TC04549

Appeal number: TC/2013/07973

EXCISE DUTY – tobacco products seized – deemed forfeiture – duty and penalty appealed – hardship application – procedural non-compliance – Rule 8(3)(c) of Tribunal Rules – no prospect of appeal succeeding – special circumstances for penalty reduction – no – strike out application granted

FIRST-TIER TRIBUNAL
TAX CHAMBER

HAIDAR AHMED **Appellant**

- and -

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

TRIBUNAL: JUDGE DR HEIDI POON

Sitting in public at The Immigration Appellate Authority, King's Court, Earl Grey Way, North Shields, on 27 April 2015

The Appellant, no appearance or representation

Mr Christopher McKee, Counsel for the Respondents

DECISION

Introduction

1. This is an application by HMRC for the appeal to be struck out under Rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('the Tribunal Rules'). The appeal concerns the assessment of excise duty of £2,596 and related penalty of £1,492 in consequence of tobacco seized on 8 February 2013 that was deemed forfeited.

Hearing in a party's absence

2. It was on the day of the hearing that the Tribunal learned of the fact that the appellant would neither appear nor be represented. The appellant had informed the tribunal office of his non-attendance; his letter and HMRC's reply were made available to the Tribunal on the day of the hearing.

3. By letter dated 16 April 2015, the appellant informed the tribunal office in Birmingham that it would be impossible for him to attend the hearing on 27 April due to 'family problems', and that he had booked flights to leave on 20 April. He stated that he was unsure when he could return to the UK, but indicated that he would contact the tribunal office as soon as possible on his return. The appellant did not expressly request the hearing to be postponed in his letter.

4. On 22 April, HMRC wrote to oppose the 'postponement application' from the appellant, which would suggest the appellant's letter of 16 April had been taken as a 'postponement application'. HMRC gave reasons for their opposition in the same terms as those stated for the strike-out application.

5. The appellant presumably would have been sent a copy of HMRC's letter of 22 April, but would have left the country by then and would not have known about HMRC's opposition to his 'deemed application of postponement' or their grounds of objection.

6. The Tribunal considered the relevant rules from the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('the Tribunal Rules') and decided to proceed with the hearing in the appellant's absence. For the appellant's reference, the relevant rules are set out in full in the Appendix to this decision.

7. First of all, the Tribunal had regard to Rule 33, which states that:

> '**33**. If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal –
>
> (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
>
> (b) considers that it is in the interests of justice to proceed with the hearing.'

The Tribunal was satisfied that the condition under Rule 33(a) had been met; the appellant's letter of 16 April is evidence to his awareness of the hearing being scheduled for 27 April 2015. In respect of Rule 33(b), whether 'it is in the interests of

justice' to proceed with the hearing in the appellant's absence, this was considered by taking in the wider provisions under Rule 2.

8. What is in the interests of justice is encompassed under Rule 2, where it is stated that 'the overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly', and that includes 'ensuring, so far as practicable, the parties are able to participate fully in the proceedings'; 'avoiding delay, so far as compatible with proper consideration of the issues'; and that the parties must 'co-operate with the Tribunal generally' to 'further the overriding objective'.

9. The central issue for the hearing concerned the strike-out application under Rule 8(3)(c) – that there is no reasonable prospect of the appellant's case succeeding. In this respect, the Tribunal took the view that the factual matrix of the case was there for the relevant law to be applied to assess the prospect of success for this appeal. Other relevant factors the Tribunal had considered and weighed up under Rule 2 included: the level of co-operation from the appellant through the history of this appeal, the likelihood of a prompt return of the appellant to the UK, the lack of specification in the 'deemed application of postponement'. On balance, the Tribunal decided that in the interests of justice by avoiding delay, and that it was not incompatible with proper consideration of the issues, to proceed with the hearing in the absence of the appellant.

Factual Background

10. The facts, taken principally from the HMRC's Notice of Application, and from the papers made available to the Tribunal, do not appear to be in dispute.

11. The case originated in a police search carried out on 13 January 2013 at the appellant's premises (a shop with living accommodation above), which resulted in 8240 cigarettes and 4.85kg of hand-rolling tobacco being found; the goods were concealed 'in beer crates, roof panels and in the oven'.

12. On 8 February 2013, the appellant was interviewed in respect of the goods found during the police search. He conceded that the goods were his; that he had purchased them some 18 months previous from a man he thought was Polish; that he had concealed the goods because he knew it was wrong to have them; that he was neither selling them nor could he throw them away because he had paid between £1,600 and £1700 for them; that he did not know it was an offence to buy or sell non-duty goods without first paying the duty.

13. Following the interview, the goods were seized as liable to forfeiture as no duty had been paid on them, and the official date of seizure was 8 February 2013.

14. The appellant was served in the course of the interview with a Seizure Information Notice (ENF 156), a warning letter (ENF 3174), and Notice 12A explaining that any claim of the goods not being liable to seizure should be appealed to the Magistrates' Court. The appellant did not challenge the seizure of the goods within the time limits advised in the Notice.

The Assessments

15. On 14 March 2013, HMRC raised an assessment for excise duty in the sum of £2,596. The letter notifying the appellant of the assessment also referred to the liability to *Excise Wrongdoing Penalty*, as explained in the accompanying Factsheet CC/FS12. Factsheet CC/FS9 was also enclosed to explain the rights under Article 6 of the European Convention of Human Rights when penalties are considered.

16. On 30 March 2013, the appellant telephoned HMRC, stating that he was not selling the cigarettes or tobacco, and that he was trying to return the goods to the Polish man. The appellant advised that he would not pay the duty assessed because it was his first offence. The HMRC officer advised that the penalty would be assessed soon and he would write at the same time to explain the review and appeal procedures.

17. On 18 April 2013, HMRC wrote to the appellant setting out the basis for the penalty charge and invited the appellant to provide any relevant information that had not already been taken into account.

18. On 2 May 2013, in the absence of any further information, HMRC raised an assessment under Schedule 41 to Finance Act 2008 ('FA2008') for wrongdoing penalty in the sum of £1,492. The penalty was mitigated to 57.5% of the potential lost revenue, taking into account the quality of disclosure made, which was considered to have been 'prompted', and the nature of the wrongdoing, which was considered to have been 'deliberate and concealed'.

History of the Appeal

19. On 3 September 2013, the appellant telephoned HMRC in respect of his request for a review of the assessments, and claimed that he had sent letters in May and August 2013 in response to demand notices from debt management.

20. On 9 September 2013, HMRC wrote to the appellant confirming the assessments following a review, and explained the options available to the appellant of seeking an independent review or appealing to the Tribunal.

21. On 18 November 2013, the appellant lodged an appeal against both the duty and penalty assessments with the Tribunal. The stated grounds of appeal on the Notice of Appeal are:

> 'In my original appeal I explained that I didn't know that the implications of any of this and that now that I understand the implications, I can assure you that it will not happen again, also after this event I had spoken to friends and they knew of cases were [*sic*] no charge was issued on a first time offence which this is for me and also I was unaware of the legality of it here, I am in no financial position to pay this penalty and I really want an appeal to help me because this is going to put a lot of strain on me financially and I will not be able to afford it, I will never be involved in anything like this again now that I fully understand it.'

22. On 19 November 2013, the Tribunal informed the appellant that his appeal would not proceed unless the tax in dispute was paid or deposited with HMRC or a hardship application was allowed by HMRC.

23. On 22 November 2013, the appellant applied for hardship to the Tribunal, which was referred to HMRC for consideration.

24. On 9 April 2014, HMRC refused the hardship application, in the absence of any information to support the application as requested by their letters dated 17 December 2013 and 28 February 2014.

25. On 4 July 2014, the Tribunal communicated HMRC's refusal of hardship and issued Directions for provision of documents for the appellant to comply with, should he wish the Tribunal to consider his hardship application.

26. On 19 August 2014, the Tribunal wrote to the appellant requesting documents that he should have supplied by 8 August 2014 under the terms of Directions issued on 4 July 2014.

27. On 23 September 2014, the Tribunal advised the appellant that a hearing would be scheduled for his hardship application.

28. On 19 November 2014, an 'unless order' direction was issued as follows:

> 'Unless the Appellant shall notify the Tribunal in writing on or before 20 November 2014 that he intends to pursue his hardship application and provides a copy of all documents he relies upon in support of that application the hardship application shall be struck out.'

29. On 25 November 2014, the appellant replied to the Tribunal and enclosed – as supporting document – *one* bank statement covering the period 28 October to 19 November 2014.

30. On 28 November 2014, the appellant's communication and enclosed bank statement were forwarded to HMRC, and the parties were advised that the hearing listed for 16 December 2014 would proceed.

31. On 9 December 2014, HMRC gave consent to the appellant's hardship application, emphasising that the appellant had 'presented very limited evidence in support of his application'. The consent was qualified as given 'exceptionally and without prejudice to [HMRC's] position generally in respect of hardship', and in view of the forthcoming application for the appeal to be struck out. The hardship hearing was vacated.

32. By notice dated 11 February 2015, HMRC applied to the Tribunal for directions that the appellant's appeal against the duty and penalty assessments be struck out under the following premises:

> '[1] … under rule 8(3)(c) of [the "Tribunal Rules"] on the basis that there is no reasonable prospect of the Appellant's case succeeding.

[2] Or, in the alternative, that the Appellant do provide further and better particulars of his Grounds of Appeal.'

33. On 25 February 2015, the Tribunal directed:

'[1] Within 21 days of release of this Direction the Appellant must provide HMRC and the Tribunal with further and better particulars of his Grounds of Appeal.

[2] Failure to comply with this Direction will automatically result in the striking out of this appeal.'

34. There was no response from the appellant to the Tribunal's notice of direction of 25 February 2015.

The Appellant's Case

35. The appellant's grounds per the Notice of Appeal lodged can be summarised as:

(1) That he is in no financial position to pay the duty and penalty;

(2) That the assessments are inappropriate for a first offence;

(3) That he intended not to be involved in anything similar again.

HMRC's Submissions

36. In summary, there are three aspects to HMRC's strike-out application:

(1) *Procedural Non-compliance* – that the appellant has failed to comply with the Unless Order Direction of 25 February 2015 to provide further and better particulars of his Grounds of Appeal.

(2) *Duty Assessment* – that the current appeal has no reasonable prospect of success.

(3) *Penalty Assessment* – that insofar as the appeal relates to the penalty assessment, provisions under Schedule 41 paragraphs 14 and 20 of FA2008 specially preclude the Tribunal from making a 'special reduction' to the penalty on the grounds of the appellant's inability to pay, and from considering 'insufficiency of funds' as 'a reasonable excuse'.

The Issues and the Law

Procedural Non-compliance

37. Reliance was placed by HMRC on the 'Unless Order' as an automatic measure, effectively paving the way for striking out the appeal in the event of failure by the appellant to comply with the Direction dated 25 February 2015.

38. Under Rule 8(1) of the 'Tribunal Rules', it is stated:

'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 decision would lead to the striking out of the proceedings or that part of them.'

39. The Tribunal's Direction dated 25 February 2015 clearly stated that '*Failure to comply with this Direction will automatically result in the striking out of this appeal.*' The appellant has not complied by providing 'further and better particulars of his Grounds of Appeal'.

40. In *Fred Perry Holdings Ltd v Brands Plaza Trading Ltd* [2012] EWCA Civ 224 ('*Fred Perry Holdings*'), it is noted at [20]:

> 'The defendant's track record [in compliance] was a bad one. The failure to comply with the unless order fitted into a pattern of previous failures to comply with court orders and time limits contained in the rules.'

Jackson LJ concluded at [48]: 'Any further grant of indulgence to the defendants in this case would be a denial of justice of the claimants and a denial of justice to other litigants whose cases await resolution by the court.'

41. The same observation can be made of the appellant's track record in complying with requests from HMRC officers, or directions from the Tribunal. The process of the appellant's hardship application is illustrative of a pattern of non-compliance, and the failure to comply with the 'unless order' direction of 25 February 2015 'fitted into a pattern of previous failures' by the appellant. Any further grant of opportunity for representations in this case will fit into 'a culture of delay and non-compliance' that is being censured by Jackson LJ as 'injurious to the civil justice system and to litigants generally' (*Fred Perry Holdings* at [48]).

Duty Assessment and Tribunal's Jurisdiction

42. Under Rule 8(3)(c) of the 'Tribunal Rules', the Tribunal may strike out the whole or a part of the proceedings if –

> '(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.'

43. The appellant was duly served with a Seizure Information Notice, the warning letter and Notice 12A when the goods were officially seized on 8 February 2013. The appellant could have challenged the legality of the seizure of the goods within the statutory time limit at the Magistrates' court – but that did not happen.

44. Where there is no timely challenge, the deeming provision under Schedule 3 paragraph 5 of Customs and Excise Management Act 1979 ('CEMA 1979') automatically applies. The goods seized are deemed as imported for commercial use, and 'duly' condemned and forfeited. The duty assessment follows in consequence of the deemed forfeiture.

45. The deeming provision is ***final*** and there is no scope for the Tribunal to re-open the case to consider whether the goods could have been imported for personal use (*HMRC v Jones and Jones* [2011] EWCA Civ 824).

46. This appeal is not against the seizure of goods as in *Jones and Jones* but against the assessment to excise duty on the condemned tobacco. However, once the deeming provision has applied, the Tribunal lacks jurisdiction to re-consider the duty assessment for the same reasons as for goods restoration. This is made clear in *HMRC v Nicholas Race* [2014] UKUT 0331 (TCC) (‘*Race’*) at [33]:

> ‘The fact that the appeal is against an assessment to excise duty rather than an appeal against non-restoration makes no difference because the substantive issue raised by Mr Race is no different from that raised by Mr and Mrs Jones.’

47. Once the deeming provision has applied, ‘it remains open to a person subject to such an assessment to argue that it is wrongly calculated, is out of time, is raised against the wrong person, or is otherwise deficient …’ (*Race* at [34]). In other words, the only issues that the Tribunal can consider in relation to a duty assessment in a case of deemed forfeiture are restricted to: (a) the basis of the duty calculation; (b) the time limit for raising the assessment; (c) the person liable for the assessment.

48. In the instant case, there is no dispute that the assessment has been correctly raised within the time limit, or that the appellant has been correctly identified as the person liable for the duty.

49. It follows therefore, that the appeal against the duty assessment has no prospect of success.

Penalty Assessment and Tribunal’s Jurisdiction

50. As regards the penalty imposed under Schedule 41 paragraph 4 of FA2008, the Tribunal has jurisdiction to consider: (a) the assessment of the degree of culpability; (b) whether the level of mitigation afforded by HMRC for co-operation is sufficient; (c) whether there should be further reductions for ‘special circumstances’; (d) whether there is a reasonable excuse for the act or failure that had resulted in the penalty.

51. The Tribunal agrees that the nature of wrongdoing is ‘deliberate and concealed’, and penalty is at 100% of the potential lost revenue; and that the level of mitigation for ‘prompted’ disclosure to 57.5% is sufficient.

52. Under Schedule 41 paragraph 14 of FA2008, HMRC are given the discretion to reduce a penalty further in special circumstances. For special circumstances to obtain, they have to be ‘exceptional, abnormal or unusual’ (*Crabtree v Hinchcliff* [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). HMRC have considered special reduction in their notice of application, and highlighted that the inability to pay is specifically ruled out in the legislation as a special circumstance. The Tribunal agrees that there is no evidence of any special circumstances to warrant a reduction.

53. HMRC have emphasised in their application that the legislation specially rules out ‘insufficiency of funds’ as a reasonable excuse. The Tribunal has regard to the specific wording under Schedule 41 paragraph 20(1) of FA2008, which provides that:

> 'Liability to a penalty under any of the paragraphs 1, 2, 3(1) and 4 does not arise in relation to *an act or failure which is not deliberate* if [the person liable] can satisfy HMRC or (on appeal) the First-tier Tribunal, that there is a reasonable excuse for the act or failure.' (emphasis added)

In this respect, the Tribunal concludes that the appellant is precluded by the statute from availing himself of a reasonable excuse as the nature of his wrongdoing was found to be *deliberate*.

54. As for the appellant's grounds of appeal – that he is in no financial position to pay the duty and penalty, that the assessments are inappropriate for a first offence, and that he has no intention to be involved in any similar wrongdoing – none of these have any basis in law for the Tribunal to consider as a valid ground of appeal.

Decision

55. Accordingly, the application for strike out of this appeal is granted.

56. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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. However, either party may apply for the 56 days to run instead from the date of the decision that disposes of all issues in the proceedings, but such an application should be made as soon as possible. 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.

HEIDI POON
TRIBUNAL JUDGE

RELEASE DATE: 21 JULY 2015

Appendix

The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009

Overriding objective and parties' obligation to co-operate with the Tribunal

2.—(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.

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

(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.

(7) This rule applies to a respondent as it applies to an appellant except that—

(a) a reference to the striking out of the proceedings must be read as a reference to the barring of the respondent from taking further part in the proceedings; and

(b) a reference to an application for the reinstatement of proceedings which have been struck out must be read as a reference to an application for the lifting of the bar on the respondent taking further part in the proceedings.

(8) If a respondent has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Tribunal need not consider any response or other submissions made by that respondent, and may summarily determine any or all issues against that respondent.

Hearings in a party's absence

33. If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal—

(a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and

(b) considers that it is in the interests of justice to proceed with the hearing.