



TC05402

Appeal number: TC/2016/02121

EXCISE DUTY – application to strike out appeal – C18 demand under Community Customs Code – inability to pay being the ground of appeal – whether Tribunal has jurisdiction to consider financial hardship for the remission of customs debts; no – whether the appellant has alternative grounds of appeal on substantive issues – whether reasonable prospect of the appeal succeeding; no – whether infringement of the ‘Right to be Heard’ period sufficient for the annulment of the C18 demand; no – Kamino and Datema applied – Rule 8 of Tribunal Rules 2009 – application granted

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MICHAEL FOX

Appellant

- and -

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

TRIBUNAL: JUDGE HEIDI POON

Sitting in public at Fox Court, Brooke Street, London on 6 July 2016

Mr Michael Fox in person for the Appellant

Miss Sadiya Choudhury, of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The hearing was to consider HMRC's application of 16 May 2016 to strike out the proceedings in relation to the appeal by Michael Fox against HMRC's decision to issue a Post-Clearance Duty Demand Note (C18) in the sum of £20,943.
2. The reason for the application is that the appellant's case, as pleaded in his appeal to the Tribunal, 'discloses no legal basis for his Appeal or any that are capable of being argued before the Tribunal'. Pursuant to the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('Tribunal Rules'), the respondents hence apply for the appeal to be struck out under Rule 8(2)(a) on the basis that the Tribunal does not have jurisdiction, and/or under Rule 8(3)(c) that there is no reasonable prospect of any part of the appellant's case succeeding.
3. The respondents also apply for a direction of the Tribunal to suspend the requirement for filing a Statement of Case until 60 days after the preliminary matter in relation to the strike out application has been dealt with, pursuant to Rule 5(3)(a) of the Tribunal Rules.

Factual background

4. On 12 September 2015, the appellant was intercepted in the green channel at London Heathrow Airport on his return from Basel, Switzerland. He was in possession of 17 kilogrammes of tobacco which had not been declared and the goods were consequently seized and confiscated.
5. On 7 October 2015, Officer Laura Wright of HMRC wrote to Mr Fox to inform him that an enquiry had been opened into the smuggling, or attempted smuggling, of tobacco products into the UK without the appropriate duty having been paid.
6. The letter also alerted Mr Fox to the possible imposition of penalties if there was sufficient evidence of dishonest conduct, and invited the appellant to co-operate with the enquiry. Various items of information were requested in the letter, including the number of times and the dates on which tobacco products were smuggled into the UK and the quantities involved.
7. By letters dated 24 October 2015 and 20 November 2015, Mr Fox informed Officer Wright that he had travelled to and from Basel on seven occasions, and was carrying 17 kilogrammes of tobacco each time; twice he was intercepted:
- (1) 2015 – 12 September – tobacco confiscated
 - (2) 2015 – 9 May
 - (3) 2015 – 7 February
 - (4) 2014 – 13 October – tobacco confiscated
 - (5) 2014 – 26 June
 - (6) 2014 – 1 March
 - (7) 2013 – 7 December

8. Mr Fox related the circumstances under which he had agreed to travel on those seven occasions to Basel. He undertook the trips for a person he met socially by the name of Stan Davies to earn extra cash after losing full-time employment. He would fly to Basel with empty hand luggage cases, and would return to the airport on the same day and purchase as much tobacco (duty-free) as the hand luggage cases could hold after checking in for his return flight. On arrival at Heathrow, he would be met outside the terminal for the tobacco to be collected. He was given enough money for the flights and the tobacco, and on each of those occasions when the goods were not seized, Mr Fox received £150 and 10 pouches of the tobacco in return.

10 *The penalty assessment and C18 demand*

9. On 2 December 2015, Officer Wright issued a penalty notice in relation to the attempted evasion of duty and VAT on 13 October 2014 and 12 September 2015 (i.e. the two occasions when the tobacco carried by Mr Fox had been seized). The civil evasion penalty was charged under section 25(1) of the Finance Act 1994 in the sum of £1,971, after applying the maximum 40% reduction for disclosure, and the maximum 40% reduction for co-operation. The penalty has been settled and is not the subject of an appeal.

10. In a separate letter also dated 2 December 2015, Officer Wright advised Mr Fox of a pending Post Clearance Duty Demand Note (Form C18) as follows:

20 'In your letters I received 28 October 2015 and 23 November 2015 you have confirmed that on 5 separate occasions (7 December 2013, 1 March 2014, 26 June 2014, 7 February 2015, and 9 May 2015) you deliberately entered into the UK with 17KG of Hand rolling tobacco evading Customs Duty, Excise Duty and Import VAT on these goods.

25 I intend to raise a post clearance demand note (C18) in the amount of £20,943 for these offences.'

11. The C18 demand was to recover customs duty of £2,160, excise duty of £14,854 and import VAT of £3,963 payable in relation to the consignments of tobacco brought into the UK from outside the EU between 7 December 2013 and 9 May 2015. The consignments relate to those five occasions when Mr Fox was not intercepted at Heathrow on return from Basel. The demand had been calculated after giving Mr Fox the personal allowance of 250g of tobacco for each offence, and by using the lowest available price for Hand Rolling Tobacco.

12. Under 'the Right to be Heard' provisions, Mr Fox was given 30 days from 2 December 2015 to provide any additional evidence or information that might change the outcome of the pending C18 demand.

13. On 20 December 2015, Mr Fox wrote to Officer Wright requesting a review of her decision. He referred to 'his initial reasons for agreeing to bring tobacco into the country' as 'motivated by financial hardship, not greed or profit'; that he had made reference to his current financial situation, which 'has not changed and is unlikely to change for the foreseeable future' to enable him to meet the demand.

14. By letter dated 5 January 2016, Officer Wright advised Mr Fox that ability to pay could not be considered in determining liability, and the C18 demand would stand. Officer Wright also advised that the ‘Right to be Heard’ period had expired and the C18 demand would therefore be issued.

5 15. The C18 demand was issued on 29 December 2015, pre-dating Officer Wright’s decision of 5 January 2016 and before the expiry of the ‘Right to be Heard’ period.

Formal departmental review

16. Mr Fox wrote on 7 January 2016 in respect of the C18 demand that had been issued on 29 December 2015. He noted that he had not yet received a reply from
10 Officer Wright in response to his letter of 20 December 2015.

17. Mr Fox pleaded financial hardship, reiterating that he was in no position to pay the sum demanded; that he accepted his action as deliberate to evade the various duties, and that to pursue him for the sum under demand would ‘only push [him] to the point of financial impossibility and hardship’.

15 18. By letter dated 16 March 2016, the formal review decision was set out and the C18 demand was upheld. The Review Officer emphasised that he could only review whether the C18 demand is correct in law, and that he could not take account of other factors such as the ability to pay the demand.

Appellant’s case

20 19. By notice dated 12 April 2016, Mr Fox appealed against the formal review decision of 16 March 2016, stating as his grounds of appeal the following:

‘I do not dispute the decision. I accept that I was stupid and naive [naïve], and also dishonest with regards [*sic* regard] to my actions.

25 I am appealing on the grounds of financial hardship, ... I simply do not have the money and am unable to acquire it.’

20. Mr Fox also made a hardship application to HMRC on 23 March 2016. HMRC issued a hardship certificate on 11 April 2016, which was provided to the appellant and the Tribunal on 10 May 2016.

30 21. By letter dated 19 May 2016 to the Tribunal, Mr Fox responded to HMRC’s strike out application, raising the following points:

(1) Why his appeal has been accepted by the Tribunal if, as HMRC assert, anything he may have to say on the matter will not affect the outcome of his appeal;

35 (2) Why would HMRC consider a waste of their time to prepare a Statement of Case but had agreed to the issue of a hardship certificate which was taken by Mr Fox to mean that HMRC recognised his inability to pay the demand;

(3) That he cannot pay the demand, and if compelled to do so, he will be left in a stricken situation; that he may deserve to be punished but he is being pursued for something he cannot pay.

The applicable law

5 22. The C18 demand is raised under Council Regulation (EEC) No 2913/92 ('the Regulation'), which is commonly referred to as the Community Customs Code. Article 38(1)(a) provides for the protocol for customs clearance in different situations, and the one relevant for the present case is:

10 '1. Goods brought into the customs territory of the Community shall be conveyed by the person bringing them into the Community without delay, by the route specified by the customs authorities and in accordance with their instructions, if any:

(a) to the customs office designated by the customs authorities or to any other place designated or approved by those authorities; ...'

15 23. Article 40 defines the duty point and the person responsible for the duty:

'Goods which, pursuant to Article 38(1)(a), arrive at the customs office or other place designated or approved by the customs authorities shall be presented to customs by the person who brought the goods into the customs territory of the Community or, if appropriate, by the person who assumes responsibility for carriage of the goods following such entry.'

Imposition of a customs debt

24. Article 202 provides for the imposition of a customs debt for unlawful importation of duty goods and the persons who can be held liable for the debt:

25 '1. A customs debt on importation shall be incurred through:

(a) the unlawful introduction into the customs territory of the Community of goods liable to import duties, ...

...

30 For the purpose of this Article, unlawful introduction means any introduction in violation of the provisions of Articles 38 to 41 and the second indent of Article 177.

2. The customs debt shall be incurred at the moment when the goods are unlawfully introduced.

3. The debtors shall be:

35 – the person who introduced such goods unlawfully,
– any persons who participated in the unlawful introduction of the goods and who were aware or should reasonably have been aware that such introduction was unlawful, and
40 – any persons who acquired or held the goods in question and who were aware or should reasonably have been aware at the time of acquiring or receiving the goods that they had been introduced unlawfully.'

25. 'Import duties' are defined under Article 4(1) as '*customs duties and charges having an effect equivalent to customs duties payable on the importation of goods*'. Apart from customs duty, another import duty comes in the form of excise duty on excise goods that are imported into the territory of the EU. Furthermore, section 16 of the Value Added Tax Act 1994 provides that provisions applicable to customs duty also apply to import VAT. The collective effect of these related provisions means that the person liable for the customs debt in respect of unpaid customs duty is also liable for the excise duty and import VAT related to the goods.

26. Under Articles 217 to 220 of the Regulation, Member States are required to account for customs debts.

27. Article 221 provides that the debt must be communicated to the debtor no later than *three years* after it was incurred, and Article 221(3) states as follows:

'3. Communication to the debtor shall not take place after the expiry of a period of three years from the date on which the customs debt was incurred. However, where it is as a result of an act that could give rise to criminal court proceedings that the customs authorities were unable to determine the exact amount legally due, such communication may, in so far as the provisions in force so allow, be made after the expiry of such three-year period.'

28. Article 222(1)(a) requires payment to be made *within ten days* following communication to the debtor of the amount of duty owed (subject to certain specific exceptions which do not apply in Mr Fox's case).

Waiver of interest on arrears and extinction of customs debt

29. Where the amount of duty due has not been paid within the prescribed period, Article 232(1)(a) provides that 'the customs authorities shall avail themselves of all options open to them under the legislation in force, including enforcement, to secure payment of that amount.' Article 232(1)(b) provides for 'interest on arrears to be charged over and above the amount of duty'.

30. The collection of interest on arrears may be waived under Article 232(2)(a) 'where, because of the situation of the debtor, it would be likely to create serious economic or social difficulties'.

31. Article 233 provides for the circumstances in which a customs debt can be extinguished:

'Without prejudice to the provisions in force relating to the time-barring of a customs debt and non-recovery of such a debt in the event of the legally established insolvency of the debtor, a customs debt shall be extinguished:

- (a) by payment of the amount of duty;
- (b) by remission of the amount of duty;
- (c) ...

(d) where goods in respect of which a customs debt is incurred in accordance with Article 202 are seized upon their unlawful introduction and are simultaneously or subsequently confiscated.

5 In the event of seizure and confiscation, the custom debt shall, nonetheless for the purposes of the criminal law applicable to customs offences, be deemed not to have been extinguished where, under a Member State's criminal law, customs duties provide the basis for determining penalties or the existence of a customs debt is grounds for taking criminal proceedings.'

10 *Repayment and remission of duty*

32. In certain circumstances, a customs debt may be repaid or remitted as provided under Articles 235 to 239.

15 33. Article 235 defines 'repayment' and 'remission' as follows: (a) 'repayment' means *the total or partial refund of import duties or export duties which have been paid*; (b) 'remission' means *either a decision to waive all or part of the amount of a customs debt or a decision to render void an entry in the account of all or part of an amount of import or export duty which has not been paid*.

34. Articles 236, 237 and 238 provide for specific circumstances for repayment or remission, but none of which pertains to an insufficiency of funds or inability to pay.

20 35. An innocent party may rely on Article 239 for a customs debt to be remitted, and Article 239(1) states as follows:

'1. Import duties or export duties may be repaid or remitted in situations other than those referred to in Articles 236, 237, and 238:
25 – to be determined in accordance with the procedure of the committee;
– resulting from circumstances in which *no deception or obvious negligence* may be attributed to the person concerned. The situations in which this provision may be applied and the procedures to be followed to that end shall be defined in accordance with the
30 Committee procedure. Repayment or remission may be made subject to special conditions.' (emphasis added)

Discussion

Tribunal's jurisdiction

35 36. Under Rule 8(2) of the Tribunal Rules, it is stated that the Tribunal *must* strike out the whole or a part of the proceedings if the Tribunal (a) does not have jurisdiction in relation to the proceedings or that part of them; and (b) does not exercise its power under Rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.

40 37. Mr Fox has staked his appeal on the ground of financial hardship. Whether the Tribunal has jurisdiction to consider his pleading as a valid ground of appeal is a matter of law. If the law has provided the Tribunal with the jurisdiction to consider

remitting the demand on hardship, then Mr Fox's appeal can be entertained. If there is no statutory provision for the exercise of such discretion, and there is no other court or tribunal with the jurisdiction to consider the case on such grounds, then the appeal *must* be struck out.

5 38. The relevant provisions of the Community Customs Code as set out above do not give rise to any course of action whereby an insufficiency of funds or inability to pay can be pleaded for the remission of a customs debt.

39. The Code provides for the non-recovery of such a debt in the event of the debtor being legally established as insolvent, and for insolvency to be legally established, it is the jurisdiction of another court and not of this Tribunal. However, Mr Fox has pleaded financial hardship – not insolvency – and the transfer of proceedings to another tribunal under Rule 5(3)(k)(i) therefore does not apply.

40. In conclusion, the Tribunal has no jurisdiction to consider Mr Fox's appeal on the ground of his inability to pay the demand, because the applicable law does not provide for such a ground to be considered. For the lack of jurisdiction, the Tribunal *must* strike out the appeal under Rule 8(2) of the Tribunal Rules.

No reasonable prospect of success

41. The Tribunal has further considered whether Mr Fox has alternative grounds of appeal that the Tribunal has jurisdiction to consider, and whether there is any reasonable prospect of the case succeeding on these alternative grounds.

42. The potential issues that this Tribunal has jurisdiction to consider in relation to Mr Fox's C18 demand, or any part thereof, would seem to be the following:

(1) The time-bar issue: whether the C18 demand has been communicated within the time limit of three years from the date on which the customs debt was incurred (Article 221(3));

(2) The innocent agent issue: whether the C18 demand has resulted from circumstances in which no deception or obvious negligence may be attributed to the person concerned (Article 29(1));

(3) Whether there was any occasion when the remission of the related customs debt under Article 233(d) would be in point.

43. In respect of the time-bar issue, the first offence occurred on 7 December 2013. Officer Wright's letter dated 2 December 2015 was the communication of the C18 demand which she intended to raise. The communication of Mr Fox's customs debt arising from each of the five offences was therefore within the three-year time limit.

44. If the circumstances under which Mr Fox's involvement in these smuggling offences would give rise to a finding of fact that there was 'no deception or obvious negligence' on his part in one or any of these attempts, then the customs debt in relation to the offence(s) may be remitted under Article 239(1). *Jeffrey Williams v HMRC* [2015] UKFTT 330 (TC) ('*Williams*') illustrates the relevance of such

considerations – no deception or obvious negligence – for the remission of a customs debt. However, unlike the appellant in *Williams*, who maintained that he was ‘an innocent agent’, Mr Fox has admitted dishonesty and that he knew the attempts to import the tobacco under the circumstances were unlawful. There is no case for the Tribunal to consider therefore whether Mr Fox could have been an innocent agent.

45. On the remission of the customs debts on the two occasions when the goods were confiscated, I am satisfied that those debts had been remitted in accordance with Article 233(d). The customs debts incurred on those two occasions form the basis for calculating the penalties imposable. The maximum reduction for disclosure and co-operation against the full amount of penalties imposable has also been given.

46. For the reasons stated above, and in relation to the potential substantive issues that the Tribunal has jurisdiction to consider, the strike out application is also granted under Rule 8(3)(a) of the Tribunal Rules, in that there is no reasonable prospect of the appellant’s case, or any part of it, succeeding.

15 *Other considerations*

(a) *C18 Demand issued before the expiry of ‘the right to be heard’ period*

47. The date for remittance stated on the C18 demand is 7 January 2016. Under Article 222(1)(a), Mr Fox was given ten days to settle the C18 demand, and HMRC has given the date of issue of the C18 demand to be 29 December 2015.

48. On the basis that the C18 demand was issued on 29 December 2015, it had pre-dated the expiry of the 30-day period for the ‘Right to be Heard’, which started on 2 December 2015. The demand had also pre-dated the decision letter of 5 January 2016 by Officer Wright in response to Mr Fox’s letter dated 20 December 2015.

49. The Tribunal was referred to the judgment by the European Court of Justice of 3 July 2014 on preliminary issues concerning both *Kamino International Logistics BV v Staatsecretaris van Financien* (C-129/13) and *Datema Hellmann Worldwide Logistics BV v Staatsecretaris van Financien* (C-130/13). The ECJ judgment would seem to be a ruling on three preliminary issues common to the two cases by the referring court of the Netherlands under the Article 267 TFEU Reference Procedure (‘TFEU’ for Treaty on the Functioning of the European Union).

50. In the two cases, Kamino and Datema did not have the opportunity to be heard before the demands for payment were issued under Articles 220(1) and 221(1) of the Community Customs Code; they lodged an objection against the relevant demand with the tax inspector, who dismissed it after considering the arguments made.

51. Of the three issues being referred to the ECJ, the third issue is of direct relevance to the present case, and concerns the legal consequences of infringements by the authorities of the principle of respect for the rights of the defence, and what circumstances could be taken into account by the national court in the context of its review. In particular, the third issue sought to ask whether the national court could

take into consideration the fact that the result of the decision-making process would have been the same, had the right to be heard before it been observed.

52. The judgment at [82] gives the ruling to this question and states that when assessing the consequences of an infringement of the rights of the defence (in particular the right to be heard), the national court could consider that such an infringement would entail the annulment of the decision *only if* the outcome of the procedure might have been different, had it not been for such an irregularity.

53. Applying the ECJ judgment to Mr Fox's case, the infringement of the right to be heard period does not warrant the annulment of the decision to raise the C18 demand. This is so because the outcome of the review procedure (by Officer Wright per letter of 5 January 2016) would not have been different even if the full period for the 'Right to be Heard' had been observed before the issue of the C18 demand.

(b) Hardship certificate and its relevance to the proceedings

54. Mr Fox has raised certain points in response to the strike out application. The principal point concerns the status of the hardship certificate issued by HMRC, which Mr Fox considered as an indication that his pleading on hardship was accepted.

55. Procedurally, HMRC have granted the hardship application to enable Mr Fox's appeal to progress *before* the payment of the disputed sum. Without the grant of hardship, the sum under appeal, being in relation to indirect taxes, would have to be paid first before the Tribunal could consider the appeal.

56. The grant of Mr Fox's hardship application is therefore a procedural step that has no bearing on the outcome of the substantive appeal. The strike out hearing was for the purpose of reviewing whether the appeal should be allowed to progress further. As set out earlier in this decision, the Tribunal has no jurisdiction to entertain Mr Fox's appeal as advanced on the ground of financial hardship; it therefore serves no good purpose for the proceedings to progress any further.

(c) Relevance of hardship in relation to waiving interest on arrears

57. Mr Fox's financial situation may mean that interest on arrears in settling his customs debt may be waived under Article 232(2)(a): 'where, because of the situation of the debtor, it would be likely to create serious economic or social difficulties'.

58. Interest on arrears is not the subject of this appeal. In the event that interest on arrears is not waived by HMRC, and Mr Fox wishes to appeal against the interest charges, that will be a matter for a separate appeal.

Decision

59. For the reasons stated above, the application to strike out the proceedings is granted under Rule 8(2)(a) and 8(3)(c) of the Tribunal Rules 2009.

Direction

60. Pursuant to Rule 5(3)(a) of the Tribunal Rules, the Tribunal hereby directs that the requirement for filing a Statement of Case be suspended until 60 days after the preliminary matter in relation to the strike out application has been dealt with.

5 **Appeal rights**

61. 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.

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**DR HEIDI POON
TRIBUNAL JUDGE**

RELEASE DATE: 23 SEPTEMBER 2016