



**TC05594**

**Appeal number: TC/2014/05243**

*EXCISE DUTY – assessment to excise duty following seizure of goods in importation from an EU member state – whether appeal should be struck out – inadequacy of Notice 12A and Warning Letters considered – appeal struck out*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**DONATAS ZYDELIS**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE AMANDA BROWN**

**Sitting in public at the Old Bakery, Norwich on 7 December 2016.**

**The Appellant appeared in person**

**Ms Laura Poots of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.**

## DECISION

1. This is an appeal against an assessment to excise duty. Donatas Zydelis (the Appellant) was stopped by officers of UK Border Force at Stansted airport on 4 December 2013 when returning from Lithuania. He was carrying 4600 cigarettes which were seized. On 19 June 2014 HMRC informed the Appellant they intended to charge excise duty and a penalty in respect of the seized cigarettes. The Appellant appeals only the assessment to duty he accepts the wrongdoing penalty.

2. HMRC has applied to the Tribunal to strike out the appeal on the basis that the Tribunal either does not have the jurisdiction to hear the appeal or that it has no reasonable prospect of success.

3. As stated at the end of the hearing, for the reasons set out below the Tribunal allows HMRC's application and strikes out the appeal. However, the Tribunal expresses great reservation as to the term of the Warning Letter and Notice 12A in the context of fairness to travellers in the position of the Appellant. Unfortunately this Tribunal has no jurisdiction on fairness in relation to appeals such as this one.

### **Findings of fact**

4. On 4 December 2013 the Appellant arrived at Stansted Airport. At approximately 16:25 he entered the blue channel. He was stopped by UK Border Force officers and asked if he was carrying cigarettes. He responded that he was carrying 25 cartons. In fact he was carrying 23 cartons totalling 4600 cigarettes. He produced a receipt for the purchase of the cigarettes. The Appellant believed that he could import the cigarettes as he was travelling from an EU country.

5. As set out in the notebook of the Border Force officer, the officer explained to the Appellant that he could stay and answer questions or leave the cigarettes behind. This note expressly corroborates the Appellant's recollection that he had a choice. The Appellant told the Tribunal that when he left the airport he believed that by leaving the cigarettes no assessment to duty would be made on him.

6. There was a small conflict of evidence as between the documentation provided to the Tribunal and the explanation given by the Appellant regarding the issue of the paperwork relevant to seizure. The Border Force officer's notebook states: "Passenger signed BOR156, refused to sign BOR 162 and the pen on the bench". The copy of BOR156 Seizure Information Notice which was available to the Tribunal indicates that 4600 Marlboro Gold cigarettes were seized, that "Notice 1", "Warning letter" and "Notice 12A" were issued. There is no signature in the Signature box beneath the legend "I acknowledge receipt of form BOR156 and agree that the above description of the things seized is correct". However "DONATAS ZYDELIS" is entered in the box "Full name in capital letters". The Warning letter BOR162 does not bear either the name or a signature of the Appellant in the acknowledgment section. The copy of Notice 12A available to the Tribunal was one printed from HMRC's website.

7. The Appellant told the Tribunal that he did not remember signing either BOR156 or BOR162 but he did agree that the name entered in capitals on BOR156 looked like his writing. He further told the Tribunal that he did not have any recollection of taking any documentation that had been issued to him with him when he left the blue channel.

8. On 19 June 2014 HMRC issued the Appellant with an excise duty and penalty explanation indicating an intention to assess £1173 excise duty and £410 penalty. The letter was accompanied by an excise duty schedule illustrating how the duty was calculated.

9. By letter dated 26 June 2014 the Appellant wrote to HMRC indicating that he accepted the penalty but claiming that he smoked around 2 packs of cigarettes per day and that the volume he was carrying represented approx 6 months' supply until his next holiday.

10. The excise duty and penalty assessments were issued on 22 July 2014. They were subsequently reduced on 11 September 2014 on the basis that the assessments had been raised in respect of 4800 cigarettes whereas only 4600 had been seized.

11. In the letter of appeal submitted by the Appellant on 24 September 2014 the Appellant reasserted that he smoked 2 packets of cigarettes per day and that he should not be liable for a duty assessment as he left the cigarettes and had not sought restoration. In the letter he states that when he left the airport he took "all flyers" with him.

12. At the hearing the Appellant claimed that he had not taken and certainly had not read the term of BOR156, BOR162 nor Notice 12A. He reasserted that he should not have to pay the duty on the cigarettes but that he accepted the penalty.

13. On the only matter of evidence which was in dispute regarding whether the Appellant had taken the documentation issued to him at the airport the Tribunal finds that he did take the documents.

14. The Tribunal notes that the officer's notebook indicates that the excise duty due on the seized goods was £1062.22. The original assessment issued was for a sum of £1173 and it was subsequently reduced to £1123 but both figures exceed the sum identified on the officer's notebook though it is quite apparent that the figures in the notebook were not shared with the Appellant.

### **Brief overview of the law**

15. There are many cases which set out relevant legislation and its effect however, the Tribunal adopts, so far as is material to the present case, the summary of the relevant legislation set out in paragraph 37 of the judgment in *Matthew Lane [2015] UKFTT 0423*:

"37. The relevant legislation provides as follows:

(1) Excise duty is charged on tobacco product imported into the United Kingdom (Section 2 of the Tobacco Products Duty Act 1979).

5 (2) HMRC can, by regulations, fix the point at which duty becomes chargeable (Section 1 of the Finance (No. 2) Act 1992).

(3) The relevant regulations provide that:

10 (a) duty is chargeable on tobacco held for a commercial purpose in the UK

(b) tobacco brought into the UK by a private individual, who has bought it duty paid in another Member State for his or her own use, is not held for a commercial purpose (and so no duty is chargeable on it)

15 (c) the duty point for tobacco held for a commercial purpose is the time of importation.

20 (The Excise Goods (Holding Movement and Duty Point) Regulations 2010, Regulation 13).

(4) Section 49 of the Customs & Excise Management Act 1979 provides that goods imported without payment of duty are liable to forfeiture.

25 (5) Section 139 of that Act provides that anything liable to forfeiture can be seized by HMRC.

30 (6) That section also introduces Schedule 3 to the Act which, in essence, provides that a person whose goods have been seized can challenge the seizure, but only if he does so in the proper form within the one month time limit. Then, the goods can only be forfeited under an order of the court in condemnation proceedings. If the person fails to serve notice, then there is a statutory deeming under which the goods are deemed “to have been duly condemned as forfeited”.

35 (7) Where it appears to HMRC that an amount has become due by way of excise duty from a person, that amount can be ascertained by HMRC who can then assess that person to that amount of duty (Section 12(1A) of the Finance Act 1994).

40 (8) A person who is assessed to duty has a right of appeal to this Tribunal (Section 16 of the Finance Act 1994).

45 16. The jurisdiction of the Tribunal on an appeal brought under s16 Finance Act 1994 has been the subject of much litigation and is now clear. Following the cases of *HMRC v Jones and Jones [2011] EWCA Civ 824* and *HMRC v Nicholas Race [2014] UKUT 0331* it is beyond doubt that the Tribunal has no jurisdiction to consider the

legality of the seizure for which an a different forum for challenge must be followed. As those cases confirm goods for which no challenge to seizure is made will become condemned by operation of law upon the effluxion of the period of one calendar month. Once condemned the importer simply cannot contend before this Tribunal or otherwise that the goods were for personal use.

17. In terms of the implications for a duty assessment the operation of the legislation has the effect that when a person imports cigarettes in circumstances in which UK Border Force or HMRC consider to represent importation for commercial use a duty point arises. The importer of goods who considers the goods are not for commercial purposes has a right to challenge seizure but must do following the prescribed procedure i.e. by raising the challenge and requiring HMRC/Border Force to apply to the magistrates court for condemnation for which strict time limits apply. Failure to raise a challenge within the prescribed calendar month has the automatic consequence that the duty point presumed to have arisen at import is then confirmed and a charge to duty crystallises. Prima facie the duty is collectable at that point though HMRC have a discretion whether to assess for its collection.

18. The recent case of *Marcin Stanszewski v HMRC [2016] UKFTT 4916* considered: (a) whether the crystallisation of the duty when the importer had been deprived of the goods, with the consequence that there could be no consumption of them, was within the spirit of the authorising EU legislation for excise taxes given that excise duty is a consumption tax; and (b) whether such a charge to duty was a disproportionate response to the wrongdoing. The Tribunal determined that the terms of the EU legislation required the duty point to arise at the point that the goods were released for consumption (in the present case and in the majority of others) when they were imported and not by reference to whether they were, as a matter of fact, consumed and therefore there was nothing intrinsically wrong with the charge to duty arising despite the seizure of the goods. It also determined that the charge to duty was a revenue raising measure and the question of proportionality did not therefore arise in relation to the duty assessment itself.

19. On the basis of the above analysis it is somewhat difficult to understand why the legislation provided for a right of appeal in respect of HMRC's decision to raise assessments to excise duty in the form and manner prescribed in sections 14 – 16 of Finance Act 1994 which is not simply limited to an appeal as to the calculation of such duty.

**Strike out application**

20. The matter before the Tribunal is an application by HMRC to strike out the Appellant's appeal. The application is made under rule 8. The Tribunal must strike out an appeal where it does not have jurisdiction. Simply put the Tribunal does not have jurisdiction to consider the Appellant's appeal and must therefore grant HMRC its application.

## **Comments on the procedures and documentation on seizure**

21. Following a review of some of the plethora of cases on importation of, in particular, cigarettes, it appears that the Appellant's experience is not an unusual one. Of particular concern to this Tribunal was the Appellant's recollection, corroborated  
5 by the officer's notes, that he was told that he had a choice to remain and answer questions or to surrender the cigarettes and leave. The Appellant in this case believed that in doing so it was likely to be the end of the matter, certainly vis a vis the charge to duty as distinct from the risk of penalty.

22. On review of the documentation provided to the Appellant at the time of seizure  
10 the Tribunal concludes that was not such an unreasonable conclusion to reach.

23. Attached as an annex to this judgement are the relevant excerpts from BOR156, BOR162 and Notice 12A.

24. In the view of the Tribunal neither the BOR documentation nor the Notice clearly (and arguably at all) notifies the owner of the goods that the only way of  
15 challenging that he or she is liable to pay duty on the goods is through challenging seizure in the magistrates courts. The explanation in the notice of condemnation proceedings focuses on the ownership of the goods and not on the legality of the import or the associated charge to duty. Ms Poots confirmed that the only paragraph of the Notice which drew any link between the liability to duty and seizure is in  
20 paragraph 3.14 which addresses a particular situation i.e. when the owner withdraws a challenge to seizure.

25. As set out in paragraph 15 above the charge to duty arises at importation where the goods are or are subsequently deemed to have been imported otherwise than for private use. HMRC have a discretion whether to assess for that duty but they  
25 invariably do so. As a consequence the only way in which an individual can challenge the charge to duty in circumstances where they consider that the goods were for personal use is through condemnation proceedings. This should, in the Tribunal's view be made abundantly clear in the documentation that is given to travellers whose dutiable goods are seized. This is particularly so given that the assessment to duty  
30 will follow up to 12 months after seizure and therefore, often many weeks or months after the opportunity to challenge seizure has passed.

26. The legislative separation of powers between the magistrates court and the Tribunal is a matter for Parliament but Border Force and HMRC are tasked with enforcing this confusing position and, in the view of this Tribunal, do it in a way  
35 which relies on a far greater knowledge of the system than can be reasonably expected of a member of the public. Many individuals do challenge condemnation but whether they do so on the basis of challenging duty or to secure the return of the dutiable goods (restoration more commonly appearing to be requested for goods seized together with the dutiable goods) is unclear. The number of cases that come before  
40 the Tribunal which are the subject of strike out applications on the grounds that the charge to duty cannot be challenged must at least be indicative that the information on

procedure for challenge is not as clear as it should be in the interests of cost effective administration.

27. These are matters on which the Tribunal has no power however, as expressed to Ms Poots this Tribunal considers that the terms of the Notice and the narrative on BOR156 and BOR162 should be actively reconsidered setting out clearly how and when the duty point arises and how a challenge the liability to duty is to be made, particularly as all opportunity to bring the challenge is lost often months before any assessment to that duty is even made.

28. 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.

**AMANDA BROWN  
TRIBUNAL JUDGE**

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**RELEASE DATE: 9 JANUARY 2017**

ANNEX  
EXCEPRTS FROM BOR156/162 AND NOTICE 12A

***BOR156:***

5            “This is not a Notice of Seizure.

This notice provides details about the seizure of the things listed below. If they do not belong to you please give this notice to the owner as soon as possible.

[details of goods]

10           Please note that the above things are liable to forfeiture and have been seized under Section 139 of the Customs and Excise Management Act 1979 from:

[Appellant’s details]

I acknowledge receipt of form BOR156 and agree the above description of the things seized is correct.

[signature – in this case none]”.

15

***BOR162:***

“[Appellant’s details]

**Warning**

20           The goods listed on the attached schedule 9 as detailed on Form BOR156) have been seized under section 139 of the Customs and Excise Management Act 1979. This is without prejudice to any further action that *may* (emphasis added) be taken against you in connection with this matter. This *may* (emphasis added) include, but is not limited to, Border Force sharing the information with:

- 25           • HM Revenue & Customs who *may* (emphasis added) take action against you such as issuing you with an assessment for *any* (emphasis added) evaded tax or duty and a wrongdoing penalty ...

In addition to the above action, any further detection which results in goods being seized from you may lead to you being prosecuted under the Customs and Excise Management Act 1979 ....”

30

***Notice 12A: what you can do if things are seized by HM Revenue & Customs:***

“ ...



## 1.1 Terms and abbreviations used in this notice

...

Forfeiture – the *legal act that transfers ownership of a seized thing* to HMRC or Border Force. It can happen by order of a court or passage of time (if there is no appeal) (emphasis added).

Notice of Claim – A letter formally challenging the seizure of something by HMRC or Border Force. A Notice of Claim must be sent to HMRC or Border Force within one calendar month of the date of seizure, or Notice of Seizure, *or legal ownership of the seized thing passes automatically to HMRC or Border Force* (emphasis added).

...

## 2 What can I do if I have had something seized?

### 2.1 What are my options if I disagree with the seizure?

If you have had something seized by HMRC or Border Force and you do not accept that there was a legal right to seize it and/or you want them to consider returning it, you have three options. You can:

(a) challenge the legality of the seizure by sending a Notice of Claim to HMRC or Border Force (see section 3 below) ...

It is important to understand that challenging the legality of seizure (a) and asking for restoration (b) are completely different processes. The legality of seizure is a decision that is usually for the magistrates' court ... in condemnation proceedings ... They cannot be combined because magistrates' courts and tribunals have different areas of authority.

...

## 3 I want to challenge HMRCs' or Border Force's legal right to seize the thing(s)

### 3.1 In what circumstances can a seizure be challenged?

If you believe something should not have been seized, you can challenge the legality of seizure. That will lead to a court hearing where HMRC or Border Force has to prove the seizure was lawful ...

...

### 3.3 How do I challenge the seizure?

...

In legal terms, by making a Notice of Claim you are asking HMRC or Border Force to start court action known as condemnation proceedings. These proceedings decide whether something was seized lawfully by HMRC or Border Force and if *ownership should pass to them* (emphasis added). ...

5           3.4   Is there a time limit for challenging the seizure?

Yes. HMRC or Border Force must receive your Notice of Claim within 1 month of the date of seizure shown on the Seizure Information Notice .... If HMRC or Border Force does not receive a Notice of Claim within the time limit, you will not be able to challenge the legality of seizure.

10          The time limit is set by the law and there is no provision for late challenges. This means that unless the legality of seizure is challenged within 1 calendar month time limit, *you will automatically lose ownership* (emphasis added) of the seized thing. There is no other way of challenging the legality of seizure.

...

15          3.9   Are these criminal proceedings

No. Challenging the legality of a seizure is a civil process, mainly to establish whether something was seized lawfully by HMRC or Border Force. ... *Those proceedings only decide what should happen to the seized things* (emphasis added). *They do not decide any action against a person in relation to seized things* (emphasis added) ...

20

3.13   What happens if I am not successful at the condemnation proceedings?

If the court finds in favour of HMRC or Border Force, it will make an order forfeiting the seized thing to them. The court may also order you to pay costs.

3.14   Can I change my mind during the process?

25          Yes. You can withdraw your challenge against the seizure at any stage by writing to HMRC or Border Force but you may still have to pay some of their costs if the case is well advanced. ...

30          If you withdraw your challenge, you are accepting the seizure was lawful and the seized things will be condemned. ... Similarly, *if you later appeal against a duty assessment or wrongdoing penalty issued to you after the seizure of the excise goods, you will not be able to do that on the grounds that Excise Duty was not payable on them or had already been paid unless you have challenged the legality of the seizure by submitting a Notice of Claim* (emphasis added).

35