



[2019] UKFTT 461 (TC)

TC07266

EXCISE DUTY- smuggled fuel – laundered rebated fuel - restoration of vehicle – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/01961

BETWEEN

JAMES QUINN

Appellants

-and-

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

Respondents

**TRIBUNAL: JUDGE ANNE SCOTT
MEMBER CELINE CORRIGAN**

Sitting in public at Belfast on 2 July 2019

Having heard Mr Jonathan Williamson BL for the Appellant and Mr Joseph Millington instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. By Notice of Appeal dated 16 March 2018, the appellant appeals against a decision of the respondents (“HMRC”) dated 23 February 2018 to uphold a decision refusing to restore to him his Citroen Panel Van, registration number LY08 HUA (“the vehicle”) which had been seized on 27 August 2017.

Preliminary issue

2. This case was listed for hearing at 2.00pm on the afternoon of 2 July 2019. The letter from the Tribunal intimating the listing instructed the appellant to turn up half an hour before the listed time. In fact, Mr Williamson had asked that the appellant arrive one hour before the appointed time. The appellant did not appear. Mr Williamson had attempted to contact both him and the instructing solicitors but to no avail. The appellant did not appear during the hearing.

3. The history of this case is one of extensive non-cooperation by the appellant and his agent. I annex at Appendix 1 the Directions issued by me putting the appellant on notice that the Tribunal might strike out the proceedings if there was further non-cooperation. I point out that although the Directions were issued on 21 June 2019 that was due to delay on the part of the administration. I prepared the Directions on 20 June 2019 and had anticipated that they would be issued on that day. That is not material.

4. In fact the Skeleton Argument and the Bundle of Authorities were lodged with the Tribunal, albeit late.

5. Mr Williamson confirmed that he had only been instructed at the end of May 2019.

6. Mr Millington confirmed that he would have taken no action in relation to the late lodging of the Skeleton Argument and the Authorities. The problem was the non-attendance at the hearing with no explanation. The witness, Miss Beattie, had travelled from Scotland and Counsel had travelled from England.

7. The original Directions released by the Tribunal on 18 July 2018 were very clear in their terms and had been accompanied by two pages of notes explaining them. That should have made everything abundantly clear to an unrepresented appellant. In this instance the appellant was represented by solicitors.

8. There should have been compliance by the appellant with those Directions on various matters by 24 August, 21 September and 5 and 19 October 2018. There was none.

9. The appellant’s solicitors wrote to the Tribunal on 14 January 2019 requesting information about procedure and costs and stating that they were still awaiting instructions from the appellant.

10. On 17 January 2019, HMRC understandably pointed out that there had not been compliance and enquired whether or not the appellant was proceeding with the appeal.

11. On 30 January 2019, the Tribunal wrote to the solicitors making it absolutely clear, on Judge Poole’s instructions, that the appellant was being given a last chance to comply and that if witness statements were not lodged, including one for the appellant, then those witnesses may not be permitted to give evidence at the hearing. No witness statement has been delivered for the appellant at any juncture.

12. That letter was obviously received since the representative complied with the Directions for lodging a list of documents. That list referred to a “To Whom It May Concern” document

dated 16 December 2018. The best that can be said of that document is that there is a possibility that that might be stated to be a witness statement from a Mr Kelly. At paragraphs 10 and 11 of HMRC's Skeleton Argument, Mr Millington put the appellant on notice that Mr Kelly's statement was not accepted and "...Martin Kelly is required to attend for cross-examination on the contents of this document." Mr Kelly did not attend.

13. In summary, Mr Millington argued that the appellant had "wasted everyone's time". We agree. He reserved his position in relation to a possible application for wasted costs.

14. We had due regard to Rules 2 and 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") and decided to proceed to determine the appeal.

15. We were satisfied that the appellant had been notified of the hearing and that it was in the interests of justice to proceed.

16. Mr Williamson offered no challenge to Ms Beattie's evidence.

Decision

17. The appeal is dismissed and the decision refusing to restore the van is upheld. For completeness, and the avoidance of doubt, we set out the Findings and Facts and reasons for the decision.

The facts

18. On 27 August 2017, officers from the HMRC Road Fuel Testing Team ("RFTU") attended the appellant's home. The vehicle was present and unlocked. In the rear of the vehicle the officers found an Intermediate Bulk Container ("IBC") containing approximately 5 litres of fuel. Preliminary testing at the roadside indicated that the fuel was ROI rebated fuel. A formal sample was taken. Officers also found within the vehicle an invoice addressed to the appellant's son for 5,000 litres of kerosene, a "milk filter", gas caps and gloves.

19. The vehicle and its contents were seized by the RFTU officers. On 29 August 2017 a Notice of Seizure was issued in respect of the vehicle, the IBC and the fuel therein.

20. The legality of the seizure has not been contested.

21. Subsequent testing of the fuel within the running tank of the vehicle confirmed that the fuel was Laundered Rebated Gas Oil. The tests on the fuel in the IBC confirmed that that was ROI rebated gas oil.

22. On 23 October 2017, the appellant was interviewed under caution. He conceded that:-

- (a) He had owned the vehicle since May or June 2017.
- (b) He was currently unemployed.
- (c) The purpose of the vehicle was to travel to Motocross in Carlow, ROI.
- (d) The vehicle was used by both himself and his son Joshua. The vehicle was fuelled by whoever had been using it when it required to be fuelled.
- (e) The IBC was purchased to hold water to wash bikes following their use in Motocross.
- (f) He was unaware that there was fuel in the IBC and he did not know what use had been made of the IBC by its previous owner.
- (g) The gas caps were played with by his grandson.
- (h) The milk filter was used to filter kerosene in a home heating tank.

23. On 23 October 2017, the appellant's representative requested restoration of the vehicle.

24. On 7 November 2017, Officer Killen issued a decision not to restore the vehicle.
25. On 21 December 2017, the appellant's representative intimated an intention to appeal the decision and that was treated as a request for a review.
26. On 23 February 2018, Officer Beattie issued the decision which is the subject matter of this appeal notifying the appellant of her conclusion that the decision to refuse restoration should be upheld.

The appellant's case

27. The Skeleton Argument for the appellant argued that the appellant had had no reasonable cause to suspect that the fuel on which the vehicle was running was anything but lawful. The fuel had been purchased from a recognised and reputable provider of fuel.
28. The appellant had purchased the IBC from one Martin Kelly and the appellant was unaware of the use to which it had been put by Mr Kelly. The Notice of Appeal stated that he had provided details of the purchase to the officers.
29. Whilst it is conceded that he was technically culpable in respect of the allegations, he had cooperated fully and HMRC had failed to take relevant considerations into account and/or had ignored relevant considerations.
30. The decision not to restore the vehicle was not proportionate.
31. The illicit fuel in the IBC is attributable to the previous owner.
32. The Skeleton Argument stated that:

“... in determining not to restore the vehicle, HMRC took into account to a material degree irrelevant factors; namely that the Appellant was aware that the running tank of vehicle contained illicit fuel and that the Appellant was aware of and/or caused there to be illicit fuel within the IBC....Furthermore HMRC failed to take into consideration the conduct and co-operation of the Appellant along with the fact that this was a first ‘offence’”.

HMRC's case

33. The officer had considered the restoration policy. This was a first offence. Although the appellant claims to have made legitimate fuel purchases there is no evidence thereof. The presence of laundered rebated fuel in the running tank and ROI rebated gas oil in the IBC strongly suggests both use of the former and probable smuggling of the latter.
34. HMRC have acted reasonably, proportionately and in accordance with their policy and have taken into account the extent of the appellant's cooperation.

Statutory Framework

35. The legality of the seizure is not in dispute.
36. Section 16 Finance Act 1994 sets out the jurisdiction of the Tribunal on an appeal against the review carried out in the present case. As such the jurisdiction of the Tribunal is limited to considering whether the decision of the review officer was reasonable. Section 16(4) provides as follows:

“ 16(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 —

- (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.”

Reasons for the Decision

37. The appellate jurisdiction of the Tribunal is confined to the reasonableness of the discretionary decision not to restore the seized goods. The burden of proof lies with the appellant. If we are satisfied that the review decision is unreasonable then we can direct HMRC to carry out a further review of the decision.

38. The penalties imposed by Parliament for taking rebated fuel into a road vehicle and for using rebated fuel in a road vehicle do not depend on knowledge or intention on the part of the person responsible. They involve what is called strict liability.

39. In our view the decision of Officer Beattie was well reasoned and proportionate. In particular the officer pointed out that there was no evidence of any legitimate fuelling of the vehicle which had been owned by the appellant for a number of months. Furthermore rebated ROI fuel was found in the IBC and that fuel is not available for sale in the UK. No explanation as to why the fuel was found in the IBC has been offered. The appellant has offered no evidence as to when he acquired the IBC. On the balance of probability the presence of that fuel indicated a smuggling offence. We agree. Officer Beattie correctly weighed that aggravating factor in the balance with the fact that this was a “first offence”.

40. We are persuaded that the decision is certainly not one that HMRC “could not reasonably have arrived at”. Indeed, we find that the decision is eminently reasonable and HMRC has neither taken into account irrelevant matters nor omitted to consider relevant matters.

41. For all these reasons the appeal is dismissed and the decision upheld.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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.

**ANNE SCOTT
TRIBUNAL JUDGE**

RELEASE DATE: 15 JULY 2019



**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/01961

BETWEEN

JAMES QUINN

Appellant

-and-

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

Respondents

DIRECTIONS

1. This appeal is listed for hearing in Belfast on the afternoon of 2 July 2019. On 30 January 2019, the Tribunal wrote to the appellant's representative stating:

“... Judge Poole has instructed that the Appellant should be given a last opportunity to comply with the outstanding case management directions. “

2. It went on to state that if the appellant did not comply then he may not be permitted to rely at the hearing on any documents or witness statements that had not been delivered.

3. The appellant was also reminded that the Directions required the appellant to produce hearing bundles for the appeal hearing by no later than 27 March 2019.

4. The appellant has not complied with that Direction and on 21 May 2019, HMRC wrote to the Tribunal confirming that the hearing bundle had not been received. HMRC required the bundle as a matter of urgency. They had chased the appellant's representative on 3 April and 10 May and 21 May 2019 but there had been no response.

5. In terms of the Directions the appellant's Skeleton Argument should have been lodged with the Tribunal and HMRC by no later than 18 June 2019.

6. No Skeleton Argument has been lodged.

7. The Tribunal administration contacted the appellant's representative's office on 19 June 2019 indicating that they required to hear from him as a matter of urgency. There has been no response.

8. I am the Judge listed to hear this appeal and I have today received the file and relevant papers.

9. I also observe that the appellant is required to produce a List of Authorities by no later than Tuesday 25 June 2019.

10. I remind the appellant and his representative of the terms of Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Rules”) which read as follows:

2.—Overriding objective and parties' obligations to co-operate with the Tribunal

- (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
- (2) Dealing with a case fairly and justly includes—
 - (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
 - (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
 - (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
 - (d) using any special expertise of the Tribunal effectively; and
 - (e) avoiding delay, so far as compatible with proper consideration of the issues.
- (3) The Tribunal must seek to give effect to the overriding objective when it—
 - (a) exercises any power under these Rules; or
 - (b) interprets any rule or practice direction.
- (4) Parties must—
 - (a) help the Tribunal to further the overriding objective; and
 - (b) co-operate with the Tribunal generally.

11. It is evident from the file and the non-compliance with Directions that there has been a lack of co-operation on the part of the appellant.

12. I refer the appellant to Rule 8(3) of the Tribunal Rules (I have highlighted in bold Rule 8(3)(b)) which reads:

Rule 8(3)

The Tribunal may strike out the whole or a part of the proceedings if—

- (a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;
- (b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or**
- (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.

13. The appellant is put on notice that UNLESS:

- (a) The bundle is lodged with HMRC, and
- (b) The Skeleton Argument is lodged with both HMRC and the Tribunal

by not later than noon on Monday 24 June 2019 and the bundle of authorities is lodged timeously by 25 June 2019, the Tribunal may strike out the proceedings in terms of Rule 8.

14. Any party may apply for these Directions to be amended, suspended or set aside or for further Directions.

15. Whilst of course the parties should correspond with the Tribunal in the usual way it would be helpful and would expedite matters if all correspondence with the Tribunal were copied to AShaw3@scotcourtribunals.gov.uk.

ANNE SCOTT
TRIBUNAL JUDGE
Release date: 21 June 2019