[2011] UKFTT 543 (TC)

TC01390

Appeal reference: TC/2010/07170

EXCISE DUTY – non-restoration of goods – Appellant on earlier hearing given leave to argue own use – non attendance by Appellant – was the decision to refuse restoration reasonable – yes – appeal dismissed

ROBERT ARTHUR NEIL **Appellant**

- and -

DIRECTOR OF BORDER REVENUE **Respondents**

Tribunal: Lady Mitting (Judge)
Susan Stott FCA (Member)

Sitting in public in Manchester on 20 July 2011

The Appellant did not appear and was not represented.

Miss E McClory of Counsel for the Respondents

DECISION

1. The Appellant, Mr Neil, appeals against the review decision of the Respondents, dated 22 June 2010, to refuse restoration of 4 kilograms of hand rolling tobacco seized from him on 25 March 2010.

Preliminary Issues

2. When the case was called on for hearing, Mr Neil was not present or represented. We noted from the Tribunal file that notification of the hearing had gone out to both parties by letter dated 9 May 2011. Mr Neil's letter had not been returned as undelivered. An issue later arose concerning this letter which we refer to in greater detail at the conclusion of this decision. We also noted from the file that Mr Neil had written in to the Tribunal by letter date stamped as having been received on 5 July 2011, requesting the attendance of the intercepting officer at the hearing on 20 July. We therefore knew from this letter that Mr Neil was aware of the date of the hearing. Not least because the Respondents had brought to the hearing both the review officer and (at the express request of Mr Neil) the intercepting officer we decided it was in the interest of justice that the hearing should proceed, not withstanding Mr Neil's failure to attend.

3. In fact, Mr Neil did arrive at the Tribunal at 2pm and as both members of the Tribunal were still on site, we saw Mr Neil and what ensued we set out at the conclusion of this decision but that does not alter anything that went before during the hearing.

4. This matter had come before the Tribunal originally on 29 March 2011 when application was made by Mr Neil to argue 'own use' before the Tribunal. The reasons which he gave were in our view exceptional and gave rise to a situation where we did not consider it would be an abuse of process to allow him to do so and leave was given. We gave our reasons orally, which both parties were happy with, and incorporated the decision into a Direction. The hearing was then adjourned, coming back before us on 20 July for full hearing.

5. At the outset of the hearing, Miss McClory raised with the Tribunal the question of our jurisdiction in the light of the Court of Appeal's judgment *in HMRC* against *Lawrence Jones and Joan Jones [2011] EWCA CIV 824.* We were reluctant to revoke our previous direction as Mr Neil was not present and we were of the view that the issue was in fact going to be academic as Mr Neil was not present to put his case. We were also concerned that we should hear the evidence of the intercepting officer, Joseph Taylor, as Mr Brenton, in his review, had drawn heavily on the contents of the interview which Mr Taylor had conducted with Mr Neil at the time of the seizure, the record of which had been strongly challenged by Mr Neil at the original hearing.

6. On the issue of restoration, the jurisdiction of the Tribunal is limited to assessing the reasonableness of Mr Brenton's decision. The test for reasonableness which we apply is that set out by Lord Lane in *Customs and Excise against J H Corbitt (Numismatists) Ltd [1980] FTC 231at page 239.*

The Evidence

7. Mr Taylor had intercepted Mr Neil at Dover on 25 March 2010. Mr Neil readily volunteered he was carrying 1,400 Lambert and Butler cigarettes (accepted by Mr Taylor as being for Mr Neil's personal use) and 4 kilograms of Golden Virginia and Amber Leaf tobacco. Mr Neil, having told Mr Taylor that he had been to stay with friends in France for 3 days; that he had last travelled to France about 4 years ago and that the tobacco goods brought in were for his personal use, agreed to stay for interview. In the course of the interview Mr Neil said that he had paid 600 plus Euros for them, his wife having loaned him £500 and he had paid in cash. He said that he was retired and received a pension of £112.03 including a £24 Carer's Allowance for his wife. His only savings were about £50 and he had no other commitments as he lived rent free and his wife paid all the bills. He was asked what he intended to do with the goods to which he replied, "smoke them". He went on to say that he smoked tobacco and cigarettes but only cigarettes when he was out and about. He was asked how many ' roll up' cigarettes he got from a pouch to which the recorded answer was, "I haven't a clue, about 150". He said he smoked about 12 or 14 'roll up' cigarettes at night and about 40 cigarettes during the day. He expected the goods to last about a year. He had not travelled abroad in the last 12 months but had been to Spain approximately 2 years before when he had bought 15 sleeves of Lambert and Butler and 6 Kilos of tobacco. He was asked to whom the goods belonged and who they were for, to both questions his answer being, 'me'.

8. Mr Taylor took the view that the tobacco was held for a commercial purpose, his recorded reasons being as follows.
   i) implausible to get 150 ' roll ups' from a pouch
   ii) no 'roll up' paraphernalia
   iii) income versus expenditure, implausible explanation of financing of trip.

   Mr Neil signed the officer's notebook.

9. An initial request for restoration was refused, a refusal which Mr Brenton upheld on review. In reaching his conclusion, Mr Brenton expressly disregarded the legality or correctness of the seizure as that was a matter for the Magistrates' Court. In considering restoration, he had in front of him all the seizure documentation and certain correspondence from Mr Neil to which we refer below. Of particular relevance Mr Brenton highlighted the following matters. First he thought the finances of the purchase were implausible, spending £600 on tobacco goods given his limited income. Secondly, he thought the estimate of 150 cigarettes from a pouch was unrealistic, experience showing him that a pouch would yield approximately 80 to 100 'roll ups'. On Mr Neil's declared consumption of 'roll ups', the

tobacco would have lasted at least two years and four months. Thirdly, he had been carrying no hand rolling paraphernalia with him. Fourthly, he had stated quite clearly in interview that the goods were for himself and that the use he was to make of them was that he would be smoking them. Nowhere had he made any reference to sharing the tobacco with his children. For all these reasons, Mr Brenton took the view that the tobacco had been brought in for profit as Mr Neil had never suggested that it was brought in to be passed on at cost. He therefore upheld the refusal to restore.

10. In the course of correspondence, Mr Neil had contended that the cigarettes and tobacco were for himself, his son and daughter. He further stated that he had been misled by Mr Taylor in his questioning. Mr Neil asserted that Mr Taylor had asked "are these for your own personal use?" To which Mr Neil had replied, "yes." He had not, he contended, said that the tobacco was for his son and daughter because he had not been asked if it was for a gift. He also said in correspondence the reason he had no 'roll up' paraphernalia on him was because he only rolled his own at home. On the move he always smoked cigarettes. He also maintained that Officer Taylor's record had been incorrect on the subject of how many cigarettes he could get from a pouch. Mr Neil maintained that he had replied, "how long is a piece of string?", meaning that he didn't know. He was then, he said, pressed as to how many to which he replied, "50, 100, 150, I don't know, I've never counted." He asserted that he would be repaying his wife the £500 she had lent him and enclosed a copy of his wife's record to that effect. Mr Neil also in correspondence totally denied that the recorded exchange about the goods brought back from Spain ever took place, questioning where the officer got this from as it was in any event incorrect.

11. Officer Taylor in his oral evidence confirmed that his record of the interview was totally accurate and that none of the recorded answers had been made up. As to the allegation that he had asked Mr Neil if the goods were for his own use, he stated that that was not a question that he would ever ask in that form.

Conclusions

12. In the absence of Mr Neil to put his case, we do not accept that the goods were brought in for his personal use. We can make no such finding on the strength of untested assertions contained in correspondence. We therefore come to the reasonableness of Mr Brenton's decision to refuse restoration, applying the test to which we referred earlier.

13. We should state from the outset that we accept Officer Taylor's evidence and accept that his notebook sets out an accurate record of the interview. Mr Brenton was therefore entitled to rely upon, and was reasonable in that reliance on, that record. Without the benefit of any financial evidence, we find Mr Brenton was reasonable in his view that the amount spent was implausible. Again we note Mr Neil's assertion in his letters that he only smoked tobacco at home but without the opportunity of hearing Mr Neil and testing that assertion, we cannot find that Mr Brenton's assumption was

unreasonable. All the factors which Mr Brenton took into account and which we listed above were relevant. We have not been persuaded that there were any factors which he should have taken into account but failed to and we find that his decision was reasonable. On the facts as he knew them, it was not unreasonable to assume that the goods had been brought in for profit and his decision to uphold the refusal of restoration was not a decision which no reasonable officer could have taken.

14. There was one piece of evidence which had not been put before Mr Brenton but was before the Tribunal. At the earlier hearing, Mr Neil had intimated that he wished to put in some evidence from the friend with whom he had been staying in France, a Mr Magness. On the direction of the Tribunal at that hearing, Mr Neil produced to the Respondents a letter from Mr Magness, thus enabling the Respondents to decide whether they could agree the evidence or wished Mr Magness to be called. With certain excepted elements, the Respondents agreed the bulk of the letter. We had the letter before us and it really takes the matter no further. Mr Magness confirms Mr Neil's poor health, confirms the purchase and that Mr Neil always used cash when in France so he did not have to change money. He also said that Mr Neil only brought out cigarettes with him and did not open any tobacco in his presence.

15. As we say this evidence was not before Mr Brenton but we considered it took the matter no further forward and in no way affects the reasonableness of Mr Brenton's decision.

16. The appeal is dismissed.

What Happened Next

17. Shortly before 2pm, and well after Miss McClory and the two officers had left, Mr Neil arrived at the Tribunal. The members of the Tribunal were still on site and we therefore took the opportunity to explain to Mr Neil what had gone on that morning. He advised that he had not come at 10.30am because he had been informed that the hearing would begin at 2pm. He stated that at the previous hearing, he had been told that the resumed hearing would take place on the 20 July at 2pm. He had, he told us, in any event been attending a medical appointment that morning and could not have come at 10.30am anyway. We informed Mr Neil that the case had been heard in his absence and that we had dismissed his appeal and we advised him to wait for the full reasoned decision which would follow, upon receipt of which one option open to him would be to apply to the Tribunal to have it set aside on the basis that the case had been heard in his absence. We explained that the reasons which he had given for non attendance could then be put to the Judge hearing his application.

18. It is not for us, and indeed we have absolutely no wish, to pre-empt the decision of the Judge who later hears any application which Mr Neil may make to have our decision set aside. We would however, for the assistance of the Tribunal then, make two points and these are no more than we dealt

with verbally with Mr Neil when he appeared before us. First, we were shown the appointment letter for Mr Neil's hospital appointment that morning and from that fully accept that he would have been unable to attend at 10.30am, given that appointment. Secondly, however and again we went through this chronology with Mr Neil, it did not appear to the Tribunal to be correct that the hearing had been listed for 2pm. At the previous hearing, no date was fixed. This is clear from the Judge's note and from the direction which the Tribunal made following the earlier hearing which provided that the hearing was adjourned part heard to be re-listed on the first available date after 1 June 2011, allowing one day. The Tribunal file shows that a letter dated 1 April 2011 went out to both parties asking them, "in order to facilitate the listing of this part heard appeal" for their availability between July and October. The Respondents responded, Mr Neil did not. The Tribunal file then contains an exchange of e-mail correspondence with the panel, seeking to agree a hearing date and on the 9 May, the letter listing the hearing for 20 July at 10.30 am went out. Mr Neil states he did not receive that letter.

19. As we say this chronological summary is only to assist the Tribunal on the hearing of any application to set aside this decision and we make no point from it.

20. We did bring to Mr Neil's attention the Court of Appeal judgment in *Jones and Jones* and we gave him a copy of it marking the relevant paragraphs. We tried to explain to him the implication of that judgment. We advised him that if our decision was to be set aside and the matter were to be re-heard, the Respondents would be making an application that the earlier direction that Mr Neil be allowed to argue 'own use', be revoked. We explained the limitations on the Tribunal's jurisdiction and advised Mr Neil that if he was in any doubt as to the meaning of the judgment, he should seek legal advice.

21. This document contains full findings of fact and reasons for this 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) Rule 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.

22. As the Appellant was neither present nor represented at the hearing, he may, pursuant to Rule 38[2][d] Tribunal Procedure Rules 2009/273, make an application in writing for this decision to be set aside.

Tribunal Judge:

Release Date 11 August 2011