[2019] UKFTT 306 (TC)

TC07134

Appeal number: TC/2017/08274

EXCISE DUTY – tobacco – person holding – employee – whether liable – yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

QAIS MAJEED ALI **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE FAIRPO
MR JULIAN SIMS

Sitting in public at London on 29 November 2018

The Appellant appeared in person

Ms Patel, presenting officer for the Respondents

DECISION

Introduction

1. This is an appeal against an assessment for £55,470 issued on 24 July 2017 under Regulation 6(1)(b) of the Excise Goods (Holding Movement and Duty Point) Regulations 2010 ("the Regulations"), in relation to tobacco seized from a van and lock up unit in London on 29 July 2016.

2. A wrongdoing penalty issued later was not appealed.

Appellant's case

3. The appellant appealed the assessment on 26 October 2017, following a review of the decision to impose the assessment. His grounds of appeal were, in summary:

(1) That he had purchased the tobacco from a known and reputable place and had paid for the tobacco plus the exact VAT, and he had all relevant receipts. He was very surprised when he was informed that the seller was not legal.

(2) The weight of the tobacco was estimated by HMRC and the appellant had further evidence of the actual weight being 100kg, unlike the HMRC estimation.

4. In his letter requesting a review of the decision to impose the assessment, the appellant stated:

(1) At the time of purchase he was under the impression that the goods were legal in the UK and he had receipts which clearly showed the VAT number of other information.

(2) The stated weight of 515kg was utterly unrealistic and he was very sure that the estimated weight would be 80-100kg.

(3) The seizure of the goods severely affected the business.

5. In the hearing, the appellant added the following submissions:

(1) The lock up unit was not his property and was owned by Palm Palace Limited ("Palm Palace"), which owned a shisha café. He produced a copy bank statement for an account in the name of Palm Palace, showing a direct debit payment to the storage company which owned the lock up unit.

(2) At the time of the seizure, he was employed by Palm Palace on a part-time basis as a driver. In previous years he had previously been a director of Palm Palace but had had to step down for health reasons. He has strong migraines, asthma and a disk problem in his back.

(3) His work involved, from time to time, visiting a shop in Queensbury Market at the request of a Palm Palace director to buy tobacco.

(4) He did not know why the rental agreement for the lock up unit was in his name, rather than the name of Palm Palace.

(5) The van was also owned by Palm Palace and had their logo on the side.

(6) Palm Palace had said that they would deal with the problem of the seizure but had not done so.

(7) He did not speak very good English and so may have answered wrongly when questioned by HMRC at the time of the seizure.

(8) He believes that HMRC exaggerated the amount of tobacco seized.

6. Under cross-examination, the appellant stated that the storage unit agreement was in his name because he was the driver for the company and was responsible for the unit, for taking tobacco and other goods to be stored there.

HMRC's case

7. HMRC Officer Ward provided the following evidence:

(1) Prior to the seizure of the tobacco from the van and the unit on 29 July 2016, the appellant had confirmed that the van and everything in it was his.

(2) The van had approximately 50 kgs of tobacco in it, which the appellant said had been purchased 6 or 7 months ago at Queensway Market, as well as at Kilburn. The appellant said he had receipts.

(3) The lock up unit held a large quantity of shisha tobacco with Arabic writing on the packets:

(a) 4 shrink wrapped boxes weighing approximately 200kg

(b) 7 plastic boxes weighing 40kg each

(c) 1 box weighing approximately 15kg

(4) The appellant said that, as far as he knew, it was all duty paid and he had proper receipts. He said he had paid £25 per kg for the tobacco.

(5) The goods were seized because various factors indicated that UK duty had not been paid: Queensway Market is a well-known supplier of non-duty paid shisha tobacco; the invoices did not cover the stock in the unit; the purchase price was below the duty price of shisha tobacco; the brand of tobacco in the unit was not the type sold at retail in the UK.

(6) At a meeting with the appellant at the lock up unit on 1 August 2016, the appellant provided three invoices dated 10 March 2016, 15 January 2016 and 10 May 2016. He stated that the tobacco in the unit and van would last between twelve and eighteen months.

(7) The weight of the goods seized was subsequently confirmed to be 515 kgs. This weight includes the weight of a number of small plastic tubs; the goods were removed from the larger containers.

(8) The officer subsequently visited the location in Queensway Market where the goods were said to have been purchased and established that the current business at those premises has been in occupation only since February 2017; the previous occupant is no longer in the UK.

8. Officer Todd also provided evidence that the duty rate of the tobacco involved was £107.71 per kilogram.

9. HMRC also produced the following documentary evidence:

(1) A storage agreement, with a "move in date" of 1 November 2015 in relation to the lock up unit, in the name of the appellant.

(2) An insurance application form, and a "proof of insurance" document, in relation to the lock up unit, in the name of the appellant.

(3) A direct debit instruction form in relation to the lock up unit, with details of a bank account in the name the appellant. The bank account number and sort code on the form were the same as those on the bank statement produced by the appellant at the hearing which was in the name of Palm Palace.

(4) An invoice from "The Price 30" to "Palm Palace Restaurant" dated 15 January 2016 for 70kg of tobacco with a unit price of £30 and a total price of £2100 plus VAT of £420.

(5) An invoice from "The Price 30" to "Palm Palace Restaurant" dated 10 March 2016 for 65kg of tobacco with a unit price of £30 and a total price of £2100 plus VAT of £390.

(6) An invoice from "The Price 30" to "Palm Palace Restaurant" dated 10 May 2016 for 50kg of tobacco with a unit price of £30 and a total price of £1500 plus VAT of £300.

10. HMRC noted as follows:

(1) The seizure of the goods was not contested at the magistrates' court and the goods are therefore deemed condemned as liable to forfeiture.

(2) It is not disputed that the appropriate warning letter was issued to the appellant, nor that the assessment was made in time.

11. HMRC submitted that an excise duty point had arisen under Regulation 6(1)(b) of the Regulations as the goods were held outside a duty suspension arrangement as the lock up unit was not a bonded warehouse and UK excise duty on the tobacco had not been paid, relived, remitted or deferred under a duty deferment arrangement.

12. HMRC submitted that the burden of proof was on the appellant, under s154(2) Customs and Excise Management Act 1979 to demonstrate that UK duty had been paid on the tobacco and he had not done so. The invoices produced do not cover all of the tobacco seized and contain a number of discrepancies:

(1) There is no VAT number on the invoices, although they purport to charge VAT;

(2) The duty on one kilogram of shisha tobacco is £107.71, but the price on the invoices is £30 per kilogram;

(3) Two of the invoices have the same sub-total (£2100) but are for different amounts of tobacco (65kg and 70kg).

13. HMRC also submitted that the branding on the tobacco, in Arabic, is not consistent with the version of the product which is available for retail sale in the UK. It was also submitted that the tobacco was shrink-wrapped in a manner consistent with a smuggling attempt.

14. HMRC submitted that the appellant was liable to pay the duty as the person holding the excise goods at the first identifiable time that they were held, duty unpaid, outside a duty suspension arrangement, under Regulation 10(1) of the Regulations.

15. HMRC submitted that "holding" means physical possession and control of the goods and the appellant had confirmed when questioned that he owned and purchased the goods. Further, he was not only a driver but had rented the storage unit and completed the direct debit agreement for the unit. The appellant had confirmed that he had purchased the tobacco and was handling the tobacco at the time of seizure.

16. The appellant's submission that he was surprised that the seller was not legal was not relevant to whether he was holding the goods. HMRC submitted that the appellant should have been alerted to the non-UK duty paid status of the goods given the very low price on the invoices.

Discussion

Whether duty had been paid on the goods

17. The burden of proof is on the appellant to show that duty has been paid on the goods (s154(2) Customs and Excise Management Act 1979).

18. The appellant argues that he had no reason to believe that duty had not been paid on the tobacco, as he had receipts for the purchases and had no reason not to believe that the supplier was acting legally.

19. We do not consider that this is a credible argument: the receipts show a per kilogram price for tobacco of less than 30% of the UK duty payable on that tobacco. We consider that the appellant, having been involved with the Palm Palace, a shisha café which sells approximately 500 kg of such tobacco in 12-18 months according to the appellant's evidence, in various roles (including that of director) for some years, would be familiar with the UK-duty paid prices for this type of tobacco and therefore should have known that the receipts were not for UK duty-paid tobacco.

20. In addition, the receipts produced by the appellant cover only 185kg of the 515kg of tobacco seized. No evidence has been provided by the appellant as to the duty on the balance of the tobacco. The appellant has argued that HMRC have overstated the weight of the tobacco but has provided no evidence as to why his

estimate of 80-100kg should be preferred. In his grounds of appeal, the appellant states that he would provide "further evidence" of the actual weight of the tobacco seized but no such evidence has been provided. We therefore find that the weight of the tobacco seized was 515 kg, as recorded by HMRC.

21. In addition to the unusually low price, HMRC submitted that the appellant would have known that the tobacco was non-UK duty paid because it was branded in a manner which is not used for that product in the UK retail trade sector and was wrapped in a manner consistent with smuggling. This was not disputed by the appellant.

22. Having considered the evidence, we find the appellant has not shown that UK duty had been paid on the tobacco at the time of seizure and, on the basis of the evidence, we find that duty had not so been paid. As the tobacco was, at that time, held outside a duty suspension arrangement and UK duty had not been paid, relieved, remitted or deferred under a duty deferment arrangement, the tobacco was "released for consumption" under Regulation 6(1)(b) of the Regulations at the time of seizure.

23. There was, therefore, an excise duty point at that time and so a liability to duty in respect of the tobacco. The rate of the duty charged was not disputed.

Whether the appellant was the person holding the tobacco at the relevant time

24. The appellant's argument, in the hearing, was that he was simply acting as an employee of Palm Palace. He did not specifically state that this meant that he should not be regarded as "holding" the tobacco and so not having any liability in relation to the assessment, but we took his submissions to have that effect.

25. We noted that the appellant had made no such argument in his correspondence with HMRC, particularly his letter to HMRC of 16 August 2017 requesting a review of the assessment, or in his grounds of appeal to this tribunal. Indeed, in his letter to HMRC, the appellant refers only to himself in relation to the goods: "I purchased the goods and paid all relevant taxes and … have kept copies of all receipts for myself".

26. In his grounds of appeal, the appellant again refers to himself as the purchaser of the tobacco, and the person paying for it. He also asks for the assessment to be waived so that he can "continue with our business which is our only income".

27. The appellant did not dispute that he had physical possession of the tobacco, both with regard to the tobacco in the unit and in the van. Although the appellant argued in the hearing that he was simply a driver for Palm Palace, he also agreed in the hearing that he was responsible for the lock up unit and van and that he had purchased the tobacco which was stored in the unit, some of which he was transferring to the van at the time of the seizure.

28. We are aware that there is a question in case law as to whether a driver who does not know that the goods in their possession are excise goods can be regarded as "holding" those excise goods for the purposes of certain excise legislation (see, for

example, the case of *Perfect* [2019] EWCA Civ 465, heard after this case and in which the Court of Appeal referred the question to the European Court of Justice).

29. In this case, however, we consider that it is clear that the appellant knew that he was in physical possession of tobacco and, as set out above, we consider that he should have known from the prices paid for the tobacco that it was not UK duty paid.

30. We therefore find that the appellant was holding the tobacco within the meaning of Regulation 10 of the Regulations and is therefore the person liable to pay the duty when the goods are released for consumption.

Whether there was an earlier release for consumption

31. We considered the possibility that there might have been an earlier point in the supply chain of the tobacco which could be established, where a different person might be liable for the duty. The only entity which can be identified earlier in the supply chain from the evidence provided is the trader which provided the three receipts, "The Price 30" in Queensway. That trader is no longer in business.

32. Following the decision in *B&M Retail* ([2016] UKUT 0429 (TC), at §155-157), we consider that it is clear that the fact that earlier excise duty points must have occurred does not preclude HMRC from assessing the appellant to excise duty, as it is unable to assess any person involved in such earlier excise duty points.

Conclusion

33. It follows from our conclusions that the assessment was correctly made and the appeal is therefore dismissed.

34. 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: 10 MAY 2019