



**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/03666

BETWEEN

MR KHALIL MEIKHAIL

Appellant

-and-

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

HMRC

**TRIBUNAL: JUDGE PETER HINCHLIFFE
MR JOHN ROBINSON**

Sitting in public at City Gate House, Brighton on 18th July 2019

Having heard the Appellant, who represented himself with the assistance of an interpreter, and Mr Ben Elliot, Counsel instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the HMRC.

Decision

1. The Tribunal decided that the parts of this appeal that relate to the forfeiture of the tobacco that Mr Meikhail brought into the UK and the imposition of excise duty of £1,485 in respect of such tobacco are struck out as the Tribunal does not have jurisdiction to determine these parts of the proceedings.
2. The Tribunal further decided that the part of the appeal that relates to the imposition of a penalty on Mr Meikhail for his failure to pay excise duty is allowed due to the special circumstances applying in this case.

Summary findings of fact and reasons for the Decision

3. On 9th February 2017 Mr Meikhail was stopped by a UK Border Force officer in the Inbound Coach Hall at Coquelles whilst traveling as part of a coach trip. He was asked how much tobacco he had with him and he disclosed that he had 15 packets of 0.5 kilos of tobacco in his luggage.

4. The tobacco was seized as liable to forfeiture under the Customs and Excise Management Act 1979 (the “Act”). On 15th November 2017 The Commissioners for Her Majesty’s Revenue and Customs (“HMRC”) wrote to Mr Meikhail and stated that they were considering assessing him to tax on the tobacco seized on 9 February 2017. They also stated that Mr Meikhail had had a right to say within 30 days of the seizure of the tobacco that it was not liable to seizure, but he had not done so and therefore the tobacco was deemed to have been forfeited and Mr Meikhail had lost the right to challenge the lawfulness of the seizure or forfeiture of the tobacco.

5. On 27th December 2017 HMRC issued an excise duty assessment to Mr Meikhail of £1,485 in respect of the tobacco that had been seized and forfeited. At the same time HMRC issued a penalty assessment to Mr Meikhail for £311 to him in respect of his failure to pay the excise duty.

6. Mr Meikhail appealed to the Tribunal on 18th May 2018 asking for the liability to HMRC to be waived and if this was not possible, to be able to pay at a rate of £5 a month. Mr Meikhail stated in the appeal that;

- It was the first time that he had bought tobacco abroad
- He had relied on a friend translating for him when the officer at Coquelles had spoken to him and he had understood that if he left the tobacco with HMRC no further action would be taken;
- The tobacco was bought as a gift for his son and was not the reason for his coach trip and he received no financial benefit from the tobacco;
- Other people on the coach trip had bought tobacco that was seized and no further action had been taken against them;
- He has no means of paying the tax or the penalty as he receives income support;
- He has never been on the wrong side of the law before.

7. HMRC and Mr Meikhail agreed on the following facts and matters:

- Mr Meikhail had 7.5kg of tobacco in his luggage when he was asked on 9th February 2017 to leave the coach at Coquelles and to disclose if he had any tobacco.
- Mr Meikhail was questioned by a UK Border Force officer at that time.
- Mr Meikhail declined to attend an interview with UK Border Force officer.
Mr Meikhail was not given a Notice of Seizure or a Notice 12A explaining that the tobacco had been seized, why it had been seized and the rights of travellers if their goods are seized by HMRC and the timescale in which they must act if they wish to object to the seizure.
- Mr Meikhail’s conduct in seeking to import tobacco without paying excise duty was “non-deliberate” and he offered assistance when questioned about the contents of his luggage.

Liability to pay excise duty

8. Mr Elliott for the HMRC referred the Tribunal to the Court of Appeal decision in *HMRC v Jones and Jones* (EWCA Civ 824) and to the Upper Tribunal decision in *HMRC v Race* (UKUT 0331 (TCC)). He argued that the Tribunal has no jurisdiction in relation to the appeal against the forfeiture of the tobacco and the assessment to pay duty on them. Mr Elliott pointed to *HMRC v Jones and Jones* in which the Court of Appeal had considered Schedule 3 to the Act, which provides at paragraph 5 that if no notice is given to HMRC seeking to challenge the seizure of goods within the relevant time limit the goods

“shall be deemed to have been duly condemned as forfeited”

In this case the Court went on to consider if a First-tier Tribunal (“FTT”), such as this Tribunal, could consider an appeal against such forfeiture of goods under the Act and concluded at paragraph 71 that:

(4) ... The tribunal must give effect to the clear deeming provisions in the 1979 Act: it is impossible to read them in any other way than as requiring the goods to be taken as "duly condemned" if the owner does not challenge the legality of the seizure in the allocated court by invoking and pursuing the appropriate procedure.

(5) The deeming process limited the scope of the issues that the HMRC were entitled to ventilate in the FTT on their restoration appeal. The FTT had to take it that the goods had been "duly" condemned as illegal imports. It was not open to it to conclude that the goods were legal imports illegally seized by HMRC by finding as a fact that they were being imported for own use. The role of the tribunal, as defined in the 1979 Act, does not extend to deciding as a fact that the goods were, as the HMRC argued in the tribunal, being imported legally for personal use. That issue could only be decided by the court.

9. Mr Elliott referred to *HMRC v Race*, where the Upper Tribunal considered if the FTT had jurisdiction to consider whether Mr Race had been wrongly assessed to excise duty in respect of tobacco and wine seized from Mr Race and then forfeited under Schedule 3 of the Act. The Upper Tribunal applied the decision in *HMRC v Jones and Jones* and went on to consider the liability for excise duty on the goods that had been forfeited. The Upper Tribunal concluded at paragraph 39 that the FTT could not re-consider the issues of whether goods had been imported for personal use :

“what the Judge was saying was that the issue of whether Mr Race held the goods for his own personal use would arise for decision in the appeal against the Penalty Assessment. It is not correct, however, to say that that issue would arise in the appeal against the Penalty Assessment. This is because the First-tier Tribunal could no more re-determine, in the appeal against the Penalty Assessment, a factual issue which was a necessary consequence of the statutory deeming provision than it could re-determine a factual issue decided by a court in condemnation proceedings. The issue of import for personal use, assuming purchase in a Member State, has been determined by the statutory deeming.”

10. HMRC stated that the law was clear on this point. If the Appellant did not challenge the seizure of the tobacco within the one month time limit set out in paragraph 3 of Schedule 3 of the Act then the Tribunal cannot consider whether the tobacco was held for personal use. HMRC said that this was the case even if the Appellant was not given notice of the one month time limit and agreed that this was harsh.

11. The Tribunal considered if Mr Meikhail’ grounds of appeal raised issues that would be relevant to the liability for excise duty on the tobacco that was forfeited, in circumstances where the issue of whether they were imported for personal use, rather than commercial purpose, cannot be considered. The Tribunal noted that Mr Meikhail had indicated at the hearing that the main reason that he did not seek to challenge the seizure of the tobacco was that he had been led to believe by the Border Force officer that he would be delayed and prevented from re-joining his coach if he did not agree to the course of action that the officer proposed. He had no money with him and was unable to speak enough English. As he was unable to understand what the Border Force officer was saying due to his poor English and he was not given any information to take away that he could have shown to his son or daughter, who understand English, he was unable to respond in the manner and the timescale that the HMRC expect.

12. The Tribunal accepted from Mr Meikhail’s submissions and demeanour at the hearing that Mr Meikhail’s command of English was very limited and that he was unlikely to have fully

understood a detailed explanation from the Border Force officer who seized the tobacco that he was importing. He signed and retained copies of two forms that confirmed the seizure of the tobacco; a form BOR162 “*Warning letter about seized goods*” and Form BOR156 headed “*Seizure Information Notice This is not a Notice of Seizure*”. These forms confirmed that the tobacco was liable to forfeiture and that further action could be taken against Mr Meikhail including being assessed for any evaded duty. Neither of the forms explain what he needed to do in order to object to the seizure of the tobacco or in what timescale he must act or order to do so.

13. The Tribunal considered the position and the decisions in *HMRC v Jones and Jones* and *HMRC v Race* and concluded that the failure to provide adequate information to Mr Meikhail fell within the ambit of procedural unfairness that the Upper Tribunal in *HMRC v Race* had concluded was not within the jurisdiction of the FTT.

14. This Tribunal is bound to follow the decision of the Upper Tribunal in this case and accordingly the Tribunal has no jurisdiction to hear the appeal against the assessment of Mr Meikhail for excise duty on the tobacco that he forfeited and that part of the appeal is struck out pursuant to Rule 8 (2) (a) of the Rules governing this Tribunal.

Penalty

15. In order to resolve the appeal against the penalty levied by HMRC on Mr Meikhail the Tribunal needs to consider if the facts of this case and any of the arguments put forward by Mr Meikhail give rise to special circumstance or to a reasonable excuse that would affect the penalty that was proposed by HMRC.

16. Paragraph 4 of Schedule 41 of the Finance Act 2008 provides that a person in possession of goods on which excise duty should be paid after the point at which it should be paid is liable to a penalty. Schedule 41 sets out the basis on which a penalty should be calculated and provides that this penalty may be reduced if there are special circumstances that make it right to reduce the penalty or if there is a reasonable excuse for the act or failure. It is clearly stated in the Schedule that having insufficient funds to pay a penalty does not constitute special circumstances or a reasonable excuse.

17. In this case Mr Meikhail had the tobacco on which excise duty should be paid when he arrived at the Inbound Coach Hall at Coquelles. HMRC accept that Mr Meikhail’s failure to pay the excise duty was not deliberate and that when prompted he had disclosed that he had the tobacco on which duty had not been paid. HMRC have set the penalty on the basis of a 90% discount because of these factors. Nevertheless they state that a penalty is required and Mr Meikhail’s lack of awareness of the law and his inability to pay the penalty are not special circumstances or a reasonable excuse.

18. Mr Meikhail stated repeatedly at the hearing that he was not aware that he had to pay duty on the tobacco that he had bought for his own use and for his son. He had bought the tobacco with a large sum of money, (over £1,000), given to him by his son, he had never bought tobacco abroad before. He had only gone on the coach trip because someone else had dropped out and his son had then asked him to buy the tobacco. He confirmed that he had understood that the tobacco had to be for his personal use or for the use of a family member. He had not understood the details of what happened when the Border Force Officer had stopped him at Coquelles. A friend from the coach had helped him by translating. He had signed the forms given to him by the Officer which confirmed that the tobacco had been seized. He had done so in order that he could get back on the coach and go home rather than being left at Coquelles on his own.

19. The Tribunal noted that Mr Meikhail had in the written response to HMRC prepared by his daughter stated that the tobacco was for his son and that he had borrowed the funds from a friend on the coach, whilst at the hearing he stated that it was for the use of his son and himself and that the money was given to him in advance by his son. The Tribunal preferred the evidence of Mr Meikhail at the hearing and accepted that the inconsistency had arisen because he had not paid close attention to his daughter's submissions.

20. HMRC admitted that Mr Meikhail had not been issued with a Notice 12A that provided information about the seizure of the tobacco. Notice 12A explains what he could do if he objected to the seizure, for example because he had had the tobacco for personal use, and the timescale that he must act within in order to challenge the seizure. HMRC argued that it was not essential that Mr Meikhail be given this information and stated that the one month time limit is set by law and is publicly available.

21. The Tribunal considered from the facts of this case that it was clear that Mr Meikhail had not been put in a position where he would have understood that he had a very limited timescale to object to the seizure of his tobacco and that if he failed to respond within this timescale he could face liability for a penalty. The Tribunal finds that his inability to speak English would have been apparent at the time that the tobacco was seized. It would have been reasonably clear that he needed a written explanation of the position that he was in following the seizure of the tobacco so that he could seek assistance later. In calculating the penalty HMRC had concluded that Mr Meikhail had acted non-deliberately in seeking to import the tobacco without payment of duty and that he had co-operated with HMRC. As a consequence he was given a discount of 90% when the penalty was calculated. The question for the Tribunal is whether the failure to provide information about the seizure and its consequences amounted to special circumstances in relation to the imposition of a penalty.

22. The Tribunal takes account of the fact that the penalty arises from the possession by Mr Meikhail of the tobacco on which excise duty should have been paid and does not arise from the failure to challenge the seizure of the tobacco. The Tribunal finds that the law deems the tobacco to have been imported for commercial use. It is accepted that Mr Meikhail's breach was not deliberate. It is clear that Mr Meikhail was not in a position to respond to the seizure of the tobacco as he lacked the language skills to understand the Border Force officer and, in a departure from the HMRC practice, he was not given any information on how to challenge the seizure in any other form. The law on this point is publicly available and Mr Meikhail had family members who were capable of reading and understanding the process being followed by HMRC. However, his family would have had to act promptly after Mr Meikhail had returned and notified them of the seizure of the tobacco and they had no reason to believe that this was necessary. The Tribunal does not regard Mr Meikhail's failure to investigate the legal position promptly as fatal to claim that there were special circumstances that are relevant to the penalty.

23. The HMRC review of the penalty levied on Mr Meikhail stated that:

“Special circumstances are either; uncommon or exceptional, or where the strict application of the penalty law produces a result that contrary to the clear compliance intention of that penalty law”

It found that no special circumstances arose in this case.

24. The Tribunal concludes from the particular circumstances of this case that if the penalty remains payable, it is more likely than not that HMRC would be benefitting from Mr Meikhail's poor command of English, which would have been apparent to the UK Border Force officer, and from the failure of the UK Border Force officer to follow due process and provide the information from HMRC that Mr Meikhail required. Such an outcome is disproportionate to the non-deliberate breach by Mr Meikhail, unjust and contrary to the compliance intention

of the penalty law. Therefore special circumstances exist in the particular circumstance of this case that justify a cancellation of the penalty.

25. Therefore the Tribunal allows the appeal against the penalty.

26. This document contains a summary of the findings of fact and reasons for the decision. A party wishing to appeal against this decision must apply within 28 days of the date of release of this decision to the Tribunal for full written findings and reasons. When these have been prepared, the Tribunal will send them to the parties and may publish them on its website and either party will have 56 days in which to appeal. 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.

PETER HINCHLIFFE
TRIBUNAL JUDGE
Release date: 02 August 2019