

STATES OF JERSEY



DRAFT CUSTOMS AND EXCISE (AMENDMENT No. 7) (JERSEY) LAW 201-

Lodged au Greffe on 11th July 2013
by the Minister for Home Affairs

STATES GREFFE



Jersey

DRAFT CUSTOMS AND EXCISE (AMENDMENT No. 7) (JERSEY) LAW 201-

European Convention on Human Rights

In accordance with the provisions of Article 16 of the Human Rights (Jersey) Law 2000 the Minister for Home Affairs has made the following statement –

In the view of the Minister for Home Affairs the provisions of the Draft Customs and Excise (Amendment No. 7) (Jersey) Law 201- are compatible with the Convention Rights.

Signed: **Senator B.I. Le Marquand**

Minister for Home Affairs

Dated: 9th July 2013

REPORT

The draft Law makes a number of amendments to the Customs and Excise (Jersey) Law 1999 ('the Law').

Article 37C falls under Part 5A of the Law, which deals with to the importation and exportation of cash. At the current time the legal limit of cash is 10,000€. Article 37C of the Law relates to people entering and leaving Jersey and reads:

- “(1) An officer may require a person entering or leaving Jersey –*
- (a) to disclose the value of any cash –*
 - (i) contained in his or her baggage, or*
 - (ii) carried with the person;*
 - (b) to answer question in respect of any such cash; and*
 - (c) to produce his or her baggage for inspection by the officer.*
- (2) A person who, when required to produce his or her baggage, refuses or fails to do so, is guilty of an offence and is liable to a fine of –*
- (a) level 3 on the standard scale; or*
 - (b) an amount equal to 3 times the value of the cash not disclosed, whichever is the higher.*
- (3) Where an officer reasonably suspect that a person entering or leaving Jersey is carrying cash with a value in excess of the proscribed amount, the officer may –*
- (a) where the officer is of the same sex as the person, search the person; or*
 - (b) request an officer of the same sex as the person to do so.*
- (4) A person who is to be searched may require to be taken before a Jurat of the Royal Court or a superior of the officer who must –*
- (a) consider the grounds for the officer’s suspicion; and*
 - (b) direct whether the search is to take place.”*

On the basis that the Jersey Customs and Immigration Service have a superior officer on duty 24 hours a day, 7 days a week, it was felt that there would be no need to have recourse to a Jurat of the Royal Court and that reference to them could be removed. Article 2 of the draft Law achieves this by deleting the words ‘a Jurat of the Royal Court or’ from paragraph 37C(4).

Article 53 of the Law relates to the power to search persons. Article 53(2) currently stipulates that:

“A person to be searched in pursuance of this Article may require to be taken before a Jurat of the Royal Court or a superior of the officer or other person concerned, who shall consider the grounds for suspicion and direct accordingly whether or not the search is to take place.”

As above, because the Jersey Customs and Immigration Service have a superior officer on duty 24 hours a day, 7 days a week, it was felt that there would be no need to have recourse to a Jurat of the Royal Court and that reference to them could be

removed. Article 3 of the draft Law achieves this through the substitution of Article 53(2).

Article 65 of the Law relates to the power of the Agent of the Impôts to levy a penalty where a person has committed an offence in relation to the importation or exportation of goods, as an alternative to prosecution. Where a penalty is levied, it is in an amount considered appropriate by the Agent of the Impôts and does not exceed 3 times the amount of duty payable. Article 65 of the Law currently reads:

- “(1) Where the Agent of the Impôts considers that a person has committed an offence under this Law in relation to the importation or exportation of goods, he may, instead of referring the matter to a Connétable or Centenier with a view to such person being prosecuted for that offence, accept such sum by way of a penalty, not exceeding three times the level of duty payable or the value of the goods, whichever is the greater, as the Agent of the Impôts considers appropriate.*
- (2) The fact that a person has paid a penalty under paragraph (1) shall not affect the right of the Attorney General to prosecute that person for any offence under this Law or to direct that he be so prosecuted.*
- (3) Where a person has paid a penalty under paragraph (1) in relation to an offence for which he is subsequently prosecuted, the amount of such penalty shall be refunded.”*

It was felt desirable to extend this ability to levy a penalty instead of referring a matter to prosecution in respect of excise duties, in addition to offences relating to the importation or exportation of goods. An example would be where officers from the Jersey Customs and Immigration Service find that someone is illegally using ‘red diesel’ in their vehicle. Article 4 of the draft Law achieves this by the insertion of paragraph (1A).

The insertion of paragraph (1B) places a requirement on the Agent of the Impôts to notify the Attorney General when he accepts a penalty, instead of referring the matter to prosecution.

Financial and manpower implications

There are no additional financial or manpower implications arising from this draft Law.

Human Rights

The notes on the human rights aspects of the draft Law in the Appendix have been prepared by the Law Officers’ Department and are included for the information of States Members. They are not, and should not be taken as, legal advice.

APPENDIX TO REPORT

Human Rights Note on the Draft Customs and Excise (Amendment No. 7) (Jersey) Law 201-

1. This note has been prepared in respect of the Draft Customs and Excise (Amendment No. 7) (Jersey) Law 201- (“the draft Law”) by the Law Officers’ Department. It summarises the principal human rights issues arising from the contents of the draft Law and explains why, in the Law Officers’ Opinion, the draft Law is compatible with the European Convention on Human Rights (“ECHR”).

These notes are included for the information of States Members. They are not, and should not be taken as, legal advice.

The right to a fair hearing

2. Article 6 of the ECHR provides that –

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

3. Accordingly, the right to a fair hearing in Article 6(1) of the ECHR is applicable in the case where a person’s civil rights or obligations or a criminal charge against a person is being determined.
4. In the decision delivered in *Ferrazzini v. Italy*¹ and subsequently confirmed in February 2004 in *Jussila v. Finland*², the European Court of Human Rights (ECtHR) held that tax matters still form part of the hardcore of public authority prerogatives, with the public nature of the relationship between the taxpayer and the authority remaining predominant. The ECtHR held that tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effect which they necessarily produce for the taxpayer. However, in practice, the scope of the *Ferrazzini* judgment is very restricted³ and for the purposes of the ECHR, many disputes over taxation matters are classified as “criminal charges”.
5. Any assessment of the applicability of the criminal aspect of Article 6 of the ECHR is firstly based on the criteria outlined in *Engel and Others v. the Netherlands*⁴: (1) the domestic classification; (2) the nature of the offence; (3) the severity of the potential penalty which the person concerned risks incurring.

¹ 12.07.2001 (Grand Chamber) No. 44759/98

² (73053/01) [2006] ECHR 996

³ <http://tmagazine.ey.com/insights/the-european-convention-on-human-rights-echr-tax-controversy-and-tax-policy/>

⁴ Judgment of 8th June 1976, Series A No. 22, p. 34–35, § 82–83

6. Thus, for Article 6 of the ECHR to be held applicable, it suffices that the offence in question is classified domestically as criminal⁵ or by its nature to be regarded as “criminal” from the point of view of the Convention, or that the offence made the person liable to a sanction which, by its nature and degree of severity, belongs in general to the “criminal” sphere (see *Öztürk v. Germany*⁶ and *Lutz v. Germany*⁷).
7. A penalty accepted by the Agent of the Impôts under the amendment proposed by *Article 4* of the draft Law (which amends Article 65 of the Customs and Excise (Jersey) Law 1999 (“the principal Law”)) is a tax penalty which will apply to any defaulting taxpayer⁸ and rather than relating to any administrative matter it is a deterrent which is dependent on the degree of culpability of the taxpayer and is potentially substantial⁹ (calculated at an amount not exceeding 3 times the amount of tax payable). The amendment proposed by *Article 4* of the draft Law will therefore engage the criminal guarantees to a fair trial afforded by Article 6 of the ECHR.
8. Article 6(1) of the ECHR requires that a taxpayer against whom a criminal penalty is imposed should have access to a tribunal of full jurisdiction. A court of full jurisdiction must have the authority to determine all questions of fact and law and substitute its own decision for that of the tax administration, and not be limited to a purely supervisory role¹⁰.
9. Article 68 of the principal Law provides for the review of certain decisions of the Agent of the Impôts by the Minister. This would include the decision of the Agent of the Impôts to accept a penalty under Article 65. The review by the Minister clearly cannot fulfil the role of an independent and impartial tribunal. However, provision is made in Article 69 for a review of a decision of the Minister by the Royal Court. The Royal Court has the power to confirm the Minister’s decision, or order the Minister to rescind his or her decision, and may make such order as the court considers necessary. Accordingly, a person aggrieved by a decision of the Minister (upon review of the decision of the Agent of the Impôts to accept a penalty) will have access to the Royal Court as an independent and impartial tribunal which is competent to determine all aspects of the matter and which is required by Article 7 of the Human Rights (Jersey) Law 2000 to act in a manner which is compatible with the ECHR.

⁵ See, for example, the High Court’s decision in *King v Walden* [2001] STC 822, which confirms that penalties for the fraudulent or negligent delivery of incorrect returns or statements is a ‘criminal’ offence for the purposes of Article 6 of the ECHR

⁶ Judgment of 21st February 1984, Series A No. 73

⁷ Judgment of 25th August 1987, Series A No. 123, p.23, § 55

⁸ *Bendenoun v. France*, judgment of 24th February 1994, Series A No. 284, § 47

⁹ See *Öztürk v. Germany and Bendenoun v. France*

¹⁰ See *Öztürk v. Germany and Bendenoun v. France*

Explanatory Note

This Law amends the Customs and Excise (Jersey) Law 1999 (“principal Law”).

Article 1 is an interpretation provision.

Article 2 amends Article 37C of the Law in respect of a person who is entering or leaving Jersey and who is to be searched by a customs officer whom the customs officer suspects of carrying more than the legal limit of cash (currently 10,000 euros). This Article removes the right of such a person to require to be taken before a Jurat for the Jurat to consider the custom officer’s grounds for suspicion and to direct whether the search should take place. The person still has the right to be taken before a superior of the customs officer who must consider the grounds for suspicion and give a direction whether the search should take place.

Article 3 amends Article 53 of the Law in respect of a person who is suspected by a customs officer of carrying articles subject to unpaid duty or which breach importation or exportation requirements. As with Article 37C, this Article removes the right of such a person to require to be taken before a Jurat for the Jurat to consider the custom officer’s grounds for suspicion and to direct whether the search should take place. The person still has the right to be taken before a superior of the customs officer who must consider the grounds for suspicion and give a direction whether the search should take place.

Article 4 amends Article 65 of the Law so as to enable the Agent of the Impôts to levy a penalty for an offence committed under the Law in respect of excise duties instead of referring the matter for prosecution. The amount of penalty is such sum as the Agent of the Impôts considers appropriate, not exceeding 3 times the amount of duty that is payable.

A further amendment to Article 65 is made to the effect that when the Agent of the Impôts accepts a penalty instead of referring a matter to prosecution in relation to excise duties or the importation or exportation of goods, the Agent of the Impôts must notify the Attorney General.

Article 5 sets out the title of this Law and provides that it will come into force 7 days after it is registered.



Jersey

DRAFT CUSTOMS AND EXCISE (AMENDMENT No. 7) (JERSEY) LAW 201-

A LAW to amend further the Customs and Excise (Jersey) Law 1999.

Adopted by the States [date to be inserted]

Sanctioned by Order of Her Majesty in Council [date to be inserted]

Registered by the Royal Court [date to be inserted]

THE STATES, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law –

1 Interpretation

In this Law “principal Law” means the Customs and Excise (Jersey) Law 1999¹.

2 Article 37C amended

In Article 37C(4) of the principal Law the words “a Jurat of the Royal Court or” shall be deleted.

3 Article 53 substituted

For Article 53(2) there shall be substituted the following paragraph –

“(2) A person to be searched in pursuance of this Article may require to be taken before a superior of the officer who shall consider the grounds for suspicion and direct accordingly whether or not the search is to take place.”.

4 Article 65 amended

In Article 65 after paragraph (1) there shall be inserted the following paragraphs –

“(1A) Where the Agent of the Impôts considers that a person has committed an offence under this Law in relation to excise duties, the Agent may, instead of referring the matter to a Centenier with a view to such person being prosecuted for that offence, accept such

sum by way of a penalty, not exceeding 3 times the level of duty payable, as the Agent of the Impôts considers appropriate.

(1B) When the Agent of the Impôts accepts a penalty under paragraph (1) or (1A), the Agent shall notify the Attorney General.”.

5 Citation and commencement

This Law may be cited as the Customs and Excise (Amendment No. 7) (Jersey) Law 201- and shall come into force 7 days after it is registered.

¹ *chapter 24.660*