[2015] UKFTT 0534 (TC)

TC04688

Appeal number: TC/2015/00552

RESTORATION – Seizure of goods in absence of export licence – Refusal to restore goods upheld on review – Whether decision reasonable and proportionate – Yes – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

BOSTON LIMITED **Appellant**

- and -

DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE JOHN BROOKS
SANDI O'NEILL

Sitting in public at Fox Court, Brooke Street, London EC1 on 20 October 2015

Neil Vadera, Finance Director of Boston Limited, for the Appellant

Natasha Barnes, counsel, instructed by the Director of Border Revenue, for the Respondents

DECISION

1. Boston Limited ("Boston") appeals against the decision of the United Kingdom Border Force ("UKBF"), contained in a letter dated 17 October 2014, by which it was notified that, after conducting a review, two SYS-5038ML-H12TRF-Supermicro Superchassis Barebone System (the "Goods") which were intended for export to India and had, in the absence of an export licence (as required by the Export Control Act 2008), been detained on 8 June 2014 at Heathrow Airport and which was subject to a seizure notice issued on 4 July 2014, would not be restored.

2. Before us Boston was represented by its Finance Director Mr Neil Vadera. Miss Natasha Barnes, of counsel, appeared for the Director of Border Revenue.

3. In addition to being provided with a bundle of documents we heard oral evidence from Mr Vadera and Mr Jon Howard on behalf of Boston and from Officer Raymond Brenton, the UKBF Officer who carried out the review which upheld the decision not to restore the Goods. Legislative provisions to which we refer are set out in full in the appendix to the decision.

Facts

4. The seizure of the Goods, in the absence of an export licence which gave rise to this appeal, was not the first occasion on which goods intended for export by Boston had been seized by UKBF.

5. On 7 September 2013 goods intended for export by Boston were seized by UKBF, under s 139 of the Customs and Excise Management Act 1979 ("CEMA"), as they did not have an export licence. Boston requested their restoration under s 152 CEMA and in a letter dated 16 October 2013, after explaining that it was the UKBF's general policy that such goods "will not be offered for restoration", the Review Officer wrote (with emphasis as stated in the letter):

> You have provided an undertaking that the aforementioned goods will be returned to your UK warehouse and not exported onto there (sic) original destination and I conclude that on this occasion the **goods will be restored on payment of £465.80:**
>
> - The goods must be accepted as they stand.
> - The goods must be accepted at no expense to the Crown
>
> If goods exported by you, are found without the appropriate paperwork being produced at the time of exportation in future they may not restore them.

6. On 21 September 2013 goods intended for export by Boston were seized by UKBF because no valid export licence had been produced at the time of exportation. Boston, having subsequently obtained an export licence requested restoration of the goods. On this occasion the goods were returned, because of the production of the export licence, but only on payment of £2,000. The letter of 28 October 2013 from

UKBF confirming the basis of the restoration of these goods also contained a warning that in future goods may not be restored if there was a failure to provide an export licence at the time they were to be exported.

7. A further seizure of goods intended for export by Boston occurred at Heathrow on 22 November 2013 as no valid export licence was produced. However, as a result of the subsequent acquisition and production of an export licence by Boston these goods were restored by UKBF on payment of £1,260. The letter from UKBF, dated 12 December 2013, contained the same warning that had been given in earlier letters that goods may not be restored if an export licence was not produced at the time they were to be exported.

8. On 23 December 2013 goods intended for export by Boston without an export licence were seized by UKBF. These too were restored on payment of £1,385.15 by Boston which had obtained and produced an export licence for these goods. As previously, the letter of 10 January 2014 from UKBF notifying Boston that the goods would be restored on payment contained a warning that in the future goods may not be restored if found without the appropriate paperwork at the time of export.

9. Mr Vadera accepted that the goods seized on 23 December 2013, like those seized on the previous occasions, did not have a valid export licence. However, he explained that this was because of a miscommunication with the freight forwarders who had failed to follow instructions to hold the goods until an export licence that had already been applied for had been obtained but had nevertheless proceeded with the export without such a licence. Mr Vadera also explained that as a result of the seizures in 2013 there had been internal staff training and advice sought from SPIRE, the Department of Business, Innovation and Skills ("BIS") Export Control Organisation responsible for its online licensing system.

10. It is clear from a letter dated 5 June 2014 from the Export Control Organisation that Boston had made an application for an export licence in respect of an intended export of goods. The letter states:

> I refer to your licence application dated 14 April 2014.
>
> 1. Based on the information provided in your application the items listed in the Schedule to this letter do not currently require an export licence.

We were told by Mr Jon Howard, an employee of Boston responsible for technical matters, that the goods for which the application was made were similar to the Goods seized by UKBF (the subject matter of this appeal). Both devices incorporated "AES encryption" and although they were different in appearance they contained the same technology and were subject to the same classification.

11. The Goods (with which this appeal is concerned) were detained by UKBF at Heathrow on 4 July 2014 as Boston did not have an export licence for them. On 22 July 2014 Boston wrote to UKBF seeking restoration of the Goods. In reply UKBF asked Boston to explain why there was no export licence or provide a copy of such a licence when it was obtained.

12. In a letter from Boston to UKBF, dated 7 August 2014 Mr Vadera wrote describing the Goods stating:

> Please note that this Bare Bone System consists of a chassis and a motherboard is not populated with CPUs, memory, hard drives or software. Due to this barebone system, no licence was applied for export.
>
> We have in the meantime applied for a licence and awaiting the licence to be granted by BIS

On 3 September 2014 Boston, having received the export licence for the Goods, sent it by fax to UKBF.

13. Restoration of the Goods was refused by UKBF on 9 September 2014 in the absence of any "exceptional circumstances" on the basis of it being the fifth seizure within a 12 month period because of a failure to produce export licences. On 10 September 2014 Boston wrote to UKBF explaining that it now had an Open General Export Licence which meant it did not need to apply for individual export licences and sought a review of the decision not to restore the Goods in accordance with s 14 of the Finance Act 1994.

14. The review was undertaken by Officer Brenton who, on 17 October 2014 wrote to Boston. After referring to the correspondence between the parties the letter summarised the UKBF's restoration policy for seized goods explaining that the "general policy" is that while seized goods should not normally be restored each case is examined on its merits to determine whether "restoration may be offered exceptionally.""

15. The letter continues (with emphasis as stated in the letter):

> It is for me to determine whether the contested decision should be upheld varied or cancelled. I have considered the decision afresh, including the circumstances of 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. I have examined all the representations and other material that was available to the Border Force both before and after the time of the decision.
>
> …
>
> I have read your letters carefully to see whether a case has been presented for disapplying the Border Force policy and whether there are any exceptional circumstances for doing so:
>
> From your companies (sic) unenviable offence history it is clear that you have a complete disregard [for] the export regulations in force. In your previous four export offences the goods were restored to you on each occasion for a fee which totalled £5110.95.
>
> On this occasion your explanation for the infringement appears to vary in each letter sent to BF:
>
> In your letter of 7th August 2014 you state:

"*Please note that this Bare Bone System consists of a chassis and a motherboard is not populated with CPUs, memory, hard drives or software. Due to this barebone system, no licence was applied for export.*

In summary your company believed that no licence was required.

We have in the meantime applied for a licence and awaiting the licence to be granted.

You have now applied for a licence even though you believe no licence was required.

In a letter faxed on 3rd September 2014 you enclosed a copy BIS Export Licence for the seized goods [*applied for and issued post seizure* - …]

On 10th September 2014, you explained that:

"***Please note we have an Open General Licence reference …, which means that we do not require to apply for SIEL licences for export shipments.***

These explanations are clearly at variance and appear to be another example of your company's cavalier attitude to export controls.

Conclusion

For the reasons set out above I conclude that:

- **The goods should not be restored**

16. On 30 January 2015 Boston appealed to the Tribunal.

17. Before us Officer Brenton confirmed that the explanations given by Mr Vadera and Mr Howard in their evidence to the Tribunal on behalf of Boston for not applying for a licence before attempting to export the Goods would not have caused him to alter his view with regard to their restoration.

Discussion and Conclusion

18. Although Boston did not appeal within the time limit required by s 16(1) of the Finance Act 1994, UKBF did not object to the appeal being heard out of time and, in the circumstances, we allowed the appeal to proceed.

19. It is appropriate at this stage to explain that the jurisdiction of the Tribunal in an appeal such as this is limited. As is clear from s 16(4) of the Finance Act 1994 the issue for us to determine is whether, having regard to our findings of fact, the decision taken by UKBF not to restore the Goods to Boston is proportionate and one that could reasonably have been reached. It is not sufficient that we might ourselves have reached a different conclusion.

20. As 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"

21. For Boston, Mr Vadera contends that the first three of the seizures of goods in 2013 caused the company to "clean up its act". He says that it now has a full understanding of export controls and has introduced internal and external training for staff and operational systems to prevent similar situations occurring in the future. He explained that the fourth seizure was the result of a misunderstanding by freight forwarders and that that the failure to apply for an export licence for the Goods was because of their similarity with those that the BIS Export Control Organisation had stated, in the letter of 6 June 2014 (see paragraph 10, above), did not require an export licence.

22. Miss Barnes, for UKBF, contends that the decision not to restore the Goods was reasonable. She referred to the evidence of Officer Brenton that having had the benefit of hearing the evidence of Mr Vadera and Mr Howard he would have maintained his decision not to restore the Goods and emphasised that this was the fifth occasion on which Boston's goods had been seized in the absence of an export licence. As there were no exceptional circumstances she submits that the appeal should be dismissed.

23. We consider Officer Brenton's decision not to restore the Goods reasonable in the circumstances that there had been four seizures in the latter half of 2013 and Boston had made no enquiries of SPIRE as to whether the Goods required a licence. It is apparent from the letter of 17 October 2014 and his evidence before us that Officer Brenton did take account of all relevant matters. There has been no suggestion that irrelevant matters were a factor in the decision of UKBF.

24. However, we find the language used by Officer Brenton in that letter to Boston, particularly his reference that Boston's explanations are "clearly at variance and appear to be another example of your company's cavalier attitude to export controls", to be intemperate and inappropriate in the circumstances of this case. Goods had been restored on previous occasions once the export licences had been obtained by Boston and, as Officer Brenton, himself, said goods would not be restored without a licence being obtained. The evidence contained a letter from BIS dated 30 June 2014 about the Goods stated that:

> "OGEL [Open General Licence] coverage for this class of information security product was expected to be in place for June 2014…..since it is expected to be removed from control in due course ….Wording of the OGEL, which would have India as an eligible destination is nearing final completion…".

We consider it a natural commercial step for Boston, which Mr Vadera said was a "medium sized" business with a turnover of "£ millions", to take to apply for, and obtain, an OGEL on 21 August 2014.

25. It therefore follows that we find the decision not to restore the Goods to be reasonable and proportionate having regard to all the circumstances of the case.

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

Right to Apply for Permission to Appeal

27. 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 28 October 2015

APPENDIX
Legislation referred to in the Decision

Customs and Excise Management Act 1979

Section 139 – Provisions as to detention, seizure and condemnation of goods, etc.

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.

Section 152 – Powers of Commissioners to mitigate penalties, etc.

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."

Finance Act 1994

Section 14 – Requirement for review of a decision.

(1) …

(2)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.

Section 15 – Review Procedure

(1) 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.

Section 16 – Appeals to a tribunal

(1) An appeal against a decision on review under section 15 … may be made to an appeal tribunal within the period of 30 days beginning with the date on of the document notifying the decision to which the appeal relates.

…

(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.