[2011] UKFTT 495 (TC)

TC01342

Appeal number: TC/2011/08153

EXCISE DUTIES – 8% red diesel in Ford Transit van – appellant denied taking and using red diesel – existence of red diesel in tank accepted – reviewing officer did not consider all matters which she should have – case referred for further review.

FIRST-TIER TRIBUNAL

TAX

JULIAN PORTEOUS **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: DAVID S PORTER (TRIBUNAL JUDGE)
ROLAND PRESHO (MEMBER)

Sitting in public at King's Court, North Shields on 14 June 2011

The Appellant in person

Mr Josh Shields, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Julian Porteous (Mr Porteous) appeals the Commissioner's (HMRC) review decision dated 20 September 2010 refusing to restore a Ford Transit Van, registration YR 05 DHE (the vehicle) on payment of £250. The vehicle was seized on 2 August 2010 and Mr Porteous says that he did not put red diesel in the vehicle. The restoration fee had been reduced from £500 to £250 even though Mr David Allen Robinson (Mr Robinson), the inspecting Officer, had said that Mr Porteous appeared honest and genuine and he was concerned as to the condition of the vehicle. Mrs Maria Finelli (Mrs Fenelli), the Reviewing Officer, had indicated in the review letter that the restoration fee had been reduced because of Mr Porteous' financial situation. Mr Porteous' financial position had never been revealed. HMRC say that as there was red diesel in the vehicle it must have been put there by Mr Porteous and the vehicle had been properly seized and restored.

2. Mr Sheilds appeared for HMRC and called Mr Robinson, who gave evidence under oath. He also produced a bundle for the tribunal. Mr Porteous appeared in person and gave evidence under oath.

3. The Law

- Section 6 of the Hydrocarbon Oils Duties Act 1979 ("HODA") provides for the levy of excise duty on hydrocarbon oil delivered for home use and by virtue of section 11 a rebate of duty is allowed at the time of delivery.

- Under section 23 where such heavy oil is used in or taken into a road vehicle in circumstances where that person knew or has reasonable cause to believe that the excise duty under section 8 has not been paid his use of the road fuel gas or, as the case may be, his taking it as fuel into the vehicle shall attract a penalty under section 9 of the Finance Act 1994 (civil penalties) and any goods in respect of which a person contravenes this section shall liable to forfeiture.
- Section 139(6) and Schedule 3 of the Customs and Excise Management Act 1979 (CEMA)provides:

  (1) Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard.
- Section 141 CEMA provides as follows-

  (1)…where any thing has become liable to forfeiture under the Customs and Excise Acts –

  (a) any ship, aircraft, vehicle…which has been used for the carriage handling ,deposit….of the thing so liable for forfeiture…and

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

- Section 152(b) CEMA 1979 provides that the Commissioners may as they see fit , restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized.

3. We were also referred to the case of *Anthony Barbagello v The Commissioners of Customs and Excise* [2004] UKVAT (excise) E00833 by Mrs Fenelli in her review letter. In that case:-

> "Mrs Neenan, the counsel in that case, pointed out that if the penalty for taking in and using rebate fuel had been imposed under section 9 of the Finance Act 1994 it would have been open to Mr Barbagello to satisfy the Tribunal that there was a reasonable excuse for his conduct and so avoid the penalty (section 10 Finance Act 1994). Judge Walters noted that section 10 is in similar terms to the provisions for the mitigation of penalties under the VAT regime in section 70 Value Added Tax Act 1994, the predecessor provisions of which were considered by the Court of Appeal in *Customs and Excise Commissioners v Steptoe* [1992] STC 757 in which Lord Donaldson held that where the insufficiency of funds arose through no fault on the part of Mr Steptoe he had a reasonable excuse for the same. Applying that approach to Mr Barbagello's circumstances Judge Walters considered that Mr Barbagello had a reasonable excuse for driving the vehicle with rebated fuel in it as he had been unaware of its existence. As the restoration fee was not dissimilar from a civil penalty under section of the Finance Act 1994, it was considered in that case that Mr Barbagello would have been able to show a reasonable excuse within section 10 of the Finance Act 1994, which would have avoided the penalty. Judge Walters decided that the principle of proportionality required the restoration fee ought to be waived altogether and decided that the review was therefore unreasonable".

The Facts

4. Officer D Ferguson checked Mr Porteous' vehicle for rebated fuel on 2 August 2010 at a check point in Redcar. The initial sample had not immediately changed colour to pink or red which is indicative of the presence of red diesel, but after being vigorously shaken for sometime the sample did change colour. It was confirmed, at that point, that the fuel did not contain the usual 'markers' indicative of red diesel. The officer thought that there might be kerosene in the fuel because it had changed colour. The Officer then referred Mr Porteous to Mr Robinson, who took a statement from Mr Porteous. Mr Porteous confirmed that he had just fuelled up the vehicle at the Great Ayton Garage and produced a receipt for £12.05. He had not put any red diesel or kerosene in the vehicle and he alleged that it must have been put in by the Great Ayrton Garage. He had given Mr Robinson several receipts from other garages where he had previously purchased fuel. Mr Robinson raised a penalty of £125 for taking in the fuel and £125 for using a vehicle with rebated fuel in it, making a total penalty of £250. Mr Robinson confirmed under oath that he had reduced the restoration fee, which should have been £500, to £250 solely based on the condition of the vehicle. He told us that the milometer was showing over 130,000 miles and that

the vehicle was in an average condition. He also said that HMRC was under pressure, for logistical reasons, not to retain vehicles and that they were anxious to restore them to their owners on payment of a restoration fee. Mr Robinson also told us that HMRC did not have the facility to check all the service stations evidenced by the receipts but that he had personally checked the Great Ayton Garage and there had been no evidence of any contamination. He told us that the department. Mr Porteous had had to borrow £250 from a friend and returned within the hour to recover the vehicle as Mr Robinson was scheduled to go elsewhere. Mr Porteous signed a restoration agreement when paying the £250 in which he stated that he had read Notice 12 A. The form then states that he understood that signing the agreement did not affect his rights to appeal against the seizure or terms of restoration. Mr Porteous pointed out that the Restoration Agreement did not contain a receipt for the £250 as the receipt space was left blank.

5. Mr Robinson was asked by Mr Porteous, in cross-examination, whether he had said that Mr Porteous appeared honest and genuine. Mr Robinson indicated that he could not remember, but he did not deny it. Mr Porteous told us that he had purchased the vehicle some 17 months before the incident. He had been diagnosed with cancer in November 2009 and had attended at hospital for treatment for the seven months up to 1 July 2010. Mr Porteous asserted that during that time he had used the vehicle to visit his family in Gateshead and to attend hospital for treatment for cancer. He had only been able to put a small amount of diesel in the vehicle on each occasion as he did not have very much money being unable to work due to his illness. He was still attending at the hospital in August and for the following months. At the beginning of July he had agreed to adapt a loft for a friend and he was starting work for the first time after his illness. He had lent the vehicle to two friends, one a solicitor and the other a psychiatric nurse. He was sure that they would not have put red diesel in the vehicle as they had both only borrowed it for a very short period of time.

6. Mr Porteous confirmed that Mr Robinson had given him Notice 1, a warning letter and Notice 12A. He also confirmed that he had read Notice 12 A but had not really understood that he needed to apply to the Magistrates' Court with in one month of the incident. He said that he had been told that the sample would be checked and that it would take six weeks. As the sample had not readily changed colour as expected, he thought that the forensic evidence might have been that there was no red diesel in the sample and that the restoration fee would be repaid. He therefore believed that he did not need to apply to the Magistrates Court until after he had received a full report from the Commissioners. He confirmed under cross-examination that he had written to the Commissioners the day after the incident asking for the vehicle to be restored. He also confirmed that he had been given a sample of the fuel, but an enquiry on the internet had indicated that it would cost him a minimum of £200 to have the sample tested. As the restoration fee had only been £250 it had not been worth his while to have his sample tested. Mr Porteous said that he had used cooking oil in the vehicle from a wholesale cash and carry called Costco sometime earlier but had not used it again because it smelt like a chip shop. Mr Robinson produced the original certificate for the testing, which had revealed 8% of red diesel and it confirmed that there was no vegetable oil content. We are satisfied that the vehicle had sufficient red diesel in it to be significant.

7. In her review letter dated 20 September 2010, Mrs Minelli explained that the Commissioner's policy for the restoration of a vehicle was designed to provide increasingly severe restoration terms for the first two detections, with a strict non-restoration policy on a third detection.

- On a first offence a charge of 100% of the revenue evaded and any storage and/or removal costs or the value of the vehicle which ever is the lower.

- On a second offence a charge of 200% of the revenue evaded and any storage and/or removal costs or the value of the vehicle which ever is the lower.

- On the third offence – seizure of the vehicle and non-restoration.

Mrs Minelli confirmed that she had examined all the representations and material both before and after the decision. She had not consider the legality of the seizure as Mr Porteous had had a chance to raise that before the magistrates and as he had failed to do so the vehicle was deemed forfeited. She was therefore only concerned with the restoration fees and not a civil penalty. She had also considered the implications of the case of *Anthony Barbagello* referred to above, and had decided that the restoration fee was proportional. She stated in the letter, from the evidence with which she had been provided, that Mr Porteous appeared honest and genuine and that was one of the reasons why the restoration fee had been reduced. She indicated in her letter that she had contacted Mr Robinson and that he had confirmed that his decision to charge £250 was based on Mr Porteous' ability to pay and the condition of the vehicle. Mr Robinson stated at the Tribunal that he had never asked about Mr Porteous' ability to pay. It is unclear as to where Mrs Minelli obtained that information. She had not, however, accepted that Mr Porteous had supplied any explanation of how the rebated fuel found its way into the vehicle and on that basis she upheld the original decision.

Submissions

8. Mr Shields submitted that as Mr Porteous had not challenged the seizure in the Magistrates' Court, he could not now challenge the forfeiture. Mr Porteous had acknowledged receipt of Notice 1, the warning letter, and Notice 12A when the vehicle was seized. He had been offered restoration by the Commissioners and he accepted that there was something in the sample sufficient for the vehicle to be seized. He had failed to apply to the Magistrates' Court to contest the seizure. The only matter before the Tribunalwas whether Mrs Minelli's had acted reasonably when producing the review letter. It matters not that the restoration fee was reduced as there was red diesel in the vehicle. There were only four possible reasons for that:-

1. The red diesel had been put in the vehicle by a third party. As the vehicle had been in Mr Porteous' sole possession for 17 months this was unlikely.

2. His two friends had fuelled the vehicle with red diesel. Mr Porteous indicated that he did not believe that that had happened both because of

the sort of people they were and because they had only had the vehicle for a short time.

3. The red diesel had been obtained from a service station when Mr Porteous last fuelled the vehicle. Mr Robinson had checked the tanks at the last station used and they had been clear of any contamination

4. Mr Porteous had put the red diesel in the vehicle. In the absence of any other explanation this was the most likely circumstance.

9. It was not reasonable to expect Mr Robinson to check all the receipts given to him by Mr Porteous, He had, in any event, checked the last garage used by Mr Porteous. Mrs Minelli had exercised her discretion reasonably. She had taken into account everything she should have and had not left out any matter that she should not have. In the circumstances the restoration fee should remain.

10. In summary Mr Porteous was adamant that he had not put the red diesel in the vehicle. Due to his illness he had only been able to put a little fuel into the vehicle at any one time. He had not queried the legality of the seizure but was concerned at the way in which the vehicle had been seized and returned to him. Mr Robinsion had said that Mr Porteous appeared honest and genuine and that Mr Robinson had reduced the restoration fee because of the condition of the vehicle. However, Mrs Minelli, although referring to Mr Porteous' honesty indicated that the restoration fee had been reduced because of Mr Porteous' financial position. He had never discussed his financial position with anyone. He maintained that he had been supplied with conflicting information. The Officers had at first indicated that red diesel had been detected but later asserted that that was not the case as the fuel did not contain the usual 'markers' indicative of red diesel. It was only after the sample had been properly examined that the existence of red diesel was confirmed Mr Porteous submitted. If, as was suggested, he was honest and genuine and the reduction in the restoration fee was because of the condition of his vehicle, but subsequently because of his financial position, the process was far from satisfactory and the matter should be reviewed again.

The decision

11. We have considered the law and the facts and have decided that Mrs Minelli has not exercised her discretion reasonably and that the case should be reviewed again by a different officer. We agree that Mr Porteous received Notice 12A and that he could not therefore contest the legality of the seizure. We would, however, reiterate yet again, that the terms of Notice 12A are far from clear even to members of the legal profession, never mind the general public. If HMRC (now the Border Agency) are going to insist, as they are rightly able to do, that the failure to attend at the Magistrates' Court to defend a seizure will result in forfeiture, then, at the very least, Notice 12A should clearly say so in layman's terms. We are concerned, however, that Mr Robinson appears to have been under considerable pressure, due to the lack of staff, and dealt with the matter somewhat perfunctorily. It is inconsistent to state that Mr Porteous appeared to be honest and genuine and then to penalise him for different

reasons than those identified in the review letter. Mrs Minelli does not appear to have considered whether Mr Porteous' treatment for cancer had any bearing on the case. Further there is no evidence as to Mr Porteous financial position and it could not therefore from any part of her decision. She has addressed her mind to the case of *Anthony Barbagello v The Commissioners of Customs and Excise* [2004] UKVAT (excise) E00833 although Mr Shields has not addressed us on that issue. It appears to us that her decision in that regards was correct. It is unclear from the decision how long Mr Barbagello had had the vehicle but it would appear that it was not for very long. The Tribunal was content to indicate that Mr Barbagello was unaware that the red diesel was in his vehicle and that the *Steptoe* defence was available to him. That was because Mr Barbagello was not responsible for the red diesel being in his vehicle. Mr Porteous has had the vehicle for over 17 months and apart from denying that he put the red diesel in the vehicle, has not produced a cogent reason why the red diesel was in it. Furthermore, in view of the fact that Mr Porteous could have raised a 'reasonable excuse' defence in the Magistrates Court, we are not satisfied that section 10 of the Finance Act 1994 is relevant. Mr Porteous has also taken exception to the omission of the restoration fee in the Restoration Agreement. We agree with Mr Shields that this is not material in itself but HMRC should carry out the procedures correctly. In the present circumstances it is evidence of the haste and potential lack of care which surrounds this case. We do not have the power to order the waiver of the restoration fee, but we allow the appeal and direct (pursuant to Section 16 94) (b) Finance Act 1994) that HMRC conduct a further review of the original decision taking into account our concerns with regard to those matters which need to be considered.

12. 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.

TRIBUNAL JUDGE
RELEASE DATE: 25 July 2011