



TC07049

Appeal number: TC/2018/00926

EXCISE DUTY – HMRC strike out application on grounds of want of jurisdiction – deeming effect of para 5 Sch 3 Customs and Excise Management Act 1979 – appeal against assessment struck out – excise penalty upheld

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JAMES AINSWORTH

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE GUY BRANNAN
JOHN ROBINSON**

Sitting in public at Taylor House, London on 20 February 2019

**The Appellant appeared in person
William Hays, counsel, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

Introduction

1. On 14 January 2017, the appellant, Mr Ainsworth, was stopped by Border Force (“BF”) officers going through the Blue Channel at Stansted airport after returning to the UK from Spain. He was found to be carrying 15 kg of hand-rolling tobacco (“HRT”). The HRT was seized. The seizure was not contested before the magistrates court. Mr Ainsworth maintained (and still maintains) that the HRT was for personal use. In December 2017, HMRC issued an assessment for excise duty in the amount of £2971 in respect of the HRT together with a penalty of £624. Mr Ainsworth now appeals against the assessment and the penalty. HMRC have applied to strike out the appeal on the basis of want of jurisdiction. The strike out application does not, however, apply to the appeal against the penalty.

The facts

2. Save as mentioned below, the essential facts were not in dispute.

3. 14 January 2017, Mr Ainsworth arrived at Stansted airport on his return to the UK from Valencia, Spain. He was stopped at the airport by Border Force Officers as he went through the Blue Channel.

4. Mr Ainsworth confirmed to the officers that the bags he was carrying were his, that he had packed them himself and that he was aware of their contents. No one had asked him to bring anything into the UK.

5. His package contained 15 kg of HRT.

6. Mr Ainsworth read and signed the Border Force officer’s notebook, essentially recording the above (except that the quantity of HRT was to be confirmed).

7. The officer read what is called “the commerciality statement” to Mr Ainsworth as follows:

“You have excise goods in your possession (control), which appear not to have borne UK duty. Goods may be held without payment of duty, providing they have been acquired and are held for your own use. I intend to ask you some questions to establish whether these goods are held for a commercial purpose. If no satisfactory explanation is forthcoming or if you do not state the questioning it may lead me to conclude that the goods are held for a commercial purpose and your goods may be seized is liable to forfeiture.”

8. The officer confirmed that Mr Ainsworth understood the statement and that he was not under arrest and was free to leave at any time.

9. Due to the quantity of tobacco (ascertained to be 15 kg – a quantity which is not in dispute) the officer deemed that the tobacco was not held by Mr Ainsworth for personal consumption and was being imported for a commercial purpose. The officer told Mr Ainsworth that she wanted to ask further questions in relation to some cigarettes, but Mr Ainsworth elected to leave.

10. There is some discrepancy between the officer's and Mr Ainsworth's accounts as to how long he was questioned by the Border Force officer. Mr Ainsworth said it was approximately two hours, but the officer's notebook records that Mr Ainsworth was stopped in the Blue Channel at 11:50 [p.m.] and that Mr Ainsworth left the baggage hall at 00:18 [a.m.].

11. Before leaving the baggage hall, Mr Ainsworth was provided with Notices 1 and 12 A and Forms BOR 156 (seizure information notice) and BOR (warning letter about seized goods) which he signed.

12. Notice 12 A explained that Mr Ainsworth could challenge the lawfulness of the seizure of the HRT (e.g. on the basis that it was held for his personal use) by bringing proceedings in the Magistrates Court. The Notice explained that a Notice of Claim had to be served on HMRC or the Border Force within one calendar month of the date of seizure. The Notice also explained that if the Notice of Claim was not received within that time limit, it was not possible thereafter to challenge the legality of the seizure. In the event, Mr Ainsworth did not challenge the legality of the seizure within the one month time limit (or at all). He said the right to challenge the legality of the seizure had not been explained to him but he admitted at the hearing that he had not read Notice 12A.

13. Next, on 1 November 2017, HMRC wrote to Mr Ainsworth indicating that they intended to issue an excise duty assessment and a penalty. The assessment was in the amount of £2971 (calculated at the rate of £198.10 per kilogram, rounded down to the nearest Pound). The letter asked Mr Ainsworth for any information that might potentially affect the penalty and requested that it be submitted by 1 December 2017. Various documents which, inter alia, explained the penalty calculation were attached.

14. On 7 December 2017, HMRC issued an assessment in the sum of £2971 and a penalty of £624

15. The penalty was calculated on the basis of Mr Ainsworth's wrongdoing was:

- (a) "non-deliberate", but
- (b) "prompted" (because he was stopped going through the Blue Channel at Stansted.

16. The maximum penalty was 30% of the potential lost revenue (i.e. the excise duty not paid) (para 6 B (c) Schedule 41 FA 2008). The minimum penalty for a prompted disclosure was 20% (para 12 (3) (b) Schedule 41 FA 2008). The penalty range was, therefore, from 20 to 30%.

17. In the event, Mr Ainsworth was charged a penalty of 21% – the 1% being charged because he had not admitted wrongdoing.
18. In deciding what penalty to impose, HMRC considered whether there were special circumstances justifying a special reduction (under paragraph 14 Schedule 41 FA 2008) and had concluded that there were none.
19. 12 December 2007, Mr Ainsworth wrote to HMRC requesting a statutory review. The review decision (15 January 2018) upheld the decision to issue the excise duty assessment and the penalty.
20. On 31 January 2018, the appellant appealed to this Tribunal.
21. By a Notice of Application, HMRC applied to strike out Mr Ainsworth’s appeal against the assessment under Rule 8 (2) (a) and Rule 8 (3) (c) Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Rules”). To be clear, HMRC have not applied for the appeal against the penalty to be struck out.
22. With his Notice of Appeal, Mr Ainsworth made the following statement:

“In early January [2017] I was stopped at Stansted airport with what was deemed to be an excessive amount of tobacco. This tobacco was absolutely for personal use and as I live between Spain and the UK I was taking advantage of the cheaper prices in Spain. I know under EU law that so long as your tobacco is for personal use and from the EU then it is legal. Upon being stopped at Stansted I was asked what I had in my bag and immediately told them the truth because I felt I had no reason to lie. I was immediately told by the border agent that in her opinion I had 0% chance of being allowed the tobacco even with an interview. To me it felt like the decision was made before I even had the chance to explain myself or to prove to them what it was for or of course I would have stayed in order to prove it was for personal use. The border agents told me it was being seized and there was no mention of me being able to appeal this until I received a letter from HMRC in November. I had no chance to challenge the liability of the goods and I am now doing that. I was absolutely devastated to have lost the tobacco at the airport. I was with the border agents for nearly 2 hours and pleaded with them to please allow me to keep this tobacco but after deliberation they seized it from me. I had absolutely no intention or means to sell this tobacco commercially and was simply bringing it between Spain and the UK taking advantage of what is completely legal. We called both my mother and stepfather who without me speaking to 1st both confirmed the tobacco was for personal use and that I am not the sort of person who is stupid enough to carry a bag personally for anything other than personal use. This is the absolute truth. I gave the border agents nothing to assume it was commercial and upon reading the excise duty notes, nothing there gives fair reason either. I have never in my life been stopped or arrested anything. I did not have a chance to defend myself in any way and this is why I am seeking a tribunal to have this cleared as it always

should have been. I know my tobacco is gone but I am seeking this taxation to be reversed and more importantly my name to be cleared.

I have seen in the HMRC notes (excise duty and penalty assessment form and the review conclusion letter 'page 3') that my actions were 'non deliberate' which is the absolute truth. I find it very difficult to understand how my actions can be seen as 'non--deliberate' and commercial at the same time. Having lost my tobacco was heart breaking enough and ruined my whole trip home. To then find out I am going to be taxed and charged a penalty for something I have already had taken away from me is both devastating and I feel very unjust. If I was to be taxed and then allowed to proceed with my tobacco then I would somewhat understand but to have something I brought innocently and legally taken away and then to be charged over £3000 on top of this I feel is totally unjust by a system I have always abided my whole life. I was not even offered the option to pay the tax on it at the time and thought that as it was duty-free it would not make sense to. I am a good person and only ever operate within the law and to receive this news 11 months after this incident I feel as a punishment that should not be issued. I truly hope common sense prevails in this matter and I am willing to cooperate and do whatever you deemed necessary to resolve this matter fairly incorrectly. I can't get on with normal life while this is stuck in my mind and I would really appreciate the chance to explain my side of things as I feel I am being punished financially and with stress for having done nothing other than operate within the law and its boundaries."

23. At the hearing, Mr Ainsworth read out the following statement:

"Upon arriving at Stansted airport I was stopped by border patrol and asked some general questions. When asked if I had any tobacco among other things I was immediately truthful and compliant. I said that I had an amount of Golden Virginia tobacco and when questioned further explained that I was simply taking advantage of the cheaper prices in Spain and at the time a stronger pound to euro rate in order to bring tobacco home to the UK to smoke while I was in the UK as I split my time between London UK and Valencia Spain. I didn't believe I had any reason not to be upfront as I was simply taking advantage of the difference in prices within the confines of the law. The border patrol agents confirmed that there was only a recommended allowance and each case is done on a case-by-case study. After checking my bags I was immediately told this tobacco was going to be confiscation [sic] without a fair interview or time to explain myself. I was with the border agents for nearly 2 hours obviously distressed before they told me the decision was final and I would not be allowed my tobacco back. This was a shock for me as I was fully cooperative from the beginning and could not understand that if there was no set amount, what had led them to decide I was not going to be allowed to pass legally into the UK with goods I had purchased by myself for myself. It was a very distressing situation but I had no other choice than to accept this before entering the UK. In HMRC notes it also states that my penalty fee had been lowered because it was done 'non-deliberately'. I do not understand how it can be stated that my actions were 'non-deliberate'

and yet I am being charged with deliberately bringing in goods illegally. Eleven months later I received a notice stating that not only had my tobacco being confiscated but I was now to be charged over £3600 on top of the price I paid for my tobacco originally. I am contesting this today because not only do I feel that I should have been allowed to enter the UK with my legal goods in the first place but to be charged this amount I feel is completely unjust. I have never in my life been through this kind of process with either border Force or any other kind of authority in the UK or elsewhere in the world. I would ask that the tribunal today uses common sense in the matter and that although I know I will not be getting my tobacco back, this fine be withdrawn.”

Strike out

24. In the present case, UK excise duty was due on the HRT pursuant to Reg 13 Excise Duty (Holding, Movement and Duty Point) Regulations 2010. HMRC are entitled to recover that excise duty by assessment pursuant to section 12(1A) Finance Act 1994.

25. Essentially, Mr Ainsworth argues that the HRT was for personal use. However, he did not challenge the lawfulness of the seizure before the Magistrates Court within the one month time limit. The effect of para 5 Schedule 3 Customs and Excise Management Act 1979 (“CEMA”) is, therefore, that the HRT shall be deemed to have been duly condemned as forfeited.

26. It is not open to this Tribunal to entertain an argument, such as personal use, which is inconsistent with the deemed position under para 5 Schedule 3 CEMA. The decision of the Court of Appeal in *HMRC v Jones & another* [2011] EWCA Civ 824 is clear authority to this effect. That principle extends to assessments and to penalties (see per Warren J in *Race v HMRC* [2014] UKUT 331 (TC)) and not just, as in *Jones*, to restoration proceedings.

27. In the present case, HMRC do not seek to strike out the appeal in respect of the penalty because considerations other than the lawfulness of the seizure may potentially apply.

28. Mr Ainsworth has complained that at the time of the seizure the ability to challenge its lawfulness was not mentioned. However, Mr Ainsworth was provided with Notice 12A which explained his right of appeal to the Magistrates Court but he did not read it. He said he was experiencing stress connection with his mother’s ill-health. We are satisfied that, in fact, Mr Ainsworth had his rights to challenge the lawfulness of the seizure adequately brought his attention. In any event, this would be a matter which would have to be considered in an application for judicial review and is not within the jurisdiction of this Tribunal.

29. Rule 8 of the Rules, so far as material, provides:

“(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

(3) 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.”

30. In the statement attached to his Notice of Appeal and his statement before the Tribunal, Mr Ainsworth is effectively seeking to challenge the lawfulness of the seizure of his HRT on the basis that it was for his personal use. He feels that it is unfair he therefore considers it unfair that the HRT was seized and that he should now be charged an assessment to duty together with a penalty.

31. There is no doubt in our mind that these are matters that this Tribunal has no jurisdiction to consider. The HRT is deemed by virtue of para 5 Schedule 3 CEMA to have been duly condemned as forfeited because Mr Ainsworth did not challenge the lawfulness of the seizure before the Magistrates Court. That is a matter, which as *Jones* holds, cannot be re-considered or questioned in this Tribunal – we simply do not have the jurisdiction to do so. Accordingly, Mr Ainsworth's appeal against the assessment must be struck out under Rule 8 (2)(a) of the Rules.

32. The appeal against the assessment is therefore struck out.

The penalty

33. We have explained above the basis upon which the penalty was calculated.

34. As already mentioned, on the authority of *Race* at [39]-[40] the deeming provision of para 5 Schedule 3 CEMA prevents Mr Ainsworth raising an argument in mitigation of penalties that the HRT was for personal use.

35. HMRC have assessed Mr Ainsworth's default as “non-deliberate” on the basis that “there was insufficient evidence to support deliberate behaviour or to suggest that you were aware that you were committing an offence.”

36. HMRC considered Mr Ainsworth's disclosure was “prompted” because, in effect, he was stopped going through the Blue Channel at Stansted.

37. We see no reason to disturb either of these conclusions, which had the result that the penalty range was between 20-30% of the excise duty payable.

38. Mr Ainsworth was given the maximum penalty reduction in respect of the “quality of disclosure” (“helping” and “giving”). However, he was not given the maximum reduction for “telling” because he had not admitted wrongdoing.

39. Again, we see no reason to disturb HMRC's weighting of the various discounting factors.

40. Mr Ainsworth argued that it was inconsistent for HMRC to contend that his behaviour was non-deliberate but penalised him for failing to admit his wrongdoing. We do not agree. Because he did not contest the legality of the seizure before the Magistrates Court he cannot now argue that he should not admit wrongdoing – the goods are deemed to have been lawfully condemned as forfeited.

41. Mr Ainsworth put forward no other grounds on which the penalty should be reduced or varied. He did not seek to argue that he had a reasonable excuse within para 20 Schedule 41 FA 2008 or that there were special circumstances which would justify a reduction under paragraph 14 Schedule 41 FA 2008.

42. Accordingly, we have decided that the appeal against the penalty should be dismissed.

43. 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.

**GUY BRANNAN
TRIBUNAL JUDGE**

RELEASE DATE: 19 MARCH 2019