[2016] UKFTT 72 (TC)

TC05590

Appeal number: TC/2015/02609

EXCISE DUTY – strike-out application – tobacco seized – no timely challenge – deemed forfeiture – excise duty and wrongdoing penalty appealed – whether assessment within the time limit – s 12(4) FA 1994 – Tribunal's lack of jurisdiction in relation to excise duty – no prospect of the penalty appeal succeeding – Rules 8(2)(a) and 8(3)(c) of the Tribunal Rules – application granted

FIRST-TIER TRIBUNAL
TAX CHAMBER

KENNETH HOLMES **Appellant**

- and -

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

TRIBUNAL: JUDGE HEIDI POON

Sitting in public at the Tribunal Centre, City Exchange, 11 Albion Street, Leeds on 21 October 2016

No representation nor attendance by the Appellant

Miss Rebecca Young, presenting officer, of the General Counsel and Solicitor to HMRC, for the Respondents

© CROWN COPYRIGHT 2017

DECISION

Introduction

1. Mr Holmes, the appellant, appeals against an assessment for excise duty of £906 and a notice for wrongdoing penalty of £317 in consequence of tobacco seized on 11 March 2014 that was deemed forfeited.

2. The hearing was for considering HMRC's application for the appeal to be struck out under Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('the Tribunal Rules') on the basis that the Tribunal does not have jurisdiction to hear the appeal.

3. In the alternative, HMRC also apply for the appeal to be struck out under Rule 8(3)(c) on the basis that there is no reasonable prospect of the appeal succeeding.

Hearing in a party's absence

4. There was no appearance of the appellant on the day of the hearing at the appointed time. The Tribunal was satisfied that the appellant had been notified of the hearing, and that no postponement application had been made.

5. Miss Young, representing HMRC, informed the Tribunal that the appellant had received the hearing bundle, which was delivered by 'track and trace' courier service and receipt was confirmed at 10:18am on 18 October 2016.

6. In accordance with Rule 33 of the Tribunal Rules, the Tribunal considered that it would be in the interests of justice to proceed with the hearing in the appellant's absence. I had regard also to the overriding objective under Rule 2 to deal with cases 'fairly and justly', which includes 'avoiding delay, so far as compatible with proper consideration of the issues'.

The facts

7. On 11 March 2014, the appellant was intercepted at Humberside Airport on return from Germany via Amsterdam. The appellant had been working in Germany and was found to be in possession of 5.25kg of hand rolling tobacco (HRT).

8. The appellant initially stated that the goods had been purchased for personal use. During the interview the appellant informed the Border Force Officer that he did not smoke and that the HRT had been purchased for his four sons.

9. The appellant was unable to produce a receipt for the HRT. His explanation was that he had acquired the goods from his colleagues in Germany, and he had not yet paid for the goods.

10. During the search of the appellant's luggage, the Officer found what would appear to be an 'order list'. The appellant explained that the names on the list related

to his colleagues from whom he had obtained the HRT. When asked why there were no price details on the list, the appellant told the Officer that he knew how much he owed each colleague, adding that it was about 3.90 euro per packet.

11. When asked about previous trips abroad, the appellant informed the Officer he had goods seized about nine years ago.

12. The Officer believed the goods had been imported for a commercial purpose and seized the HRT. The following documents were sent to the appellant by post:

(1) Seizure Information Notice (BOR156) is a listing the items seized, namely 5.25kg of HRT. The Notice states the goods are liable to forfeiture and have been seized under section 139 Customs and Excise Management Act 1979. The form also lists the other documents provided to the appellant, namely: Notice 1, Notice 12A and a Warning Letter.

(2) Notice 1 identifies the goods which can or cannot be imported, and the goods which must be declared if imported.

(3) Notice 12A gives advice on options once goods are seized, including the procedure to challenge the seizure.

(4) Warning Letter (BOR162) gives notice of the potential action which may be taken against the appellant, including the issue of an assessment and wrongdoing penalty by HMRC.

13. The appellant did not challenge the seizure within the time limit.

14. On 1 April 2015, HMRC issued an assessment for £906 in relation to the excise duty on the seized goods and a notice to impose a wrongdoing penalty of £317. The excise duty assessment was raised under regulations 13(1) and (2) of the Excise Duty (Holding, Movement and Duty Point) Regulations 2010, and the penalty was imposed by virtue of Schedule 41 to the Finance Act 2008.

15. In response to the duty assessment and penalty notice, the appellant telephoned HMRC (date not recorded). The appellant said that he had decided not to challenge the seizure following legal advice. The HMRC officer explained that once the deeming provisions took effect, HMRC had to assess for the unpaid duty and impose a penalty. The appellant was informed of his rights to a review or an appeal.

The applicable law

16. The relevant provisions of Rule 8 of the Tribunal Rules on 'Striking out a party's case' state the following:

> **8.—(1)** ....
>
> (2) 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

....

(3) The Tribunal may strike out the whole or a part of the proceedings if —

…

5 (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.'

17. The provisions in relation to forfeiture are under Schedule 3 to the Customs and Excise Management Act 1979 ('CEMA 1979'), and paragraphs 3 and 5 of Schedule 3 state as follows:

10 '**Notice of claim**

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
15 Commissioners at any office of customs and excise.

...

Condemnation

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
20 has been given to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not compiled with, the thing in question shall be deemed to have been duly condemned as forfeited.'

18. The time limit for issuing an assessment of excise duty following deemed
25 forfeiture is provided under subsection 12(4) of the Finance Act 1994 ('FA 1994'):

'12(4) An assessment of the amount of any duty of excise due from any person shall not be made under this section at any time after whichever is the earlier of the following times, that is to say—

(a) subject to subsection (5) below, the end of the period of [4 years]
30 beginning with the time when his liability to the duty arose; and

(b) the end of the period of one year beginning with the day on which evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge;

35 but this subsection shall be without prejudice, where further evidence comes to the knowledge of the Commissioners at any time after the making of an assessment under this section, to the making of a further assessment within the period applicable by virtue of this subsection in relation to that further assessment.'

40 The insertion of '4 years' square brackets in paragraph (a) of subsection 12(4) substituted the 'three years' as the time limit formerly in force. The substitution was made by the Finance (No 3) Act 2010 (section 29, and under paragraphs 3(1), (2), (7) of Schedule 13) and came into force from 1 April 2011.

19. The penalty regime for failure to notify a liability to excise duty is set out in Schedule 41 to the Finance Act 2008 ('FA 2008'). Paragraph 14 provides for special circumstances that can give rise to 'special reduction'. Paragraph 20 provides for 'reasonable excuse' against a penalty, and sub-paragraph 20(1) states as follows:

> 'Liability to a penalty under any of the paragraphs 1, 2, 3(1) and 4 does not arise in relation to an act or failure which is not deliberate if [the person liable] satisfies HMRC or (on an appeal notified to the tribunal) the tribunal, that there is a reasonable excuse for the act or failure.'

Grounds of appeal

20. By notice dated 6 April 2015, the appellant appealed to the Tribunal. The stated grounds of appeal are as follows:

> (1) The HRT was acquired for the appellant's family and not for re-sale.
>
> (2) The appellant had acted on legal advice, which guided him not to challenge the seizure, as the legal costs for doing so would be more than the value of the HRT.
>
> (3) The duty assessment and the penalty notice were issued almost a year after the seizure event.
>
> (4) The appellant had no intention to defraud or deceive; that the price he had paid for the goods was with 'local taxes paid'; that if he had sold the goods on, he would not have made a profit, 'as on checking with one of [his] sons the "going price on the black market was the same as [he] paid in the shop in Holland" [at] £8.50 a pouch.' He further added: 'To risk the fines and charges to make no profit would be a stupid way to conduct a [sic] illegal undertaking.'
>
> (5) Buying the HRT in Holland saved his sons from 'buying in the illegal trade [in the UK] and the possibility that the tobacco had come from a source that would have included the contamination of heavy metals and other chemicals'.

HMRC's case

21. In response to each of the appellant's grounds of appeal, HMRC submit:

> (1) The appellant's reason for importing the goods is a matter for the Magistrates' Court and not the Tax Tribunal.
>
> (2) If the appellant believes he has received incorrect legal advice, he should pursue the matter via the legal firm he used; and this is not a matter for the Tax Tribunal.
>
> (3) The decisions were issued on 1 April 2015 and therefore over one year after the seizure of 11 March 2014. HMRC became aware of the appellant's liability on 3 March 2015 and issued the decision within one year of this date; the duty assessment and the penalty notice are therefore in time.

(4) Whether the appellant intended to defraud or sell the HRT for profit is a matter for the Magistrates' Court.

(5) The appellant's reasons for importing the HRT to stop his sons from buying on the black market would have been a factor for the Magistrates' Court to consider, not the Tax Tribunal. HMRC, however, note the conflicting information as to where the HRT was bought. The appellant had initially told the Border Force Officer that the HRT had been obtained from colleagues in Germany whom he had yet to pay, while the grounds of appeal state the goods were brought in Holland.

Discussion

Duty Assessment and the legality of seizure

22. The first ground of the appellant's appeal is that the HRT was acquired for the use of his family and not for re-sale, which would have been a valid ground to put forward at the Magistrates' Court to challenge the legality of the seizure.

23. The appellant had been duly served with a Seizure Information Notice, Notices 1 and 12A, and the Warning Letter, following the seizure of the goods. The appellant could have challenged the legality of the seizure on the ground that the goods were 'imported' for personal use within the statutory time limit at the Magistrates' Court, but that did not happen.

24. Where there is no timely challenge, the deeming provision by virtue of paragraph 5 of Schedule 3 to CEMA 1979 automatically applies. The goods seized are deemed as imported for commercial use, and duly condemned and forfeited. The duty assessment follows in consequence of the deemed forfeiture.

25. The deeming provision is *final* and there is no scope for the Tribunal to re-open the case to consider whether the goods could have been imported for personal use (*HMRC v Jones and Jones* [2011] EWCA Civ 824).

26. This appeal is not against the seizure of goods as in *Jones and Jones* but against the assessment to excise duty on the condemned tobacco. However, once the deeming provision has applied, the Tribunal lacks jurisdiction to re-consider the duty assessment for the same reasons as for goods restoration. This is made clear in *HMRC v Nicholas Race* [2014] UKUT 0331 (TCC) ('*Race*') at [33]:

> 'The fact that the appeal is against an assessment to excise duty rather than an appeal against non-restoration makes no difference because the substantive issue raised by Mr Race is no different from that raised by Mr and Mrs Jones.'

27. The second ground of appeal concerns the legal advice given to the appellant not to challenge the legality of seizure at the Magistrates' Court due to the costs involved. As HMRC have pointed out, what advice the appellant had received, and the legal consequences that ensued as a result of acting on the advice, are matters

between the appellant and his adviser. It is not a relevant factor for the Tribunal to take into account in determining the outcome of this application.

28. The fourth and fifth grounds of appeal as summarised above at §20 might have been relevant for the Magistrates' consideration had there been an action to challenge the legality of the seizure. However, for reasons already related earlier, the Tribunal lacks jurisdiction to re-open the matter once the seized goods have been condemned by deemed forfeiture.

29. Rule 8(2)(a) of the Tribunal Rules provides that the Tribunal *must* strike out the whole or a part of the proceedings if the Tribunal has no jurisdiction in relation to the proceedings or that part of them. In respect of the ground of appeal pertaining to the legality of seizure, the Tribunal has no jurisdiction to consider the matter. The appeal in relation to the duty assessment, which has been raised following the condemnation proceedings, must therefore be struck out.

Duty assessment and the time limit issue

30. Once the deeming provision has applied, 'it remains open to a person subject to such an assessment to argue that it is wrongly calculated, is out of time, is raised against the wrong person, or is otherwise deficient …' (*Race* at [34]). In other words, the only issues that the Tribunal can consider in relation to a duty assessment in a case of deemed forfeiture are restricted to: (a) the basis of the duty calculation; (b) the time limit for raising the assessment; and (c) the person held liable for the assessment.

31. In the instant case, there is no contention as regards the calculation of the duty assessment, or that the appellant has been correctly identified as the person liable for the duty. The appellant, however, would seem to have raised the issue concerning the time limit by stating as a ground of appeal that 'it was almost one year later that [he] received a notice from HMR that a charge and a penalty was [sic] being made against [him] and that [he] had committed a wrongdoing'.

32. The time limit for HMRC to raise such an assessment for goods condemned by deemed forfeiture is provided under subsection 12(4) of FA 1994. The time limit is stated as the earlier of: (a) 4 years beginning with the time when his liability to the duty arose; and (b) the end of the period of one year beginning with the day on which evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge.

33. The relevant dates in the present case for determining the time limit for raising the assessment are: (a) *11 March 2018*, being four years from the time when the appellant's liability to the duty arose; that is four years from the date of seizure on 11 March 2014; and (b) *3 March 2016*, being one year of the day on which evidence of facts came to the Commissioners' knowledge; that date was given by HMRC as 3 March 2015. The assessment was raised on 1 April 2015, and is therefore made within the statutory time limit of 3 March 2016, being the earlier of the two dates.

34. According to Miss Young's submission, due to the 'cross-information transfer' between Border Force and HMRC, there is always a time gap between the seizure of the goods and the Commissioners becoming aware of the evidence of facts

surrounding a particular case for the purpose of raising an assessment. That is the reason why the Commissioners only became aware of the evidence of facts in this present case on 3 March 2015, almost a year after the event of seizure.

35. The Tribunal is satisfied that the duty assessment has been raised within the statutory time limit provided under subsection 12(4) of FA 1994. Indeed, the lapse of a year between the event of seizure and the issue of the duty assessment is common to cases of this kind that have been considered by this Tribunal. The passage of time is required, to a large extent, to allow any likely proceedings at the Magistrates' Court to take place first before such an assessment can be raised. Whether an assessment can be raised is dependent on the outcome of the action to challenge the legality of the seizure, or in the absence of such an action, for deemed forfeiture to take effect.

36. The Tribunal also has regard to the extension in the reckoning of the time limit from the date of liability arising, from the previous three years to the current four years, as from 1 April 2011.

37. The extension of the time limit is of material significance, for example, in a case where the Commissioners only became aware of the evidence of facts in the fourth year of the seizure (i.e. after the end of the third year), and would have been time-barred from raising a duty assessment but for the enactment to extend the time limit to four years. The extension of the time limit is an indication of Parliament's intention to allow a wide margin to accommodate the likely time lapse between an event that gives rise to a liability to duty, and HMRC having the knowledge of such an event to raise an assessment.

38. I have considered the appeal in relation to the residual jurisdiction that the Tribunal has regarding the duty assessment, and conclude that the appeal against the duty assessment has no reasonable prospect of succeeding. In accordance with Rule 8(3)(c) of the Tribunal Rules, I allow the application for this part of the proceedings to be struck out.

Penalty Assessment and Tribunal's Jurisdiction

39. Concerning the penalty of £317 imposed under paragraph 4 of Schedule 41 to FA 2008, the Tribunal has jurisdiction to consider: (a) the assessment of the degree of culpability; (b) whether the level of mitigation given for co-operation is sufficient; (c) whether there should be further reductions for 'special circumstances'; (d) whether there is a reasonable excuse for the act or failure that had resulted in the penalty.

40. HMRC have assessed the appellant's behaviour to be 'deliberate', as the appellant is a regular traveller and should have been aware of the guidelines for bringing excise goods into the UK. The disclosure in this case was 'prompted' because the appellant did not tell Border Force about the excess tobacco until he was discovered to be in possession of the excise goods over the recommended guideline for 'personal use'.

41. The penalty range for 'deliberate behaviour' and 'prompted disclosure' is 35% to 70%. HMRC have given the maximum mitigation of 100% in this case, bringing the penalty percentage down to 35% of the excise duty assessed of £906.

42. The Tribunal agrees with HMRC's assessment of the degree of culpability to be 'deliberate' and of the disclosure being 'prompted'.

43. It is of note that the appellant has not been consistent with his account of where he had acquired the HRT. He had informed Border Force that the HRT was acquired from his colleagues in Germany when he was interviewed, but he has stated that the HRT had been bought in Holland in the Notice of Appeal.

44. Another inconsistency of note is the reported price for each packet of HRT. The appellant had informed Border Force that he purchased each packet at 3.9 euro *from* his German colleagues, while in the Notice of Appeal, he has stated the price at '£8.50 a pouch', that being the 'going price on the black market' and was 'the same as [he] paid in the shop in Holland'. Finally, there would also seem to be an inconsistency as regards the intended recipients of the HRT. If the appellant had, as he claims, bought the HRT from a shop in Holland, and not from several German colleagues on the list found in the luggage search, then the list could in fact have been an 'order' list as it appeared to Border Force.

45. Mitigation is given in relation to the 'quality' of disclosure, and is with reference to the assistance provided by 'telling, helping and giving'. In view of the inconsistencies in the appellant's accounts in relation to the HRT acquired, the Tribunal is of the view that the maximum 100% mitigation for the penalty percentage far exceeds the level of mitigation that the quality of disclosure should have merited.

46. Under paragraph 14 of Schedule 41 to FA 2008, HMRC are given the discretion to reduce a penalty further in special circumstances. For special circumstances to obtain, they have to be 'exceptional, abnormal or unusual' (*Crabtree v Hinchcliff* [1971] 3 All ER 967) or 'something out of the ordinary run of events' (*Clarks of Hove Ltd v Bakers' Union* [1979] 1 All ER 152). HMRC have considered special reduction in their notice of application, and the Tribunal agrees that there is no evidence of any special circumstances to warrant any special reduction.

47. In respect of whether the appellant could have a reasonable excuse against the penalty, the Tribunal has regard to the specific wording under paragraph 20(1) of Schedule 41 to FA 2008, which limits the relevance of reasonable excuse to only '*an act or failure which is not deliberate*'. The Tribunal therefore concludes that the appellant is precluded by the statute from availing himself of a reasonable excuse, since the behaviour which has resulted in the penalty has been found to be deliberate.

48. Having considered the four aspects that could have been relevant to the penalty appeal, the Tribunal concludes that the appeal against the penalty assessment has no reasonable prospect of succeeding either. The application for this part of the proceedings to be struck out is granted under Rule 8(3)(c) of the Tribunal Rules.

Decision

49. For the reasons stated, the application to strike out this appeal is granted.

50. 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.

DR HEIDI POON
TRIBUNAL JUDGE

RELEASE DATE: 6 JANUARY 2017