TC01751

Appeal number TC/2011/00516

Excise Duty – Non-restoration of motor vehicle – Reasonableness of decision – mistake of fact – appeal allowed

FIRST-TIER TRIBUNAL

TAX

PIO-MAR-TRANS **Appellant**

- and -

UNITED KINGDOM BORDER AGENCY **Respondent**

TRIBUNAL: TRIBUNAL JUDGE MANUELL
Mr MARK BUFFERY, FCA AIIT

Sitting in public at 45 Bedford Square, London WC1B 3DN on 16 December 2011

Mr M Wiencek for the Appellant

Mr J Lill, Presenting Officer, for the Respondent

DECISION

1. The Appellant operates a fleet of heavy goods vehicles and is based in Poland. The Appellant is owned by Mrs Lucyna Niedbalska ("Mrs Niedbalska"). The Appellant appealed against the Respondent's decision contained in a letter dated 10 December 2010 which notified the Appellant that the Respondent would not restore three vehicles seized because they were used for the carriage of goods liable to forfeiture. The vehicles were a Kogal Trailer (registration POB88US), seized 1 August 2010, a Volvo Tractor (registration POB11FF), seized 10 August 2010, and a second Volvo Tractor (registration POBN866), seized 30 August 2010. The goods liable to forfeiture were a total of 24,560 cigarettes and the excise duty evaded was a total of £4,227.01: see Tobacco Products Duty Act 1979, Section 2(1), Excise Goods (Holding, Movement and Duty Point) Regulations 2010, regulations 13 and 88.

2. When the vehicles were seized notice was given to the Appellant that it could challenge the seizures in the Magistrates' Court by sending the Respondent notice of appeal within one month of the date of the seizures. The Appellant failed to pursue any such appeal and the three vehicles were thus deemed forfeit to the Crown by the passage of time and under paragraph 5 of schedule 3 of the Customs and Excise Management Act 1979.

3. By virtue of section 14(2) of the Finance Act 1994, any person whose liability to pay any relevant duty or penalty is determined by, results from or is or will be affected by any decision to which the section applies, may require the Respondents to review their decision. Section 16(4) of the same act provides that

"(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that [the Respondents] or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say –

(a) to direct that the decision, so far as it remains in force, is to case to have effect from such time as the tribunal may direct;

(b) to require [the Respondents] to conduct, in accordance with the direction of the tribunal, a further review of the original decision; and

(c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a further review, to declare the decision to have been unreasonable and to give directions to [the Respondents] as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in the future."

Section 16(6) of the same act provides that (apart from specified matters which are not in dispute in this appeal) it shall be for the Appellant to show that the grounds on which the appeal is brought have been established.

4. Mrs Niedbalska accompanied by her husband Mr Niedbalska appeared at the hearing. The proceedings were interpreted to them throughout and at all stages by the Tribunal's qualified Polish interpreter. Mr and Mrs Niedbalska confirmed that they understood the interpreter. The Tribunal was satisfied throughout the hearing that such comprehension was maintained. The Tribunal established that Mr Weincek who appeared for the Appellant was not legally qualified but was assisting the Appellant without fee, at its request. There was no objection raised to his participation in the proceedings and the Tribunal considers that his presence and assistance to the Appellant was helpful.

5. The Tribunal explained the nature of the proceedings to the Appellant and that its powers were limited by the legislation summarised at paragraph 3, above. The Appellant had to show that there had been unreasonableness by the Respondent such that a review was needed and/or that the decision was unlawful, e.g., because it was disproportionate. It was not open to the Appellant to reopen the issue of commerciality because they had not appealed to the Magistrates' Court over the vehicle seizures.

6. Mrs Niedbalska was sworn and gave evidence. She adopted her witness statement dated 16 December 2011. There Mrs Niedbalska gave details of the individual shipments for the three disputed vehicles. In each case the driver had admitted that the cigarettes were carried without the knowledge or consent of the Appellant. Each driver had signed a declaration addressed to the Appellant stating that smuggling attempts were illegal and that they would bear personal liability. Disciplinary action was taken by the Appellant against each driver. Two were fined and given final warnings, the other was dismissed. The Appellant had been in business for over 20 years and considered that it had taken all reasonable steps to prevent misuse of its vehicles.

7. The Tribunal examined Mrs Niedbalska in chief to enable her evidence to be given, in the absence of a legally qualified representative. Mrs Niedbalska said that she with her husband owned the Appellant, which had 37 vehicles and 42 drivers. Drivers were recruited using references (including checking criminal records and previous employers) and a driving test. No driver with a criminal record would be offered employment. The drivers collected the vehicles from the company depot and were next seen when the vehicle was returned after completion of each delivery. Mrs Niedbalska was unaware of any date in the list of seizures from the Appellant's vehicles in the Respondent's bundle shown to her prior to the dates of seizure for the three vehicles the subject of the present appeal.

8. Cross-examined, Mrs Niedbalska accepted that she was responsible for the company administration. She insisted that she had no knowledge of the individual drivers' actions and had no additional means of supervision beyond the certificates which each driver signed. She did not accept that smuggling was normal. Company policy was dismissal in such cases. All three drivers involved had been dismissed. Mrs Niedbalska agreed that in one case she had given one driver a second chance but that was because the driver was the family breadwinner. That driver had been restricted to work within Poland. He had been dismissed once he had paid back what

he owed. Mrs Niedbalska denied that the Appellant's systems were not robust, and that the Appellant had been complicit in the smuggling by failing to enforce dismissals of drivers caught smuggling.

9. The seizures in question had happened while Mr and Mrs Niedbalska were on their August holiday. One driver had sworn that he would not reoffend and so he was given a second chance.

10. Mrs Niedbalska was shown the Respondent's list of seized goods from the Appellant's vehicles. It was pointed out that there had been 13 seizures in 2010 alone, i.e., more than one per month. Mrs Niedbalska said that the company could not realistically do more than it already did. It could hardly conduct physical checks on each vehicle after they had left the depot. No letter had ever been received from the Respondents about the seizures of smuggled goods before the vehicle seizures in question.

11. It was put to Mrs Niedbalska that company vehicles had been restored, free of charge, in 2006 and 2008. She agreed. The Appellant had no English speaking employee and had used the services of an English speaking Polish lawyer for a period but he had not been satisfactory. Mrs Niedbalska insisted that she had no knowledge of any seizures of smuggled goods in 2010 apart from the three the subject of the present appeal.

12. In re-examination Mrs Niedbalska explained that the English speaking Polish lawyer had not shown her letters from the Respondent until later on. He had been unsatisfactory.

13. Mr Niedbalska gave evidence. He valued the three vehicles at about €55,000 in total, based on his knowledge and experience in the industry, and the buying and selling of the Appellant's vehicles which he arranged.

14. Mr Raymond Brenton ("Mr Brenton"), a Review Officer employed by the Respondent, gave evidence. He confirmed as true and adopted as his evidence in chief his witness statement dated 3 June 2011. There he gave details of his experience, the Respondent's procedures and of the Respondent's past dealings with the Appellant and its drivers.

15. In his oral evidence he explained his work, in which he had been engaged for the past 10 years. Review of decision letters were posted and faxed. All circumstances were considered when a review was conducted. He had examined his review letter again and stood by his conclusions. The letters of warning which would have been sent to the Appellant were in standard form. A letter was given to the driver caught with smuggled goods explaining that the seizure rendered him liable to prosecution. These were handed to each driver personally. There was a Seizure Information Notice which was generated by the National Post-seizure Unit. The seizure numbers issued were unique. The list of seizures in the Respondents' bundle was accurate but not necessarily exhaustive, as there was no central index kept. But it indicated the history of the Appellant and should be regarded as the minimum. There was an order

of penalties, ranging from restoration of vehicles free of charge to fines to the ultimate sanction of seizure of vehicles. Seizure of vehicles was applied where the lower penalties had not worked.

16. Mr Brenton explained that evidence of ownership was needed before seizure of a vehicle could be effected. If vehicles were leased they had to be returned to the leasing company. Innocent third parties had to be protected. It was the case that a driver might not inform his employer where a vehicle was restored for a fee, so a letter would be sent to the employer/owner. That was standard practice, unless a vehicle was not restored in which case notice of seizure of the vehicle would be sent to the owner. There had been two more seizures of smuggled goods from the Appellant's vehicles since the vehicle seizures the subject of the appeal. The relevant letters were in the Respondent's bundle. The Respondent's decision had to be reasonable in all the circumstances. Proportionality and hardship had to be considered and were considered. No exceptional hardship had been shown by the Appellant.

17. Cross-examined, Mr Brenton said that the letters in the Respondent's bundle as given to drivers which showed that the vehicle had been restored were followed up by a separate letter to the owner who might not otherwise know what had been going on. An explanatory leaflet "Where is my lorry" was given to drivers when vehicle seizure was effected.

18. Mr Brenton explained to the Tribunal that prosecutions of drivers for smuggling were rare in practice. They were warned of a criminal prosecution if they repeated the offence, but this was almost never done. The policy was one of disruption. Seizures created problems of storage which was why seized vehicles were sold off promptly if restoration proceedings were not commenced.

19. Mr Brenton explained to the Tribunal that if he when making his review decision had believed that the Appellant had not known of the recent history of its drivers and their appalling record, he might well have taken a different view.

20. Mr Lill for the Respondents relied on his skeleton argument and submitted that the Respondents' decision was reasonable and proportionate in all the circumstances. While Mrs Niedbalska said that she had not received the letters preceding the seizures, that was unlikely. Mrs Niedbalska had not followed her declared policy for drivers caught smuggling, but had turned a blind eye. Mrs Niedbalska had accepted responsibility but sought to hide behind the certificates signed by the drivers. The previous sanctions applied to the Appellant had been insufficient, which warranted the ultimate sanction of seizure of vehicles used in connection with smuggling. There was an accumulation of incidents, 13 in 2010 alone for the Appellant. There was a failure by the Appellant to control its drivers. There was no disproportionality nor breach of European Convention on Human Rights rights in the vehicle seizures, i.e., Article 1 of the First Protocol.

21. Mr Weincek for the Appellant relied on his skeleton argument. In summary he argued that there had been problems for the Appellant in its past representation by the

Polish lawyer who no longer acted. There was inadequate evidence that any relevant warning letters had in fact reached the Appellant, and so the Appellant had been placed at a serious disadvantage. The vehicle seizures were disproportionate.

22. The Tribunal reserved its determination, which now follows.

23. The Tribunal is satisfied that the evidence given to it by the witnesses at the hearing was truthful and can be relied on. The one area of disputed fact, or unclear fact, is the state of the Appellant's knowledge of the embarrassing conduct of its drivers during 2010 and earlier. Here it is important to record that the Tribunal formed the impression of Mr and Mrs Niedbalska that they were responsible persons, unlikely to condone wrongdoing, unlikely to ignore official correspondence brought to their notice and unlikely to ignore any threat to the business they had carefully nurtured over the years. No copy of any letter sent to the Appellant by the Respondents in connection with incidents of smuggling by the Appellant's drivers prior to the vehicle seizures the subject of the present appeal was produced by the Respondent. Mr Brenton was reliant on the Respondent's established practice and his knowledge derived from that and the documents sent to him in his capacity as Review Officer. In principle it is unlikely that the Respondents would have deviated from standard practice, which was also good practice for the reasons explained by Mr Brenton in his evidence. The difficulty is that there was insufficient evidence before the Tribunal to show that the Appellant had actual notice of the previous recent illegal smuggling history of its drivers. There had been a vehicle seizure and restoration in each of 2006 and 2008, but that was some time ago and the Appellant's staff and fleet were large. It is not for the Tribunal to speculate as to why the letters which should have been sent by the Respondent and perhaps were sent were not in fact received. It is certainly possible that the Appellant's Polish lawyer had not kept the Appellant informed if any such letters had been received by him. In any event, it seems to the Tribunal improbable from its assessment of the evidence and the witnesses that Mr and Mrs Niedbalska would not have taken prompt action had they learned that their business and reputation were being undermined by illegal activity by its drivers. Mrs Niedbalska was challenged for her decision not to sack one driver immediately his smuggling had come to light, but in the Tribunal's view her decision to restrict the driver in question's deliveries to within Poland was a sensible business decision as it gave the opportunity to recoup at least part of the loss as well as showing humane employee relations which would encourage driver loyalty. It is, of course, a matter for the Respondent, but prosecutions of smuggling drivers in cases similar to the present where there has been no question of the owner's complicity might be thought to have a useful deterrent effect at least as great as the prospect of dismissal by the employer.

24. Taking all of the available evidence into account, the Tribunal finds that Appellant had not received actual notice and had no means of knowing of the relevant recent smuggling incidents by its drivers prior to the vehicle seizures the subject of the present appeal. The actions of the drivers in question plainly had no connection with the Appellant and were not readily detectable, given that the drivers had so much time with the vehicles in question, away from the Appellant's premises. The drivers had to be trusted and the recruitment procedures and anti smuggling declarations were

reasonable steps on which the Appellant placed reliance. The summary of the evidence set out above at paragraphs 6 to 19, above, of this determination stands as the Tribunal's findings of fact, read with this additional finding.

25. The Tribunal accordingly finds that the Respondent's decision was made under a misapprehension of fact and resulted in a decision which was unreasonable in law. That finding, it must be emphasised, implies no criticism at all of the Respondent or any of its officers, least of all Mr Brenton, all of whom have acted in a professional and honourable manner throughout. The difficulty is that the Respondent reached its review decision believing that the Appellant, i.e., Mr and Mrs Niedbalska, had been notified of the past seizures of smuggled goods from the drivers of their vehicles and thus had good reason to be aware of frequent if not systematic dishonesty by its drivers. The Tribunal has found that this was not, however, the case and that the ultimate sanction point in the enforcement armoury had not necessarily been reached.

26. The Tribunal thus finds that the respondent's decision was inadvertently unreasonable and that it cannot stand. The appeal is accordingly allowed.

27. In accordance with its powers under the Finance Act 1994, section 16, the Tribunal directs that: -

(a) the Respondent's decision dated 10 December 2010 (the subject of the present appeal) cease to have effect from the date of release of the Tribunal's decision; and

(b) the Respondent shall conduct a further review of that decision, taking into account the Tribunal's finding that the Appellant was unaware of the relevant recent illegal conduct of its drivers prior to the vehicle seizures on 1 August 2010, 10 August 2010 and 30 August 2010.

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 (as amended). 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 MANUELL
RELEASE DATE: 16 January 2012