



TC06036

Appeal number: TC/2016/03531

EXCISE DUTY – Seizure of cigarettes – Restoration refused – Whether the decision not to restore reasonable and proportionate – Yes – Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BASSEM REDHA

Appellant

- and -

DIRECTOR OF BORDER REVENUE

Respondents

**TRIBUNAL: JUDGE JOHN BROOKS
CHARLES BAKER**

Sitting in public at Taylor House, Rosebery Avenue, London EC1 on 26 July 2017

The Appellant did not appear and was not represented

Jessica Franklin, Counsel, instructed by the Director of Border Revenue for the Respondents

DECISION

1. This is the appeal of Mr Bassem Redha against the decision of the Director of Border Revenue, contained in a letter dated 23 May 2016, in which he was notified that, after undertaking a review, 600 cigarettes seized from him on 23 January 2016 at Heathrow Airport would not be restored.

2. Mr Redha did not appear and was not represented and although the Tribunal clerk was unable to contact him by telephone we were satisfied that reasonable steps had been taken to notify him of the hearing. As we considered it was in the interests of justice to do so, we proceeded with the hearing in his absence under rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

Background

3. On 23 January 2016 Mr Redha arrived at Heathrow Airport on a flight from Beirut. He was intercepted by a Border Force Officer in the Green (Nothing to Declare) Channel for persons arriving from non-EU countries and was found to be carrying 600 cigarettes exceeding his allowance, under Article 45 of Council Regulation 918/83/EC, of 200 cigarettes. The cigarettes were seized by the Border Force Officer under s 139 of the Customs and Excise Management Act 1979 (“CEMA”) and Mr Redha was issued with a “Seizure Information Notice”, form 156, and “Notice 12A” notifying him of his right to challenge the seizure in the Magistrates’ Court. However, Mr Redha did not challenge the seizure of the cigarettes.

4. Mr Redha requested restoration of the cigarettes in a letter to Border Force dated 6 February 2016. This letter was acknowledged by Border Force on 11 February 2016. By letter of 20 March 2016 Border Force refused to restore the cigarettes.

5. On 29 April 2016 Mr Redha wrote to Border Force stating his strong disagreement to their decision and explained he had travelled with two “close friends” from Lebanon and that the cigarettes were for himself and his friends as it was cheaper to buy them in a single pack. He also explained that he was very tired on arrival and had asked the officer to call back his friends, who had passed through the green channel, so that they could corroborate his explanation but that she refused to do so. Mr Redha’s letter also states that his health has deteriorated since the time the cigarettes were seized and that without the cigarettes it would further deteriorate.

6. Border Force treated Mr Redha’s letter as a request for a review and, following further correspondence between Mr Redha and Border Force, a review was undertaken by Officer Norfolk of Border Force who had not been involved in either the seizure of the cigarettes or the decision not to restore them to Mr Redha.

7. Mr Redha was notified of the outcome of the review of the decision by Border Force not to restore the cigarettes in a letter, dated 23 May 2016, from Officer Norfolk.

8. After setting out the background, which included an erroneous reference to the cigarettes being seized at Gatwick Airport (which we do not consider material to our decision), Officer Norfolk's letter of 23 May 2016 summarised the restoration policy of Border Force for excise goods as follows:

"The general policy is that seized excise goods should not normally be restored. However, each case is examined on its merits to determine whether or not restoration may be offered exceptionally.

The letter continues (with emphasis as stated in the letter):

Consideration

It is for me to determine whether or not the contested decision should be upheld, varied or withdrawn. The policy should be applied firmly, but not rigidly, so as to allow an exercise of discretion on a case by case basis.

I have considered the decision afresh on its own merits, including the circumstances of the events on the date of seizure and the related evidence, so as to decide if any mitigating or exceptional circumstances exist that should be taken into account. I have examined all of the representations and other material that was available to Border Force both and after the time of the decision.

You were invited to provide any further information in support of your request for a review but as nothing has been received from you I have to make my decision based in the evidence that I already have.

In considering restoration I have looked at all of the circumstances surrounding the seizure but **I have not considered the legality or correctness of the seizure** itself. If you are contesting the legality or correctness of the seizure – and that includes any claim that excise goods are within your allowances – then you should have appealed your appeal, via Border Force, to a Magistrates' Court within 1 month of the date of seizure as explained ... above.

As you have not challenged the legality of the seizure the things are confirmed as exceeding the allowances and condemned as forfeit to the Crown by passage of time under paragraph 5 of schedule 3 of CEMA.

...

As I have already said, the only avenue to challenge the legality of the seizure is through the Magistrates Court. I am also not persuaded by your submission that you were indeed traveling with others as the passenger you indicated to be a close friend had told the Officer that they had nothing to declare and they were only travelling with their father. The passenger told the Officer that he was not travelling with you and had only just met you on a flight. I also find it strange that you would not refer to you "close" friend by name. Any attempt to provide a statement by the person you say was travelling with you, would add little weight as the passenger [had] already told the Officer that they had nothing to declare and proceeded to leave.

I have reviewed your other submissions that your health has deteriorated; that you suffer from other medical conditions and require the return of the cigarettes on this basis. I do not find this to be an exceptional circumstance that would result in my deciding to restore the goods to you under the Border Force policy.

Furthermore, the following circumstances form positive *additional* reasons for concluding that the goods should not be restored:-

With 600 cigarettes you were carrying **3 times** your allowance of 200 cigarettes.

On entering the Border Force controls at Gatwick [sic] airport, you would have been confronted by very large signs inviting travellers arriving from Third countries to enter either the Green “Nothing to Declare” or the Red “Goods to Declare” Channels respectively.

You entered the Green “Nothing to Declare” Channel for travellers arriving from countries outside of the EU, indicating that you had no more than 200 cigarettes. ...

I have read your letters carefully to see whether a case has been presented for depart from the Border Force policy and whether there are any exceptional circumstances for doing so. I have found no reason for departing from the policy and no exceptional circumstances.”

9. The letter concludes by stating that the as application of Border Force policy treats Mr Redha “no more harshly or leniently than anyone else in similar circumstances” and as there is no reason to vary the policy the cigarettes should not be restored.

10. On 27 June 2016 Mr Redha appealed to the Tribunal against the decision of Border Force not to restore the cigarettes. Although the appeal was outside the statutory time limit no issue has been taken by Border Force and we therefore allowed the appeal to proceed notwithstanding it was late. Mr Redha’s grounds of appeal given in his Notice of Appeal, read in the context of the earlier correspondence with Border Force can be summarised as:

(1) There were three people travelling together and only 200 cigarettes (which were within his allowance) were for Mr Redha.

(2) Mr Redha has depression and other health problems and needs the cigarettes for medical reasons.

Law

11. Under Article 45 of Regulation 918/83/EC a traveller entering the EU from a “third country” (ie a country which is not an EU Member State) is entitled to bring certain specified goods for his personal use into the EU free of import duties in his personal luggage subject to the limits stated in Articles 46 to 49. The limited stated in Article 46 of the Regulation is 200 cigarettes.

12. Section 49(1) CEMA provides:

1) Where—

- (a) except as provided by or under the Customs and Excise Acts 1979, any imported goods, being goods chargeable on their importation with customs or excise duty, are, without payment of that duty—
 - (i) unshipped in any port,
 - (ii) unloaded from any aircraft in the United Kingdom,
 - (iii) unloaded from any vehicle in, or otherwise brought across the boundary into, Northern Ireland, or
 - (iv) removed from their place of importation or from any approved wharf, examination station or transit shed; or
- (b) any goods are imported, landed or unloaded contrary to any prohibition or restriction for the time being in force with respect thereto under or by virtue of any enactment; or
- (c) any goods, being goods chargeable with any duty or goods the importation of which is for the time being prohibited or restricted by or under any enactment, are found, whether before or after the unloading thereof, to have been concealed in any manner on board any ship or aircraft or, while in Northern Ireland, in any vehicle; or
- (d) any goods are imported concealed in a container holding goods of a different description; or
- (e) any imported goods are found, whether before or after delivery, not to correspond with the entry made thereof; or
- (f) any imported goods are concealed or packed in any manner appearing to be intended to deceive an officer,

Those goods shall, ..., be liable to forfeiture.

13. Section 78 CEMA provides:

- (1) Any person entering the United Kingdom shall, at such place and in such manner as the Commissioners may direct, declare any thing contained in his baggage or carried with him which—
 - (a) he has obtained outside the United Kingdom; or
 - (b) being dutiable goods or chargeable goods, he has obtained in the United Kingdom without payment of duty or tax,

and in respect of which he is not entitled to exemption from duty and tax by virtue of any order under section 13 of the Customs and Excise Duties (General Reliefs) Act 1979 (personal reliefs).

In this subsection “chargeable goods” means goods on the importation of which value added tax is chargeable or goods obtained in the United Kingdom before 1st April 1973 which are chargeable goods within the meaning of the Purchase Tax Act 1963; and “tax” means value added tax or purchase tax.

...

(2) Any person entering or leaving the United Kingdom shall answer such questions as the proper officer may put to him with respect to his baggage and any thing contained therein or carried with him, and shall, if required by the proper officer, produce that baggage and any such thing for examination at such place as the Commissioners may direct.

...

(3) Any person failing to declare any thing or to produce any baggage or thing as required by this section shall be liable on summary conviction to a penalty of three times the value of the thing not declared or of the baggage or thing not produced, as the case may be, or [level 3 on the standard scale], whichever is the greater.

(4) Any thing chargeable with any duty or tax which is found concealed, or is not declared, and any thing which is being taken into or out of the United Kingdom contrary to any prohibition or restriction for the time being in force with respect thereto under or by virtue of any enactment, shall be liable to forfeiture.

14. Under s 139(1) CEMA:

Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or constable, or any member of Her Majesty's armed forces or coastguard.

15. Any challenge to a seizure on the grounds that the item seized is not liable to forfeiture must, by virtue s 139(6) and schedule 5 to CEMA, be notified to HMRC within one month of the date of the seizure. Where notice is given condemnation proceedings shall be commenced by HMRC in the Magistrates' Court to determine whether the item seized was liable to forfeiture (see paragraph 6, schedule 5 CEMA). However, if HMRC are not notified of a challenge within one month the item seized "shall be deemed to have been duly condemned as forfeited" (see paragraph 5, schedule 5 CEMA).

16. It is clear from the decision of the Court of Appeal in *HMRC v Jones & Jones* [2012] Ch 414 that the Tribunal does not have the jurisdiction to consider the lawfulness of a seizure on the grounds that it was not liable to forfeiture irrespective of whether such a finding was made by a Magistrates' Court or, as in the present case, deemed to have been made by virtue of the legislation.

17. However, under s 152 CEMA:

The Commissioners may, as they see fit –

(a) ...

(b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under the Customs and Excise Acts.

18. Section 14(2) of the Finance Act 1994 provides:

Any person who is –

- (a) a person whose liability to pay any relevant duty or penalty is determined by, results from or is or will be affected by any decision to which this section applies,
- (b) a person in relation to whom, or on whose application, such a decision has been made, or
- (c) a person on or to whom the conditions, limitations, restrictions, prohibitions or other requirements to which such a decision relates are or are to be imposed or applied,

may by notice in writing to the Commissioners require them to review that decision.

19. Section 15(1) of the Finance Act 1994 states:

Where the Commissioners are required in accordance with this Chapter to review any decision, it shall be their duty to do so and they may, on that review, either –

- (a) confirm the decision; or
- (b) withdraw or vary the decision and take such further steps (if any) in consequence of the withdrawal or variation as they may consider appropriate.

20. Section 16(4) to (6) of the Finance Act 1994 sets out the powers of the Tribunal on an appeal against a decision as follows:

(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this sections shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say -

- (a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;
- (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a further review of the original decision; and
- (c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a further review, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.

(5) In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal;

- (6) On an appeal under this section the burden of proof as to –
- (a) the matters mentioned in subsection (1)(a) and (b) of section 8 above;
 - (b) the question whether any person has acted knowingly in using any substance or liquor in contravention of section 114(2) of the Management Act, and
 - (c) the question whether any person had such knowledge or reasonable cause for belief as is required for liability to a penalty to arise under section 22(1) or 23(1) of the Hydrocarbon Oil Duties Act 1979 (use of fuel substitute or road fuel gas on which duty not paid).

shall lie upon the Commissioners, but it shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established

21. Section 16(8) Finance Act 1994 and Schedule 5 paragraph 2(1)(r) provides that an “ancillary matter” is:

... any decision under section 152(b) as to whether or not anything forfeited or seized under the customs and excise Acts is to be restored to any person or as to the conditions subject to which any such thing is so restored.

Discussion

22. It is clear from s 16(4) of the Finance Act 1994 that the issue before the Tribunal is not whether the cigarettes should be restored to Mr Redha but whether, having regard to the facts, the decision taken by Border Force not to restore cigarettes is proportionate and one that could reasonably have been reached. It is not sufficient that we might have reached a different conclusion.

23. Whether a decision is one that could reasonably have been reached was considered by Lord Phillips MR (as he then was) giving the leading judgment in *Lindsay v Commissioners of Customs and Excise* [2002] STC 508 who said, at [40]:

“... the Commissioners will not arrive reasonably at a decision if they take into account irrelevant matters, or fail to take into account all relevant matters”

He continued, at [52], in relation to proportionality:

“The commissioners’ policy involves the deprivation of people’s possessions. Under art 1 of the First Protocol to the convention such deprivation will only be justified if it is in the public interest. More specifically, the deprivation can be justified if it is ‘to secure the payment of taxes or other contributions or penalties’. The action taken must, however, strike a fair balance between the rights of the individual and the public interest. There must be a reasonable relationship of proportionality between the means employed and the aim pursued (*Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35,

para 61; *Air Canada v United Kingdom* (1995) 20 EHRR 150, para 36). I would accept Mr Baker's submission that one must consider the individual case to ensure that the penalty imposed is fair. However strong the public interest, it cannot justify subjecting an individual to an interference with his fundamental rights that is unconscionable."

24. It has been necessary for us to set out the facts and explain the reasons behind our decision in legal terms but, for the benefit of Mr Redha, we address the specific grounds that raised in his appeal:

(1) That the cigarettes should not have been seized as there were three people travelling together.

As Mr Redha did not challenge the seizure of the cigarettes in the Magistrates' Court they have been condemned as forfeited. We cannot interfere with that although we note that Border Force have explained why they think the seizure was right.

(2) He is a sick man and needs the cigarettes to steady his nerves.

The Review Officer did consider this but decided that it was not an exceptional circumstance. We agree that was a reasonable conclusion. Mr Redha could buy replacement cigarettes and so did not need these particular cigarettes restored for medical reasons.

Conclusion

25. Having carefully considered all of the circumstances of the case we have concluded that the decision of Border Force not to restore the cigarettes to Mr Redha was both reasonable and proportionate. As such his appeal, cannot succeed and is therefore dismissed.

Appeal Rights

26. 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 BROOKS
TRIBUNAL JUDGE**

RELEASE DATE: 31 JULY 2017