



**TC07241**

**Appeal numbers: TC/2018/01606  
and TC/2018/03430**

*Excise Duty - importation of tobacco and alcohol products - no challenge to seizure - goods deemed lawfully seized - conjoined application for permission to appeal against assessments and penalties - objection to application by HMRC and cross application to strike out on the basis that the Tribunal has no jurisdiction and appeal no reasonable prospect of succeeding - appeal struck out*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**CATHERINE GLOVER and HARVEY GLOVER      Appellant**

**- and -**

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

**TRIBUNAL: JUDGE MICHAEL CONNELL  
MEMBER ANN CHRISTIAN**

**Sitting in public at Bradford IAC, Phoenix House, Rushton Avenue, Bradford on  
5 November 2018**

**The Appellants in person**

**Ms Charlotte Brown, Officer of HMRC, for the Respondents**

## DECISION

1. These are conjoined applications to appeal out of time by Mr Harvey Glover and Mrs Catherine Glover (“the appellants”) pursuant to rule 20(4)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 against assessments of Excise Duty issued by the Respondents (“HMRC”) in the amount of £1,122 each and also against penalties of £112 each.
2. HMRC object to the appellants’ applications and contend that the Tribunal should not exercise its discretion in favour of allowing the appeals out of time, because there has been a lengthy delay. Mrs Glover’s and Mr Glover’s appeals against the assessments and penalties are 19 and 22 months out of time respectively.
3. The respondents also make a cross application for the appellants’ Notices of Appeal to be struck out under rule 8(2)(a) and 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chambers) Rules 2009 on the basis that the Tribunal does not have jurisdiction to hear the appeals and there is no reasonable prospect of the appellants’ cases succeeding.
4. Possibly because of some confusion on the appellants’ part, Mrs Glover paid the assessment against Mr Glover of £1,122 (but not his penalty of £112). Mrs Glover has paid her penalty of £112 but not her assessment.
5. Having reviewed the case papers and the notices of appeal, we determined that we should treat the late appeals as applications by both appellants to appeal out of time against the assessments and the penalties.

### **Background**

6. On 2 May 2015, the appellants were intercepted at Hull Port on their return from Belgium. Between them, they were carrying 8kg of hand-rolling tobacco, 9.9L of spirits, 37.78L of beer and 224.75L of wine.
7. The goods were seized by Border Force as it was judged that they were being imported for a commercial purpose. The appellants’ car was also seized. The appellants were issued with the relevant paperwork, including Public Notice form 12A which advised them of their right to challenge the legality of the seizures in the Magistrates Court.
8. On 4 May 2015, Mrs Glover wrote to Border Force to challenge the legality of the seizure of the goods and the car. However, Mrs Glover subsequently withdrew her challenge to avoid incurring any legal costs awarded against her that may have arisen in consequence.

9. On 6 May 2016, HMRC issued an excise assessment on the basis that the amount of duty due on the total value of the goods should be halved, with half of the amount (£1,122) being demanded from Mrs Glover and the other half being demanded from Mr Glover. The same letter also notified Mrs Glover that the Officer was considering issuing a wrongdoing penalty in the amount of £252.
10. Following correspondence from Mrs Glover the Officer reduced the penalty from £224 to £112 having taken into account further evidence provided by Mrs Glover. The penalty was issued to Mrs Glover on 8 June 2016 which she paid on 20 June 2016.
11. A penalty also in the sum of £112 was issued to Mr Glover. The penalty has not been paid or formally challenged.
12. On 11 July 2016, the assessment of £1,122 which was issued to Mr Glover was paid by Mrs Glover. Mrs Glover has not paid the £1,122 assessment issued to her.
13. On 13 June 2017, HMRC advised the appellants that the assessment issued to Mrs Glover and the penalty issued to Mr Glover, were outstanding and overdue.
14. HMRC records show that on 16 October 2017, HMRC reminded the appellants of the outstanding amounts.
15. The appellants subsequently applied for a late review.
16. On 21 February 2018, HMRC wrote to the appellants to explain that HMRC were unable to consider a request for a review as more than a year had elapsed since the appellants were offered the opportunity of an independent review. HMRC explained that they nonetheless had the option of applying for permission to make a late appeal to the Tribunal service.
17. On 28 February 2018, Mrs Glover applied to the Tribunal to appeal out of time. The grounds of appeal were that the goods seized were for their own personal use.
18. It should be noted that only an appeal against Mrs Glover's assessment and penalty have been received. Mr Glover has not formally submitted an appeal - out of time or otherwise. We determined however for the sake of completeness that Mr Glover had intended to appeal the assessment and penalty and that we should hear both appeals together.

#### HMRC's grounds of objection to late appeals

19. The length of the delay in the appeal to the Tribunal is almost two years. The respondents contend that this is a serious and significant delay with no apparent justification or explanation.
20. Paragraph 96 of *Romasave (Property Services) Ltd v HMRC* 2015 UKUT 0254 (TCC) ("Romasave") reads:

“... The exercise of a discretion to allow a late appeal is a matter of material import, since it gives the Tribunal a jurisdiction it would not otherwise have. Time limits imposed by law should generally be respected. In the context of an appeal right which must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant.”

21. The reason for this lengthy delay has not been particularised in the notice of appeal.
22. Given that Mrs Glover had paid the penalty which was issued to her and the assessment which was issued to her husband, the respondents are entitled to assume that the appellants were in possession of the letters which communicated the amounts to be paid. Mrs Glover has not paid the assessment issued to her and Mr Glover has not paid the penalty issued to him.
23. The notice of penalty assessments made it clear to the appellants that they could ask for a review of the decisions or appeal to the Tribunal. At the same time, HMRC issued standard documentation to the appellants which detailed the options available for a review or appeal. The appellants were therefore on notice of both the decisions and the issue of both assessments and penalties as set out within the relevant letters. Mrs Glover elected to pay her penalty and her husband’s assessment instead of exercising the option of a review or appeal at the time. This indicates that she accepted at least some degree of liability at the time of payment.
24. Furthermore, as well as the initial letters which first notified the appellants of the assessments and penalties, it was again explained to them, in a letter of 13 June 2017, which amounts were outstanding. Despite this clarification, the appellants further delayed any attempt at applying for a late review or lodging a notice of appeal until after a letter from HMRC dated 16 October 2017 which pursued the outstanding amounts.
25. HMRC aver that the principles in *Data Select* apply in these circumstances. Justice Morgan emphasised at paragraph 37 of *Data Select*, the desirability of “... not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled.”
26. The time limit gives finality. It allows for the overriding objectives in rule 2 of the Tribunal Procedure Rules to be furthered in that it ensures that litigation is dealt with fairly and at proportionate cost.

#### Grounds for HMRC’s application to strike out the appeal

27. The appellants were entitled to challenge the legality of the seizure to the Magistrates Court by lodging a notice of claim within 30 days of the seizure. The seizure was indeed challenged to the Magistrates Court by Mrs Glover, but she withdrew from those proceedings. HMRC aver that the reason for this is not relevant here. The point of note here is that the appellants elected not to challenge the seizures.
28. The appellants appealed on the basis that the seized goods were for personal use. The Court of Appeal judgment in *HM Revenue and Customs Commissioners v Jones &*

*another* [2011] EWCA Civ 824 held that the Tribunal has no jurisdiction to go beyond the deeming provisions of paragraph 5, Schedule 3 of CEMA. That approach was confirmed by the Upper Tribunal in the case of *HM Revenue and Customs v. Nicholas Race* [2014] UKUT 0331 (TCC), *European Brand Trading v HMRC* [2016] EWCA Civ 90 and more recently in *HM Revenue and Customs v Liam Hill* [2018] UKUT 0045 (TCC).

29. It is therefore deemed in law, pursuant to paragraph 5 of Schedule 3 to CEMA 1979, that the goods were imported for a commercial purpose and the duties assessed fall due. As this was not challenged at the Magistrates Court, the Tribunal has no jurisdiction to reverse this conclusion.

## **THE LAW**

30. The Finance Act 1994 s12 provides:

12 Assessments to excise duty.

(1A) Subject to subsection (4) below, where it appears to the Commissioners -

(a) that any person is a person from whom any amount has become due in respect of any duty of excise; and

(b) that the amount due can be ascertained by the Commissioners,

the Commissioners may assess the amount of duty due from that person and notify that amount to that person or his representative.

The Excise Goods (Holding, Movement & Duty Point) Regulations 2010 provides:

Goods already released for consumption in another Member State - excise duty point and persons liable to pay

(13) (1) 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.

(2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person —.

(b) Holding the goods intended for delivery...

31. It was held in *HMRC v Jones & Jones* [2011] EWCA Civ 824 that:

71... For the future guidance of tribunals and their users I will summarise the conclusions that I have reached in this case in the light of the provisions of the 1979 Act, the relevant authorities, the articles of the Convention and the detailed points made by HMRC.

(4) The stipulated statutory effect of the owners' withdrawal of their notice of claim under paragraph 3 of Schedule 3 was that the goods were deemed by the express language of paragraph 5 to have been condemned and to have been "duly"

condemned as forfeited as illegally imported goods. The tribunal must give effect to the clear deeming provisions in the 1979 Act: it is impossible to read them in any other way than as requiring the goods to be taken as “duly condemned” if the owner does not challenge the legality of the seizure in the allocated court by invoking and pursuing the appropriate procedure.

(5) The deeming process limited the scope of the issues that the owners were entitled to ventilate in the FTT on their restoration appeal. The FTT had to take it that the goods had been “duly” condemned as illegal imports. It was not open to it to conclude that the goods were legal imports illegally seized by HMRC by finding as a fact that they were being imported for own use. The role of the tribunal, as defined in the 1979 Act, does not extend to deciding as a fact that the goods were, as the owners argued in the tribunal, being imported legally for personal use. That issue could only be decided by the court. The FTT's jurisdiction is limited to hearing an appeal against a discretionary decision by HMRC not to restore the seized goods to the owners. In brief, the deemed effect of the owners' failure to contest condemnation of the goods by the court was that the goods were being illegally imported by the owners for commercial use.

- per Mummery, L J

32. The Tribunal Procedure (First-tier Tribunal) (Tax Chambers) Rules 2009 state:

Striking out a party's case

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

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

33. “Reasonable prospects of success” has been subject to case law in the County Courts with *International Finance Corp v Uteaxfrica Sprl* [2001] CLC 1361) and *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 providing helpful guidance:

That prospect must be real, i.e. the court will disregard prospects which are false, fanciful or imaginary. The inclusion of the word real means that the respondent [to the application] has to have a case which is better than merely arguable.

### **The appellants' case**

34. The appellants appeal on the ground that the goods were for their own personal use and were not held for a commercial purpose. Mrs Glover said at the hearing that they had initially been confused by HMRC's correspondence. They had not really understood the basis of the assessments and penalties or why they had been dealt with separately. They thought that they had paid the “fine” in full and had not understood that there were two identical amounts, one payable by each of them. They had been very frightened by HMRC's warnings that they may face more costs if they continued with their challenge of the seizures in the Magistrates Court and did not succeed.

## Conclusion

35. The facts relating to the seizure and the issue of the assessments and penalties are not in dispute.

36. Mrs Glover's and Mr Glover's appeals are respectively 19 and 22 months late and therefore inordinately out of time.

37. The Tribunal has discretion in considering whether to admit a late appeal and the relevant considerations to be addressed when considering whether to admit a late appeal have been set out by the Upper Tribunal in *William Maitland v The Commissioners for Her Majesty's Revenue & Customs* [2018] UKUT 178 (TCC).

38. At paragraph 44 of *Maitland*, the Upper Tribunal stated:

When the FtT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FtT is satisfied on balance that it should be.

39. In considering that question, they considered that the FtT can usefully follow the three-stage process set out in *Denton v T M White Limited* [2014] WLR 3926:

*(1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FtT "is unlikely to need to spend much time on the second and third stages" - though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.*

*(2) The reason (or reasons) why the default occurred should be established.*

*(3) The FtT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.*

*That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen and Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FtT's deliberations artificially by reference to those factors.*

40. On the basis of the above principles and for the reasons argued by HMRC, we find that there is no justifiable reason to allow the applications to appeal out of time.

41. We nonetheless set out our views with regard to the substantive appeals.

42. The appellants decided not to proceed with any challenge to the legality of the seizures within the statutory time limit. The goods were therefore deemed forfeited to the Crown and the question of whether the seized goods were or were not held for a

commercial purpose has already been finally determined. The Tribunal is therefore prevented from considering arguments and evidence which may render the seizure unlawful; this was for a Magistrates Court to determine in condemnation proceedings.

43. The appellants were given a copy of Public Notice 12A which stipulated how they could challenge the seizures. If the appellants had challenged the seizures and succeeded, the assessment would not have been issued and they would have been entitled to the return of the goods, or compensation.

44. The grounds of appeal therefore disclose no reasonable prospect of success and the Tribunal does not have jurisdiction to consider the issue of whether the seized goods were held for a commercial purpose,

45. The appellants' applications for permission to appeal out of time must therefore be refused and the assessments and penalties confirmed.

46. 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.

**MICHAEL CONNELL**

**TRIBUNAL JUDGE**

**RELEASE DATE: 01 JULY 2019**