Neutral Citation: [2024] UKFTT 00433 (TC)

Case Number: TC09179

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2020/00819

EXCISE DUTY and PENALTY – section 12 Finance Act 1994 – Schedule 41 Finance Act 2008 – sections 139(6) and paragraph 3, Schedule 3 Customs and Excise Management Act 1979 – seizure of goods and deemed forfeiture – effect of statutory deeming – ***appeal dismissed***

Heard on: 27 March 2024
Judgment date: 23 May 2024

Before

JUDGE VIMAL TILAKAPALA

Between

SPAS IVANOV

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Miglena Metcalfe

For the Respondents: Joshua Carey of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This appeal concerns an Excise Duty Assessment for £4,804 for unpaid excise duty (the "Excise Assessment") in relation to a seizure of 15,600 cigarettes (the "Cigarettes"), and an Excise Wrongdoing Penalty for £1,849 (the "Penalty Assessment").

2. The Excise Assessment and Penalty Assessment were both issued on 17 July 2019 although the Penalty was reduced on 10 January 2020 to £1,681 following an internal HMRC review.

3. The Appellant appeals against the Excise Assessment and the Penalty Assessment.

4. We were provided with a hearing bundle of 181 pages, an authorities bundle and supplementary authorities bundle and a skeleton argument from HMRC. Ms Metcalfe also provided us at the start of the hearing with a document headed "Statement of the appeal and response to HMRC". This contained a summary of facts and various arguments as to why the Excise Assessment should be set aside. We heard witness evidence from HMRC officer Ms Joanne Littleton and from the Appellant who participated in the hearing with the aid of an interpreter.

BACKGROUND AND RELEVANT FACTS

5. The background facts to this appeal are as follows:

(1) The Appellant is of Bulgarian origin and does not speak English fluently.

(2) On 8 September 2018 the Appellant entered the Green Channel at Stansted Airport. He was stopped by Border Force and questioned. He gave the following answers in response to questions from the Border Force officers:

(a) He had arrived from Sophia, Bulgaria having been on a family holiday.

(b) He was aware of what was in his luggage and had packed it himself.

(c) The Cigarettes were not all for him, some were for other people.

(d) He had received payment from four friends to purchase the Cigarettes.

(3) When the Appellants bags were searched the Cigarettes were found. The Cigarettes were seized on the basis that they had been brought into the UK for a commercial purpose.

(4) The Appellant was provided with Border Force Notice 1 (travelling to the UK), Notice 12A (what you can do if things are seized by HMRC or Border Force), BOR 156 (seizure information notice) and BOR 162 (warning letter about seized goods). The Appellant also signed the border force officers note book.

(5) On 12 June 2019, HMRC wrote to the Appellant notifying him that he had one month to start proceedings in the Magistrates court to challenge the seizure. No challenge was made and so the goods were deemed to have been duly condemned. The Appellant was also notified that he was liable to pay the unpaid excise duty and that there was a possibility of a penalty being levied. In respect of the penalty the Appellant was invited to provide information about the goods that were being brought into the UK.

(6) Also on 12 June 2019 HMRC issued a Penalty Explanation letter to the Appellant explaining that as the goods were seized on the basis that they were imported for a

commercial purpose rather than personal use and as UK Excise Duty had not been paid, he was liable to pay a penalty.

(7) The Penalty Explanation letter stated that the penalty was being issued on a "deliberate but not concealed basis" and that it was being classed as a "prompted disclosure" with full reductions being given for "telling", "helping" and "giving".

(8) On 17 July 2019 HMRC issued the Excise Assessment and Penalty Assessment.

(9) The Excise Assessment was calculated by reference to the amount of UK excise duty which had not been paid on the Cigarettes.

(10) On September 2019 the Appellant wrote to HMRC asking for an extension of time to respond to the Assessments.

(11) The Appellant then attempted to provide evidence to HMRC by way of an undated letter. This was sent to HMRC after the deadline for submission which the Appellant explained was for reasons outside his control including him working away from his home for three months and also being out of the country on holiday. He provided evidence to prove his reasons for lateness.

(12) On 18 September 2019 HMRC notified the Appellant that they had accepted an out of time request for reconsideration but that they did not have any information regarding the seizure to enable them to consider the case. They pointed out that in his earlier letter the Appellant had provided evidence for why he had responded late but had not provided any evidence in relation to the seizure to enable any reconsideration. Both Assessments therefore stood as they were.

(13) By another undated letter the Appellant then provided information relating to the seizure. His main point was that he regarded the Excise Assessment as contrary to European Union ("EU") regulations as he was travelling within the EU and so duty should not have been payable. He added that he was living permanently in the UK and so entitled to rely on his relevant EU rights. He also pointed out that the Cigarettes were not intended for commercial use as they were for his personal use and that he should not have to pay additional tax on the Cigarettes as they had been subject to Bulgarian excise duty.

(14) On 8 November 2019 HMRC notified the Appellant that the original decision would still stand, noting that: (i) There were no limits to the amount of cigarettes that could be brought into the UK from EU countries for personal use or as gifts but where the amount brought in exceeded the guideline amount (of 800 cigarettes) it was necessary to satisfy Border Force that they were for personal use. Border Force had not been so satisfied in this case. (ii) As the seizure was not appealed within one calendar month, the goods were deemed to have been imported for a commercial purpose, HMRC did not have the ability to consider whether the seizure was correct or not and UK excise duty and penalties became payable. HMRC added that the rules would be the same for anyone bringing goods into the country regardless of the country they resided in.

(15) By a further undated letter the Appellant sought an independent review of the decisions. The review decision was issued on 10 January 2020. It upheld the Excise Assessment but reduced the quantum of the Penalty Assessment from £1,849 to £1,681 as an incorrect penalty reduction had been applied.

Issues for the Tribunal to determine

6. The issues for determination are as follows:

(1) Is the Appellant liable to an Excise Duty assessment

(2) If the Appellant is liable to an Excise Duty assessment is he liable to a penalty. an

(3) Has the quantum of the penalty been correctly calculated

THE RELEVANT LAW

Excise Duties

7. The statutory provisions are in the Finance (No.2) Act 1992 ("FA(2) 1992"), the Customs and Excise Management Act 1979 ("CEMA") and the Excise Goods (Holding Movement and Duty Point) Regulations 2010 (the "HMDP Regulations").

8. S. 49 CEMA provides for the seizure of goods improperly imported. Goods are liable to forfeiture in a variety of circumstances. In this case, the relevant provision is s. 49(1) CEMA which applies (subject to any exceptions under the legislation) in relation to goods which are chargeable with customs or excise duty on their importation but where the duty has not been paid. The power to forfeit such goods arises where the goods are unshipped at a port, unloaded from an aircraft in the UK or removed from their place of importation or from any approved place such as a transit shed.

9. S.139 CEMA provides that anything liable to forfeiture may be seized by a relevant authorised person.

10. S. 139(6) CEMA introduces the provisions of Sched. 3, CEMA relating to forfeitures and condemnation proceedings. Paras. 3, 4, 5 and 6 of Sched. 3 provide as follows:

> "3. Any person claiming that any thing seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of the date of the seizure, give notice of his claim in writing to the Commissioners at any office of customs and excise.
>
> 4. Any notice under paragraph 3 above shall specify the name and address of the claimant …
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> 5. If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of any thing no such notice has been given to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with, the thing in question shall be deemed to have been duly condemned as forfeited.
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> 6. Where notice of claim in respect of any thing is duly given in accordance with paragraphs 3 and 4 above, the Commissioners shall take proceedings for the condemnation of that thing by the court, and if the court finds that the thing was at the time of seizure liable to forfeiture the court shall condemn it as forfeited."

11. S. 1 FA(2) 1992 gives HMRC the power to fix an excise duty point by Regulations. The HMDP Regulations set out the relevant duty points.

(1) Reg. 10 of the HMDP Regulations applies where a person is liable to pay the duty when excise goods are released for consumption pursuant to reg. 6(1)(b) of the HMDP Regulations (holding goods outside a duty suspension arrangement). Where there is a conclusive determination regarding the liability to forfeiture of the goods, and that they were held for a commercial purpose, a duty point arises.

(2) Pursuant to Reg. 13, Reg. 20 of the HMDP Regulations provides that duty must be paid at or before an excise duty point.

(3) Reg. 88 of the HMDP Regulations provides that where there is a contravention of the HMDP Regulations in relation to excise goods in respect of which duty was due but not paid, those goods are liable to forfeiture. and an assessment can be made pursuant to s12(1A) of the Finance Act 1994 ("FA 1994").

Excise Penalties

12. Section 13 FA 1994 provides the power to assess a penalty from any person liable to a penalty.

13. Para. 4, Sched. 41, Finance Act 2008 ("FA 2008") provides as follows:

> "(1) A penalty is payable by a person (P) where-
>
> (a) after the excise duty point for any goods which are chargeable with a duty of excise, P acquires possession of the goods or is concerned with the carrying, removing, depositing, keeping or otherwise dealing with the goods, and
>
> (b) at the time when P acquires possession of the goods or is so concerned, a payment of duty on the goods is outstanding and has not been deferred."

14. Para. 5(4), Sched. 41, FA 2008 sets the "degrees of culpability" in relation to a penalty as being either "deliberate and concealed" or "deliberate but not concealed".

15. Para. 6B, Sched 41, FA 2008 provides for the penalty percentages associated with "deliberate and concealed" conduct (100% of the potential lost revenue) and "deliberate but not concealed" (70% of the potential lost revenue).

16. Para.10, Sched. 41, FA 2008 provides that potential lost revenue is an amount equal to the amount of duty due on the goods.

17. Para.14, Sched. 41 provides that if HMRC "think it right because of special circumstances, they may reduce a penalty".

18. Para. 12, Sched. 41, FA 2008 permits HMRC to reduce the level of penalty where there has been disclosure of the relevant act or failure by telling HMRC about it, giving them reasonable help in quantifying the unpaid tax and allowing them to access records for the purpose of determining how much tax was unpaid ("telling", "helping" and "giving"). Disclosure can be on a prompted or unprompted basis – each determining the level of reduction.

19. Para. 19, Sched 41 gives the Tribunal power to affirm or cancel a penalty decision or substitute for HMRC's decision another decision that HMRC had the power to make. The Tribunal can rely on Para.14 (special circumstances) to the same extent as HMRC but to a different extent only if the Tribunal thinks that HMRC's decision in respect of special circumstances was flawed in the light of the principles applicable in proceedings for judicial review.

20. The burden of proof is with the Appellant to show that grounds on which an appeal against the Excise Assessment have been established (s. 16(6) FA 1994).

21. The burden of proof is with HMRC to show that the Penalty Assessment was correctly imposed. It is then with the Appellant to show that the quantum is incorrect.

22. The standard of proof in each case is the ordinary civil standard which is the balance of probabilities.

THE SUBMISSIONS

23. The Appellant has advanced the following grounds as to why the Excise Assessment should not be levied:

(1) The Cigarettes were not imported for a commercial purpose.

(2) No excise duty should have been levied as he was travelling within the EU and so able to bring an unlimited quantity of cigarettes into the UK.

(3) No excise duty should be payable as the Cigarettes were destroyed.

(4) He was not issued with Notice 12A outlining his rights to appeal the forfeiture.

(5) There would be double taxation as Bulgarian Excise Duty had been paid on the Cigarettes.

24. The Appellant has not specified any particular grounds on which the Penalty Assessment should not be levied and has simply asked for it to be set aside, although of course if the Excise Assessment is not valid then the Penalty Assessment will fall away.

25. HMRC contend that the Excise Duty Assessment and Penalty Assessment were validly issued and that the Tribunal does not have jurisdiction to consider most of the grounds on which the Appellant seeks to appeal.

DISCUSSION

26. To the extent that the Appellant's grounds of appeal seek to challenge the basis of the seizure of the Cigarettes, including any facts on which that seizure relies, they must fail.

27. This is because any challenge to a seizure must be made within a set time period by delivery of a notice to HMRC who must then take proceedings generally in the Magistrates court. As no such notice was given by the Appellant the Cigarettes are deemed to have been duly condemned as forfeited. This is provided for by para. 5, Sched. 3, CEMA (the "CEMA Deeming Provisions").

28. It is well established from the cases of *HMRC v Jones* [2011] EWCA Civ 824, *HMRC v Race* [2014] UKUT 0331 and others that as a result of the CEMA Deeming Provisions the Tribunal does not have the jurisdiction to consider the legality or correctness of a seizure.

29. The position was set out clearly by Mummery LJ in the Court of Appeal's decision in *Jones*, a case which also involved individuals challenging the basis of a seizure on grounds that the seized goods were imported for personal use.

30. In his decision, Mummery LJ held at [71] that a person who wishes to challenge a seizure on the basis that he is importing goods for personal use must do so in the Magistrates court. If a person fails to do so, the law deems the goods to have been correctly seized. In other words the Tribunal must assume that the Border Force acted lawfully.

31. He found also at [71(7)] that:

> "Deeming something to be the case carries with it any fact that forms part of the conclusion."

32. In *European Brand v HMRC* [2016] EWCA Civ 90, Lewison LJ noted that Mummery LJ was following well established legal principles, citing *East End Dwellings v Finsbury BC* [1952] AC 109 at p 132 where Lord Asquith said:

> "if you are bidden to treat an imaginary state of affairs as real, you must surely unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed must have inevitably flowed from or accompanied it."

33. The effect of the CEMA Deeming Provisions is that we must proceed on the basis that the Cigarettes were illegally imported by the Appellant for commercial purposes and that all the factual requirements for that seizure were satisfied.

34. The Appellant's contentions as to personal use, and there being no excise duty point are therefore not for us to consider as they would contradict the statutory deeming.

35. The Appellant's contention that Notice 12A was not received is also a fact that goes to the validity of the seizure and so is contrary to the statutory deeming. We note here that even if this was for us to consider, the Border Force officer's notebook states that Notice 12A was provided to the Appellant and the Appellant signed confirmations of receipt of the Notice.

36. Similarly the Appellant's contentions as to the seizure and penalty conflicting with EU law are not for us to consider – although we would note here that both of the issues raised in this regard by the Appellant; (a) the fact that Excise Duty had been paid in another EU member state, and (b) the fact that the goods were destroyed, were considered by this Tribunal in *Ferenc v HMRC* [2020] UKFTT 8(TC).

37. In that case the Tribunal found at [68-72] in respect of (a) under Article 33 of the Excise Directive and regs. 13(1) and (3)(b) of the HMDP Regulations that the UK was required to impose excise duty on goods imported for commercial purposes even though they were previously released for consumption in another country and that the effect of Article 33(6) was to require the first member state to reimburse the excise duty initially levied. In this case it would be Bulgarian authorities that would be so responsible. In respect of (b) the Tribunal found that Articles 7 and 37 of the Excise Directive, which address the excise duty position where there is the total destruction or irretrievable loss of excise goods, were not intended to deal with a situation where the goods in question were seized and destroyed by the relevant tax authority.

38. We note also that the Excise Assessment was issued within the relevant statutory time limit being within one year of the day on which HMRC became aware of the unpaid excise duty (s. 12(4)(b) FA 1994).

Conclusion on the Excise Assessment

39. We find that the Excise Assessment was validly issued and that the Appellant has not shown that the amount of excise duty charged was incorrectly calculated.

The Penalty Assessment

40. We must also proceed on the basis that the factual requirements for the penalty assessment have been satisfied. This is because the principle that we have outlined in relation to statutory deeming and the Excise Assessment extends to a penalty assessment relating to such an excise assessment, see *HMRC v Susan Jacobson* [2018] UKUT 18 TCC at [24].

41. In terms of the quantum of the penalty, the penalty calculation has been clearly set out by HMRC. It has been determined by reference to the potential lost excise duty and the degree of culpability ascribed to the Appellant is "deliberate but not concealed". It also takes into account the fact that the Appellant's disclosure was "prompted" rather than unprompted given that the Appellant did not voluntarily admit that he had the Cigarettes. Full reductions were then applied by HMRC for "telling", "helping" and "giving" – to reflect the Appellant's co-operation with HMRC following the seizure.

42. HMRC have explained that the decision on degree of culpability was based on their belief that the Appellant knew that he was committing a wrongdoing and that his behaviour was deliberate. This was based on his answers to Border Force's questions at the time of interception which included questions as to his awareness of his import allowances and a

question as to whether he had obtained anything whilst he was out of the UK. It was also based on the number of cigarettes that he was carrying which exceeded very significantly the personal allowance. We note also that the Border Force officer's notebook records that the Appellant understood the questions asked and we consider that the answers given reflect that understanding.

43. Mr Carey has also pointed out that the Appellant entered the green channel at Stansted Airport, so effectively declaring that he had nothing to declare.

44. HMRC did not consider that there were any special circumstances justifying a further reduction of the penalty. We have considered whether HMRC correctly determined that there were no special circumstances, noting that our ability to interfere with HMRC's conclusion is limited to circumstances where we think that HMRC's decision was flawed when considered in the light of principles applicable in proceedings for judicial review. This is a high bar and requires us, broadly, to find that the decision was so unreasonable that no reasonable person could have reached it or that HMRC failed to take into account facts which it should have done or took into account facts which it should not have done (*Associated Provincial Pictures Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223). We do not consider that this is the case here.

Conclusion on the Penalty Assessment

45. We agree with HMRC that the Penalty Assessment was validly imposed.

46. We consider the quantum of the penalty to be appropriate and not unreasonable.

DISPOSITION

47. The appeal is dismissed. The Excise Duty Assessment in the sum of £4,804 and the Penalty Assessment in the sum of £1.681 are upheld.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

48. 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.

VIMAL TILAKAPALA
TRIBUNAL JUDGE

Release date: 23rd May 2024