TC03027

Appeal number: TC/2013/00234

EXCISE DUTY – Appeal against decision not to restore vehicle seized on entry into the UK – Whether the decision could reasonably have been reached – Yes – Whether exceptional hardship – No – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

RICHARD BALAZ **Appellant**

- and -

DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE JOHN BROOKS
NORAH CLARKE

Sitting in public at Eastgate House, Newport Road, Cardiff on 22 October 2013

The Appellant in person

Tara Wolfe, counsel, instructed by the Director of Border Revenue for the Respondents for the Respondents

DECISION

1. This is an appeal by Mr Richard Balaz against the decision of the UK Border Force ("UKBF"), contained in a letter dated 7 December 2012, in which they notified him that, after conducting a further review they would not restore a Skoda Octavia motor vehicle (the "Vehicle") that had been seized on 12 August 2012 when it was used by him to carry 20.8 kg of hand rolling tobacco.

2. It may be useful, at this stage, to explain the role of the Tribunal in an appeal such as the present. This was helpfully set out by Judge Hellier in *Harris v Director of Border Revenue* [2013] UKFTT 134 (TC) as follows:

> "4. We must explain at the outset that the role of this tribunal in an appeal of this nature is unusual and is limited. There are two aspects to this.
>
> 5. First, in relation to the question of whether or not a car should be returned, we are not given authority by Parliament to make a decision that it should or should not be restored. The decision as to whether or not to restore the car is left in the hands of [the UKBF]: only they have the power or duty to restore it. Instead we are required to consider whether any decision they have made is reasonable. If it is not reasonable we can set the decision aside and require them to remake it; we can give some instructions in relation to the remaking of the decision, but we cannot take the decision ourselves. If we set aside a decision and [UKBF] make a new decision, then the taxpayer may appeal against that decision and the same process follows.
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> 6. It is important to remember that a conclusion that a decision is not unreasonable is not the same as a conclusion that it is correct. There can be circumstances where different people could reasonably reach different conclusions. The mere fact that we might have reached a different conclusion is not enough for us to declare that a conclusion reached by [UKBF] should be set aside.
>
> 7. The second limitation in our role follows from the fact that Parliament has decreed that it is for the magistrates court or the High Court to decide upon whether or not goods are legally forfeit. The Customs and Excise Management Act 1979 ("CEMA") sets out the required procedure: if the subject disputes the legality of the seizure he can require [UKBF] to bring proceedings (unhappily they are called condemnation proceedings) in the magistrates court to determine the legality of the seizure. If the magistrates court decides that the goods are properly forfeit then the tribunal cannot overturn that decision or take a different view. Further we must proceed on the basis that any finding of fact which was necessary for the magistrates court to have come to this decision is to be taken as having been determined by the magistrates and, before us, is therefore to be treated as proved.
>
> 8. If the subject does not require condemnation proceedings to be taken in the magistrates court, he can effectively concedes the legality of the seizure. That is because Schedule 3 CEMA provides:

> "5. If on the expiration of the [one month period for giving notice that something is asserted not to be liable to forfeiture] no such notice has been given to the commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with, the thing in question shall be deemed to have been duly condemned as forfeit."
>
> 9. The effect of this deeming is that any facts which would have been necessary to the conclusion that the goods are forfeit must also be assumed to have been proved. It would be an abuse of process to permit such conclusions to be reopened in this (see para [71(7)] *HMRC v Jones* [2011] EWCA Civ 824: "Deeming something to be the case carries with it any fact that forms part of that conclusion").
>
> 10. ...
>
> 11. There is one other oddity about this procedure. We are required to determine whether or not the [UKBF's] decision was "unreasonable"; normally such an exercise is performed by looking at the evidence before the decision maker and considering whether he took into account all relevant matters, included none that were irrelevant, made no mistake of law, and came to a decision to which a reasonable tribunal could have come. But we are a fact finding tribunal, and in *Gora and Others v Customs and Excise Commissioners* [2003] EWCA Civ 525 Pill LJ approved an approach under which the tribunal should decide the primary facts and then decide whether, in the light of the tribunal's findings, the decision on restoration was in that sense reasonable. Thus we may find that a decision is "unreasonable" even if the officer had been, by reference to what was before him, perfectly reasonable in all senses."

Evidence

3. We heard from Mr Balaz, through an interpreter, and also from Mr David Harris, the UKBF Officer who carried out the review against which Mr Balaz had appealed. Both gave their evidence on oath. In addition we were provided with a bundle of documents that included all of the material that was before Mr Harris when undertaking the review.

4. On the basis of this evidence we make the following findings of fact.

Facts

5. On 2 August 2012, whilst driving the Vehicle with Ms Leula Kroupova as a passenger, Mr Balaz was stopped by a UKBF officer at the Port of Dover. He told the officer that he was going to Chatham, Cardiff and Bradford to see his family and was intending to stay in the UK for one or two weeks and that he had a return ticket and was going to stay with his family in the UK. Mr Balaz confirmed that he owned the Vehicle and had done so for "a couple of months." Asked if this was the first time he had been to see his family Mr Balaz answered "No second."

6. When questioned if he had any cigarettes or tobacco Mr Balaz said that he did have tobacco but that he did not know how much. He agreed for the Vehicle to be searched and opened the boot in which there were four boxes marked 4.8 Kgs of Lancia hand rolling tobacco. Also, behind the driver's seat, was a Marlboro box containing a number of tubs of Marlboro hand rolling tobacco. Mr Balaz explained that six of the Marlboro tubs were for him and three for Ms Kroupova and the remainder of the tobacco was for his family who were paying him for it.

7. After it had been read to him, Mr Balaz signed the officer's notebook to confirm he agreed its contents. He was then read the following statement:

> You have excise goods in your possession (or control) which appear not to have borne UK duty. Goods may be held without payment of duty provided they are held for your own use. I intend to ask you some questions to establish whether those goods are held for a commercial purpose. If no satisfactory explanation is forthcoming or you do not stay for questioning, it may lead me to conclude that the goods are held for a commercial purpose and your goods and vehicle may be seized as liable to forfeiture. You are not under arrest and are free to leave at any time. Do you understand?

Mr Balaz confirmed that he understood and agreed to be interviewed.

8. During the interview Mr Balaz confirmed that six tubs of Marlboro were for him. As for the remainder of the tobacco, he said that three tubs were for his cousin in Chatham with whom he was going to stay for three days because his child has a christening. One box was for his wife as she was staying in Cardiff and they were going to stay there for "a couple of days together". The rest of the tobacco was for his family in Bradford where he had four cousins as they had a christening in Bradford. Mr Balaz said this was the first time he had brought tobacco into the UK for his family and that they were paying him €700 which was to cover the cost of the tobacco ferry ticket and fuel.

9. A receipt found in the Vehicle issued by Aldi Markt Oostendelaan (near Ostend, Belgium) on 31 July 2012, shows that 90 x 200g pouches of tobacco had been bought at a cost of €1,169.10.

10. Mr Balaz said that he smoked Marlboro tobacco and Pall Mall cigarettes and as he smoked "a good 40" cigarettes a day, a 170g tub of Marlboro would last him two days as he could make 60 to 80 hand rolled cigarettes from a tub. This compares with the 80 to 100 hand rolled cigarettes that Mr Harris told us an average smoker would get from this quantity of tobacco.

11. When asked, Mr Balaz said that he worked in Belgium and that he had been resident there from September 1999. He said that he did not receive any benefits in Belgium or any other countries but that his wife, by whom he meant Ms Kroupova, who lived in Cardiff as she was studying there was in receipt of benefits. Mr Balaz explained that he had worked as a warehouse manager in Cardiff from September to December 2011.

12. However, documents found in the Vehicle included an undated letter from Cardiff City Council Benefits Section regarding Housing/Council Tax Benefit claim which had enclosed a "notification letter" (not found in the Vehicle) advising Mr Balaz of his "benefit award"; part of a form (which appears to be an application for Housing Benefit) completed and signed by Mr Balaz on 23 January 2012 in which he states he came to the UK on 25 September 2011 and planned to stay in the UK "for always"; a letter from Cardiff City Council dated 12 July 2012 to Mr Balaz confirming payment of Housing Benefit in respect of a property in Cardiff; and a continuation of a letter from HM Revenue and Customs to Mr Balaz and Ms Kroupova detailing the amounts of Working Tax Credit and Child Tax Credit for the period from 5 July 2011 to 5 April 2012 stating that a further payment will be made to Mr Balaz for this period.

13. Mr Balaz was asked how many times he had travelled to the UK in the last six months. He replied, "two weeks ago I was here to check my wife and son. Beginning of June, February that's it" and said that he had previously been stopped by Customs when entering the UK in the beginning of June 2012 but that "everything was OK then."

14. Although he had only travelled to the UK once before in the Vehicle, on 17 July 2012, which Mr Balaz said is what he understood the question "how many times have you travelled to the UK in the last six months?" to mean, this was in fact the 12th trip Mr Balaz had made to the UK from Belgium in the last six months.

15. Satisfied that the tobacco was held for a commercial purpose it was seized by the Officer who also seized the Vehicle, as it had been used to carry the tobacco. Although Mr Balaz did initially challenge the legality of the seizure in the Magistrates Court as a solicitor was not appointed the tobacco and the Vehicle were condemned as forfeit to the Crown by passage of time under paragraph 5 of schedule 3 to the Customs and Excise Management Act 1979 ("CEMA").

16. On 8 August 2012 Mr Balaz wrote to the UKBF asking for restoration of the Vehicle. The request was refused and Mr Balaz notified of this by a letter from UKBF dated 9 October 2012.

17. On 13 November 2012 Adam Khattack Solicitors, acting for Mr Balaz, wrote to UKBF seeking a review of the decision not to restore the vehicle. The letter explained that Mr Balaz:

> … clearly understands and accepts that his actions were wrong. He regrets what he has done and he certainly believes that he has learned important lessons which will deter him from undertaking such exercise ever.

The letter continued:

> **Mr Balaz's mitigating circumstances for restoration of his vehicle**
>
> Mr Balaz travels fortnightly to the UK from Belgium as he has a 2 year old son who resides in Cardiff. His commitment to this child is juggled

> with his responsibilities to his two other children in Belgium, a 3 and an 8 [year] old. The latter is disabled and requires 3/4 attendances every month at a hospital 80 kilometres from his home town.
>
> He also uses the vehicle daily to commute to work and take his children to school. Although the vehicle is registered in Mr Balaz's name his wife in Belgium has been the one who contributed most towards its purchase and is in reality the legal owner. This is the only family vehicle. Consequently the vehicle seizure has put immense pressure on the whole family and is tearing the family apart so much that his wife is contemplating taking his two children away from Mr Balaz. Mr Balaz in his circumstances can not afford to purchase another vehicle as he financially, as well as emotionally, supports his family in Belgium and the UK.
>
> As you will appreciate the seizure of the vehicle, and its eventual destruction, will have sever (sic) repercussions on the children and families involved. Mr Balaz will be severally (sic) restricted in maintaining contact with, and providing his love and affections, to the child in the UK as well as keeping his family together in Belgium.
>
> As a consequence of the seizure Mr Balaz also has had [a] large drop in the hours he puts into his work and has seen a drop in his take home wages. This has put additional pressure on the family.
>
> It is in these circumstances that we write on behalf of our client to favourably review the restoration request. It is our opinion that Mr Balaz had learnt lessons and is unlikely to re offend.

Mr Balaz explained that his circumstances have changed since that letter was written. He now lives in Ostend with Ms Kroupova and their son and they no longer live in Cardiff. He said that he used to live and work in Leuven (which is approximately 150 kilometres from Ostend) where his former wife and two children are and when he lived there he was able to take his children to school.

18. A review of the decision not to restore the Vehicle was undertaken by UKBF Officer David Harris.

19. In his letter of 7 December 2012 to Mr Balaz's solicitors Mr Harris sets out the factual background to the seizure and summarised the UKBF policy for the restoration of private vehicles. This depended on whether the excise goods seized were destined for a supply for profit or on a "not for profit basis", whether, if in "not for profit" case, there were "aggravated" circumstances and explained that aggravating circumstances included any previous offence by the individual or if large quantities of goods were involved. By large quantities it was meant more than 5 kg of hand rolling tobacco. The letter also explained that Mr Harris, although guided by the restoration policy of UKBF was not fettered by it and that he considered every case on its merits.

20. Having considered the frequency with which Mr Balaz travelled to the UK and the misleading answers given to the Officer when questioned about this on 12 August 2012 and that the amount of hand rolling tobacco concerned, 20.8 kg, does not qualify as a small quantity Mr Harris concluded that the decision not to restore the Vehicle should be upheld.

21. With regard to the degree of hardship caused by the seizure of the Vehicle, Mr Harris wrote in the letter:

> I have also paid particular attention to the degree of hardship caused by the loss of the car. I sympathise with your client's difficulties. One must expect considerable inconvenience as a result of having a vehicle seized by the BF, and perhaps considerable expense in making other transport arrangements or even in replacing the vehicle. Hardship is a natural consequence of having a vehicle seized and I would consider only exceptional hardship as a reason not to apply the policy not to restore the vehicle.

22. On 30 December 2012 Mr Balaz appealed to the Tribunal on essentially on the same grounds as set out in the letter to UKBF from his solicitors.

Law

23. Under s 2(1) of the Tobacco Products Duty Act 1979:

> There shall be charged on tobacco products imported into or manufactured in the United Kingdom a duty of excise …

24. Regulation 13 of the Excise Goods (Holding, Movement, and Duty Point) Regulations 2010 provides that:

> (1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.
>
> (2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person:
>
> (a) making the delivery of the goods; and
>
> (b) holding the goods intended for delivery; or
>
> (c) to whom the goods are delivered.
>
> (3) For the purposes of paragraph (1) excise goods are held for a commercial purpose if they are held --
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> (a) by a person other than a private individual; or
>
> (b) by a private individual ("P"), except in the case where the excise goods are held for P's own use and were acquired in, and transported to the United Kingdom from, another member State by P.
>
> (4) For the purpose of determining whether excise goods referred to in the exception in paragraph (3)(b) are for P's own use regard must be taken of:
>
> (a) P's reasons for having possession or control of those goods;
>
> (b) whether or not P is a revenue trader
>
> (c) P's conduct, including P's intended use of those goods or any refusal to disclose the intended use of those goods;

(d) the location of those goods;

(e) the mode of transport used to convey those goods;

(f) any document or other information relating to those goods;

(g)the nature of those goods including the nature or condition of any package or container;

(h) the quantity of those goods and, in particular, whether the quantity exceeds any of the following quantities --

... 3 kg of any other tobacco products [1 kg from 1 October 2011]

(i) whether P personally financed the purchase of the goods;

(j) any other circumstances that appear to be relevant.

(5) For the purposes of the exception in paragraph (3) (b)-

... (b) "own use" includes use as a personal gift but does not include the transfer of goods to another person for money or money's worth (including any reimbursement of expenses incurred in connection with obtaining them)".

25. If excise duty has not been paid or secured prior to the time that the goods are held for a commercial purpose, they are liable to forfeiture under section 49(1) CEMA

26. Section 139(1) CEMA provides that:

> 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.

27. Under s 141(1) CEMA: where any thing has become liable to forfeiture under the Customs and Excise Acts-

> (a) any ship, aircraft, vehicle, animal, container (including any article of passengers' baggage) or other thing whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture, either at a time when it was so liable or for the purposes of the commission of the offence for which it later became so liable; and
>
> (b) any other thing mixed, packed or found with the fittings so liable,
>
> shall also be liable to forfeiture

28. Section 152 CEMA establishes that:

> The Commissioners may, as they see fit –
>
> (a) …
>
> (b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under the Customs and Excise Acts."

29. Section 14(2) of the Finance Act 1994 provides that:

> Any person who is –

(a) a 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 this section applies,

(b) a person in relation to whom, or on whose application, such a decision has been made, or

(c) a person on or to whom the conditions, limitations, restrictions, prohibitions or other requirements to which such a decision relates are or are to be imposed or applied,

may by notice in writing to the Commissioners require them to review that decision.

30. Section 15(1) of the Finance Act 1994 states:

Where the Commissioners are required in accordance with this Chapter to review any decision, it shall be their duty to do so and they may, on that review, either –

(a) confirm the decision; or

(b) withdraw or vary the decision and take such further steps (if any) in consequence of the withdrawal or variation as they may consider appropriate.

31. Section 16(4) to (6) of the Finance Act 1994 sets out the powers of the Tribunal on an appeal against a decision as follows:

(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 sections 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 -

(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;

(b) to require the Commissioners to conduct, in accordance with the directions 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 Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.

(5) In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal;

(6) On an appeal under this section the burden of proof as to –

(a) the matters mentioned in subsection (1)(a) and (b) of section 8 above;

> (b) the question whether any person has acted knowingly in using any substance or liquor in contravention of section 114(2) of the management Act, and
>
> (c) the question whether any person had such knowledge or reasonable cause for belief as is required for liability to a penalty to arise under section 22(1) or 23(1) of the Hydrocarbon Oil Duties Act 1979 (use of fuel substitute or road fuel gas on which duty not paid).
>
> shall lie upon the Commissioners, but it shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established.

Discussion and Conclusion

32. As we have explained the jurisdiction of the Tribunal in an appeal such as this is limited. The issue for us to determine is not whether the Vehicle should be restored to Mr Balaz (and it is not sufficient that we might ourselves have reached a different conclusion) but whether, having regard to our findings of fact, the decision taken by UKBF not to restore the Vehicle is one that could reasonably have been reached.

33. Lord Phillips of Worth Maltravers MR (as he then was) said in *Lindsay v Commissioners of Customs and Excise* [2002] STC 508 at [40]:

> "… the Commissioners will not arrive reasonably at a decision if they take into account irrelevant matters, or fail to take into account all relevant matters"

34. Having heard from Mr Harris who confirmed the matters he had taken into account when reaching his conclusion to uphold the decision not to restore the Vehicle to Mr Balaz (as set out in paragraph 20, above) we find that he did not take into account any irrelevant matters or fail to take into account all relevant matters. It therefore follows that we find the decision not to restore the Vehicle to be reasonable and proportionate having regard to all the circumstances of the case.

35. Turning to the issue of exceptional hardship we note that circumstances have somewhat changed since Mr Balaz's solicitors requested the review and the completion of the Notice of Appeal. Mr Balaz now lives in Ostend with Ms Kroupova and their son and as they no longer live in Cardiff there is no need to travel to the UK to see them. As for his other children, Mr Balaz has chosen to live in Ostend rather than Leuven where they live with his former wife and as a result he is less able to spend time with them.

36. We agree, as Mr Harris has stated in his letter of 7 December 2012 to Mr Balaz's solicitors (which we have quoted at paragraph 21, above), that "hardship is a natural consequence of having a vehicle seized" and accept that Mr Balaz has indeed suffered hardship as a result of the seizure of the Vehicle. However, we are unable to find that, having regard to all the circumstances, this hardship is exceptional.

37. Therefore, for the above reasons the appeal is dismissed.

Right to Apply for Permission to Appeal

38. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 5 November 2013