[2017] UKFTT 294 (TC)

# TC05770

**Appeal number: TC/2015/02188**

***CUSTOMS DUTY - Seizure of mobile phone - Regulation 20 (Postal Packets) (Revenue and Customs) Regulations 2011 - Articles 237 and 238 of Community Regulation 2454/93/EEC - Refusal to restore - Errors of fact and law in review decision - Appeal allowed - Re-review directed***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**MR ANDREW KNOX** **Appellant**

**- and -**

**THE DIRECTOR OF BORDER REVENUE** **Respondents**

**TRIBUNAL: JUDGE CHRISTOPHER MCNALL**
**MR ANTHONY HENNESSEY FCA**

**Sitting in public at the Tribunal Hearing Centre, 2nd Floor, Royal Courts of Justice, Chichester Street, Belfast BT1 3JF on 13 March 2017**

**The Appellant did not attend**

**Ms Fiona Fee, of Counsel, instructed by Marian Killen of the Crown Solicitor's Office, for the Respondents**

DECISION

1. The Appellant did not attend the hearing. Nonetheless, we were satisfied, pursuant to Rule 33 of the Tribunal's Rules, that he had been given notice of the hearing (indeed, that notice had been given by recorded delivery) and that it was in the interests of justice to proceed.

2. The Respondents did not ask us to adjourn the hearing in order to allow the Appellant to attend. That was a sensible stance to have adopted. This appeal had been ongoing for some time. An earlier decision of one composition of the Tribunal (Judge Kenneth Mure QC and Miss Gordon) made at a hearing on 13 June 2016, similarly in the absence of the Appellant, had been set aside by Judge Mure QC on 1 August 2016. The interests of proportionality leant heavily in favour of continuing the hearing, even though the Appellant had not attended.

3. However, the Respondents subsequently changed tack. In the face of close questioning by the Tribunal concerning various aspects of the Review Decision, discussed in more detail below, the Respondents applied to adjourn in order to permit the Respondents to collate more evidence and for the Reviewing Officer to attend to give evidence.

4. We refused that application, principally on the basis that an adjournment would not have served to further the overriding objective. Moreover, the Respondents themselves had applied for the witness statement of Officer David Harris, the reviewing officer, dated 2 April 2015, to be treated as hearsay on the basis that, *'in the circumstances the costs outweigh the likely benefit of the personal attendance (by him) at Court'*.

5. We are nonetheless grateful for the assistance of Ms Fiona Fee of Counsel. However, despite her lucid and succinct submissions, and for the reasons set out below, we allow this appeal and we direct that there be a re-review of the decision not to restore.

**The Facts**

6. Mr Knox bought a Samsung Galaxy 4 Note mobile phone ('**the Phone**') online, in order to replace one which had been stolen. He paid £517 for it.

7. The Phone was intercepted at the Countrywide Freight postal depot. It had been sent to the UK from Hong Kong. It was therefore a foreign postal packet.

8. The parcel containing the Phone bore a customs declaration, but the contents were declared as 'Camera Electronic Parts' and were valued by the sender at £11.

9. The Phone was not 'camera electronic parts'. Nor could the Phone sensibly be valued at £11.

10. On 20 November 2014 the Phone was seized as liable to forfeiture. No condemnation proceedings were brought in the Magistrates' Court.

11. Restoration was refused by way of a letter dated 7 January 2015.

12. A review was conducted. Restoration was refused in a letter dated 11 February 2015: 'the Review Decision'. That is the decision which is the subject matter of this appeal.

**The Law**

13. Insofar as material, Regulation 20 of the *Postal Packets (Revenue and Customs) Regulations 2011* provides as follows:

> *"20(1) Where-*
>
> *(a) the contents of a foreign postal packet are not in accordance with the accompanying customs declaration [...]*
>
> *The packet and all its contents shall be liable to forfeiture*
>
> *20(2) Subject to Regulation 8, section 139 (provisions as to detention, seizure and condemnation of goods, etc) and of Schedule 3 to the Act of 1979 [namely, the Customs and Excise Management Act 1979] shall apply to anything liable to forfeiture under paragraph (1) above as they apply to goods liable to forfeiture under that Act"*

14. Section 152 of the *Customs and Excise Management Act 1979* entitles the Commissioners, 'as they see fit', to 'restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under the Customs and Excise Acts'. Hence, and when it comes to restoration, section 152 confers a broad discretion on HMRC.

15. The Review Decision is an 'ancillary matter' for the purposes of section 16 of the *Finance Act 1994*. Our powers are therefore those which are set out in section 16(4) of that Act:

> *"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 section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not have reasonably have arrived at it, to do one of 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;*
>
> *(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"*

16. In broad terms, our jurisdiction in this regard is that the Review Decision can only be challenged on 'Wednesbury' principles, or principles analogous to Wednesbury: see the judgment of Dyson J. (as he then was) in *Pegasus Birds v Customs and Excise Commissioners* [1999] STC 95 at 101.

17. 'Wednesbury' is simply a useful shorthand referring to the principles articulated by the Court of Appeal (Lord Greene M.R., with whom Somervell LJ and Singleton J agreed) in the seminal case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223:

> "The court is entitled to investigate the action of the [decision-maker] with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account..." (at pp 233-234)

18. Thus, we are not concerned with reviewing the *merits* of the Review Decision, but rather the lawfulness of the decision-making process itself, including whether the Review Decision has identified and applied the law correctly.

**Discussion**

19. We find that there was no reason for Mr Knox to have either known or even suspected that the Phone was coming to him from abroad. Conversely, there was good reason for Mr Knox to have genuinely believed that the Phone was coming to him from somewhere in the UK, and we so find.

20. The website from which he purchased gave him and (as the printed extracts of it which we saw) also gave us every impression of being the website of a reputable UK-based trader:

(1) The website has a 'co.uk' domain;

(2) Prices are given in sterling (GBP);

(3) The website is in literate and conventional English.

21. Consistently with this, Mr Knox received an invoice from 'eGlobal Central (UK)'.

22. Given that there was no apparent reason for Mr Knox to have either known or even suspected that the Phone was going to come from abroad, then it must follow that he neither knew nor had any reason (i) to know or suspect that the Phone would go through customs at all, or (ii) to know or suspect that any customs duty was going to be payable on the Phone.

23. Consistently with those facts, Mr Knox paid the seller in sterling. The money was transferred from his bank account, in sterling, to another bank account, in sterling. Every indication available to Mr Knox, and put before us, was that the seller's bank account was in the UK since (i) there was no currency exchange; and (ii) there was no overseas remittance fee.

24. Mr Knox subsequently drew attention to the 'small print' contained in eGlobal's Terms and Conditions, obtainable via its website. He had not read them at the time of purchase. We were only provided with a screen-shot of a small section. Whilst those referred to 'international' sales, and liability for duties, there is no obvious indication in the extract which we saw that the seller was in Hong Kong. 'International' does not necessarily and exclusively connote trade into the UK from abroad. References to 'international' and duties could equally apply to sales by a UK seller to buyers abroad. Hence, the point is neutral - it neither assists or undermines Mr Knox's appeal, nor does it undermine or assist the Respondents' opposition to the appeal.

25. Mr Knox was not the seller and he did not fill in the customs declaration. There is no evidence whatsoever to suggest that Mr Knox either knew that the customs declaration would be filled in wrongly, or was otherwise complicit in the same. The weight of the evidence before us is the other way. The evidence, which we have set out above, is strongly suggestive that Mr Knox did not even know that the Phone was going to come from abroad.

26. We acknowledge that the Review Letter is not an examination paper on the law of restoration, and must not be read over forensically. But nonetheless, it is conspicuous that the Review Letter fails to consider any of the above material matters. In and of itself, that failure is sufficient to compel a re-review.

27. There are other justicable errors with the Review Decision. The Review Decision seems to treat *'not being declared'* as an 'aggravating feature'. In our view, that is a justiciable error. Regulation 20 imposes strict liability, in the sense that it does not contain any mental element such as intent or dishonesty. A parcel either complies with the Regulation or it does not. That is a question of fact. On that analysis, the introduction of 'aggravating' features at the review stage seems unwarranted. The parcel had already been seized through non-compliance with the Regulation.

28. Moreover, the Reviewing Officer seems to equate failure to declare at all (not the case here) with incorrect declaration.

29. But, if we are wrong about that, and the consideration of 'aggravating' features at the review stage is proper, then the Officer, in failing to consider (or even acknowledge) any mitigating features, has failed to take all the relevant material into account, and has therefore failed to conduct any form of balancing exercise. In our view, and whilst acknowledging the pressures which Reviewing Officers work under, a decision which only considers aggravating features without any regard to whether there are any mitigating features (even to the extent of saying that in the view of the

Officer there are none) is self-evidently a decision in which the decision maker has left material matters out of account.

30. The Review Decision also appears to contain a material error of law. The Review Decision proceeds on the basis that Article 237 of *Commission Regulation 2454/93/EEC* (2 July 1993 - laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code) applies.

31. Article 237 deals with Postal Traffic. Article 237(1)(A) provides that postal consignments of this kind are considered to have been declared to customs when they are presented to customs. The consignee - here, Mr Knox - is considered to be the declarant: see Article 237(2). Hence, treating Mr Knox as the declarant was correct.

32. However, the Review Letter does not go on to consider the effect of Article 238 which states that Article 237 shall not apply "*where a customs declaration is made in writing*". In this case, a customs declaration, albeit an inaccurate one, was made in writing.

33. Given that the Respondents' otherwise compendious Statement of Case does not even mention Article 237, and that we did not hear full argument on the point, we express no concluded view as to whether Article 238 engages or not. But, and whilst we cannot dictate the terms of the re-review, it seems to us that it would be salutary, if the re-review did consider Article 237, that it should also consider whether Article 238 has effect in the circumstances of this case.

34. Finally, the Review Letter appears to proceed on the footing that the Appellant had been provided with Notice 12A, notifying him of his appeal rights. Close scrutiny of the evidence suggests that the Appellant was not in fact provided with Notice 12A, but was instead simply directed (in some document which was not put into evidence before us) to Notice 12A on the web. Given our above findings, we do not need to decide whether the giving of Notice 12A (a non-statutory notice) was required, nor do we need to decide whether, if it had not been given, the references to the law in the correspondence were adequate to inform Mr Knox of the legal position.

35. The Review Decision proceeded on the footing that it could not consider the legality of the seizure since there had not been condemnation proceedings in the Magistrates' Court. With respect to the Reviewing Officer, that is a stock phrase obviously designed to reflect the decision of the Court of Appeal in *Jones v HMRC*.

36. Had that been the only point in this appeal, then we may have had to decide whether Mr Knox's first letter to the Respondents, sent on 28 November 2014, should have been treated as a Notice of Claim thereby putting the Respondents under a duty to commence condemnation proceedings in the Magistrates' Court. The Respondents did not seek to rely on *Jones*, but we are bound to note (if not simply for the sake of completeness) that, if an in-time Notice of Claim had been given, but had not been treated as such or acted upon, then it would arguably have been an error for the Review Officer to have excluded all consideration of the legality of the seizure.

37. Ultimately, we do not need to decide the point. The evidence on both sides is inconclusive. The first letter of response dated 5 December 2014 said, confusingly, that Mr Knox's letter had been treated as a request by Mr Knox to follow:

> "one of the processes listed below
>
> - Appeal against the legality of the seizure of the items
> - Request restoration of the seized items
> - Appeal against the legality of the seizure and request restoration of the seized items"

38. That letter does not state which of the three avenues (whether individually, in parallel, or in succession) the unnamed sender (an Officer of the National Post Seizure Unit of the Border Force) believed was or were being engaged.

39. Given Mr Knox's absence from the hearing, and hence the absence of any evidence from him as to why he did what he did, we proceed on the footing that the point cannot for present purposes be determined.

**Decision**

40. The Appeal is allowed.

41. There must be a re-review of the decision not to restore the Phone. That re-review is to take place on the basis of the above findings of fact.

42. 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.

**DR CHRISTOPHER McNALL**
**TRIBUNAL JUDGE**

**RELEASE DATE: 11 APRIL 2017**