TC01873

Appeal number: TC/2011/00507

EXCISE DUTY – Restoration of goods – Hand rolling tobacco seized – Restoration refused – Whether reasonable

FIRST-TIER TRIBUNAL

TAX

GORDON & DIANE ROBERTS **Appellant**

- and -

UK BORDER AGENCY **Respondents**

TRIBUNAL: SIR STEPHEN OLIVER QC
SIMON BIRD

Sitting in public in Cardiff on 1 February 2012

Gordon Roberts, for the Appellants

Matthew Cannings for the Respondents

DECISION

1. Mr Gordon Roberts and Mrs Diane Roberts, the Appellants, appeal against a refusal of HMRC to restore certain goods to them. The goods in question were 12kgs of Golden Virgin hand rolling tobacco (HRT). The revenue in respect of this quantity of HRT is £1,555.08.

2. The Appellants had been intercepted by UK Border Agency ("UKBA") officers after alighting from a flight from Palma. When asked, their reply was that they had been away for four days and their trip had been funded by their children. 12kgs of HRT and 3,020 cigarettes had been found in their package. The Appellants have claimed that the tobacco and the cigarettes were intended for their personal use. The UKBA officer informed the Appellants that as they had excise goods in their possession upon which UK excise duty appeared not to have been paid they would be questioned as to whether or not the goods were held for a commercial purpose.

3. Following separate interviews of the two Appellants, UKBA were not satisfied that the goods found in their possession were not held for a commercial purpose. The goods were seized. By letter of 2 September 2010 the Appellants requested that the goods be restored to them and challenged the legality of the seizure. On 6 October 2010 UKBA informed the Appellants that the goods would not be restored and on 9 November 2009 the Appellants requested that UKBA review their decision.

4. Following a formal review the Review Officer's decision was that the goods should not be restored and that the reviewed decision had been fair, reasonable and proportionate in the circumstances and in line with the stated policy in respect of seizure and restoration.

5. On 10 November 2011 the Appellants withdrew their appeal against the seizure.

6. Mr G Roberts, for the Appellants, argued that the decision to seize the 12kgs of HRT, taken on 17 August 2010, had been wrong and invalid.

7. The decision had been wrong because the officer taking the decision had failed to take account of the fact that Mrs Roberts' consumption of cigarettes was 60 a day. On the erroneous basis that the consumption rate of both Mr and Mrs Roberts had been 30 a day (as compared with 60 by Mrs Roberts and 20/30 by Mr Roberts), the UKBA officer taking the decision had worked out that the 12kgs of HRT would have taken twenty months to consume. The right basis should have led to the conclusion that the HRT would have been consumed in less than half that time. Had the UKBA officer adopted the right approach, the conclusion should have been that the HRT had obviously been imported for the "own use" of Mr and Mrs Roberts.

8. The decision was invalid because the Seizure Information Notice had wrongly stated the quantity of HRT as 24kgs. The UKBA officer's decision had therefore be taken on a patently false assumption of fact. It had been Mr Roberts himself who had

had to correct the Notice. The error had been corrected but the Decision had not been retaken.

9. Whatever view we may take of those two points made by Mr Roberts, we are shut out from giving any effect to them by the recent decision of the Court of Appeal in *HMRC v Jones* [2011] EWCA. They are points that go to the seizure issue. Whether the 12kgs of HRT can, or cannot, properly be said to have been imported for the "own use" of Mr and Mrs Roberts is relevant only to the question of whether HMRC had properly seized them. It has no relevance to the issue that is before us, namely whether the decision not to restore the HRT was reasonable. Had Mr and Mrs Roberts wanted to raise the matter, they should have pursued it before the Magistrates Court in the proceedings resisting a UKBA's right to seize the goods in the first place. For those reasons we are against the Appellants on their main point.

10. Mr and Mrs Roberts did not challenge the grounds of the decision taken by the Reviewing Officer, on any other grounds.

11. As we read the notes of interviews (one of the point of interception and the other two, which were separate interviews of Mr and Mrs Roberts) there was no doubt on either side that the amount of HRT had been 12kgs and not 24kgs. There are at least five recorded entries in the notes of 12kgs of HRT and there are none that mention 24kgs. Thus, even if the Notice of Seizure had contained the entry of quantity as being 24kgs, this had evidently been a slip and it was immediately corrected with the consent of all parties.

12. Finally, we mention that Mr and Mrs Roberts commenced proceedings before the Magistrates' Court to challenge the seizure. As noted above, they withdrew this in January 2011. Seven months later the Court of Appeal released the Jones decision that effectively ruled out the opportunity of the Appellants to rely, before this Tribunal, upon their contention that the HRT had been purchased for their own use. We note however that, in September 2010, a letter from the UKBA had, under the paragraph heading "What happens now?" explain the implications of withdrawal of the appeal to the Magistrates' Court against the legality of the seizure. It reads:

> "The Magistrates' Court is the only forum for you to challenge the legality of the seizure, including any claim that the goods were for your own use or not commercial: you may not claim that the excise goods were for own use as part of a restoration request, review or appeal to a tribunal; or in a complaint."

While this is not really relevant the point we have to decide, we think that the route through this notoriously difficult process had been made sufficiently clear to the Appellants.

13. For the reasons given above we dismiss the appeal.

14. 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.

SIR STEPHEN OLIVER QC
TRIBUNAL JUDGE

RELEASE DATE: 6 March 2012