



TC06881

Appeal number: TC/2016/04060

EXCISE DUTY – seizure of private car carrying excisable goods liable to forfeiture – request for restoration of car – restoration refused – discretion of UK Border Force – whether or not decision of reviewing officer reasonable – held not – direction that Commissioners should conduct a further review of the original decision

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

KEITH DOCKETT

Appellant

- and -

THE DIRECTOR OF BORDER REVENUE

Respondent

**TRIBUNAL: JUDGE PHILIP GILLETT
CHARLES BAKER**

Sitting in public at Taylor House, London on 7 November 2018

The Appellant appeared in person

Tom Rainsbury, counsel, instructed by the Director of Border Revenue, for the Respondent

DECISION

1. This was an appeal against a decision of the respondent contained in a letter
5 dated 6 July 2016 which stated that, after conducting a review, the respondent would
not restore a Vauxhall Insignia car, registration number FP12ZMY which had been
seized on 23 April 2016, because it was being used for carrying goods liable to
forfeiture, namely 9.8 kg of hand rolling tobacco liable to excise duty of £1,941.38,
380 Pall Mall Red cigarettes liable to excise duty of £92.13 and 400 Pall Mall
10 Menthol cigarettes liable to excise duty of £101.67.

The Facts

2. On 23 April 2016 Mr Dockett was stopped at Coquelles, France, driving the car.
He was accompanied by his son, Daniel Savage-Hamlin.

3. On questioning, Mr Dockett initially said that he and his son were carrying 100
15 50g pouches of tobacco each. A search of the car revealed that they were in fact
carrying 392 pouches between them and they then produced a receipt for 392
pouches, showing a cost of £1,842.40, paid in cash. The search also revealed the
cigarettes, which had been paid for separately by Mr Savage-Hamlin using a credit
card. When asked why they had initially said they were carrying only 200 pouches
20 Mr Dockett said that that is what they had been told by a friend to say if they were
stopped.

4. They were also asked about recent travel abroad and Mr Dockett initially said
that he had last travelled abroad in January and the previous October. This turned out
to be untrue and he agreed that he had also travelled to France in March and June
25 2016.

5. The Border Force officer decided that the goods should be seized under s139(1)
Customs and Excise Management Act 1979 (“CEMA”) as being liable to forfeiture
under s49(1)(a)(i) CEMA. The vehicle was also seized, under s141(1)(a) CEMA, as it
was being used for the carriage of goods liable to forfeiture.

6. Mr Dockett and Mr Savage-Hamlin were issued with seizure information
30 notices which explained that a challenge to the legality of the seizure could only be
made to a Magistrates’ Court and that such a challenge would have to be made within
one month of the date of seizure.

7. There was some confusion as to whether or not a claim had been made to the
35 Magistrates’ Court. Mr Savage-Hamlin had written to Border Force but had not used
the correct form or given sufficient information for Border Force to regard it as
challenging the seizure, and in the event no such challenge was taken forward.

8. We would note that we consider it very unlikely that either Mr Dockett or Mr
Savage-Hamlin understood the difference between condemnation proceedings (those

before the Magistrates' Court) and restoration proceedings (those before this tribunal), especially given their confusing terminology.

5 9. It was however agreed between the parties that there were now no proceedings before the Magistrates' Court and that no claim to the Magistrates' Court had been made within the one month time limit. The goods and vehicle were therefore deemed to have been seized legally.

10 10. At the hearing Mr Dockett freely admitted that he had initially lied to the Border Force officers and he described this as "a stupid mistake". Mr Dockett is diabetic and said that his blood sugar was getting low as he waited in the queue of cars for the officer to talk to him and that he was eating a sherbet lollipop, to help his blood sugar level, when the officer arrived, which the officer appears to have considered a sign of disinterest (or disrespect). Mr Dockett explained that his blood sugar was low but it was not clear that he explained that he was a diabetic. Nevertheless the first officer to whom Mr Dockett spoke appeared to ignore this. A subsequent officer understood the issue and noted in his notebook that he had given Mr Dockett some dextrose tablets. Mr Dockett was however at pains to stress that he did not blame his low blood sugar for telling lies.

20 11. Mr Dockett confirmed that he had made a number of day trips to France in the recent months but these were primarily treats for his extended family, with whom he had been out of touch for 20 years, and that he was trying to make up for this. He also subsequently said that much of the tobacco was intended as presents for his family, again as a way of making up for the past. He himself was a heavy smoker and estimated that he smoked 45/50 cigarettes a day and used two/three pouches a week. Mr Savage-Hamlin said that both he and his wife were also heavy smokers.

25 12. Mr Dockett said that he had not used the previous day trips as an opportunity to import large quantities of tobacco. Importantly, he said that he had been stopped and his vehicle had been searched by Border Force on two occasions on previous day trips, but that they had found nothing untoward. We therefore find, on the balance of probabilities, that Mr Dockett had not previously imported significant quantities of dutiable goods on previous trips.

30 13. Mr Dockett confirmed under oath that he had no intention of the selling the tobacco on a commercial basis. Again, on the balance of probabilities, we accept this as factually correct.

35 14. The fact that he had paid for the goods in cash was apparently an important part of the review officer's consideration but Mr Dockett explained that the reason he paid for the tobacco in cash was that on the previous day he had taken his nephew, Mr Wallace, to a local garage for him to buy a second-hand car. Mr Wallace had intended to pay for the car in cash but Mr Dockett had advised him not to buy a car from a second-hand car dealer in cash since he would have no protection in case something went wrong. They therefore agreed that Mr Dockett would pay for the car using his debit card, utilising £800 which he had transferred from his ISA Savings account into his current account in anticipation of the day trip to France, and that Mr

Wallace would give him the £800 in cash which he had intended to use to pay the car dealer. We received a signed statement from Mr Wallace, a prison officer, to this effect and we were also shown a copy of Mr Dockett's bank statement which corroborated this explanation. We therefore accept this version of events as factually correct.

15 15. By letter dated 26 April 2016 Mr Dockett wrote to Border Force requesting restoration of the vehicle and goods. Mr Dockett explained that he was paying off a £10,000 loan regarding the car and that he needed the vehicle for medical and family reasons.

10 16. This request for restoration was refused by Border Force on 27 May 2016. A review was then requested by Mr Dockett on 14 June and, after further correspondence, Border Force wrote to Mr Dockett informing him that the conclusion of the review was that the vehicle should not be restored. This is the decision currently under appeal.

15 17. This appeal first came before this tribunal in April 2018, before Judge Christopher McNall, but was postponed because of uncertainty at that time as to whether or not there were ongoing condemnation proceedings before a Magistrates' Court. In addition, Judge McNall instructed Mr Dockett to produce further evidence in support of his request. Border Force reconsidered their decision on two further occasions but still came to the conclusion not to restore the car.

25 18. Since the seizure, Mr Dockett has paid the excise duty on the seized goods and also paid a civil penalty of £2,131, which was raised on 20 April 2017. Interestingly the civil penalty was calculated by HMRC on the basis that Mr Dockett's actions were non-deliberate, ie on the basis that HMRC had no evidence to suggest that he knew that he had committed a wrong-doing. It was also at the minimum percentage permitted, of 20%.

The Review Decision

19. We received a witness statement and oral evidence from Helen Perkins, the reviewing officer.

30 20. Miss Perkins had helpfully summarised Border Force's policy on restoration in her review letter as follows:

The general policy is that private vehicles used for the improper importation or transportation of excise goods should not normally be restored, but vehicles may be restored at the discretion of Border Force in circumstances such as:

- 35 (1) If the excise goods were destined for supply on a "not for profit" basis, eg for simple reimbursement, but depending on any aggravating features.
- (2) If the excise goods were destined for supply for profit, the quantity of excise goods is small and it is a first occurrence.

(3) If the vehicle is owned by a third party who was not present at the time of the seizure and can show that they were both innocent and blameless for the smuggling attempt.

21. It was clear that in coming to her conclusion not to restore the vehicle she had decided at the outset that the goods were being imported for a commercial purpose, ie a supply for profit. If this was not the case then, from the policy quoted above, we assume that, especially on a first offence, the vehicle would normally have been restored in accordance with item (1) above.

22. Miss Perkins explained that she had come to the conclusion that the goods were being imported for commercial purposes for the following reasons:

(1) The quantity of goods was large.

(2) On interception Mr Dockett did not tell the truth in a number of respects, which led her to question Mr Dockett's integrity. This general inconsistency of responses on a number of issues was regarded by Border Force as a sign of commercial activity.

(3) They had carried out a number of day trips to France in recent months and therefore had the opportunity to import excise goods on a number of occasions.

(4) The tobacco had been purchased entirely for cash. This was also regarded by Border Force as a tell-tale sign of commercial activity because it was normal for "customers" to pay in advance, in cash, for the tobacco they were intending to purchase.

23. Miss Perkins also confirmed that even though Mr Dockett had already paid the duty and a civil penalty she regarded the decision not to restore the car as proportionate. She explained that she believed that the deterrent effect of the risk of a person's car being seized was very important in the battle against illegal importation. We noted in this respect however that very few people seem to be aware that there is a risk of seizure of their vehicle if they import large quantities of dutiable goods, in which case it cannot be a very effective deterrent. The whole point of a deterrent of this nature is that potential importers of excess quantities of tobacco should be aware of the risk of seizure of their vehicle before it happens to them.

The Law

24. As was confirmed by the case of *HMRC v Jones and Jones* [2011] EWCA Civ 824, this tribunal cannot reopen the question of whether or not the goods were legally seized. Such a challenge can only be made through the Magistrates' Courts and any such challenge must be made within one month of the seizure. If no such challenge has been made within that time limit the goods and vehicle are deemed to have been seized lawfully.

25. The only remedies available through this tribunal are set out in s16 Finance Act 1994, which provides, as far as is relevant, as follows:

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“Appeals to a tribunal.

(1) Subject to the following provisions of this section, an appeal shall lie to an appeal tribunal with respect to any of the following decisions, that is to say—

5 (a) any decision by the Commissioners on a review under section 15 above (including a deemed confirmation under subsection (2) of that section); and

10 (b) any decision by the Commissioners on such review of a decision to which section 14 above applies as the Commissioners have agreed to undertake in consequence of a request made after the end of the period mentioned in section 14(3) above.

(2) An appeal under this section shall not be entertained unless the appellant is the person who required the review in question.

(3) ...

(3A) ...

15 (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 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—

20 (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

25 (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.

30 (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.”

26. Therefore, in accordance with the provisions of s16(4) Finance Act 1994, as set out above, this tribunal has no power to order the restoration of the vehicle as such.
35 The only authority which this tribunal has in such cases is to direct that Border Force carry out a further review, and it can only do that if it finds that the decision of the

reviewing officer is not a decision which a reasonable person, who is properly directed could come to.

Discussion

27. As set out above, we are only able to consider the reasonableness of HMRC's
5 decision and can only interfere with it if we find that it was flawed. This is generally taken to mean that we can only interfere with it if we believe that the reviewing officer took into account irrelevant information, ignored relevant information, or reached a conclusion that no reasonable officer, if properly directed, could have reached on the facts before them.

10 28. Importantly, it is not relevant whether or not we would have come to the same conclusions as the reviewing officer. We can only consider whether or not her decision was reasonable.

15 29. In addition, it is well established that we can only consider the facts as they were at the time the decision was taken. We cannot take into account subsequent events. We can consider facts which existed at the time the decision was taken but which were ignored by the reviewing officer, either at the time of the decision or at the time of the subsequent review, but we cannot take into account new facts.

20 30. The decision whether or not Border Force should restore goods or a vehicle which has been treated as legally seized is a discretionary power. Border Force have an internal policy which gives guidance to officers when they are deciding whether or not to exercise this discretion but in her review letter Miss Perkins stated that she applied the policy but was not fettered by it.

25 31. As stated above, it is clear that the key factor which Miss Perkins took into account when deciding not to restore the car was that she believed Mr Dockett was carrying the goods with the intention of reselling them, at a profit, in the UK and that the goods were therefore held for commercial purposes.

32. The factors which led her to this conclusion were:

- (1) the large quantity of goods, almost ten times the normal personal "allowance",
- 30 (2) the inconsistency of his answers when he was stopped,
- (3) the frequency of trips to France, and
- (4) the fact that the goods were paid for in cash.

35 33. However, Mr Dockett provided a very satisfactory explanation as to why the goods were paid for in cash, which was related to his nephew's purchase of a car the previous day. We do not therefore think that this should have been considered a relevant factor.

34. He had also provided an explanation for his frequent trips to France, which were essentially treats for his newly re-found family. He also stated that he had been

stopped on two occasions on previous trips and on neither occasion had anything untoward been found by the Border Force officers who had stopped him. This pattern of frequent trips to France was not therefore in our view a relevant factor for Miss Perkins to take into account.

5 35. There is no doubt that the quantity of goods was large but again Mr Dockett was able to provide a very credible explanation as to why he was bringing in so much tobacco. This fact seems to have been ignored by Miss Perkins.

36. The only relevant factor remaining therefore which might have led Miss Perkins to have come to the conclusion that these goods were intended for resale was the
10 inconsistency of replies to the officers who interviewed him at Coquelles.

37. Mr Dockett acknowledges that this was simply “a stupid mistake”, but we do not think it unknown for individuals who have been stopped by Border Force officials to panic, and give false answers, especially if they know they are carrying too much tobacco. We certainly think it would be a very thin reason for anyone to come to the
15 conclusion from these inconsistencies that the goods were intended for resale.

38. Lastly, of course, Miss Perkins has given no credence whatsoever to Mr Dockett’s consistent statements that the goods were for himself and for gifts for his family. We understand that she may doubt Mr Dockett’s truthfulness because of his inconsistent answers to the officers at Coquelles, but these inconsistencies
20 disappeared once the more formal interviews at Coquelles were complete. Moreover it is in our view unlikely that Mr Dockett would have known that carrying the goods for resale at a profit was a key factor in the decision not to restore, such that he would have tailored his statements accordingly.

39. In summary, it appears to us that a, if not the, key factor in Miss Perkin’s
25 decision that the vehicle should not be restored was that she believed the goods were being carried to the UK for resale at a profit. She had no solid evidence for this other than a pattern of behaviour and other factors which she regarded as determinative. We, on the other hand, have found as a matter of fact that Mr Dockett had no intention of selling the tobacco on a commercial basis.

30 40. As we have explained above, Mr Dockett had sound explanations for most of the factors which concerned Miss Perkins, and these had nothing to do with the resale of the goods for profit. Indeed, there was no evidence that the goods were even being sold on a “not for profit” basis, eg for simple reimbursement, as envisaged in item (1) of Border Force’s policy on restoration set out at para [19] above.

35 41. Mr Dockett had also asked for restoration of the vehicle on the grounds of hardship since he had to attend hospital appointments, because he was diabetic, and he was also required to take his partner’s mother, who was also ill, to various appointments. Miss Perkins accepted that there was hardship but did not consider it to be undue hardship and she therefore refused restoration on these grounds.

42. Although we might consider Miss Perkins's decision as regards hardship harsh, and might not agree with it, we did not find that it was fundamentally flawed in this respect, such as to allow us to interfere with it.

5 43. In summary therefore, we consider that when making her decision not to restore the vehicle Miss Perkins based her conclusions on her belief that Mr Dockett was intending to resell the goods in the UK on a commercial basis and that she had no evidence to support that belief other than four indicative factors, three of which had satisfactory explanations.

Decision

10 44. We therefore find that Miss Perkins took into account irrelevant or incorrect information and that she could not therefore reasonably have arrived at that decision. We therefore DIRECT, in accordance with s16(4)(a) Finance Act 1994, that the decision, so far as it remains in force, is to cease to have effect from the date of this decision.

15 45. We further DIRECT, in accordance with the provisions of s16(4)(b) Finance Act 1994, that the Commissioners should conduct a further review of the original decision.

20 46. We further DIRECT that in undertaking that additional review they should take into account our finding of fact that Mr Dockett was not carrying the excise goods for resale at a profit in the UK.

25 47. 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.

30 **PHILIP GILLETT**

TRIBUNAL JUDGE
RELEASE DATE: 18 December 2018

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