TC03112

Appeal number: TC/2012/08665

Excise Duty – restoration of excise goods deemed condemned as forfeit – seizure based on mismatch between shipping documents and physical load – 2 pallets found to contain lesser quantity of different type of lager than listed on shipping documents – liability to forfeiture not contested – restoration requested – refused and refusal confirmed on review – basis of refusal stated to be that goods seized should not normally be restored, and in the absence of notice contesting the lawfulness of the seizure, the goods were deemed lawfully seized – no "exceptional circumstances" justifying restoration found, also doubts about ownership of the goods expressed – HMRC v Jones & Jones relied on – held evidence of ownership sufficient, mismatch attributable to simple error from which no advantage could be seen to accrue – vague suggestions of prior fraud unsubstantiated and not relied on – on the basis of the relevant information no reasonable officer could have refused to restore the goods – direction given for further review to be carried out on the basis that ownership of the goods has been established, the mismatch was due to a simple error and there was no association with any attempted fraudulent evasion of duty – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ADRENA SP. ZO. O.K **Appellant**

-and-

DIRECTOR OF BORDER REVENUE **Respondent**

TRIBUNAL: **JUDGE KEVIN POOLE**
JULIAN STAFFORD

Sitting in public in Bedford Square, London on 24 October 2013

Charlotte Hadfield of counsel, instructed by Altion Limited for the Appellant

Stuart Lill of counsel for the Respondent

DECISION

Introduction

1. This is an appeal against the respondent's refusal to restore to the appellant over 17,000 litres of beer and lager which had been seized by the respondent as liable to forfeiture and which were subsequently deemed condemned as forfeit.

2. In this decision, "UKBA" and "UKBF" (UK Border Agency and UK Border Force) refer to the body through which the respondent has from time to time carried on his relevant activities.

The facts

Introduction

3. We received two (overlapping) bundles of documents prepared by the parties. Included in those documents was a witness statement of Graham Crouch, the officer who issued the review decision currently under appeal.

4. Mr Crouch was not called to give evidence before us (even though he was in attendance at the hearing) and therefore his evidence could not be tested in cross examination. Miss Hadfield made nothing of the point as both parties were agreed that the appeal could sensibly be decided on the basis of the documents before us and legal submissions. Nonetheless, where there were points which Mr Crouch might have been able to clarify on his evidence, he did not do so. To that extent, we are left without clear evidence on some details of the matters which he might have taken into account in reaching his decision and we must therefore take it that his review letter sets out all information relevant to his review and that matters not mentioned in his review letter did not form any part of his decision making process.

The seizure

5. On 9 March 2012 a tractor and trailer unit carrying 17,222.40 litres of mixed beers and lagers (22 pallets) was stopped at Dover East docks whilst being imported under duty suspense arrangements. The load was checked and it was discovered that there was a discrepancy between the physical load being carried and the details which had been declared on the electronic administrative document (the "EAD") lodged with the customs authorities before the goods were moved from the Belgian warehouse. The list shown on the CMR note accompanying the load was the same as originally declared on the EAD (and therefore was also different from the load physically carried).

6. The total load actually carried was 17,222.40 litres on 22 pallets. The correct load should have been 17,462.40 litres. The load was therefore 240 litres less than it should have been. The discrepancy arose because instead of 180 cases of Tennents Super lager on two pallets (total 2,160 litres) there were found to be 160 cases of Super Kestrel lager on two pallets (total 1,920 litres). All the other items were in accordance with the EAD and CMR note.

7. The Respondent's officers decided to seize the tractor, trailer and beer as liable to forfeiture, by reason of the discrepancy. On the notice of seizure, it was stated that the goods were seized as liable to forfeiture:

> "by force of the following provisions, namely:
>
> Regulation 88 of the Excise Goods (Holding Movement and Duty Point) Regulations 2010, in contravention of Regulation 53 and/or 68 & 69 and Regulation 87 and section 170B of the Customs and Excise Management Act (CEMA) 1979."

8. The notice of seizure went on to identify the details which had been submitted to the electronic movement control system for the administrative reference code presented to the authorities on import and stated that:

> "Following checks conducted by the Revenue Fraud Detection Team in relation to these goods it is believed that the unique ARC number presented to the UK Border Agency Officers has been used on a previous occasion(s) prior to the interception of this load, with the earlier load(s) having already been diverted within the UK without the payment of UK excise duty. It is also believed that had this load not been intercepted it would not have been delivered to the UK destination bond but would have been diverted to avoid payment of UK Excise Duty."

Subsequent events

9. The appellant did not contest the legality of the seizure, and the goods therefore were deemed validly condemned as forfeit by passage of time.

10. The appellant did however request restoration of the goods.

11. By letter dated 14 June 2012, the UK Border Agency refused to restore the goods. In that letter, they stated that the goods (i.e. all the beer and lager comprised in the load) "were liable to forfeiture under section 170(b) of the Customs & Excise Management Act 1979 ("the Act") because of the intent to evade the payment of duty". That letter went on to summarise the UKBA's policy on restoration of Excise goods as follows:

> "The general policy is that excise goods seized because of an attempt to evade excise duty should not normally be restored but each case is examined on its merits to determine whether or not restoration may be offered exceptionally."

12. The letter then went on to consider the question of ownership of the goods. It noted that the appellant had been requested to provide proof of ownership by letter dated 19 March 2012, including "identifying markers such as lot numbers, rotation numbers or pallet numbers." Nothing had been provided. The request for proof of ownership had, it said, been renewed in a letter dated 9 May 2012 to the appellant's newly-appointed representative but again nothing had been supplied.

13. The letter dated 14 June 2012 went on to say "I conclude that there are no exceptional circumstances that would justify a departure from the Commissioners' policy. On this occasion **the goods will not be restored.**" It was therefore clear that ownership of the goods was a concern so far as UKBA was concerned, but they did not say they were refusing to restore the goods because they were not satisfied the appellant owned them, they said they were refusing to restore them because that was their normal policy in cases of attempted duty evasion and they saw no reason to depart from that policy.

14. The appellant's advisers then provided, with a letter dated 31 July 2012, some documentary evidence of ownership, in the form of a copy invoice dated 6 March 2012 to the appellant from a Malaysian company called Sintra Global S.A. for £11,640 (which identified, albeit without any detail, the same list of goods as were included in the subsequent CMR Note and EAD), a copy invoice dated 6 March 2012 from the Belgian Beverages Company BVBA for "Offloading/reloading beverages" at a cost of €350 and some heavily redacted sheets from a Polish bank statement which might be interpreted as showing that the two invoices had been paid (on 11 April and 12 March 2012 respectively).

The formal review letter

15. Following the receipt of this further information, a letter dated 14 August 2012 was issued by Officer Graham Crouch of UK Border Force to the appellant's representative. This letter comprised the formal review of the earlier decision not to restore the goods, and it is the decision in this letter which is the subject of the present appeal.

16. In the review letter, Officer Crouch recorded the reason for the seizure as follows:

> "The load was checked against the CMR. It was found that the quantity of beer tallied differed from that declared on the ARC and the CMR. The quantity carried on the vehicle totalled 17,222.40 litres and the documentation provided to support the load recorded 17,462.40 litres, a difference of 240 litres. One of the brands of beer found on the vehicle does not show on any of the accompanying paperwork.
>
> As a consequence the Officer was satisfied that excise goods were held for a commercial purpose but none of the proper methods of removing excise goods to the UK were used and therefore seized them under section 139(1) of *CEMA* as being liable to forfeiture under both Regulation 88 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 and section 49(1)(a)(i) of *CEMA*."

17. Without mentioning any further relevant facts about the reasons why the goods were seized, Officer Crouch went on to give a "Summary of the UKBF Restoration Policy for Excise Goods", as follows:

> "The general policy is that seized excise goods should not normally be restored. However, each case is examined on its merits to determine whether or not restoration may be offered exceptionally."

18. It can readily be seen that this supposed version of the policy is significantly different from the version set out in the original decision letter dated 14 June 2012. It contains no reference to "an attempt to evade excise duty", it merely states that seized goods generally should not normally be restored. It appears to us to be highly unsatisfactory that in a matter as important as this, the UKBF appears not to be certain what its own policy actually is. That very uncertainty could be seen as tending to suggest a flawed basis for the whole decision making process. That point was not argued by Miss Hadfield, and in any event is not necessary to the decision we have reached, so we consider it no further in this decision. We have however noticed a marked reticence on the part of the respondent in such cases to give a full and clear statement of what the policy actually is, possibly because of uncertainties about it such as we have seen in this case. We see no good reason for such reticence and many concerns could be addressed by its clear publication.

19. After recording that he was guided but not fettered by his version of the policy, Officer Crouch went on to say:

> "I have considered the decision afresh, including the circumstances of the events on the date of seizure and the related evidence, so as to decide if any mitigating or exceptional circumstances exist that should be taken into account.....
>
> It is apparent to me that the main issue you seem to be contesting when asking for restoration is the purpose to which these goods were to be put. In other words, whether the goods were to being brought in for a legitimate purpose as defined by the legislation...."

20. He went on to refer to the decision in *HMRC v Jones & Jones* [2011] EWCA (Civ) 824, in particular the comments of Mummery LJ:

> "The deeming process limited the scope of the issues that the respondents 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 by 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. 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 respondents' failure to contest condemnation of the goods by the court was that the goods were being illegally imported by the respondents for commercial use..."

21. He went on to rely on this passage in making his decision:

> "Therefore, according to policy, goods which have been correctly forfeited should not normally be restored."

22. He then went on to consider whether anything in the material presented to him gave rise to a case for disapplying this general policy:

> "I have read your letters carefully to see whether a case for disapplying the UKBA policy of non-restoration has been presented. In my opinion, I have not been provided with details of exceptional circumstances that would result in the goods being restored."

23. He also cited the following as "positive *additional* reasons why the goods should not be restored:

> "The volume of the goods seized and the differed *[sic]* by 240 litres from that shown on the ARC numbered 12BEGZH3F66Q00130X9X1 issued on 6th March 2012 and a CMR numbered BBCc2012/017. The brand of beers also differed to those shown on the CMR and the documentation provided by you in an attempt to support your client's claim to these improperly imported excise goods. Therefore, it is my view that these goods are not your client's."

24. He then went on simply to confirm his decision that the goods should not be restored.

25. This is the decision against which the appellant now appeals. The appeal appears to have been notified late to the Tribunal, but Mr Lill made no objection and we formally give permission for the late appeal.

Submissions

Appellant's submissions

26. Miss Hadfield confirmed that it was accepted that the CMR note did not accurately reflect the load in the vehicle and therefore it was accepted that any attempt to contest the legality of the seizure was likely to have been problematic. It was accepted that such non-conformity was probably sufficient to render all the other goods liable to forfeiture along with the "unexpected" Super Kestrel lager under the "mixed, packed or found" rule in section 14(1)(b) of the Customs and Excise Management Act 1979 ("CEMA"), whatever the underlying reason for the mismatch.

27. But she also submitted that the error should be seen for what it was – a simple mistake. Instead of 2 pallets of one sort of lager in a 22 pallet load, someone had mistakenly loaded 2 pallets of a different sort of lager – which was actually a smaller amount. There was no potential advantage for the appellant in this mistake, and even if there were some unknown mischief behind the substitution, it was impossible to see how it could benefit the appellant.

28. As to ownership, she submitted that the documents provided were more than enough, in the absence of any competing claims, to demonstrate ownership. And in

any event, it was anything but clear precisely what point was being made by UKBF in relation to ownership. They had not refused to consider restoration on the basis that the appellant had no locus standi to apply for it, they had merely cited that as an afterthought in the review letter.

29. Whilst the initial seizure notice appeared to suggest that some wider suspicions of "duplicate load" smuggling activity lay behind the seizure, that point had not been pursued by UKBF, had not even been mentioned in the review letter and appeared to have been dropped by UKBF. Indeed, when the appellant had seen the suspicion voiced in the original seizure notice, it had written to UKBF explaining that the same vehicle had made another delivery earlier in the week under a different ARC number and it had heard nothing further from UKBF on the point; it therefore assumed it had been dropped.

Respondent's submissions

30. Mr Lill said the starting point was that, on the basis of *Jones & Jones*, the importation was illegal. It was not for the Tribunal to go into the background. We should limit our consideration to the question of whether HMRC's refusal to restore was reasonable, based on the fact that it was triggered by an illegal importation.

31. He submitted the appellant had provided no coherent reason why the review decision should be regarded as unreasonable.

32. In his submission, in consequence of the decision not to contest the seizure in condemnation proceedings, we were bound to proceed on the basis that the seizure was a lawful response to an attempted evasion of duty. He referred us to the original suspicions voiced in the seizure notice itself about possible "duplicate load" fraud, and to the fact that one of the officer's notebooks exhibited to Mr Crouch's statement referred to having discovered two other CMR's in the driver's cab when the vehicle was seized. Also, the original electronic declaration of the intended movement under suspension of duty contained a date of 6 March 2012 as, he said, the date on which the goods left the warehouse in Belgium (some three days before the vehicle was intercepted at Dover, which he suggested was suspicious) - though the title of the box on that form in which the 6 March date was inserted was in Flemish and no evidence was available to confirm that the significance of that date was as he asserted. Nor had this point been raised before, so the appellant had not been asked to explain it.

33. So far as proof of the alleged mistake was concerned, he observed that there was simply no evidence – no witness statement from the Belgian Warehouse operator confirming a mistake had been made, no audit trail of individual pallets, so it was not possible to reach the conclusion that this had been a simple mistake. The appellant's advisers had not even attempted to flesh out any explanation of the supposed mistake in their correspondence.

34. So far as proof of ownership was concerned, he submitted that the material provided was not helpful, and UKBF maintained the appellant had not established its title to the goods. He did not assert that there was any particular evidence required by

the legislative framework which was missing, merely that the material actually supplied was inadequate.

35. A further email had been produced from the Belgian warehouse, dated 6 June 2013, which had only been sent to UKBF some three weeks before the hearing (and therefore was not in Mr Crouch's possession when conducting his review). Mr Lill referred to that email which did nothing to clarify the position, indeed if anything he argued it cast further doubt on the appellant's assertions. That email said that the warehouse had "quickly identified through stock control" that the vehicle in question had accidentally been loaded with "160 cases of Tennents Lager" instead of "180 cases Super Tennents as stated on the paperwork." In fact, of course, the vehicle was found to be carrying 160 cases litres of Super Kestrel lager instead of the 180 cases of Tennents Super.

Discussion and decision

36. The parties are agreed that the Tribunal's role in this appeal is to consider the review carried out by Officer Crouch. If we are satisfied that he could not reasonably have arrived at the decision he did, we have power to do one or more of the following things:

> "(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." (See section 16 Finance Act 1994)

37. If we are to decide whether Officer Crouch could reasonably have reached the decision that he did, we must consider what matters he should (and should not) have taken into account and we must then decide whether it would have been possible for him to reach the decision that he did on the basis of the matters he should have taken into account (and, of course, disregarding the matters he should not have taken into account).

38. We are of course bound by the decision in *Jones & Jones*, which means we must accept that the seizure by UKBA was lawful, and that the factual basis on which that seizure was made cannot now be contested before this Tribunal.

39. But that is a long way from being required to accept, as Mr Lill submitted, that we are required to accept there was a criminal attempt at duty evasion.

40. The basis on which the goods were originally seized was the mismatch between the physical goods on the one hand and the description of them on the CMR

and the electronic administrative declaration on the other. The appellant has not questioned the existence of that mismatch, and nor do we. That gave rise to lawful grounds for seizure of the whole load, which has not been (and is not) contested by the appellant.

41. On the basis of *Jones & Jones* it would not be open to us to find that there was no mismatch, or that the nature of the mismatch was such that it did not give rise to a liability to forfeiture. We make no such finding. But we consider that in a discretionary matter such as restoration, it is legitimate (indeed necessary) to investigate beyond the bare facts that gave rise to the forfeiture. That investigation might include matters unrelated to the seizure (such as the personal circumstances of the claimant), but it can equally clearly include the circumstances surrounding the seizure itself, as long as it does not seek to contradict the facts upon which the seizure was based. Mr Crouch in his letter recognised as much by stating that "[i]n considering restoration I have looked at all of the circumstances surrounding the seizure..." On this basis, we consider that the size and nature of the mismatch, its potential effects if it had not been detected, and the likely underlying reason for it are all matters that should properly form part of the decision making process.

42. It is also clear that any such consideration must not take account of any circumstances that might be suspected but for which there is no evidence. It seems the original seizing officers had a suspicion that the appellant had been involved in a diversion fraud of some type on a previous occasion, but no evidence has been produced, either to Mr Crouch or to the Tribunal, of any such activity. When the suggestion was first raised, it was immediately responded to and there has been no indication that the suspicion persists. Obviously, therefore, no grounds have been put forward in an attempt to justify it. In those circumstances, it cannot be taken into account in the context of the restoration decision.

43. We accept that the evidence of ownership supplied to UKBF is less than perfect. However, there is no indication that any other person has sought to claim ownership of the goods and the evidence produced should be considered against that background. It is reasonable to assume that if goods are seized and a person named as "transport arranger" on the electronic administrative declaration relating to them requests restoration of them, then if no competing claims are received and the claimant provides some evidence of ownership, he is the owner of those goods.

44. It is clear from the review letter that, in making his decision, Officer Crouch did not take account of the fact that the mismatch between the load and the documentation was comparatively small and involved the importation of a smaller amount of excise goods than had been declared, or that the discrepancy could be seen to be explained by the inclusion of two pallets of one product in the place of two pallets of a different product whilst the vast majority of the load was as declared. Instead, he simply recorded that the goods were duly forfeit, should not normally therefore be restored and he saw no reason to depart from the normal policy. He also cited as an additional reason for non-restoration the fact that the invoice produced to show ownership did not match the physical load in exactly the same way as the CMR

and electronic administrative declaration did not match it, leading him to believe that the goods did not belong to the appellant.

45. In the absence of any other explanation, it seems to us self-evident that the inclusion of 160 cases of Super Kestrel in place of 180 cases of Tennents Super was an error from which no discernible advantage could accrue to the appellant. To insist on production of evidence that the error took place by mistake displays a somewhat unrealistic view of the world. In such situations, where no possible advantage for the appellant can be discerned from the discrepancy, it is appropriate to presume that it occurred by reason of a simple mistake unless and until some other reason for it can be credibly asserted.

46. Officer Crouch either did not consider the matter at all or he considered, without saying so, that there was some other reason apart from a simple mistake for the discrepancy arising. In either case, we consider his approach was flawed. Once the explanation of a simple mistake is accepted, and no other unsubstantiated suspicions are taken into account, we do not consider it would be possible for any review officer to reach the conclusion that the goods should not have been restored. It follows that we find Officer Crouch could not reasonably have arrived at the decision to refuse restoration.

47. What then should we direct?

48. It is clear that we have no obligation under section 16(4) Finance Act 1994 to take any further action consequent upon our above finding, for example if we were satisfied that further evidence had come to light since Officer Crouch's review letter which would, if known to him at the time, have justified his decision. We cannot think of any other circumstance in which we would find the original decision to have been flawed but then take no action in relation to it.

49. In the present case, the only significant further development since Officer Crouch's decision letter is the production of the email dated 6 June 2013 from Belgian Beverages Company BVBA in Belgium to the appellant (referred to at [35] above). That email clearly demonstrates weak systems and unreliable records at Belgium Beverages Company BVBA in Belgium, but does not on its own provide any further evidence of potential unlawful or illicit intent or activity on the part of the appellant.

50. We therefore consider it appropriate to exercise the powers conferred on us by section 16(4) Finance Act 1994 to make an appropriate direction.

51. We do not consider Officer Crouch's decision to be incapable of remedy by a further review, therefore we do not consider it appropriate to make a direction under section 16(4)(c) Finance Act 1994.

52. It seems to us that the correct approach is to require a further review of the non-restoration decision to be carried out on appropriate terms, and for the existing decision of Officer Crouch to cease to have effect from the time that further review is completed.

53. Pursuant to section 16(4)(b) Finance Act 1994 we therefore direct that a further review of the decision to refuse restoration be carried out. In carrying out that further review, it should be assumed that:

(1) The appellant has established its ownership of the goods in question,

(2) the discrepancy that led to the lawful seizure and forfeiture of the goods was a simple error involving no unlawful or illicit intent, and

(3) this particular importation was not in any way associated with any fraudulent attempt to evade Excise Duty.

54. We also direct that the existing review decision of Officer Crouch is to cease to have effect from the time of issue of the further review directed at [53] above.

55. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 6 December 2013