[2016] UKFTT 0418 (TC)

TC05172

Appeal number:TC/2015/05120

Customs Duty – Restoration of vehicle –owner not user – link between owner and user – appeal refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

GRUPA EURO-MIX SPOLKA Z OGRANICZONA ODPOWIEDZIALNOSCIA SPOLKA KOMANDYTOWA **Appellant**

- and -

THE DIRECTOR OF THE BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE SARAH ALLATT
MR NICHOLAS DEE

Sitting in public at Royal Courts of Justice on 13 April 2016

Dr A Morgan, Counsel, instructed by Pembridge Solicitors, for the Appellant

Mr T Rainsbury, Counsel, instructed by the Director of the Border Revenue, for the Respondents

DECISION

1. This is an appeal against a review confirming a refusal by the Border Force to restore a tractor unit and trailer to the Appellant.

Background

2. The following is undisputed:

3. On 21 March 2015 at Dover, the Border Force seized a tractor and a trailer together with 21,924 litres of beer. There was no paperwork to confirm that duty had been paid on the beer, or that the beer was in duty suspension.

4. The tractor and the trailer were owned by the Appellant, and leased to a company named Grupa Euro-Mix Spolka z orgraniczona odpowiedzialnoscia.

5. The seizure was not appealed in the magistrates courts

6. On 14 April a letter was sent to the Border Force requesting restoration of the vehicle

7. On 12 May further information was given about the lessor and lessee companies and the lease of the vehicle. We note this letter was dated both 12 May and 15 May – we refer to 12 May throughout for ease of reference.

8. On 17 June the Border Force refused to restore the tractor unit and trailer.

9. On 14 July a review of this decision was requested

10. On 20 July the Border Force invited the Appellant to send any further information

11. On 31 July the review of the decision was issued, confirming the decision not to restore.

12. This appeal is against the review of 31 July.

Evidence

13. The tribunal heard from Mrs D Hodge, the Officer who had issued the review letter on 31 July. In written evidence and under examination and cross-examination she confirmed the following:

14. The matters she took into account when reviewing the decision were:

15. The lessee company and the lessor company were separate legal entities. She had however researched any link between them (which the similarities in the names led her to suspect) and found that it appeared (she cannot put it more strongly as the documents were in Polish) that the companies shared a common director and were registered to the same address. She therefore considered that the two companies were 'inextricably linked'. She had been provided with documents related to the lease between the two companies (and its subsequent termination once the tractor unit had

been seized) but in her experience the existence of a lease was sometimes used to try to protect the vehicle from seizure in cases such as these, and did not disprove a close link between the companies.

16. There had been an earlier seizure of a vehicle belonging to the Appellant one week before the seizure to which this case relates. She was therefore dealing with a case where 'there had been a previous seizure within a 12 month period'. In that case the lessee company was a different company to the one in this case and the vehicle was restored. These facts were known at the date of the review.

17. She did not consider that adequate proof of the ownership of the trailer had been given. An invoice had been provided but the chassis number on the invoice did not match the vehicle that was held by the Border Force.

18. She considered whether exceptional hardship would result from the seizure of the vehicle but concluded that although hardship would result, this would not be exceptional.

Grounds of Appeal

19. Dr Morgan, Counsel for the Appellant, had been instructed only the day before the hearing. Brief consideration was given during the hearing to an adjournment, both to allow the Border Force to fully reply to the Skeleton Argument which was produced only on the morning of the appeal, or to allow Mr Morgan longer to prepare. We decided not to adjourn, principally because the Appellant had had ample notice of the hearing and the Directions, and had indeed written to the Tribunal two weeks before the hearing that 'the Appellant sustains their arguments mentioned in the letters and motions provided so far' which was taken to mean they had nothing more to add.

20. The grounds of appeal proposed in the hearing were:

21. Firstly, that the notice of seizure was not served upon the Appellant who had no opportunity to plead their case in the magistrates courts. An subsidiary point made in the first ground was the the Border Force did not take full account of the fact that there were 2 companies involved - the carrier (responsible for the goods and their importation) and the appellant (who was suffering the loss of the seizure of the vehicle).

22. Secondly, that the Border Force acted unreasonably in the original decision not to restore the vehicle.

23. Thirdly, that the Border Force acted unreasonably in the reviewing decision.

24. Fourthly, that Border Force policy in this area is contrary to EU Law in that (for reasons of language difficulties and access to English solicitors) it treats UK companies different to those of other EU states.

25. Fifthly, the seizure is contrary to the UK Human Rights Act.

The Law

26. Section 36(1) Alcoholic Liquor Duties Act 1979 provides

(1) There shall be a charge on beer-

(a) imported into the United Kingdom, or

(b) produced in the United Kingdom

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

88. 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 liable to forfeiture.

27. Section 49(1)(a) of CEMA provides that

(1) Where

(a) Except as provided by or under the Customs and Excise Acts 1979, any imported goods, being goods chargeable on their importation with customs or excise duty, are, without payment of that duty –

(i) unshipped in any port.

...

(b) Any goods are imported, landed or unloaded contrary to any prohibition or restriction for the time being in force with respect thereto under or by virtue of any enactment

...those goods shall, subject to subsection (2) below, be liable to forfeiture

Section 139(1) of 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.

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 things so liable, shall also be liable to forfeiture.

28. 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.

29. Section 14(2) of the Finance Act 1994 provides: 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(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.

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 appeal under this section the burden of proof as to -

(a) the matters mentioned in subsection (1)(a) and (b) of section 8 above, ...

Shall lie with the Commissioners, but shall otherwise be for the Appellant to show that the grounds on which any application is brought have been established.

Decision

30. We shall deal briefly with grounds one, four and five of the appeal. Ground one (that the company did not have time to appeal to the magistrates) is not an appealable decision in this court, and in any case given that the company had instructed solicitors within the 30 day time limit to appeal to the magistrates (as the solicitors wrote to the border force on 14 April, 23 days after the seizure) this is clearly not the case.

31. Ground four (that the matter is contrary to EU provisions as UK companies/nationals are treated differently to other nationals) was not fully argued before us. Other than speculation that language difficulties would exist for (some) non-UK nationals/entities, no arguments were maintained. We consider that the burden of proof has not been discharged in this area.

32. Ground five (that the matter contravenes the Human Rights legislation) has been dealt with previously in *HMRC v Jones* [2011] EWCA Civ 824 and most recently by the Court of Appeal in *European Brand Trading Ltd v HMRC* [2016] EWCA Civ 90. In the latter case, Lord Justice Lewison said 'Some tribunal judges have expressed dissatisfaction with *HMRC v Jones*. In reality, however, what they are dissatisfied with is the statutory scheme. But since this court has held in *HMRC v Jones* that the statutory procedure is Convention compliant, any perceived shortcomings in the scheme are matters for Parliament and not for the courts or tribunals. Their duty is to apply *HMRC v Jones*.' This Tribunal is bound by the Court of Appeal in this matter and we therefore dismiss this ground of appeal.

33. We shall take grounds two and three together. Ground two is that the original decision not to restore was unreasonable, and ground three is that the review decision was unreasonable. Ground two is not the decision being appealed in this hearing, as the appeal is against the review. However, since similar points were made by Dr Morgan in relation to both decisions, we will cover these together, treating all as made in appeal against the review.

34. Under grounds 2 and 3 it was argued that the Border Force:

(1) Took no account of the notice of claim on 15 May 2015

(2) Referred to a seizure on 7 April

(3) Failed to take (proper) account of the letter of 14 July

(4) Treated the lessor as the carrier

(5) Speculated about the companies being 'inextricably linked', and that it was unreasonable to do this

(6) Referred (and continued to refer) to the earlier seizure (where the vehicle was restored to the Appellant)

(7) Failed to consider (and continued to fail to consider) the disproportionate effect between the lost duty and the loss of the vehicle

(8) Was wrong to hold (and continue to hold) that ownership had not been proven

(9) Disregarded the Appellants reasonable steps to prevent smuggling in its vehicles

35. Points one, three, four and five are all linked. In essence the argument from the appellant is that the companies are separate legal entities. Lease documents have been provided which show the lease, and termination documents to show the lease was terminated after the smuggling attempt. The argument from the Border Force is that they are well aware that the companies are separate, but they have similar names indicating they may be members of a group, they appear to share a common director, they appear to share an address, and therefore it is reasonable to conclude they are linked, and that restoring the vehicle to the appellant is tantamount to restoring to the company responsible for the smuggling attempt. In the experience of the officer, leases such as this one are often used to try to circumvent Border Force policy in this area.

36. We remind ourselves that the onus of proof is on the appellant in such cases. We also remind ourselves that our jurisdiction in this matter is supervisory only, that is to say, was it unreasonable for the officer performing the review to come to the conclusion she did.

37. The first letter from the Border Force states 'I have treated [the Appellant] as the haulier because no evidence has been provided to support the claim that there are two separate companies involved in the lease agreement. The second letter (the review subject to this appeal) puts the point more clearly 'Your case for restoration relies on the fact that there are two separate Grupa Euro-mix companies and one leases the vehicles to the other and therefore [the Appellant] is an innocent third party. Technically, you may be correct. However, as far as restoration is concerned, my view is that the two companies are inextricably linked and you have not demonstrated otherwise....It is my belief that the arrangement has been set up in order to circumvent the Border Force restoration policy'

38. We find it reasonable for the officer to conclude, on the basis of the information she held, that the companies were inextricably linked, and therefore to apply the Border Force policy as if the Appellant was the haulier in this case. The Appellant was asked, in the original decision letter and in the review letter, to provide fresh evidence if they so wished. No evidence has been produced (other than the lease documents, which are not conclusive for the reasons set out by Ms Hodge) that the companies are not 'inextricably linked'.

39. Point two was an administrative error and made no difference to the actual decision.

40. At point six the Appellant argues that because an earlier seizure had resulted in the restoration of the vehicle, the either that earlier seizure should be disregarded, or, that earlier decision somehow shows that this second decision is unreasonable.

41. Ms Hodge explained in her evidence that she was aware that there was an earlier seizure, and that she was aware that the vehicle had been restored. She did not read any papers surrounding the earlier seizure.

42. The previous seizure had been from a lessee different to the lessee in this case.

43. We do not consider that the mere fact that restoration had taken place at an earlier seizure has any bearing on this case. In fact, given that the earlier seizure would have been a first seizure, restoration is more likely than in this case, which is a second seizure.

44. The appellant makes the point that it is a large logistics company that also leases vehicles out, and does the best it can to prevent smuggling but cannot be held responsible for the actions of the drivers of the lessee companies.

45. However, that does not fully address the main points of this case, which is that the Border Force suspect a strong link between the Appellant and the lessee company, which has not been disproved.

46. We were not fully advised of the Border Force Policy in this area, where, at a first seizure, the lessor company is (presumably from the fact of restoration) determined not to have been responsible, but at a second seizure a different view is taken.

47. We do not think it unreasonable for either the original decision or the review to take the view that they did, where the seizure is taken both as a second seizure (but one where the lessee company is different from the first seizure), and one in which the lessee and lessor companies are linked, the combination of which results in the decision not to restore.

48. Point seven was that hardship (or disproportionality) had not been considered. The review letter makes it clear that hardship had been considered, but that exceptional hardship the reviewer did not think that this was a case of exceptional hardship. Once again it is important to bear in mind that the onus is on the Appellant in this case, both at this Appeal and when providing information to the Border Force, to prove their case. The Appellant's solicitor said, in a letter dated 15 May 2015 'due to the vehicles being seized my Client has suffered a great financial loss and therefore asks for their prompt restoration'. This appears to be the entirety of the argument that exceptional hardship has been suffered. At the hearing Mr. Morgan argued that the seizure of the vehicles was 'disproportionate to the loss of revenue'. However we Border Force policy is made to ensure compliance, not to punish in strict proportion to an offence. Border force policy does recognise proportionality in that it deals differently with matters depending on whether the loss of revenue was greater or less than £50,000. We can see no compelling evidence that exceptional hardship has been suffered by the appellant and we therefore do not think it is unreasonable of Ms Hodge to decide that this was not a case of exceptional hardship.

49. Point eight relates to ownership and is relevant to the trailer only. The vehicles have been described both by their registration numbers (tractor KRA1333C, trailer KRA367P) and by their chassis numbers. When asked to prove ownership, the appellant produced an invoice for the tractor detailing the chassis number WMA06XZZ0BM574945, which matched the unit that was held by the Border Force. The invoice produced by the Appellant purporting to relate to the trailer had a chassis number WSM00000005039989. This did not match the trailer held by the Border Force, where the chassis number ended 5080755. We hold it entirely reasonable for the Border Force to conclude that this did not prove ownership of the trailer.

50. Point 9 was that the Border Force paid no attention to the steps taken to prevent smuggling in the vehicles.

51. In the review letter dated 31 July 2015, Ms Hodge states 'In a letter dated 12 May 2015 you gave further details explaining that the vehicle was leased to a Company with a similar name, which was a completely separate legal entity. You stated that your client bears no responsibility for the illegal actions of their lessees' drivers. You then went on to say that your client takes preventative measures to discipline their drivers against illegal actions...'. Ms Hodges was asked about this paragraph in the hearing, and referred to the letter written by the Appellant's solicitors on 12 May. This letter states 'Please note that my Client deals with international logistics professionally and uses plenty of vehicles for transportation. They sometimes hire their vehicles which are later usufructed by third parties. This is what happened in this particular case. My Client cannot be responsible for the actions of their lessees and especially for the actions of their lessees' drivers. My Client has acquired information that the drivers charged with smuggling offences were immediately fired. Moreover, my Client takes preventative measures to discipline their drivers against any illegal actions. Having committed any illegal action, drivers are obliged to take financial responsibility and get fired disciplinarily. They get monitored and undergo random checks.

My client is a reliable entrepreneur, vehicles used by their direct employees have never been seized under smuggling offences...'

52. Ms Hodge confirmed in the hearing that she believed the sentence 'Moreover, my Client takes preventative measures to discipline their drivers' was referring to the drivers of the (as she suspected, closely linked) company. Hence her use of 'You then went on to say...' in her review.

53. However, on reading this we believe that is not what the relevant paragraph in the letter states. It states, firstly, that the [Appellant] is itself a professional logistic company that uses vehicles [and drivers]. They then go on to say they sometimes hire vehicles out. They say they cannot be responsible for the actions of the lessee [nor the lessees drivers]. They then go on to say that for their own drivers, where they can be responsible, these are the measures they take. They then add that no direct employee has been involved in smuggling.

54. We therefore consider that in reading this paragraph as further evidence of the linked nature of the companies, where it was trying to distinguish between direct and indirect employees, Ms Hodge took notice of an irrelevant fact.

55. We consider that she did take notice of the steps to prevent smuggling (as she refers to the points being made by the Appellant in the letter of 12 May when writing her review letter) but considered these were not sufficient.

56. In such a case, the Tribunal may decide not to interfere, even if something irrelevant has been taken onto account, if the decision would inevitably have been the same (as held by the Court of Appeal in John Dee Ltd v Commissioners of Customs and Excise [1995] STC 941).

57. This Tribunal considers that this is such a case. We consider that although Mrs Hodge's erroneous interpretation of the letter was an irrelevant fact, this was only one

of a number of facts that led to her taking the view that the two companies in question were 'inextricably linked' and therefore deciding not to restore. The other facts supporting her view were the similarity of the names, the common address and the common director. The Appellant was given the opportunity to show that the companies were not inextricably linked, but has not done so. It has merely argued that the two companies are separate legal entities, a fact that is not in dispute.

58. We therefore dismiss this 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.

SARAH ALLATT
TRIBUNAL JUDGE

RELEASE DATE: 14 June 2016