[2020] UKFTT 0016 (TC)

TC07522

PROCEDURE – application for stay pending the CJEU decision in Perfect – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/00279

BETWEEN

CANMI LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL

Sitting in public at Taylor House, London on 16 December 2019

Mr Hammid Baig, Counsel, for the Appellant

Mr Joshua Carey, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. The substantive appeal in this case concerns the importation of alcohol into the UK. The appellant (or "**Canmi**") acts as a representative of persons who import alcohol into the UK (the "**Importer**"). In this case, the appellant acted as representative of an Importer called Ms Miriam Bumah ("**Ms Bumah**").

2. HMRC have assessed the appellant to unpaid excise duty in the sum of £13,972. This is on the basis that the appellant is jointly and severally liable for the unpaid excise duty for which Ms Bumah is also liable. This duty arises as a result of the wrong duty code being submitted to HMRC on form C88.

3. The appellant resists the assessment and does so on a number of grounds one of which is that it is an "innocent agent". The application before me today is an application for a stay of the substantive appeal by the appellant, on the grounds that a reference has been made by the Court of Appeal to the CJEU in the case of *HMRC v Martin Glenn Perfect* [2019] EWCA Civ 465 ("***Perfect***"). In the appellant's view, *Perfect* is relevant to its assertion that it is an innocent agent and the CJEU decision, and any relevant subsequent decision of the UK courts will be of material assistance in resolving the substantive (or one of the substantive) issues in its appeal.

4. The respondents resist that application. For the reasons given later in this decision I have decided to refuse the application.

OTHER APPEALS

5. The appellant acts for a number of Importers. It has been assessed as being jointly and severally liable for unpaid duty in 34 other cases. It has appealed against those assessments. Due to issues regarding hardship, those other appeals are currently in abeyance. The parties, however, have agreed that given that the issues in those cases are virtually identical to each other and to the issues in this case, my decision in this application will apply equally to all of those other appeals if and when the hardship issues are resolved and those appeals proceed in the usual way.

THE BACKGROUND TO THE ASSESSMENTS

6. The appellant has been assessed on the basis that insufficient excise duty has been paid following a duty point created by Ms Bumah when the goods were imported. This is in contravention of Regulation 6(1)(d) of The Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (the "**Regulations**") which state, inter alia, as follows:

> "5. Subject to regulation 7(2), there is an excise duty point at the time when excise goods are released for consumption in the United Kingdom.
>
> 6.(1) Excise goods are released for consumption in the United Kingdom at the time when the goods—
>
> (a) ……..

(b) are held outside a duty suspension arrangement and UK excise duty on those goods has not been paid, relieved, remitted or deferred under a duty deferment arrangement;

(c) ……

(d) are charged with duty at importation unless they are placed, immediately upon importation, under a duty suspension arrangement.

(2) In paragraph (1)(d) "importation" means—

(a) the entry into the United Kingdom of excise goods other than EU excise goods, unless the goods upon their entry into the United Kingdom are immediately placed under a customs suspensive procedure or arrangement; or

(b) the release in the United Kingdom of excise goods from a customs suspensive procedure or arrangement.

……………..

12 (1) The person liable to pay the duty when excise goods are released for consumption by virtue of regulation 6(1)(d) (importation of excise goods that have not been produced or are not in free circulation in the EU) is the person who declares the excise goods or on whose behalf they are declared upon importation.

(2) In the case of an irregular importation any person involved in the importation is liable to pay the duty.

(3) Where more than one person is involved in the irregular importation, each person is jointly and severally liable to pay the duty."

7. The Regulations introduce into domestic UK law the relevant provisions of the Union Customs Code and Council Directive 2008/118/EC. There was no dispute between the parties as to the relevant law.

8. The goods in question in this case comprise various brands of beer bought from suppliers based in Nigeria. It is HMRC's position that between 1 April 2016 and 22 November 2016 Ms Bumah imported beer from Nigeria into the UK, and the appellant made import declarations on her behalf. The relevant import declaration must be made on form C88, and it is HMRC's case that the incorrect tax type code was used in the relevant declaration. HMRC say that code 473 should have been used rather than code 443 which was actually used. Code 443 indicates an importation of beer brewed by small breweries and thus attracts a lower rate of duty than beer imported from larger breweries.

9. The appellant accepts that it acted in the name of and on behalf of Ms Bumah and completed and submitted form C88 to CHIEF, acting, in that process, as direct representative.

10. It is HMRC's case that the appellant is a person liable to pay duty under Regulation 12, as is Ms Bumah; and that the appellant is jointly and severally liable to pay that duty with Ms Bumah.

11. The parties are agreed that in order for the appellant to be jointly and severally liable for the underpaid duty, there must be both an irregular importation, and Canmi must have been involved in that irregular importation.

12. It is my understanding that the parties are also agreed that the use of the incorrect tax code (over which I understand there to be no dispute) comprises such an irregularity. And so the only issue in this case is whether Canmi was involved in that irregular importation.

The relevant legal principles

13. Although I was not referred to this case by either party, the relevant legal principles which apply to an application for a stay of proceedings have been elegantly set out by Judge Falk (as she was then) in the First-tier Tribunal case of *Waverton Property LLP v HMRC* [2017] UKFTT 0853 (TC). The relevant extract is set out below:

> "6. The Tribunal has power to stay proceedings under its case management powers. This is specifically acknowledged in rule 5(3)(j) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules"). Under rule 2(3) the Tribunal must, when exercising of its powers, seek to give effect to the overriding objective set out in rule 2, namely to deal with cases fairly and justly. It is worth setting out the relevant parts of rule 2 in full:
>
> > 2 (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly. (2) Dealing with a case fairly and justly includes—
> >
> > > (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
> > >
> > > (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
> > >
> > > (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
> > >
> > > (d) using any special expertise of the Tribunal effectively; and
> > >
> > > (e) avoiding delay, so far as compatible with proper consideration of the issues.
> >
> > (3) The Tribunal must seek to give effect to the overriding objective when it—
> >
> > > (a) exercises any power under these Rules … …".
>
> 7. There was no dispute that the proper approach to take is the one succinctly described in *Revenue and Customs Commissioners v RBS Deutschland Holdings GmbH* [2007] STC 814 at [22], namely that a tribunal or court may stay (or sist) proceedings against the wishes of a party:
>
> > "… if it considered that a decision in another court would be of material assistance in resolving the issues before the tribunal or court in question and that it was expedient to do so."

8. This test is discussed further in two First-tier Tribunal cases that I was referred to, *Coast Telecom Limited* v HMRC [2012] UKFTT 3017 (TC) and *Peel Investments UK Limited* [2013] UKFTT 404 (TC). In *Peel Investments* Judge Herrington said this at paragraphs [9] to [12]:

> "9. The parties were agreed that the proper approach to be adopted as regards an application for a stay in the absence of agreement between the parties in a case in this Tribunal was that set out in *Coast Telecom Limited v HMRC* [2012] UKFTT 307 (TC) where Judge Berner stated at paragraph 5:
>
> > "I start by reminding myself of the proper approach to be adopted in considering whether to grant a stay in the absence of agreement between the parties. Although neither party referred to it, I consider that the correct approach is to be derived from *Revenue and Customs Commissioners v RBS Deutschland Holdings GmbH* [2007] STC 814 where the Court of Session as the Court of Exchequer in Scotland held (at [22]) that a tribunal or court might sist, or stay, proceedings against the wish of a party if it considers that a decision in another court would be of material assistance (not necessarily determinative) in resolving issues before the tribunal or court in question, and that it is expedient to do so."
>
> The Court of Session in *RBS Deutschland Holdings* had held at paragraph 22 of its judgment as follows:
>
> > "Furthermore, at page 8 of the decision, the Tribunal made a pronouncement to the effect that it would sist proceedings against the wish of one of the parties pending a decision in another court only where that decision would be determinative of the issues before the Tribunal. We do not recognise that proposition as one reflecting normal practice in relation to the exercise of a discretion to sist. As we would see it, a Tribunal or court might sist proceedings against the wish of a party if it considered that a decision in another court would be of material assistance in resolving the issues before the Tribunal or court in question and that it was expedient to do so."
>
> 10. The Tribunal in *Coast Telecom* went on to stress that it was not enough that another court's determination might provide answers of relevance and that this put the test in RBS Deutschland too low (at paragraph 21):
>
> > "The question is not whether the determination of another court might provide assistance, but whether it will provide material assistance."
>
> 11. The Tribunal also considered that different factors can apply to a fact-finding Tribunal as referred to in paragraph 22 of its decision:
>
> > "Where issues of law alone remain in dispute it can be seen that the imminent consideration of the position under EU law could justify a stay of the appeal proceedings. But the same does not hold good where the facts remain to be determined. Many of the questions raised in the references are themselves fact-specific. Accordingly, I do not consider that it would be expedient to order a stay in circumstances where the facts remain to be found by the first instance tribunal."

> 12. It is important to note that *Coast* was an MTIC case with complex factual issues to determine and witnesses on both sides where it is fair to say that the findings of fact are paramount. …"

9. In summary, therefore, the test is not whether a decision in another case would be necessarily determinative, but whether it would be of material assistance, and whether the grant of a stay would be expedient. The fact that another case may be relevant is not enough. There is also a distinction between cases raising pure legal issues and those which will involve a material fact-finding exercise.

10. These principles were applied by the First-tier Tribunal in *Degorce v HMRC* [2016] UKFTT 429 (TC) to refuse a stay of the appellant's appeal in relation to his 2007-08 return behind his own appeal to the Court of Appeal in relation to his 2006-07 return, even though both appeals related to the same appellant and what were described at [16] as "structurally identical" transactions, on the basis that whilst the Court of Appeal decision might be of assistance the Tribunal was not convinced that it would provide sufficient material assistance to justify a stay."

14. The respondents also rely upon Judge Berner's decision in *Grattan Plc (No 2) v Revenue and Customs* [2011] UKFTT 282 (TC) referring to *DEFRA v Downs* [2009] EWCA Civ 257, as being instructive as to the relevant test:

> "...a stay is an exception rather than the rule, and solid grounds have to be put forward. If those grounds are then established, the Court must undertake a balancing exercise weighing the risks of injustice to each side if a stay is or is not granted." (Emphasis added).

PERFECT

15. *Perfect* is a case which revolves around Regulation 13 which relevantly states 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."

16. The principle question arising in the appeal to the Court of Appeal was whether a lorry driver who at the excise duty point was found to be carrying goods in respect of which duty had not been paid is strictly liable to pay the duty under the Regulations. The appeal focuses on what is meant by "holding" goods within the meaning of Regulation 13.

17. "Holding" is not defined in any of the relevant legislation.

18. It was HMRC's position both in the First-tier Tribunal and in the Upper Tribunal that Regulation 13 imposed strict liability on the lorry driver who delivered or held the goods. Mr Perfect's position, on the other hand, was that the Regulations do not impose strict liability at all and in particular they do not impose liability on those involved as "innocent agents", a term which extends to those who lack actual or constructive knowledge of a criminal enterprise in which they have become unwittingly involved.

19. The First-tier Tribunal found, as a fact, that Mr Perfect had neither actual nor constructive knowledge that a liability to excise duty had arisen in respect of the goods that he had imported into the United Kingdom in his lorry. And no challenge to that finding of fact was made before either the Upper Tribunal, or the Court of Appeal.

20. The First-tier Tribunal decided that an innocent agent (i.e. a driver who has neither actual or constructive knowledge that goods in his physical possession are smuggled goods) is not to be regarded as holding those goods for the purposes of Regulation 13.

21. This decision was upheld by the Upper Tribunal.

22. The Court of Appeal recognised that the natural meaning of the words "holding" or "making delivery" of goods does not impute any requirement that the person is aware of the tax status of the goods. And that there was "very considerable force in the argument that, given the policy underlying the Directive, the imposition of strict liability on a driver in the circumstances does not offend the principles of fairness or proportionality".

23. However it recognised that there were decisions of the Criminal Division of the Court of Appeal which supported Mr Perfect's contention that someone in physical possession of goods without actual or constructive knowledge that duty has not been paid on them, cannot be a "holder" for the purposes of Regulation 13.

24. Accordingly it concluded that the issue is not *acte clair*, and so referred the following questions to the CJEU for a preliminary ruling:

> "(1) Is a person ("P") who is in physical possession of excise goods at a point when those goods become chargeable to excise duty in Member State B liable for that excise duty pursuant to Article 33(3) of Directive 2008/118/EC ("the Directive") in circumstances where that person
>
> > (a) had no legal or beneficial interest in the excise goods;
> >
> > (b) was transporting the excise goods, for a fee, on behalf of others between Member State A and Member State B; and
> >
> > (c) knew that the goods he was in possession of were excise goods but did not know and did not have reason to suspect the goods had become chargeable to excise duty in the Member State B at or prior to the time that they became so chargeable?
>
> (2) Is the answer to question (1) different if P did not know that the goods he was in possession of were excise goods?"

DISCUSSION

25. Both Mr Carey and Mr Baig made cogent and persuasive submissions on a number of relevant matters. Mr Baig identified eight similarities between *Perfect* and the appellant which he said suggested sufficient common ground so as to make a decision in *Perfect* materially relevant. Mr Carey, on the other hand, submitted that these did not have the relevance claimed by Mr Baig, and on a consideration of those points, I prefer Mr Carey's submissions to those of Mr Baig. Whilst there are some common features, many of those suggested by Mr Baig are of interest but not relevance. And so I have not considered them in detail below. But the issue of knowledge which Mr Baig says is common to both *Perfect* and the appellant is very relevant to the defence of innocent agent, and I do consider this in detail below.

26. The test of whether I should grant a stay is whether *Perfect* (when ultimately decided) will be of material assistance to the trial judge, and whether the stay is expedient. It is unlikely that the stay will be expedient where the facts have not been found by the fact finding tribunal.

27. In this case the facts remain to be found. The appellant resists the assessments on a number of grounds, the relevant one for this stay application being that it is an innocent agent. It says that although its position is not directly analogous to that of Mr Perfect, there is sufficient common ground that the principles to be resolved in *Perfect* will be of material assistance to the trial judge hearing the substantive appeal. HMRC say that the issue here is whether the appellant was involved in the irregular importation (which irregularity, HMRC submits, is agreed); and *Perfect* considers strict liability in the context of Regulation 13 whereas this appeal is a Regulation 12 case, and "holding" is not the same as "involvement".

28. I am sympathetic with Mr Baig's submissions that *Perfect* is relevant to the appellant's position. Although *Perfect* is concerned with "holding" goods, the main point in *Perfect* is whether Regulation 13 imposes strict liability on someone who is in physical possession of goods at an excise duty point. The issue of strict liability is, to my mind, equally apposite to the concept of "involvement" in Regulation 12. A decision on this point in *Perfect* will bring the issue of whether there must be actual or constructive knowledge in the context of "holding" closer to home into the field of excise duty. It will hopefully resolve the apparent discrepancy between the decisions of the Criminal Division of the Court of Appeal, on the one hand, and the decisions cited by HMRC in their submissions to the Court of Appeal in *Perfect*, on the other.

29. The discussion of the issue in *Perfect* may provide an insight into whether a lack of actual or constructive knowledge is a defence to an ostensibly strict liability excise duty offence.

30. But it is my view that such discussion and subsequent decision will not satisfy the tests of material assistance and of expediency that are required for me to grant a stay. I say this for two reasons.

31. The first is that there have been no findings of fact in this case. In *Perfect* it had been accepted that Mr Perfect had neither actual nor constructive knowledge that the goods were smuggled goods. In this appeal, no such finding has yet been made. As a matter of legal principle, it would not be expedient to order a stay pending those findings. As a matter of practicality it would not be appropriate to do so either. The defence of innocent agent cannot get off the ground unless the appellant establishes that it had neither actual or constructive knowledge of the irregularity. HMRC have put forward prima facie evidence that it did have such knowledge. This is not something that I have to decide at this time. It is a matter for the trial judge. But to order a stay now without any findings would, in my view, be premature.

32. The appropriate course is for the appeal to continue and the facts to be found by the trial judge on hearing the substantive appeal. If such findings are that the appellant had actual or constructive knowledge, then its defence of innocent agent is likely to be considerably weakened if not rendered unsustainable, and its other grounds of appeal will then become more relevant. It has not been suggested that those other grounds are relevant to the application for a stay. If there is a finding that the appellant had neither actual nor constructive knowledge of the irregularity, then the issue of innocent agent can be considered by the trial judge in the context of Regulation 12. It may be that the trial judge will take the view that, having made those findings of fact, the decision in *Perfect* (if it has not been decided by then) will be of material assistance. If so, that judge can order a stay at that time. But it is my view that granting a stay now without any findings of fact would be premature and would not be expedient.

33. Nor do I think that the decision in *Perfect* would be of material assistance without any findings of fact. Clarification of strict liability only becomes relevant, let alone materially relevant, if the relevant underlying facts in *Perfec*t are satisfied in this appeal i.e. that the appellant has been found to have neither actual nor constructive knowledge. Without that, *Perfect*, whilst of academic interest, will not be materially relevant.

34. Secondly I have serious doubts that the specific question asked by the Court of Appeal in *Perfect*, set out at [24] above will generate an answer which will enable the issue of strict liability in the context of Regulation 12 to be clarified sufficiently such that the *Perfect* decision will be of material assistance in this case.

35. The specific question posed in the reference to the CJEU, by the Court of Appeal concerns a person who is "in physical possession of excise goods". In this appeal there does not seem to be any dispute that the appellant never took physical possession of the goods. It acted as direct representative, and one of its tasks was to complete form C88. The goods were physically shipped into the UK and the importer was responsible for taking possession of them.

36. It is my experience that when a specific question is asked of the CJEU, the question is answered in specific terms. So that when the CJEU answers the question posed of it, it will be couched in terms of "physical possession". Whilst the text of the decision may include a discussion of the concept of strict liability and the issue of whether actual or constructive knowledge that they were smuggled goods might provide a defence to such liability, it is likely that that issue will relate specifically to physical possession. This is a very different concept from "involvement" which is the issue in this appeal.

37. Whilst the decision in *Perfect* is likely to include a discussion about strict liability and actual constructive knowledge, and that discussion is likely to be of interest and indeed relevance to this appeal, it will not, to my mind, be of sufficient material assistance to this case to warrant a stay.

38. And so for these reasons the appellant's application for a stay is refused. I will issue brief case management directions to deal, inter alia, with the appellant's application for amending its grounds of appeal, separately.

39. Finally Mr Baig made a half-hearted application for a reference in this appeal to the CJEU. This was not pursued with any conviction, rightly so in my opinion, and was opposed by Mr Carey. Given that such an application requires the appellant to jump through a number of procedural hoops which it has not done, I refuse that application too.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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.

NIGEL POPPLEWELL

TRIBUNAL JUDGE

Release date: 09 January 2020