



TC07752

EXCISE DUTY – appeal against excise assessment – vehicle stopped in UK carrying duty unpaid cigarettes – whether driver “holding” the goods – whether driver an “innocent agent” – effect of an acquittal by a Magistrates Court of a charge under s 170 CEMA

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2015/06772

BETWEEN

BRENDAN LENNON

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY’S REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: JUDGE CHRISTOPHER STAKER
MR JOHN AGBOOLA**

Sitting in public at Belfast on 4 July 2019

Mr D McNamee of McNamee McDonnell Duffy, solicitors, for the Appellant

Mr J Millington of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. The Appellant appeals against a decision of HMRC to issue to him an excise duty assessment pursuant to section 12(1A) of the Finance Act 1994.
2. This appeal was determined by a differently constituted Tribunal in a decision dated 26 September 2018: see *Lennon v Revenue & Customs* [2018] UKFTT 562 (TC). HMRC applied for permission to appeal against that earlier decision. In its consideration of that application, the previously constituted Tribunal determined that there was an error of law in that decision, and directed that the appeal be reheard before a differently constituted panel. This is the decision on the rehearing of the appeal.

BACKGROUND

3. On 16 December 2014, a vehicle driven by the Appellant was stopped in Claudy, County Londonderry, by officers of the Police Service of Northern Ireland, who found 60,000 cigarettes in the rear of the vehicle, none of which had UK duty paid markings on them. The Appellant was arrested by the police and taken to Strand Road Police Station. Officers of HMRC attended, and seized the vehicle and cigarettes. The Appellant signed a seizure information notice.
4. At the police station, the Appellant was interviewed under caution by HMRC officers in the presence of his solicitor. In the interview he stated as follows. He was driving a vehicle which he got in Dundalk, and was to be paid £100 for driving it to Donegal. He declined to comment when asked who he got the van from. He suspected that there were cigarettes in the van, but did not know that they were not UK duty paid. He was given a phone and the van, and was going to meet someone in Donegal who was going to take the van from him. He did the job because he needed the money.
5. No one challenged the seizure of either the cigarettes by way of condemnation proceedings in the Magistrates Court, and accordingly they were duly condemned as forfeit by paragraph 5 of Schedule 3 to the Customs and Excise Management Act 1979 (“CEMA”).
6. On 18 August 2015, the Appellant was notified of the assessment against which he now appeals.
7. On 27 August 2015, the Appellant requested a review of the assessment.
8. In a review decision dated 28 October 2015, the reviewing officer upheld the assessment.
9. By a notice of appeal dated 17 November 2015, the Appellant commenced the present Tribunal appeal.
10. The Appellant was prosecuted for an offence contrary to s 170 CEMA. On 12 December 2016 he was acquitted of this charge.
11. As noted above, this appeal was originally heard by a differently constituted Tribunal. In a decision released on 26 September 2018, that Tribunal allowed the Appellant’s appeal. It found that no evidence had been produced by HMRC to contradict the Appellant’s statement that he had established before the Magistrates Court that he had no dishonest intention in relation to the cigarettes and that the Magistrates Court had found as a fact that he was transshipping the cigarettes through Northern Ireland. That Tribunal found that the acquittal of the criminal charge resulted in the matter being *res judicata*.
12. On 20 November 2018, HMRC filed an Application for permission to appeal to the Upper Tribunal on the basis that this finding of *res judicata* amounted to an error of law.

13. On 6 December 2018, having conducted a review pursuant to rule 41 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, the Tribunal as then constituted was satisfied that there was an error of law in its decision, and on 14 January 2019, the Tribunal directed that the appeal be reheard before a differently constituted panel.

APPLICABLE LEGISLATION

14. Regulation 10 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (the “**2010 Regulations**”) provides:

- (1) The person liable to pay the duty when excise goods are released for consumption by virtue of regulation 6(1)(b) (holding of excise goods outside a duty suspension arrangement) is the person holding the excise goods at that time.
- (2) Any other person involved in the holding of the excise goods is jointly and severally liable to pay the duty with the person specified in paragraph (1).

15. Regulation 13 of the 2010 Regulations provides:

- (1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.
- (2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person -
 - (a) making the delivery of the goods;
 - (b) holding the goods intended for delivery; or
 - (c) to whom the goods are delivered.

16. Section 170(1) and (2) of CEMA provide:

- (1) Without prejudice to any other provision of the Customs and Excise Acts 1979, if any person—
 - (a) knowingly acquires possession of any of the following goods, that is to say—
 - (i) goods which have been unlawfully removed from a warehouse or Queen’s warehouse;
 - (ii) goods which are chargeable with a duty which has not been paid;
 - (iii) goods with respect to the importation or exportation of which any prohibition or restriction is for the time being in force under or by virtue of any enactment; or
 - (b) is in any way knowingly concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with any such goods,

and does so with intent to defraud Her Majesty of any duty payable on the goods or to evade any such prohibition or restriction with respect to the goods he shall be guilty of an offence under this section and may be arrested.

- (2) Without prejudice to any other provision of the Customs and Excise Acts 1979, if any person is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion—
 - (a) of any duty chargeable on the goods;

- (b) of any prohibition or restriction for the time being in force with respect to the goods under or by virtue of any enactment; or
- (c) of any provision of the Customs and Excise Acts 1979 applicable to the goods,

he shall be guilty of an offence under this section and may be arrested.

THE APPELLANT'S EVIDENCE

17. A witness statement of the Appellant dated 8 February 2018 states as follows. He regularly works as a casual driver to raise extra money. He normally works in the building trade but at the relevant time he was unable to find work. When stopped in his vehicle he immediately informed officers that he was transporting goods from Dundalk to Donegal, both of which are in the Republic of Ireland, and that he was transiting Northern Ireland which was the most direct route. He had no dishonest intention in relation to the goods, and no proprietary control over them. He was simply involved in their transshipment through Northern Ireland. A witness statement of the Appellant dated 4 June 2019 repeats this evidence.

18. At the hearing, in cross-examination, the Appellant said amongst other matters as follows. He had no knowledge at the time of cigarette smuggling. He thought that he had given the police all of the information that he could. When it was put to him that he must have known the person from whom he had got the van, and that he had not told the police who that person was, he answered "Maybe I wasn't in a position to say" and that he was "not feeling comfortable to say". He confirmed that he would not tell the Tribunal from whom he had got the van, or who had made the arrangement for him to transport the cigarettes. He said that he was not comfortable in saying where he went in Dundalk to get the van or whether he knew who owned the van, or where he was going in Donegal or what time he picked the vehicle up. He said that he was not comfortable, or "not at liberty", to answer other questions put to him, and stated that he had been found not guilty by the Magistrates Court. He said that he did not understand duty, and was unaware that duty was charged on cigarettes. When it was put to him that the place where the police stopped him was not on a direct route from Dundalk to Donegal, he replied that the Magistrates Court had accepted that he was travelling to Donegal. He said that when he picked up the vehicle he had not been given any paperwork in respect of the cigarettes.

19. In re-examination the Appellant stated as follows. At the interview with HMRC, he had been legally represented, and had received legal advice on what questions to answer or not answer. The purpose of the interview had been for HMRC to gather evidence for a criminal prosecution. When the criminal prosecution was later heard by the Magistrates Court, he was acquitted.

THE APPELLANT'S SUBMISSIONS

20. The earlier decision of the First-tier Tribunal allowing this appeal should not be interfered with.

21. The only evidence of what happened in the Magistrates Court has been the evidence of the Appellant, which is uncontradicted by HMRC.

22. The only basis for the Appellant's defence in the Magistrates Court was the fact that the goods were destined for the Republic of Ireland. The only evidence of that fact before the Magistrates Court was the Appellant's oral evidence to that effect.

23. The acquittal by the Magistrates Court gives rise to an issue estoppel, by analogy with *HMRC v Jones* [2012] Ch 414, [2011] EWCA Civ 824 (“*Jones*”) and *Revenue & Customs v Race* [2014] UKUT 331 (TCC) (“*Race*”). HMRC cannot have it both ways. HMRC cannot contend that a judgement of the Magistrates Court leads to an irrebuttable deeming for certain purposes but not others. The Appellant does not argue that any criminal acquittal in itself will result in a form of issue estoppel. However, it will in circumstances where the acquittal in the circumstances could only be premised upon the factual basis of the defence advanced by the Appellant. The earlier decision of this Tribunal allowing this appeal was correct, even if it referred to “*res judicata*” rather than “issue estoppel”. There has been a determination of a fact by the Magistrates Court which cannot be reopened in this Tribunal.

24. As the goods were merely being transhipped through Northern Ireland, there was no basis in UK or European legislation to fix a person in the position of the Appellant with liability for the duty on the goods. Reliance was placed on Case C-175/14, *Prankl v Bundesfinanzgericht* [2015] STC 1375, ECLI:EU:C:2015:142 (“*Prankl*”). The Appellant was not the owner of the goods, had no beneficial interest in them, and no power of disposition or control over them. He was merely transporting the goods. He was not “holding” the goods for purposes of the Regulations, and was not “holding” them for a commercial purpose.

25. For the Magistrates Court to acquit the Appellant, it would also have had to have found as a fact that the Appellant was merely the transporter of goods from one location in the Republic of Ireland to another location in the Republic of Ireland, and that he did not know that he was carrying non UK duty-paid cigarettes. This Tribunal is bound by these findings of the Magistrates Court.

26. A route from Dundalk to Donegal passing through the point where the Appellant’s vehicle was stopped is not an improbable route.

THE HMRC SUBMISSIONS

27. The doctrine of *res judicata* has no application in an appeal against an excise duty assessment where there has been a related criminal prosecution that did not result in conviction.

28. Criminal proceedings are concerned not with the liability of a thing to forfeiture, but with the commission by a defendant of a criminal offence. Neither *Jones* nor *Race* is authority for the proposition that the First-tier Tribunal is unable to determine *any* fact previously determined by a Magistrates’ Court in *any* proceedings.

29. The cigarettes have been duly condemned as forfeit. UK duty was due and had not been paid. The Appellant cannot in this appeal seek to go behind the deemed fact that the goods were duly condemned as forfeit (*Jones* and *Race*). The goods were duty unpaid and held for a commercial purpose (reliance was placed on *HMRC v Hill* [2018] UKUT 45 (TCC)). The Appellant’s assertion that the cigarettes were being “transhipped” through the UK is a submission that the excise duty point did not arise. However, an excise duty point had arisen.

30. Even if the Appellant were to establish as a fact that the goods were intended to be delivered to the Republic of Ireland, UK excise duty was due and had not been paid, the Appellant was the “holder” or “making delivery” of those duty unpaid goods, and, there is no other person identified with any connection to these goods. The Appellant is a person from whom an amount has become due in respect of duty of excise and was properly assessed under s 12 Finance Act 1994.

31. Other than the Appellant’s mere assertions in interview, there is no evidence at all that these cigarettes were intended for delivery outside the United Kingdom. The Appellant was obstructive in interview, failing to provide any credible explanation or detail relating to his

possession of these duty unpaid cigarettes. One result of the Appellant's failure to provide acceptable responses to questions is that there is simply no other individual identified with any connection to this commercial quantity of duty unpaid cigarettes.

32. The Appellant was not an "innocent agent". His answers during interview were evasive, failing to provide even basic explanations such as when and from where he collected the vehicle, to where he was making delivery, or at whose request he was acting. The Appellant either knew that he was carrying goods upon which the duty had been evaded, or at the very least he should have known of that fact.

33. The Appellant was the driver and sole occupant of the vehicle in which the cigarettes were found. That is sufficient *de facto* control for him to "hold" the goods.

34. *Prankl* concerned the situation where goods are discovered in the destination Member State, and holds that in such circumstances the transit Member States are not permitted *also* to levy excise duty on the driver of the goods vehicle who transported them for having held those goods for commercial purposes in their territory. In this case, the Appellant was stopped in the United Kingdom, there was no later release for consumption in another Member State, and there is no risk of several assessments to excise duty.

THE TRIBUNAL'S FINDINGS

35. The Tribunal finds that the Appellant's acquittal on a criminal charge by the Magistrates Court creates no issue estoppel and has no *res judicata* effect in relation to the issues to be determined in this appeal.

36. First, and apart from anything else, in the present appeal the Tribunal applies the ordinary civil standard of proof on a balance of probability. In criminal proceedings before the Magistrates Court, the standard of proof is the higher criminal standard of proof. A finding by a criminal court that a fact has not been proved by the prosecution to the criminal standard of proof would not be inconsistent with a finding by this Tribunal that the same fact had nonetheless been proved by HMRC to the lower civil standard of proof.

37. Secondly, the Appellant says in his witness statement that he was charged with and acquitted of an offence of being knowingly concerned in the fraudulent evasion of duty. It appears that this was a charge under s 170(1) or (2) of CEMA. To be convicted of an offence under one of those provisions, the Magistrates Court would have needed to be satisfied on the criminal standard of proof that the Appellant acted "with intent to defraud Her Majesty of any duty payable on the goods or to evade any such prohibition or restriction with respect to the goods" (s 170(1)) or that he was "knowingly concerned in any fraudulent evasion or attempt at evasion" (s 170(2)). However, the Appellant can be liable to the duty on the goods, even if he did not have such an intent to defraud and was not knowingly concerned in the fraudulent evasion of duty. A finding by a criminal court that it has not been established that a person was knowingly concerned in the fraudulent evasion of duty would not be inconsistent with a finding by this Tribunal that the same person nonetheless met all requirements to be liable for the payment of duty on goods.

38. Thirdly, there is no evidence before this Tribunal, apart from the Appellant's own witness evidence, of what exactly transpired at the Magistrates Court hearing of the criminal charge, or of what the reasons were for the decision of the Magistrates Court to acquit him. This Tribunal cannot take judicial knowledge of such matters, and indeed, the Tribunal *has* no knowledge of such matters apart from what the parties put before it by way of evidence. It is not the case that the Tribunal must accept whatever account the Appellant gives of the Magistrates Court proceedings unless HMRC produce evidence to contradict that account. Rather, the Tribunal

makes findings of fact based on all the evidence before it considered as a whole. Therefore, the Tribunal cannot simply accept, without more, the Appellant's claims that the Magistrates Court found that he was transshipping the cigarettes through the United Kingdom from one place in the Republic of Ireland to another. The Magistrates Court could have acquitted the Appellant, even if it had found that the destination of the goods was a place in Northern Ireland, if it found that the requisite fraudulent intent had not been proved.

39. Fourthly, the Tribunal does not accept the Appellant's argument concerning the effect of *Jones and Race*.

40. The decisions in *Jones and Race* are not based on principles of *res judicata* or issue estoppel. Rather, they are based on the fact that under the relevant statutory scheme, this Tribunal has not been given jurisdiction to determine whether seized goods were being held for a commercial purpose or whether they were imported legally for personal use, and that only the Magistrates Court has jurisdiction to determine that question in condemnation proceedings.

41. The effect of *Jones and Race* in the present case is as follows. Given the failure of anyone to challenge the seizure of the cigarettes and vehicle in condemnation proceedings before the Magistrates Court, this Tribunal must proceed on the basis that the goods in this case were being held for a commercial purpose. This Tribunal has no jurisdiction to decide otherwise.

42. However, the remaining factual issues that need to be decided in order to determine whether or not the Appellant is a person liable in the circumstances to pay duty on the seized goods are issues which this Tribunal *does* have jurisdiction to decide. The fact that the Appellant was acquitted by the Magistrates Court of a charge under s 170 CEMA does not of itself mean that the Tribunal must find in his favour in this appeal by virtue of the principles in, or by virtue of principles analogous to those in, *Jones and Race*.

43. The Appellant accepts that he was the driver of the vehicle that transported the cigarettes from the Republic of Ireland across the border into Northern Ireland.

44. There is no suggestion, let alone evidence, that the goods in question were being held in a duty suspension arrangement in the Republic of Ireland before they crossed the border into the United Kingdom. On the evidence before it, the Tribunal is satisfied that the goods had already been released for consumption in the Republic of Ireland.

45. On the evidence before it, the Tribunal is not persuaded on a balance of probability that the goods were intended to be delivered by the Appellant to a place in the Republic of Ireland, and that they were merely being transhipped through the United Kingdom. The only evidence to that effect is the witness evidence of the Appellant himself. The Tribunal has given what weight it can to the Appellant's evidence. However, it takes into account that the Appellant has given virtually no details about the circumstances of the case at all. When asked for further details, he declined to give them, stating that he was "not comfortable" or "not at liberty" to say anything further (paragraphs 18-19 above).

46. The impression that the Appellant gave was that he was concerned about repercussions from others if he was to give further information. However, even if so, this would not make his witness evidence more reliable. If anything, it would make it less reliable. The Appellant has admitted in his interview under caution that he suspected that the van contained cigarettes (paragraph 4 above), and he acknowledges that he was given no paperwork for them (paragraph 19 above). Taking these matters into account, together with his reluctance to provide further details of the circumstances of the case, the Tribunal is satisfied that the Appellant in fact knew, rather than merely suspected, that the vehicle was carrying cigarettes, or at least, excise goods. It is implausible that someone would pay him to drive the vehicle to deliver such goods if the goods were not intended for commercial purposes, and the Appellant himself must have

realized this at the time. The Tribunal does not accept his evidence that he did not understand duty and was unaware that duty was charged on cigarettes. The Tribunal finds on a balance of probability that the Appellant would have been aware that the correct paperwork was needed to transport a commercial quantity of cigarettes or other excise goods into Northern Ireland, even if these goods were merely being transhipped through the United Kingdom. He says that he did not know that the cigarettes did not have UK duty paid on them, but the Tribunal is satisfied on a balance of probability that he would have assumed this not to be the case, given that he was given no accompanying paperwork, and given his reluctance to give further details about the circumstances of the case. In all the circumstances, the Tribunal considers it more likely than not that the Appellant was aware at the outset that driving the vehicle into the United Kingdom was not in the circumstances in compliance with legal requirements. Overall, the Tribunal does not consider that great reliance can be placed on the Appellant's witness evidence.

47. At the hearing, HMRC also argued that the place where the Appellant was stopped in the vehicle was not on a direct route from Dundalk to Donegal. The Appellant argued that while Claudy may not have been on the shortest route between Dundalk and Donegal in terms of distance, it was a reasonable and plausible route to take. The Tribunal has given what weight it can to the Appellant's evidence in this respect. On the evidence before it, the Tribunal nonetheless finds it surprising that a trip from Dundalk to Donegal would take the Appellant through Claudy.

48. On its consideration of the material before it as a whole, the Tribunal finds on a balance of probability that the cigarettes were not destined for Donegal, but rather that the intended place of delivery was in Northern Ireland. As a corollary of this, the Tribunal does not accept the Appellant's claim that the Magistrates Court found that the cigarettes were destined for the Republic of Ireland.

49. The Tribunal therefore finds that the cigarettes were excise goods already released for consumption in another Member State which were being held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom.

50. The excise duty point is the time when those goods were first so held. The Tribunal finds that the cigarettes were first so held in the United Kingdom as soon as the Appellant's vehicle crossed the border into Northern Ireland (regulation 13(1) of the 2010 Regulations). The Appellant accepts that he was driving the vehicle at the time. This is not one of those cases where an earlier duty point can be established on the facts such that another person can be assessed to duty in respect of it.

51. In the circumstances, the Tribunal finds that the Appellant was a person liable to payment of the duty on the cigarettes, for purposes of regulation 13(2) of the 2010 Regulations. At the time of the duty point, he was the person making the delivery of the goods (regulation 13(2)(a)). As the person in physical possession of the cigarettes, in circumstances where no other person having any interest in the goods can be identified, he was also the person holding the goods intended for delivery (regulation 13(2)(b)).

52. In *Revenue and Customs v Perfect* [2019] EWCA Civ 465, the Court of Appeal referred to the Court of Justice of the European Union the following questions for a preliminary ruling:

- (1) Is a person ("P") who is in physical possession of excise goods at a point when those goods become chargeable to excise duty in Member State B liable for that excise duty pursuant to Article 33(3) of Directive 2008/118/EC ("the Directive") in circumstances where that person
 - (a) had no legal or beneficial interest in the excise goods;

- (b) was transporting the excise goods, for a fee, on behalf of others between Member State A and Member State B; and
 - (c) knew that the goods he was in possession of were excise goods but did not know and did not have reason to suspect the goods had become chargeable to excise duty in the Member State B at or prior to the time that they became so chargeable?
- (2) Is the answer to question (1) different if P did not know that the goods he was in possession of were excise goods?

53. The Tribunal finds that these questions are not pertinent to this appeal. The Tribunal is satisfied on the evidence that the Appellant knew before driving across the border into Northern Ireland that the vehicle was carrying excise goods. For the reasons given above, the Tribunal finds on a balance of probability that the Appellant, before driving his vehicle across the border into Northern Ireland, at the very least had reason to suspect the goods would become chargeable to excise duty in the United Kingdom as soon as he crossed the border.

54. For these reasons, the Tribunal finds that the Appellant is liable to the duty on the cigarettes. He has not contended that the duty has been incorrectly calculated, or challenged the duty on any other basis. The appeal is accordingly dismissed.

CONCLUSION

55. The appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

56. 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.

DR CHRISTOPHER STAKER

TRIBUNAL JUDGE

RELEASE DATE: 24 JUNE 2020