



TC07130

Appeal number: TC/2013/04692

EXCISE DUTY – assessment for a penalty in relation to excise goods seized from the appellant – no reasonable excuse – no special circumstances – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MATTHEW LANE

Appellant

- and -

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

**TRIBUNAL: JUDGE NIGEL POPPLEWELL
 MRS SONIA GABLE**

Sitting in public at Bristol on 12 April 2019

The Appellant appeared in person

**Mr Richard Evans, Counsel, instructed by the General Counsel and Solicitor to
HM Revenue and Customs for the Respondents**

Introduction

1. This appeal is against a penalty for failure to pay Excise duty. The appellant, Matthew Lane (“**the appellant**” or "**Mr Lane**") was stopped by officers of UK Border Force at Coquelles on 27 January 2013 with a travelling companion. When searched, their vehicle was found to contain 40.5kg of hand rolling tobacco. This tobacco was seized and condemned. HMRC subsequently raised assessments for duty and a penalty of £664 (the “**penalty**”).
2. The appellant appealed against the assessments on 18 July 2013 to which HMRC responded by making an application to strike out the appellant’s appeal. That appeal was heard in Bristol on 29 July 2015 by myself and Ms Elizabeth Bridge.
3. In our decision which was released on 26 August 2015 ([2015] UKFTT 0423 (TC)) (the “**earlier decision**”), we struck out the appellant’s appeal against the Excise duty, but gave directions that he could maintain his appeal against the penalty but on only two grounds which are set out below.
4. This appeal was subsequently stayed pending the Upper Tribunal decision in Kevin Denley v HMRC [2017] UKUT 0340. That is the reason why this appeal has only now been determined.

Evidence and findings of fact

5. We were provided with a bundle of documents for this hearing. Mr Lane gave oral evidence. We had also made findings of fact in the earlier decision. On the basis of this evidence and those findings, we make the following findings of fact:
 - (1) On 27 January 2013 at Coquelles, the appellant was returning to the UK with travelling companion Jonathan Garraway when they were stopped by a UK Border Force Officer.
 - (2) When initially questioned, the appellant declared that he was holding 5 kilos of Hand Rolling Tobacco for himself and some for family and friends. In the course of the initial interview both the appellant and Mr Garraway estimated that they had each purchased approximately another 14 kilos of HRT to give to family and friends as gifts.
 - (3) A full search of the vehicle was conducted which revealed that the vehicle contained 31.5 kilos of HRT.
 - (4) The appellant confirmed in the interview that he had paid for his tobacco and that his friends and family wrote down what they wanted and gave him money for it.
 - (5) After the interview, it was agreed by the appellant and his co-traveller that they were each personally responsible for 50% of the tobacco.
 - (6) The total tobacco seized was 40.5kg, 20.25kg of which belonged to the appellant.

(7) The appellant was given a copy of BOR156 Seizure Information Notice, Notice 1 (travelling to the UK) and Notice 12A (what you can do if things are seized by HMRC or UKBF).

(8) The tobacco was seized as liable to forfeiture under the Customs & Excise Management Act. The appellant did not challenge the seizure of the tobacco.

(9) On 27 February 2013 HMRC raised an assessment for duty due on the tobacco in the amount of £3,323.00 and notified the appellant. In addition HMRC raised a valid penalty assessment for the penalty on 25 April 2013. The penalty reflects the maximum amount of mitigation which HMRC can give in the circumstances. The penalty was calculated at 20% of the duty (reduced from 30%).

(10) The appellant requested a review of the assessment decision by letter dated 12 May 2013. The original decision was upheld on review.

(11) The appellant submitted a Notice of Appeal dated 18 July 2013.

(12) On 3 February 2014 HMRC submitted a notice of application to the tribunal to strike out the appeal on the basis that the tribunal has no jurisdiction and is bound by the authority of *Jones* or, in the alternative, his case has no reasonable prospect of success.

(13) In the earlier decision, the appellant's appeal against the duty assessment was struck out.

(14) In his appeal against both the duty and the penalty, the appellant had put forward four submissions

- (a) The tobacco was for personal and not for commercial use.
- (b) There has been a misrepresentation (our words, not his) in the Citizens Advice Bureau booklet, and on HMRC's website on which he relied, and which in his submission, represent that an unlimited amount of hand rolling tobacco can be brought in without it being construed as being for commercial use.
- (c) He cannot afford to pay the duty or the penalty.
- (d) It is not fair to levy duty or a penalty on someone who is on the cusp of attaining intellectual and financial independence, having just finished a course at university.

(15) In the earlier appeal we stated as follows:

"75 Although Mr Lane did not express his second and fourth submission in these terms, it is our view that they do have the potential to comprise special circumstances. In respect of his second submission, we would emphasise that Mr Lane would need to prove both reliance, and an unambiguous representation by the tax authorities. He has failed to do either at the hearing today; but we are mindful that he is a litigant in person and has not, therefore,

perhaps focused on the possibility of raising this argument in detail. As we have said before, Mr Lane was unconvincing evidentially on this point, and the matter is finally balanced. But bearing in mind that striking out an appellant's case is a draconian remedy, we consider that Mr Lane should be permitted to seek to establish the facts which would demonstrate special circumstances at a substantive hearing.

76 Furthermore, Mr Lane's fourth submission, if construed as comprising procedural unfairness could, too, theoretically, comprise special circumstances. Mr Lane will have to demonstrate, with a great deal more specificity, how this is the case if he is to succeed at the substantive hearing. But we believe that he should have the opportunity of elaborating on this submission, too, and how it might comprise special circumstances at such a hearing."

(16) The tribunal went on to direct that a further hearing should be arranged at which:

"The issues which may be ventilated by the appellant are restricted to:

(a) Whether Mr Lane's submission at paragraph 52(2) of this Decision comprises either special circumstances, or a reasonable excuse, for the penalty.

(b) Whether Mr Lane's submission at paragraph 52(4) of this Decision comprises either special circumstances, or a reasonable excuse, for the penalty."

The Law

6. The relevant legislation provides as follows:

(1) Excise duty is charged on tobacco product imported into the United Kingdom (Section 2 of the Tobacco Products Duty Act 1979).

(2) HMRC can, by regulations, fix the point at which duty becomes chargeable (Section 1 of the Finance (No. 2) Act 1992).

(3) The relevant regulations provide that

(a) duty is chargeable on tobacco held for a commercial purpose in the UK

(b) tobacco brought into the UK by a private individual, who has bought it duty paid in another Member State for his or her own use, is not held for a commercial purpose (and so no duty is chargeable on it)

(c) the duty point for tobacco held for a commercial purpose is the time of importation.

(The Excise Goods (Holding Movement and Duty Point) Regulations 2010, Regulation 13).

(4) Section 49 of the Customs & Excise Management Act 1979 provides that goods imported without payment of duty are liable to forfeiture.

(5) Section 139 of that Act provides that anything liable to forfeiture can be seized by HMRC.

(6) That section also introduces Schedule 3 to the Act which, in essence, provides that a person whose goods have been seized can challenge the seizure, but only if he does so in the proper form within the one month time limit. Then, the goods can only be forfeited under an order of the court in condemnation proceedings. If the person fails to serve notice, then there is a statutory deeming under which the goods are deemed “to have been duly condemned as forfeited”.

(7) Where it appears to HMRC that an amount has become due by way of excise duty from a person, that amount can be ascertained by HMRC who can then assess that person to that amount of duty (Section 12(1A) of the Finance Act 1994).

(8) A person who is assessed to duty has a right of appeal to this tribunal (Section 16 of the Finance Act 1994).

(9) A penalty is payable by person who has failed to pay excise duty in these circumstances. The provisions dealing with the penalty are set out in Schedule 41 Finance Act 2008 (“FA 2008”). The penalty is calculated as a percentage of the potential lost duty, i.e. the unpaid excise duty in this case (see paragraphs 4, 5 and 6 of Schedule 41 FA 2008).

(10) In this case, the appellant was assessed to the penalty on the basis that the failure to pay the duty was neither deliberate nor concealed. In these circumstances, the penalty is 30% of the unpaid duty. Where there has been disclosure of the failure, the penalty may be reduced. The amount of the reduction depends on the level of the penalty and whether the disclosure is prompted or unprompted. In the case of a 30% penalty the maximum reduction for disclosure is 10%, i.e. reducing the penalty from 30% to 20% (paragraph 13 of Schedule 41 FA 2008).

(11) HMRC may also reduce the penalty if they consider that there are special circumstances. A reduction for special circumstances is not subject to a statutory minimum and can include a reduction to nil. The legislation states that “special circumstances” does not include the fact that someone is not able to pay the penalty (paragraph 14 of Schedule 41 FA 2008).

(12) A person who is assessed to a penalty has a right to appeal to this tribunal (paragraph 17 of Schedule 41).

(13) On an appeal, the tribunal has full appellate jurisdiction, in other words the tribunal may substitute for HMRC’s decision another decision that HMRC had power to make (paragraph 19 of schedule 41).

(14) Where an act or failure is not deliberate, a person is not liable to a penalty if there is a reasonable excuse for the act or failure. The legislation states that a lack of funds is not a reasonable excuse, unless attributable to events outside the person's control (paragraph 20 of Schedule 41 FA 2008).

Burden of proof

7. The burden of proving that a valid in time assessment for the penalty has been visited on the appellant rests with HMRC. The standard of proof is the balance of probabilities.

8. The burden of establishing that he has a reasonable excuse, or that there are special circumstances, rests with the appellant. The standard of proof is the balance of probabilities.

The appellant's case

9. As set out at [5(16)] the appellant's grounds of appeal against the penalty are limited to the following:

(1) There has been a misrepresentation (our words, not his) in the Citizens Advice Bureau booklet, and on HMRC's website on which he relied, and which in his submission, represent that an unlimited amount of hand rolling tobacco can be brought in without it being construed as being for commercial use. Set out

(2) It is not fair to levy duty or a penalty on someone who is on the cusp of attaining intellectual and financial independence, having just finished a course at university.

The respondents' case

10. HMRC make the following submissions:

(1) As regards reliance on the Citizens Advice Bureau booklet, the earlier decision found that this had only come to the appellant's attention after he returned from France.

(2) The HMRC website document does not, as suggested by the appellant, say that it is permissible to bring back unlimited tobacco.

(3) The fairness of levying a penalty on someone who is about to achieve financial independence is, in effect, a disguised submission that the appellant cannot afford to pay the penalty. This is statutorily prohibited from being either a special circumstance or a reasonable excuse.

Discussion

Special circumstances

11. While "special circumstances" are not defined, the courts accept that for circumstances to be special they must be "exceptional, abnormal or unusual"

(*Crabtree v Hinchcliffe* [1971], 3 All ER 967) or “something out of the ordinary run of events” (*Clarks of Hove Ltd v Bakers Union* [1979], 1 All ER 152).

12. Paragraph 14(2) of Schedule 41 FA 2008 provides that “special circumstances” does not include the ability to pay.

Reasonable Excuse

13. The test we adopt in determining whether the appellant has a reasonable excuse is that set out in *The Clean Car Co Ltd v C&E Commissions* [1991] VATTR 234, in which Judge Medd QC said:

"The test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?"

14. As mentioned at [5(9)] HMRC have reduced the penalty to the maximum possible extent permitted by statute. Furthermore, when considering reasonable excuse, neither HMRC, nor ourselves, can take into account an insufficiency of funds, unless attributable to events outside Mr Lane’s control.

15. The appellant’s first submission is that he was misled by the HMRC information which he had either downloaded or scrutinised online (we are not sure which) before he travelled to France. At the hearing, he produced a paper copy of that information which he had downloaded on 6 December 2018. He was not seriously challenged about its provenance and we find that not only did he either download or examine this document online, but also the version of that document (which might have been slightly different from that which he produced to the tribunal) contained essentially the same information in essentially the same format as the document he produced to the tribunal.

16. This document is headed “**Bringing goods into the UK**” and under the first subheading (“**Overview**”), states that “You can bring some goods from abroad without having to pay UK tax or “duty” (customs charges), as long as they’re for your own use.”

17. It then goes on to say, under the next subheading (“**Arrivals from EU countries**”) that “you don’t pay duty or tax on goods you bring in from the European Union..... as long as you:

- Transport them yourself
- Will use them yourself or give them away as a gift
- Have paid duty and tax in the country where you bought them

18. The appellant had then highlighted some text which appears under the subheading “Customs checks” and which reads “Although there are no limits to the alcohol and tobacco you can bring in from EU countries...”. It is this text on which

he relies. However he did not highlight the rest of that sentence which goes on to say “you’re more likely to be asked questions if you have more than the amounts below.”

19. There is then a table and the amount of tobacco set out in that table is 1 kg.

20. Mr Lane’s evidence was that he had been paid by friends and family for some if not all of the tobacco which he had imported.

21. When questioned about how that fitted in to the second bullet point at [17] above, Mr Lane accepted that it did not. He accepted that the tobacco was neither for his own use nor was it to be given away as a gift. Mr Evans made the point that the document handed up by Mr Lane needs to be read as a whole and we agree.

22. Reading the document as a whole, it is clear that it does not say that an individual can bring back unlimited handrolling tobacco as suggested by Mr Lane. It stresses that an individual can only import excise goods if they are for personal use. It explains that this means for use by that individual or to be given away as gifts. It says that there is an amount which will be treated as being for personal use but if you bring back more than that amount it is more likely you will be asked questions by a customs officer. This is what happened to the appellant.

23. If there is any ambiguity in the document, then in our view a prudent and conscientious taxpayer would have sought clarification from a reliable source. The appellant did not do this.

24. So we do not consider that there has been any misrepresentation of the amount which Mr Lane could import into the UK free of excise duty. There is no, let alone no unambiguous, representation that he could import an unlimited amount of handrolling tobacco free of duty.

25. So there are no special circumstances, nor does the appellant have a reasonable excuse for failing to pay the excise duty comprised within this first submission.

26. Turning now to the second submission, that the appellant believes that he has been unfairly financially penalised, we do not think that this comprises a reasonable excuse or special circumstances either. It has to be said that the appellant did not press this submission with any force at the hearing.

27. Mr Evans suggests that this is simply a disguised way of saying that he cannot afford to pay which cannot be raised as either a special circumstance or a reasonable excuse. We agree. And in any event someone who imports goods for commercial use and fails to pay duty should suffer the financial consequences irrespective of the state of their educational or their workplace circumstances.

28. Mr Lane also raised submissions concerning personal use and service of various document regarding the seizure of the tobacco. He had made similar submissions at the first hearing. But of course we cannot consider such submissions since firstly they go to the point regarding personal use, something which Mr Lane cannot argue since he failed to challenge the seizure by way of condemnation proceedings; and secondly we had given Mr Lane permission to raise only two issues at this hearing and whether they comprised special circumstances or a reasonable excuse.

Decision

For the foregoing reasons we dismiss this appeal.

Appeal rights

29. 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. 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: 9 MAY 2019