



[2021] UKFTT 0337 (TC)

TC08271

EXCISE AND CUSTOMS DUTY – importation of tobacco products – application to strike out appeal against assessment to excise duty – allowed - penalty - whether amount of penalty correct and valid – yes - appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/06353

BETWEEN

JAMIE HODGSON

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY’S REVENUE AND CUSTOMS**

Respondents

TRIBUNAL: JUDGE KELVAN SWINNERTON

The Tribunal determined the appeal on 1 June 2021 without a hearing given that both parties had agreed to the matter being determined on the papers. The Tribunal considered the Notice of Appeal of the Appellant of 9 October 2018, the Statement of Case of the Respondents dated 8 August 2019 and all of the other documentation provided. HMRC provided a bundle of documentation that consisted of, amongst other things, a witness statement of Officer Rajen Shah dated 12 December 2019 and a witness statement of Officer Joseph Archer dated 7 January 2020.

DECISION

INTRODUCTION

1. This is an appeal against a review decision dated 4 September 2018 which upheld the Excise Duty Assessment (“the Assessment”) in the amount of £2367 and a Wrongdoing Penalty (“the Penalty”) in the sum of £911 issued on 5 July 2018.

THE FACTS

2. On 8 April 2018, Mr Hodgson (“the Appellant”) arrived at Luton Airport on a flight from Sofia, Bulgaria (flight W64301).

3. The Appellant was stopped in the blue channel at the airport. The blue channel is a facility for intra-EU travellers existing the baggage collection area.

4. The Appellant was searched by Officer Rajen Shah of UK Border Force.

5. The Appellant informed Officer Shah that he had 30 cartons (6000 cigarettes) in his bags.

6. A search of the bags of the Appellant revealed 6800 cigarettes (34 cartons) and 2 kilograms of hand-rolled tobacco (HRT).

7. Following an interview with the Appellant, Officer Shah was satisfied that the cigarettes and HRT were held for commercial purposes and they were seized under section 139 (1) of the Customs and Excise Management Act 1979 (“CEMA”) as being liable for forfeiture under Regulation 88 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010.

8. The Appellant was issued with a Notice of Seizure dated 8 April 2018 and with accompanying documents.

9. The Notice of Seizure and accompanying documents explained that the Appellant could contest the legality of the seizure of the cigarettes and the HRT in a magistrate’s court by sending a notice of claim within one month of the date of the Notice of Seizure.

10. The Appellant did not contest the legality of the seizure of the cigarettes or the HRT.

11. The review decision of HMRC dated 4 September 2018 confirmed the Assessment and the Penalty.

THE LAW

12. Section 139 of the Customs and Excise Management Act 1979 (Provisions as to detention, seizure and condemnation of goods, etc) states:

(1) Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard.

[(1A) A person mentioned in subsection (1) who reasonably suspects that any thing may be liable to forfeiture under the customs and excise Acts may detain that thing.

13. Schedule 3 of CEMA (Provisions Relating to Forfeiture) states:

3. Notice of Claim

Any person claiming that any thing seized as liable to forfeiture is not so liable shall, within one month of the date of 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 and excise.

5. Condemnation

If on the expiration of the relevant period under paragraph 3 for the giving of notice of claim in respect of any thing no such notice has been given to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with, the thing in question shall be deemed to have been duly condemned as forfeited.

14. Section 12 of the Finance Act 1994 states:

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 excise; and

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

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

15. Schedule 41 (Penalties: Failure to Notify and Certain VAT and Excise Wrongdoing) of the Finance Act 2008 states:

(1) A penalty is payable by a person (P) where-

(a) after the excise point for any goods which are chargeable with a duty of excise, P acquires possession of the goods or is concerned in carrying, removing or depositing, keeping or otherwise dealing with the goods, and

(b) at the time when P acquires possession of the goods or is so concerned, a payment of duty on the goods is outstanding and has not been deferred.

16. Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009:

(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal-

(a) does not have jurisdiction in relation to the proceedings or that part of them; and

(b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.

DISCUSSION

17. The first issue – Jurisdiction of the Tribunal in respect of the assessment to excise duty

18. HMRC contend that, because the Appellant did not challenge the lawfulness of the seizure and forfeiture of the cigarettes and the HRT through the procedure available at the Magistrates court (referred to above), it is no longer open to the Appellant to contest the assessment to excise duty made in the amount of £2367. The burden of proof that this part of the appeal should be struck out lies with HMRC.

19. HMRC, in its Statement of Case and Submissions, refers to the decision of the Court of Appeal in the case of *Revenue and Customs Commissioners v Jones and another* [2011] EWCA Civ 824 and to the decision of the Upper Tribunal in the case of *The Commissioners for Her Majesty's Revenue and Customs v Nicholas Race* [2014] UKUT 0331 (TCC). In the *Jones* case, ultimately the condemnation of the goods was not opposed and the Court of Appeal decided that the First-tier Tribunal had to take it that the goods had been duly condemned as illegal imports.

20. The Appellant states, amongst other things, that he did not do anything wrong, that he was just a holidaymaker, that the cigarettes and the HRT were for his own personal consumption and for his wife's personal consumption, that he and his wife are both smokers, that he does not owe anything because the cigarettes and HRT were taken away from him and confiscated, and that he paid duty on the cigarettes and HRT in Bulgaria.

21. In his letter dated 20 June 2018, the Appellant states that he told the officer at the airport that he would challenge the seizure in court and the officer told him that, if he did so, he would lose and would have to pay HMRC's costs of £3500 which is why the Appellant chose not to oppose the seizure and forfeiture of the cigarettes and the HRT.

22. Whatever was or was not said to the Appellant at the airport, it is indisputable that the Appellant did not oppose the seizure and forfeiture of the cigarettes and the HRT and that they were forfeited. The Appellant had the opportunity, and was fully aware of the opportunity, to challenge that the cigarettes and HRT were for a commercial purpose rather than for a personal use but he did not take up that opportunity. Consequently, in accordance with the decisions in *the cases of Jones and Race*, I find that the Tribunal does not have jurisdiction to hear an appeal in respect of the assessment to excise duty on those forfeited cigarettes and HRT and I direct that this part of the appeal is struck out under Rule 8(2)(a).

23. The second issue – the Penalty

24. The burden of proof rests with HMRC to establish a prima facie case that the conditions for issuing a penalty are satisfied and that the penalty amount is correct. Once HMRC has satisfied that burden of proof, the burden of proof is then upon the taxpayer to provide evidence to rebut HMRC's case. The standard of proof is assessed on the balance of probabilities.

25. The witness statement of Officer Shaf details that the Appellant stated that he had been away to Bulgaria just for the day as he has property there and was looking to purchase another property. The Appellant stated that he resided in Lancashire and worked as a van driver.

26. HMRC, in its Statement of Claim, refer to the Appellant having intentionally misled the Border Force officers about the amount of cigarettes that he was carrying and state that he made no mention at all of carrying any HRT. It is stated that the Appellant confirmed that he packed his own bags such that he would have known what his bags contained. It is not in dispute that the Appellant was carrying goods that were chargeable with a duty of excise and I accept that the Appellant's wrongdoing was deliberate but not concealed.

27. In this case, the potential lost revenue (or PLR) is stated to be the duty amount of £2367. A percentage of this amount was calculated as the Penalty. That percentage was 38.5% which resulted in a Penalty of £911. In arriving at that figure, a reduction of 20% was allowed for Telling, a reduction of 40% for Helping and 30% for Giving. In any event, the Penalty was reduced further to £497 on review as detailed in the review conclusion letter.

28. I am satisfied that these reductions are correct in the circumstances and I do not consider that there is any reason to change the reductions. I am also satisfied that the Penalty was validly issued and is correct.

DECISION

29. I direct that the part of the appeal relating to the assessment to excise duty of £2367 is struck out.

30. The Penalty in the sum of £497 is confirmed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

31. 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.

**KELVAN SWINNERTON
TRIBUNAL JUDGE**

RELEASE DATE: 14 SEPTEMBER 2021