[2016] UKFTT 476 (TC)

TC05228

Appeal number: TC/2015/006842

EXCISE DUTY – seizure of oil considered to be diesel on which duty not paid – whether HMRC's decision to refuse to restore unreasonable – whether appellant could seek to establish that the oil was not diesel – decision in* HMRC v Jones and Jones *considered and applied – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

VYBIGON S.R.O. **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE JONATHAN RICHARDS
RUTH WATTS-DAVIES

Sitting in public at Fox Court, Brooke Street, London on 27 June 2016

The Appellant did not appear, and was not represented

George Hobson, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents

DECISION

1. The appellant company (the "Company") is incorporated in the Czech Republic and appeals against HMRC's decision (upheld following a review) to refuse to restore 28,500 litres of oil that was seized on 23 June 2015.

2. No representative or agent of the Company attended the hearing. Until 26 May 2016, the Company was represented by Euro Lex LLP ("Euro Lex") who were duly appointed as the Company's representative under Rule 11 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules"). On 26 May 2016, the Tribunal sent Euro Lex a Notice of Hearing by email. Euro Lex replied to this email stating that they were no longer instructed to act for the Company. This exchange demonstrated that the Company's representative had received the Notice of Hearing. We were satisfied that it was in the interests of justice to proceed in the Company's absence and we duly did so as permitted by Rule 33 of the Tribunal Rules.

Evidence

3. We had evidence from Allan Donnachie, the officer of HMRC who performed the review decision against which the Company appeals. He provided a witness statement and answered some questions from the Tribunal. We have accepted his evidence.

4. The Company did not serve any witness evidence and, since no agent or employee of the Company attended the hearing, there was no opportunity for us to hear live evidence on behalf of the Company.

5. HMRC prepared a bundle of documents and we were referred to a number of these documents.

Findings of fact

6. At approximately 20.15 on 22 June 2015, UK Border Force officers at Dover Docks stopped a Renault Magnum tractor unit and a tanker trailer unit. The CMR accompanying the load indicated that the tanker unit contained 24,040 kilos of "LOK" (which other documentation explained as standing for "Lubricating Oil Kayla") which was being shipped from Kayla Limited, at an address in Cyprus, to an address in London. The transporter was "Nefaria Trans", a Polish transportation company. The UK Border Force officers broke the seal on the tank and, having performed some roadside tests, suspected that the product was, or contained, gas oil that was subject to excise duty. They detained the goods pending the attendance of officers from HMRC's Road Fuel Testing Unit ("RFTU"). The UK Border Force officers issued a notice of goods detained to the driver of the vehicle, but did not arrest the driver.

7. At approximately 09.40 on 23 June 2015, RFTU officers attended to inspect the vehicle's load. The driver of the vehicle did not return in order to witness this inspection. The RFTU officers took samples from the tanker's five container pots and

two running tanks and, in the absence of the vehicle's driver, this sampling was witnessed by Officer Bushell, a UK Border Force officer. The results of specific gravity tests indicated that the oil was consistent with diesel and the RFTU officers accordingly seized the vehicle, trailer and load. The samples that the RFTU had taken were sent to LGC Forensics for further analysis.

8. On 16 July 2015, the results of the LGC tests became available. Those tests indicated that all of the samples contained diesel.[1]

9. Meanwhile, on 14 July 2015, Euro Lex, on behalf of the Company, wrote to request restoration of the seized oil in a letter headed "Application for Restoration of the Goods". In their letter they asserted that the oil was classified under the combined nomenclature in Council Regulation No 2658/87 under commodity code 27101991 as "metal working compounds, mould-release oils, anti-corrosion oils". The letter did not require HMRC to take condemnation proceedings in the magistrates' court to establish the lawfulness of the seizure and the core of Euro Lex's request is set out in the following extract from their letter:

> Our understanding is that the goods in question are not subject to excise duty (fuel duty) and should therefore be released. In the circumstances our client requests their goods be restored as a matter of urgency.

10. On 7 August 2015, Officer Dempster of HMRC refused to restore the oil seized, stating that it was "predominantly diesel and therefore dutiable". He notified the Company of its right to an internal review of his decision.

11. On 17 September, Euro Lex replied to Officer Dempster's letter. They argued that, since gasoil (diesel) was classified under a different commodity code from that applicable to the seized oil for the purposes of the combined nomenclature, it followed that the seized oil was not diesel and could thus not be subject to excise duty. They developed this argument by saying that, it was not relevant that the seized oil contained gasoil. In order to be subject to excise duty it needed to consist entirely of hydrocarbon oil. Euro Lex requested a review of the decision not to restore the seized oil.

12. A review was performed by Officer Donnachie of HMRC who concluded that the seized oil should not be restored in a letter dated 21 October 2015. The essence of Officer Donnachie's conclusion was that the oil was subject to duty and that HMRC's policy is that smuggled oil is not restored to the owner unless there are exceptional circumstances. Since he could not identify any exceptional circumstances, he concluded that the refusal to restore the oil was "legally correct" and "in line with HMRC policy".

---

[1] Mr Hobson's skeleton argument said that "[t]he results for all but one of the samples indicated the presence of Gas Oil/ DERV." However, our review of the LGC forensic reports suggests that this was true of all of the samples.

13. We are satisfied that at no point in the month following the seizure of the oil (or indeed at any time) did the Company, or Euro Lex, serve a "notice of claim" for the purposes of paragraph 3 of Schedule 3 of the Customs and Excise Management Act 1979 ("CEMA") which contested the legality of the seizure and required HMRC to take condemnation proceedings in the magistrates' court. We have considered whether Euro Lex's letter of 14 July 2015 could be read as a "notice of claim" since it did contain a suggestion that the oil was not subject to excise duty. However, we have concluded that this letter was not a "notice of claim", but was a request for HMRC to exercise their discretionary power to restore seized goods set out in s152(b) of CEMA. We have reached that conclusion for the following reasons:

(1) The letter was written by Euro Lex whose letterhead describes them as being regulated by the Ministry of Justice in respect of regulated claims management activities. Euro Lex used the technical term "restoration" in their letter which mirrors the terminology of s152(b) of CEMA. Their letter does not positively assert that the oil was seized unlawfully, only records Euro Lex's "understanding" that the oil was not subject to excise duty and concludes by requesting restoration. If they had intended to contest the legality of seizure in the magistrates' court, as claims management specialists, we would have expected them to be explicit on this point.

(2) Euro Lex did not demur when Officer Dempster offered a review of his decision (which would not be available if a formal notice of claim under paragraph 3 of Schedule 3 had been made). They did not ask why condemnation proceedings were not being commenced in response to their letter of 14 July 2015. On the contrary, they accepted Officer Dempster's offer of a review.

(3) HMRC's Statement of Case dated 29 January 2016 contains the assertion that "no valid notice of claim contesting the seizure was received by the Respondents within the period of one month from the date of the seizure". Neither the Company nor Euro Lex has sought to challenge that statement by arguing that the letter of 14 July 2015 was, in fact, a notice of claim.

The law

14. We have not set out in any detail the law relating to the charging of excise duty on hydrocarbon oil or the power of HMRC to seize goods or vehicles since our jurisdiction is confined to considering the reasonableness of HMRC's decision to refuse to restore the oil and is circumscribed by the decision in *HM Revenue & Customs v Jones and another* [2011] EWCA Civ 284. However, for completeness, we note that s6 of the Hydrocarbon Oil Duties Act 1979 imposes a charge to excise duty on hydrocarbon oils including "heavy oil", s49 of CEMA provides for the forfeiture of goods that are imported without duty being paid and s139 of CEMA gives HMRC the power to seize goods that are liable to forfeiture.

15. Schedule 3 of CEMA sets out a number of provisions connected with the seizure of goods which, so far as material, are as follows:

> **Notice of claim**
>
> 3. Any person claiming that any thing seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of the date of the seizure, give notice of his claim in writing to the Commissioners at any office of customs and excise…
>
> **Condemnation**
>
> 5. If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of any thing 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 forfeited.

HMRC's discretionary power to restore goods

16. Section 152 of CEMA gives HMRC a discretionary power to restore goods and vehicles that have been lawfully seized in the following terms:

> **152 Power of Commissioners to mitigate penalties, etc.**
>
> The Commissioners may, as they see fit--
>
> …
>
> (b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under those Acts.

Reviews of discretionary powers

17. Section 14 of the Finance Act 1994 ("FA 1994") permits a person to require a review of a decision by HMRC to refuse to restore seized goods. Section 15 of FA 1994 sets out the procedure to be followed on a review under s14 of FA 1994.

18. Section 16 of FA 1994 sets out rights of appeal to the Tribunal in relation to matters connected with a refusal to restore goods and provides, relevantly, as follows:

> **16 Appeals to a tribunal**
>
> (1) An appeal against a decision on a review under section 15 (not including a deemed confirmation under section 15(2)) may be made to an appeal tribunal within the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates.
>
> …

> (4) In relation to any decision as to an ancillary matter[2], or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section 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 review or further review as appropriate 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 review or further review as appropriate, 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.

The decision in Jones

19. In *HMRC v Jones and Jones* [2011] EWCA Civ 824, the Court of Appeal considered the potential overlap between condemnation proceedings and an appeal to the Tribunal under s16 of FA 1994 against HMRC's refusal to restore seized goods. In that case Mummery LJ said:

> The deeming process [contained in paragraph 5 of Schedule 3 of CEMA] limited the scope of the issues that the respondents 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 a fact that they were being imported for own use. The role of the tribunal, as defined in the 1979 Act, does not extend to deciding as a fact that the goods were, as the respondents argued in the tribunal, being imported legally for personal use. That issue could only be decided by the court. The FTT's jurisdiction is limited to hearing an appeal against a discretionary decision by HMRC not to restore the seized goods to the respondents. In brief, the deemed effect of the respondents' failure to contest condemnation of the goods by the court was that the goods were being illegally imported by the respondents for commercial use.

Approach to assessing the "reasonableness" or otherwise of a review decision

20. Following the approach set out in *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1980] 2 WLR 753 at 663 we consider that we must

[2] The combined effect of s16(9) of FA 1994 and paragraph 2(1)(r) of Sch 5 of FA 1994 is that the decisions to refuse to restore goods that are the subject of this appeal are decisions as to "ancillary matters".

address the following questions in order to assess the reasonableness or otherwise of Officer Donnachie's decision:

(1) Did Officer Donnachie reach a decision which no reasonable officer could have reached?

(2) Does the decision betray an error of law material to it?

(3) Did Officer Donnachie take into account all relevant considerations?

(4) Did Officer Donnachie leave out of account all irrelevant considerations?

21. In *Balbir Singh Gora v C&E Comms* [2003] EWCA Civ 525, Pill LJ accepted that, 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. However, since the Company has not put forward any witness evidence, our scope for making such findings of fact is limited accordingly.

Discussion

22. Since the Company did not attend the hearing (or produce any witness evidence or skeleton argument), we have approached this appeal by considering the Grounds of Appeal that the Company advanced in its Notice of Appeal to the Tribunal. Those can be summarised as follows:

(1) The seized oil is not subject to excise duty. The Company disputes the results of the LGC analysis.

(2) The Company explained why the oil was not subject to excise duty when it first requested restoration. HMRC did not pay any attention to those arguments.

(3) The driver of the vehicle was not present when the samples referred to at [7] were taken. HMRC did not provide a duplicate set of those samples to the Company.

(4) HMRC's review was generally unfair. A specific criticism was that they did not provide the Company with a copy of their policy on restoration.

(5) HMRC's refusal to restore the oil has adversely affected the Company's business.

23. Since we have concluded that the Company did not make a notice of claim under paragraph 3 of Schedule 3 of CEMA, the effect of paragraph 5 of Schedule 3 of CEMA and the decision in *Jones* is that we cannot consider the ground set out at [22(1)]. If the Company wished to argue that the oil was not subject to duty (either because HMRC had misunderstood the law, or because the conclusions of the LGC analysis were incorrect) it should have served a "notice of claim" under Schedule 3 of CEMA and contested proceedings in the magistrates' court. The ground in [22(2)] is covered by the same principle. It is not unreasonable for HMRC to refuse to consider arguments that should have been raised in the magistrates' court.

24. The ground summarised in [22(3)] amounts in part to an assertion that there were irregularities in the process by which the oil was seized. That is relevant to the legality of the seizure (which is the province of condemnation proceedings in the magistrates' court) and is not relevant to the question of whether HMRC should exercise their discretionary power to restore the oil.

25. Having read Officer Donnachie's review decision and surrounding correspondence, we can see no basis for concluding that it was generally unfair (the ground set out at [22(4)]). We do not consider that there was any obligation on Officer Donnachie to send the Company the full text of HMRC's restoration policy. His obligation was to turn his mind to the Company's request for restoration and consider, in a reasonable way, whether HMRC should exercise their discretion in the Company's favour. He duly did so.

26. The ground set out at [22(5)] does not approach the threshold of establishing that HMRC's decision was unreasonable. It is inevitable that the lawful seizure of goods will have an adverse economic effect on the person from whom those goods were seized. That of itself cannot make the refusal to restore unreasonable. More generally, having read Officer Donnachie's decision and surrounding documents, we do not consider that it contains any of the indicators of "unreasonableness" set out at [20].

27. If Euro Lex's letter of 14 July was (contrary to our conclusion) a valid "notice of claim" then it is at least arguable that, because the deeming provision in paragraph 5 of Schedule 3 of CEMA is not engaged, the Company could make arguments to this Tribunal that relate to the lawfulness of the seizure. However, in the absence of any witness evidence or detailed submissions from the Company, we are not in a position to conclude that the seized oil was not subject to duty or that the seizure was in any way irregular or unlawful. Therefore, even in this case, we would not interfere with Officer Donnachie's decision.

Conclusion

28. The appeal is dismissed. 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.

JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 5 JULY 2016