[2017] UKFTT 133 (TC)

TC05627

Appeal number: TC/2015/03726

EXCISE DUTY – Cigarettes brought in from another Member State - Excise assessment - Excise wrongdoing penalty - Whether appellant misled by HMRC as to alleged need to pay £2,500 to pursue a claim in the Magistrates' Court? - Terms of HMRC's letter considered - No, HMRC did not mislead - Other issues relate to legality of seizure and personal use - No jurisdiction: Jones and Race applied - Whether reasonable prospect of successfully challenging Excise wrongdoing penalty? - No - Appeal struck-out

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR MARCIN MOTOWIDEŁKO **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL

Sitting in public at Tribunals Service, Alexandra House, 14-22 The Parsonage, Manchester M3 2JA on 5 January 2017

The Appellant appeared in person

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

DECISION

1. This is my decision in relation to an application by HMRC dated 1 October 2015 to strike out the Appellant's Notice of Appeal dated 10 June 2015.

2. This decision relates to events which now occurred several years ago when the Appellant was stopped inbound from Poland at Liverpool Airport on 18 October 2012.

3. The Notice of Appeal challenges the following decisions of HMRC:

(1) A decision issued on 12 July 2013 to assess the Appellant in the sum of £1,553 in respect of the excise duty due on 7,000 Marlboro cigarettes seized from the Appellant on 18 October 2012; and

(2) An excise wrongdoing penalty issued on 4 September 2013 in the sum of £543.

4. The total of those two sums is £2,096.

5. The Notice of Appeal was issued out of time, but no objection was taken to this by HMRC. Substantial delays in this case had happened for a variety of reasons. Of my own initiative I extend the time for appealing. The present appeal was therefore made in time.

6. Mr Motowidełko sets out 4 numbered grounds for his appeal:

(1) "At the time of seizure, I was not provided with an interpreter and I misunderstood a lot of what was said to me" (Ground 1)

(2) "No tangible proof was given by the border officer to declare I was a non-smoker. I was a smoker at the time" (Ground 2)

(3) "I do not believe that my goods were lawfully seized" (Ground 3)

(4) "On the Border Force letter of 5.12.12 I did not pursue my claim as I thought I would have to pay £2,500 to do so. My English was not good enough to understand" (Ground 4)

7. He also referred to a letter dated 11.10.2013, which is in the bundle and which I have considered.

8. HMRC's Application was advanced in two ways:

(1) In relation to appeal against the assessment, the Notice of Appeal should be struck out under Rule 8(2)(a) of *The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009* ('the 2009 Rules') on the basis that I did not have jurisdiction to hear that aspect of the appeal; and

(2) In relation to the appeal against the wrondoing penalty, the Notice of Appeal should be struck out under Rule 8(3)(c) of The 2009 Rules since there was no reasonable prospect of the Appeal succeeding.

9. It is important at this point that I make it clear that the hearing before me on 5 January 2017 was not a full hearing of the appeal, but rather was a hearing to deal with HMRC's application to strike-out the appeal which, if successful, would have the effect (in the absence of any successful application for permission to appeal my decision) of preventing Mr Motowidełko's appeal going to a full hearing.

10. Given the narrow scope of the hearing before me, I did not hear any evidence in a formal sense, but I did hear and have taken full consideration of representations made by Mr Motowidełko, through a Polish-language interpreter. The Appellant was not cross-examined. I have also carefully considered all the documents in the hearing bundle as well as the document provided to me subsequently.

11. For present purposes, it is sufficient if I make the following findings of fact:

(1) On 18 October 2012, Mr Motowidełko flew from Wrocław in Poland to Liverpool;

(2) He was stopped in the Green 'Nothing to Declare' Channel;

(3) A search of his baggage revealed 7,000 Marlboro cigarettes in two bags;

(4) The Appellant told the Officer that the cigarettes were all for him;

(5) A commerciality statement was read to him;

(6) The cigarettes were seized and Mr Motowidełko was issued with forms BOR 156 (Seizure Information Notice), BOR 162 (Warning Letter about Seized Goods), both of which he signed, and Public Notices 1 and 12A;

(7) He did not stay for an interview. His (at that time) pregnant wife was waiting outside and he was worried for her.

(8) The Applicant did not sign the Officer's notebook.

Ground 4: The letter of 5 December 2012

12. I shall deal with the Ground 4 first. It is:

"On the Border Force letter of 5.12.12 I did not pursue my claim as I thought I would have to pay £2,500 to do so. My English was not good enough to understand".

13. I believed Mr Motowidełko when he told me that he had the letter translated for him by a friend. He told me that he had been under the impression, that, if he were to pursue his claim to the Magistrates' Court, he would have to pay £2,500 irrespective of the outcome: or, put another way, that he would need to pay £2,500 (in effect) as a form of fee for proceeding in the Magistrates' Court.

14. I also believed him when he told me that, having formed that impression, he formed the further impression that the choice being faced by him was either (i) to withdraw his claim and walk away, thinking that would an end of the matter and he

would not hear anything further, or (ii) pay £2,500 and go to the Magistrates' Court. Given that assessment he chose, perhaps unsurprisingly, option (i).

15. Unfortunately, although that letter was expressly referred to in the Grounds of Appeal and had apparently been attached to the Notice of Appeal when sent to the Tribunal, it was not in the materials before me and neither party had a complete copy of it with them at the hearing. I directed that a copy be produced after the hearing, which it was.

16. The letter refers to an earlier letter from Mr Motowidełko dated 29 October 2012. The letter of 29 October 2012 is an important letter. It gives a detailed account of events at the airport some 3 weeks earlier. It is written in English, but composed by a friend of Mr Motowidełko. Given that Mr Motowidełko later claimed that he had not understood the interview (which had been conducted in English) the letter nonetheless sets out in a detailed way some of the things which had been discussed at the airport. If he had genuinely not understood what was being said at the airport, Mr Motowidełko would not have been able to explain those things in his letter (even in Polish, to his friend composing the letter). Moreover, that letter did not complain of, or mention, any lack of understanding in English, or any alleged need for an interpreter. That point, put as Ground 1 of the Appeal, only emerged later.

17. The relevant part of the 5 December 2012 letter reads, in full, as follows:

> **"What Happens Now**
>
> **1. If you wish to continue with your appeal against the legality of the seizure.**
>
> No further action is required by you at this stage as BF [Border Force] will start Condemnation proceedings in the magistrates' court. In due course you will receive a summons from the court advising you where and when the Condemnation hearing will take place. It may take several months for the summons to be sent to you. Under Section 10 of Schedule 3 of the Customs and Excise Management Act 1979 you will be required to claim ownership of the seized things on oath in court, usually at a preliminary hearing.
>
> If the magistrates do not accept your claim that the seizure was unlawful, they will condemn the goods as liable to forfeiture and the goods will remain the property of the BF. **BF will also ask the Court to order you to make a contribution towards its costs, which are likely to be not less than £2,500.** (emphasis added by me)
>
> Alternatively, if the court were to find in your favour, then the goods would be returned to you and you would be entitled to ask the Court to award costs against the BF. If that were to happen, but the goods had been disposed of, BF would offer you appropriate recompense.
>
> **2. If you wish to withdraw your appeal against the legality of the seizure**

If you do not wish to proceed with your appeal, you must inform this office in writing within 14 days of the date of this letter, otherwise Condemnation proceedings will be started and you may become liable to costs even if you withdraw later.

If you withdraw from Condemnation proceedings after they have started, or do not attend court when summonsed, costs may be awarded against you. (Emphasis added by me)

The magistrates' court is the only forum for you to challenge the legality of the seizure, including any claim that the goods were for your own use or not commercial: You may not claim that the excise goods were for own use as part of a restoration request, review or appeal to a tribunal; or in a complaint.

You should read Customs Notice 12A, given to you at the time of seizure, which also tells you about requesting restoration of the goods. You should also consider seeking legal advice.

18. The last page of the letter has a form attached for completion. It says:

"Please tick one of the two boxes:-

☐ *I wish to continue my claim in the magistrates' court challenging the legality of the seizure.*

OR

☐ *I wish to withdraw/ discontinue my claim."*

19. That form is not in the bundle. I am assuming (by its absence from the letter which Mr Motowidełko sent the Tribunal) that he completed this form and returned it, indicating that he wished to withdraw or discontinue his claim.

20. The form then carries a series of 'Notes', of which the relevant Notes read as follows:

1. The purpose of this form is to avoid incurring costs if you do not intend to continue with your claim to a full hearing in court.

2. BF will apply to the court for you to pay its costs, likely to be not less than £2,500, if:

- *You are not successful in your claim; or*
- *You do not attend court when summonsed; or*
- *You continue with your claim now, but withdraw it later.*

3. Of course, if your claim succeeds, then you may apply for your costs to be paid by BF.

21. Read carefully and objectively, neither the letter nor the form (which is consistent with it) do give the impression that £2,500 must be paid up front, or paid irrespective of outcome, as a form of fee. The letter and form had not been translated accurately for Mr Motowidełko. UKBF cannot be held responsible for the accuracy of that translation. I find that it was the inaccurate translation, and not the content of the letter, which led Mr Motowidełko to decide to withdraw his claim.

22. In my view, that letter is just about good enough to convey the information, accurately and not misleadingly, that one potential consequence of an unsuccessful challenge to legality in the Magistrates' Court is exposure to the UK Border Force's costs of at least £2,500.

23. Having concluded that the letter is accurate in this regard, and is not misleading, then Ground 4 must fail. Ground 4 is simply an explanation of why condemnation proceedings were not pursued, when they could have been. The explanation, although honestly given, is not, when tested objectively, a good one. Nothing stood in the way of Mr Motowidełko pursuing his claim in the Magistrates' Court except his own, honest but mistaken, understanding of the letter.

24. Although it is not necessary to my Decision, I am bound to add that several aspects of this letter do strike me as perhaps less than wholly satisfactory:

(1) £2,500 is baldly stated. There is no 'breakdown' of the anticipated costs which would be incurred by UKBF: for instance, in terms of solicitors' time and hourly rates and the costs of representation at the hearing, so as to show how £2,500 had been arrived at, and so as to provide the recipient with some information to assure himself that the sum of £2,500 had not simply been plucked from the air;

(2) There is nothing in the letter to suggest that £2,500 was an estimate in this case, and was not simply a generic estimate;

(3) £2,500 is a slightly surprising sum, given that it equates to over 12 hours of Grade A National 1 fee-earner rate of the Guideline Rates for summary assessment of costs in the County Court (a Grade A fee-earner being a solicitor of over 8 years post-qualification experience whose expertise is normally reserved for the more demanding cases);

(4) It refers to 'costs' without making clear that UKBF would be limited in any event to recovering only its *legal* costs - that is, the costs of and incidental to the condemnation proceedings. It would not extend to any other 'costs'; for instance (and if the same could meaningfully be identified) of the initial seizure;

(5) There is no relevant provision relating to costs in Schedule 3 of the *Customs and Excise Management Act 1979*. There is nothing in Schedule 3 which refers to the inter partes incidence of costs, the manner or basis upon which they should be assessed, or the incidence of costs upon discontinuance;

(6) The letter makes no reference to section 64 of the *Magistrates' Courts Act 1980*, which governs the Magistrates' powers as to costs, including their discretion to make any such order as they think 'just and reasonable'.

The other Grounds

25. Grounds 1 and 3 both deal with the same issue, which is the legality of seizure and the process surrounding seizure.

26. Ground 2 deals with personal use.

Jurisdiction in relation to the Excise Assessment

27. Mr Motowidełko did not dispute the amount of duty nor HMRC's right to raise the assessment.

28. My attention was drawn to the decisions of the Court of Appeal in *HMRC v Lawrence Jones and Joan Jones [2011] EWCA Civ 824* and the Upper Tribunal in *Race v HMRC [2014] UKUT 331 (TCC*). Both of those decisions come down to me from higher courts or Tribunals, and they bind me. I have to apply and follow them.

29. In *Jones*, the Court of Appeal held unanimously (at Paragraphs 66 to 71 of its decision) that:

(1) The legality of seizure was for decision by the Magistrates' courts in condemnation proceedings and not for this Tribunal;

(2) In the scheme of the legislation governing the procedures relating to imported goods seized by HMRC, Parliament has provided different avenues for challenging condemnation and forfeiture (via the courts) on the one hand, and the restoration procedure (via an appeal to the FTT against the refusal of HMRC to restore goods) on the other hand.

30. In *Race*, Mr Justice Warren was clear that the reasoning of the Court of Appeal in the *Jones* case meant that the First-tier Tribunal cannot go behind the deeming effect of Paragraph 5 of Schedule 3 of the *Customs and Excise Management Act 1979* when it comes to an assessment to excise duty: see Paragraphs [26] and [33] of his decision.

31. Hence, the fact that no claim was made in the Magistrates' Court means that the cigarettes are now 'deemed' to be (that is, treated as being) for commercial use, and are now treated as being lawfully seized, and are forfeit to the Crown.

32. In the absence of any challenge in the Magistrates' Court, that means that the issues of the legality of seizure and personal use cannot now be raised in this Tribunal. The Tribunal has no jurisdiction. They should have been raised in the Magistrates' Court. I have already dealt with why that did not happen and why HMRC cannot be held responsible for Mr Motowidelko's failure to pursue his claim there.

33. The excise duty assessment raised cannot be challenged in this Tribunal.

34. The effect of this is that this Tribunal, in this case, has no jurisdiction in relation to the excise duty assessment of £1,553 and that therefore the appeal in that regard must be struck-out.

The excise wrongdoing penalty

35. On 4 September 2013, HMRC issued an excise wrongdoing penalty, under Schedule 41 of the *Finance Act 2008*, in the sum of £543.

36. The penalty explanation provided on 18 August 2013 says that HMRC considered the behaviour as deliberate, insofar as when first questioned, Mr Motowidełko did not confirm the full amount of cigarettes which he had. That is confirmed by the Officer's Notebook. It considers the disclosure as prompted, giving a penalty range of 35% to 70%.

37. Deductions were then applied for 'telling', 'helping' and 'giving': each in the maximum permissible percentage, amounting to a total reduction of 100%, leaving an overall penalty percentage of 35%.

38. I have jurisdiction in relation to this issue: Paragraphs 17(1) and 17(2) of Schedule 41. But my powers are limited to affirming the decision, or substituting another decision which HMRC had the power to make, but only where I consider HMRC's decision to be flawed in a public law sense - namely, where it has taken something into account which it ought to have left out of account, or failed to take account of something which it should have done.

39. Whilst Mr Motowidełko pointed out, in his Notice of Appeal, his limited financial circumstances, I am not allowed to consider insufficiency of funds as a reasonable excuse when it comes to considering the penalty: see Paragraph 20(2)(a) of Schedule 41.

40. I have already made comments above about the letter of 29 October 2012, and the fact that it does not raise any issues about interpretation or language difficulties.

41. Although the officer's notebook is not signed by Mr Motowidełko, he does not seriously challenge the accuracy of its contents. He is not recorded as asking for an interpreter. He apparently understood and answered the series of questions which he is recorded as having been asked. Those questions and the other events that evening could easily have occupied the 1hr 10 minutes which the notebook covers.

42. He was asked if he had 4 sleeves of 200 cigarettes each. Even if he was unfamiliar with the word 'sleeve', the question is clearly asking whether he had 4 x 200 = 800 cigarettes. He was asked if that was all the cigarettes he had, and he is recorded as answering 'yes'. He was asked if he had any other cigarettes in his other bag, and he said 'no'. That was not correct. Mr Motowidełko told the Officer that his friend on the flight had told him that he (Mr Motowidełko) had too many.

43. In my view, Mr Motowidelko does not have any reasonable prospect (within the meaning of Rule 8(3)(c) of the 2009 Rules) of successfully challenging the penalty assessment, and I must therefore affirm HMRC's decision.

Outcome

44. The appeal against the excise duty assessment is struck-out under Rule 8(2). I uphold the excise duty assessment in the sum of £1,553.

45. The appeal against the excise wrongdoing penalty is struck-out under Rule 8(3). I affirm the excise wrongdoing penalty in the sum of £543.

46. 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.

Dr CHRISTOPHER MCNALL
TRIBUNAL JUDGE

RELEASE DATE: 1 FEBRUARY 2017