[2018] UKFTT 666 (TC)

TC06814

Appeal number: TC/2017/05831

EXCISE DUTY – application to strike out appeal – jurisdiction of the tribunal – appeal struck out and penalty confirmed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DENNIS WALLACE **Appellant**

- and -

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

TRIBUNAL: JUDGE VICTORIA NICHOLL
MR JULIAN STAFFORD

Sitting in public at Taylor House on 11 September 2018

The Appellant in person

Mr Christopher Vallis, HM Revenue and Customs Presenting Officer, for the Respondents

DECISION

1. This is an application by the Respondents ("HMRC") for the Tribunal to strike out the appeal by the Appellant ("Mr Wallace") against the decisions to make an excise duty assessment in the amount of £793 on 9 May 2017 and to impose a wrongdoing penalty in the amount of £166 on 8 June 2017.

Background and facts found

2. On 4 May 2016 Mr Wallace was stopped and searched by UK Border Force at Dover. He was travelling from Belgium back to England on a coach. He regularly goes on such day trips from Lewisham, sometimes to buy tobacco and sometimes other shopping. He told us that the trip costs £40 and is a nice day out with regulars who make this trip. He had made the trip three or four times in 2016 before he the journey on which he was stopped in May 2016. On this occasion he had purchased 3.95kg of hand rolling tobacco (HRT) and 150 cigars ("the goods"). He had purchased approximately 4kg of HRT three or four weeks earlier and he had purchased tobacco on his earlier trips in 2016.

3. Mr Wallace was interviewed by UK Border Force. Mr Wallace had told UK Border Force that the tobacco that he had just bought cost just under £600. This was supported by the fact that he had a cashpoint receipt for £550 from the previous day. He said that his income is approximately £600 per month in benefits. He told UK Border Force that his monthly outgoings are only £51-£56, including food, and that he does not pay council tax. However his letter dated 31 May 2017 enclosed a council tax reminder notice, indicating that he pays council tax in monthly instalments of £24.76.

4. Mr Wallace told us that he smokes four 50g pouches of HRT per week, making some 200 g per week and 1kg per five weeks. Interestingly, there is a separate receipt for each purchase of 1kg of tobacco made on 4 May 2016 and this shows that each purchase of 20xGolden Virginia 50gr (1kg) was made at a different time. The printed receipts all state "Guidelines: only 1kg tobacco/800sigarettes each person" (reflecting the provisions of regulation 13 of the Excise Goods (Holding, Movement, and Duty Point) Regulations 2010 set out in paragraph 15 below). As Mr Wallace admits that he goes on these shopping trips about every month or so, this guideline reflects the 1kg that he would smoke between trips. However, Mr Wallace claims that he bought 4kg on 4 May 2016 because he was about to go away to Canada for two months and he cannot buy HRT there. We did not accept this explanation as it ignores the additional tobacco that he had bought earlier in the year and was in any event more than double what he smokes in two months.

5. The UK Border Force officer, Maria Middleton, seized the goods because it was considered that Mr Wallace had them for commercial purposes. The reasons given for this conclusion were that there was a discrepancy between his income and his expenditure on tobacco, the frequency of his trips and because his excuse that he had bought it for his imminent two month trip to Canada was not consistent with his 48

week supply or the amount that he would be allowed to import into Canada. The officer gave Mr Wallace forms BOR 162 (a warning letter that HMRC may issue an assessment for any evaded tax or duty and a wrongdoing penalty), BOR 156 (seizure information notice) and Notice 12 A (What you can do if goods are seized). Mr Wallace signed forms BOR 162 and BOR 156.

6. We do not accept that Mr Wallace bought the HRT for personal use because, even at the very considerable rate of consumption claimed, the amount brought into UK on 4 May 2016, together with what he had bought earlier in the year, was far in excess of his smoking requirements. As HMRC have suggested, it is also not credible that Mr Wallace could spend his entire monthly income on tobacco two months running without some commercial purpose.

7. Mr Wallace did not contest the legality of the seizure of the goods. He told us that this was because he went to Canada on 6 June 2016, but we do not need decide on whether this was the reason why because he accepts that he did not exercise this right.

8. On 9 May 2017 Officer Newbigging wrote to Mr Wallace to inform him that he was liable to pay excise duty on the goods. The letter enclosed an excise duty assessment for £793. The letter also informed Mr Wallace that he would be charged a penalty. He was asked to respond within 30 days with any information that he wished to be taken into account in relation to the penalty, such as whether he had a reasonable excuse or if there were special circumstances.

9. On 31 May 2017 Mr Wallace wrote to HMRC "to appeal the penalty issued to me regarding the seizure of goods on 4th May 2016". He explained that he thought that he was allowed to bring back as such tobacco as he liked if it was for personal use. He also said that could not afford to pay such a large sum as he was on benefits. The letter was not received by Officer Newbigging until 15 June 2017.

10. On 8 June 2017 Officer Newbigging issued an excise wrongdoing penalty for £166. The penalty was calculated on the basis that HMRC considered that as there was insufficient evidence that Mr Wallace was aware that he was committing an offence and as he had not tried to conceal the goods, it was 'non-deliberate' behaviour but his disclosure was prompted by UK Border Force's discovery. This fixed the penalty range between a minimum of 20% and a maximum of 30% of the potential lost revenue. HMRC allowed a reduction of 90% for the quality of Mr Wallace's disclosure and this was applied to the 10% difference between the minimum and maximum penalty, reducing it to 1%. This made the penalty percentage 21%. HMRC noted that this was the minimum penalty that could be imposed in these circumstances. They did not consider that there were any special circumstances which could lead them to reduce the penalty further.

11. On 15 June 2017 Officer Newbigging replied to Mr Wallace's letter dated 31 May 2017 to explain that the assessment and penalty had been issued and that he could appeal to the First-tier Tax Tribunal ("the Tribunal").

12. On 26 July 2017 Mr Wallace signed and submitted his appeal to the Tribunal. HMRC do not object to the appeal being made out of time (as it was made more than 30 days after their letter of 15 June 2017).

13. On 26 September 2017 HMRC produced its statement of case in which HMRC applied for a direction that the appeal relating to the assessment be struck out pursuant to rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. On 31 October 2017 the Tribunal issued directions but Mr Wallace failed to comply with the directions or to respond to the Tribunal's letter dated 16 December 2017. On 27 April 2018 the Tribunal directed that the appeal may be struck out unless Mr Wallace confirmed that he wished to proceed by 11 May 2018.

14. On 10 May 2018 the Tribunal received confirmation from Mr Wallace that he wished to go ahead with his appeal. He raised the argument that he feels that the authorities "took advantage of my state of intoxication during the course of my interview." We considered this claim in finding the facts set out above and we found that the relevant statements made in the interview were largely repeated in the oral evidence that Mr Wallace gave at the hearing. These included the statements about the number of journeys that he had made in 2016, the quantities of tobacco purchased and the amount that he smokes.

The law

15. Regulation 13 of the Excise Goods (Holding, Movement, and Duty Point) Regulations 2010 provides that:

> "(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; and
> (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) by a person other than a private individual; or
> (b) by a private individual ("P"), except in the case where the excise goods are held for P's own use and were acquired in, and transported to the United Kingdom from, another member State by P.
> (4) For the purpose of determining whether excise goods referred to in the exception in paragraph (3)(b) are for P's own use regard must be taken of:
> (a) P's reasons for having possession or control of those goods;
> (b) whether or not P is a revenue trader
> (c) P's conduct, including P's intended use of those goods or any refusal to disclose the intended use of those goods;
> (d) the location of those goods;
> (e) the mode of transport used to convey those goods;
> (f) any document or other information relating to those goods;
> (g) the nature of those goods including the nature or condition of any package or container;
> (h) the quantity of those goods and, in particular, whether the quantity exceeds any of the following quantities –

10litres of spirits…
800 cigarettes…
1 kg of any other tobacco products;
(i) whether P personally financed the purchase of the goods;
(j) any other circumstances that appear to be relevant.
(5) For the purposes of the exception in paragraph (3) (b)-
(a) "excise goods" does not include any goods chargeable with excise duty by virtue of any provision of the Hydrocarbon Oil Duties Act 1979 or of any order made under section 10 of the Finance Act 1993;
(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)."

16. Where it appears to HMRC that any amount has become due in respect of excise duty, **section 12 (1A) Finance Act 1994** provides that they may assess the amount of excise duty due from that person to the best of their judgment and notify that amount to that person.

17. **Paragraph 4 of schedule 41 Finance Act 2008** ("Schedule 41") provides that a penalty is payable in addition to the excise duty in the following circumstances:

"4 (1) A penalty is payable by a person (P) where—
(a) after the excise duty point for any goods which are chargeable with a duty of excise, P acquires possession of the goods or is concerned in carrying, removing, 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."

18. Paragraphs 5-13 of Schedule 41 set out how the penalty is calculated, taking account of the degree of culpability and deductions for disclosure. A failure to comply with a relevant obligation is "deliberate but not concealed" if it is done deliberately but the person does not make arrangements to conceal it.

19. Paragraph 14 of Schedule 41 provides for a special reduction if HMRC think it right because of special circumstances. For this purpose "special circumstances" does not include:
(a)ability to pay, or
(b)the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

20. Paragraph 20 of Schedule 41 sets out the provisions relating to reasonable excuse which are as follows:

"20 (1)Liability to a penalty under any of paragraphs 1, 2, 3(1) and 4 does not arise in relation to an act or failure which is not deliberate if P satisfies HMRC or (on appeal) the First-tier Tribunal that there is a reasonable excuse for the act or failure.

(2)For the purposes of sub-paragraph (1)—
(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,
(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the relevant act or failure, and

(c) where P had a reasonable excuse for the relevant act or failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the relevant act or failure is remedied without unreasonable delay after the excuse ceased."

21. Regulation 88 of the Excise Goods (Holding, Movement, and Duty Point) Regulations 2010 provides that:

> "If in relation to any excise goods that are liable to duty that has not been paid there is -
> a contravention of any provision of these Regulations, or
> a contravention of any condition or restriction imposed by or under these Regulations,
> those goods shall be liable to forfeiture"

22. Section 139 (1) of the Customs and Excise Management Act 1970 ("CEMA 1979") provides as follows:

> "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."

23. 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 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…"

24. As notice 12A explains, if a notice of claim is given under paragraph 1 Schedule 3 CEMA 1979 condemnation proceedings are heard in the Magistrates' Court. If no notice of claim is given under paragraph 1 Schedule 3 CEMA 1979 then paragraph 5 provides that the legality of the seizure is automatically conceded as the goods are deemed by law to have been liable to forfeiture. The effect of this is that any facts which could have argued against the seizure, such as whether they goods were for personal or commercial use and so whether duty was payable, are also deemed to have been conceded. This means that these points cannot be reopened and raised in an appeal before the Tribunal as it has no jurisdiction to find different facts.

25. This lack of jurisdiction was confirmed by Mummery LJ in *HMRC V Jones and Jones [2011] EWCA Civ 824* (the "*Jones*" case) who said at paragraph 73 that the Tribunal "has no power to re-open and re-determine the question whether or not seized goods had been legally imported for the [appellant's] personal use; that question was already the subject of a valid and binding deemed determination under the 1979 Act".

26. In *The Commissioners for HMRC v Nicholas Race* [2014] UKUT 0331 (the "*Race*" case) *[2014] UKUT 0331* Mr Nicholas Warren, then Chamber President, found that in the light of the decision in the *Jones* case Mr Race was unable to ask the Tribunal go behind the deeming provisions of paragraph 5 Schedule 3 CEMA 1979 in order to argue that the goods were for personal use and not for a commercial purpose in his appeal against an assessment to excise duty. This decision is binding on the

Tribunal and it makes clear that the Tribunal does not have jurisdiction to reopen the issue of whether the goods are for personal use where this has been determined by the statutory deeming.

27. Upper Tribunal Judge Warren also noted that the "Tribunal could no more re-determine, in the appeal against the Penalty Assessment, a factual issue which was a necessary consequence of the statutory deeming provision than it could re-determine a factual issue decided by a court in condemnation proceedings. The issue of import for personal use, assuming purchase in a Member State, has been determined by the statutory deeming." As noted by Judge Anne Redston and Mr Julian Stafford in *Inge Van Driessche v HMRC* [2016] UKFTT 441 (TC) ("*Van Driessche*"), the *Nicholas Race* appeal did not concern a penalty and so this passage "is *obiter* and not binding on this Tribunal, although it must of course be treated with respect."

28. **Rules 8(2) – (4)** of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules") provide as follows:

> "(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.
> (3) The Tribunal may strike out the whole or a part of the proceedings if—
> (a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;
> (b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or
> (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.
> (4) The Tribunal may not strike out the whole or a part of the proceedings under paragraphs (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out."

29. **Rule 2** of the Tribunal Rules sets out their overriding objective of enabling the Tribunal to deal with cases fairly and justly.

Submissions

30. HMRC submit that Mr Wallace's appeal should be struck out because the Tribunal has no jurisdiction to hear the appeal and because it has no reasonable prospect of success.

31. Mr Wallace's appeal is on the grounds that he believed that he could bring in as much tobacco as he wanted as it was for personal use. He is claims that he is unable to pay the penalty because he is on benefits. He claims that UK Border Force took advantage of the fact that he was intoxicated when they interviewed him.

Discussion

32. This is an application by HMRC for the Tribunal to strike out the appeal under Rule 8 on the grounds that the Tribunal has no jurisdiction to hear the appeal and

because it has no reasonable prospect of success. We have considered this application first in relation to the excise duty assessment and then in relation to the penalty.

33. The position in relation to the excise duty assessment is summarised in paragraphs 23 to 26 above. This explains that following the judgment of the Court of Appeal in *Jones and Jones* and the decision of the Upper Tribunal in *Race*, it is clear that the effect of paragraph 5 Schedule 3 CEMA 1979 is that where an appellant has failed to challenge the seizure of the goods, the Tribunal must accept as a fact that the tobacco was held for a commercial purpose. As the success of any appeal against the excise duty depends on our finding that it was for personal use as claimed by Mr Wallace, and as this cannot be found as a fact by the Tribunal, the Tribunal has no jurisdiction to consider this issue and the appeal has no reasonable prospect of success. We have considered the provisions of Rules 2 and 8 of the Tribunal Rules and concluded that we must therefore strike out Mr Wallace's appeal against the excise duty assessment under Rule 8(2)(c) and Rule 8(3)(c) of the Tribunal Rules.

34. The position in relation to the wrongdoing penalty is that it was correctly imposed under paragraph 4 Schedule 41 as a result of the assessment to excise duty being outstanding when the goods were brought in and, in that sense, it arises because of the statutory deeming that the tobacco was imported for commercial purposes.

35. However, HMRC submit in this case that the Tribunal also has to apply the statutory deeming when considering Mr Wallace's conduct and circumstances for the purposes of considering whether Mr Wallace has a reasonable excuse or there are 'special circumstances'. We asked HMRC what could be raised as a reasonable excuse if statutory deeming is to be read as precluding argument that the appellant did anything other than bring in tobacco for commercial purposes. HMRC gave the examples of appellants who were ill or suffering from mental health problems, but we found it difficult to conceive of examples in which this could apply if we accept HMRC's submission that the statutory deeming that the goods were imported for commercial purposes applies when considering both the special circumstances and reasonable excuse provisions.

36. We do not agree with HMRC's submission in paragraph 35 above for the following reasons:

36.1 HMRC accepted that there was insufficient evidence to prove that the action taken by Mr Wallace was deliberate. It was not suggested that the penalty must always be calculated on the basis that the import was deliberately for commercial purposes. It therefore appears that they accept that statutory deeming provision does not extend to the calculation of the penalty once it has been established that the penalty is to be imposed because a liability to excise duty arose as the tobacco is deemed to be for commercial purposes. The logical extension is that the statutory deeming should not apply to the consideration of whether there are special circumstances or a reasonable excuse under paragraphs 14 and 20 of Schedule 41; and

36.2 Upper Tribunal Judge Warren makes clear in *Race* at paragraph 40 that the issues raised by appeal against a penalty assessment extend beyond the question of whether duty is payable because of the statutory deeming. For example, the Tribunal must make an assessment of culpability and circumstances because this is relevant to the level of penalty imposed, and "to decide whether the level of mitigation afforded by HMRC for cooperation provided by [the appellant] was sufficient and/or whether there should be further reductions for 'special circumstances'. Thus, even if the issue whether duty was payable may not be reopened there are other aspects of behaviour or conduct raised by the penalty provisions which the [Tribunal] will be required to consider."

37. However, for the reasons set out in paragraph 6 above, we confirm HMRC's penalty assessment without reduction on the facts of this case. This is because we do not accept Mr Wallace's excuse that the tobacco was all for his personal use. Mr Wallace has also claimed that he was intoxicated when he was interviewed by UK Border Force but we have based our findings on his evidence to the Tribunal. This confirmed that he bought 4kg of HRT on at least two occasions on and before 4 May 2016 and that he made this shopping trip regularly. Finally Mr Wallace claimed that he cannot afford to pay the penalty but this is specifically excluded as a special circumstance or a reasonable excuse by paragraphs 14(2)(a) and 20 (2) (a) Schedule 41. In these circumstances we find that Mr Wallace does not have a reasonable excuse and we confirm HMRC's conclusion that there are no special circumstances that would justify a reduction of the penalty.

Decision

38. For the reasons set out above, we have concluded that the Tribunal does not have jurisdiction to hear Mr Wallace's appeal against the excise duty assessment based on his claim that the tobacco is for personal use and there is no reasonable prospect of Mr Wallace's appeal succeeding. We therefore direct under rule 8(2)(a) and rule 8(3)(c) of the Tribunal Rules that the appeal against the excise duty assessment is struck out.

39. For the reasons set out above we refuse the appeal against the penalty assessment.

40. 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.

VICTORIA NICHOLL
TRIBUNAL JUDGE

RELEASE DATE: 12 NOVEMBER 2018