



[2019] UKFTT 696 (TC)
TC07468

PROCEDURE – strike out application – holding of excise goods with no duty paid – no timely challenge against seizure – deemed forfeiture – grounds of appeal no merits – no reasonable prospect of success – application granted

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/06507

BETWEEN

SORAN SAHIB ZAKI

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE HEIDI POON
CHARLOTTE BARBOUR**

Sitting in public at George House, Edinburgh on 1 November 2019

Mr Soran Zaki in person for the Appellant

Ms Sarah Mitchell, Solicitor, Office of the Advocate General, for the Respondents

DECISION

INTRODUCTION

1. Mr Zaki ('the appellant') lodged a Notice of Appeal on 17 October 2018 against an Excise Duty Assessment in the sum of £19,304 issued to him on 7 February 2017.
2. On 14 October 2019 (three weeks before the scheduled hearing), the respondents ('HMRC') applied to the Tribunal to strike out the appeal. All relevant documents had been lodged in time, and witnesses were in attendance on the day for the substantive hearing to proceed. The Tribunal heard HMRC's application as a preliminary matter, and disposed of the proceedings by granting the strike-out application.

RELEVANT LEGISLATION

3. The relevant provisions under the Excise Goods (Holding, Movement and Duty Point) Regulations 2010/593 ('The 2010 Regulations') are the following:

- (1) Regulation 5 provides: 'Subject to regulation 7(2), there is an excise duty point at the time when excise goods are released for consumption in the United Kingdom'.

- (2) Regulation 6 provides as follows:

'(1) Excise goods are released for consumption in the United Kingdom at the time when the goods— ...

(b) are held outside a duty suspension arrangement and UK excise duty on those goods has not been paid, relieved, remitted or deferred under a duty deferment arrangement; ...'

- (3) Regulation 10(1) provides as follows:

'The person liable to pay the duty when 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'.

4. In relation to forfeiture, the Customs and Excise Management Act 1979 ('CEMA') provides under paragraphs 3 and 5 of Schedule 3 as follows:

'Notice of claim

3 Any person claiming that anything 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.'

Condemnation

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.'

FACTUAL BACKGROUND

5. The facts in relation to the seizure of the excise goods are as follows:

- (1) On 18 February 2016, the appellant was the driver of a hire car, a Fiat 500X with registration number [etc] ('the car') travelling northwards on the M74 motorway.

- (2) The appellant was stopped by police officers and questioned as to the contents of three boxes visible in the rear of the car. The appellant advised that a fourth box was in the boot of the car.
- (3) The appellant advised the police officers that the boxes contained household items and then amended his answer by admitting that the boxes contained cigarettes.
- (4) HMRC officers were called to the location by Police Scotland.
- (5) HMRC officers obtained a search warrant for the appellant's vehicle and discovered a total of 80,000 cigarettes of three brands: 40,000 'Tradition', 20,000 'The King', and 20,000 'Amnesia'.
- (6) The cigarettes were of brands which are not sold in the UK; the boxes bore no UK duty stamps, nor were they branded by the manufacturer.
- (7) The cigarettes were seized and the appellant was issued with seizure documents:
 - (a) A Seizure Information Notice (BOR 156);
 - (b) A PN1 Form for a Search of the Index of Proprietors' Names;
 - (c) Notice 12A on the time limit and the actions to take to challenge the seizure;
 - (d) A Warning Letter (BOR 162);
 - (e) A Notice of Seizure by letter dated 19 February 2016.

6. The appellant did not challenge the seizure of the goods within the time limit as detailed in paragraph 4 above.

7. The transcript of the interview of the appellant by HMRC officers (Trowbridge and Grieve) on 18 February 2016 is circa 80 pages long and was certified by Officer Trowbridge on 16 September 2016 that it is 'an accurate transcript made for the Persecutor' in terms of s 277 of the Criminal Procedure (Scotland) Act 1995. A Note to the Accused follows the certification of the transcript, and states that the transcript 'will be received in evidence' and that the Accused has 'the right, not less than six days before the trial [etc]' to serve notice on the Procurator to challenge the making of the transcript or its accuracy. No such challenge would appear to have been made.

8. The transcript recorded certain replies from Mr Zaki, which are summarised as follows:

- (1) He had travelled to Birmingham from where he lived in Aberdeen to buy a 3D printer, and was approached by a Polish man offering to sell him the cigarettes, and that he was told 'Polish duty' had been paid on them.
- (2) When asked what he was going to do with the cigarettes, he said he was going to give them to a Polish person who runs a Polish shop selling Polish products.
- (3) When asked how much the 3D printer would cost, Mr Zaki replied: 'it's about four and a half, five thousand, six thousand, it's between three to six', and he intended to send the machine to Iraq.
- (4) When asked why he was buying the machine in Birmingham, Mr Zaki replied he had 'lots of Iraqi friends down there', that he was going to buy the machine:

'But I knew every Thursday yeah, Thursday yeah, the guy come in a big truck like their food to the shops and ... everything around the [name of a] Road ...'
- (5) When asked why there was no machine in the car, only cigarettes, various replies were given, such as:

- (a) 'no, no it's two different thing (sic), actually there was a few things I wanted to (inaudible) not just this honestly, I don't know why god changed my mind forever came to this one, its not my job at all this, never been near, this is my first time ever.'
- (b) 'I was going to look for a sports supplement to send it to Iraq you know. Sports supplement like protein, Keratein things like that ...'
- (6) When asked how much the cigarettes cost him, Mr Zaki replied £4,500.
- (7) When asked where the money came from, Mr Zaki replied that he had just returned from Iraq recently with 'two thousand three, seven hundred pounds' and that he had 'won a few times on bookie'.
9. The relevant events after the seizure of the goods are the following:
- (1) By letter dated 7 February 2017, HMRC informed the appellant of their intention to assess him to excise duty.
- (2) Also on 7 February 2017, the appellant was issued with Excise Duty Notice of Assessment in the sum of £19,304, as calculated by an accompanying schedule.
- (3) On or around 4 October 2017, criminal proceedings against the appellant were completed and he was ordered to carry out 280 hours of community payback.
- (4) By letter dated 29 May 2018, the appellant sought to appeal against the Excise Duty Assessment. He stated that his solicitor had failed to appeal against the assessment even though instructions were given on 10 February 2017. In relation to the seizure event, the appellant stated he had lost the sums he paid for the cigarettes together with the cigarettes themselves, and he had paid £800 for legal advice, and the imposition of the unpaid community service.
- (5) On 2 August 2018, HMRC wrote to advise that they were unable to change the decision to issue the Excise Duty Assessment, and that the criminal proceedings taken against him were separate from his liability to pay the excise duty that was due.
- (6) On 21 August 2018, HMRC received an undated letter from the appellant requesting a review of his case.
- (7) HMRC accepted the request for review, even though it was made after the 30-day time limit from the date of the Notice of Assessment of 7 February 2017. On 19 September 2018, the review conclusion upheld the assessment.

GROUNDS OF APPEAL

10. On 17 October 2018, Mr Zaki lodged his appeal with the Tribunal, stating as his grounds:

- (1) 'I have travelled from Aberdeen to Birmingham to by a machine (Wood Machine) to send it away. Also had some sport supplements to send it to Iraq from Birmingham.'
- (2) 'I was offered amount of cigarette to buy for £4500 in Birmingham – ... from a truck driver whom (sic) came from Poland.'
- (3) 'It thought I duty is already been paid because the truck came through custom control in border! I bought without asking for duty paid letter!'
- (4) 'I got stopped on the way back to Aberdeen by police, I offered to take them back to the truck driver which I got them from but the (sic) refused it.'

(5) 'I appeared [in] court and got charged 280 hours community service. I have finished it. HMRC destroyed the Cigarettes. I have lost £4500 plus £800 solicitor charges.'

11. The section for 'Desired Outcome' on the Notice of Appeal shows as follows:

1. Reduce the amount.
2. Payment time plan that suitable with my income.'

HMRC'S APPLICATION

12. The respondents' case for striking out the appeal is as follows:

(1) An excise duty point was created when the appellant was found to be in possession of the 80,000 cigarettes as: (a) the goods were held outside a duty suspension arrangement, and (b) no duty was paid on the goods.

(2) The appellant is the individual liable to pay the duty as he was the individual holding the goods at the excise duty point. The appellant was fully aware of the goods, and was able to confirm to police that he was in possession of cigarettes.

(3) In terms of s 154(2) CEMA, the appellant bears the burden of proof in demonstrating that UK duty was paid on the goods. The appellant has failed to present any evidence to support that UK duty was paid, or evidence to support his position that he reasonably believed UK duty to have been paid: *Ali v HMRC* [2009] UKFTT 0306.

(4) The appellant's contention that he thought the goods were UK duty paid is to attempt to challenge the legality of the seizure.

(5) However, his failure to appeal against the seizure of goods within one month has rendered the goods legally condemned as forfeit.

(6) The contention that the appellant is trying to advance is 'inconsistent with the assumption that the tobacco was "duly condemned": *Kaven Denley v HMRC* [2017] UKUT 0340 (TCC).

(7) The legal consequence of this assertion is that if UK duty was paid, the goods were not liable to forfeiture. Such a challenge can only be competently raised in condemnation proceedings following the appellant's written notice of claim within the statutory time frame. In the absence of a notice of claim challenging the seizure, the goods are legally condemned as forfeit and accordingly, the duty amount of £19,304 was lawfully raised.

13. The appellant's assertions that he would co-operate, that he was convicted in the criminal courts already, and that he made no gain are irrelevant to the question of the duty assessment.

14. The appellant takes no issue with the manner in which the duty assessment was calculated. Therefore, the assessment is considered to have been correctly calculated.

15. The respondents move the Tribunal to strike out the appeal under Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('the Tribunal Rules'), which states that the Tribunal must strike out the whole or a part of the proceedings if the Tribunal does not have jurisdiction in relation to the proceedings or that part of them.

16. In the alternative, the Tribunal is moved to strike out the appeal under Rule 8(3)(c) on the basis that the grounds as advanced by the appellant have no reasonable prospect of success.

THE APPELLANT'S OBJECTIONS

17. During the hearing, Mr Zaki raised objections against the application to strike out his appeal, which we summarise as follows:

- (1) He had believed that the cigarettes had duty paid, and he made the mistake of not getting the duty document when he bought the goods.
- (2) He instructed his solicitor to challenge the seizure but the solicitor failed to do so within the time limit.
- (3) HMRC had written to him to allow 'hardship', which means he should not be asked to pay the duty assessment.
- (4) He is a 'victim' of the incident because he had lost £4,500, as well as the goods, and incurred £800 of legal fees, and had served his community service sentence.
- (5) He cannot afford to pay the duty assessment and asked the Tribunal to reduce it.

DISCUSSION

Ground 1: mistake for not obtaining relevant duty document

18. As a matter of fact, the appellant does not dispute that he was correctly identified as the person liable for the duty under Reg 6(1)(b) of the 2010 Regulations, since he was identified as the 'holder' of the excise goods that were found to have no duty paid.

19. The appellant asserted that he believed the cigarettes had duty paid. We do not find this belief to be credible as a matter of fact, on the basis that the appellant stated that he has lived in the UK for some 20 years. Whilst the appellant told the Tribunal how much cigarettes cost in Iraq, this was not relevant to how much they cost in the UK. It is not credible that the appellant could have believed that when he paid £4,500 for 80,000 cigarettes, being a fraction of the UK retail price for 80,000 cigarettes, there could have been excise duty paid on those cigarettes, whether it be UK or Polish excise duty.

20. In any event, this ground of objection is in effect an attempt to challenge the legality of the seizure of the goods. The appellant did not challenge the legality of the seizure within the statutory time limit. Where there is no timely challenge, the deeming provision under paragraph 5 of Schedule 3 to CEMA automatically applies. The goods seized are duly condemned and forfeited. The duty assessment follows in consequence of the deemed forfeiture.

21. Following *HMRC v Jones and another* [2011] EWCA Civ 824 ('*Jones*'), the deeming provision is final and there is no scope for the Tribunal to re-open the case to consider the legality of the seizure.

22. There is no legal basis for the first ground of objection, and we dismiss it.

Ground 2: solicitor failed to lodge a timely challenge

23. Having explained to Mr Zaki that the Tribunal has no jurisdiction to consider his first ground of objection to the strike out application, Mr Zaki said that he had instructed his solicitor to lodge an appeal at the time, but his solicitor failed to do so.

24. The context in which the second ground of objection was mooted would appear to suggest that Mr Zaki had attempted to raise a timely challenge against the seizure of the goods, and that his solicitors had failed to make the challenge for him in time.

25. However, it soon became apparent to the Tribunal that Mr Zaki was referring to his attempt to appeal against HMRC's duty assessment issued in February 2017, in relation to which Mr Zaki had written to HMRC Debt Management on 29 May 2018 against the demand for the sum of £19,304 in the following terms:

‘... I got charged with the matter and got a solicitor ([a firm of] solicitors in Dumfries and paid £800 for them to deal with [sic] case in Court).

Before court date and on 10th Feb 2017 I received a letter from HM revenue and gave me 30 days to appeal.

On the same date 10th Feb 2017, I attached the letter and emailed to my solicitor ... and instructed him to appeal and respond on my behalf ... but he failed to do so, and I changed lawyer because he didn't do anything for me!

I plead guilty and received a sentence of 280 hours unpaid work which I completed, so I have been punished. The cigarettes were forfeit by the Court.’

26. By letter dated 2 August 2018, Officer Lawrence of HMRC replied to Mr Zaki as follows:

‘I can confirm that HM Revenue & Customs criminal action against you was separate to your liability to pay the excise duty that is due. If criminal action had not been taken then we would have considered additional civil action by the way of an excise wrongdoing penalty (which would have been a further penalty assessed based on the total excise duty due).’

27. As a matter of fact, there was no challenge against the seizure of the goods, which happened in February 2016, nearly a year previous to the issue of the duty assessment. A timely challenge against the seizure would have to have been made by 20 March 2016, which was 30 days after the seizure event on 18 February 2016. As Mr Zaki stated in his letter of 29 May 2018: ‘The cigarettes were forfeited by the Court’, which suggests that Mr Zaki was aware of the consequence of not having raised a timely challenge by 20 March 2016.

28. It would seem that Mr Zaki's solicitors had represented him in the criminal court action, but did not appeal the assessment to HMRC on his behalf. In any event, Mr Zaki's letter of 29 May 2018 was accepted by HMRC as a late appeal against the duty assessment. A request for review was granted, which resulted in a review conclusion being issued on 19 September 2018, upholding the duty assessment.

29. There is no factual basis for the second ground of objection therefore, and we dismiss it.

Ground 3: HMRC had granted 'hardship' application

30. Mr Zaki said that HMRC had given him a hardship certificate, which meant that he was no longer required to settle the duty assessment. The certificate was issued on 13 December

2018 pursuant to s 16(3)(a)(i) of the Finance Act 1994. By email dated 9 June 2019, Mr Zaki wrote to the Office of the Advocate General as representative for the respondents in this appeal. In this email, Mr Zaki referred to the hardship certificate as follows:

‘Please see attached HMRC Hardship letter as confirmed that amount is NOT required any more.’ (emphasis original)

31. Mr Zaki tried to assert in front of the Tribunal, as he had done in his email of 9 June 2019, that the grant of hardship meant that the assessment was cancelled.

32. It was explained to Mr Zaki that the normal procedure requires the excise duty in question to have been paid upfront before an appeal can be considered by the Tribunal. The hardship certificate issued by HMRC on 13 December 2018 was no more than a step to clear the procedural hurdle, so that Mr Zaki’s appeal against the duty assessment could be considered by this Tribunal. The hardship certificate did not relieve Mr Zaki’s liability to the duty assessed – it only enabled him to proceed with his appeal.

33. The hardship certificate is therefore not relevant to the substantive matter of the duty assessment, and we dismiss this ground of objection.

Ground 4: proportionality

34. Mr Zaki emphasised the ‘losses’ he had borne in relation to the cigarettes that had been seized: (a) monetary loss of £4,500 for the cigarettes, (b) £800 for representation at the criminal court, and (c) 280 hours of unpaid work. This ground of objection is therefore staked on fairness in terms of proportionality.

35. As explained by Officer Lawrence, HMRC raised two actions against Mr Zaki following the seizure event on 18 February 2016:

(1) a criminal action that resulted in the community service sentence of 280 hours; and

(2) a civil action in terms of the excise duty assessment of £19,304.

36. Officer Lawrence also stated that HMRC could have raised a wrongdoing penalty assessment *in addition to* the duty assessment. Indeed, for this type of appeal, the substantive matter concerning an excise duty assessment is often conjoined with an appeal against a wrongdoing penalty assessment, which can range from 20% to 80% of the duty assessment.

37. The 280 hours of community service was in effect a substitution of a wrongdoing penalty, which HMRC could have imposed according to the legislation. Had HMRC raised a wrongdoing penalty (instead of a criminal action) against Mr Zaki, it would have meant at least a further £4,000 being charged as penalty, in addition to the duty assessment of £19,304.

38. The Tribunal reminded Mr Zaki that he had pleaded guilty to an offence, which in common language is branded as ‘smuggling’. What Mr Zaki referred to as his ‘losses’ are in fact the consequences of having committed an offence.

39. In any event, the Tribunal has no general jurisdiction to consider fairness in terms of proportionality. For this reason, we dismiss this ground of objection.

Ground 5: the quantum of the assessment

40. The quantity of cigarettes at 80,000 is fixed as a matter of fact, and is not in dispute. There are two parts to the excise duty calculation, where the ad valorem percentage of 16.5% and the per 1000 levy of £189.49 were the rates in force when the goods were seized.

(1) The first part of the excise duty calculation is the ‘Ad Valorem’, being an amount equal to 16.5% of the total Recommended Retail Price (‘RRP’):

- (a) 80,000 cigarettes equate to 4,000 packs of 20 cigarettes each;
- (b) the *lowest* RRP for a pack of cigarettes is £6.28;
- (c) 4,000 packets at £6.28 give the total RRP of £25,120;
- (d) Ad Valorem at 16.5% of £25,120 is £4,144.80.

(2) The second part of the duty calculation is a levy at £189.49 per 1,000 cigarettes:

- (a) 80,000 cigarettes equate to 80 times of 1,000;
- (b) 80 times of £189.49 is £15,159.20.

41. The total of the two parts, being £4,144.80 and £15,159.20, is the excise duty assessment of £19,304. It was noted that the excise duty assessment was already at its lowest possible by using the RRP of £6.28.

42. The Tribunal has no powers to reduce the quantum of the excise duty assessment that has been calculated in accordance with the legislation, and we dismiss this ground of objection.

DISPOSITION

43. For the reasons stated, the respondents’ application to strike out the appeal is granted.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

44. 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 HEIDI POON
TRIBUNAL JUDGE**

Release date: 14 November 2019