[2019] UKFTT 0468 (TC)

Penalty – seizure of goods - proof that the 30 day challenge period has elapsed. Otherwise HMRC v Jones [2011] EWCA Civ 824 not applicable.

FIRST-TIER TRIBUNAL
TAX CHAMBER

TC07270

Appeal number: TC/2018/03879

BETWEEN

JEFFREY DAVID LEWIS **Appellant**

-and-

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

TRIBUNAL: JUDGE GERAINT JONES QC.
ANDREW PERRIN

Sitting in public at Eastgate House, Cardiff on 08 July 2019

The Appellant appeared in person.

Miss F. Payne, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.

DECISION

INTRODUCTION

1. On 10 December 2016, the appellant, Mr Lewis, was travelling on a coach coming into this country through Dover docks when he was found to be in possession of a quantity of hand rolling tobacco and cigarettes which resulted in those goods being seized. He was given a document headed "Warning letter about seized goods" which cited the relevant statutory provision under which the seizure had taken place, that is, section 139 Customs and Excise Management Act 1979. It was not necessary for him to be provided with a Notice of Seizure because where a person is present at the time of seizure, the reasons for that seizure may be communicated orally. Nonetheless, reasons there must be and those reasons must be communicated if the 30 day period allowed for challenging the seizure by judicial proceedings, is to begin to run. That is only right and proper given the very Draconian effect of the decision of the Court of Appeal in HMRC v Jones & Jones [2011] EWCA Civ 824 which means that the unsuspecting may find themselves unable to challenge a subsequent assessment and/or penalty notice.

2. In the case of this appellant it was not until 22 September 2017 that HMRC informed him that they intended to issue an excise duty assessment in respect of the seized goods as well as a penalty. The respondents gave no reason for their dilatoriness in informing the appellant of the probability of an excise assessment and/or penalty. If an appellant had to be informed thereof within the 30 day period for challenging the seizure, that would be some mitigation of the Draconian effect of the Jones decision, referred to above.

3. Where an individual, who is extremely unlikely to be aware of the intricacies and technicalities involved in Schedule 3 of the Customs and Excise Management Act 1979, is said to be dis-entitled to raise any issue about whether the seizure of his goods was or was not lawful and/or whether same were being imported for commercial or personal use, it becomes incumbent upon this Tribunal to be astute to ensure that a fair trial takes place in respect of those matters which can be raised on appeal.

4. In circumstances where a penalty has been levied against the appellant, as well as an assessment to excise duty, the respondents bear the onus of proving that a penalty has become due and payable. Because a penalty, albeit levied in a civil context rather than a criminal court context, is what it says, a penalty, this Tribunal must be astute to ensure that each pre-condition for the levying of such a penalty has been evidentially established. Adequate proof is a necessity; not a luxury.

5. The first and most important point to note in this appeal is that the respondents argue, through Miss Payne, that it is not open to the appellant to challenge the lawfulness of the seizure. That submission was made because it is perfectly clear from the Grounds of Appeal that the appellant maintains that the hand rolling tobacco and cigarettes in his possession were for his personal use.

6. Miss Payne's submission would be correct, on the present state of the authorities, provided that HMRC can prove that the 30 day period for challenging the seizure decision, has elapsed. That, of necessity, must be the starting point.

7. Thus we turned to the evidence adduced by HMRC, given that it bears the onus of proof on this point, albeit to the civil standard, at least so far as the penalty is concerned.

8. HMRC relied upon a witness statement dated 14 February 2019 from Mr James Robinson. He was not the Border Force officer who seized the goods but simply says that the goods had been seized because Border Force officials "believed they were being imported for a commercial purpose." He does not disclose the basis upon which he holds any such belief.

On the point which we have identified above, the remainder of his evidence is irrelevant. That is because he goes on to give evidence about the service of the excise notice and penalty notice.

9. Nonetheless, argued Miss Payne, HMRC could make good its case by reference to the documents adduced in the hearing bundle. She relied heavily upon four manuscript pages of writing of unknown provenance. The author of the writing has not been identified. There is no witness statement speaking to the source, authenticity and/or content of any of the writing (which seems to comprise entries from a notebook).

10. In our judgement, keeping in mind the need for a rigorous approach when deciding whether HMRC has discharged the onus of proof upon it, the manuscript writing to which we have referred was not probative of the issue as to whether the appellant had or had not been given any, let alone proper, reasons for the seizure of his goods on 10 December 2016. In saying that we are very aware that the strict rules of evidence as they would apply in a criminal court are not applied with the same rigour in this Tribunal, but we cannot conclude that a document which is unattributed to any author and whose provenance is wholly unexplained by evidence, is sufficient, even in the rather more relaxed atmosphere of a Tribunal, to establish that the appellant was given reasons for the seizure on 10 December 2016.

11. We should point out that the appellant has not acknowledged or stated that he was given any reasons. If he had given evidence and been cross examined, it would have been legitimate for him to be asked whether he had or had not been given any reasons and, if so, what reasons. However, unless and until HMRC adduced a *prima facie* case on that issue, the stage was not reached where the appellant had to make the choice as to whether he would or would not give evidence.

12. The effect of HMRC failing to prove that the appellant was given (lawful) reasons for the seizure, is not that an excise assessment and/or a penalty assessment might not subsequently prove to be good. The effect, in the context of this appeal, is simply that because HMRC cannot prove that the 30 day period for challenging the seizure has elapsed, given that it only begins to run when a lawful seizure takes place (which involves seizure together with lawful reasons being given for that seizure), HMRC finds itself unable to rely upon the principle established in HMRC v Jones (above).

13. Whether, in any subsequent scenario, HMRC may be able so to prove, is an entirely different issue.

14. The foregoing conclusion gave rise to a discussion about what the proper outcome of this appeal should be. We rejected the tentative suggestion by Miss Payne that the appeal could be adjourned for HMRC, if able, to adduce further evidence. In our judgement a matter going back over 2½ years should be dealt with expeditiously rather than drawn out for any longer period of time. HMRC has had the luxury of a very lengthy period of time to consider what, if any, evidence it wished to adduce in this appeal.

15. Miss Payne then adopted the pragmatic approach of indicating to us that if we concluded, as we have, that HMRC had failed to prove that the 30 day challenge period had run against the appellant, the appropriate outcome would be for us to allow his appeal (in respect of both the penalty and the excise assessment), leaving HMRC to decide what, if any, further steps it may wish to take against somebody who appears to live in total reliance upon state benefits.

16. We considered whether it would be appropriate for us to go on to decide whether the appellant had imported the identified goods for commercial as opposed to personal use, but decided that that course would be inappropriate because it might in fact prove to be the case that the 30 day challenge period has run against the appellant, notwithstanding that HMRC is unable so to prove within this appeal.

17. Accordingly we allow the appeal and set aside the penalty assessment and the excise assessment on the discrete basis set out above.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

18. 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.

GERAINT JONES QC.
TRIBUNAL JUDGE

Release date: 17 July 2019