TC03382

Appeal number: TC/2013/00265

Excise duty – restoration of car seized under section 88 CEMA – whether decision not to restore unreasonable – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MIR SAJA **Appellant**

- and -

DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE CHARLES HELLIER
MRS SHAHWAR SADEQUE

Sitting in public at 45 Bedford Square WC1 on 7 February 2014

The Appellant was neither present or represented

N Carpenter, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

The absence of the Appellant

1. At 7.41 on the evening of 6 February 2014, the day before the date scheduled for the hearing of this appeal, Malik and Malik, who had been acting for the appellant in this appeal wrote to the tribunal saying that they had been unable to receive instructions from their client and asking that the matter be "dealt with on the papers".

2. On the morning of the hearing our clerk telephoned Malik and Malik and asked to speak to the lawyer handling the appeal. He was told he was not present and that they had no instructions to deal with the matter. At our instigation our clerk telephoned a second time, but was told that the lawyer dealing with the matter was busy and would not be attending the hearing. Our clerk asked for a phone number for Mr Saja but was told that Malik and Malik did not have a telephone number for him.

3. Miss Carpenter told us that the Respondent's last contact with Malik and Malik was in November 2013 when they had indicated that they did not object to an adjournment.

4. We considered how important Mr Saja's own evidence was to the potential outcome of the appeal. For, if, by proceeding in his absence, we would effectively be deciding the appeal against him, then it might be unjust to proceed. The nub of Mr Saja's appeal was that it was unreasonable to conclude that he knew of an alteration which had been made to his car. Clearly his evidence as to his state of mind was relevant to this issue, but it would not be conclusive because the question was not whether he knew but whether it was reasonable to conclude that he knew. In relation to that question other evidence could be relevant. Mr Saja had been asked by the Respondent on many occasions to provide whatever evidence he had in relation to the relevant circumstances, and had been required by a direction of the tribunal to list any documentary evidence on which he wished to rely in advance of the hearing.

5. We concluded that Mr Saja had been given proper notice of the hearing and that it was just in the circumstances to continue in his absence. It seemed to us to be better to hear the oral representations of the Respondent rather than to deal with the matter on the papers because (relying on Miss Carpenter's duty in these circumstances to present both sides of the case) that would enable us to explore more fully the arguments made by both parties.

The Appeal.

6. On to April 2012 Mr Saja 's Audi A6 was stopped by officers of the Director of Border Revenue (the "Director"), on its way to England at the control zone at Coquelles in France. At the time it was being driven by Mr Ermal Fosa.

7. The officers inspected the car and decided that it had been adapted so that a concealed space had been created. They decided to seize it under their powers in

section 139 Customs and Excise Management Acts 1979 ("CEMA") on the basis that it was liable to forfeiture.

8. Mr Saja did not require the Director to bring proceedings to test whether or not the car was in fact liable to forfeiture, but, through his solicitors Malik and Malik, sought restoration of the car. The Director's officer refused. Mr Saja sought a review of the decision. That review was provided in a letter dated 6 August 2012 from Jonathan Aston of the Director's National Post Seizure Unit, in which restoration was refused.

9. Mr Saja appeals against that decision. In his grounds of appeal he says that it:

(1) was unreasonable within the *Wednesbury* principle; and

(2) did not take into account consideration of the fact that Mr Saja purchased the vehicle as seen and was an innocent person. The vehicle he says could have been restored on condition that the compartment was removed.

Findings of fact.

10. The car had been adapted by the attachment to its underside of a piece of orange ribbed plastic tube, covered in black sticky tape and glued with mastic, in the space on the near side of the car before the rear wheel and between the exhaust pipe shielding and the middle of the fuel tank. The enclosure was accessed by removing the plate under the back seat which normally gave access to the fuel sender unit in the fuel tank.

11. The enclosure was found by the Director's officers on inspection of the car. A "disturbance" was noted around the fuel sender unit cover and, on its removal, the enclosure was found. When the car was placed on a ramp to examine the underside, the nature of the enclosure was apparent.

12. The officer who examined the car on the ramp recorded that the enclosure was empty and was "suspected to be used for cash outbound".

13. On being stopped Mr Fosa told the officers:

(1) his English was "not so good";

(2) he was taking the car "back" to London;

(3) he lived in Belgium (later giving his address as in Antwerp);

(4) he knew Mr Saja from Albania. But he did not know his address in London. He said "I will phone him maybe and put it in the navigation" -- pointing to the satellite navigation system;

(5) Mr Saja had driven the car to visit Mr Fosa in Belgium and had had to return urgently by train to the UK; he did not know why;

(6) He was not aware of, and had not checked the contents of the car; and

(7) he had brought no clothes, intending to travel back to Belgium by train -- his ticket would be paid for by Mr Saja.

14. On 4 April 2012 Malik and Malik wrote to the Director saying that Mr Fosa was a friend of Mr Saja and had been authorised by Mr Saja to bring the car back to the UK after the car had broken down in Belgium. The letter enclosed a copy of Mr Saja's UK driving licence, showing him to be a citizen of Albania, and a copy of a hire purchase agreement (it seemed to us in pre-signature cooling off form) relating to the car, which was undated and unsigned. The hire purchase agreement showed that the car was first registered on 1 April 2007.

15. The Director responded with a questionnaire which was later returned by Malik and Malik completed by Mr Saja. In the answers to the questions he said:

(1) he had owned the car since 1 April 2007;

(2) he knew Mr Fosa as a friend;

(3) he had not arranged for insurance for Mr Fosa's driving the car back because he considered that Mr Fosa would have insurance;

(4) no one else had driven the car into the UK before his behalf;

(5) he had left the car in Belgium because it had broken down; he gave the address where it had been left. This was near Antwerp;

(6) in answer to a question asking which garage the car had been repaired by, and what repairs were made, he gave the short answer "Repaired Privately";

(7) in answer to a question as to whether he had been stopped by Customs officers before, he replied "normal checks".

16. The 8 June 2012 Malik and Malik wrote to the Director with a precontract summary of the hire purchase agreement, and on 23 June sent a signed and dated version. It was dated 26 January 2009, some 22 months after the stated date of the first registration of the car.

17. On 4 July 2012 Malik and Malik wrote to the Director to say that:

(1) Mr Saja bought the car from Car Giant and did not check to see if it had any adaptations, or get anyone else to check it;

(2) he had travelled to Albania in August 2010 and 2011 and December 2012 to visit relatives.

18. Between these letters and in the letter of review, Malik and Malik were asked for any further information or evidence they would like to adduce on behalf of Mr Saja. Nothing further was forthcoming.

19. Before us the Director produced details taken from the agency's computer and showing the number plates and dates of travel of cars which had travelled in the Channel Tunnel. Mr Saja's car was shown on this printout as having travelled on 2 April 2012 (the date of seizure) and on 18 January 2012.

The relevant law.

20. The relevant law is unusual and not particularly satisfactory (see Evans Lombe J in *HMRC v Weller* [2006] EWHC 237 Ch and others).

21. Section 88 CEMA provides so far is relevant that:

> "Where-
>
> …(c) a vehicle is or has been within the limits of any port
>
> while constructed, adapted, altered or fitted in any manner for the purpose of concealing goods, that ... vehicle shall be liable to forfeiture."

22. Thus if the control zone at Coquelles was a "port" and if the car was adapted for concealing "goods" it was, when it was at Coquelles liable to forfeiture. A "port" is defined by section 1 CEMA to be any port designated by the Director by statutory instrument. The Director's representatives kindly referred us to SI 1990 No. 2167, the Channel Tunnel Order, which, in schedule 3 provides:

> "19**.** For the purposes of section 88 (forfeiture of ship, aircraft or vehicle constructed, etc. for concealing goods) a vehicle which is or has been in a customs approved area, whether or not such area is within the limits of a port, shall be treated as if it is or has been within the limits of a port."

The control zone at Coquelles is a customs approved area. Thus if the car was adapted or the purpose of concealing goods it would be liable to forfeiture under section 88.

23. Section 139 CMA provides that anything liable to forfeiture may be seized by an officer of the Director.

24. Schedule 3 CEMA provides a method by which the owner of something which has been seized may challenge the legality of the seizure (Mr Saja did not). Paragraph 3 provides that a person claiming that something seized was not liable to forfeiture shall within one month of the seizure give written notice of his claim to the Director. The Director is then obliged (by paragraph 5) to commence proceedings in the magistrates court or the High Court to test the legality of the seizure.

25. If the owner does not give such notice, then paragraph 5 provides: "the thing in question shall be deemed to have been duly condemned as forfeited."

26. Section 152 CEMA gives the Respondent a power to restore, subject to any conditions it thinks proper, things which have been forfeited or seized.

27. Section 14(2) Finance Act 1994 provides that a person affected by a decision may by notice require the Respondent to conduct a review of any decision in relation to that restoration power.

28. Section 16 of that Act permits the owner to appeal to this tribunal against any decision made (or deemed to have been made) on that review. But it provides that the powers of an appeal tribunal on such an appeal are confined to a power, where the

tribunal is satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to require the decision to be remade subject to certain directions.

29. In *Balbir Singh Gora v C&E Comms* [2003] EWCA Civ 525, Pill LJ accepted that, given the power of the tribunal to carry out a fact-finding exercise, the tribunal could decide for itself primary facts and then go on to decide whether, in the light of its findings of fact, the decision on restoration was reasonable. Thus the tribunal exercises a measure of hindsight in its assessment of the reasonableness of a decision, and a decision which in the light of the information available to the officer making it could well have been quite reasonable may be found to be unreasonable in the light of the facts as found by the tribunal.

30. The effect of the statutory deeming in paragraph 5 schedule 3 on an appeal against a restoration review decision to this tribunal has been considered in a number of cases. The most recent was HMR*C v Jones and Jones* [2011] EWCA Civ 824. In that case HMRC (the statutory predecessor of the Director) had seized tobacco being imported by Mr and Mrs Jones and the car in which it was being carried. In the circumstances of that case the tobacco was liable to seizure if it had been imported without payment of duty; and it bore duty unless it was being imported for Mr or Mrs Jones' own use. Mr and Mrs Jones did not require the legality of the seizure to be tested under paragraph 3, schedule 3, but they sought restoration of the tobacco and the car, and when HMRC refused to restore them appealed to this tribunal (the "FTT"). The question before the Court of Appeal was whether the tribunal was bound to assume that, because Mr and Mrs Jones had not served a notice requiring the legality of the seizure to be tested, the tobacco was to be treated as not for Mr and Mrs Jones own use since it had been deemed by paragraph 5 schedule 3 to be duly condemned as forfeited.

31. The Court of Appeal held at [21]:

> "(5) The deeming provision limited the scope of the issues that [Mr and Mrs Jones] 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 fact that they were being imported for own use ..."

32. The reason the FTT were prohibited from finding that the tobacco was imported for own use was that such a finding would be in contradiction to the statutory deeming that it had been duly condemned, for if it was for own use in the circumstances of that case it could not have been liable to seizure.

33. In *HMRC v Smith* [2005] EWHC 3455 (Ch) Lewison J likened the effect of the statutory deeming in paragraph 5 schedule 3 to the abuse of process doctrine:

> "[29] [The] reference to "abuse of process" or to considerations analogous to abuse of process are, in my view, references to the well-known principle that it may be an abuse of process to raise in one tribunal matters that could and should have been raised in another." .

34. Once an issue between the parties has been determined by a court given jurisdiction to determine it, it is not open to the same issue to be relitigated between the parties in another forum (other than on appeal). This is the principle of res judicata, that a finding which was necessary to the conclusion of the first court and which must have formed part of the reasoning for its conclusion cannot be reopened between the same parties by a later court. In the same way a finding (like own use) which in the circumstances (like the import of tobacco) must have been necessary for a deemed conclusion that the goods were duly condemned, cannot be revisited by this tribunal.

35. The deemed factual findings which are binding on this tribunal are limited to those facts which were necessary to for the deemed decision, and the nature of deemed facts would depend upon the factual circumstances of the seizure. Thus in *Jones*, tobacco was seized but also the van in which it was carried. Both were deemed to be duly forfeited under paragraph 5. There was no argument that the van had been imported without the payment of duty but it had been argued that duty on the tobacco was due and unpaid. The effect of the deeming in those circumstances was to deem the tobacco to have been liable to duty and the duty not to have been paid, and to deem the van to have been used for the carriage of the tobacco. It was not to deem the van to have been imported without proper payment of duty or to deem the tobacco to have been associated with the van and forfeited by reason thereof. In the same way in *HMRC v Mills* [2007] EWHC 2241, a finding of not for own use was, on the particular facts in that case, not a necessary requirement for legal seizure, so that the issue was open for adjudication by the tribunal.

36. There are some blurred edges to this process. Before this tribunal can ascertain what facts it cannot revisit, it must find the facts relating to the circumstances of seizure. Thus in *Jones* it needed to find that Mr and Mrs Jones were importing tobacco.

37. In this appeal the circumstances surrounding the seizure of the car means that it can have been legally seized only if section 88 applied. Since the car is deemed duly forfeit thus section 88 must be deemed to have applied. As a result this tribunal must proceed on the basis that the car was "constructed, adapted, altered, or fitted for the purpose of concealing goods".

38. This is a significant conclusion because, as we have explained, the officer seizing the car recorded that he suspected that the enclosure was "to be used for cash outbound". It is clear that cash is not "goods" within the meaning of section 88, and as a result if the purpose of the enclosure was concealing cash, not goods, section 88 and would not be satisfied. But the effect of the statutory deeming is that the enclosure must be taken to have been for the purpose of concealing goods, and we must work on that basis.

The letter of review.

39. The letter sets out the background facts accurately and recites the Director's policy on restoration, which was that, in circumstances where the owner of a car had

no knowledge of the adaptation, restoration might be offered after the removal of the adaptation at the owner's expense.

40. Mr Aston then said that his starting point was that the seizure was deemed to be lawful; he then:

(1) indicated that the question was who was responsible for the adaptation;

(2) doubted Mr Saja's response on the questionnaire that he had owned the car since 1 April 2007 since the hire purchase agreement had been signed on 26 January 2009;

(3) expressed surprise that Mr Saja had not examined of the car on purchase;

(4) said it was difficult to believe that the adaptation had not been noticed - particularly by someone carrying out an MOT or service, and that such a person would have commented on it to the owner;

(5) concluded that it was not credible that the adaptation remained undetected, and inferred that it was therefore carried out during Mr Saja's ownership;

(6) said that since Mr Saja said he was the only person who had previously driven the car into the UK, only he could have taken advantage of the compartment;

(7) found that the following issues did not lend credibility to Mr Saja's account:

(a) that Mr Fosa made no mention of a breakdown when he was interviewed by the officer;

(b) that Mr Saja had given an ambiguous and inadequate answer to the question about the garage and repairs to his car;

(c) that Mr Saja's description of "normal checks" seemed to evade the question;

(d) that Mr Saja showed "little concern for his legal obligations" in his answer to the question about the insurance of the car; and

(8) concluded that Mr Saja should not be treated as an innocent who did not know of the adaptation, and that the Director’s policy should be applied to refuse restoration; and

(9) found that no information had been received or which indicated that the seizure had given rise to such exceptional hardship as would warrant restoration.

Discussion

41. The question for us was whether Mr Aston's decision not to restore was one which could reasonably have been arrived at. There are four elements to this review: (i) was anything irrelevant taken into consideration, (ii) was anything relevant omitted

from consideration, (iii) was any mistake of law made, and (iv) was the decision one which could have been made by a reasonable decision maker?

(1) Were irrelevant considerations taken into account?

42. Of the primary facts taken into consideration by Mr Aston, none appeared us to be irrelevant to his consideration of whether or not Mr Saja knew of the adaptation.

43. We have recorded that Mr Aston took into consideration that he considered what he considered would have resulted from an MOT or service of the car. We accept that it is likely that the car had an MOT and a service in the period from 29 January 2009 to its seizure in April 2012.

44. It was suggested to us by Ms Carpenter that on an MOT there would be a requirement to report any adaptation to the car, but we were shown no statutory authority for that proposition, nor did we find any**.**

45. Mr Aston does not, however, make the same assertion. He merely asserts that the adaptation would have been discovered and he assumes reported. Given the apparent size and position of the enclosure, it seems to us that it was likely that in this adaptation would have been discovered, and that it is likely that at least one mention of it would have been made to the owner in that period of ownership.

46. We find that Mr Aston's consideration did not include any irrelevant matters.

(2) Were relevant considerations omitted?

47. Mr Aston takes into consideration Mr Saja’s contention (made via Malik and Malik) that he relied on Car Giant. But Mr Aston concludes that, for other reasons, Mr Saja must have known of the adaptation. In this process he does not fail to take into account a relevant consideration, but decides that if Mr Saja relied on Car Giant then the adaptation was made while he owned the car.

48. Furthermore we consider that Mr Aston would not have been unreasonable to conclude that if the adaptation had been present when Mr Saja purchased the car, he would have been told about it by Car Giant.

49. We could not identify any consideration which Mr Aston should have taken into account which he did not.

(3) A mistake of law.

50. We could not identify any mistake of law.

(4) A reasonable decision.

51. There were three aspects of the decision where we might have taken a different view of the implications of the primary facts from that taken by Mr Aston.

52. The first was in relation to the failure to inspect the vehicle. Mr Hellier has bought cars after taking them for a trial drive, but has never had a mechanic inspect them or even himself checked to see whether or not they had any adaptation or concealed compartment. He was not at all surprised that Mr Saja did not check the car. But he recognises that many purchasers will adopt a different attitude. We do not find Mr Aston's conclusion in this regard was one which could not have been reached by a reasonable person.

53. The second related to the explanation of Mr Saja's return to the UK. Mr Fosa had said that Mr Saja needed to return urgently and Mr Saja said that the car had broken down. We noted that Mr Fosa had said that his English was "not so good", although he gave seemingly clear answers to most of the questions he was asked. It seems to us that a non-native speaker might not give the answers as comprehensive or as extensive as someone who was a native speaker. It seemed to us that Mr Fosa's and Mr Saja's explanations could well have been two sides of the same story: the car broke down when Mr Saja was with Mr Fosa, Mr Saja had to return to the UK for pressing reasons ("urgently"), so he left the car to be repaired and brought back by Mr Fosa. That is one possible explanation. Another, however is that adopted by Mr Aston that it was suspicious that their stories were not identical. Whilst we do not agree with Mr Aston that "clearly Mr Fosa did not know how it had broken down", it seems to us that this was a conclusion which was reasonably open to Mr Aston on facts: given that Mr Fosa knew enough English to explain that Mr Saja had to travel back to England urgently, and yet did not mention the breakdown which, if Mr Saja's explanation is correct, would have meant that Mr Fosa had to pick up the car after it had been repaired.

54. Third we did not unanimously share Mr Aston's views in relation to insurance. We were shown nothing which indicated that the owner of the vehicle is required either here or in France or Belgium to have insurance which covers if the third party liability of any driver other than the keeper. Mr Aston's conclusion therefore that Mr Saja's reliance on Mr Fosa having insurance "shows little concern for his legal obligations" was not supported, although the onus of proof in these proceedings is on the appellant and the statement might well be taken to be a comment in relation to his obligations under the hire purchase agreement. It was suggested that if Mr Saja was relying on Mr Fosa's insurance, that such insurance would be third party insurance only, leaving the risk to Mr Saja's vehicle uninsured. Mr Hellier did not find this odd or unusual. Mrs Sadeque, however, considered that, given Mr Saja's car was quite an expensive car and on hire purchase, it was unlikely that he would not have ensured that the person driving his car was insured for more than third party liabilities: if Mr Fosa had had an accident and written-off the car Mr Saja would have remained liable for the hire purchase payments. Mr Saja did not supply any further information about the nature of the insurance applicable to Mr Fosa's driving of the car. We therefore accept that Mr Aston's view was not outside the bounds of reason.

55. We therefore find that Mr Aston did not act unreasonably in finding that: (i) Mr Saja's inconsistent account of the date of acquisition, (ii) his slapdash answer to questions on insurance, repairs, and being stopped by Customs, and (iii) his inference that Mr Saja's must have been told of the adaptation, tended to cast doubt on the

credibility of his assertion that he did not know of the adaptation. The lack of presentation of further evidence, documentary or otherwise, supported that conclusion.

56. Taking the facts together it seemed to us that there was sufficient evidence for Mr Aston to be able reasonably to conclude that it was likely that Mr Saja knew of the adaptation.

Conclusion.

57. We do not find it proved that Mr Aston's decision was unreasonable.

58. We therefore dismiss the appeal.

Rights of Appeal

59. 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.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 5 March 2014