

Decision impact statement

Comptroller General of Customs v. Zappia

Court citation(s):	[2018] HCA 54
Venue:	High Court of Australia
Venue reference no:	S91/2018
Judge names:	Kiefel CJ, Bell, Gageler, Nettle and Gordon JJ
Judgment date:	14 November 2018
Appeals on foot:	No
Decision outcome:	Favourable to the Commissioner

Impacted advice



This decision has no impact on any related advice or guidance.

Précis

This Decision impact statement outlines the ATO's response to this case which concerns whether a person who was employed as the manager of a warehouse storing dutiable goods met the description of a person who 'has, or has been entrusted with, the possession, custody or control of dutiable goods which are subject to customs control', under subsection 35A(1) of the *Customs Act 1901* (Customs Act).

Under delegation from the Department of Home Affairs, the ATO administers excise equivalent goods imported into Australia and warehoused under the Customs Act, and the administration of the warehouse licences issued under the Customs Act, if the warehouses store excise equivalent goods.

Brief summary of facts

Zaps Transport (Aust) Pty Ltd (Zaps) held a customs storage licence which permitted it to store dutiable goods in its warehouse before customs duty was paid. John Zappia was the sole director of Zaps and Domenic Zappia, his son, was employed as the general manager and warehouse manager of Zaps.

In accordance with a standard condition of Zaps' warehouse licence, Zaps had notified the ATO that Domenic and John Zappia were persons who participated in the management or control of the warehouse. Domenic Zappia had the authority to direct what was to happen to the goods in the warehouse on a day-to-day basis. He made the operational decisions, attended to the documentation required for Customs' purposes, and handled some of the paperwork and communications with the ATO. He was required to refer anything 'big' – that might require legal advice or have tax implications – to his father for resolution. In May 2015 tobacco products were stolen

from the warehouse in a break-in which occurred when none of Zaps' employees were present.

A Collector of Customs served notices of demand under section 35A of the Customs Act on Zaps, John Zappia and Domenic Zappia for an amount equal to the amount of the customs duty which would have been payable on the stolen goods if they had been entered for home consumption on the day of the demand. Zaps, John Zappia and Domenic Zappia each applied to the Administrative Appeals Tribunal (Tribunal) for review of the decisions to demand payment from them. The Tribunal affirmed each decision of the Collector.

Domenic Zappia appealed from the Tribunal. No appeal was brought on behalf of or by John Zappia, who was bankrupt, or by Zaps, which was in liquidation. The Full Federal Court, by majority, allowed the appeal and set aside the decision of the Tribunal. The Full Federal Court concluded that the 'kind of control' over goods exercised by an employee of a warehouse licence holder, acting in their capacity as an employee, does not meet the level of control required by subsection 35A(1) of the Customs Act.

Issues decided by the court

The issue considered by the High Court was whether an employee of the holder of a warehouse licence can meet the description of 'a person who has, or has been entrusted with, the possession, custody or control of dutiable goods which are subject to customs control' in subsection 35A(1) of the Customs Act.

The High Court unanimously held that an employee could meet that description, and that the facts found by the Tribunal were sufficient to establish that Domenic Zappia was a person who had the possession, custody or control of the stolen goods and who failed to keep those goods safely.

The decision affirmed that section 35A of the Customs Act is to be read in light of the statutory purpose of subjecting dutiable goods to customs control, which is to ensure that customs duty is paid before the goods are delivered into home consumption.

In construing section 35A, the majority of the High Court held that none of the terms 'possession', 'custody' or 'control' has a fixed legal meaning. The reference to those terms in section 35A is to a degree of power or authority in relation to dutiable goods which is sufficient to enable a person to meet the obligations to keep the goods safely or account for the goods to the satisfaction of a Collector. Such power or authority need not be exclusive or paramount. A person who possesses power or authority in relation to those goods to that degree is a person who comes within the ambit of section 35A, irrespective of the manner in which that person might choose to exercise that power or authority. Several persons, such as directors, shareholders, officers or employees, may each possess power or authority to the requisite degree within a chain of command or hierarchy of responsibility.

Nettle J agreed with the majority and made an additional observation that the object of subsection 35A(1) is the practical one of motivating persons with the ability *de facto* to keep dutiable goods safely, and to account for them to the satisfaction of a Collector, to do just that. As such, the provision is not concerned so much with the legal relationship of those persons to the goods in their possession, custody or control as with the ability of those persons to prevent those goods passing into home consumption without the payment of duty.

ATO view of decision

The High Court's decision is consistent with our view of subsection 35A(1) of the Customs Act, and also subsection 60(1) of the *Excise Act 1901*, which applies to excisable goods in materially identical terms. We will continue to issue notices of demand under these subsections as appropriate.

Implications for impacted advice or guidance

None.

Comments

We invite you to advise us if you feel this decision has consequences we have not identified. Please forward your comments to the contact officer.

Date issued:	17 January 2019
Due date:	15 February 2019
Contact officer:	Contact officer details have been removed as the comments period has expired.

Legislative references

Customs Act 1901

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35A

35A(1)

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Part V

Excise Act 1901

60(1)

Case references

Collector of Customs (NSW) v. Southern Shipping Co Ltd (1962) 107 CLR 279

Commissioner of Stamps (SA) v. Telegraph Investment Co Pty Ltd (1995) 184 CLR 453

Federal Commissioner of Taxation v. Australia and New Zealand Banking Group Ltd (1979) 143 CLR 499

Goben Pty Ltd v. Chief Executive Officer of Customs [No 2] (1996) 68 FCR 301

Moama Refinery Ltd v. Chief Executive Officer of Customs (2001) 115 FCR 205

R v. Lyon (1906) 3 CLR 770

Wing On & Co Ltd v. Collector of Customs (NSW) (1938) 60 CLR 97

Re Zaps Transport (Aust) Pty Ltd and Comptroller General of Customs [2017] AATA 202

Zappia v. Comptroller-General of Customs (2017) 254 FCR 363

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