

COMPTROLLER GENERAL OF CUSTOMS v ZAPPIA (S91/2018)

Court appealed from: Full Court of the Federal Court of Australia
[2017] FCAFC 147

Date of judgment: 19 September 2017

On 23 May 2015 400,000 cigarettes were stolen from a warehouse (“the Warehouse”) operated by Zaps Transport (Aust) Pty Ltd (“Zaps”). Zaps operated the Warehouse as a bonded warehouse pursuant to a licence (“the Licence”) issued under Part V of the *Customs Act 1901* (Cth) (“the Act”). At the time of the theft, Zaps was awaiting Customs permission to move the cigarettes stored at the Warehouse to other licensed premises. That followed a variation of the Licence, made by the appellant on 15 April 2015 (after previous instances of cigarette theft), such that Zaps was no longer authorised to store tobacco products at the Warehouse.

The respondent, Mr Domenic Zappia, was employed as both general manager and warehouse manager of Zaps. His father, Mr John Zappia, was a director of Zaps. On 27 August 2015 a statutory demand on the respondent (“the Statutory Demand”) was issued and served by a Collector under s 35A of the Act. (Similar statutory demands were also served on Zaps and John Zappia.) The Statutory Demand required the respondent to pay \$188,032.00, being the amount of duty payable on the 400,000 stolen cigarettes, on the basis that the respondent was “a person who has (or has been entrusted with) possession, custody or control over the goods stored at Zaps premises” who had failed to keep the goods safe.

The respondent sought a review by the Administrative Appeals Tribunal (“the Tribunal”), which affirmed the decision to issue the Statutory Demand. The Tribunal found that, because he directed what happened to goods at the Warehouse on a day-to-day basis, the respondent had “control” over the cigarettes within the meaning of s 35A(1) of the Act, which imposed strict liability for unpaid duty.

An appeal by Mr Zappia was allowed by the Full Court of the Federal Court. White and Moshinsky JJ held that the Statutory Demand must be set aside. This was because s 35A(1) of the Act was directed to persons having *the* control, as opposed to *some* control, of the relevant goods, and the respondent was an employee whose control over the cigarettes was incomplete. Their Honours found it improbable that the Act would impose liability on employees who acted as no more than the human agent of those who did have possession, custody or control of bonded goods.

Davies J also held that the appeal should be allowed, but would have remitted the matter to the Tribunal for redetermination. Her Honour held that whether s 35A(1) applied to a person was to be determined by the measure of control exercised, not merely by whether the person was an employee. The Tribunal had erred by failing to relate its finding that the cigarettes had not been kept safely to the nature and degree of control exercised by the respondent.

The grounds of appeal are:

- The Full Court of the Federal Court of Australia (White and Moshinsky JJ; Davies J dissenting) erred in holding that an employee of an entity holding a licence to warehouse dutiable goods could never be “a person who has, or has been entrusted with, the possession, custody or control of dutiable goods” within the meaning of s 35A(1) of the Act.
- The Full Court of the Federal Court of Australia (White and Moshinsky JJ; Davies J dissenting) erred in holding that, given the proper construction of s 35A(1) of the Act, the statutory demand issued by the appellant to the respondent employee was invalid and of no effect.