[2017] UKFTT 377 (TC)

TC05843

Appeal number: TC/2015/05115

EXCISE DUTY - Seizure of vehicles - Evidence as to ownership - Application to strike-out on a discretionary basis - Rule 8(3)(c) - Appeal struck-out - If decision on striking-out disturbed, whether decision not to restore the vehicles unreasonable - No - If not struck out, appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR FARON JOHN COULTER **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL
MS CELINE CORRIGAN

Sitting in public at the Tribunal Hearing Centre, 2nd Floor, Royal Courts of Justice, Chichester Street, Belfast BT1 3JF on Friday 24 March 2017

The Appellant did not attend

Mr Richard Adkinson, of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant did not attend the hearing, and there was no attendance on his behalf. Under Rule 33 of the Tribunal's Rules (*The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, SI 2009/273*: 'Hearings in a party's absence') we were satisfied that the Appellant had been given notice of the hearing. A copy Notice of Hearing, dated 16 December 2016, personally addressed to the Appellant and sent to the address given for the Appellant on the Notice of Appeal, was marked on the file by the Tribunal's clerk as having been sent by post. A copy was also sent at the same time to the Appellant's solicitors. There was nothing to suggest that either Notice of Hearing had been returned as undelivered. We were told that HMRC had been told by the Appellant's solicitors on or about 10 March 2014 (that is, about a fortnight before the hearing), and upon receipt of HMRC's Amended Statement of Case, that they were no longer instructed.

2. We were also satisfied that it was in the interests of justice to proceed with the hearing. The Appellant had not played any active role at all in advancing this appeal for almost a year. He had not filed any witness statement, nor had he filed any outline of his case. There was nothing to suggest that the grant of an adjournment would further the overriding objective of dealing with this appeal fairly and justly in the sense that there was nothing to indicate that any adjournment would be likely to result in the Appellant re-engaging with his own appeal.

The Facts

3. We find the following facts.

4. On various dates between 23 September 2014 and 18 February 2015, officers of HMRC's Specialist Investigations Road Fuel Testing Unit made several visits to business premises at Mallusk Road in Newtownabbey (comprising a yard with several businesses) and McKinney Industrial Estate (comprising an operating yard, a pallet retrieval centre, and 'CSC Coulter Scott Contracts').

5. They tested the fuel in the running tanks of several vehicles. The tests showed that the fuel tested in each of those running tanks was positive for laundered rebated gas oil or laundered rebated kerosene.

6. At various dates, the following seven vehicles (together with a bonded fuel tank) were seized:

1.	KNZ3009		Seized on 4.1.15
2.	MNZ4469	Scania	Seized on 4.1.15
3.	KFZ6603	Mercedes	Seized on 18.2.15
4.	WA05EBD	Man	Seized on 19.11.14
5.	VCZ5956		Seized on 18.2.15
6.	VKZ7696	Nightline	Seized on 19.10.14
7.	OKZ7109	Foden	Seized on 26.1.15

7. On 10 April 2015 the Appellant was interviewed voluntarily under caution, in the presence of his solicitor. He stated that he owned all the vehicles except VKZ7696 which he said was rented out to him on the day it was seized.

8. Restoration was refused by Officer Mark Colhoun of HMRC's Road Fuel Testing Unit in a letter dated 28 May 2015. The letter recorded that Mr Coulter had been invited to produce records to support his claim for restoration by 18 May 2015. No records had been received, nor had there been any communication from the Appellant or his representatives. Officer Colhoun was not satisfied that the appellant had title to the vehicles. In addition, the officer was not satisfied that the vehicles were not part of a business selling illegal fuel, or that the vehicles were 'operated or owned by a genuine and legitimate business'.

9. A departmental review was requested on 16 June 2015. HMRC was unable to complete its review within the 45-day deadline, which was 30 July 2015. The effect of that failure, pursuant to Section 15(2)(b) of the *Finance Act 1994,* is that HMRC is assumed, for the purposes of section 14 of the *Finance Act 1994* to have confirmed the decision not to restore.

10. The Notice of Appeal was dated 28 August 2015. The Grounds of Appeal were, in full, as follows:

> "The Appellant would state that the Respondent in this matter has acted entirely unreasonably.
>
> Firstly, the Respondent has failed to give any basis for the refusal of restoration of the vehicles herein. The Respondent equally has failed to conduct a review within the statutory period.
>
> The Respondent's issue in relation to ownership is incomprehensible given that fact that the Respondent's (sic) served their seizure notices on the Appellant and is (sic) fully aware that these vehicles belong to the Appellant's business. There is no reason, policy or otherwise why these vehicles should not have been returned under the normal terms of restoration.
>
> In all of the circumstances the Appellant would state that the decision of the Respondent herein is irrational and unreasonable."

11. A non-statutory review was carried out on 30 September 2015. It upheld the decision not to restore.

The Application to Strike-out

12. On 20 November 2015, the Tribunal gave directions for witness statements to be exchanged by no later than 15 January 2016.

13. On 6 April 2016, the Appellant's representatives wrote that their client was '*presently suffering from health issues. He has however advised that he will attend our offices next week to provide full instructions and we shall endeavour to have all the*

material served as soon as possible'. There was an agreed extension to the filing of witness statements to mid April 2016.

14. The Tribunal approved that extension. Nothing further was heard from the Appellant or his representatives, and no such evidence was filed. On 9 June 2016, the Tribunal directed that unless witness statements were exchanged by 16 June 2016, that the Tribunal would direct a case management hearing. There was no response to that from direction from either the Appellant or his representatives.

15. On 22 June 2016, Judge Richards reviewed the file and of his own initiative ordered that the Appellant could not, without the Tribunal's permission, rely on witness evidence that had not been served on HMRC on or prior to 16 June 2016. No such witness evidence was served - whether then, or subsequently.

16. Judge Richards went on to observe:

> "...it will be difficult for the Appellant to succeed in this appeal without witness evidence (particularly as to the question of whether the Appellant is the owner of these vehicles). In those circumstances, he considers that it may be appropriate for the Tribunal to consider striking out the appeal on the basis that it has no reasonable prospect of success."

17. There was no application to vary, set aside, or appeal Judge Richards' order. Judge Richards invited HMRC to write to the Tribunal to explain whether it wished to apply for the appeal to be struck out. On 6 July 2016, HMRC wrote to the Tribunal (copied to the Appellant's representatives) that HMRC did intend to make an application to strike out the appeal '*and the application can be dealt with at the start of the full hearing'*.

18. Whilst that intention was not (as originally contemplated) formally embodied in a direction, it is what happened. At the beginning of the hearing before us, an application was made to strike-out the appeal on a discretionary basis, under Rule 8(3)(c) of the Tribunal's rules.

19. In accordance with our case management powers under the overriding objective, we were prepared to allow this application to be made in the face of the Tribunal. HMRC had made its intentions clear many months earlier, and the grounds for such application had been clearly flagged up by Judge Richards in June 2016.

20. The application was advanced on the footing, under Rule 8(3)(c), that the appeal stood no reasonable chance of succeeding in the absence of any evidence from the Appellant as to ownership of the vehicles.

21. It is important to note that HMRC's application was not advanced on the footing that the absence of any evidence from the appellant as to ownership meant that the Tribunal had no jurisdiction. If that proposition were correct as a matter of law (being a matter which we are not called upon to decide) it would have led to a mandatory striking-out of the Appeal under Rule 8(2)(a).

22. Nor were we invited to consider striking-out this appeal on the basis that the Appellant had failed to co-operate with the Tribunal to such an extent that the Tribunal could not deal with the proceedings fairly or justly: Rule 8(2)(b).

23. On several occasions, the Tribunal has made it clear that proof of ownership or title is an important feature of an application to restore. Some decisions perhaps go further and suggest that proof of ownership is a pre-condition to such an application. All of those decisions have been made at substantive hearings. None of those decisions have been made in the context of an application to strike-out.

24. In *Worx Food and Beverage BV v Director of Border Revenue* [2014] UKFTT 774 (TC) the Tribunal (Judge Anne Redston and Mrs Shameem Akhtar) considered whether it was reasonable for UKBF to refuse to restore because the Appellant had not proved ownership. At Paragraph [58] of its Decision, the Tribunal, having heard argument on the point, and having summarised the parties' positions, said:

> *"Our starting point is that the UKBF's general policy of restoring goods only when satisfied that a person has proved ownership is self-evidently reasonable. The UKBF stores many thousands of items; it has to be a precondition of release that a person claiming a seized item must first show that it belongs to them."*

25. In *LVTC Limited v HMRC* [2015] UKFTT 544 the issue was again considered by the Tribunal (Judge John Clark and Mr Simon). What seems to have been a slightly different approach was articulated. There it was held that ownership was a relevant consideration both in relation to the initial decision and also the review decision, but was not the only consideration. The Tribunal in *LVTC* did not accept the Respondents' broad submission that there could be no review at all unless proof of ownership had been provided. In *LVTC*, the question for the Respondents to consider was simply whether or not the goods should be restored, and, in arriving at a decision on that question, the Respondents were to take into account all relevant information and were to disregard irrelevant matters, including what information as to ownership had been provided: see Paragraph [70] of the decision.

26. In *Global Logistik Heinsberg GmbH v Director of Border Revenue* TC/2015/02217 the Tribunal (Judge Anne Fairpo and Mr Freeston) referred to *Worx* and *LVTC*, albeit recognising that it (as we) was not bound by those decisions. The Tribunal remarked:

> "... proof of title must be a precondition of restoration for the reason given by Border Force: without such proof of title, items might be restored to the wrong party."

27. The Tribunal developed the analysis in this way (at Paragraph [46]):

> "The Appellant has provided no evidence that it had title to the trailer applicable to the request for restoration and accordingly, we find that the BF policy on restoration was not engaged and so the decision not to apply the relevant policy cannot be considered to be unreasonable."

28. The Tribunal (Judge Mainwaring-Taylor) applied similar reasoning to arrive at a similar conclusion in *Aurel Ionut Ipate* [2017] UKFTT 164 (TC).

29. Given that the application to strike-out was not advanced before us on the footing of want of jurisdiction, under Rule 8(2), our task is simply to assess whether the Appellant enjoys a reasonable prospect of succeeding in his appeal. Although some of the decisions appear to suggest (we cannot put it any higher than that) that proof of ownership is a pre-condition for advancing an appeal against a decision not to restore (and that, absent proof of ownership, no such appeal could even be entertained) it is not necessary for us to go so far in consideration of this appeal.

The Law

30. Section 141(1) of the *Customs and Excise Management Act 1979* provides that, where any thing has become liable to forfeiture (for instance, laundered fuel) (a) 'any vehicle ... or other thing whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture' and (b) 'any other thing mixed, packed or found with the thing so liable' shall also be liable to forfeiture.

31. 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.

32. The decision whether or not to restore is an 'ancillary matter' for the purposes of section 16 of the *Finance Act 1994* by virtue of sections 16(8) and Schedule 5 Paragraph 2(1)(r) of that 1994 Act. It makes no material difference that the decision not to restore was deemed upheld by HMRC's failure to conduct a statutory review within the 45 day period. It simply means that we assess the original decision not to restore rather than the review decision.

33. Our powers are set out in section 16(4) of the *Finance Act 1994*:

> *"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": emphasis added

34. In broad terms, our jurisdiction in this regard is that the 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. '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)

35. Thus, we are not concerned with reviewing the *merits* of the decision.

Discussion

36. The failure to have conducted a review within the statutory period is, as a matter of law (as set out above), not a proper basis upon which this appeal could ever have been advanced. In any event, a non-statutory review was subsequently conducted.

37. The alleged failure *'to give any basis for the refusal of the restoration of the vehicles herein'* is plainly misconceived. The reasons for the refusal to restore are set out, albeit in a brief way, in the letter from Officer Mark Colhoun dated 28 May 2015:

> "I refer to my letter of 6th May 2015 in which I reminded you to produce records to support your claim for restoration by 18th May 2015. I have received no records to date, nor have I received any communication from you or your solicitor, despite allowing additional time. You have not satisfied me that you have title to the above vehicles [...]. In addition, you have not satisfied me that the above vehicles [...] are not part of a business selling illegal fuel or that the vehicles [...] are operated or owned by a genuine and legitimate business. In addition I believe that the vehicles are part of a wider operation in which there is suspected substantial tax evasion."

38. That passage, read neutrally, gives several reasons. As such, the assertion that no reasons were given is not tenable. The letter, as well as being sent to Mr Coulter, was copied to MMD Solicitors (the predecessor firm to McNamee McDonnell Solicitors). Mr McNamee of that firm (who signed the Notice of Appeal on his client's behalf on 28 August 2015) knew of that letter since it is referred to in the Notice of Appeal as the decision appealed against.

39. The suggestion in the Grounds of Appeal that HMRC's *'issue in relation to ownership'* was *'incomprehensible, given that fact that the Respondent's (sic) served their seizure notices on the Appellant'* is not well-founded. The Seizure Information

Notices (Forms ENF156) do not have to be signed by the owner. They are simply a form of receipt, confirming that the original of the ENF156 has been left with the signatory, and that the description of the goods seized is correct. As the notice makes clear, *'if they'* (that is, the goods) *'do not belong to you'* (that is, to the signatory) *'please give this notice to the owner as soon as possible'.* The ENF 156s in the bundle are signed by a variety of people. Only one of them is signed by Mr Coulter, and that does not relate to a vehicle in dispute in this appeal (PEZ 4313).

40. It is not in dispute that the samples taken from the running tanks of each of the seized vehicles were consistent with containing laundered UK rebated gas oil or laundered kerosene.

41. At the hearing before us, Officer Colhoun confirmed the truth of the contents of his witness statement dated 6 April 2016. We accept his evidence.

42. His evidence included the following remarks:

> *"I have encountered some difficulty in establishing both who was liable for the laundered fuel, who owned that fuel, who owned and operated the fuel tanks, who used that fuel, and who owned and operated a large fleet of associated commercial vehicles. The difficulties have been mainly:*
>
> *(i) Lack of co-operation;*
> *(ii) Lack of records and information;*
> *(iii) Contradicting accounts and statements, particularly surrounding ownership; and*
> *(iv) Deliberate attempts to mask, conceal, and cause confusion about the true ownership, control and beneficiaries of the entities concerned."*

43. On our reading of the papers, we accept that as a fair characterisation of the difficulties encountered by Officer Colhoun in the course of his investigation.

44. We accept that Mr Coulter did not produce invoices for any legitimate purchases of fuel between October 2013 and 23 September 2014.

45. In an undated letter (but date-stamped in by HMRC on 4 March 2015) Mr Coulter wrote to ask for restoration of the seven vehicles. He said:

> "I would like to state that a number of my vehicles are hired out to subcontractors on a daily basis. It is very difficult for me to trace what fuel has been put into these vehicles."

46. The account given by the Appellant when interviewed under caution on 10 April 2015 was, at best, hopelessly confusing and vague. For the sake of completeness, we record that no criticism has been advanced before us in relation to Mr Coulter not having attended such an interview sooner. At least one interview scheduled to have taken place in January 2015 had to be cancelled at short notice due to Mr Coulter being involved in a serious road traffic accident. A later interview did not proceed in the absence of a legal representative.

47. Even reading the transcript of the interview of 10 April 2015, it remains far from clear what the Appellant's case as to ownership really was, even to the extent of whether these vehicles were owned by him personally, in his own name, or personally through some trading name, or through some legal entity such as a company.

48. Following that interview, and before the decision appealed against, letters were written to Mr Coulter on 15 April 2015 and 6 May 2015 requesting that he produce records to support his claim for restoration. There is no recorded response to those letters.

49. Therefore, as matters stood at the time of the decision appealed against, and as they still stand today, Mr Coulter has not advanced any documentary proof that he *owns* any of these vehicles.

50. We accept that the V5s (UK Registration Certificates) are not sufficient for this purpose. They all make clear, on the face of them, in section C.4.c that they are not proof of ownership.

51. On 12 and 13 January 2015 (that is, after the seizures) the registered keeper of six of the vehicles was changed by DVLA Swansea to 'Rent 365' in Randalstown, on the expressed footing that the vehicles had been ostensibly acquired by 'Rent 365' on 1 November 2014. On 7 January 2015, the seventh vehicle (VKZ7676) was registered by DVA Coleraine into the name of 'Truck & Van Contracts Corey Scott', said to have acquired the vehicle on 16 April 2012: that is, over 2 and a half years earlier.

52. 'Corey Scott' refers to a Mr Luke Corey Scott. Letters were written to him on 8 December 2014, 6 January 2015 and 9 February 2015 to ask him to contact Officer Colhoun to arrange an interview. As far as we are aware, no such interview took place. Therefore, HMRC was not afforded any opportunity to assess whether any of these vehicles belonged to Mr Corey Scott.

53. At interview, the Appellant claimed that none of the vehicles were his, but were rented and operated by Boss Transport NI Ltd, being a limited company. Boss Transport Ltd is a legal person, distinct as a matter of law from the natural persons who act as its directors. Boss Transport NI Ltd is not the appellant, and has not sought to appeal the seizures or the decision not to restore. In his interview on 10 April 2015, Mr Coulter said that Boss was *'still owned'* by a Mr Jonathan McVeigh, as a 100% shareholder, even though Mr Coulter was a director.

54. V5s were presented to HMRC ostensibly recording that the keepers of five vehicles were Boss Transport NI Limited, but we accept that these documents were not produced until September 2015 - i.e, postdating seizure - and were not produced on 1 December 2014.

55. Hence, after the seizures, it seems that there were two successive attempts to change the registered keepers of six of the vehicles. Our impression is that those things were done as a means of giving the impression that, at the time of the seizures, those vehicles were owned by entities controlled by Mr Coulter: one attempt in

January 2015 (back-dated to 1 November 2014) to 'Rent 365'; and a second attempt in September 2015 (back-dated to 1 December 2014).

56. In the absence of any evidence from Mr Coulter to explain these transactions, we cannot regard the V5 certificates as proof of ownership (or, if materially different, proof of title) and hence those do not support his appeal.

57. The nature and identity of 'Rent 365' remains a mystery. On 4 January 2015, one Christopher Maxwell told Officer Colhoun that he owned all the vehicles in the yard (about 20 in total) having apparently bought the same for £2,000 in cash two days earlier. Shortly thereafter, at a pre-arranged voluntary interview under caution on 10 February 2015, Mr Maxwell stated that he was the owner of 'Rent 365', having set it up just before Christmas 2014. However, having made that assertion, Mr Maxwell is then recorded as giving a series of 'No Comment' answers to questions about Mr Coulter and Boss Transport and Mr Maxwell's alleged purchase of vehicles in the yard. Mr Maxwell gave a 'no comment' answer to a question as to whether he was claiming to own vehicles in his garage business. At a further pre-arranged voluntary interview on 11 August 2015, Mr Maxwell then said that he had intended to start 'Rent 365' as a business but had not, and said that he had never purchased or owned any of the vehicles although he said that some may have been registered in his name.

58. Ultimately, it is not part of the Tribunal's task in this appeal to act as a detective to try to piece together scattered clues so as to try to reconstruct the likely ownership of these vehicles at the time they were seized or at any other time.

59. On the totality of the evidence before us (and which was before HMRC when it made its decision) the situation is so muddled and contradictory that no reliable picture emerges as to ownership of these vehicles - whether generally, or whether Mr Coulter in particular was the owner.

60. It seems to us that HMRC was entitled to consider the information and materials put forward on the issue of ownership, and was also entitled to consider the likely inferences to be drawn from the absence of any particular information or material.

61. It was not unreasonable for HMRC to refuse to accept the V5 documents as proof of ownership. Moreover, if Mr Coulter indeed was the true owner of these vehicles, then it should have been easy for him to have proved it: for example, by way of sales notes and/or purchase invoices and/or receipts, or, if trading, by inclusion in a fixed assets register. No such evidence was put forward. Taking Mr Coulter's case at its highest, and disregarding the V5s, for the reasons already set out, all that is left are his bare assertions in interview that the vehicles were his.

62. In our view, HMRC's suspicions were genuine and well-founded. We accept that Officer Colhoun had not made his mind up before the decision not to restore. It is obvious from the correspondence that he was extending repeated invitations to Mr Coulter to set the record straight by proving that he was the owner; and also, in doing so, to dispel the suspicion that all these vehicles were being used in connection with fuel-laundering. Mr Coulter chose not to avail himself of that invitation.

63. We simply do not see any justiciable error in the manner in which HMRC approached the decision not to restore. It was reasonable for HMRC to consider whether the assertions as to ownership, and Mr Coulter's right and ability to advance a claim to restoration were supported or corroborated by contemporary, independent, documentation. It was reasonable for HMRC to conclude that Mr Coulter's assertions were not so supported or corroborated.

Decision

64. We consider that HMRC's application to strike-out this appeal does succeed in the circumstances of this appeal. In short, the evidence advanced by Mr Coulter to HMRC as to his alleged ownership of these vehicles, and in relation to the other points raised by HMRC in the letter of 28 May 2015, was so inadequate and muddled that there is simply no realistic prospect of Mr Coulter demonstrating that HMRC committed a justiciable error of fact or of law in arriving at its decision not to restore.

65. However, and in the event that our conclusion on the application to strike-out should subsequently fall to be disturbed, we are nonetheless satisfied, that the appeal, even if not struck-out, should be dismissed. The basis is broadly the same (albeit applying a different - lesser - standard of proof to Mr Coulter). Even on the balance of probabilities, we are not persuaded, on the basis of the information and materials put before us, that it has been shown that HMRC's treatment of that information and material was in error so as to justify any re-review.

66. This decision disposes of proceedings. Any application to set aside this decision under Rule 38 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 must be received by the Tribunal by no later than 28 days after the date on which the Tribunal sends this decision to the appellant.

67. 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: 28 APRIL 2017