



TC05574

Appeal number: TC/2013/05135

EXCISE DUTY – tobacco brought in from another Member State – assessments duty – Jones and Race applied – duty payable – appeal against duty assessment dismissed – Excise wrongdoing penalty – minimum penalty – no special circumstances – no possibility of success – strike out application granted

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MR CHARLES FLEMING

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ANNE SCOTT

Sitting in public at North Shields on Wednesday 2 November 2016

Written Submissions dated 28 November 2016

Having heard the Appellant in person

Miss Bond of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Background

1. On 16 October 2013 the appeals by Mr Fleming against the review decision dated 25 July 2013 for excise assessment and against the decision dated 16 August 2013 for excise wrongdoing penalty were consolidated.
2. The consolidated appeal was stood over pending the outcome of *HMRC v Race*¹.

The First Hearing

3. Following the decision in *Race*, HMRC's strike out application dated 22 August 2014 was heard at North Shields on 9 February 2015 and is reported at TC/2013/05135. As far as the excise assessment is concerned the Tribunal confirmed at paragraph 21 that

“... an appeal against an assessment to duty raised on only the ground of appeal, that the seizure was illegal because the goods had been intended for Mr Fleming's personal use, would have no prospects of success and ought to be struck out but that there were two relevant points which Mr Fleming might wish to raise, namely 'consumption' and 'proportionality'”.

The Tribunal went on to say at paragraph 22 that

“The position on the appeal against the penalty is, we consider, different in that it is open to Mr Fleming to argue that the penalty should be reduced or stayed by reason of special circumstances”.

4. The application for strike out was refused. Directions were given to enable Mr Fleming to amend his grounds of appeal, if so advised. Unsurprisingly, on 17 August 2015, he intimated that he wished to raise the issues of consumption and proportionality.
5. On 19 October 2015 HMRC served the Statement of Case. This appeal was then stayed pending the outcome of the hearing in *Marcin Staniszewski v HMRC*² (“Staniszewski”) which was a preliminary hearing on the consumption and proportionality issues in this context.
6. Following the release of the decision in that case, the stay was lifted on 18 May 2016. Judge Brooks found in *Staniszewski* that the First-tier Tribunal does not have jurisdiction to consider consumption and proportionality arguments in relation to assessments for excise duty. At paragraph 51 Judge Brooks found that the penalty regime does comply with the principle of proportionality. That decision has not been appealed. Although not binding on me, I agree with it and adopt those findings.

¹ 2014 UKUT 0331 (TCC)

² 2016 UKFTT 0128 (TC)

7. On 11 July 2016, HMRC served a notice of application for strike out in terms of Rule 8 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Rules”) on the basis that the appeal had no prospects of success.

Mr Fleming’s arguments

5 8. Mr Fleming’s primary argument is that he has been unfairly treated.

9. He has consistently argued, and continued to do so at this hearing, that he had purchased the tobacco and cigarettes for his own use, that they had never been held for a commercial purpose and that he was not a revenue trader. He also argues that HMRC should have told him to apply to the Magistrates Court rather than telling him
10 it would cost him a great deal of money to do so. He states that he was never given the opportunity to pay the duty on his goods.

10. As far as the penalty is concerned he repeatedly stated that he now understood why it had been imposed but he did not wish to pay it. There was no argument in regard to any special circumstances.

15 HMRC’s arguments

11. As far as the assessment was concerned HMRC relied on *Race* and *Staniszewski* and argued that therefore the appeal in regard to the assessment to excise duty should be struck out and thus the assessment upheld.

12. As far as the penalty was concerned it is not in dispute that the minimum possible
20 penalty had been applied so the only other potential reduction related to special circumstances and that was not argued by Mr Fleming.

13. Miss Bond then stated that in fairness to Mr Fleming she felt obligated to draw the Tribunal’s attention to the decision of the Tribunal (Judge Richard Thomas and Susan Stott) in *Susan Jacobson v HMRC*³ (“Jacobson”).

25 Preliminary and procedural matters

The Bundles

14. I pointed out that the excerpt of the copy of the Officer’s notebook in the bundle did not include page 4. That is not material since nothing turned on the interview and in any event Mr Fleming had repeatedly signed the notebook to confirm that it was
30 accurate.

15. The original bundle included at pages 163-284 copies of various legal references. I had removed them from the bundle prior to the hearing since they did not appear to be entirely accurate. Fortunately Miss Bond had taken the same view and lodged a new bundle of authorities. Very properly, Mr Fleming did not object to that course of
35 action.

³ 2016 UKFTT 570

Discussion

16. The factual background is that Mr Fleming had purchased a quantity of tobacco in Belgium and on his return to the United Kingdom he was stopped by UK Border Force officers and the tobacco was seized.
- 5 17. The only issue which arose in regard to the interview was that Mr Fleming asserted that he did not know how to challenge the seizure. However, in his letter to the Tribunal dated 31 July 2013 he described the actual seizure and stated "... the officer seized the tobacco from me and gave me receipts and leaflets, he told me I could ask for goods back but I would have to go to court and if I lost I could end up paying court costs of £1,500 plus. After
10 reading the leaflet and thinking it over I decided it was a lot of money to lose so I never asked for it back and I thought that would be an end to the situation ...". Clearly he did know how to challenge it but chose not to do so as the seizure was not challenged in accordance with the statutory procedure in Schedule 3 Customs & Excise Management Act 1979 ("CEMA").
- 15 18. Under Schedule 3 CEMA, in order to challenge the legality of the seizure a person is required to give notice of his claim to HMRC within a month of a Notice of Seizure being served on him. A failure to do so will, by virtue of paragraph 5 of Schedule 3, result in the goods being "deemed to have been duly condemned as forfeited". Mr Fleming did not do so and therefore the tobacco was "deemed to have been duly condemned as forfeited".
- 20 19. Judge Brooks pointed out in *Staniszewski* that deeming provision had been clarified by the Court of Appeal in *HMRC v Jones & Jones*⁴ ("Jones") and the Upper Tribunal in *Race*. The impact of the deeming provision is that, in terms of the relevant law, it is no longer open to Mr Fleming to argue, in relation to an assessment,
25 for his personal use, it then follows that, in law, Mr Fleming must be treated as a person who imported the tobacco for commercial purposes even although he is clear that he did not.
20. Where tobacco is held for commercial purposes then in terms of Regulation 13 Excise Goods (Holding, Movement and Duty Point) Regulations 2010, the point at
30 which duty is payable is when the goods are first held. Accordingly it is beyond doubt that by the time Mr Fleming was stopped in his car with the tobacco by Border Force the excise duty point had passed. In other words, the duty was due and payable before he was stopped. The consequence of that is that by the time he was stopped HMRC did not have to give him a further opportunity to pay. It was too late.
- 35 21. I have considered *Jacobson*. That decision is not binding on me and, in any event, is the subject matter of an appeal to the Upper Tribunal. I am clear that because, at the point he was stopped, Mr Fleming was holding goods upon which duty was outstanding then he was liable to a penalty. That penalty is the minimum penalty and there is no suggestion of any special circumstances.

⁴ 2011 STC 2206

Decision

21. Accordingly, having due regard to Rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, I grant the application for strike out of the appeal since there is no reasonable prospect of Mr Fleming’s case, or any part of it succeeding.

22. 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.

**JUDGE ANNE SCOTT
TRIBUNAL JUDGE**

RELEASE DATE: 22 DECEMBER 2016