



Neutral Citation: [2024] UKFTT 00215 (TC)

Case Number: TC09102

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Excise duty – seizure and condemnation of vehicle – appeal against refusal to restore the vehicle – whether or not the decision was unreasonable –no – appeal dismissed

Appeal reference: TC/2022/13556

Heard on: 27 February 2024
Judgment date: 11 March 2024

Before

**TRIBUNAL JUDGE NEWSTEAD TAYLOR
MISS SUSAN STOTT**

Between

MR SAFIR AHMED

Appellant

and

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS
Respondents**

Representation:

For the Appellant: Mr Safir Ahmed

For the Respondents: Mr Rupert Davies of counsel

DECISION

INTRODUCTION

1. The Appellant (Mr Ahmed) appeals the Respondents' review decision ("the Review Decision"), dated 6 September 2022, refusing restoration of a Volkswagen Golf ("the Vehicle") following its seizure on 2 July 2022 and a request for restoration.

2. We were provided with and referred to the Respondents' Skeleton Argument, a Hearing Bundle of 75 pages and an Authorities Bundle of 77 pages.

EVIDENCE AND FINDINGS OF FACT

3. On 10 February 2023, Judge Bailey directed witness statements not later than 14 April 2023. The Appellant has not provided any witness statements to the Respondents or to the First-tier Tax Tribunal ("the Tribunal"). In the circumstances and with the Respondents' agreement, we treated the Appellant's emails dated 2 July 2022, 4 July 2022, 14 July 2022, 7 August 2022 and the Grounds of Appeal as the Appellant's evidence. The Respondents provided Officer Summers' witness statement.

4. We heard oral evidence from the Appellant and Officer Summers. We explained the privilege against self-incrimination to the Appellant. Specifically, we informed him that he was not compelled to provide information which might incriminate him in any potential or current criminal proceedings in England and Wales. The Appellant was cross-examined by Mr Davies and answered our questions. The Appellant's evidence was a mixture. At times, he was frank and candid. At other times, he provided lengthy responses which failed to answer the question asked. At still other times, he failed to explain inconsistencies in his evidence satisfactorily, such as who he bought the Vehicle from and where the money came from to pay for his sister's funeral expenses. On a few occasions, he became aggressive in response to questions. Whilst we acknowledge and take into account the pressure of and stress associated with giving evidence in the Tribunal, we consider that the Appellant failed to provide a credible and complete account. Officer Summers was cross-examined by the Appellant. We are satisfied that Officer Summers was doing his best to assist the Tribunal. Accordingly, as to any factual disputes, we prefer, in the absence of any contradictory contemporaneous documentation, the Respondents' evidence. On the basis of all of the evidence, we make the following findings of fact on the balance of probabilities.

5. The Appellant is not a smoker.

6. At all material times, the Appellant was aware that tobacco products were subject to excise duty in the United Kingdom, but not in Europe making them cheaper to purchase in Europe.

On 30 January 2019, 3,800 cigarettes were seized from the Appellant at Stansted Airport on his arrival. On 29 August 2019, 1,200 cigarettes were seized from the Appellant at St Pancras. On 14 December 2019, 600 cigarettes were seized from the Appellant at Luton Airport. The Appellant contended that these cigarettes were for his 5 brothers who are all heavy smokers. However, it is agreed that the Appellant did not appeal any of these seizures. The absence of condemnation proceedings means that we cannot go behind the deemed position that these were not for personal use and were not personal gifts and so we do not do so.

7. On 6 November 2020, the Appellant's younger sister passed away. The Appellant took responsibility for his sister's funeral and her memorial stone. It was the Appellant's position that he incurred a debt to the funeral house in respect of the funeral and his sister's memorial stone and that this was the reason for his activities on 2 July 2022. We do not accept this. We are not satisfied that the Appellant has provided a credible or consistent explanation in this

regard. For the following reasons, we do not accept that the Appellant had incurred a debt associated with his sister's funeral and memorial stone:

(1) In emails dated 2 July 2022 and 4 July 2022, the Appellant stated "*I admit I have made a mistake to carry cigarettes in my vehicle whilst entering Dover port from France I had a reason to do this after the loss of my young sister to pay for her funeral and cost to pay my debt on the 6/12/2020 of her loss date and I have not been able to find a job since then...*" These emails are consistent with the Appellant's position that his activities on 2 July 2022 were undertaken to settle funeral debts.

(2) In an email dated 14 July 2020, the Appellant stated that "*... i am regretful for my actions and this would never happen again after the tragedy of my young sister and the spendings i had no one to help me in these difficult moments after my loss of my young sister 6/11/2020 unexpectedly sudden loss i brought the vehicle specially for my mother to make her journey comfortable to my young sister final resting place on a daily basis none of my family members or any of my relatives have helped me to provide the final journey for my sister resting place and the funeral cost and am grateful that i had some savings in my account to pay for my sisters final journey to a private funeral company and cost of her memory no one in my family or relatives had no courage to make a difference to contribute towards the cost of my young sister...*" (Emphasis added) This email is inconsistent. It suggests that the Appellant used savings to pay for the funeral expenses.

(3) In an email dated 7 August 2022, the Appellant stated "*...am not in a position to afford to buy any car after spending the expenses for the funeral cost of my sister and her memory stone...*" (Emphasis added) Again, this email is inconsistent. We consider that the term 'spending' is not consistent with incurring a debt and is more consistent with the use of personal funds to pay for the funeral expenses, especially in light of the email dated 14 July 2022.

(4) In the Grounds of Appeal, dated 15 September 2022, the Appellant states "*I brought cigarettes in my vehicle to pay off the balance to who I borrowed after losing my young sister to pay her funeral and other fees and cost...*" This is the first time that the Appellant refers to borrowing money from a third party. No evidence was provided as to the identity of the third party or the terms of the loan.

(5) During cross examination, the Appellant was asked why, his sister having passed away on 6 November 2020, it was only in July 2022 that he was seeking to repay the alleged debt. In answer, the Appellant initially stated that he had taken money off someone to pay the cost. However, he later stated that the debt was owed to the funeral house, which was run by a friend of the family, which had waited for him to pay, that he had tried, without success, to obtain a loan from a bank and, again without success, had asked relatives.

8. In short, the Appellant's explanations have evolved over time. He did not provide any supporting evidence, such as a bill from the funeral home detailing the debt or a witness statement from the funeral home confirming that the debt remained due and owing in July 2022. He did not explain the inconsistencies either satisfactorily or at all. Accordingly, we are not satisfied, on the balance of probabilities, that the Appellant had incurred a debt associated with his sister's funeral and memorial stone.

9. On 16 December 2021, the Appellant was escorted to the Customs Channel at Luton Airport where he declared 2,400 cigarettes, following a search 5,940 cigarettes were seized. In

evidence, the Appellant contended that on 14 December 2019 and 16 December 2021, following difficulties with his passport, he had gone to the red channel at Luton Airport to declare the cigarettes where he had been informed of the duty payable which he had been unable to pay that day and, as he could not return and pay the next day, he had left the cigarettes. As the Appellant did not challenge this seizure, we do not take into account his alternate version of events. Further and for the avoidance of doubt, we note that the Appellant's explanation is inconsistent with the Respondents' account in the Review Decision, which is itself based on the Appellant's seizure history, namely the Appellant being escorted to the Customs Channel is inconsistent with him voluntarily attending. Also, as the Appellant did not challenge the seizure, we do not take into account his argument that the cigarettes were for personal use, being personal gifts for his brothers, as they were deemed not to have been by Paragraph 5 of Sch.3 CEMA.

10. On 23 December 2021, the Appellant acquired the Vehicle and, thereafter, he was recorded as the registered keeper as stated on the V5C. The reason for the purchase was to provide daily transport for his mother to visit his sister's resting place. However, the Appellant provided subtly differing versions as to the purchase of the Vehicle:

(1) In an email dated 2 July 2022, he referred to the Vehicle being his and to him having bought it from his brother by way of monthly instalments.

(2) In an email dated 4 July 2022, the Appellant referred to the Vehicle as being his brother's vehicle. He stated that he was buying the car from his brother by way of monthly instalments but was not the full owner, which is inconsistent with the V5C.

(3) In the first of two emails dated 14 July 2022, the Appellant attached the logbook, referred to the Vehicle as his personal car and confirmed that he bought the Vehicle from his final salary.

(4) In the second email dated 14 July 2022 and in an email dated 7 August 2022, he referred to buying the Vehicle from a brokers using his final salary.

(5) In the Grounds of Appeal dated 15 September 2022, he referred to the Vehicle as his.

(6) In response to a question from us pointing out the inconsistencies, he stated that he bought the Vehicle from a salvage company in Middlesbrough that he visited with his brother. The Vehicle was jointly owned, both he and his brother paying half. However, he bought his brother out as they were not on good terms. In short, this last explanation was an amalgamation of the earlier explanations.

11. Whilst we accept that the Appellant was the registered keeper of the Vehicle from 23 December 2021, we do not accept, again in light of the differing versions detailed above, that the Appellant provided credible or consistent evidence as to its purchase. Specifically, we are not satisfied, in the absence of any contemporaneous documents, as to who he purchased the Vehicle from or how.

12. On 4 May 2022, 1,400 cigarettes were seized from the Appellant at Gatwick Airport. The Appellant disputes that these were hidden in a green jacket.

13. On 21 June 2022, the Appellant was intercepted by Border Force at Manchester Airport. Despite declaring no goods, officers discovered and seized 1.5kg of tobacco and 1,200 cigarettes hidden in a black jacket.

14. In evidence the Appellant disputed that the cigarettes were hidden in jackets on 4 May 2022 and 21 June 2022. The Appellant did not appeal either seizure. Accordingly, we do not take into account his arguments either that the cigarettes were not hidden in jackets or that the

cigarettes were for personal use, being personal gifts for his brothers, as they were deemed not to have been by virtue of the absence of condemnation proceedings.

15. On 2 July 2022, the Vehicle was stopped at the Port of Dover by the Respondents' officers. The Vehicle was being driven by the Appellant. The Appellant was questioned by Officer Kerry, who was in uniform. The Appellant stated, so far as material, that he was returning from Austria where he had been visiting his ex-girlfriend. He sold mobile phones on Amazon imported from China. The Vehicle was his. Officer Kerry asked the Appellant if he had any cigarettes, tobacco or alcohol. The Appellant stated that he had 2 blocks of cigarettes, albeit that in evidence he could not recall saying this. We find that he did. We note that this is recorded in the Officer's notebook. Subsequently, the Vehicle was searched by the Respondents' officers who discovered 11,260 Rothmans cigarettes (being 563 packets) and 1.5kg of Golden Virginia tobacco (together "the Tobacco Goods") concealed within the Vehicle. Notably, the Tobacco Goods were hidden within the fabric of the Vehicle, behind the wheel arches, in the wing and behind the bumper. In evidence, the Respondent explained that he had asked a mechanic friend of his in Austria to help hide the Tobacco Goods in the Vehicle. The Appellant was present when his friend, using tools, took the Vehicle apart, for example, by removing the bumper, to hide the Tobacco Goods in the fabric of the Vehicle. Accordingly, the Tobacco Goods were deliberately placed in intricate places to avoid detection. They were held for a commercial purpose. In evidence, the Appellant confirmed that he intended to sell the Tobacco Goods to pay off the alleged debt but disputed that he was a smuggler as the funds were not for personal use or to fund a lavish lifestyle. The Tobacco Goods and the Vehicle were seized.

16. The Appellant was given a BOR 77 car condition report, a BOR156 seizure information notice, a BOR 162 warning letter about seized goods and a SEE 004C seizure of vehicle notice. Form BOR 156 confirmed, and we accept, that Notice 1, Notice12A and a warning letter were issued to the Appellant, albeit Notice 12A was not included in the Hearing Bundle. We do not accept the Appellant's evidence that he was told by the Respondents that he would only get a warning. On the balance of probabilities, we consider that the Appellant misunderstood a reference to the BOR162 which is headed Warning letter about seized goods.

17. The Appellant did not challenge the legality of the seizure of the Tobacco Goods or the Vehicle.

18. On 2 July 2022, the Appellant emailed seeking restoration of the Vehicle:

"I admit I have made a mistake to carry cigarettes in my vehicle whilst entering Dover port from france I had a reason to do this after the loss of my young sister to pay for her funeral and cost to pay my dept on the 6/12/2020 of her loss date and I have not been able to find a job since then I would like to sincerely apologies with what I have caused and this would never happen again and the impact what this will cause to me my car being seized and the amount I paid for the vehicle has I brought the car from my brother on monthly instalments if you could allow my vehicle to be release and I sincerely apology for my actions and if you could understand my actions thank you." (sic)

19. On 4 July 2022, the Appellant emailed again seeking restoration of the Vehicle:

"I admit i have made a mistake to carry cigarettes in my brothers vehicle whilst entering Dover port from france i had a reason to do this after the loss of my young sister to pay for her funeral and cost to pay my dept on the 6/12/2020 of her loss dated and i have not been able to find a job since then i would like to sincerely apologies with what i have caused and this would never happen again and impact what this will cause to me my brothers car being seized and the amount I pay for the vehicle has i brought the car from my brother on monthly instalments and still not the full owner if you could allow my vehicle to be released and i sincerely apology for my actions and if you could understand my actions thank you." (sic)

20. In evidence, the Appellant explained that the mistake he was referring to was not breaking the law, but not knowing that the Vehicle could be seized.

21. On 13 July 2022, the Respondents acknowledged the Appellant's emails and set out the procedure for progressing the Appellant's case.

22. On 14 July 2022, the Appellant emailed twice. First, stating:

"Has requested i have managed to locate my copy of my log book and attached it for your reference below i kindly ask you to accept my sincerely apology for my actions to release my vehicle which i paid after leaving my job and receiving my final salary to pay for the vehicle this was my first time existing with my personal car and returning to england i never took the car out of england until the day it was seized i am regretful for my actions and this would never happen again after the tragedy of my young sister and the spendings i had no one to help me in these difficult moments after my loss of my young sister 6/11/2020 unexpectedly sudden loss i brought the vehicle specially for my mother to make her journey comfortable to my young sister final resting place on a daily basis none of my family members or any of my relatives have helped me to provide the final journey for my sister resting place and the funeral cost and am grateful that i had some savings in my account to pay for my sisters final journey to a private funeral company and cost of her memory no one in my family or relatives had no courage to make a difference to contribute towards the cost of my young sister i understand the consequences what's happened my car been seized and this would not happen again words can not express my actions has my mind is not in the physical states i have been on depression tables prescribed from my doctor for over a year after the tragic loss of my young sister but am truly asking you to accept my actions of my vehicle and the purpose of it has it will not happen again thank you." (sic)

23. Second, stating:

"I would to sincerely request you accept my wronge doing of bringing the cigarettes into the country without declaring them and i truly understand my actions not to do this again i ask you to accept my wronge doing and to release my vehicle which i paid for whilst receiving my last salary from my job to pay for the vehicle from the brokers 7 months ago has am not able to take my elderly mother to visit my young sister to her final resting place has am not able to afford to buy a another car i ask you sincerely to accept my apologies and my actions what I did not declare into the country will not happen again thank you." (Sic)

24. On 4 August 2022, the Respondents refused to restore the Vehicle, noting that there were no exceptional circumstances justifying a departure from their policy of seizing vehicles used for improper importation or transportation of excise goods, that the Tobacco Goods were concealed in a manner intended to evade detection and that the Appellant had had excise goods seized on four occasions within the last 12 months ("the Decision").

25. On 7 August 2022, the Appellant requested a review of the Decision stating:

"I would like to appeal against the decision you took with regarding not releasing my vehicle which I paid for from my salary I was given a warning at and this has been the first time I took my overseas has I had a read through what has been sent to me with regards stating that this has happened before that's incorrect previously I did go to the declare exit at the airport but because of the custom tax for the cigarettes and was unable to pay because of my affordability and decided to take them and that was not more than 8 blocks of cigarettes I have never been in this position before with large amount and I accept my fault and mentioned this would not happen again you have asked for a copy of my log book to confirm that the vehicle belongs and was informed this is only to confirm that am the owner for it to be released back to me about after receiving a letter view e-mail it shows me that's not been the i expressed my mistake and

admitted it and fully cooperate with your colleague and informed of the cigarettes where they air I would appreciate sincerely if you could look at my concerns and accept my apology for my wronge doing not to happen again has this will be a great loss for my vehicle not be return to me this will cause a huge impact to me and my beloved mother who is currently suffering after losing my young sister am not in a position to afford to buy any car after spending the expenses for the funeral cost of my sister and her memory stone i express and admit my mistake and for it not to happen again but I would have appreciated at the time i was informed a warning in acceptable on this occasion from your colleague at the time i handed the keys to my vehicle and informing me to get my vehicle back i need to send a e-mail am requesting if you can please reconsider my correspondence has i worked very hard to buy a car from my final salary from my job to buy it from the brokers this was the first occasion that this has happened at the port boarder i always used the declare exit at the airport but because of the tax charge changed and was not able to afford it and left them but this was my first time I used my personal car to do the crossing in this situation once again this would not happen again and i would appreciate your understanding to release my vehicle what i paid costing me £9000 including the repair cost what has been done on the car after purchasing it thank you i sincerely ask you if you please accept my wronge doing and release my vehicle back what I paid for off my final salary thank you.” (Sic)

26. On 8 August 2022, the Respondents acknowledged the Appellant’s request for a review and outlined the procedure.

27. On 6 September 2022, the Respondents issued the Review Decision refusing restoration of the Vehicle.

28. On 15 September 2022, the Appellant appealed to the Tribunal. The Appellant’s grounds of appeal stated:

“I brought cigarettes in my vehicle to pay off the balace to who I borrowed after losing my young sister to pay her funeral and other fees and cost this was the first time I used my vehicle to bring cigarettes I did a mistake and would not happen again I paid for my vehicle from salary I would like my vehicle to returned I was not aware of my vehicle can be taken thank you.”(Sic)

29. On 28 November 20222, the Respondents served their Statement of Case.

THE LAW

30. The relevant statutory provisions and authorities are not in dispute and, so far as relevant, are included as an Annex to this decision.

31. The Appellant bears the burden of proof to show that the grounds on which his appeal has been brought have been established, S.16(6) Finance Act 1994. This means that he must prove that the Respondents could not reasonably have arrived at the Review Decision, s.16 (4) Finance Act 1994. The standard of proof is the balance of probabilities.

DISCUSSION

32. We have decided that the Review Decision was reasonable. In reaching that decision we have referred to and relied on the following points:

(1) The Tobacco Goods were liable to forfeiture, s.78 (4) CEMA.

(2) As to seizure, s.139 CEMA provides that Goods liable to forfeiture may be seized and s.141 CEMA provides that any vehicle carrying those goods may also be seized. Therefore, the Tobacco Goods and the Vehicle were seized.

(3) S.139 (6) CEMA provides that Sch 3 to CEMA has effect “...for the purpose of forfeiture, and of proceedings for the condemnation of anything as being forfeited, under the customs and excise acts.” Paragraph 6 of Sch 3 to CEMA provides that seizure must be challenged within one month by delivery of a notice to the Commissioners of HMRC who must then take proceedings (usually in the Magistrates’ Court) seeking condemnation of the seized goods. However, if no such notice is given within the relevant period then Paragraph 5 of Sch.3 to CEMA provides that “...the thing in question shall be deemed to have been duly condemned as forfeited.” The Appellant did not challenge the seizure or, in fact, any of the earlier seizures.

(4) It is clear from the cases of *Jones, Race, Hill* and *EBT* that, as a result of the deeming provision at Paragraph 5 of Sch.3 CEMA, we do not have jurisdiction to consider the legality or correctness of the seizure itself. We are required to proceed (and have proceeded) on the basis that the Tobacco Goods were being illegally imported by the Appellant for commercial use.

(5) Ss.14 and 15 of the Finance Act 1994 provide that the Appellant can seek restoration of the Vehicle from the Respondents and, if dissatisfied with the decision, can apply for a statutory review of the decision. The Appellant may then appeal the Review Decision to the Tribunal. A decision to refuse restoration is a decision as to an “ancillary matter”, and, consequently, the Tribunal’s powers on such an appeal are limited by section 16(4) Finance Act 1994, as set out at paragraph 14 of the Annex. In short, the question for our consideration is whether or not the Review Decision was reasonable.

(6) Pursuant to *Customs and Excise v JH Corbitt (Numismatists) Ltd* [1980] STC 2312, a decision is not reasonable if the decision maker acted in a way which no reasonable decision maker could have acted, if they had taken into account some irrelevant matter or had disregarded something to which he or she should have given weight. Further, as conceded by the Respondents in *Commissioners of Customs and Excise in Gora v CCE* [2003] EWCA Civ 525, §§38 (e) & 39 and confirmed in *Harris v Director of Border Revenue* [2013] UKFTT 134 (TC), §11, the reasonableness of the decision-maker’s decision is to be judged against the information available to us at the date of the hearing, even though in some cases this may include information which was not available to the decision-maker when the decision was taken.

(7) We remind ourselves of Judge Hellier’s comments in *Harris v Director of Border Revenue* [2013] UKFTT 134 (TC), § 6:

“It is important to remember that a conclusion that a decision is not unreasonable is not the same as a conclusion that it is correct. There can be circumstances where different people could reasonably reach different conclusions. The mere fact that we might have reached a different conclusion is not enough for us to declare that a conclusion reached by UKBA should be set aside.”

33. The Review Decision applied the Respondents’ Policy, namely that private vehicles used for the improper importation or transportation of excise goods should not normally be restored so as to protect legitimate UK trade and revenue and prevent illicit trade in excise goods. Officer Summers’ discretion was not fettered by this Policy. He considered all of the circumstances, taking into account all relevant matters and no irrelevant matters. Specifically, he took into account the following:

(1) This was the first time the Appellant had improperly imported / transported excise goods using a motor vehicle.

(2) The Appellant misled the Respondents as to the quantity of Tobacco Goods. Accordingly, the comments of Judge Bishopp in *Michael Robert Brearley* and in *Mr Gordon Grimshaw* (MAN/04/8070 11/11/04) apply:

“If travellers lie to Customs about the ... quantities of goods they have brought ... they cannot be surprised, nor can they complain, if Customs doubt everything else they say ... it cannot, in our view, be regarded as unreasonable if Customs officers, having detected lies, conclude that a traveller’s purposes are not as innocent as he claims.” (Michael Robert Brearley)

“in our view it cannot be an unreasonable inference that travellers who concealed trips they have made abroad, give conflicting information and provide unconvincing explanations are not telling the whole truth, and are attempting to conceal the true reason for their importation of goods.” (Mr Gordon Grimshaw)

(3) The quantity was extremely high, being 56 times the cigarette allowance and 6 times the tobacco allowance, being a commercial quantity.

(4) The Appellant knew that the Tobacco Goods were subject to Excise Duty in the United Kingdom.

(5) The Appellant intended to sell the Tobacco Goods and use the proceeds to pay off a debt.

(6) The Appellant was involved in a sophisticated, pre-planned, deliberate and orchestrated attempt to evade detection by hiding, with assistance from a mechanic, the Tobacco Goods within the fabric of the Vehicle.

(7) The Appellant has a history of smuggling.

34. Further, we accept that the Appellant cannot establish exceptional hardship. For the avoidance of doubt, whilst the Appellant briefly referred to not being in the best physical condition, he did not elaborate on his email of 14 July 2022 referring to depression or adduce any evidence as to his medical position. In all the circumstances, his position does not go beyond the natural consequences of his own behaviour resulting in the seizure. For the avoidance of doubt, if, which we do not accept, the Appellant imported the Tobacco Goods in order to discharge a debt arising from his sister’s funeral and memorial stone, whilst we are naturally sympathetic to the loss of his sister, we do not consider that this amounts to exceptional hardship.

35. In all the circumstances, the appeal is dismissed.

36. We note that in this case the comments of Judge Dr K Khan in *David Arthur Hemms* (LON/2008/8057, §22) are pertinent, namely that *“where people attempt to evade excise duty and try to deceive HMRC officers, with conflicting explanations as to why items were purchased and proceed to give half truths and feeble explanations for the reason for the importation of goods, in such circumstances, those people would not have a right to complain when the vehicle being used for smuggling is confiscated.”*

RIGHT TO APPLY FOR PERMISSION TO APPEAL

37. 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

JENNIFER NEWSTEAD TAYLOR
TRIBUNAL JUDGE
Release date: 11th MARCH 2024

ANNEX

LEGISLATION & AUTHORITIES

Tobacco products being liable to excise duty, the duty point is established by Regulation 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (SI 2010/593) (“the 2010 Regulations”). The relevant parts of Regulation 13 are as follows:

“13 (1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.”

(2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person—

(a) making the delivery of the goods;

(b) holding the goods intended for delivery; or

(c) to whom the goods are delivered.

(3) For the purposes of paragraph (1) excise goods are held for a commercial purpose if they are held—

(a) ...

(b) by a private individual (“P”), except in a case where the excise goods are for P's own use and were acquired in, and transported to the United Kingdom from, another Member State by P.

...

(5) For the purposes of the exception in paragraph (3)(b)—

(a) ...

(b) “own use” includes 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) ...”

S.78 (4) CEMA states that:

“Any thing chargeable with any duty or tax which is found concealed, or is not declared, and any thing which is being taken into or out of the United Kingdom contrary to any prohibition or restriction for the time being in force with respect thereto under or by virtue of any enactment, shall be liable to forfeiture.”

S.139 (1) of CEMA states that:

“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.”

S.139 (6) of CEMA provides that:

“Schedule 3 to CEMA shall have effect for the purpose of forfeiture, and of proceedings for the condemnation of anything as being forfeited, under the customs and excise acts.”

Paragraph 5 of Schedule 3 to CEMA provides as follows:

“If on the expiration of the relevant period under paragraph 3 above 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.”

Pursuant to *The Commissioners for Her Majesty's Revenue and Customs v Jones & Jones* [2011] EWCA Civ 824 @ Para 71 (1 – 10) (“Jones”):

“5. The deeming process [contained in paragraph 5 of Schedule 3 of CEMA] 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 was 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. The role of the tribunal, as defined in the 1979 Act, does not extend to deciding as a fact that the goods were, as the respondents argued in the tribunal, being imported legally for personal use. That issue could only be decided by the court. The FTT's jurisdiction is limited to hearing an appeal against a discretionary decision by HMRC not to restore the seized goods to the respondents. In brief, the deemed effect of the respondents' failure to contest condemnation of the goods by the court was that the goods were being illegally imported by the respondents for commercial use.”

The Upper Tribunal in *The Commissioners for Her Majesty's Revenue and Customs v Nicholas Race* [2014] UKUT 0331 (TCC) (“Race”) and *The Commissioners for Her Majesty's Revenue & Customs v Liam Hill* [2018] UKUT 0045 (TCC) (“Hill”), confirmed that the Tribunal does not have the jurisdiction to consider the legality or correctness of the seizure itself.

Further, the Court of Appeal in *European Brand Trading v HMRC* [2016] EWCA Civ 90, para 31 & 37 (“EBT”) stated:

“31. The decision to restore or not to restore is a different issue which was not raised in the condemnation proceedings. HMRC must make its decision on restoration in the light of all relevant factors, which will include the duty paid status of the goods in question. If I have understood this argument what is said is that in deciding whether or not to exercise the discretionary power to restore things seized or forfeited HMRC must consider the question (if it is raised by the applicant) whether excise duty was in fact payable and, if so, whether it had in fact been paid. But HMRC's decision is only one part of the overall process. If HMRC refuse to restore them the applicant can appeal to the FTT. If HMRC have refused to restore on the ground that excise duty was payable and has been deemed not to have been paid, then the clear effect of HMRC v Jones is that the FTT cannot investigate that question. It would make for an incoherent system if HMRC was required to investigate the question whether duty had been paid, but any appeal against its decision had to be conducted on the basis of a different set of assumed facts. The answer to this argument is, in my judgment, to be found in two passages from the judgment of Mummery LJ in HMRC v Jones. First, at [71] (5) he said:

“In brief, the deemed effect of the owners' failure to contest condemnation of the goods by the court was that the goods were being illegally imported by the owners for commercial use.” ...

However, in the light of HMRC v Jones, the question of proportionality must be considered on the assumption that the goods on which excise duty was payable (and any vehicle in which they were carried) have been validly and lawfully forfeited and that the excise duty has not been paid. In our case EBT wishes to advance the argument that the excise duty has in fact been paid on the very goods that have been forfeited. In my judgment HMRC v Jones plainly prevents that argument from being raised once the goods have been condemned, either by the magistrates or by the deeming provision.”

S. 141 (1) (a-b) of CEMA provides that:

“where any thing has become liable to forfeiture under the Customs and Excise Acts –

(a) any ... vehicle ... which has been used for the carriage, handling, deposit ... of the thing so liable to forfeiture

(b) any other thing mixed, packed or found with the thing so liable

shall also be liable to forfeiture.”

S.152 (b) of CEMA provides that *“the Respondents may as they see fit restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized....”*

S.170 of CEMA provides that:

“Without prejudice to any other provision of the Customs and Excise Acts 1979, if any person—

(a) knowingly acquires possession of any of the following goods, that is to say—...

(ii) goods which are chargeable with a duty which has not been paid;

(b) is in any way knowingly concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with any such goods, and does so with intent to defraud Her Majesty of any duty payable on the goods or to evade any such prohibition or restriction with respect to the goods he shall be guilty of an offence under this section and may be [arrested] ...”

Section 14 (2) Finance Act 1994 permits a person to require a review of the Respondents’ decision to refuse restoration of seized goods as follows:

“(2) Any person who is -

(a) a person whose liability to pay any relevant duty or penalty is determined by, results from or is or will be affected by any decision to which this section applies,

(b) a person in relation to whom, on his application, such a decision has been made,
or

(c) a person on or to whom the conditions, limitations, restrictions, prohibitions or other requirements to which such a decision relates are or are to be imposed or applied,

may by notice in writing to the Commissioners require them to review that decision.”

Section 15(1) Finance Act 1994 sets out the procedure to be followed on such a review:

“Where the Commissioners are required in accordance with this chapter to review any decision, it shall be their duty to do so and they may, on that review, either:

(a) confirm the decision; or

(b) withdraw or vary the decision and take such further steps (if any) in consequence of the withdrawal or variation as they may consider appropriate.”

Section 16 (4-6) Finance Act 1994 provides appeal rights to the FTT in relation to a review decision refusing restoration of seized goods as follows:

"(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an Appeal Tribunal on an appeal under this section shall be confined to a power, where the Tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say -

(a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the Tribunal may direct;

(b) to require the Commissioners to conduct, in accordance with the directions of the Tribunal, a further review of the original decision;

(c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a further review, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.

(5) In relation to other decisions, the powers of an Appeal Tribunal on an appeal under this section shall also include a power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal.

(6) On an appeal under this section the burden of proof as to-

(a) the matters mentioned in sub-section (1)(a) and (b) of section 8 above.

(b) ...

.... shall lie upon the Commissioners, but it shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established."