[2017] UKFTT 752 (TC)

TC06163

Appeal number: TC/2016/04543

EXCISE DUTY – hand rolling tobacco brought in from another Member State – excise assessment – excise wrongdoing penalty

FIRST-TIER TRIBUNAL
TAX CHAMBER

MARK BOWES **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MR LESLIE BROWN

Sitting in public at Hull on 3 October 2017

No appearance by or on behalf of the Appellant

Mr Rupert Davies, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant appeals against an assessment to excise duty in the sum of £1,114 and an excise wrongdoing penalty in the sum of £122.

2. The background facts are as follows. On 25 May 2015, the Appellant arrived at Hull King George Docks on a ferry from Zeebrugge. He was in possession of 6 kilograms of hand rolling tobacco. He was examined on arrival by Border Force Officer Bhachu. He claimed that the tobacco was for his own use. The officer disagreed, and the tobacco was seized as liable to forfeiture under s 139 of the Customs and Excise Management Act 1979 ("CEMA").

3. The Appellant brought condemnation proceedings in the Magistrates' Court. On 4 March 2016, the Hull and Holderness Magistrates' Court issued an order for condemnation.

4. This order for condemnation states amongst other matters as follows. A complaint had been made by the Director of Border Revenue. That complaint stated amongst other matters that the goods were liable to forfeiture under s 49(1) CEMA and/or Regulation 88 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 and/or s 7(2) of the Tobacco Products Duty Act 1979, in that they had been released for consumption in another Member State of the European Union and at importation into the United Kingdom were held for a commercial purpose, and no excise duty had been paid on the goods.

5. The order of the Magistrates' Court concluded by adjudging that the complaint was true, and ordering that the goods be condemned as forfeit. There was no appeal against that order of the Magistrates Court.

6. HMRC subsequently issued the Appellant with an excise duty assessment and a penalty notification. In a subsequent review decision, the assessment was upheld in full, and the wrongdoing penalty was reduced from £250 to £122.

7. The Appellant now appeals to the Tribunal against the assessment and wrongdoing penalty. His grounds of appeal state:

> Border Force added the same money to the Court costs when I appealed the decision to take my tobacco off me now HMRC are trying to claim the same money for the same tobacco. Border Force also stated that if not appealed there would be no cost.

8. At the hearing of this appeal, there was no appearance by or on behalf of the Appellant. At the Tribunal's suggestion, Mr Davies who represented HMRC telephoned the Appellant to ask if he intended to attend. Mr Davies reported to the Tribunal that he had managed to speak to the Appellant, who had stated that he would not be attending, and was not applying for an adjournment as he might not attend on a future occasion. The Appellant had also said that in the proceedings before the Magistrates' Court he had felt that everyone was against him. Mr Davies submitted that the Tribunal should in the circumstances proceed in the Appellant's absence. The

Tribunal was satisfied that all of the requirements of Rule 33 were met, and decided to proceed with the hearing.

9. Evidence was given under oath or affirmation by Border Force Officer Bhachu, the officer who examined the Appellant on arrival at King George Docks and seized the tobacco, and HMRC Officer Mills, who issued the assessment and wrongdoing penalty now under appeal. Both adopted their witness statements.

10. Officer Bhachu additionally said in her evidence amongst other matters as follows. Because the only arrivals at King George Docks are from another European Union Member State, there are no red or green channels. There is only a blue channel for arrivals from the EU. Arriving passengers pass through the blue channel only after they have already passed through the immigration checkpoint and the baggage hall. After entering the blue channel, and before passing through the exit into the public area of the terminal, there is a "red point" with a telephone. An arriving passenger with goods to declare on arrival would use that telephone inside the blue channel to call an official. In the present case, the officer at the immigration checkpoint had asked the Appellant whether he had any tobacco, and the Appellant had told the immigration official that he had 6 kilos. The officer at the immigration checkpoint then radioed Officer Bhachu. Officer Bhachu does not recall whether she came to the immigration checkpoint to find the Appellant, or whether the Appellant had been sent to the baggage hall and Officer Bhachu had met him there. In any event, when she examined the Appellant he had not yet reached the entrance to the blue channel or the "red point" with the telephone. Officer Bhachu could not say how many arriving passengers would be asked by the official at the immigration checkpoint if they had tobacco, but said that some would be asked and others not.

11. In relation to the appeal against the assessment, Mr Davies relied on *HMRC v Jones* [2012] Ch 414, [2011] EWCA Civ 824 ("*Jones*"); *Revenue & Customs v Race* [2014] UKUT 331 (TCC) ("*Race*"); and *Staniszewski v Revenue and Customs* [2016] UKFTT 128 (TC). He submitted that this was an even stronger case than *Jones*. HMRC were not in this case relying on legislative provisions that *deem* goods to be condemned as forfeited if no proceedings are brought in the Magistrates' Court. Rather, in the present case proceedings *were* brought in the Magistrates' Court, which *found* that the goods were held for a commercial purpose and *ordered* the goods to be condemned as forfeited. There has therefore been a judicial finding of fact that the goods were held for a commercial purpose, and that finding is now *res judicata*. As to the amount of the assessment, the excise for hand rolling tobacco is calculated by weight, so that there is no issue in this case as to the valuation of the goods.

12. In relation to the appeal against the wrongdoing penalty, Mr Davies submitted that the same principle applied. In the appeal against the wrongdoing penalty, the Appellant cannot dispute that the goods were held for a commercial purpose and liable to excise duty, or that they have been lawfully condemned as forfeited. Mr Davies drew the Tribunal's attention to the contrary decision in *Jacobson v Revenue and Customs* [2016] UKFTT 570 (TC) ("*Jacobson*"), which he submitted was wrong, not binding on this Tribunal, and in any event subject to a pending appeal to the Upper Tribunal. As to the amount of the penalty, under the applicable provisions of

Schedule 41 to the Finance Act 2008, the penalty range was 10-30% for a non-deliberate wrongdoing and unprompted disclosure. The Appellant had been given a 95% reduction such that the penalty imposed had been 11% of the excise duty payable. If 100% reduction had been given, the penalty would have been only 10% of the duty payable, such that the penalty would have been £111.40 rather than £122. It was appropriate to deny maximum reduction given that the Appellant had maintained to the end that the goods were for personal use when in fact they were for a commercial purpose. Mr Davies acknowledged that the Tribunal has jurisdiction to substitute its own decision on the penalty for that of HMRC, and that the Tribunal could reduce the penalty below 10%, and even to zero, under paragraph 14 of Schedule 41 if satisfied that there are "special circumstances".

13. The Tribunal asked Mr Davies about the effect of regulation 13(1) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010. This provides:

> Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.

The Tribunal asked whether there was any other legislation providing that, in a case such as the present, goods were not "held for a commercial purpose in the United Kingdom" until the person holding the goods has passed through the blue channel, or at least, passed the "red point" telephone. Mr Davies was unaware of any such legislation, and understood that the words "in the United Kingdom" were to be read literally.

14. The Tribunal asked Mr Davies whether the effect of regulation 13(1) would then be the following. If a person arrived with tobacco intended for commercial purposes, the goods would become liable to seizure and forfeiture from the moment that the ferry coming from Zeebrugge crossed the boundary of the United Kingdom's territorial sea, or at least, from the moment that the person stepped off the ferry on arrival, even before reaching the immigration checkpoint. If so, even if the person declared the goods on arrival as being liable to duty by using the "red point" telephone provided for that purpose, the goods could nonetheless be seized on the ground that the goods were already being held in the United Kingdom for a commercial purpose without the duty being paid.

15. Mr Davies, quite fairly, said that he had not come prepared to answer that question, and therefore could not do so. However, he accepted that it may be the case that goods intended for a commercial purpose become liable to seizure even before the person carrying them reaches the blue customs channel (or the red or green channel at other ports or airports in the UK), and that it is just a matter of practice that the UK authorities allow passengers the opportunity to pass through the customs channel and only seize goods if they are not declared in the appropriate customs channel.

16. At the end of the hearing, the Tribunal reserved its decision, which it now gives.

17. In relation to the assessment, the Tribunal considers that it has no jurisdiction to determine that the goods were not subject to excise duty on the ground that they were not held "for a commercial purpose in the United Kingdom". Had the Appellant wanted to argue that the goods were not held for a commercial purpose in the United Kingdom, for instance on the ground that the goods were seized before he passed through the blue channel, the time and place for making that argument would have been the proceedings before the Magistrates' Court. That is the effect of *Jones* and *Race*, both of which are binding on this Tribunal. In *Jones* at [73] it was said that "the FTT only had jurisdiction to hear an appeal against a review decision made by HMRC on the deemed basis of the unchallenged process of forfeiture and condemnation". In the present case, the Tribunal only has jurisdiction to hear an appeal against a review decision made by HMRC on the basis of the findings of the Magistrates' Court in the condemnation proceedings. This is also demonstrated, for instance, by *Denley v Revenue and Customs* [2017] UKUT 340 (TCC) at [35]-[48], a case not referred to by Mr Davies but which is also binding on this Tribunal.

18. The appeal against the assessment is accordingly dismissed.

19. In relation to the penalty, the Tribunal has considered what was said in *Jacobson*. The penalty in *Jacobson*, as in the present case, was imposed under paragraph 4(1) of Schedule 41. Such a penalty applies where a person carries goods on which excise has not been paid "after the excise duty point". In *Jacobson*, the Tribunal grappled in some detail with the question referred to in paragraph 14 above. The Tribunal in that case considered that as a matter of statutory construction, paragraph 4(1) applies only after a person has left the customs area via one of the various red, green or blue channels.

20. We find that we do not have to consider if that interpretation of paragraph 4(1) is correct. It appears that this is a matter that will soon be decided by the Upper Tribunal.

21. We find that the circumstances of this case are as follows.

22. For the reasons given above, the Tribunal accepts that the goods were intended for a commercial purpose, that duty had not been paid on them, and that they were liable to seizure on that basis. It is furthermore accepted that the Appellant maintained that the goods were not for a commercial purpose even though they were, which means that he made a statement to officials that was not true.

23. On the material before it in this case, it is not clear exactly at what point the goods became liable to seizure, or on what basis. It is also not entirely clear whether goods intended for a commercial purpose can in fact be declared in the blue channel on arrival, or whether arrangements for the payment of duty would have to be made before the goods are even brought in to the UK.

24. However, on the basis of the material before the Tribunal, it appears that it is possible that the goods were liable to seizure from the moment that the ferry arriving from Zeebrugge crossed into the UK territorial sea, or from the moment that the

Appellant stepped off the ferry. If so, even though the goods were from that point liable to seizure, and were lawfully seized, it appears that the Appellant would ordinarily have been given the opportunity to declare the goods in the customs channel on arrival. On the material before the Tribunal, it seems that the customs channel was the point where the Appellant would have declared the goods if he had acted in accordance with what HMRC consider to be the correct and proper procedure. It is difficult to see otherwise what the point would have been in providing a "red point" telephone in the blue channel for use by arriving passengers. Thus, even if the goods were liable to seizure before that point, it appears that the goods would not have been seized and the penalty would not have been imposed if the Appellant had declared the goods to be for a commercial purpose by using the "red point" telephone in the blue channel.

25. However, the goods in this case were seized from Appellant before he reached the "red point" telephone in the customs channel. Given that he was unable to take the goods to that point, it cannot be known exactly what he would have done if he had been able to do so. He openly declared to officials at the immigration checkpoint that he was carrying 6 kilograms of tobacco. Apart from the fact that he maintained that they were for his own use, HMRC acknowledge that he was cooperative. It is therefore possible that if he had been allowed to proceed that far, he might have used the red point telephone to call an official, and might have declared that he was carrying 6 kilograms of tobacco but that it was all for his own use. There is no evidence before the Tribunal that in such circumstances the goods would necessarily have been seized and a wrongdoing penalty applied, even if the official had formed the view that the goods were not for his own personal use.

26. At the hearing, Mr Davies raised the possibility of further submissions being submitted by HMRC in relation to the matters above that remain unclear. The Tribunal has considered whether to invite such further submissions from the parties, but has decided against that course. The penalty in this case is only £122. The delay and cost of such further submissions would be disproportionate to what is at stake, and would thus be inconsistent with the overriding objective in Rule 2 of the Tribunal's Rules. The Tribunal has decided to issue its decision on the basis of the material before it. Needless to say, this decision should not be considered as having precedential weight in any future case in which further material about these matters is before the Tribunal.

27. The Tribunal considers that in the specific circumstances of the present case, considered as a whole, there are special circumstances justifying a reduction of the penalty under paragraph 14 of Schedule 41. Although the goods were liable to seizure, it appears from the material before the Tribunal that ordinarily a decision as to whether or not they should be seized would not be taken until a passenger has reached a customs channel, and that the decision whether or not to seize goods would depend on what the passenger did and said (or did not do or say) at the customs channel. The Appellant in this case did not have the opportunity to reach the customs channel. It cannot be known what he would have said or done if he had had that opportunity, and it cannot be known whether or not a penalty would have been

imposed in consequence. The denial of that opportunity justifies a reduction in the penalty.

28. The remaining question is the amount by which the penalty should be reduced in the light of these circumstances. Paragraph 14 does not require the Tribunal necessarily to determine a percentage by which it is appropriate to reduce the penalty. The penalty here is only £122. The Tribunal considers it appropriate in the present case to reduce the penalty by £122. The result is that the penalty is reduced to zero.

29. It follows that the appeal against the assessment is dismissed, and the appeal against the wrongdoing penalty is allowed.

30. 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 CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 13 OCTOBER 2017