TC03498

Appeal number: TC/2013/03966

EXCISE DUTY RESTORATION OF GOODS - application to strike out appeal - seizure of excise goods and vehicle not contested - appeal against refusal to restore vehicle without payment of fee - jurisdiction of the tribunal – HMRC v Jones and Jones [2011] EWCA Civ 824 applied – application granted – appeal struck out

FIRST-TIER TRIBUNAL
TAX CHAMBER

JONATHON GARRAWAY

Appellant

- and -

THE DIRECTOR OF BORDER REVENUE

Respondent

TRIBUNAL: JUDGE GREG SINFIELD

Application determined on 4 April 2014 without a hearing, each party having agreed that the matter should be dealt with on written submissions only

DECISION

Introduction

1. This is an application by the Respondent to strike out the appeal by the Appellant ("Mr Garraway") against a decision not to restore a vehicle belonging to him which had been seized on the grounds that

(1) the tribunal does not have jurisdiction in relation to the matter under appeal; and, or in the alternative,

(2) there is no reasonable prospect of the appeal succeeding.

Background

2. Mr Garraway is the owner of a Ford Focus. The car was seized together with 40.5 kilos of hand rolling tobacco found in it when Mr Garraway, who was the driver, was stopped by the UK Border Force while returning from France to the UK on 27 January 2013. Mr Garraway said, when stopped, that he had 5 kilos of tobacco but later admitted to having 16 kilos. A further 25 kilos of tobacco appeared to belong to a passenger in the car. Nine kilos of the tobacco were concealed in the car speakers. Mr Garraway said that the tobacco was for his own consumption and as gifts. The UK Border Force did not accept Mr Garraway's explanation and concluded that it was held for a commercial purpose. The UK Border Force seized the tobacco and the car as liable to forfeiture.

3. On 28 January, Mr Garraway wrote to the Respondent and asked for the car to be restored on the grounds that he needed it to attend hospital appointments for treatment required following a motorcycle accident in November 2011 which left him unable to walk long distances. He stated that he found using public transport challenging. He also stated that not having a car would make it difficult for him to obtain full time work and would adversely affect his personal life as his girlfriend lived nine miles away and did not drive. Mr Garraway did not challenge the seizure of the tobacco or the car but said:

> "… although I accept the grounds on which the UKBA seized the goods, I do not concur [with] them."

4. In the absence of a challenge to the seizure, the tobacco and car were deemed to have been condemned as forfeit. The Respondent considered Mr Garraway's request for restoration of the car and decided that it should be restored to him on payment of a fee of £2,580 which is the estimated value of the vehicle. Mr Garraway asked for the decision to be reviewed. The review upheld the decision not to restore the car to Mr Garraway unless he paid £2,580. The review decision confirming the original decision was notified to him on 8 May 2013. Mr Garraway appealed against the review decision on 30 May. His grounds of appeal were as follows:

> "… the vehicle should be restored because the tobacco was for personal consumption and the grounds on which the vehicle was 1st seized were on counterfactual assumptions.
>
> The UKBA are basing their fee on the fact that the tobacco was for commercial use, which is wrong."

Legislation

5. The Customs and Excise Management Act 1979 ("CEMA 1979") provides as follows:

> "139(1) Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer…
>
> …
>
> 141(1) …where any thing has become liable to forfeiture under the customs and excise Acts -
>
> (a) any ship, aircraft, vehicle, animal, container (including any article of passengers' baggage) or other thing whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture, either at a time when it was so liable or for the purposes of the commission of the offence for which it later became so liable; and
>
> (b) any other thing mixed, packed or found with the things so liable,
>
> shall also be liable to forfeiture."

6. Paragraph 1 Schedule 3 CEMA 1979 provides for notice of the seizure to be given in certain circumstances. Paragraph 3 Schedule 3 CEMA 1979 then states:

> "Any person claiming that any thing 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 …"

7. Where notice of a claim is given under paragraph 1, condemnation proceedings are commenced in the magistrate's court. Where no notice of claim is given Paragraph 5 Schedule 3 CEMA 1979 provides:

> "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."

8. Section 152 of CEMA 1979 provides …

> "The Commissioners may as they see fit –
>
> (a) …
>
> (b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under [the Customs and Excise Acts] …"

9. Section 14 Finance Act 1994 makes provision for a person to require a review of a decision of HMRC under section 152(b) CEMA not to restore anything seized from that person.

10. The application to strike out the appeal is made pursuant to rule 8(2)(a), alternatively rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. These rules provide as follows:

> "8(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 part of them
>
> ...
>
> (3) The Tribunal may strike out the whole or part of the proceedings if –
>
> …
>
> (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding."

Submissions

11. The Respondent contends that Mr Garraway's appeal should be struck out because:

> (1) applying the guidance given by Mummery LJ in *HMRC v Jones and Jones* [2011] EWCA Civ 824, the Tribunal has no jurisdiction to hear the appeal which seeks to challenge the legality of the seizure of the tobacco and car; and
>
> (2) in the absence of any challenge to the legality of the seizure, the appeal has no reasonable prospects of success.

12. Mr Garraway developed his grounds of appeal in correspondence stating that

> "The tobacco was NOT for commercial use
>
> I did not challenge the seizure because I did not want [the] hassle (which HMRC [sic] are now giving me)
>
> I was fully within my rights of bringing back to the UK from Europe an 'unlimited amount' as stated in government legislation
>
> I am not due to pay [an] amount of excise duty, especially when I do not now hold the goods
>
> I am a working class tax paying citizen that does not deserve to be mistreated in such a way"

Discussion

13. In summary, the facts of *Jones and Jones* were as follows. Mr and Mrs Jones were stopped at Hull Ferry Port with a large amount of tobacco, wine and beer which was seized on the basis that it was for commercial use. The seizing officer reached that view following an interview with Mr and Mrs Jones. They were informed of their rights to challenge the legality of the seizure and request restoration of the goods. Initially, they challenged the legality of the seizure by serving a notice of claim pursuant to Paragraph 1 Schedule 3 CEMA 1979. They were also notified by HMRC that if they decided to withdraw from the resulting condemnation proceedings they would have to accept that the goods were legally seized, for example that they were imported for commercial use. Subsequently Mr and Mrs Jones, who at that time were represented by solicitors, withdrew from the condemnation proceedings and pursued restoration of the goods. HMRC refused to restore the goods and Mr and Mrs Jones appealed to the First-tier Tribunal ("the FTT"). The FTT made findings of fact that the goods were for personal use and allowed the appeal. The Upper Tribunal

upheld this decision. HMRC appealed to the Court of Appeal on the ground that the FTT were not entitled to make findings of fact inconsistent with the deemed forfeiture of the goods from which it was implicit that the goods were not for personal use. The Court of Appeal agreed. Mummery LJ's summary of his conclusions at [71] included the following:

> "(4) The stipulated statutory effect of the respondents' withdrawal of their notice of claim under paragraph 3 of Schedule 3 was that the goods were deemed by the express language of paragraph 5 to have been condemned and to have been 'duly' condemned as forfeited as illegally imported goods. The tribunal must give effect to the clear deeming provisions in the 1979 Act: it is impossible to read them in any other way than as requiring the goods to be taken as 'duly condemned' if the owner does not challenge the legality of the seizure in the allocated court by invoking and pursuing the appropriate procedure.
>
> (5) The deeming process 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."

14. Mummery LJ said at [73]:

> "… the FTT erred in law; the UTT should have allowed the HMRC's appeal on the ground that the FTT had no power to re-open and re-determine the question whether or not the seized goods had been legally imported for the respondents' personal use; that question was already the subject of a valid and binding deemed determination under the 1979 Act; the deeming was the consequence of the respondents' own decision to withdraw their notice of claim contesting the condemnation and forfeiture of the goods and the car in the courts; the FTT only had jurisdiction to hear an appeal against a review decision made by HMRC on the deemed basis of the unchallenged process of forfeiture and condemnation; and the appellate jurisdiction of the FTT was confined to the correctness or otherwise of the discretionary review decision not to restore the seized goods and car. No Convention issue arises on that outcome, as the process was compliant with Article 6 and Article 1 of the First Protocol: there is no judge-made exception to the application of paragraph 5 according to its terms; the respondents had the option of contesting in the courts forfeiture on the basis of importation for personal use; they had decided on legal advice to withdraw from their initial step to engage in it; and that withdrawal of notice gave rise to the statutory deeming process which was conclusive on the issue of the illegal purpose of the importation."

15. It is clear from the judgment of the Court of Appeal in *Jones and Jones* that the effect of paragraph 5 of Schedule 3 CEMA 1979 is that, in the absence of any notice of claim from Mr Garraway challenging the seizure of the car, it was deemed to have been duly condemned as forfeited on 28 February 2013. The tribunal must consider the appeal against the decision not to restore without payment of a fee on the basis that the tobacco and car were lawfully seized. That means that the tribunal must accept that the tobacco was being held for a commercial purpose. The tribunal cannot find as a fact that the tobacco was being imported for own use. As Mr Garraway's grounds of appeal depend on the tribunal finding that the tobacco was held for personal use, which it cannot do, the appeal must fail.

Conclusion

16. For the reasons set out above, I have concluded that the tribunal does not have jurisdiction to hear the appeal and there is no reasonable prospect of Mr Garraway's appeal succeeding because the tribunal cannot find as a fact that the tobacco was being imported for own use, which is the only basis of the appeal. Accordingly, I direct under rule 8(2)(a) and rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 that these proceedings are now STRUCK OUT.

Right to apply for permission to appeal

17. 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.

GREG SINFIELD
TRIBUNAL JUDGE

RELEASE DATE: 14 April 2014