-speaker, did not argue with the authorities because his attitude was that to do so would have made things worse. We were told that the cigarettes would have cost between £400 and £500 in Poland. Mr Staniszewski had bought them at Warsaw Airport.

7. Mr Staniszewski appears to have accepted the loss of his cigarettes until, one year after their seizure, he received a letter dated 1 April 2014 from HMRC informing him that "[a]s you have not applied for condemnation within the time limit, we will now charge you the Excise duty on the goods that were seized. Excise duty is chargeable even though the goods have been seized from you, and paying the Excise duty will **not** entitle you to get the goods back."

8. The letter informed Mr Staniszewski that "[o]n this occasion we have decided **not** to take criminal proceedings against you" but warned that this might happen on a future occasion.

9. The letter also informed Mr Staniszewski that because he had brought goods into the UK from the EU on which Excise duty was due but not paid or accounted for, he had committed an Excise wrongdoing, in relation to which a penalty would be charged.

10. The letter stated that HMRC intended to charge £799 in Excise duty and £159 in penalty. Mr Staniszewski was informed that if he had a reasonable excuse the penalty would not be charged, and he was invited to write to HMRC to tell them about any reasonable excuse for committing the Excise wrongdoing that he might have had.

11. Mr Staniszewski wrote to HMRC on 30 April 2014 informing them of his intention to appeal the decisions to assess to Excise duty and to impose a penalty. He stated that he was not aware of the time limit of one month to contest the seizure or that failure to do so would amount to admitting to the wrongdoing. He repeated that he was carrying the cigarettes for his own personal use and that he was a regular smoker. He accepted that the information given about the quantity of cigarettes, the description of them and the date of seizure was correct.

12. As stated above, the assessments to Excise duty and the penalty were raised on 2 May 2014 and Mr Staniszewski duly appealed to this Tribunal.

13. Mr Senior submitted that, following *Revenue and Customs Commissioners v Jones and Another* [2011] EWCA Civ 824, it is clear that this Tribunal does not have jurisdiction to consider whether the cigarettes in issue were duty paid or intended for personal or commercial use because those facts have been finally determined, in HMRC's favour by the deemed condemnation provided for by paragraph 5, Schedule 3, Customs and Excise Management Act 1979 ("CEMA") in the absence of any actual condemnation proceedings.

14. He submitted that the Upper Tribunal's decision in *Nicholas Race v HM Revenue & Customs* (FTC/131/2013) confirmed that *Jones* was clear authority for the

proposition that this Tribunal has no jurisdiction to go behind the deeming provisions of paragraph 5, Schedule 3, CEMA and that an appeal against an assessment to duty raised on only one ground of appeal, namely that the goods were acquired for personal use, and in the absence of actual condemnation proceedings, could not succeed and ought to be struck out.

15. Mr Senior also submitted that the part of Mr Staniszewski's appeal which relates to the penalty should also be struck out. He submitted that the deeming effect of paragraph 5, Schedule 3, CEMA means that the facts giving rise to the penalty are likewise made out and there is no prospect of Mr Staniszewski succeeding in his appeal against the penalty. He submitted that the lowest possible rate of penalty had been charged in respect of non-deliberate behaviour and, in these circumstances Mr Staniszewski had no prospect of succeeding in challenging the mitigation of the penalty payable under Schedule 41, Finance Act 2008. In particular, he submitted that there were no special circumstances nor any reasonable excuse which Mr Staniszewski could put forward to reduce the penalty further (or eliminate it).

16. Mr Krause contended that it was not made sufficiently clear to Mr Staniszewski that if he wished to argue that the cigarettes were being transported for private use and not for commercial purposes he had to serve a notice of claim to commence condemnation proceedings within one month from the date of the Seizure Information Notice. He submitted that it followed, from paragraph [58] of *Jones*, that Mr Staniszewski's rights under the European Convention on Human Rights had not been sufficiently protected. The basis for this submission was that Mr Staniszewski's command of English was so imperfect that he did not understand the documents that were given to him when the goods were seized. On that basis, Mr Staniszewski did not make an effective 'choice' not to challenge the legality of the seizure in condemnation proceedings (compare paragraph 71(6) of *Jones*).

17. We consider (without deciding) that the answer to this point may well be that it was open to Mr Staniszewski to take legal advice immediately following the seizure (as he had, apparently, immediately following receipt of HMRC's letter dated 30 April 2014) and on this basis his Convention rights cannot be said to have been materially infringed.

18. We note that the Upper Tribunal (Warren J) in *Nicholas Race* held that this Tribunal does not have any more jurisdiction to consider the legality of a seizure of goods in a case where there is a deemed condemnation under paragraph 5, Schedule 3, CEMA in an appeal against an assessment to excise duty than it does on an appeal against non-restoration of goods (*ibid.* [33]). That means, as Mr Senior submitted, that an appeal against an assessment to duty raised on only the ground of appeal, that the seizure was illegal because the goods had been intended for Mr Staniszewski's personal use, would have no prospects of success, and ought to be struck out.

19. The position on the appeal against the penalty is, we consider, different in that it is open to Mr Staniszewski to argue that the penalty should be reduced or stayed by reason of special circumstances (other than ability to pay or the fact that a potential

loss of revenue from one taxpayer is balanced by a potential over-payment by another – paragraph 14(2), Sch. 41, FA 2008).

20. We decline, on this basis, to strike out the appeal against the penalty assessment.

21. Turning to the excise duty assessment, we note that in *Dmitrij Fedoruk v HMRC* (TC/2013/02371), in *Andrew Wood v HMRC* (TC/2013/01036) and in *Daron Massey v HMRC* (TC/2013/08129) this Tribunal (Judge Kenneth Mure QC) struck out appeals against excise duty assessments and penalties in cases raising factual circumstances comparable to those raised in this appeal. In *Tina Hammond v HMRC* (TC/2013/00260) this Tribunal (Judge Barbara King) struck out an appeal against an excise duty assessment, but not the appeal against the penalty.

22. We are troubled by this appeal and would respectfully agree with the reported comment of Evan Lombe J in *Weller v Customs and Excise Commrs.* [2006] EWHC 237 (Ch) that a statutory rationalisation of the procedure governing the forfeiture of goods is urgently required as the present system is so confusing to the public and pregnant with the possibility of substantial injustice (see *Jones* [63]). We are also aware that in some cases of seizure of goods HMRC do not raise excise duty assessments or penalty assessments (e.g. *Samuel Ottey* [2015] UKFTT 0246(TC)**)** and we are not aware of any rationale or justification for a different approach in some cases, such as the present.

23. We also note that in the appeal of *Jeffrey Williams v HMRC* (TC/2013/05378), the appellant, who was professionally represented, raised two points which did not need to be decided on the facts of that case, but which could be relevant, if raised by or on behalf of Mr Staniszewski in this case.

24. They were points referred to in that Decision (by a Tribunal in which Judge Walters was sitting) as 'the Consumption point' and 'the Proportionality point' (see: *ibid.* [65], [66], [106] to [115] and [116] to [120]).

25. Shortly stated, the Consumption point was that the assessment in *Williams* was bad because it was not compliant with the spirit of the Excise Directive (Directive 2008/118/EC). This was said to be because the Directive makes it clear that excise duty is a duty on consumption and should not be charged where goods have been destroyed or irrevocably lost. The suggested importance of consumption being the justification for excise duty to be levied was said not to have been reflected in the Excise Duty (Holding, Movement and Duty Point) Regulations 2010 under which the assessment in *Williams*, as in this case, was raised. It was submitted in *Williams* that HMRC cannot properly act contrary to the aims of the Directive by assessing for excise duty on goods which they have seized and condemned, or, alternatively, even if duty is chargeable, it ought to be remitted back in the circumstances, and so it was not reasonable to raise an assessment to excise duty in the first place.

26. The Proportionality point was that the assessment to excise duty was bad in that to raise it in addition to seizing the goods was a disproportionate response and a duplicated remedy for a perceived wrong (*viz:* the evasion of duty).

27. We consider that the overriding objective of the Rules, to deal with cases fairly and justly (cf. rule 2 of the Rules) would be served by refusing HMRC's Application to strike out and by making directions allowing for Mr Staniszewski to reconsider his grounds of appeal in the light of this Decision. We refuse the application and make Directions accordingly.

28. A similar decision has been made and Directions issued by this Tribunal in the appeal of Charles Fleming (TC/2013/06135).

29. 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.

JOHN WALTERS QC
TRIBUNAL JUDGE

RELEASE DATE: 17 July 2015