



TC07563

Appeal number: TC/2017/02128

EXCISE DUTY – application to strike out appeal against assessment on grounds of no jurisdiction – goods deemed forfeit – no appeal against quantum – appeal struck out – appeal against wrongdoing penalty – no reasonable excuse – no special circumstances – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DAVID WILLIAMSON

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE ANNE FAIRPO
ELIZABETH POLLARD**

Sitting in public at Manchester on 15 November 2018

The Appellant appeared in person

Mr Rupert Davies, Counsel, for the Respondents

DECISION

Introduction

1. This is:
 - (1) An application by the Respondents (HMRC) to strike out an appeal against an assessment to excise duty of £928.70; and
 - (2) An appeal against a wrongdoing penalty of £185.00.

Background

2. The Appellant (Mr Williamson) was stopped at Dover by Border Force officers on 14 January 2016 as he returned from Belgium by coach. He stated that he had bought 10 packs of tobacco, of which half were gifts and half was for his own use. His receipts showed that he had purchased 100 pouches of tobacco; there are 10 pouches of tobacco in a packet. Each pouch had 50g of tobacco, making a total of 5kg of tobacco.
3. When questioned by the Border Force officer, Mr Williamson made the following statements:
 - (1) He didn't really smoke, just one or two when he goes fishing. Only one pack of the tobacco was for his own use and would last months. Most of the tobacco was for his son but some was for other family members as well.
 - (2) He was not paid by his family for the tobacco but that he would get it back in other ways: for example, the coat he was wearing had been purchased for him, and he knew that it had been expensive.
 - (3) He thought he might have made 2 or 3 trips abroad in 2015. He had travelled with his wife in December 2015 (less than a month earlier) to buy wine.
 - (4) He had made the same trip in October 2015 (three months earlier) with his son. On that occasion his son had bought his own tobacco; Mr Williamson had only purchased one pack of ten pouches. In the hearing, Mr Williamson said that this must have been in October 2014.
 - (5) He had previously been stopped by Border Force in December 2014. On that occasion he had 30 packs of tobacco and had been allowed to keep them but had advised him not to travel for 12 months.
 - (6) His income was £141 per week; his wife receives an attendance allowance of £220. He has a car through disability and half of his rent is paid by housing benefit.
4. Border Force concluded that the tobacco had been imported for commercial purposes and seized it. Mr Williamson asked whether he could pay the duty, but this request was declined. Mr Williamson was given an explanation as to how to appeal the seizure and was provided with the Seizure Information Notice (BOR156) and Warning

Letter (BOR162) which include the information that HMRC may (inter alia) issue an assessment for the excise duty and a penalty.

5. Mr Williamson states that he appealed the seizure but had been informed by letter that he had lost. HMRC has no record of such proceedings.

First issue: application to strike out an appeal against the assessment to excise duty

HMRC's case

6. HMRC had no record of a challenge against the liability to forfeiture which Mr Williamson states that he made but, as he states that he was told that he had lost, submitted that it is still the case that under paragraph 5 of Schedule 3 CEMA 1979, the goods are deemed to have been condemned as forfeit and so are deemed in law to have been held for a commercial purpose.

7. The decision in *Jones & another* [2011] EWCA Civ 824 confirmed that this Tribunal has no jurisdiction to consider any challenge to liability to forfeiture and that it is not open to this Tribunal to conclude that goods have been legally imported for a person's own use where those goods have been condemned as illegal imports.

8. HMRC submitted that this Tribunal's powers in respect of the assessment to excise duty are contained in s16 Finance Act 1994, which provides a power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal.

9. HMRC submitted that s12 Finance Act 1994 allows HMRC to assess an amount of duty where goods are imported for a commercial purpose without payment of duty. In such a case, HMRC may assess the amount of duty due from the person from whom the amount has become due. HMRC submitted that Mr Williamson is the person liable for the duty as he was holding the goods (Regulation 13(2), Excise Goods (Holding Movement and Duty Point) Regulations 2010). Under Regulation 13(1) of the same Regulations an excise duty point arises when the goods are first held. Following the case of *Jacobsen* [2018] UKUT 18 (TCC) that duty point arose when Mr Williamson first entered UK territorial waters.

10. HMRC therefore submitted that they are entitled to assess Mr Williamson for excise duty as he was deemed to have imported goods for a commercial purpose without payment of duty at the duty point.

11. HMRC further submitted that the duty was correctly calculated at £185.74 per kilogram.

Appellant's case

12. Mr Williamson submitted that the tobacco was for use by himself and family members, and that he should not have to pay duty on tobacco imported from the EU, nor should he have to pay duty on tobacco that has been confiscated.

13. In correspondence with HMRC, Mr Williamson said that he had challenged the seizure but that he had subsequently had a letter to say that he had lost. In the hearing, Mr Williamson said that he had sent a letter to an address in Plymouth after the seizure but had heard nothing further until November.

Decision as to the application to strike out the appeal against the assessment to excise duty

14. Mr Williamson states that he challenged the liability but has provided no evidence to support this and HMRC have been unable to find any record of the liability being challenged at the magistrates' court as required. However, Mr Williamson also states that he was advised that he lost that challenge.

15. The case law in *Jones* is clear that this Tribunal has no jurisdiction to re-consider the legality of a seizure and, as we consider that there are no grounds to dispute HMRC's entitlement to make an assessment to duty nor to the amount of duty, the application strike out the appeal against the assessment to excise duty is granted and that part of the appeal is STRUCK OUT.

Appeal against the penalty assessment

Appellant's case

16. Mr Williamson submitted that the tobacco was for use by himself and family members, and that he should not have to pay duty on tobacco imported from the EU, nor should he have to pay duty on tobacco that has been confiscated.

17. When Mr Williamson had been stopped in December 2014, the Border Force officer at that time had told him that the guidelines were not "black and white" and that the "buck stops with me". He was told to bring less next time and only to import tobacco for himself and his son.

18. Mr Williamson submitted that on the government website it states that you can bring in as much as you like within reason for your own use and family. He considered that the "travelling to the UK" booklet given to him in December 2014 was confusing as it said that the limits were "1 kg" or "own use". Mr Williamson thought this meant he could bring in more than 1 kg if it was for his own use.

19. Some of the tobacco was for Mr Williamson's son, who had worked for the Ministry of Defence in Iraq and now had mental health problems and smokes 2 pouches a week. Mr Williamson planned to go to Belgium to buy tobacco once a year to save money as they were on benefits. Mr Williamson also submitted that he could not afford to pay the penalty.

HMRC's case

20. HMRC submitted that Mr Williamson could not be regarded as having a reasonable excuse which would remove the liability to a penalty for the following reasons:

(1) The goods have been deemed in law to have been imported for a commercial purpose and so the explanation put forward by Mr Williamson, that the goods were imported for personal use, cannot be considered by the Tribunal;

(2) In the alternative, this was a large amount of tobacco. Mr Williamson had been made aware of the guidelines a year earlier but had still imported goods which were 4 kg in excess of those guidelines.

(3) HMRC had considered whether any special circumstances applied which might reduce the penalty but concluded that there was nothing unusual or exceptional in this case which would merit such a reduction.

21. The penalty was calculated in accordance with paragraph 6 of Schedule 41 Finance Act 2008 as a percentage of the lost revenue. The failure to pay the duty was considered to be non-deliberate so that the maximum penalty was 30%. Deductions were made to take into account Mr Williamson's prompted disclosure. The disclosure was considered prompted because he had been stopped by Border Force before disclosing the amount of tobacco that he was importing. The minimum applicable penalty was therefore 20% and, considering the quality of assistance given, that was the penalty applied.

Decision as to the appeal against the penalty

22. Schedule 41 Finance Act 2008 provides that a penalty is not payable where the person has a reasonable excuse for the failure to pay duty (paragraph 20) or where there are special circumstances (paragraph 14).

Did Mr Williamson have a reasonable excuse?

23. Mr Williamson's grounds for appeal are that the goods were imported for personal use and that he cannot afford to pay the penalty.

24. Inability to pay cannot be a reasonable excuse unless the lack of funds is attributable to events outside a person's control (paragraph 20(2)(a) of Schedule 41, Finance Act 2008). Case law has established that these events must be unusual or unforeseeable; Mr Williamson did not say that his inability to pay was due to any particular unusual or unforeseeable event and so we find that the inability to pay is not a reasonable excuse.

25. We note that, in law, the goods are deemed to have been imported for a commercial purpose and that case law indicates that this deeming provision applies when considering whether or not a reasonable excuse applies. We are required therefore to disregard the submissions as to personal use and so, as no other submissions were made, consider that Mr Williamson has not established that he has a reasonable excuse.

It should be noted that, even if we were not required to disregard such submissions, we do not consider that they amount to a reasonable excuse for the reasons set out below in respect of special circumstances.

26. We note that HMRC concluded that there were no special circumstances. We considered Mr Williamson's evidence and agreed that there are no special circumstances which could reduce the penalty, as follows:

(1) He imported an amount of tobacco which was four times the guideline limit, having previously been stopped by Border Force and advised that he was importing tobacco in excess of the guideline limit.

(2) His confusion over the amount which could be imported cannot amount to special circumstances as he made no attempt to clarify what the appropriate limits were by, for example, making enquiries of Border Force on a subsequent trip (or by telephone).

(3) Mr Williamson's lack of funds are due to his general financial circumstances and so cannot amount to special circumstances.

Decision

27. The appeal against the assessment is struck out and therefore cannot succeed. The appeal against the penalty is dismissed.

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.

**ANNE FAIRPO
TRIBUNAL JUDGE**

RELEASE DATE: 03 FEBRUARY 2020