



TC05683

Appeal number: TC/2016/03399

Excise duty – application for strike-out – jurisdiction of Tribunal – tobacco brought in from another Member State – minimum penalty – no special circumstances – no possibility of success – strike-out application granted qua excise duty – penalty stayed pending the outcome of HMRC v Jacobson in the Upper Tribunal

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ROLAND DAVID WINLOW

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ANNE SCOTT

Sitting in public at North Shields on Wednesday 15 February 2017

The Appellant in person

Mr A Senior of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Background

1. The appellant appealed against the review decision dated 1 June 2016 in respect of an excise duty assessment in the sum of £1,263 and a wrong doing penalty in the sum of £271.
2. The grounds of appeal were that the goods were for personal use and he had not challenged the seizure on the basis that he could neither read nor write properly. Further he believes that he has been over zealously “punished” because he had been irritable with the officers as a result of anxiety about his poor health.
3. The respondents (“HMRC”) consented to the appeal proceeding without payment of duty on the grounds of hardship. The appellant is a pensioner with limited means.
4. On 17 October 2016 HMRC lodged an application with the Tribunal to strike-out the appeal either under Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Rules”) on the basis that the Tribunal did not have jurisdiction or on the alternative that the appeal be struck out under Rule 8(3)(c) of the Rules on the basis that there is no reasonable prospect of the appellant’s case succeeding. This hearing was to consider that application only.

The Facts

5. There is no dispute about the facts. On 11 April 2014 the appellant had travelled back from France and was stopped at Dover Port and questioned by a UK Border Force officer. The appellant confirmed that he had purchased some tobacco and a search of his bags revealed 7 kilograms of hand rolling tobacco.
6. The Border Force officer suspected that the goods had been imported for commercial purpose and offered the appellant the opportunity to stay for interview either then or later. By his own admission the appellant was irritable with the officer and left before he could be handed the appropriate seizure documentation.

The Law

7. The statutory provisions relating to the seizure of goods on importation into the UK are set out in the Customs & Excise Management Act 1979 (“CEMA”). Subject to certain exceptions, Section 49(1)(a) CEMA provides that “where ... any imported goods, being goods chargeable on their importation with customs or excise duty, are, without payment of that duty ... in the UK ... those goods shall ... be liable to forfeiture”.
8. Section 139(1) CEMA then provides:-
 - “(1) Anything liable to forfeiture under the Customs & Excise Acts may be seized or detained by any officer or constable or any member of Her Majesty’s Armed Forces or Coastguard”.

9. The procedure for a person to challenge the seizure of goods is set out in Schedule 3 CEMA. The relevant provisions for present purposes are paragraphs 3 and 5 of Schedule 3 and in so far as relevant read as follows:-

5 “3. Any person claiming that anything seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of the date of the seizure, give notice of his claim in writing to the Commissioners at any office of Customs & Excise.

10 5. If on the exploration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of anything, no such notice has been given to the Commissioners, ... the thing in question shall be deemed to have been duly condemned as forfeited”.

Discussion

15 10. Mr Winlow did not challenge the seizure of the tobacco. The fact that no claim was made to the tobacco in the Magistrates Court means that the tobacco is deemed to be for commercial use, and is forfeit to the Crown. I understand that the appellant still argues that the tobacco was for his personal use but as a matter of law it has to be treated as being for commercial use and therefore liable to excise duty. Shortly put, the Tribunal has no jurisdiction to hear evidence about whether the goods were intended for personal or commercial use and the authorities for that are *HMRC v Jones and Jones*¹, *HMRC v Nicholas Race*² and *Staniszewski v HMRC*³.

20 11. HMRC also referred us to the decision in *European Brand Trading Ltd v HMRC*⁴. That decision made it absolutely explicit that the Tribunal has no discretion and must apply *HMRC v Jones*.

25 12. For all these reasons and having due regard to the Tribunal Rules I grant the application for strike-out of the appeal in regard to excise duty since there is no reasonable prospect of the appellant’s case or any part of it succeeding.

30 13. As far as the penalty is concerned Mr Winlow told the Tribunal that HMRC had written to him stating that the penalty would be offset against the excise duty. Mr Senior had no instructions in that regard. The appeal was adjourned for confirmation of the position which has now been received. The original penalty was £296 but reduced on review by £25 to £271. HMRC had agreed to offset the £25 against the excise duty. The remaining penalty is outstanding.

14. In those circumstances HMRC’s application that the Tribunal stay the appeal in regard to the penalty pending the decision of the Upper Tribunal in *HMRC v Susan Jacobson* UT/2016/0224 is granted.

¹ 2011 EWCA Civ 824

² 2014 UKUT 331

³ 2016 UKFTT 128 (TC)

⁴ 2016 EWCA Civ 90

15. 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.

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**JUDGE ANNE SCOTT
TRIBUNAL JUDGE**

RELEASE DATE: 27 FEBRUARY 2017

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