[2018] UKFTT 546 (TC)

TC06716

Appeal number: TC/2017/08656

TOBACCO DUTY – assessment to duty on appellant for handling goods not duty paid – application to strike out appeal on basis appeal had no reasonable prospects of success – appellant convicted of offence under s 170(2) CEMA 1979 – whether conviction irrebuttable evidence of handling to justify assessment – whether arguable that appellant a person who was not handling the goods – application dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

SAQIB MUNIR **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

Sitting in public at Alexandra House, Manchester on 4 September 2018

The Appellant in person

Mr Karl Beresford, litigator, HM Revenue and Customs, for the Respondents

DECISION

1. This was a hearing of an application by the respondents ("HMRC") to strike out the appeal of Mr Saqib Munir ("the appellant") against an assessment to tobacco products duty. The application was made on the basis that there was no reasonable prospect of the appeal succeeding.

2. I declined to strike out the appeal for the reasons set out below.

Facts

3. A number of documents were produced by HMRC relating to events which gave rise to the assessment. The appellant did not dispute their authenticity. As there is no apparent dispute about them, for the purposes of the application I accept them as true. I relate below the evidence which is relevant to the application.

4. The appellant was driving a Fiat Doblo van along the Bury New Road in Manchester when he was stopped. He tried to run away. When the van was searched by HMRC officers, 44,734 cigarettes and 54kgs of hand rolling tobacco were found in the rear of the van, and £4,065 and 2 mobile phones were seized from the appellant.

5. He was arrested by an officer of HMRC on suspicion of fraudulent evasion of excise duty and take to a police station in Manchester where he was interviewed by two HMRC officers.

6. In the course of that interview (the transcript of which was in the bundle) the appellant, in response to the questions (Q) set out below, gave the replies (A) as set out:

> Q In the back of the van you were driving there were cigarettes and tobacco, did you know them goods were in the back of the van?
>
> A No I don't have the keys for it.
>
> Q And whose van is that?
>
> A It's Hama Hussain's car my boss name.
>
> Q (in response to the appellant's statement that his boss said "go to that car park and bring the car tomorrow morning and park it here") And did you ask questions why?
>
> A He [Hama] said he'll give you £30 if you can bring the car from there to there and just park it here leave it there.
>
> Q Have you done that before for him?
>
> A Sometime I did it for him yeah.

Q Have you ever seen what's happening with the van, what's in the back, in the front?

A No.

Q There was approximately how much money on you?

A £4060 .. I think 65.

Q Whose money is that?

A That was my boss money.

Q Do you know what the money's for, where it's from?

A I don't know.

Q Does your boss sell cigarettes and tobacco?

AI don't know to be honest what he sells.

Q … so all them goods have no tax or duty paid on them and that adds up to quite a lot of money, so your [*sic*] saying all them goods in the back of the van, you don't know anything about?

A They don't belong to me.

Q Do you ever question what's in the back of the van, do you ever think there's stuff in the back of the van?"

A I just drive this one to (INAUDIBLE) never drive before.

Q And you've never asked him [Hama] what's in the van or you've never asked why he wants you to move it?

A He just no, we didn't ask him.

7. The appellant was charged subsequently with what the application says was "fraudulent evasion of excise duty". The trial was on 4 May 2017. A certificate of conviction exhibited shows:

(1) The court was Manchester Magistrates Court.

(2) The charge was that the appellant "on 30/09/2016 at Manchester in relation to any goods, namely 44,734 cigarettes and 54 kilograms of hand rolling tobacco, was knowingly concerned in the fraudulent attempt at evasion of any duty chargeable on the goods. Contrary to section 170(2) and (3) of the Customs and Excise Management Act 1979."

(3) The appellant pleaded guilty.

(4) His solicitor was in attendance.

(5) The sentence was a community order to carry out 200 hours unpaid work and he was order to pay £85 victim surcharge and £85 costs to the CPS, payable at £5 per week.

8. On 21 July 2017 a notice of an assessment of £22,044 was issued to the appellant under (HMRC say) regulations 5, 6(1)(b) and 10(1) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2011.

9. The appellant sought an "independent" review of the decision to assess, and that review upheld the decision on 20 September 2017.

10. The appellant appealed to the Tribunal on 3 November 2017.

11. On 2 January 2018 HMRC applied to the Tribunal to have the appeal struck out on the basis that it had no reasonable prospect of success.

The basis of HMRC's application

12. HMRC say that the appellant's grounds of appeal are (1) that the goods in the van did not belong to him and the van was locked from the back door (2) he could not afford to pay (3) he has already been charged for the offence. In relation to ground (1) HMRC say that it is contrary to his admission of guilt in the Magistrates Court and therefore his appeal is "unlikely to succeed".

13. By admitting in a criminal court to fraudulently evading excise duty on the goods seized, the appellant is acknowledging that he did in fact know about the goods he was holding and the fact that no duty had been paid. The only important factor is the he pleaded guilty and not the reasons for doing so (which were the appellant had said that his solicitor advised him to so that he would get the kind of sentence he did and not go to jail).

14. HMRC say that the appellant cannot argue that an assessment flowing from (*sic*) the goods "so held" (*sic* – I cannot see what the "so" refers back to) should not have been issued since the appellant has admitted to holding goods on which no duty had been paid and the civil consequences of such an act is the possibility of being assessed for the unpaid duty.

15. The argument that he has already been charged for the offence bear (*sic*) no relevance to the raising of an assessment. Double jeopardy is not involved.

The law

16. Strike out of proceedings in provided for in Rule 8 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, which reads:

> "**Striking out a party's case**
>
> 8.—(1) The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a

direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings or that part of them.

(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.

(5) If the proceedings, or part of them, have been struck out under paragraphs (1) or (3)(a), the appellant may apply for the proceedings, or part of them, to be reinstated.

(6) An application under paragraph (5) must be made in writing and received by the Tribunal within 28 days after the date that the Tribunal sent notification of the striking out to the appellant.

…"

17. From this it can be seen that the Tribunal has a discretion whether to strike out even if it reaches the conclusion that the appellant has no reasonable prospect of success. It can also be seen that when a decision is made by the Tribunal to strike out on those grounds, the person whose case is struck out cannot apply for reinstatement. Thus the proceedings are at an end.

18. In Edward Jacobs' book "Tribunal Practice and Procedure" at 12.40 the author, who is Judge of the Upper Tribunal (AAC), says:

"Under TCEA 2007, the threshold is whether the case has no reasonable prospect of succeeding. This is similar or equivalent to 'no real prospect of succeeding'. In *Swain v Hillman* [2001] 1 All ER 91 Lord Woolf MR said (at [92]) of this phrase:

'The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real'

> distinguishes fanciful prospects of success or… they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success.'"

19. At 12.39 Judge Jacobs also says that if a party is not represented, it may be appropriate to allow the case to be presented, however implausible it may seem on paper (for which proposition he cites *Merelle v Newcastle Primary Care Trust* (2004) *Times* 1 December).

20. In *Liam Hill v HMRC* [2018] UKUT 45 (TCC) ("*Hill*") the Upper Tribunal (Tax and Chancery Chamber) (Judges Greg Sinfield and Thomas Scott) gave guidance as to the approach this tribunal should take to cases where the litigant is unrepresented:

> 54. In relation to the appropriate approach by the FTT in considering a strike out application in respect of a duty assessment against an unrepresented appellant, some observations may be helpful, with the caveat that each case turns on its facts. It is not always the best way to further the overriding objective, or to assist an appellant, to devise ingenious arguments simply in order to keep an appeal alive. We agree with the comment of Walker J in *Chambers v Rooney* [2017] EWHC 285(QB), at [17], cited by Judge Thomas in his Costs Decision, that striking out can be of particular value to litigants in person. As Walker J expressed it, at [18] of his judgment:
>
> > '18. There is a real danger that litigants in person may press on with parts of a claim which seem to them to demonstrate how badly the other side has behaved but for which there is no legal basis. Similarly, there may be parts of the claim for which, despite the strong suspicions or firm belief of the litigant in person, there is plainly no factual basis.'
>
> 55. While it is appropriate for the FTT to adopt a more inquisitorial role in relation to a striking out application against an unrepresented appellant, care must be taken in identifying and objectively evaluating grounds of appeal not raised by the appellant. Any such grounds should be based on or derived from facts discernible from the evidence before the tribunal, including at the hearing, and should be arguments which, as a matter of law, the tribunal considers to have a reasonable prospect of success. There is no standard "checklist" of arguments which the tribunal should be raising and considering in that exercise.

21. I have endeavoured to follow this approach.

22. The offence with which the appellant was charged and to which he pleaded guilty is in s 170 Customs and Excise Management Act 1979 ("CEMA"):

> "***Penalty for fraudulent evasion of duty, etc***
>
> (1) if any person—
>
> (a) knowingly acquires possession of any of the following goods, that is to say—
>
> …

(ii) goods which are chargeable with a duty which has not been paid; or

(b) is in any way knowingly concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with any such goods,

and does so with intent to defraud Her Majesty of any duty payable on the goods … he shall be guilty of an offence under this section and may be arrested.

(2) Without prejudice to any other provision of the Customs and Excise Acts 1979, if any person is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion—

(a) of any duty chargeable on the goods;

…

he shall be guilty of an offence under this section and may be arrested.

(3) … a person guilty of an offence under this section shall be liable—

(a) on summary conviction, to a penalty of £20,000 or of three times the value of the goods, whichever is the greater, or to imprisonment for a term not exceeding 6 months, or to both; or

(b) on conviction on indictment, to a penalty of any amount, or to imprisonment for a term not exceeding 7 years, or to both.

(6) Where any person is guilty of an offence under this section, the goods in respect of which the offence was committed shall be liable to forfeiture."

23. In my view it may fairly be said that the sentence on the appellant is at the very bottom end of the scale, even where a case is tried in the Magistrates Court.

24. The regulations which HMRC say the appellant was assessed under are the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (SI 2010/593) ("HMDP Regulations") and the relevant regulations are:

"**Part 2**

Excise Duty Points and Payment of the Duty

Goods released for consumption in the United Kingdom-excise duty point

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—

…

(b) are held outside a duty suspension arrangement and UK excise duty on those goods has not been paid, …;

10(1) The person liable to pay the duty when excise goods are released for consumption by virtue of regulation 6(1)(b) (holding of excise goods

outside a duty suspension arrangement) is the person holding the excise goods at that time.

(2) Any other person involved in the holding of the excise goods is jointly and severally liable to pay the duty with the person specified in paragraph (1)."

25. Contrary to what HMRC say these regulations establish liability, they do not deal with assessment. That is done by s 12 Finance Act 1994 which says:

"*Assessments to excise duty*

…

(1A) Subject to subsection (4) below, where it appears to the Commissioners—

(a) that any person is a person from whom any amount has become due in respect of any duty of excise; and

(b) that the amount due can be ascertained by the Commissioners,

the Commissioners may assess the amount of duty due from that person and notify that amount to that person ….

…

(3) Where an amount has been assessed as due from any person and notified in accordance with this section, it shall, subject to any appeal under section 16 below, be deemed to be an amount of the duty in question due from that person and may be recovered accordingly, unless, or except to the extent that, the assessment has subsequently been withdrawn or reduced."

Discussion

26. I asked Mr Beresford to explain to me where in the record from the Manchester Magistrates Court that had been produced there was a reference to the appellant being convicted for holding the goods. He agreed there was none.

27. I asked him if he considered that to be "knowingly concerned in the fraudulent evasion of excuse duty" it was necessary to be holding the goods. He did not know.

28. In my view it cannot be assumed from the wording of s 170(2) CEMA or the wording of the charge, which merely said that the appellant was charged under s 170(2) repeating the wording, that the specific offence of which the appellant was convicted and to which he pleaded guilty necessarily had the consequence that he had handled the goods in the sense of regulations 6 and 10 of the HMDP Regulations.

29. But even if it is accepted that his offence did involve him being accused of and convicted of "handling", the appellant denied in his interview and continues to deny (as he did at the hearing) that he knew what the goods were in the back of the van and that he had no access to the back. HMRC say that his denials are irrelevant as he pleaded guilty.

30. I asked Mr Beresford if he was aware of s 11 Civil Evidence Act 1968. He said he wasn't, so I explained it to him. It reads:

> "*Convictions as evidence in civil proceedings*
>
> (1) In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom … be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence, whether he was so convicted upon a plea of guilty or otherwise and whether or not he is a party to the civil proceedings; but no conviction other than a subsisting one shall be admissible in evidence by virtue of this section.
>
> (2) In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in the United Kingdom …—
>
> (a) he shall be taken to have committed that offence unless the contrary is proved; and
>
> (b) without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge-sheet on which the person in question was convicted, shall be admissible in evidence for that purpose.
>
> (4) Where in any civil proceedings the contents of any document are admissible in evidence by virtue of subsection (2) above, a copy of that document, or of the material part thereof, purporting to be certified or otherwise authenticated by or on behalf of the court or authority having custody of that document shall be admissible in evidence and shall be taken to be a true copy of that document or part unless the contrary is shown."

31. The crucial words are those in subsection (2)(b) "unless the contrary is proved". In other words at any appeal hearing against the assessment the appellant would be permitted to put forward evidence to show that he did not commit the offence of which he was convicted, and by subsection (1) he is permitted to do that even if he pleaded guilty.

32. He would be able, as far as I can see, to produce evidence from the solicitor who advised him to plead guilty to an offence under s 170(2) CEMA to explain why he was advised to so plead.

33. And as I have explained he was not in fact charged with or convicted of handling goods on which duty had not been paid. He might then be able to make play of the fact that he was not charged under s 170(1) CEMA which seems to describe conduct much closer to the conduct which gives rise to liability under the HMDP Regulations.

34. As to the question whether he was handling the goods concerned, I asked Mr Beresford if he was aware of the Upper Tribunal case of *McKeown and others v HMRC*

[2016] UKUT 479 (TCC) ("*McKeown*"). He said he wasn't. In *McKeown* the Upper Tribunal was concerned with the meaning of "holding" in HMDP, albeit in a different regulation (regulation 13(2)(b)) from the one in this case. At [65] and [66] they said:

> 65. There is no question that the Appellants had physical possession of the goods but that is neither necessary nor, by itself, enough to constitute 'holding' for the purposes of reg 13. In order to be 'holding the goods', a person must be capable of exercising de jure and/or de facto control over the goods, whether temporarily or permanently, either directly or by acting through an agent. In this case, as the tribunals found, the drivers had control over the goods. That was, in our view, obviously correct. The Appellants, as drivers, had custody of the goods and were responsible for them during their transportation. The fact that the drivers had obligations to others, who had engaged them to transport the goods, and those others had control over the drivers does not mean that the drivers did not also have de jure and de facto control, albeit subject to obligations owed to and direction by the others.
>
> 66. A person who has de jure and de facto control of goods but who lacks both actual and constructive knowledge of them and the fact that duty is payable on them, cannot be said to be 'holding' the goods for the purposes of reg 13. …"

35. On the basis of his replies in his interview and subsequent assertions including in his statements to us, I do not think it is unrealistic or fanciful to say that the appellant may be able to show that he was not holding the goods in the sense given by regulation 10 HMDP. Indeed in the absence of a presumption that his conviction shows that he must be treated as holding the goods, I consider it would be verging on the unrealistic to suggest that his appeal would fail.

36. I consider that HMRC has come nowhere near showing that the appeal has no reasonable prospect of success, and I refuse to strike the proceedings out for the reasons I have given.

37. With some trepidation, given what the Upper Tribunal said about me in *Hill*, I mention a possible argument that the appellant could deploy were it to be found that he was liable. The application by HMRC and the assessment itself are based on the assumption that the goods were not UK duty paid. In the documents disclosed by HMRC which included the transcript of the interview, there is a witness statement by another officer of HMRC describing what the goods found consisted of. Of the 44,734 cigarettes, 20,420 are shown in the officer's statement as "marked UK duty paid but suspected counterfeit". Of the 54 kg HRT, 35.5 kg are shown in the officer's statement as "marked duty paid but suspected counterfeit". It is also clear from the "Schedule of revenue evaded" that it is the full amounts that have been used in calculating the assessment.

Observations

38. Mr Beresford confirmed to me that he was not a lawyer not was the officer who compiled the application to the skeleton argument. Nor had he, or she, taken legal advice from a lawyer in HMRC or from counsel. I am astonished that HMRC wished

to deprive an unrepresented litigant of his right of appeal against an amount of over £20,000 when they must have realised that he would be unable to pay even a fraction of that amount and they knew from the interview what he had said about his "holding" of the goods and who the owner of the goods was, and came to the Tribunal to do so without any knowledge of or legal advice about the implications in law of a criminal conviction or even that there was an importance difference between the elements constituting the offence he pleaded guilty to and the elements giving rise to liability to duty. The excise duty part of HMRC routinely use counsel to present, and indeed make strike out applications in, excise duty cases involving far smaller amounts than this case.

39. This unacceptable conduct is not the fault of Mr Beresford who was apologetic for being unable to answer my questions. He had only recently become involved in the case as a litigator before the tribunal. The fault lies elsewhere and higher up.

40. I suggested to Mr Beresford that HMRC should consider what I had said (particularly in relation to *McKeown*) and review the case to see if making an assessment on this appellant is really in accordance with their policy on assessing excise duty where there may have been more than one excise duty point for the same goods and where they are aware of bigger fish, and ones with much deeper pockets, than the appellant, and in accordance with their Litigation and Settlement Strategy. I added that I expected them to discharge the assessment, but I could not of course force them to do so.

Decision

41. I refuse to strike the appeal out.

42. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 11 September 2018