TC02878

Appeal number: TC/2012/08668

EXCISE DUTY – assessment in relation to excise goods seized from the appellant – jurisdiction of the tribunal – Revenue and Customs Commissioners v Jones and Jones [2011] EWCA Civ 824 considered – application to strike out appeal – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

NICHOLAS RACE **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Manchester on 23 August 2013

The Appellant appeared in person

Mr Richard Shaw of HM Revenue & Customs Solicitor's Office for the Respondents

DECISION

Background

1. This is an application by the respondents to strike out the appeal on the grounds either that the tribunal does not have jurisdiction to hear the appeal, alternatively that there is no reasonable prospect of the appeal succeeding.

2. The appeal is in relation to an assessment to excise duty in the sum of £2,317 made on 27 April 2012 ("the Assessment"). The Assessment was made following the seizure of a quantity of cigarettes, tobacco and wine at the appellant's home address on 4 August 2011. It was made on the basis that the goods seized had been released for consumption without payment of excise duty. On this appeal the appellant seeks to contend that the goods were purchased legitimately by way of cross border shopping.

3. Put briefly, the respondents contend that the effect of the decision of the Court of Appeal in *Revenue and Customs Commissioners v Jones and Jones [2011] EWCA Civ 824* precludes the appellant from asserting that the seized goods were purchased legitimately. If he had wished to do so, he should have challenged the legality of the seizure in condemnation proceedings.

4. It is not my function on this application to determine any issues of fact. The respondents contend that whatever the underlying factual dispute as to the circumstances in which the appellant obtained the goods, I am bound as a matter of law to strike out the appeal.

Statutory Framework

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.*

…

152 The Commissioners may as they see fit –

… (b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under [the Customs and Excise Acts]…"

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. The assessment, review and appeals procedure in relation to the recovery of excise duty is contained in *Finance Act 1994*. In particular section 12(1A) gives the respondents power to assess excise duty where it appears that a person is a person from whom excise duty has become due.

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. *Section 15A* provides for HMRC to offer a review of a "relevant decision" which includes the Assessment under appeal in the present appeal.

10. *Section 16 Finance Act 1994* sets out the jurisdiction of the tribunal on an appeal against the review carried out by HMRC in the present case. The decision to make the Assessment and confirm it on review is not an ancillary matter. As such the tribunal's jurisdiction is not limited to considering whether the decision of the review officer was reasonable under *section 16(4)*. The tribunal has what is called a full appellate jurisdiction under *section 16(5)*. Hence it can consider whether liability to the assessment is justified as a matter of law and if so whether or not the assessment is excessive.

11. *Section 16(6)* makes provision as to the burden of proof on an appeal. For present purposes the burden at a final hearing of the appeal would be on the appellant to satisfy the tribunal that the grounds of his appeal are established. For present purposes, as indicated above, I am not concerned with making findings of fact.

12. In addition to the Assessment the respondents have also assessed a penalty on the appellant of £892 pursuant to Schedule 41 Finance Act 2008. In his notice of appeal the appellant has also appealed against the penalty on the same grounds as his appeal against the Assessment. The respondent's application to strike out the appeal only extends to the appeal against the Assessment. The respondents accept that there will still be a hearing of the appeal against the penalty assessment.

The Respondents' Case on the Strike Out Application

13. The application to strike out the appeal is made pursuant to Tribunal Rule 8(2)(a), alternatively Rule 8(3)(c). 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.*"

14. Rule 8(3)(c) is the equivalent of summary judgment. In appropriate cases summary judgment can be given even where there is a factual issue but the appellant has no reasonable prospect of establishing the facts necessary to support an appeal. However that is not how the respondents put their case on this application. The respondents say that the appeal has no reasonable prospect of success because as a matter of law the appellant cannot assert that excise duty had been paid on the seized goods or is not otherwise due.

15. The basis on which the respondents seek to make good that submission is, they say, to be found in the decision of the Court of Appeal in *Jones & Jones*. In that case 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 a detailed 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.

16. 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 maintaining that the FTT was 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.

17. The Respondents rely in particular on the judgment of Mummery LJ at [71] which I shall set out in full:

> *" I am in broad agreement with the main submissions of HMRC. For the future guidance of tribunals and their users I will summarise the conclusions that I have reached in this case in the light of the provisions of the 1979 Act, the relevant authorities, the articles of the Convention and the detailed points made by HMRC.*
>
> *(1) The respondents' goods seized by the customs officers could only be condemned as forfeit pursuant to an order of a court. The FTT and the UTT are statutory appellate bodies that have not been given any such original jurisdiction.*
>
> *(2) The respondents had the right to invoke the notice of claim procedure to oppose condemnation by the court on the ground that they were importing the goods for their personal use, not for commercial use.*
>
> *(3) The respondents in fact exercised that right by giving to HMRC a notice of claim to the goods, but, on legal advice, they later decided to withdraw the notice and not to contest condemnation in the court proceedings that would otherwise have been brought by HMRC.*
>
> *(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.

(6) The deeming provisions in paragraph 5 and the restoration procedure are compatible with Article 1 of the First Protocol to the Convention and with Article 6, because the respondents were entitled under the 1979 Act to challenge in court, in accordance with Convention compliant legal procedures, the legality of the seizure of their goods. The notice of claim procedure was initiated but not pursued by the respondents. That was the choice they had made. Their Convention rights were not infringed by the limited nature of the issues that they could raise on a subsequent appeal in the different jurisdiction of the tribunal against a refusal to restore the goods.

(7) I completely agree with the analysis of the domestic law jurisdiction position by Pill LJ in Gora and as approved by the Court of Appeal in Gascoyne. The key to the understanding of the scheme of deeming is that in the legal world created by legislation the deeming of a fact or of a state of affairs is not contrary to "reality"; it is a commonly used and legitimate legislative device for spelling out a legal state of affairs consequent on the occurrence of a specified act or omission. Deeming something to be the case carries with it any fact that forms part of the conclusion.

(8) The tentative obiter dicta of Buxton LJ in Gascoyne on the possible impact of the Convention on the interpretation and application of the 1979 Act procedures and the potential application of the abuse of process doctrine do not prevent this court from reaching the above conclusions. That case is not binding authority for the proposition that paragraph 5 of Schedule 3 is ineffective as infringing Article 1 of the First Protocol or Article 6 where it is not an abuse to reopen the condemnation issue; nor is it binding authority for the propositions that paragraph 5 should be construed other than according to its clear terms, or that it should be disapplied judicially, or that the respondents are entitled to argue in the tribunal that the goods ought not to be condemned as forfeited.

(9) It is fortunate that Buxton LJ flagged up potential Convention concerns on Article 1 of the First Protocol and Article 6, which the court in Gora did not expressly address, and also considered the doctrine of abuse of process. The Convention concerns expressed in Gascoyne are allayed once it has been appreciated, with the benefit of the full argument on the 1979 Act, that there is no question of an owner of goods being deprived of them without having the legal right to have the lawfulness of seizure judicially determined one way or other by an impartial and independent court or tribunal: either through the

courts on the issue of the legality of the seizure and/or through the FTT on the application of the principles of judicial review, such as reasonableness and proportionality, to the review decision of HMRC not to restore the goods to the owner.

(10) As for the doctrine of abuse of process, it prevents the owner from litigating a particular issue about the goods otherwise than in the allocated court, but strictly speaking it is unnecessary to have recourse to that common law doctrine in this case, because, according to its own terms, the 1979 Act itself stipulates a deemed state of affairs which the FTT had no power to contradict and the respondents were not entitled to contest. The deeming does not offend against the Convention, because it will only arise if the owner has not taken the available option of challenging the legality of the seizure in the allocated forum."

18. Mr Shaw submits that the crucial aspect of the present appeal is that the appellant took no action to challenge the legality of the seizure, hence the effect of the deeming provision in Schedule 3 CEMA 1979 is that he can no longer do so. In short, he says that the appellant's opportunity to put forward his factual case that no excise duty was payable on the goods was in condemnation proceedings and not before the tribunal. He argues that the tribunal has no jurisdiction to consider the issues raised by the appellant and the appeal should therefore be struck out pursuant to Tribunal Rule 8(2)(a). Alternatively because the appellant has no right to raise the issue as to whether duty had been paid on the seized goods the appeal has no reasonable prospect of success and should be struck out pursuant to Tribunal Rule 8(3)(c).

19. In the circumstances Mr Shaw submits that the extent of the tribunal's jurisdiction on this appeal is to consider whether the Assessment is technically deficient in some way. For example if it assesses the wrong person, it is out of time or the amount is incorrectly stated. There is no suggestion of any such deficiencies in the present case.

Discussion

20. I have had cause to deal with similar issues in previous appeals, most recently in a case called *B & G Liquor Store Limited v Commissioners for HM Revenue and Customs [2013] UKFTT 339 (TC)*. In the particular circumstances of that case I refused to strike out the appeal. I considered that if the appellant made good its factual case then it had been trying immediately following the seizure to obtain information necessary for it to challenge the seizure but this had not been provided by HMRC. It had not received Notice 12A and it had not been advised by HMRC that there was a time limit of 1 month for the bringing of condemnation proceedings which could not be extended. Further it had not been informed that if it did not pursue condemnation proceedings then the grounds on which it could resist an assessment to excise duty on the seized goods would be severely limited.

21. I decided that it was arguable on the facts of that case that there would be a procedural unfairness and possible infringement of the appellant's Convention rights

under Article 1 if it was not entitled to put its case that the goods were duty paid. If the appellant were to be denied the opportunity to challenge the legality of the procedure in the tribunal its Convention rights may have been infringed. It could not be said that the appellant had no reasonable prospect of succeeding in the appeal.

22. I understand that the respondents considered an appeal against that decision but they did not seek permission to appeal.

23. The present application to strike out is factually very different from *B & G Liquor Store Ltd*. Having said that the appellant says in support of the present appeal that he was told by the seizing officer that he could appeal the seizure of goods. If he wished to do so he should put it in writing and the appeal would come to the seizing officer but that he would not be getting the goods back. The appellant says that he did write to the seizing officer but nothing happened and at the time of the assessment the respondents told him that they had no record of any appeal against the legality of the seizure. Whether or not these exchanges ever happened is not a question I am invited to resolve on this application. I must therefore take it that the appellant would have a reasonable prospect of establishing that these events did happen.

24. For the same reasons as I gave in *B & G Liquor Store Ltd* it seems to me that the appellant does have an arguable case that there would be a procedural unfairness and possible infringement of the appellant's Convention rights under Article 1 if he is not entitled to put his case that no excise duty was payable in relation to the goods.

25. The present application also highlights two further aspects of such appeals.

26. Firstly the time between the date of seizure and the date of the assessment to excise duty. In the present case there was a period of some 8 months between the date of seizure and the date of the assessment. In comparison there is a time limit of one month from the date of seizure within which the appellant must notify the respondents that he wishes to challenge the legality of the seizure. There is no provision to extend that time limit.

27. When the period of one month expired the appellant was not in a position to know whether the respondents would be issuing an assessment for the excise duty involved. Nor is there any evidence that he was told that if he wished to challenge any subsequent assessment to duty on the grounds that no excise duty was payable then he should make a claim under *Paragraph 1 Schedule 3 CEMA 1979*.

28. The position can therefore be contrasted with the issue in *Jones & Jones* where the Court of Appeal was concerned with an application for restoration. If an individual wants his goods back he knows that if he wishes to challenge the legality of the seizure he must initiate condemnation proceedings by making a claim to the respondents. Alternatively if he wants his goods back but does not wish to challenge the legality of the seizure, then he can still ask HMRC to exercise their discretion to restore. Either way, HMRC have his goods and he wants them back.

29. In a case such as the present an appellant for one reason or another may not want the goods back. For example he may consider that he does not want to be

exposed to any risk as to the costs of condemnation proceedings. However, he does not know whether HMRC will be making an assessment to duty. At most he knows that there is a risk of such an assessment. Indeed Mr Shaw accepted at the hearing that it is only relatively recently that HMRC have sought to make assessments on persons unlawfully importing excise goods.

30. Secondly, there is also the possibility of a penalty being assessed. A penalty was assessed in the present case although not until more than a year after the date of seizure. It is notable that the respondents have not applied to strike out the appeal against the penalty assessment. Having said that Mr Shaw argued that even in relation to the penalty appeal *Jones & Jones* may limit the extent of the tribunal's jurisdiction to make findings of fact inconsistent with the deemed lawful condemnation of the goods.

31. It seems to me that if an individual decides to accept forfeiture of the goods rather than embark upon potentially costly condemnation proceedings in the magistrate's court, he should not be forced to bring such proceedings simply to guard against the possibility that there may subsequently be an assessment to duty and/or a penalty assessment.

32. During the course of the hearing my attention was drawn to a summary decision which I made in the case of *Ryan Eccles TC/2012/07689*. In that case I struck out an appeal against an excise duty assessment on the basis that following *Jones & Jones* it was not open to the appellant to assert that the goods were for private use. In relation to that decision I note that there was no suggestion of any attempt to challenge the legality of the seizure within the period of one month allowed by *Schedule 3 CEMA 1979*. Nor on that occasion did I fully consider the timing differences described above. In the present appeal, as in *B & G Liquor Stores Ltd*, the appellant claims that he did attempt to challenge the seizure.

33. I invited Mr Shaw to identify any other tribunal decisions where the present issue has arisen in relation to duty assessments. I was referred to a number of other decisions of the First-tier Tribunal including *Repertoire Culinaire v HMRC [2013] UKFTT 278 (TC)*. None of those decisions involved any detailed consideration as to the application of *Jones & Jones* to appeals against assessments to excise duty.

34. On one view a claim by an appellant that he has somehow been frustrated by HMRC in an attempt to challenge the legality of seizure is something which should be brought by way of judicial review, rather than an appeal to the tribunal. However I do not consider that the appellant in the present case and in *B & G Liquor Stores Ltd* are seeking to challenge the conduct of HMRC in relation to prospective condemnation proceedings. Rather they are seeking to challenge assessments to excise duty in circumstances where they contend that they should not be precluded from doing so because they had not initiated the condemnation procedure.

35. In all the circumstances I do not consider that it is appropriate to strike out this appeal. In particular:

(1) It is arguable that *Jones & Jones* does not limit the jurisdiction of the tribunal in relation to an appeal against an assessment to excise duty.

(2) If the appellant satisfies the tribunal that he was frustrated in a genuine attempt to challenge the legality of the seizure then the Tribunal arguably must give him a remedy in order to vindicate his rights under Article 1 which include the right to a procedurally fair hearing.

(3) The same factual issues will in any event arguably arise at the hearing of the penalty appeal.

(4) In so far as the strike out application raises issues of law, I do not consider it appropriate to determine those issues without a full investigation of the facts (Cp *Barratt v London Borough of Enfield [1999] UKHL 25*).

36. For these reasons I refuse the application to strike out. I further direct that the respondents should serve their statement of case within 63 days from the date this decision is released.

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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 10 September 2013