TC04284

Appeal number: TC/2014/00702

EXCISE DUTY – Appeal against decision to restore vehicle seized on entry into the UK for a fee – Whether the decision could reasonably have been reached – Yes – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

TRANS-LUX **Appellant**

- and -

HOME OFFICE **Respondents**

TRIBUNAL: JUDGE JOHN BROOKS
MRS GILL HUNTER

Sitting in public at Fox Court, Gray's Inn Road, London WC1 on 3 February 2015

Anna Radajewska of Adwokat Przemyslaw Kral for the Appellant

James Jackson, counsel instructed by the Home Office, for the Respondents

DECISION

1. This is an appeal by Trans-Lux against the decision of the UK Border Force ("UKBF"), contained in a letter dated 3 January 2014, in which they notified the company that, after conducting a review they would restore a MAN tractor unit and a 13.6 metre Tri Axle trailer (the "Vehicle") that had been seized on 9 August 2013 when it was used by him to carry 199,960 cigarettes, for a fee of £16,400.

2. The jurisdiction of the Tribunal in an appeal such as this requires some explanation and we gratefully adopt that of Judge Hellier *Harris v Director of Border Revenue* [2013] UKFTT 134 (TC):

> "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.
>
> 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 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."

Law

3. Under Article 3 of the Convention on the Contract for the International Carriage of Goods by Road (the "CMR Convention"), which has "the force of law in the United Kingdom by virtue of s 1 of the Carriage of Goods by Road Act 1965, a carrier is responsible for the acts and omissions of his agents and servants and any persons whose services he used for the performance of the carriage. Article 4 of the CMR Convention requires the contract of carriage to be confirmed by the making out of a consignment note (ie a CMR document and Article 6 of the CMR Convention sets out the particulars which are required to be contained in the CMR document.

4. Article 8 of the CMR Convention provides:

> 1. On taking over the goods, the carrier shall check:
>
> (a) The accuracy of the statements in the consignment note as to the number of packages and their marks and numbers, and
>
> (b) The apparent condition of the goods and their packaging.
>
> 2. Where the carrier has no reasonable means of checking the accuracy of the statements referred to in paragraph 1 (a) of this article, he shall enter his reservations in the consignment note together with the grounds on which they are based. He shall likewise specify the grounds

for any reservations which he makes with regard to the apparent condition of the goods and their packaging, such reservations shall not bind the sender unless he has expressly agreed to be bound by them in the consignment note.

5. 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 …

6. 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 --
>
> (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 --
>
> ... 3,200 cigarettes 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)-

7. Regulation 88 of the Excise Goods (Holding, Movement, and Duty Point) Regulations 2010 provides:

> If in relation to any excise goods that are liable to duty that has not been paid there is –
>
> (a) a contravention of any provision of these Regulations, or
>
> (b) a contravention of any condition or restriction imposed by or under these regulations,
>
> Those goods shall be forfeiture

8. Section 139(1) of the Customs and Excise Management Act 1979 ("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.

9. 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

10. 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."

11. 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.

12. 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.

13. 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;

Facts

14. After obtaining oral references from his previous employer Trans-Lux employed Mr Sylwester Roszkowski as a driver/mechanic on 23 July 2013.

15. On 9 August 2013 the Vehicle, whilst being driven by Mr Roszkowski and documented as carrying industrial steel rods, was stopped at Dover by UKBF Officers. Mr Roszkowski told the Officers that he had beer but no cigarettes on the Vehicle. The Officers then examined the vehicle. This included drilling a hole in the trailer floor to gain access to the coil well where 199,960 concealed cigarettes were found.

16. As the officers were satisfied that the cigarettes had been improperly imported they were seized under s 139 CEMA as they were liable to forfeiture under s 49(1)(a)(i) CEMA and regulation 88 of the Excise Goods (Holding Movement and Duty Point) Regulations 2010. The Vehicle was also seized under s 139 CEMA as it was liable to forfeiture.

17. Although Mr Roszkowski was given a form 156 Seizure Information Office and a Notice 12A explaining the procedure for doing so no challenge was made to the legality of the seizure.

18. On 23 August 2013 Adwokat Przemyslaw Kral, acting on behalf of Trans-Lux, wrote to the UKBF requesting restoration of the Vehicle stating "My client needs the vehicle and the trailer to run her business."

19. UKBF replied on 16 September 2013 requesting information further including copies of any instructions or written procedures that Trans-Lux issued to its drivers or other staff, "including any steps to prevent smuggling."

20. A copy of Mr Roszkowski's contract of employment was sent to UKBF by Adwokat Przemyslaw Kral on 30 September 2013. The letter which enclosed the contract also stated:

> There is no obligation [in Poland] to issue written procedures for drivers to prevent smuggling. Staff is fully informed about Polish, International (including European), and target country law according to duty regulations, smuggling preventions, traffic rules and criminal law. Staff is also trained to handle with load, and take care of it, including its security. These training is ordered once, after employment, and consists mentioned law information and practical matters to take care of the load and a car. There is no individual written regulations issued for drivers.

21. By a letter dated 18 October 2013, after summarising the applicable UKBF restoration policy for commercial vehicles, the UKBF offered restoration of the Vehicle for a fee of £16,400, its value according to *Glass' Guide Valuations.*

22. A review of this decision was requested by Trans-Lux on 26 November 2015. This was undertaken by Mr Robert Brenton, a UKBF Officer, who upheld the decision to restore the Vehicle for a fee of £16,400. Adwokat Przemyslaw Kral, acting for Trans-Lux, were notified of the outcome of the review by a letter dated 3 January 2014 (the "Decision Letter").

23. After summarising the background to the case and correspondence between UKBF and Adwokat Przemyslaw Kral the Decision Letter refers to the UKBF "Restoration Policy for Commercial Vehicles" in the following terms (with emphasis as stated in the letter):

> The Policy for the restoration of commercial vehicles that have been used for smuggling excise goods is intended to tackle cross border smuggling and disrupt the supply of goods in the illicit market … Each case is considered carefully on its individual merits so as to decide whether exceptions should be made and any evidence of hardship is always considered.
>
> A vehicle adapted for the purposes of smuggling will not normally be restored.
>
> Otherwise the policy depends on who is responsible for the smuggling attempt:
>
> A: Neither the operator nor the driver are responsible; or
>
> B: The driver, but not the operator is responsible; or
>
> C: The operator is responsible
>
> …
>
> B. If the operator provides *evidence* satisfying [UK]BF that the driver but not the operator, is responsible for or complicit in the smuggling attempt then:
>
> (1) if the operator also provides evidence that satisfying [UK]BF that the operator took reasonable steps to prevent drivers smuggling then the vehicle will normally be restored free of charge unless:
>
> (a) ..
>
> (b) …
>
> (2) Otherwise:
>
> **(a) On the first occasion the vehicle will normally be restored for 100% of the revenue involved (or the trade value if lower).**
>
> (b) On a second or subsequent occasion the vehicle will not normally be restored

After stating that he (Mr Brenton) was "guided by the restoration policy but not fettered by it" in that he considered "every case on its individual merits" the Decision Letter continued:

> Having considered the evidence provided and concluded that paragraph B of the policy applies in that the driver, but not the operator, was responsible or complicit in the smuggling attempt it remains for me to determine whether satisfactory *evidence* has also been provided that the operator took reasonable steps to prevent drivers smuggling so that the vehicle should be restored free of charge unless the same driver was involved on a previous occasion.

> I would expect an operator involved in moving goods across international frontiers (not just to and from the UK) to make reasonable checks of the drivers to prevent smuggling and to be very well aware of the risks involved in illicit loads carried by drivers including the smuggling of firearms, explosives and excise goods. As a matter of routine I would expect such an operator to "vet" the drivers extremely carefully and to include extremely strict rules and penalties in their contracts, ensuring that all drivers are covered by these arrangements. … The contract with the driver, as provided to me, contains very little information; no paper references were obtained due to a personal recommendation; there was no formal interview procedure or references requested; nothing about the consequences of gross misconduct, criminal activity or [UK]BF irregularities and certainly nothing about smuggling or UK Customs or [UK]BF. I conclude that reasonable steps to prevent driver smuggling were not taken.
>
> I conclude that the operator did not take reasonable steps to prevent drivers smuggling and paragraph B(2) of the policy applies but as this was the first occasion [paragraph B(2)(a)] the vehicle should be restored for 100% of the revenue involved in the smuggling attempt (**or the trade value if lower**).
>
> …
>
> I have also paid particular attention to the degree of **hardship** caused by the imposition of a fee for the restoration of the vehicle. I sympathise with your client's difficulties in carrying on their business. … Hardship is a natural consequence of having a vehicle seized and it would have to be *exceptional* hardship for me to withdraw the fee for the restoration of the vehicle under this part of the policy. I do not regard either the inconvenience or expense caused by having to pay the fee for the restoration of the vehicle in this case as *exceptional* hardship over and above what one should expect. In the circumstances I do not consider that your client has suffered *exceptiona*l hardship I conclude that there is no reason to disapply the policy in all of the circumstances.

24. Although Trans-Lux accepted the UKBF decision "in general" it appealed to the Tribunal on 25 January 2014 on the grounds the fee for restoration of the Vehicle is "too high according to financial possibilities of the company" and value of the Vehicle as since its seizure it is not generating income but losses which may lead to the closure of the company. Also that Trans-Lux had no knowledge of the attempt to smuggle the cigarettes and actively cooperated with UKBF following the seizure.

Discussion and Conclusion

25. 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 Vehicle should be restored to Trans-Lux for a fee of £16,400, a lower sum or no fee at all (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 to restore it for that amount is one that could reasonably have been reached.

26. Lord Phillips of Worth Matravers 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"

27. It is apparent from the Decision Letter that Mr Brenton did take account of all relevant matters, including the representations made on behalf of Trans-Lux by Adwokat Przemyslaw Kral and whether the seizure of the Vehicle result in exceptional hardship for Trans-Lux. There has been no suggestion that irrelevant matters were a factor in the decision of UKBF. 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.

28. As such, and for the above reasons, the appeal is dismissed.

Right to Apply for Permission to Appeal

29. 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: 13 February 2015