TC02203

Appeal number: TC/2012/00238

Excise Duty – Seizure of 600kgs of unprocessed tobacco – Seizure of vehicle – Whether decision to refuse restoration reasonable – Yes – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MARIA STRZELECKA t/a KAI **Appellant**

- and -

DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE LADY MITTING
MRS GILLIAN PRATT

Sitting in public in Manchester on 7 August 2012

Patrick Williamson, counsel, for the Appellant

Rupert Davies, counsel instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant appeals against the decision of the Respondents, taken on review and notified by letter dated 29 November 2011, to refuse restoration of a Citroen Jumper van FZ87523 ("the van") which was seized on 7 November 2011 at Dover Eastern Dock.

2. The Appellant did not attend the hearing and no oral evidence was called on her behalf. For the Respondents we heard oral evidence from the review officer, Mr Brian Rayden.

The background

3. On7 September 2011, at Dover Eastern Dock, officers stopped the van which was being driven by a Mr Mazgajski ("the driver"). The driver produced three CMR documents, two of which related to consignments which were not relevant to the issue before us and these consignments were not seized and were freed for onward movement.

4. The third CMR document showed the Appellant as haulier; the consignor as Wohnwelt in Germany; the consignee as James Spencer & Co of Bradford. The only description of the goods given was "3 pal" with a given weight of 600kgs. There was no indication of the number of packages, method of packing, nature of the goods or marks and numbers. The intercepting officer's notebook states that he opened the back of the van and found a group of 18 identical unmarked cardboard boxes. One was opened and found to contain unprocessed tobacco. The total weight of the consignment was 600kgs. An issue was to arise over the nature of the packaging, it being the Appellant's assertion in correspondence that the boxes were shrink wrapped. Mr Rayden was of the view that this could not have been so as there was no reference to it in the notebook and it would have been standard practice in describing the appearance of the goods to refer to any outer packaging. The assumption he drew from the notebook was that the boxes were unwrapped and easily opened.

5. In interview, the driver answered or indicated that he did not speak English; that the van belonged to his boss, Kai, and that the tobacco was already on the van when he collected it. There then followed this exchange:

PB	Where were you taking tobacco?
KJM	I don't know – tomorrow morning I get the address
PB	So you not deliver to address on CMR? Indicates Box 1
KJM	No. But maybe tomorrow I am told
PB	How will you get told?
KJM	Not understand
PB	Holds hand to ear – by telephone?
KJM	No by SMS
PB	What about the goods? You deliver to address on the paperwork?

KJM No response

Mr Williamson was later to address us on this exchange although he at no time suggested that it had been incorrectly recorded.

6. Subsequent enquiries were later to reveal that the consignor's and consignee's names and addresses had been highjacked and that James Spencer in fact dealt in furniture.

7. The officers were satisfied that the tobacco was being imported for a commercial purpose and the tobacco and the van were both seized under powers given to the officers under the Customs and Excise Management Act 1979. The driver was served with the Seizure Information Notice and the usual accompanying documentation. The following day, 8 September 2011, the Respondents received by fax a letter from the Appellant. The letter was a request for restoration of the seized van. The Appellant explained that the driver did not know German and did not know what kind of cargo he was carrying and that he could neither speak nor read any foreign language in which the documents were written.

8. By letter dated 13 September 2011, the Respondents asked the Appellant for the following:

1. A copy of the terms and conditions of your contract with the driver.

2. Copies of employment references from the driver's previous employers.

3. Details of your interview with the driver before you employed him.

4. Copies of any instructions or written procedures that you issue to drivers or other staff, including any steps to be taken to prevent smuggling.

5. Details of how you obtained the contract to carry the goods.

6. The checks that you made of the consignor.

7. The arrangements to collect the goods from the consignor and load them onto your vehicle.

8. Details of any physical checks made of the load and the application of any seals/

9. The checks that you made of the consignee.

10. The arrangements to deliver the goods to the consignee.

11. Details of any other measures you take to prevent vehicles being used for smuggling.

9. The Appellant replied by letter dated 20 September 2011. She enclosed certain documents which the Respondents had translated and we had in evidence before us an agreed summary of the translation. The "contract of employment" was a single sheet which did no more than give the name of the Appellant, the name of the driver, his remuneration and that the object of his contract was "using a vehicle in Poland and abroad to carry out orders between 29-08-2011 and 28-09-2011". Also enclosed was a single line statement by the driver stating he had read the professional risk documentation for the position of driver; a single-line signed statement that he had read the health and safety instructions on organising internal transportation and a two page health and safety training certificate. The Appellant explained in her letter that as the driver used to work on a building site, she did not require his references as they would not have been connected with the job of driver. She went on to say that the interview had been carried out in accordance with common practice and the regulations of the Polish Code of Labour. She stated that the drivers were instructed to check their load if it was possible to do so. Her drivers were trained and instructed to observe the regulations on the prevention of smuggling. She went on to say that the contract for the carrying of this consignment had been obtained through the internet; that she had made no special checks on the legitimacy of the consignor or the consignee and that the driver had had no chance to make any physical checks of this load as the goods were packed in boxes, shrink wrapped in plastic foil. Her drivers would have participated in a number of training courses including those focussed on smuggling and they were instructed to be extra careful to check the quantity of goods against the documents and to pay particular attention to "strange" packages.

10. By letter dated 10 October 2011, restoration was offered upon payment of the trade value of the van, £4,350, the officer concluding that the haulier had been reckless.

11. By letter dated 17 October 2011, the Appellant sought a review of this decision. She explained in her letter that the consignor had contacted her on the internet and she had been ordered to pick up a load containing bird litter to transport from Germany to the UK. After the seizure of the vehicle she had tried repeatedly to telephone the consignor but the number was never answered. She repeated that the packages had been wrapped in stretch foil and that the driver had therefore had no opportunity to check the load. She explained that she was over 70 and had been running the firm on her own for a couple of years after her husband's death. The firm had only two vans, including the seized one and her income had therefore fallen by 50% leaving the company in severe financial difficulties. She could not afford to pay the restoration fee, could not work effectively without the van but could not afford to purchase a new one.

12. It fell to Mr Rayden to carry out the review. He had before him the CMR note; the notes of the initial interception; the notes of the interview with the driver; the seizure documentation and the correspondence passing between the parties. After

setting out the facts, Mr Rayden summarised the Respondents' restoration policy for commercial vehicles. The operation of the policy depends upon who is responsible for the smuggling attempt. There were three options:

A : Neither the operator nor the driver are responsible
B : The driver, but not the operator is responsible
C : The operator is responsible

Mr Williamson did not contend for section A and the two relevant sections are therefore B and C which Mr Rayden summarised as follows:

> B: If the operator provides evidence satisfying UKBA that the driver, but not the operator is responsible for or complicit in the smuggling attempt then:
>
> > (1) If the operator also provides evidence satisfying UKBA that the operator took reasonable steps to prevent drivers smuggling then the vehicle will normally be restored free of charge unless:
> >
> > > (a) The same driver is involved (working for the same operator) on a second or subsequent occasion in which case the vehicle will normally be restored for 100% of the revenue involved in the smuggling attempt (or for the trade value of the vehicle if lower) except that
> > >
> > > (b) If the second or subsequent occasion occurs within 6 months of the first, the vehicle will not normally be restored.
> >
> > (2) Otherwise:
> >
> > > (a) On the first occasion the vehicle will normally be restored for 100% of the revenue involved (or the trade value of the vehicle if lower).
> > >
> > > (b) On a second or subsequent occasion the vehicle will not normally be restored.
>
> C. If the operator fails to provide evidence satisfying UKBA that the operator was neither responsible for nor complicit in the smuggling attempt then:
>
> > (1) If the revenue involved is less than £50,000 and it is the first occasion, the vehicle will normally be restored for 100% of the revenue involved (or the trade value of the vehicle if less).

(2) If the revenue involved is £50,000 or more or it is seized on a second or subsequent occasion within 6 months, the vehicle will not normally be restored.

13. Mr Rayden concluded that "In my opinion your company has acted beyond failing to take reasonable checks to prevent smuggling to the point of being negligent or responsible for the smuggling attempt". He took the view that the Appellant was "responsible or complicit" in the smuggling attempt and as the revenue evaded exceeded £50,000, paragraph C(2) should be applied and his decision was that the vehicle would not be restored. In reaching his decision, Mr Rayden took the view that the internet was a very dangerous medium on which to make a contract for the international transport of freight. He would have expected a haulier to make careful checks of consignor, consignee and load but no such checks had been made. The CMR failed to comply with the mandatory CMR regulations in that it did not even attempt to describe the goods. Even though the Appellant claimed that the driver was unable to check the contents of the packages, this in fact was irrelevant as the CMR provided no information capable of being checked against. Further there was no evidence before him that the driver had been informed about the consequences of failing to check loads. The contract of employment contained no such information and there were no details of the driver's interview. Further the Appellant had not taken up any references and he could only conclude from all of this that she had not taken reasonable steps to prevent driver smuggling.

14. In cross-examination, there was some discussion about the nature of the internet site which could have given rise to the contract. There was much supposition but no firm evidence. Mr Rayden was asked what a driver could do if he arrived to collect a load only to find the consignor refused to complete fully the CMR document. Mr Rayden's response was that the driver should contact his employer or as an ultimate sanction just refuse to carry the goods. It was Mr Rayden's view, having taken a holistic approach. that in all likelihood the Appellant was actively involved in the smuggling attempt. His view was that no honest haulier could be negligent in quite so many areas. The Appellant's degree of negligence had passed the point where she became responsible.

15. The Appellant lodged an appeal to the Tribunal against Mr Rayden's decision to refuse restoration. In a rider to the notice of appeal, the Appellant asserted primarily that neither she nor the driver were responsible for or complicit in the smuggling attempt. The Appellant maintained that she had obtained all appropriate details of the consignor company and was satisfied that she was dealing with a legitimate and trustworthy concern and nothing raised her suspicions. She was also satisfied that the consignee was legitimate having carried out a routine internet search against the company. The driver, having arrived at the consignor's premises, had checked the accuracy of the statements in the CMR as to number of packages and condition of the goods and their packaging and he had no grounds to believe that there were any illicit goods within the packages. The boxes bore a German inscription and were wrapped in stretch foil and he also made all reasonable checks. The Appellant's alternative position was that the driver but not she was responsible for or complicit in the

smuggling attempt, she having carried out all reasonable checks of the driver before engaging him. Alternatively, if the Tribunal were to hold that the Appellant had failed to take reasonable steps to prevent her drivers from smuggling, the vehicle should be restored for 100% of its trade value. Immediately before the hearing, the Appellant put in to the Tribunal an unsigned witness statement which took matters little further and to which Mr Williamson made no reference. She also put in what purported to be notes of the interview which she had held with the driver before engaging him. The note concludes with the sentence "I have rung the previous employer who has given a positive reference to Mr Mazgajski". We were told nothing about the origin of this interview note. Importantly we were given no reason why it had not been disclosed in response to the Respondents' letter of 13 September 2011 as it would appear to fall exactly within what was asked for in question 3. We do not know when it was compiled. Was it contemporaneous or drawn up later from memory? We also note that the reference to having rung the previous employer would appear to conflict totally with the statement in the letter of 20 September 2011 that the Appellant did not require the references. We are far from convinced as to the authenticity of this statement but as it was not backed up by any form of oral or written evidence and was in any event not before Mr Rayden when he made his decision, it is not a document which we now take into account.

The jurisdiction of the Tribunal

16. It was accepted by both Mr Davies and Mr Williamson that our jurisdiction was limited to judging the reasonableness of Mr Rayden's decision. The test which we apply is to determine whether or not the Commissioners have acted in a way in which no reasonable panel of Commissioners could have acted; if they have taken account of any irrelevant matter or have disregarded something to which they should have given weight.

Submissions and conclusions

16. In considering the reasonableness of the Respondents' decision, both the reasonableness of the policy and the reasonableness of its implementation have to be considered. Mr Williamson did not seek to challenge the reasonableness of the policy and the issue before us was therefore confined to the reasonableness of Mr Rayden's implementation of the policy.

17. It was Mr Davies's contention that all the factors taken into account by Mr Rayden, and detailed above in this decision, were relevant and that the conclusions which Mr Rayden had drawn from them were reasonable.

18. Mr Williamson began by very helpfully and fairly making certain concessions. Primarily he conceded that in her obligation to carry out checks into the consignor and consignee companies, the Appellant had failed to do enough and had failed to discharge the burden upon her. Secondly, in respect of the interview and contract of employment, Mr Williamson accepted that the Appellant had wholly failed to address the points raised by the Respondents and he conceded that the Appellant had failed to

establish that she had carried out the necessary checks into the driver's background. He also accepted that there was no evidence to show that he had been properly trained in the obligations and duties of transporting goods across international borders or that he had been advised of the penalties which would be attracted if he were to become engaged in smuggling. Thirdly Mr Williamson accepted that the completion of the CMR document was woefully inadequate and indeed that it was self-evident that it lacked the mandatory details.

19. Mr Williamson stressed that it was not in dispute that the company appears to have been of previous "good character"; the firm had not previously come to the attention of the Border Agency and that this was to be treated as a first offence. He stressed that the Appellant had checked that the consignor had a company registration number which, under Polish law, would indicate to her that this was a reputable company with which she was entitled to engage. He accepted that the company's affairs were not in the best of order and its systems somewhat lacking but this did not mean that it was trading illegally. Mr Williamson's submission was that the evidence certainly pointed to negligence and indeed he conceded that there had been a degree of recklessness and risk but this did not go as far as pointing to a knowing involvement.

20. Mr Williamson's strongest challenge was to the interview with the driver and he invited the Tribunal to approach the answers given with a degree of caution. He pointed to what he saw as a substantial amount of evidence from both the officer's notebook and the interview to show that the driver had little English. Mr Williamson also pointed out that the officer, in questioning the driver, states that he "indicates Box 1" when asking about the address to which the goods were to be delivered whereas Box 1 gives the consignor's details. This would be enough to throw a driver with little English in to a deal of confusion before answering. He also pointed out that when asked how he would be told of the destination of the goods, the driver did say that he did not understand.

21. Mr Williamson also made the point that the first officer had offered restoration on terms and in seeking a review of that decision, the Appellant was not to be aware that her position could worsen. It was not fair, contended Mr Williamson, that the first decision should be made on the basis that the Appellant had been reckless but that on review, a decision could be based on a totally different premise, namely that she had been complicit.

Conclusions

22. We were considerably hampered, as Mr Williamson acknowledged, by a lack of evidence. We had no information about the journey made by this consignment. We know nothing of the circumstances of its collection or of the journey which it made from collection to interception. The Appellant had asserted in correspondence that the driver could not check the load because it was shrink wrapped. There was no supporting evidence to this assertion and in our view the better evidence comes from Mr Rayden that had the packages been shrink wrapped there would have been

reference to that in the notebook. We know nothing as to the circumstances of the completion of the CMR. Much was made of the difficulties which a driver faces if a consignor fails to cooperate in completing the document but there was no evidence that that was what happened here. We know nothing of any communication, or lack of communication, between the Appellant and her driver either before or during the journey. Other than that the Appellant had been approached over the internet, we have no information as to how the contract came into being. All we have on behalf of the Appellant is exactly what Mr Rayden had, namely a couple of letters. These shortcomings are of course all the more crucial given that the burden of proof is upon the Appellant.

23. We did not hear any evidence from the driver so we have no idea how good his English may have been or how much he understood of what he was being asked. Mr Williamson is clearly right when he pointed out that the officer had indicated the incorrect box on the CMR and we don't know what degree of confusion this led to in the driver's understanding of what he was being asked. Whether he understood what he was being asked, we do not know, but what is quite clear, and indeed is not challenged by Mr Williamson, is that in answer to a question, he answered "I don't know – tomorrow morning I get the address". This exchange preceded the incorrect indication of box 1. The exchange between the officer and the driver as to the method of communication also appears to be clear. The officer held his hand to his ear to indicate a mobile phone message but the driver replied "no by SMS". The only conclusion to be drawn from this is that the driver knew he was not taking the goods to the named destination but was expecting a text message the following day. This we find to be clear.

24. The factors which Mr Rayden took into account were obviously all relevant. There is the accepted complete absence of any checks on the identity of the consignor or consignee load and there is the absence of any evidence surrounding the employment of the driver and what instructions he was given as to the likely penalties to smuggling. Mr Rayden was, in our view, more than entitled to conclude that the company had acted "beyond failing to take reasonable checks to prevent smuggling to the point of being negligent or responsible for the smuggling attempt". In his submissions, Mr Williamson highlighted the distinction between the first decision where the officer had considered the Appellant to have acted recklessly and allowed restoration on terms and Mr Rayden's decision that the Appellant had been complicit and had refused restoration at all. We see nothing wrong in Mr Rayden basing his decision on a different premise. The whole purpose of a review is that it looks at the matter afresh. Mr Rayden does not take as his starting point the view of the original officer. He in effect begins again. The question before us is whether or not Mr Rayden, in reaching the conclusion which he did, acted reasonably. We do not have to decide whether we believe the Appellant was complicit but whether Mr Rayden was reasonable in reaching that view. It is our considered view that he clearly was. He took into account all the documents that had been put before him and in our view reached a reasonable conclusion upon them. He was fully entitled to believe that the recklessness was so total in every single area of this consignment that it could only point to complicity. Given that he believed the Appellant to have been complicit, the

policy provides for a refusal of restoration, given the value of the revenue involved. As we have said the onus of proof is upon the Appellant and she has put before us no evidence to detract from a very clear inference that the company acted so recklessly it had to bear at least some responsibility for what occurred.

25. Mr Williamson did not address us on either proportionality or hardship but for the sake of completeness we will deal briefly with both of these issues as they were considered by Mr Rayden. Mr Rayden was, in our view, quite right to conclude that non-restoration was proportionate given the respective values of the van, worth £4,350 against the evaded excise duty of £114,168. We appreciate that the Appellant will have suffered hardship as a result of the seizure but we share Mr Rayden's view that hardship is to be expected and that it was not here exceptional. Again we would point out that the onus of proof is on the Appellant and of course she put nothing before the Tribunal.

26. We therefore conclude that Mr Rayden's decision was reasonable. It was not one which could not reasonably have been reached and the appeal is dismissed. One point arose as to the ownership of the van as it is believed that it could have been leased. The uncertainty arises over the fact that the "lease document" is in Polish and there was therefore no actual knowledge of its terms. It is outside our jurisdiction to make any directions as to the disposal of the vehicle but Mr Davies and Mr Rayden indicated that they would be willing to put a stop on its disposal for say 28 days from the date of release of this Decision to allow the Appellant to contact the lessors and for any representations to be made by then.

27. 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.

LADY MITTING
TRIBUNAL JUDGE

RELEASE DATE: 20 August 2012