

Forfeit fags

Paul Tapsell looks at condemnation proceedings under Sched 3 to the Customs and Excise Management Act 1979

MANY HUNDREDS of cross-channel travellers are falling foul of the provisions relating to the seizure of excise goods and, more recently, of the vehicles used to transport them, by customs officers. This article outlines the relevant statutory provisions and cases.

The Excise Duties (Personal Reliefs) Order 1992 (SI no 3155) allows a traveller coming from an EC country to import a quantity of excise goods without paying UK duty provided they are for 'own use'. Article 2(1) states "own use" includes use as a personal gift provided that 'if the person making the gift receives in consequence any money or money's worth (including any reimbursement of expenses incurred in connection with obtaining the goods in question) his use shall not be regarded as own use'.

In addition, art 5(3) provides:

'a person shall be regarded as having imported, held or used excise goods for a commercial purpose if he has in his possession or control any excise goods in excess of any of the quantities shown in the Schedule to this order [see box] unless, if required to do so, he satisfies the commissioners to the contrary'.

Personal use relief only applies to a traveller over 17 years (art 5(4)).

Section 141 of the Customs and Excise Management Act 1979 provides that:

'(1)... where any thing has become liable to forfeiture under the customs and excise Acts—

'(a) any ship, aircraft, vehicle, animal, container (including any article of passengers' baggage) or other thing whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture, either at a time when it was so liable or for the purposes of the commission of the offence for which it later became so liable; and

'(b) any other thing mixed, packed or found with the thing so liable, shall also be liable to forfeiture.'

In practice, if customs officers intercept a traveller with any excise goods in excess of the guidelines (even if he is under the limit for everything else) they will provide him with an opportunity to explain why the goods are for personal use or, more accurately, why they are not for a commercial purpose. If he fails to provide an explanation, or that explanation is not accepted, the goods will be seized as liable

to forfeiture as will, usually, any other excise goods found with them and the vehicle in which they were imported (s 141(1)(b) and (a) of the 1979 Act).

Procedure

A notice is served, detailing the traveller's right to appeal the seizure (under Sched 3 to the 1979 Act). Notice of appeal will result in a hearing before a magistrates' court which has to determine whether it 'finds that the thing was at the time of seizure liable to forfeiture' (para 6 of Sched 3). While the burden of proof (to the civil standard) is initially on customs to establish commerciality, if the quantity of any of the excise goods is in excess of the guidelines then a rebuttable presumption of commerciality applies, with the burden of proof resting on the traveller to establish 'own use'.

Burden not excessive

The case of *Goldsmith v HM Commissioners of Customs and Excise* [2001] 1 WLR 1673 (QBD) has confirmed that condemnation proceedings are civil in nature, notwithstanding the penal effect of the forfeiture and loss of the goods (and any vehicle) and, *obiter*, that even if the proceedings were criminal 'the burden placed on [the traveller] is not excessive or unreasonable'.

Air Canada v Customs and Excise [1991] 1 All ER 570 (CA) involved the seizure of a large commercial jet following the discovery of 331kg of cannabis resin in a cargo container. The court found that the fact that the owners of the aircraft had no knowledge of the presence of the drugs was irrelevant:

'the wording of s 141 is ... clear and unambiguous and does not permit of any implication or construction so as to import an element equivalent to *mens rea* nor does it involve in any way any person in the widest sense whether as user, proprietor or owner but depends solely on 'the thing' being used in the commission of the offence which rendered the goods liable to forfeiture' (Purchas LJ at 587b).

Consequences

The practical application of s 141 of the 1979 Act can lead to some severe conclusions: if two or more individuals share a vehicle and one traveller has exceeded the guideline level for a particular type of excise goods, eg bringing in 1,000 cigarettes then, unless he satisfies customs that those cigarettes are for own use,

In brief

'Own use' guideline levels are;

800 cigarettes; 400 cigarillos; 200 cigars; 1 kg of other tobacco products; 10 litres of spirits; 20 litres of intermediate products (fortified wines etc); 90 litres of wines (of which no more than 60 litres may be sparkling) or 110 litres of beer.

Exceeding 'own use' levels for any item results in the traveller having to justify the quantity not being for a commercial purpose.

Goods found with any forfeit goods and any vehicle used to transport them are forfeit.

any other excise goods in the vehicle and the vehicle itself are liable to forfeiture (ss 141(1)(b) and (a)) irrespective of who owns those other goods and the vehicle. Similarly, if one of the travellers indicates to customs that a third party has contributed to the purchase of some of the goods he has in his possession, or that they are to be used as a payment in lieu of wages or rent or to clear a debt, then own use does not apply and those goods are forfeit and therefore (as above) so are any other goods and the vehicle.

If several individuals travelling together have their excise goods and vehicle seized, it will be necessary for all of them to attend the condemnation hearing and, where appropriate (ie wherever an individual has exceeded the guideline level for any type of item), satisfy the magistrates that each individual's goods were for 'own use'. If any one individual fails to attend the hearing or fails to discharge his burden of proof then, because his goods are forfeit, the other individuals' goods and the vehicle will, again, also be forfeit.

In the majority of cases, the traveller is more worried about the seizure of the vehicle than about the seizure of the goods.

Given that para 10(1) of Sched 3 states that 'a claimant (ie the person challenging the seizure) or his solicitor shall make oath that the thing seized was, or was to the best of his knowledge and belief, the property of the claimant at the time of the seizure' it is the owner of the car – not necessarily the traveller – who has to make the claim in person (within one month of the seizure: para 3).

It is often argued that seizure of a car, particularly a valuable one or one required by its owner for business purposes, is not proportionate and therefore contrary to protocol 1 to the European Convention (see *James v UK* (1986) 8 EHRR 123 and *Air Canada v UK* (1995) 20 EHRR 150). However, the courts generally find that, when weighed against the public interest, namely the prevention of bootlegging – annual cost to the Treasury in excess of £1.7bn – the individual, or indeed the international airline, generally comes a poor second ■

Paul Tapsell is a barrister practising from Becket Chambers, Canterbury