Neutral Citation: [2022] UKFTT 357 (TC)

Case Number: TC08610

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2020/00176

*Customs & Excise Duty: strike out of appeal against assessment as no claim had been made before the magistrates, appeal allowed against penalty, applying guidance in DCC Holdings, Jones and Race on the scope of a deeming provision.*

**Heard on: 13 September 2022**
**Judgment date: 30 September 2022**

**Before**

**TRIBUNAL JUDGE Heather Gething**
**MEMBER Ian Malcolm**

**Between**

**Viktor Mlekanov**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Ms Migleve Metcalf of Metcalfs Solicitors.

For the Respondents: Rupert Davies of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs ("HMRC")

## DECISION

**INTRODUCTION**

1. With the consent of the parties, the form of the hearing was V (video), and all parties attended remotely using the Tribunal video hearing system. A face to face hearing was not held due to covid restrictions pertaining at the time of booking. The documents to which we were referred are a Trial Bundle of 268 pages, including three witness statements for the Appellant, an Authorities Bundle and a skeleton argument of Mr Davies.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

3. Mr Mlekanov appeals against:

(1) an assessment to Customs and Excise Duty ("***Duty***") of £1,971.00 on the importation of cigarettes that were seized at Birmingham airport on 13 January 2019 and in respect of which no challenge to the seizure had been made before the Magistrates' Court within 30 days of seizure, and

(2) the imposition of a penalty of £689.00.

4. HMRC contests both appeals and seeks a strike out of the appeal against assessment of duty.

5. We did not hear evidence from any party. Mr Mlekanov was unable to attend the hearing as he was sitting a work-related examination on the day. We had the benefit of his witness statement and those of two of his friends, Mr Emil Gadzhurov and Mr Matthew Marsom, ("the two friends"). We also had the benefit of a witness statement of Officer Christopher Allen who attended to Mr Mlekanov at Birmingham airport in January 2019. We also had a witness statement of Officer Katie Carrick, though she was not engaged at Birmingham airport.

THE FACTS

6. Having reviewed the witness statements and following discussion with the representatives of the parties we find the following facts:

(1) Mr Mlekanov was in full time employment in 2019. He had no other source of income.

(2) He went on holiday for two weeks to Bulgaria in January 2019. Before returning to the UK, he bought 32 sleeves of Dunhill king size cigarettes for £28.00 a sleeve. He bought 10 sleeves for each of the two friends and 12 sleeves for himself and his family. He smoked 20 cigarettes a day. A sleeve contains 200 cigarettes.

(3) The two friends had each given Mr Mlekanov £280 to buy them 10 sleeves of cigarettes. The cigarettes retail at a much higher price in the UK. Mr Mlekanov thought that as he was not selling the goods at market value to his friends, but simply receiving the cost price to him in Bulgaria, he was effectively making a gift of the cigarettes to his friends.

(4) As Mr Mlekanov believed he was making a gift of the cigarettes to his friends and not importing them for a commercial purpose, he proceeded through the green channel at Birmingham airport.

(5) Mr Mlekanov was stopped in the green channel. Two officers were present. Officer Allen opened his suitcase. Both asked questions while the suitcase was being opened.

(6) The handwritten notes of the officers are not contemporaneous in the sense of the notes being made at the time questions are asked and answered. The notes were prepared after the interview takes place. The notes portray a different order of events from that order as explained to us by Ms Metcalfe. She explained that Mr Mlekanov told the officers the whole truth. Mr Mlekanov informed them that he had 10 sleeves for himself. He went onto explain he had sleeves for his family and his friends. He had 10 sleeves for each of his friends who had paid him £280 for the cigarettes. He provided the receipt for the cigarettes. In due course he also provided his bank statements and his employment contract to demonstrate that he had received the £280 from each of his friends and not a penny more, and had no other source of income. We accept the explanation provided by Ms Metcalfe on Mr Mlekanov's behalf. We also accept Ms Metcalfe's view that although Mr Mlekanov had lived in the UK for two years he was not able to express himself in English as clearly as a native speaker would be able to do.

(7) The officers seized all the cigarettes under section 139 Customs & Excise Management Act 1979 as they were liable for forfeiture under Regulation 88 of the Excise Duty (Holding, Movement and Duty Point) Regulations 2010 on the ground that they had been imported for a commercial purpose.

(8) Mr Mlekanov did not challenge the legality of the seizure in the Magistrates Court. Ms Metcalfe explained that Mr Mlekanov had not done so as the officers at Birmingham airport had led him to believe there would be no further consequences of the seizure.

(9) We formed the view that Mr Mlekanov was an honest individual. He honestly believed that he was going to make a gift of the goods to his friends and family (notwithstanding the contribution to his costs made by his friends) because of the large value of the goods in the UK as compared with Bulgaria, which is why he went through the green channel.

(10) HMRC assessed duty of £1,971.00 on the ground that as the goods had been forfeited they were deemed to have been imported for a commercial purpose but the duty had not been paid, and imposed a wrongdoing penalty of 35% of the assessed duty under paras 5 and 6 of Schedule 41 to Finance Act 2008.

(11) The decision to assess duty and impose a wrong-doing penalty was the subject of a review. The Review Officer confirmed the assessment of duty and penalty. Mr Mlekanov appealed both the assessment and penalty.

**THE APPLICATION TO STRIKE OUT**

7. HMRC invited the Tribunal to strike out the appeal against assessment on two grounds under the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009:

(1) That there is no reasonable prospect of success, under Rule 8(3)(c).

(2) That the Tribunal has no jurisdiction to entertain the appeal, see rule 8(2).

8. HMRC rely on the effect of the deeming provision in Para 5 of Schedule 3 of the Customs & Excise Management Act 1979 ("***CEMA*" and "the deeming provision"**). As Mr Mlekanov was able to claim that the goods were imported for own use and challenge the seizure, and as he did not do so within 30 days of seizure, the goods were forfeit and were deemed to have been brought into the UK for commercial purposes. HMRC submitted that it is not open to the Tribunal to find facts that contradict the effect of the deeming provision. HMRC submitted that if goods were deemed imported for commercial purposes it is implied that that was the

taxpayer's intention. That state of mind must also be considered in determining liability to penalties.

9. Mr Mlekanov appeals against the assessment on the basis that the goods were imported for "own use" (which included gifts for his friends) and not commercial purposes. Although the two friends paid him the cost price for the goods in Bulgaria, the amount received by him was a substantial under value of the goods in the UK and Mr Mlekanov considered that resulted in him making a gift of the goods given to his friends.

**THE LEGISLATION**

10. HMRC may assess a person with excise duty under Section 1(1A) Finance Act 1994 if it appears to HMRC that an amount has become due and the amount of duty can be ascertained.

11. According to Regulation 13 of Excise Goods (Holding Movement and Duty Point) Regulations 2010 SI/2010/551, where goods which have been released for consumption in another Member State, an excise duty point arises when the goods are first held in the UK and the person liable to the duty is the person in possession of the goods if the goods are held "*for a commercial purpose*" (per Regulation 13(1) and (2)). Goods will not be held for a commercial purpose by an individual if they are acquired from another member State and are held for his "*own use*", see Regulation 13(3)(b). "Own use" is defined in Regulation 13(5)(b) as including, "*use as a personal gift but does not include the transfer of the goods to another person for money or money's worth (including any reimbursement of expenses incurred in connection with obtaining them).*"

12. The Customs and Excise Management Act 1979, sections 49 and 139 and Schedule 3 are relevant. Section 49 provides that goods, that have been imported but the duty has not been paid, are liable to forfeiture. Section 139 provides that anything liable to forfeiture may be seized by HMRC. Para 3 of Schedule 3 provides that a person claiming that any goods seized as liable to forfeiture are not so liable, may within one month of the date of the seizure give notice of the claim. If after the expiration of one month no claim has been made the goods "*shall be deemed to have been duly condemned as forfeited*" under para 5.

**CASE LAW**

13. One effect of the deeming provision in Para 5 of Schedule 3 is that it cannot be asserted in proceedings in this Tribunal dealing with the assessment to duty that the goods were imported for private use. The scope of the deeming provision in Para 5 was considered by the Court of Appeal in *Jones v HMRC* [ 2011] EWCA Civ 824 ("***Jones***"). Mummery LJ set out guidance at [71]. At [71(5)] "*The deeming process limited the scope of the issues that the respondents 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 is 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.*" And at [71(7)] "*The key to the understanding of the deeming is that in the legal world created by legislation the deeming of a fact or a state of affairs is not contrary to 'reality': … deeming something to be the case carries with it any fact that forms part of the conclusion.*"

14. In view of the effect of the deeming provision it is not now open to the Tribunal to find as a fact that Mr Mlekanov brought the goods into the UK for "own use", In consequence there was no prospect of success in Mr Mlekanov's challenge to the assessment of duty.

15. In consequence we allow the strike out of the appeal against the assessment to duty on ground one and do not need to consider the alternative ground.

**APPEAL AGAINST PENALTY BACKGROUND**

16. HMRC imposed a penalty under para 4 of Schedule 41 to Finance Act 2008. A penalty is payable if, after an excise duty point has arisen, duty is unpaid on any goods that are chargeable with duty. The duty is payable by the person in possession of the goods or concerned with the possession of the goods.

17. The penalty was calculated in accordance with Para 6(1A) of Schedule 41 as a percentage of potentially lost duty. The maximum penalty can be 100% of the unpaid duty if the "failure" was deliberate and concealed, 70% if it was deliberate and not concealed and 30% in any other case. These percentages are referred to as "standard percentages".

18. The standard percentages may be reduced under Para 13 depending on whether the disclosure was prompted or unprompted, but it cannot be reduced under that paragraph below the minimums specified in a table in Para 13(3)(b). The standard rates can be reduced as follows where the issue becomes known to HMRC within 12 months of the goods being imported:

| Standard % | Minimum % for prompted disclosure | Minimum % for unprompted disclosure |
|---|---|---|
| 30% | 10% | 0% |
| 70% | 35% | 20% |
| 100% | 50% | 30% |

19. HMRC determined that the failure to declare the goods (i.e. failure to walk through the red channel as opposed to the green or blue channel) was deliberate because Mr Mlekanov stated at the border that he was aware of the legislation concerning duty on importation of goods and he grossly underdeclared the number of cigarettes he had in his case. HMRC concluded that it was likely therefore that Mr Mlekanov intended to deceive the officer, which is indicative that he was aware of the wrongdoing.

**HMRC'S SUBMISSIONS**

20. HMRC referred to the Supreme Court decision in ***Tooth v HMRC*** [2021] UKSC 17 ("***Tooth***") where it explained the meaning of deliberate in Para 6 is "*an adjective which attaches a requirement of intentionality to the whole of that which describes, namely the inaccuracy"*.

21. HMRC referred us to two FTT decisions which came to different conclusions as to whether the deemed importation of goods for commercial purpose impairs the ability of the FTT to consider the actual behaviour of Mr Mlekanov.

(1) The first case was ***Odinas v HMRC*** [2021] UKFTT 303 (TC) at [9] ("***Odinas***") where the Tribunal referred to the House of Lords decision in *Marshall v Kerr* [1993] HL STC 360 at page 366 which stated that when considering the deeming provisions "*the Tribunal is required to treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs*". The Tribunal concluded that the fact that the goods were deemed to have been imported for commercial purposes, and as the taxpayer was the only person involved in the importation, meant that the taxpayer must have known that he was importing the goods for commercial purposes. The FTT concluded that the taxpayer had acted deliberately.

**(2)** HMRC consider that the reasoning in *Odinas* should apply to Mr Mlekanov. He should be deemed to have known he was importing goods for commercial purposes and as he appears to know goods imported for a commercial purpose are subject to duty his

behaviour must be considered to be deliberate. In *Odinas* there were two brands of cigarettes: Marlborough which he imported for his own use and Winston that he bought for others who were to pay him for the goods. Mr Odinas was unaware that duty could be payable on the Winston cigarettes. The Tribunal said Mr Odinas' behaviour was not deliberate in relation to the Winston cigarettes but was deliberate in relation to the Marlborough cigarettes**.**

(3) **The second case was** *Puiu v HMRC* [021] UKFTT 255 (TC) where Mr Puiu brought a large number of cigarettes into the UK from Romania for himself, his wife, his brother and brother in law. They were confiscated. The Tribunal found that Mr Puiu was an honest witness. Under questioning at the airport Mr Puiu knew exactly what cigarettes he had in each bag and to whom they were intended to be given. The Tribunal concluded having considered the guidance in *Tooth* that it was obliged to follow the guidance in *Tooth* on the meaning of deliberate but considered that Parliament could not have intended the deeming provision as to the liability of a person to pay duty on goods should effectively deem what a person's intention was at the point of import. Further there are no indications in Schedule 41 dealing with penalties that the intention of the individual was to be determined by the deeming provisions in the CEMA, see paras [56] to [58]. It was therefore for the Tribunal to ascertain the intention of Mr Puiu for the purposes of Schedule 41.

**DISCUSSION**

22. We do not find the reasoning in *Odinas* compelling. We agree with the conclusion of the FTT in *Puiu*. We also note that this approach to construction of the provisions relating to penalty is supported by the decision of the House of Lords in *DCC Holdings Limited v HMRC* [2006] which indicates that there are limitations on the effect of a deeming provision and by the decision of Warren J in the case of *HMRC v Nicholas Race* [2013] UKUT (TC) at 40. Warren J accepts at [39] the guidance given by the Court of Appeal in *Jones v HMRC* about the inability of the FTT to find facts that are a necessary consequence of the deeming provision. But he goes on at [40] to indicate that the Tribunal nevertheless has fact finding obligations to determine issues of culpability. "*The issues raised by the appeal against the Penalty Assessment extend beyond the question of whether duty is payable and include for example, an assessment of culpability because this is relevant to the level of penalty imposed under Schedule 41. Further the First-tier Tribunal will need to decide whether the level of mitigation afforded by HMRC was sufficient and/or whether there should be further reductions for 'special circumstances'. Thus, even if the issue whether duty was payable may not be reopened there are circumstance raised by the penalty provisions which the First-tier Tribunal will be required to consider in respect of the appeal against Penalty assessment. It was for this reason that no application was made to strike out the appeal.*"

23. HMRC state that because at Birmingham airport Mr Mlekanov said that he knew the rules and still went through the green channel and did not declare the cigarettes until asked and then only mentioned 10 sleeves, that was evidence of his deliberate intention to fail to declare the dutiable goods.

24. We consider that Mr Mlekanov's failure to go through the red channel/declare the goods as liable for duty was not deliberate. He did not intend to break the rules. He was ignorant of the rules. He did not appreciate that receiving any sum of money from a "donee" towards the cost of acquisition of the goods would prevent the "own use" exemption from being available.

25. We accept that the disclosure was prompted so that under para 13(3), after the maximum reductions permitted, the minimum penalty would be 10%.

26. The penalty can be reduced to zero if there is a special circumstance under para 14 of Schedule 41 or if Mr Mlekanov had a reasonable excuse, under Para 16 of Schedule 41.

**SPECIAL CIRCUMSTANCE AND REASONABLE EXCUSE**

27. HMRC consider that there is no special circumstance and no reasonable excuse to enable the Tribunal to reduce the penalty.

28. Mr Mlekanov's case is that he was unaware that the own use exemption from duty did not apply where he receives a contribution to the cost of the goods he acquired. He considered that as the goods have a value in the UK far in excess of the purchase price of the goods in Bulgaria there was a substantial gift being made by him to his friends. Mr Miekenov had brought back 32 sleeves, he said 10 sleeves for himself, 10 for each of his two friends and we deduce the remaining two were for his partner/family.

29. HMRC say there is neither a special circumstance not a reasonable excuse. As to whether ignorance of the law is a reasonable excuse must be determined after consideration of the taxpayer's personal attributes, per ***Perrin v HMR****C [2018] UKUT 0156 (TCC). In this case Mr* Mlekanov was mistaken as to the meaning of the law. He erroneously believed that giving cigarettes with a very large retail value in the UK to a friend in return for a relatively small contribution to their cost was nevertheless a gift and "own use" exemption could be claimed. It was that mistaken belief that had caused him to go through the green channel. To a lay person there is an element of bounty in the arrangement made by Mr Mlekanov with his friends. It is not unreasonable for a lay person to consider the arrangement may result in a gift being made by Mr Mlekanov to his friends. In view of this we find that Mr Mlekanov had a reasonable excuse and reduce the penalty to zero.

30. We notice that the Tribunal has jurisdiction under para 14 of Schedule 41 to stay the payment of a penalty. As the penalty is reduced to zero we do not consider this further.

31. We understand that Mr Mlekanov is financially constrained, We would hope and expect HMRC to assist Mr Kiekanov to agree a reasonable time to pay the duty assessed.

32. The appeal against penalty is allowed.

33. 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.

**HEATHER GETHING**
**TRIBUNAL JUDGE**

**Release date: 30TH SEPTEMBER 2022**