TC01433

Appeal number: TC/2010/02728

Excise duty – non-restoration of seized goods – application to strike out appeal on basis that no appealable decision yet issued – held that since no review decision issued, appeal must be premature – appeal struck out – however UKBA now required to issue formal review of decision, which may lead to renewed appeal – any application to strike out appeal as "doomed" in the light of HMRC v Jones & Jones is premature

FIRST-TIER TRIBUNAL

TAX

SIMON DAWES (1) **Appellants**
LEANNA DAWES (2)

-and-

UK BORDER AGENCY (Excise Duty) **Respondents**

TRIBUNAL: **KEVIN POOLE (TRIBUNAL JUDGE)**

Sitting in public in Bristol on 6 September 2011

The Appellants did not appear and were not represented

Matthew Cannings of counsel for the Respondents

DECISION

Introduction

1. This decision relates to an application by the UK Border Agency ("UKBA") to strike out the Appellants' appeal to the Tribunal. That appeal was made in connection with the seizure by UKBA on 5 December 2009 of tobacco and tobacco products belonging to the Appellants which were being imported by them into the UK from France.

2. UKBA argue that the appeal should be struck out on the basis that it was premature: the Appellants had neither requested a review nor a decision from UKBA which could be the subject of an appeal to the Tribunal and accordingly the appeal should be struck out under rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules"). In the alternative, they argue that the appeal had no reasonable prospects of success in the light of the decision of the Court of Appeal in *HMRC v Jones & Jones* [2011] EWCA Civ 824 and should accordingly be struck out under rule 8(3)(c) of the Rules.

The facts

3. At the time of the seizure on 5 December 2009, the Appellants were travelling in the same vehicle as a Mr John Martin. Mr Martin owned the vehicle and some other tobacco products in it. The vehicle and Mr Martin's tobacco products were also seized by UKBA and a separate appeal was made to the Tribunal by Mr Martin in relation to UKBA's refusal to restore his tobacco and vehicle to him. That appeal has since been disposed of.

4. The Appellants commenced their appeal to the Tribunal by sending a letter dated 9 March 2010. In it, they said:

> "As regard to us writing in to ask for our tobacco, we wrote a letter to Customs requesting the return of our goods. We had no reply so assumed it was being dealt with. Having never been in this position before we did not no the length of time it would take to deal with our request."
>
> ...
>
> "These actions have cost us dearly, financially and character wise, we ask that you look at the events again and reconsider your decision."

5. This letter was forwarded by the Tribunal to UKBA on or about 31 March 2010. UKBA say they have no record of any earlier letter from the Appellants requesting the return of their goods, and I find that no such earlier letter was sent.

6. There had however been an earlier letter to UKBA from Mr Martin (but apparently signed by the Appellants as well) dated 2 March 2010. Whilst much of that letter was taken up with statements and information about Mr Martin alone (and

was therefore couched in the first person singular), it concluded with the following text, which could (and should) be taken to refer to the Appellants as well as Mr Martin:

> "We are not happy that you have assumed we are smugglers.
>
> We are not sure what we can do to reverse this decision as it is impossible for us to prove we are not smugglers and in the law of the land your evidence is superficial hearsay and would not stand up in court.
>
> We feel aggrieved that no course of defence is available to us to clear our names.
>
> All we have is the vague hope that our case will be reviewed more leniently."

7. The letter dated 2 March 2010 was written predominantly in response to UKBA's letter dated 23 February 2010 to Mr Martin, in which they confirmed their earlier decision issued on 11 January 2010 not to restore Mr Martin's car to him, and also confirmed their decision not to restore his tobacco products to him.

8. I was not provided with any evidence that UKBA has ever made any decision under section 152(b) Customs and Excise Management Act 1979 ("CEMA") not to restore the Appellants' tobacco to them; nor was I provided with any evidence that any such decision (if actually made) was communicated to the Appellants. Since the goods have not been returned to the Appellants, I must infer that HMRC have not exercised their discretion under section 152(b) CEMA, but there was no evidence that they have actually made a decision to that effect, indeed from the terms of their application they appear to be stating that no such decision has actually been taken.

9. I therefore find as a fact that UKBA have not as yet made a decision one way or the other as to whether or not to exercise the discretion conferred by section 152(b) CEMA in favour of the Appellants.

10. The Appellants did not take any steps to challenge the lawfulness of the seizure of their tobacco in condemnation proceedings before the Magistrates' Court or High Court, and the time limit for doing so has now passed.

Analysis

11. When (as here) any goods are seized by UKBA under sections 49(1) and 139(1) CEMA, there is a discretion to restore those goods under section 152(b) CEMA.

12. Generally, no doubt, UKBA will be prompted to consider the exercise of this discretion when they receive a request to do so (usually from the owner of the seized goods). Mr Cannings told me that in the notice given to the Appellants when the goods were originally seized, they were given a time limit within which to apply for restoration of the seized goods under section 152(b) CEMA, but they did not comply

with that time limit. He acknowledged however that there was no statutory time limit for the making of such a request.

13. If UKBA are requested to restore seized goods but refuse to do so (or offer to do so subject to conditions) then any person in the position of the Appellants in this case has the right under section 14 Finance Act 1994 ("FA 94") to require UKBA to review their decision. That right is to be exercised by notice in writing to UKBA.

14. There is a general time limit (laid down in section 14(3) FA 94) for requiring such a review. Under that subsection:

> "[UKBA] shall not be required under this section to review any decision unless the notice requiring the review is given before the end of the period of forty-five days beginning with the day on which written notification of the decision, or of the assessment containing the decision, was first given to the person requiring the review."

15. The normal chronology in these cases, after the seizure has initially occurred, is for the traveller to decide whether or not to challenge the lawfulness of the seizure in condemnation proceedings before the Magistrates' Court or High Court. At the same time, he/she will generally request the restoration of his/her goods. If restoration is refused, the traveller will then ask for a review of that refusal under section 14 FA 94. If the traveller is still unhappy at the outcome of that review, then he/she has a right of appeal to the Tribunal under section 16 FA 94.

16. However, in the present case it appears that UKBA have not issued any formal refusal of the Appellants' request for restoration because they do not consider any such request to have been made.

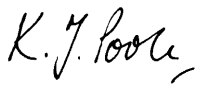
Decision

17. I agree with UKBA that the appeal to the Tribunal is premature. The Tribunal's jurisdiction is only engaged if there has been a formal review under section 15 FA 94. There has been no such review and therefore the appeal must be struck out under rule 8(2)(a) of the Rules on the basis that the Tribunal does not have jurisdiction in relation to the subject matter of the appeal.

18. I would observe however that the Appellants have clearly expressed their desire to have the goods returned to them – see the statements in the two letters referred to above – and at some point it must be assumed that UKBA's continued retention of the goods should be taken to indicate their decision not to restore the goods under section 152(b) CEMA. In that context, the Appellants' letter of appeal dated 9 March 2010 is to be read as a request for a review by UKBA of its apparent decision not to restore the goods. As UKBA have never formally indicated their refusal of the Appellants' original request for the restoration of the goods, this request for a review cannot be out of time, though in the circumstances I also make a direction under section 14A FA 94 ordering UKBA to carry out a review of their decision out of time if necessary.

19. In view of my findings, I do not need to consider UKBA's alternative grounds for their strike-out application. If and when the review process has been completed and followed by a formal appeal, they can renew that application. I do not think it is appropriate for me to consider UKBA's submission that any appeal is "doomed" by reason of the decision in *Jones & Jones* before they have even completed the review process.

20. 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.



KEVIN POOLE
TRIBUNAL JUDGE
RELEASE DATE: 9 September 2011