



TC04554

Appeal number: TC/2013/06153

EXCISE DUTY – assessment to excise duty 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**

JAMES MURRAY

Appellant

- and -

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

**TRIBUNAL: JUDGE JOHN WALTERS QC
 LESLIE BROWN**

Sitting in public at North Shields on 21 July 2015

The Appellant in person

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
5 appeal. The Application was first made on 17 October 2013, amended on 7 January
2014, and renewed on 22 August 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
10 (“the Rules”) on the basis that there is no reasonable prospect of the appeal
succeeding.

2. The appeal by the appellant, Mr Murray, is dated 22 August 2013. It followed a
review letter dated 14 June 2013 and refers to an assessment to excise duty of £1,815
dated 7 January 2013 in respect of 780 cigarettes of various brands and 10 kilograms
15 of hand-rolling tobacco seized from him by officers of the UK Border Force on 29
September 2012. The letter dated 7 January 2013 from HMRC informing Mr Murray
that the assessment to excise duty would be issued also stated that Mr Murray was
liable to an excise wrongdoing penalty in accordance with Schedule 41, Finance Act
2008 and that he would be contacted ‘after 30 days, with the amount and details of the
20 penalty to be charged’. Although Mr Murray’s liability to a wrongdoing penalty was
again referred to by HMRC in their letter to him dated 11 February 2013, it appears
that no penalty has been charged. The review letter dated 14 June 2013 (which
upheld the excise duty assessment) made no mention of a penalty being charged. Mr
Senior (for HMRC) told us that he had no explanation for the fact that a penalty had
25 not been charged, but that his understanding was that, particularly in the light of the
length of time that had elapsed since the seizure, HMRC would not now be minded to
charge a penalty and, indeed, that Mr Murray would not be charged a penalty.

3. The assessment has been raised in the following circumstances.

4. On 29 September 2012, Mr Murray (who was travelling with his partner) was
stopped by officers of the UK Border Force at Eastern Docks, Dover after arriving
30 from Belgium. He had with him the cigarettes and hand-rolling tobacco, although it
was not clear how much of the goods were bought by or given to his partner. He
claimed at an interview with the officers before the goods were seized that they were
intended for his own use and that of his partner.

5. The officer (Officer Minetti) was not satisfied that the cigarettes and hand-
35 rolling tobacco were for the personal use of Mr Murray or his partner and they were
seized. Mr Murray was issued with a Seizure Information Notice, a warning letter
(which warned Mr Murray 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
40 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. Mr Murray did not send a Notice of Claim to request condemnation proceedings to be commenced. We were referred to Mr Murray's letter to the Tribunal dated 3 November 2013, in which he said that at the time of the seizure of the goods he had asked about appealing and had been told that it would be 'a waste of time' as HMRC would be legally represented and he would have to travel to Dover for the appeal. Notice 12A (at paragraph 3.13) makes the point that if a person is not successful at condemnation proceedings, the court may order that person to pay the costs of HMRC or the UK Border Force and that, at the time the Notice was published, HMRC and the UK Border Force were applying for costs in the region of £1,500 and that this could be 'considerably more in complex cases'. (The Notice also states – at paragraph 3.12 – that a person who is successful at condemnation proceedings may also be able to claim their costs in relation to the hearing.)

7. Mr Murray appears to have accepted the loss of his cigarettes and tobacco until, more than 3 months after their seizure, he received the letter dated 7 January 2013 from HMRC informing him that "by virtue of your actions you are liable to pay the excise duty and a financial penalty. Payment of the excise duty does not mean that the goods seized from you will be returned." We observe that liability for excise duty *prima facie* follows from the seizure of the goods by the UK Border Force rather than any actions of Mr Murray.

8. The letter informed Mr Murray that "[o]n this occasion we have decided **not** to take criminal proceedings against you".

9. Mr Murray wrote to HMRC complaining about the decision to charge excise duty of £1,815, again making the point that the cigarettes and hand-rolling tobacco were for his and his partner's personal consumption and stating that he was 'at a loss to understand why I have to pay duty on them when I do not have the goods to show for it'.

10. He wrote again to HMRC on 26 April 2013 (this time to their Debt Management unit) informing them that he was appealing the decision to charge excise duty of £1,815.

11. He finally sent a Notice of Appeal to the Tribunal (as stated above) on 22 August 2013. HMRC raised no objection to the late appeal and allowed a hardship application.

12. 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.

13. 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.

14. 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 Murray's personal use, would have no prospects of success, and ought to be struck out.

15. 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.

16. 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. We are also aware that penalties have been raised in other similar cases where assessments to excise duty have been raised and do not know why no penalty has been charged in this case. We make these points because we are uneasy about the apparent position being that different individuals in relevantly similar positions are being treated differently by HMRC, not to encourage HMRC to raise a penalty in Mr Murray's case.

17. 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 Murray in this case.

18. 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]).

19. 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.

20. 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).

21. We raised the possibility of Mr Murray arguing the Proportionality and Consumption points in this appeal and Mr Senior, who was aware of this Tribunal's decision in the appeal of *Marcin Staniszewski* (TC/2014/03033), submitted that it would be difficult to argue that Mr Murray's appeal should be struck out if there were avenues open to him other than reliance on his intention to use the goods for his own and his partner's consumption.

22. 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 Murray to reconsider his grounds of appeal in the light of this Decision. We refuse the application and make Directions accordingly.

23. A similar decision has been made and Directions issued by this Tribunal in the appeal of Charles Fleming (TC/2013/06135), besides that of and *Marcin Staniszewski* (TC/2014/03033) referred to above.

24. 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: 24 JULY 2015