TC03676

Appeal number: TC/2013/06899

EXCISE DUTY – Appeal against decision, upheld on review, not to restore goods seized on entry into the UK – Whether goods chewing tobacco, snuff or snus – Whether decision could reasonably have been reached – If not whether decision would inevitably have been the same - John Dee Ltd v Commissioners of Customs and Excise [1995] STC 941 applied – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

KRISHAN TYAGI
t/a STANDARDS TRADING **Appellant**

- and -

HOME OFFICE **Respondents**

TRIBUNAL: JUDGE JOHN BROOKS
MRS GILL HUNTER

Sitting in public at 45 Bedford Square, London WC1 on 23 May 2014

The Appellant in person

Catherine Collins, Counsel instructed by the Home Office, for the Respondents

DECISION

Introduction

1. Mr Krishan Tyagi, who trades as Standards Trading, appeals against the decision of the UK Border Force ("UKBF"), also referred to as the UK Border Agency ("UKBA"), contained in a letter, dated 4 September 2013, in which he was notified that, after a further review, 25 kg of Makla Bouhel Bentchicou ("Makla") described as "chewing tobacco", seized on 8 December 2012, would not be restored to him.

2. Although the Notice of Appeal was submitted to the Tribunal one day after the expiry of the statutory time limit it was explained, within the Notice, that this was because Mr Tyagi, who represented himself before us, was required to take on duties of a colleague who had gone on long-term sick leave following an accident. Miss Catherine Collins, of counsel, who appeared for the Home Office did not raise any objection to our hearing the appeal and, in the circumstances, we allowed the appeal to proceed.

3. The role of the Tribunal in case such as this was helpfully set out by the Tribunal (Judge Hellier and John Coles) in *Harris v Director of Border Revenue* [2013] UKFTT 134 (TC) which, although it concerned the restoration of a vehicle is applicable in relation to the seizure of any type of excise goods. The Tribunal said:

> "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 UKBA: 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 UKBA make a new decision, then the taxpayer may appeal against that decision and the same process follows.
>
> 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 UKBA 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 UKBA 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 concede 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 UKBA'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."

Facts

4. Although there was not a "Statement of Agreed Facts" the following facts which gave rise to this appeal were not disputed.

5. Having had 300 Kg of Makla seized by the UKBA when imported into the UK from Belgium on 6 August 2010, and following a subsequent visit from Officers of HM Revenue and Customs ("HMRC"), Mr Tyagi applied for approval as a "Registered Consignee" under s 100G of the Customs and Excise Management Act 1979 and the Excise Goods (Holding, Movement and Duty Point) Regulations 2010.

6. He was notified by HMRC in a letter dated 17 November 2010 that his application was successful. As such Mr Tyagi was authorised to import duty-suspended tobacco products from other EU Member States.

7. By a letter, dated 13 June 2011, written in relation to Tribunal proceedings (other than the present case) HMRC wrote to Mr Tyagi to explain:

> .. that the product you import, "Makla", is not liable to excise duty in the United kingdom as it does not fall within the definition of chewing tobacco set out in the Tobacco Products (Description of Products) Order 2003.

A subsequent letter from HMRC, dated 12 August 2011 stated, inter alia:

> The products 'Red Bentichicou sic Makla Bouhel' and 'Green Bentichicou sic Makla Bouhel' have been classed as Oral Snuff or Snus and not as chewing tobacco. Oral Snuff is not eligible for excise duty.

that letter continued:

> I am also writing to advise that Oral Snuff can not be sold commercially in the UK. Please find enclosed a copy of the legislation from the Tobacco for Oral Use Safety Regulations 1992.

8. On 19 November a 50 Kg consignment of Makla transported into the UK by TNT for Mr Tyagi was seized by the UKBA at Stansted Airport. Following correspondence and a visit by Mr Tyagi to the UKBA's office, the matter was referred to a David Walsh of HMRC and an email dated 5 December to Mr Tyagi from UKBA Officer Andrew Kemp explained:

> I have received instructions from Dave Walsh, ECSM on how to proceed in the matter of your importation of chewing tobacco.
>
> As mentioned on the telephone and during your visit to this office, this is not a straightforward matter, and as such I needed to hold your shipment here at Stansted whilst obtaining a directive from the HMRC sic that holds overall responsibility in this field.
>
> I am informed that on this occasion I may now release your shipment to TNT for onward dispatch to you, upon certain conditions being met. For this reason I have sought to contact you by E-mail and not telephone in order that the following instructions, and your response are recorded. To save time I thought that an E-mail would be preferable to a formal letter in the post.

The email then set out the conditions (which are not relevant for present purposes) before continuing:

> For any future importations of chewing tobacco please speak to Dave Walsh in HMRC, as I understand that you will in future need to adhere more closely to the correct procedures.

9. On 8 December 2012 a consignment containing 25 kilograms of Makla was, in the absence of any Administrative Reference Code or Accompanying Document, seized by officers of the UKBF who were satisfied that the goods were held for a commercial purpose and that none of the proper methods of importation of excise goods had been followed. It is this seizure that is the subject matter of the present appeal.

10. The Makla had been acquired from a Belgian supplier and was being transported by TNT when seized at Dover. Mr Tyagi was informed of the seizure by a letter dated 9 December 2012 and, although he had been provided with a Notice explaining the procedure by which he could do so, did not challenge the legality of the seizure. However, Mr Tyagi did seek restoration of the Makla. On 14 December 2012 he wrote to the UKBF as follows:

> With regard to your letter dated 09/12/12 (received on 13/12/12) informing me of the seizure of our consignment, firstly to my knowledge there is no Tribunal decision barring the sale of the product in the UK.
>
> Coming to the main point in your letter, I would like to bring to your notice that I am a Registered Consignee and my Excise ID is …, the number given in the DDA accompanying the consignment. However, as one of the enclosed documents issued by the Belgian authorities states, the product is not an excise good in Belgium, the country of despatch. Therefore our supplier cannot use ECMS and raise AD. As a result, Administrative Reference Code (ARC) cannot be generated. In the given situation, our supplier is creating the document called 'Document Adminstratif D'Accompagnement' (AAD) to accompany the goods.
>
> The HMRC authorities are aware of the situation. I request you kindly confirm with Mr David Walsh of HMRC Holding and Movement Policy Team and Ralli Quays, Salford, Manchester Tel. [number].

11. In its reply, dated 13 June 2013, the UKBF summarised its general policy not to restore goods which had been seized "because of an attempt to avoid excise duty" and having considered the circumstances of the seizure concluded the Makla should not be restored. On 22 July Mr Tyagi wrote to the UKBF requesting a review of that decision.

12. Having reviewed the decision not to restore the Makla the UKBF wrote to Mr Tyagi on 4 September 2013 to notify him that the "tobacco goods should not be restored".

13. It is clear from this letter that UKBF regarded the Makla as chewing tobacco and therefore subject to excise duty. However, at the request of HMRC, an analysis of the Makla was undertaken by Campden BRI (Chipping Campden) Limited. In its report, issued on 2 October 2013, the Makla was described as "brown lumps of matter which were photographed as received and can be referred to in Plate 1." The photograph at Plate 1 shows the sample against a millimetre-squared background

from which it is clear that the largest "lumps" to be no more than several millimetres in size.

14. An email, dated 10 October 2013, from the Food Specification and Control Group Manager of Campden BRI to HMRC explaining the result of the analysis states:

> Microscopy has confirmed it as tobacco with the addition of small fragments of grit … This product is moist and is intended to be rolled into a ball between the finger and then placed in the cavity between the gum and the lip. Basically it just rests there and can be sort of sucked but certainly not chewed. The intended use is the same as a product you mention in your email called Snus, these look like tiny teabags. They contain tobacco as well as other flavour ingredients and are placed in the cavity between gum and lip. These products fall under the titles oral snuff and not chewing tobacco and as I understand it are illegal in the UK.

15. The Food Specification and Control Group Manager of Campden BRI was correct in her understanding as Regulation 2 of the Tobacco for Oral Use (Safety) Regulations 1992 provides that "no person shall supply, offer to supply, agree to supply, expose for supply or possess for supply any tobacco for oral use."

16. The definition of "tobacco for oral use" for the purpose of these Regulations is contained in Regulation 1(2) which provides that it is:

> .. any product made wholly or partly of tobacco which is–
>
> (a) intended for oral use, unless it is intended to be smoked or chewed and
>
> (b) is either–
>
> (i) in powder or particulate form or any combination of these forms, whether presented in sachet portions or porous sachets or in any other way, or
>
> (ii) presented in a form resembling a food product.

Discussion and Conclusion

17. Although Miss Collins, relying on the Campden BRI Report, contended that the product imported was not chewing tobacco but snus, Mr Tyagi maintained that this was not the case. He referred us to Regulation 1(2)(b)(i) of the Tobacco for Oral Use (Safety) Regulations 1992 (see above) and the photograph in Plate 1 and description of the Makla in the Report as "brown lumps of matter" which therefore could not be "in powder or particulate form". However, given the size of the of the "lumps" and description of the product in the email to HMRC especially that can "certainly not" be chewed we find that it to be tobacco for oral use as defined by the Tobacco for Oral Use (Safety) Regulations 1992 and as such its supply is prohibited.

18. As the Tribunal noted *Harris v Director of Border Revenue* (see above) our jurisdiction in an appeal such as this is limited. The issue for us to determine is not

whether the Makla should be restored to Mr Tyagi (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 the UKBF not to restore it is one that could reasonably have been reached.

19. 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"

20. The decision of the UKBF not to restore the Makla to Mr Tyagi was made solely on the basis that it was chewing tobacco. This is despite HMRC's letters of 13 June and 12 August 2011 stating otherwise. Clearly by not considering the nature of the goods seized the UKBF failed to take into account all relevant matters and, as such we find that the decision, not to restore the Makla, to have been unreasonable.

21. In *John Dee Ltd v Commissioners of Customs and Excise* [1995] STC 941 the Court of Appeal held that in cases, such as the present, where the Tribunal had to consider whether HMRC (or the UKBF) had arrived reasonably at a decision and if it was shown that it had not, because of a failure to take some relevant material into account, the Tribunal could, nevertheless, dismiss the appeal if the decision would *inevitably* have been the same had account been taken of the additional material.

22. Having regard to all the circumstances of this case we are satisfied that had the nature of the Makla been taken into account by the UKBF, given our conclusion that it is tobacco for oral use as defined by the Tobacco for Oral Use (Safety) Regulations 1992 and its supply prohibited, the decision not to restore the Makla would inevitably have been the same and therefore we dismiss the appeal.

Right to Apply for Permission to Appeal

23. 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: 4 June 2014