TC02026

Appeal number: TC/2011/02665

EXCISE DUTIES – Seizure of vehicle – Refusal of Restoration – Whether refusal reasonable and proportionate in the circumstances – Yes – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MANMOHAN SINGH ARORA **Appellant**

- and -

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

TRIBUNAL: JUDGE NICHOLAS ALEKSANDER
CAROLINE DE ALBUQUERQUE

Sitting in public at Bedford Square, London on 26 March 2012

Amit Sareen of ie Law Solicitors for the Appellant

David Bedenham of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The appellant, Mr Arora, appeals against a review by John Harris (an officer of HM Revenue and Customs) contained in a letter dated 10 March 2011, by which he confirmed an earlier decision refusing to restore Mr Arora's car (black VW Touareg registration EJ05 DZD).

2. We heard evidence on oath from Mr Arora (with the aid of an interpreter) and from Mr Ben Cooper (an officer of HM Revenue and Customs). In addition there was presented to us a witness statement from Mr Harris, which was not challenged. A bundle of documents was also produced in evidence.

Background Facts

3. The background facts are not in dispute and we find them to be as follows.

4. Mr Arora is the owner of three convenience shops, including one on the Goldhawk Road near Shepherds Bush in London.

5. On 10 November 2010, HMRC officers visited the shop and found bottles of spirits on the shelves which had counterfeit "duty paid" labels. As Mr Arora was not present in the shop, they told the shop assistant that HMRC officers would return the following day. On 11 November 2010 Mr Cooper visited the shop with his colleague Mr Eve. Mr Arora was present. They identified themselves as officers of HMRC and explained that they were there to check UK duty paid stickers and stamps on both alcohol and tobacco products. They carried out a search under section 122, Customs and Excise Management Act 1979 ("CEMA"). Found on the shelves were 22 bottles (16.5 litres) of wines and 61 bottles (46.2 litres) of mixed spirits. The duty paid labels on the spirits were tested with an ultra violet torch and none of the duty labels fluoresced, indicating that the tax labels and the spirits were counterfeit. Mr Arora was asked to produce documentary evidence (such as invoices or receipts) for the wine and spirits, but did not produce any. Mr Cooper therefore seized the wine and spirits under section 139, CEMA, and form C156 (notice of seizure) was issued to Mr Arora and countersigned by him.

6. Mr Arora was then asked by Mr Cooper about his vehicle, and was told that it was parked at home in Northolt, and that he had taken the bus to work. Mr Arora was asked to empty his trouser pockets, and he produced keys to a Volkswagen vehicle. Mr Arora then took the HMRC officer to the vehicle (the VW Touareg) which was parked in a nearby car park. The car was searched under section 163, CEMA. Found in the car were 218 bottles (106.1 litres) of mixed spirits. The duty paid labels on these bottles were tested with the ultra violet torch. None of the labels fluoresced, again indicating that the tax labels and the spirits were counterfeit. The spirits and the car were seized under sections 49(1), 139(1) and 141, CEMA. Form C156 was issued to and countersigned by Mr Arora.

7. The total amount of duty evaded for the bottles of wine is £37.11 (excluding any VAT) and the duty evaded on the spirits is £1359.28 (excluding any VAT).

8. On 20 November 2010 Mr Arora wrote to HMRC contesting the seizure of the car and the 218 bottles of spirits found in it on the basis that the spirits were for personal use or had been purchased from legitimate sources. HMRC responded on 7 December 2010 stating that they would commence condemnation proceedings in the Magistrates Court. We note that Mr Arora did not contest the condemnation proceedings, and on 15 June 2011, the West London Magistrates Court ordered that the alcohol and the car be condemned as forfeit.

9. On 30 December 2010 wrote to HMRC requesting release of the car. This was treated by HMRC as a request for restoration and on 5 January 2011, HMRC wrote to Mr Arora stating that restoration of the car would not be offered. Mr Arora applied for a review of that decision by an e-mail dated 2 February 2011.

10. The review was undertaken by Mr Harris and his decision not to restore the vehicle was confirmed by letter dated 10 March 2011.

11. The reason Mr Harris gave for his decision was because HMRC's general policy is to seize smuggled goods and any vehicle used to smuggle or transport them. HMRC's policy is not to restore vehicles unless (a) the quantity of goods involved is small (the guide level for spirits is 10 litres) and it is a first offence; (b) the vehicle is adapted for a disabled person; (c) although not adapted, the vehicle is essential for the transport of an elderly person or disabled children to a special school; or (d) the vehicle is used to transport seriously ill people for regular treatment (eg dialysis) and there is no viable alternative transport available. Mr Harris stated in his letter that although he was guided by HMRC policy, he considered every case on its individual merits, and took into account whether there were any mitigating or exceptional circumstances. Mr Harris considered the reasons given by Mr Arora in his letter of 20 November 2010 and did not consider that the explanations given were plausible. Mr Harris took into account that the seizure of the car would cause Mr Arora difficulties, but those were to be expected and were a natural consequence of the car being seized. Mr Harris did not consider that Mr Arora would suffer exceptional hardship from the seizure. For these reasons he decided that the car should not be restored.

12. On 5 April 2011 and 12 May 2011 Mr Arora's solicitors wrote to Mr Harris, contending that HMRC's decision was disproportionate and offering additional explanations for Mr Arora's conduct, and appealing against the review decision. Enclosed with the letter of 12 May were a series of receipts for various purchases of alcohol.

13. The explanation given in those letters to HMRC was repeated to us at the hearing by Mr Arora in his evidence. Mr Arora stated that a man (he did not know his name and he had never met him before – his name was something like "Ali") had visited him in his shop. "Ali" said that he was also a shopkeeper, but he had to close his business and was selling his stock. Mr Arora offered to buy wine and spirits from "Ali". "Ali" subsequently delivered the wine and spirits to Mr Arora's shop. The

price for the wine and spirits was between £2200 and £2300 (compared with a cost of approximately £3000 if it were purchased from a cash and carry). Mr Arora paid a small deposit on delivery, and the balance later. The price was paid in cash, and "Ali" did not provide an invoice or any other form of receipt.

14. On 10 November 2010, when Mr Arora learned of the first visit by HMRC officers, he told us that he was concerned about the fact that he had been duped by "Ali", and took steps to remove the contraband alcohol from the shop, and placed it in his car with a view to disposing of the bottles later – but he was not able to remove all of the alcohol from his shop. When HMRC officers interviewed him on 11 November 2010, he was extremely nervous, which is why he lied about where he lived and the location of the car.

15. Mr Arora also told us that he needed his car to be able to take his children to school and to transport his wife (who was ill) to hospital. Included in the bundles was a letter from Mrs Arora's GP confirming that she is ill – although the letter referred to hospital appointments in the past, it was unclear whether Mrs Arora was still visiting the hospital. However, Mr Arora confirmed in evidence that he had another vehicle (a van) which had two passenger seats and that it was possible to use the van to take his children to school or (in an emergency) take his wife to hospital.

The Law

16. Section 49 CEMA provides that goods which are imported without payment of duty are liable to forfeiture. Section 141(1) provides that, where a thing has become liable to forfeiture, then (a) any vehicle used for the carriage, handling, deposit or concealment of that thing, and (b) any other thing mixed, packed or found with that thing is also liable to forfeiture. Section 139(1) provides that anything liable to forfeiture may be seized by an HMRC officer. Section 152(b) provides:

> "The Commissioners may, as they see fit- …
>
> (b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under [the customs and excise] Acts … ."

17. Section 16, Finance Act 1994 ("FA94") provides that an appeal shall lie to the Tribunal against a decision on review under section 15 FA94. Section 15 provides for the review of decisions which come within section 14 FA94. Section 14(1)(d) includes any decision specified in Schedule 5 FA94. Paragraph 2(1)(r) of Schedule 5 specifies any decision under section 152(b) CEMA "as to whether or not anything forfeited or seized under the customs and excise Acts is to be restored to any person or as to the conditions subject to which any such thing is so restored."

18. Thus, although section 152(b) gives HMRC a discretion as to whether or not to restore seized vehicles or goods, sections 14 to 16 FA94 give a right of appeal to the Tribunal against a refusal to restore or the conditions of restoration. However, section 16 FA94 limits the jurisdiction of the Tribunal in respect of ancillary matters. Section 16(8) defines ancillary matters as those specified in Schedule 5. As a refusal to restore

and the conditions of restoration are specified in Schedule 5 they are, therefore, ancillary matters. The relevant parts of section 16(4) provide:

> "16(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 Commissioners 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:
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> (a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the Tribunal may direct;
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> (b) to require the Commissioners to conduct, in accordance with the directions of the Tribunal, a further review of the original decision, and
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> (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 Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in the future."

19. The precondition to the Tribunal's exercise of one or more of its three powers, namely, that the person making a decision could not reasonably have arrived at it, falls within the guidance given by Lord Lane in the decision in *Customs and Excise v JH Corbitt (Numismatists) Ltd* [1980] STC 231 (not cited to us) at page 239:

> "…..if it were shown the Commissioners had acted in a way in which no reasonable panel of commissioners could have acted; if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight".

20. The Tribunal is entitled to make its own findings on the primary facts which are to be taken into account by HMRC when exercising their powers regarding restoration of goods. The findings of fact include blameworthiness and the proportionality of the penalty imposed to the policy aims pursued having full regard to the individual circumstances of the case. The Tribunal, however, has no fact finding jurisdiction for the purpose of challenging the legality of the seizure and forfeiture of the goods. The Tribunal will then apply its findings of fact to determine whether the Respondents acted reasonably in refusing restoration.

21. The Court of Appeal in *Revenue and Customs Commissioners v Jones and another* [2011] EWCA Civ 824 confirmed the scope of the Tribunal's jurisdiction when a person does not contest the seizure before the magistrates' court. Mummery LJ at paragraphs 71(4) & (5) stated:

> "The stipulated statutory effect of the [importers'] withdrawal of their notice of claim under para 3 of Sch 3 was that the goods were deemed by the express language of para 5 to have been condemned and to have been 'duly' condemned as forfeited as illegally imported goods. The tribunal must give effect to the clear deeming provisions in the 1979 Act: it is impossible to read them in any other way than as requiring

> the goods to be taken as 'duly condemned' if the owner does not challenge the legality of the seizure in the allocated court by invoking and pursuing the appropriate procedure. The deeming process limited the scope of the issues that the [importers] were entitled to ventilate in the FTT on their restoration appeal. The FTT had to take it that the goods had been 'duly' condemned as illegal imports. It was not open to it to conclude that the goods were legal imports illegally seized by HMRC by finding as a fact that they were being imported for own use. 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 [importers] argued in the tribunal, being imported legally for personal use. That issue could only be decided by the court. The FTT's jurisdiction is limited to hearing an appeal against a discretionary decision by HMRC not to restore the seized goods to the respondents. In brief, the deemed effect of the [importers'] failure to contest condemnation of the goods by the court was that the goods were being illegally imported by the [importers] for commercial use".

Issues before the Tribunal

22. Mr Arora's main argument is that the loss of the vehicle is a disproportionate penalty, having regard to (a) the fact that he was an innocent purchaser of the goods and was unaware that duty had not been paid on them, (b) that as soon as he became aware that the goods were contraband, he withdrew then from sale and placed them in his car for subsequent disposal, (c) that the loss of his car will cause him exceptional hardship, (d) that this is a first offence, and (e) that the vehicle (at a value of £10,000) is worth over seven times the excise duty sought to be evaded,

23. We reject this argument. We find Mr Arora's explanations implausible. Mr Arora has been in business for many years, and has been retailing alcohol through three shops for more than five years. Individuals do not just turn up off the street offering to sell wine and spirits at a substantial discount to wholesale prices. Indeed Mr Arora stated in his evidence that nothing like this had ever happened to him before. Mr Arora is a successful small businessman with three shops, and he is clearly no fool. These circumstances would have placed Mr Arora on notice that there was something suspicious about the proposal. The fact that no invoice or other receipt was sought or offered confirms that the sale was illegitimate; a legitimate trader would need to issue a VAT invoice for a sale of this quantity, and Mr Arora would need such an invoice in order to be able to claim his input VAT credit, and provide accounting evidence for the purposes of preparing his own accounts and his income tax return.

24. Mr Arora's actions after HMRC's visits reinforces our view. If Mr Arora had been an innocent purchaser, and had removed the contraband bottles to his car with a view to disposing of them later, then why did he not tell this to HMRC when they arrived. Instead he lied, saying that his home was in Northolt and that his car was parked there. Whilst we understand that Mr Arora may have been nervous, this does not explain his lies.

25. Mr Sareen also sought to argue that some of the bottles found in the vehicle had been purchased legitimately, and duty had been paid on them. If this were the case, then this is an issue that should have been ventilated in the condemnation proceedings before the Magistrates Court. As all the bottles of alcohol seized by HMRC had been condemned as forfeit in condemnation proceedings, this Tribunal is bound by the decision of the Magistrates Court that all the alcohol seized was contraband.

26. We cannot regard the seizure of or the refusal to restore his vehicle as disproportionate, because the point is explicitly dealt with in an authority, binding on us, namely the decision of the Court of Appeal in *Lindsay v Commissioners of Customs and Excise* [2002] EWCA Civ 607.

27. In that case (at [63] and [64]) Lord Phillips MR (as he then was) said this:

> 63. Having regard to these considerations, I would not have been prepared to condemn the Commissioners' policy had it been one that was applied to those who were using their cars for commercial smuggling, giving that phrase the meaning that it naturally bears of smuggling goods in order to sell them at a profit. *Those who deliberately use their cars to further fraudulent commercial ventures in the knowledge that if they are caught their cars will be rendered liable to forfeiture cannot reasonably be heard to complain if they lose those vehicles. Nor does it seem to me that, in such circumstances, the value of the car used need be taken into consideration. Those circumstances will normally take the case beyond the threshold where that factor can carry significant weight in the balance. Cases of exceptional hardship must always, of course, be given due consideration.*
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> 64. The Commissioners' policy does not, however, draw a distinction between the commercial smuggler and the driver importing goods for social distribution to family or friends in circumstances where there is no attempt to make a profit. Of course even in such a case the scale of importation, or other circumstances, may be such as to justify forfeiture of the car. But *where the importation is not for the purpose of making a profit*, I consider that the principle of proportionality requires that each case should be considered on its particular facts, which will include the scale of importation, whether it is a 'first offence', whether there was an attempt at concealment or dissimulation, the value of the vehicle and the degree of hardship that will be caused by forfeiture. There is open to the Commissioners a wide range of lesser sanctions that will enable them to impose a sanction that is proportionate where forfeiture of the vehicle is not justified.

28. Lord Justice Judge (as he then was), agreeing with Lord Phillips said this (at [71] and [72]):

> 71. I agree with the judgment of the Master of the Rolls on the issues of principle and their application to this appeal. My brief observations are by way of emphasis only. There is usually a marked distinction between those who smuggle alcohol, cigarettes and tobacco for profit and those who, without profit, smuggle amounts in excess of the permitted limits for their personal use and occasional distribution to family members and close friends. The vehicles used by those whose activity falls into either category are liable to be seized.
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> 72. *Given the extent of the damage caused to the public interest, it is, in my judgment, acceptable and proportionate that, subject to exceptional individual considerations, whatever they are worth, the vehicles of those who smuggle for profit, even for a small profit, should be seized as a matter of policy*. However, the equal application of the same stringent policy to those who are not importing for profit fails adequately to recognise the distinction between them and those who are trading in smuggled goods. Accordingly the policy is flawed.

29. It appears from these passages (to which we have added the emphases) that the real question of proportionality arising in cases such as this, where illicit alcohol is being sold commercially, is not whether the value of a seized vehicle is disproportionate to the offence, or the amount of duty sought to be evaded, but whether the seizure of a valuable vehicle intentionally used to further a fraudulent commercial venture is disproportionate to the damage caused to the public interest by such ventures. The Court of Appeal has made it clear that in the absence of exceptional circumstances it is not.

30. We consider that there are no exceptional circumstances in this case which would justify restoration. Mr Arora lives in an area which has good public transport and also has a van which can be used to transport his children to school, or take his wife to hospital in an emergency. Although the van may not be as comfortable and convenient as a VW Touareg (for example because it has only two passenger seats, and therefore cannot accommodate his wife and his children at the same time), it is sufficient to do the job if required.

Conclusion

31. We find that HMRC's decision that there were no relevant exceptional circumstances in this case was reasonable and also that HMRC's decision to refuse restoration of the vehicle was not disproportionate or otherwise unreasonable.

32. The appeal is therefore dismissed

33. 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.

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE

RELEASE DATE: 16 May 2012

Authorities mentioned in skeleton arguments but not referred to in this decision:
Aykut Ates v CCE (2002) (E00188)
CCE v Newbury [2003] EWHC 702 (Admin)
Louloudiakis v Dimosio [2001] EUECJ C-262/99
R (oao Hoverspeed and others) v CCE [2002] EWHC 1630 (Admin)