TC01805

Customs Duty Request for the restoration of Volvo V70 estate car, seized, along with significant amount of tobacco - jurisdiction of the Tribunal and the Appellant's contentions - whether we accepted the Appellant's account of the intended use of the tobacco - Appeal dismissed

FIRST-TIER TRIBUNAL **Reference no: TC/2010/05776**

TAX

JOHN GOODAYLE

Appellant

-and-

DIRECTOR OF BORDER REVENUE

Respondent

Tribunal: HOWARD M. NOWLAN (Tribunal Judge)
CATHY FARQUHARSON

Sitting in public at The Old Bakery, Queen's Road in Norwich
On 17 January 2012

The Appellant in person, assisted by his daughter
Miss Forbes of the Criminality and Detention Group of the UK Borders Agency on behalf of the Respondents

DECISION

Introduction

1. This was a case where the Appellant was contending that it had been unreasonable that his Volvo V70 car had been seized and not restored to him. The seizure had occurred when he, his wife and his brother-in-law were returning from a short trip to Belgium, returning via Eurotunnel, when Customs officers had concluded that the considerable amount of hand-rolling tobacco in large boxes in the estate car section of the Volvo had been imported for commercial purposes.

The facts

2. The Appellant, his wife and her brother ("Mr. Cotton") were stopped and questioned at the UK Control Zone, Coquelles on 22 March 2010 when returning to the UK from Belgium. They admitted that they had bought hand-rolling tobacco, and the 6 boxes, each containing 120 50 gram sealed packs of hand-rolling tobacco were easily seen in the rear section of the Volvo V70 estate car. The total weight of tobacco involved in the importation, there being 720 sealed packs of 50 grams each, was 36 kilograms.

3. It was suggested by the Appellant and his travelling companions that the tobacco had been bought so that each occupant of the car would have 2 boxes, or 240 packs, and that the tobacco had been purchased for own consumption.

4. All three occupants of the car were interviewed and the Customs officers decided that their explanations were inconsistent. The officers noted that on Mr. Cotton's indicated level of tobacco consumption, it would take him 5 years to smoke the tobacco in 240 packs, which seemed odd when tobacco was said to have a shelf-life of only about 12 months when stored in ideal conditions. When asked why he had bought so much tobacco, he had replied "It seems a long way to come. You don't want to go home and say I haven't bought much".

5. Whilst it was initially said that the Appellant's wife would take 240 packs herself, it emerged that she was only a modest smoker, and that she smoked cigarettes (about 20 a week) and very little hand-rolled tobacco. She indicated that, with high blood pressure, she was advised not to smoke heavily.

6. When asked about the way in which the tobacco had been paid for, it emerged that it had been paid for in cash. We were shown two consecutive invoices from the Belgian supplier, each for the amount of "1404.00". We were told in the hearing that although the invoice did not indicate the currency involved, the Appellant's understanding was that the total figure of 2808 had actually been £2808. We were certainly familiar with the way in which the various stores in Calais and nearby Adinkerke in Belgium readily received cash payment in Sterling from returning holidaymakers and others, but it still seemed odd that a store in Belgium would produce invoices in Sterling, particularly without indicating that the invoice prices were denominated in Sterling, rather than in Euros. It was then said that Mr. Cotton had given the Appellant £900 in cash on the evening before the purchase, and that the expectation was that when they divided out the tobacco, they would make any required adjustments to the cash payments. When a very small amount of wine had been purchased by the Appellant's wife, she had used a credit card to pay for it.

7. When asked about previous trips through Eurotunnel, the Appellant explained that for some years he, his wife, and generally Mr. Cotton and his wife had travelled quite frequently to Calais because Mr. Cotton had a shareholder voucher that enabled all four and the car to do the trip for £1. It was accordingly quite a pleasant day out, and because they bought back tobacco for own consumption it was some years since the Appellant had bought tobacco in the UK.

8. When asked when he had last made a trip, the Appellant indicated that it was in October or November 2009, and he appeared to indicate that the trip prior to that (when tobacco had last been purchased) had been early in 2009. In fact automatic number plate recognition equipment at the terminal indicated that the relevant Volvo had made trips through the tunnel prior to the one on 22 March 2010 on the dates 3 December 2009, 3 September 2009, 8 June 2009 and 19 February 2009. The last two trips (December 2009 and March 2010) had involved a stay on the Continent for approximately 4 hours, and the earlier ones for 6 hours.

9. Following the interviews with the three occupants of the car, the officers seized the tobacco and the car. They indicated, either then or in subsequent correspondence, that they considered that the tobacco was being illegally imported with a view to sale at a profit. The short grounds mentioned for supporting this conclusion were the very significant quantity of tobacco, the fact that it had been purchased in cash, the inconsistencies between the accounts given by the three occupants of the car, and the feature that if the Appellant's wife smoked only cigarettes, and those very modestly, and her brother would take 5 years to consume the tobacco that he had purchased, when it would go stale in 12 months, much of their evidence was unconvincing.

10. At some point, the Appellant instituted proceedings in the magistrates court, the appropriate court in which to advance any argument that the seizure was illegal. Such an argument could most obviously be mounted on the basis that the tobacco had been purchased either for consumption by the purchaser or for gifts. At a subsequent point, the proceedings before the magistrates court, designed to show illegal seizure, were dropped. In the proceedings before us, the Appellant was no longer seeking the recovery of the tobacco, but was claiming the restoration of the car.

The Appellant's contentions before us

11. In the hearing before us, the Appellant and his daughter, who was supporting the Appellant in advancing his case, advanced the following contentions.

- Having retired, and having the facility to travel to and from the Continent with the benefit of concessionary Eurotunnel terms, the Appellant, his wife, his wife's brother and his wife, did regularly enjoy short trips to the Continent.
- The accounts that the occupants of the car had given when questioned by the Customs officers, all directed to saying that between them the three occupants of the car had bought the tobacco for personal consumption, were not accurate. They had been made, presumably in some panic, and largely because the Appellant and his travelling companions had not understood at the time that it was permissible to import tobacco either for own consumption or with a view to giving it away. In fact their motivation was that the Appellant himself would smoke the tobacco, but much of it would be given away. We were told that there were always pouches of tobacco in the Appellant's sitting room, and

it was "open house" in the sense that the Appellant's daughter, her partner, and various friends were always welcome to take a free pouch of hand-rolling tobacco, whenever they wished.

- The Appellant had already made some reference in the original interview to the fact that his daughter would smoke some of the tobacco because when asked how long it would last, he had made some comment along the lines of "Not as long as you might expect if my daughter keeps on taking it".
- The seizure of the car had caused considerable hardship because the Appellant was not wealthy, and although his wife had a small "run-about", the Volvo had been needed to tow the Appellant's caravan.
- Proceedings that had been instituted before the magistrates court had been dropped, ostensibly because the Appellant had been advised by a friend "high up in Customs" that the better course was to abandon claims for the restoration of the tobacco, and simply advance a claim before our Tax Tribunal that the non-restoration of the car was unreasonable in the circumstances.
- The trip on 22 March 2010 had been arranged partially because the UK budget was then imminent, and it was believed that tobacco duty would then be increased. It was suggested that a UK duty increase would automatically lead to the price of tobacco in Belgium being increased, so that it was prudent to purchase tobacco, and quite a large quantity, prior to the Budget increase in duty.

The contentions on behalf of the Respondents

12. The Respondents reminded us of the division in jurisdiction between the magistrates' court, and the Tribunal. We were told, and we accept, that if an Appellant wishes to assert that tobacco was purchased for own consumption or to be given away, such that the seizure was illegal, then this contention should, and could only, be brought before the magistrates' court. By contrast, before the Tribunal, a contention could be made that the retention of a seized vehicle was unreasonable, but that contention could not be advanced by either of the contentions that could only be brought before the magistrates' court.

13. The Respondents also outlined their policy as it applied to importations of tobacco for commercial use, and they indicated that commercial use itself was subdivided into the two categories of intended commercial sales at a profit, and sales on a cost-reimbursement basis.

14. In the case of intended sales at a profit, vehicles would almost invariably be seized but might be restored if the quantity of tobacco or other excise goods was small, the seizure was a "first occurrence", and the claimant paid whatever fee was charged or other conditions imposed in return for restoration.

15. In the case of seizures of vehicles where tobacco was imported for "not for profit" sale, a division was made between aggravated cases and non-aggravated cases. A case would be aggravated if the amount of hand-rolling tobacco brought to the UK in the vehicle was large, which was taken to mean more than 6 kilograms of tobacco. In this case, the weight of the tobacco was 6 times the limit, and even if the limit was applied (wrongly it was then suggested) by reference to the amount allegedly purchased by each occupant of the car, the weight was still double the limit.

16. It was then explained that Customs' normal policy in relation to restoration in "not for profit" commercial sale cases was to restore a detained vehicle on a first aggravated detection for a fee of 100% of the revenue chargeable on the excise goods in question. We were told, in this case, that the relevant duty was £4,400.

17. For the reasons already referred to in paragraph 9 above, however, the Respondents contended that their view was that the tobacco had been imported for commercial sale at a profit, and not for sale on a cost reimbursement basis. There was nothing unreasonable in the refusal to restore the vehicle. Admittedly the Appellant would have to purchase another car to tow the caravan, and it emerged that the Appellant had purchased a secondhand Skoda. It was accepted that the Appellant was not particularly wealthy, and that the purchase of a replacement car would have dented his modest savings, but it was inevitable that the seizure of vehicles, when seized on illegal importations, would cause some inconvenience and cost and loss. There was, however, nothing particularly unreasonable or unfair about the non-restoration in the present case.

Our decision

18. We accept first the limitations on our jurisdiction. This means firstly that there is no question of our being able to decide that the importation was legal, and that the vehicle should actually be restored on that basis. That contention should have been advanced before the magistrates' court. Whether the case before that court was abandoned because of concerns about costs being awarded against the Appellant or because advice was followed that this was the prudent course, the abandonment of that case precluded any decision that the importation was legal.

19. Before us, the only contention advanced was that the tobacco was being imported for consumption and gift. The Court of Appeal decided in the recent case of *Laurence and Joan Jones v. HMRC* [EWCA] 2011 Civ 824 that:

> *"The role of the tribunal, as defined in the 1979 Act, does not extend to deciding as a fact that the goods were, as the respondents argued in the tribunal, being imported legally for personal use."*

This unfortunate division of jurisdiction leads to a somewhat curious question, albeit one that, on the facts of this case, we decide will not actually arise. Nevertheless, the theoretical question does arise as to what should be done if an Appellant provides irrefutable evidence before the Tribunal, having chosen not to bring proceedings before the magistrates' court, that tobacco was imported with a view to it being given away. It appears to us that the best that a Tribunal could do in this situation would be to find as a fact that the tobacco had been imported with a view to its being given away (that, on this assumption, being the only realistic finding of fact); the Tribunal would then have to conclude that it was precluded from making the resultant finding of law that the importation was legal, and that therefore the best that it could do would be to presume that non-profit sales were at least closer to gifts than sales at a profit, so that the case should be dealt with as if there had been an importation for commercial "not at a profit" sales. In the alternative, perhaps, the Tribunal should simply refuse to hear any contention in relation to intended gifts, so that in that rather technical manner, the Tribunal could and should avoid the dilemma that we have just tried to reconcile.

20. In this case, it is clear that the Appellant can only succeed on any contention in relation to unreasonable detention if the Appellant surmounts the burden of proof. Since the approach of the Customs officers, and the basis of the original seizure was that the tobacco was being imported with a view to commercial sale at a profit, we consider that, unless the Appellant has surmounted the burden of proof in undermining that basis on which the case has been brought by the Respondents, we should dismiss the appeal and leave the seizure of the vehicle in place.

21. Our decision, that renders the complication addressed in paragraph 19 above irrelevant in this case, is that the Appellant has not surmounted the burden of proof in undermining the Respondents' contention that the importation was made with a view to commercial sale at a profit. The grounds for our conclusion of fact are that:

- the suggested explanation for the importation, namely that the Appellant's house or sitting-room was "open house", and that the Appellant's daughter, her partner and other friends were always welcome to take free packets of hand-rolling tobacco whenever they pleased is preposterous;
- whilst it may be common-place for one smoker to offer another smoker a cigarette, it is extraordinarily unusual for anyone just to hand around free packets of cigarettes, and pouches of tobacco hold sufficient tobacco to make many more than the 20 cigarettes normally contained in a packet;
- the Appellant was certainly not particularly wealthy so that the notion of anyone being at liberty to take packets of hand-rolling tobacco seemed particularly far-fetched;
- the various accounts given by the three occupants of the seized Volvo, both in relation to who was going to smoke the tobacco, and how frequently the same Volvo had made the trip to the Continent, were in conflict and later admitted to be untrue;
- since Mr. Cotton would only consume one fifth of the tobacco that, on his estimate of consumption, would be consumed before the tobacco was stale, and the Appellant's wife was unlikely to smoke any appreciable amount at all, the importation involved an importation of 36 kilograms, when the modest limit was 6 kilograms, leading to a very realistic supposition, with a product with a 12-month shelf-life, that most of the tobacco would be sold;
- the claim that the tobacco was bought in a large quantity to "beat the Budget" made no sense, since there was no reason to suppose that the Belgian price would rise merely because UK duty had been raised. The expected Budget increase might however make it particularly attractive to import tobacco with a view to selling it in the UK after the UK prices had all been increased by a Budget increase in duty;
- the feature that the Volvo appeared to have been taken to the Continent on a three-monthly basis; that the concessionary travel permit and the apparent readiness of the occupants of the car to spend a day going to and from Belgium (and rather enjoying the experience) seemed to indicate that there was no reason, assuming personal consumption of tobacco and a few gifts, to bring the very large quantity of 36 kilograms of tobacco into the UK, when it would only remain fresh for a relatively short time. On the past travel record of the Appellant and the occupants of the car, they might easily have travelled to Belgium again in June, September and December 2010, and could easily have then purchased further very modest amounts of absolutely fresh tobacco. Why therefore, if personal consumption or gifts to family and friends were what was intended, did the Appellant and his travelling companions bring in a

very substantial amount of tobacco which on various estimates might take years to consume?

22. In short, the confused, conflicting and untrue evidence and the improbably large amount of imported tobacco lead us to conclude that the Appellant has ended up very well short of having established that the tobacco was imported for any purpose other than commercial sale at a profit. We therefore dismiss the Appeal.

Right of Appeal

23. This document contains full findings of fact and the reasons for our 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.

HOWARD M. NOWLAN
(Tribunal Judge)

Released: 8 February 2012