TC03678

Appeal Numbers: TC/2012/05576 & TC/2012/09067

Excise Duty - whether decisions and review decisions refusing requests for restoration of seized alcohol were unreasonable - "burden of proof" issues and the Appellant's contention that HMRC should have sustained the refusal of requests, rather than the Appellant demonstrate unreasonable features of the decisions to refuse restoration - confused issues concerning any claim that the duty had indeed been paid notwithstanding that in one case condemnation proceedings in the Magistrates' Courts had not been commenced, and that such proceedings had been commenced and then withdrawn in the second case in issue - Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

PIONEER TRADERS (UK) LTD
t/a CENTREPOINT CASH & CARRY

Appellant

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS

Respondents

TRIBUNAL: JUDGE HOWARD M. NOWLAN

Sitting in public at 45 Bedford Square in London on 27 May 2014

Charlotte Hadfield, counsel, for the Appellant

Christopher Staker, counsel, for the Respondents

DECISION

Introduction

1. This was an Appeal against two decisions and related review decisions on the part of HMRC to refuse to restore large quantities of beer seized ostensibly for non-payment of Excise Duty.

2. Since it was an Appeal in relation to the decisions concerning restoration, it was clear and indeed emphasised in the Appellant's Skeleton Argument, and reiterated by the Appellant's counsel, that the Appeal was not challenging the legality of the seizures. It was simply a supervisory Appeal in which I had to consider whether the officers' various decisions had been justified, and whether the decisions and reviews had been wrongly influenced by taking into account matters that should have been ignored or by ignoring others that should have been considered. Had I concluded that the decisions had been questionable, my jurisdiction would then have been limited, for instance, to requiring a further review in which my criticisms of the earlier review should be addressed, and I could not have simply substituted my own decision.

3. In the event, and largely because the Appellant's Appeal had been managed in a somewhat extraordinary manner, much of the hearing was side-lined onto different matters, including a request for adjournment, some discussion about the seemingly closed matter of the original legality of the seizure, and a very late application to provide new evidence.

4. My decision is that the Appeal is dismissed, and I do not remit the case back for a further review. The Appellant had advanced no evidence before me, and no ground for saying that the decisions taken by the officers making the original decisions not to restore, or the decisions of the officers upholding those decisions on review, were unreasonable in any way.

5. I will explain below the points to which I made brief reference in paragraph 3 above. In short, they related to the sudden suggestion, sprung onto the Appellant's counsel by an officer of the Appellant company who was attending the hearing, that the Appellant did have evidence that the duty had been paid in relation to at least one, if not both, of the disputed cases. We had a moderately short adjournment, whilst the relevant counsel discussed this matter (not disclosed at this point to me or the Respondents) with the relevant company officer, and when eventually the two returned to the court, there was reference to the counsel having seen photos of the invoices via her mobile phone. As a result she asked for an adjournment so that further evidence could be produced.

6. I refused this application partially because it was made at an extremely late point but, more relevantly, because it had nothing to do with the issue before me of whether anything in the decisions and review decisions had been unreasonable, and that it also impinged on the question of whether duty had initially been paid, and thus on the closed issue of the legality of the seizure. I did however say that if, as was by then asserted, the Appellant had proof that the duty had actually been paid in relation to both disputed seizures, then if the Appellant provided this evidence to HMRC, (even after this present appeal had been dismissed) HMRC might (entirely without legal obligation to do so, and naturally with every expectation that at this late stage the evidence would have to be compelling for HMRC to be persuaded that it would be appropriate to grant any redress) consider whether this claimed evidence influenced

them, in the interests of justice, to compensate the Appellant in any way for the fact that its seized beer can no longer be restored, as it had been destroyed.

7. When I volunteered the remarks recorded in the latter part of the previous paragraph, I had not reconsidered at the time the detail of the decision in *HMRC v. Jones* [2012] Ch 414 and rather more obviously I had not considered the judgment of Mr. Justice Morgan in the Upper Tribunal case of *HMRC v. European Brand Trading Limited* [2014] 0226 (TCC) since that decision was not released until the very day of the hearing of these present Appeals before me.

8. In this Introduction I will leave aside the points to which I will later turn, and simply state the end result of the decisions in these two authorities, both of which are of course binding on me. Their effect is to decide that the statutory provision that deems seizure to have been legal, once it has not been challenged within the one month period, also deems duty not to have been paid, and deems other defences to lawful importations (such as personal consumption of cigarettes) to be deemed not to be available. The decisions, and particularly Mr. Justice Morgan's decision then make it clear that HMRC officers, considering any matter relevant to whether or not to restore goods after the statutory deeming provision has come into effect, must completely ignore any facts (such as evidence to the effect that the duty had in fact plainly been paid) that are in conflict with the statutory notion that it had not been paid. The new reviewing officer in the *European Brand* case has accordingly been directed to ignore anything material to actual payment or non-payment of duty. It must follow from this that the same principle must apply to the initial considerations addressed by those dealing with review decisions in the first place. This approach was clearly not one that either officer had actually followed in the present case because both officers confirmed that the total absence of proof that duty had actually been paid had been taken into account by both of them, particularly the officer dealing with the first seizure mentioned below. The two court decisions also appear to undermine the common sense practice, recorded by both officers, that in deciding whether to restore goods, one of the factors most likely to justify restoration in their minds would indeed be proof of actual payment of the duty. HMRC was said to have no desire to ensure the payment of duty twice, or effectively to seize duty-paid goods such that proof of payment of duty was considered in dealing with restoration requests. This, it would appear, should no longer be the practice.

9. The consequence of these decisions is therefore that it would seem to be completely pointless for the Appellant to try to establish proof of the original payment of duty, in requesting any further review or consideration of this case by HMRC. I think it is fair to say that, while those representing HMRC at the hearing before me might have regarded there to be no legal obligation on HMRC to consider new evidence at this extremely late stage (as I had also accepted), they had not appreciated that the effect of the decision in *Jones*, and more obviously the decision in the *European Brand* case, would render it quite improper to consider any such evidence.

The facts

10. The Appellant conducts a cash and carry business, obviously dealing in beer and doubtless many other products. It has at least two sales warehouses, one in Rainham and one in Barking, the one in Rainham possibly ranking as the main storage warehouse.

11. On the night of 16 December 2011, a lorry (owned by a hire company) brought a load of various pallets of canned beer from the warehouse or depot in Rainham to the Barking premises and at about 11 p.m. two warehouse employees started to unload the pallets. Half way through the job, HMRC officials arrived, and detained the beer, claiming that it was not

"duty-paid" beer. The warehouse manager, a Mr. Frank, was called and he soon arrived at the depot with a document called a "DeltaBOND DUTY LIABILITY REPORT" in his pocket. This document appeared to relate to the quantities of beer of the various brands that were on the lorry, or that had just been unloaded, but the document dated 12 December 2011 appeared to relate to quantities of beer being despatched by a quite different and unconnected warehouse operator for a named owner again unconnected with the Appellant. On 19 December HMRC wrote to the Appellant requesting correct invoices for the beer detained pm 16/17 December. The letter advised that if the invoices were not forthcoming the goods would be liable to forfeiture and seized. No such invoices were produced to HMRC and on 10 January 2012, HMRC wrote to the Appellant formally seizing the beer.

12. Whilst at the premises on the night of 16 December, and remaining there until about 3.00 a.m. on 17 December, the officers also inspected certain other stock and detained that, again on suspicion that duty had not been paid in respect of it. This other stock was formally seized by a letter of 30 January 2012.

13. Condemnation proceedings, challenging the legality of the seizures, were not commenced in the Magistrates' Court within the requisite time limit of one month, and as a consequence the statutory deeming provision deemed the seizures to have been lawful.

14. No claim was made in relation to the seizure of the "other stock" referred to in paragraph 12 above, and nothing in relation to that stock was relevant to the present Appeal. As regards the stock that had been on the lorry mentioned in paragraph 11 above, a request was made that that stock be restored to the Appellant on 27 January 2012. The decision in response to this request was made on 30 January, refusing restoration, and the review decision made on the request that the decision be reviewed was made on 20 April by Mrs. Louise Bines. The review decision confirmed the original decision. The Appeal before me related firstly (in other words as regards the seizure of the goods on 17 December 2001), to the issue of whether those decisions, and particularly the review decision, had been unreasonable in any way.

15. A second seizure was made on the night of 27/28 March 2012 at the premises of an unconnected company called Millenium Foods & Wine Ltd ("Millenium"). On this occasion a quantity of beer was again being unloaded from a lorry at about 8.00 p.m. on 27 March. The beer was being delivered by the Appellant, ostensibly from its Rainham depot. Since by the point of the seizure the beer had not been paid for by Millenium and title was not to pass until payment, the beer remained the Appellant's beer at the point of seizure.

16. Nobody produced any documentation on this occasion that confirmed any sort of payment of duty. The lorry driver produced a delivery note which itemised the supposed contents of the load, and that delivery note duly tallied with an invoice from the Appellant to Millenium evidencing the sale of the relevant load. I was told that, with a minor substitution of some Guinness (not mentioned on either document) for some of the Grolsch beer that was indicated on both the delivery note and the invoice, the two documents also tallied with the beer on the lorry that was being unloaded. I was told that such minor substitutions were not at all unusual and that no particular point was based on this minor difference between the goods being unloaded and those mentioned on the delivery note and the invoice.

17. The officers making the seizure made a note of the discussions with the lorry driver, who was employed by an independent transport firm. The relevant note indicated that the driver had said that he had left Calais at 5.45 a.m. on the morning of 27 March, carrying a load of timber flooring. He had dropped that somewhere near an exit on the M25; had then

been told to drive to Rainham to pick up beer and deliver that to Millenium's premises near Crawley. He had been delayed by having to wait for a replacement for a broken side window in his lorry, and had arrived at Millenium's premises at 8.00 p.m.

18. HMRC's officers had in some way been given information that the relevant lorry had been manifested to be carrying beer, and not timber flooring, when it left Calais. It had obviously not been inspected on arrival at Dover. The information passed to HMRC about the indication that the lorry was carrying beer from Calais to the UK doubtless accounted for why the HMRC officers managed in some way to trace the lorry to its point of arrival at Millenium's warehouse.

19. On this occasion, the Appellant did challenge the legality of the seizure before the Magistrates' Court, presumably on the basis that the seizure had been unlawful because duty had duly been paid in respect of the consignment. The challenge was, however, withdrawn for unspecified reasons.

20. A request was made for restoration of the goods seized on 27/28 March on 12 April 2012; that request was refused in a decision dated 16 June 2012, and the review subsequently requested was made by the HMRC officer, Mr. David Paton, on 31 August 2012, upholding the decision and refusing restoration.

21. The present two Appeals were respectively appeals against the refusals to restore the goods being unloaded from the lorries on 16 December 2011 and 27 March 2012. No condemnation proceeds had been commenced in respect of the former. They had been commenced, but then abandoned, in the case of the latter. No issue arose in either of these Appeals in relation to those other goods detained, and subsequently seized, that I mentioned in paragraph 12 above.

The various contentions advanced by the Appellant in correspondence and in its Notices of Appeal in the two cases

22. The whole tenor of the grounds on which the Appellant's representative (not the counsel who represented them at the hearing before me) sought to persuade HMRC that the goods should be restored to the Appellant, was not to the effect that the Appellant's innocence was being proved in any cogent manner, or that exceptional circumstances were demonstrated, justifying restoration contrary to HMRC's normal policy not to restore goods legally seized. The relevant letter on behalf of the Appellant, sent on 27 January 2012, contained the following claims:

> *"Restoration request*
>
> *Neither we nor our client has been provided with any reasons behind the seizure of the Goods. The Notice provided by Officer Read contains no particularisation whatsoever in respect of any allegations that HMRC believes would justify the seizure in the first place. It is completely unacceptable for such a draconian power to be exercised in the absence of any legal justification or evidence.*
>
> *Our client therefore requests that the Goods be restored to it forthwith, as it appears HMRC has absolutely no justification whatsoever for having seized these goods in the first place".*

23. The review decision of 20 April 2012 pointed out that the Appellant had done nothing to provide the requested invoices to demonstrate its ownership of the goods on the DeltaBond

report (that referred to completely different parties) by the date of the formal seizure of the goods. The principal ground then given for confirming the decision not to restore the goods was that there was still no evidence that the goods detained had belonged to the Appellant. In other words there was no form of invoice or evidence concerning the transfer of the goods from the named owner in the DeltaBond report to the Appellant. In evidence before me, Mrs. Bines confirmed that she had been influenced by a belief that duty had not been paid in respect of the goods, and of course by the date of her review, this was, we now appreciate from the decisions referred to in paragraph 7 to 9 above, a conclusion that she was bound to reach, regardless of any actual facts. In the event no actual facts had been advanced to relate any payment of duty to the beer seized.

24. The more noteworthy feature of the review decision is that because no single relevant contention had been advanced on behalf of the Appellant, it can certainly not be said that the review decision unreasonably turned down any ground on which it was claimed that there were exceptional circumstances justifying restoration. None of the correspondence, and even the subsequent grounds advanced in the Notice of Appeal had done anything other than complain that HMRC had not themselves proved "non-ownership" of the goods by the Appellant or "non-payment" of the duty. The Appellant seemed to contemplate that the burden of proof to justify seizure and non-restoration were on HMRC, which is quite clearly wrong. The statute puts the burden of proof on the Appellant. Even in the Appeal before me, nobody was advancing any evidence on behalf of the Appellant. It was a complete mystery to me whether there was or was not some explanation for the vague claim (asserted by Mr. Frank in producing the DeltaBond document from his pocket on the night of 16 December) that the seized goods were those referred to in the bond; whether the seized goods were goods owned by the Appellant at the time of detention, or whether the goods had indeed been subjected to the correct duty.

25. The circumstances relating to the seizure of the beer at Millenium's premises on 27 March 2012 were somewhat different, in that no documentation of any sort was produced to show that that beer had suffered duty. Much of the complaint advanced on behalf of the Appellant seemed to relate to the way in which the HMRC officers had been influenced by evidence of the lorry driver who was not employed by the Appellant, and the respect in which his evidence appeared to conflict with the officers' own belief that the lorry that left Calais at 5.45 a.m. on the morning of 27 March had been manifested to be carrying beer not timber flooring. Again, not a single contention appears to have been advanced demonstrating total innocence on the part of the Appellant; confirmatory evidence based for instance on the beer having plainly been bought at "a full duty paid price" for the relevant wholesale quantities, or any other evidence to demonstrate exceptional circumstances justifying restoration.

My decision

26. My decision is that there is no ground on which to conclude that there was anything unreasonable in the decisions and review decisions taken by HMRC officers not to restore the beer to the Appellant. Once beer has been lawfully seized it is incumbent on the person claiming restoration to advance compelling reasons as to why the normal policy of HMRC not to restore lawfully seized goods should be modified, and the goods be restored to their owner. In the present case, the Appellant has principally complained about the irrelevant fact that HMRC officers have not themselves proved "non-ownership" of the beer involved in the 16 December detention, and "non-payment" of the duty in respect of either seizure, and these complaints are simply irrelevant. No single argument has been advanced as to why HMRC's normal practice of refusing restoration should be varied in this case. It may have been suggested that the seizure of the beer adversely affects the Appellant's profitability, and

the seizure may have prevented the Appellant from supplying the beer to a customer, but these matters are self-evident in any seizure, and cannot possibly constitute exceptional circumstances. No evidence of any sort was advanced before me by the Appellant, and in the documentation no contention had been advanced that could possible lead me to conclude that the decisions not to restore the goods had been unreasonable in any way.

27. Both Appeals against non-restoration are accordingly dismissed. Perhaps I should make it clear that I obviously regard it as irrelevant that the two reviewing officers took into account actual non-payment of duty (when they should now regard that as a closed issue on account of the statutory fiction). Since that evidence and any regard paid to it merely tallied with the statutory fiction, it does not mean that the feature of considering this irrelevant material renders the decisions unreasonable.

The late claim to advance documentary proof of payment of duty

28. I ended the hearing on 27 May believing that I would need in this Decision to justify my decision to refuse the Appellant's requested adjournment, and the opportunity in other words to advance new evidence to the effect that the duty had been paid. Since no such evidence had been referred to in any of the papers preceding the hearing, and nobody was intending to give any evidence on behalf of the Appellant at the hearing, I consider that I would have been justified in refusing the adjournment in any event, simply on the ground that it was too late to advance evidence, the nature of which was anyway totally unclear to me. Furthermore I considered that when HMRC officers had attended the hearing by travelling from Glasgow and Maidstone respectively, it would have been improper to adjourn the hearing for evidence that appeared to have nothing to do with whether the reviews conducted by the two reviewing officers had been unreasonable in any way. The most that the Appellant could have asserted would have been that, had they been able in future to produce evidence that they had so far failed to mention in any way for at least 3 years, they might have demonstrated that, had the reviewing officers been able to consider that evidence, and had they rejected it, their decisions might then have been unreasonable. Not considering evidence that had still not been mentioned until the hearing could obviously have no bearing on the challenge mounted against the two review decisions.

29. Now that the full effect of the two decisions referred to in paragraphs 7 to 9 above is appreciated, the decision to refuse the adjournment becomes all the more obvious because it immediately becomes clear that the suggested evidence is something that the reviewing officers should definitely disregard because they, like the First-tier Tribunal, are compelled by the statutory fiction to treat there as having been no payment of duty.

30. It follows from this conclusion that the suggestion made tentatively (and indeed not totally rejected by HMRC) that HMRC might reconsider matters, albeit without legal obligation to do so, if the Appellant was able after the hearing to advance proof of duty payment, cannot now sensibly be pursued. This is because any HMRC officers receiving this evidence would be bound to ignore it, just as they should have ignored it once the statutory deeming provision deeming duty to have been paid had come into effect.

The somewhat unsatisfactory outcome

31. There have been many criticisms of the split jurisdiction, whereunder the claim that a seizure was illegal must be brought before the magistrates' court or the High Court within one month of seizure, and matters relating to any unreasonable feature of restoration decisions fall within the jurisdiction of the First-tier Tribunal.

32. The two decisions referred to in paragraphs 7 to 9 above that clearly bind the First-tier Tribunal, have a somewhat wider relevance than the mere jurisdiction of the First-tier Tribunal, and indeed a relevance that I surmise that HMRC had not initially appreciated. I accept that the review letter from Mrs. Bines said that she could not re-visit the closed issue of the deemed legality of the seizure, but she certainly said in evidence that the actual belief that the duty had not been paid had indeed largely contributed to her decision. More clearly still, Mr. Paton's review letter expressly referred to the lack of evidence of duty payment either at the time of seizure or since. Both officers had clearly paid regard to the actual facts and evidence, or rather absence of evidence, and they should now regard all such enquiry as irrelevant.

33. This leads of course to the slightly odd result that it might still be in order for HMRC officers to grant restoration in the situation where the duty had fraudulently been avoided, but where the later owner was completely innocent of this fact, and had somehow demonstrated exceptional circumstances, whereas it would not be permissible to allow restoration of the goods even if it became abundantly clear that the duty had been paid.

34. Whilst this outcome might be thought to be curious, to put it very mildly, it is worth observing that if the statutory fiction that the seizure was lawful had not been taken to extend to the notion that the duty was also deemed not to have been paid, there would still be a curious result. For the position would then have been, as was obviously implicit in the First-tier Decision in the *European Brand* case, that because it would be open to HMRC officers to restore the goods to a claimant if the duty was shown actually to have been paid, then if the First-tier Tribunal had jurisdiction in relation to whether decisions on that issue had been reasonable or not, this would have driven a coach and horses through the notion that the First-tier Tribunal should not have jurisdiction in relation to the whole issue of the legality of the seizure. Strictly the jurisdiction would relate not to the legality of the seizure, but to the question of whether the goods should be restored to the owner or not, and implicitly to the key issue of whether the duty had been paid, but the end result might well be said effectively to reverse the effect of the statutory provision that deems the seizure to have been legal, and thus to have been rendered a closed issue.

35. The crucial passage of the decision in the *Jones* case that extends the statutory fiction concerning legality of seizure to deem the duty not to have been paid (and, for instance, cigarettes not to have been imported for "own consumption") is the closing sentence of item (7) in paragraph 71 of the Court of Appeal decision. There it is concluded that *"Deeming something to be the case carries with it any fact that forms part of the conclusion"*. In other words, deeming the seizure to have been lawful inevitably deems duty not to have been paid, and there to have been no legal justification (such as "own consumption") for the non-payment of the duty. Whilst this extension of the deeming notion may not inevitably have had to follow, because the conclusion could still have been that *"seizures are deemed lawful, once they have not been challenged in the magistrates' courts in the requisite one month period, regardless of whether the duty had been paid or not and regardless of whether any other ground might potentially have justified non-payment of duty"*, the clear authority that now binds the First-tier Tribunal, and of course HMRC in actually conducting reviews is that this is not the right interpretation of the statutory fiction.

36. When the Court of Appeal observed in the *Jones* decision that it was unfortunate that the then Respondent had chosen not to appear or be represented, there must remain some question as to whether or not it was appropriate to extend the deeming provision in the way that the Court of Appeal chose to do, or whether equally good sense of the provision might have been achieved by the interpretation suggested towards the end of the previous paragraph. It is also possible that the Court did not have the full benefit of argument in

relation to the existing authorities in relation to the scope and in particular the extent and effective extension of the effect of deeming provisions. For present purposes all this is now academic because it is clear that these two decisions bind the First-tier Tribunal and they also bind HMRC in their practice.

37. It does appear fair to observe, however, that the result of the decisions that I recorded in paragraph 33 is fairly extraordinary, and it will also require a revision of HMRC's practice in considering requests for restoration of goods to their owner (as least in contrast to the present practice, as it was explained to me). It also appears fair to conclude that these two decisions, and the effect of them now made quite clear by Mr. Justice Morgan's decision, may rather increase the criticism of the split in jurisdiction that many have already addressed.

Right of Appeal

38. This document contains full findings of fact and the reasons for our decision in relation to each appeal. Any party dissatisfied with the decision relevant to it 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.

HOWARD M. NOWLAN
TRIBUNAL JUDGE

RELEASE DATE: 3 June 2014