[2019] UKFTT 0679 (TC)

TC07454

Appeal number: TC/2017/06289

EXCISE DUTY – seizure of vehicle – whether or not HMRC decision to restore on payment of a fee equal to 100% of the duty at stake reasonable – held not – appeal allowed – decision referred to HMRC for further review

FIRST-TIER TRIBUNAL
TAX CHAMBER

CLIFFORD EATON T/A J TRANSPORT **Appellant**

- and -

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

TRIBUNAL: JUDGE PHILIP GILLETT
CAROLINE DE ALBUQUERQUE

Sitting in public at Taylor House, London on 4 November 2019

The Appellant appeared in person

Richard Evans, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This was an appeal against a review decision by HMRC, dated 13 July 2017, imposing a fee for the restoration of a vehicle, a DAF XF 510 registration number CA11CJE tractor unit and a trailer number CJE05, which were seized as being liable to forfeiture pursuant to s141(1)(a) Customs and Excise Management Act 1979 ("CEMA").

2. The decision was that the vehicle and trailer should be restored to Mr Eaton for a fee of £14,603, being equal to 100% of the duty payable on 15 pallets of beer which were seized at the same time. This appeal is not related to the seizure of the beer.

3. HMRC state that the legality of the seizure was not challenged and that therefore this appeal is solely concerned with the reasonableness of HMRC's decision to restore the vehicle and trailer for a fee of £14,603.

THE FACTS

4. We received oral evidence from Mr Eaton and witness statements and oral evidence from David Crotch, an officer of HMRC who was present at the time the goods and vehicle were seized, and Paul Cumberland, the HMRC officer who made the initial decision that the vehicle and trailer should be restored for a fee of £14,603. We found all to be credible and reliable witnesses.

5. We received a witness statement from Elizabeth Elliott, the HMRC officer who carried out the review, but did not receive oral evidence from her, nor was she cross-examined. This was not satisfactory because it is of course her decision that is being appealed. We were therefore unable to ascertain her full reasons for upholding Mr Cumberland's decision.

6. We also received a bundle of documents, including letters written by Mr Eaton to HMRC following the seizure, and from the witness evidence and the documents provided we make the following findings of fact.

7. Mr Eaton is an HGV driver with over 25 years' experience. He is a sole trader and operates one vehicle, which is leased from Hitachi Capital Business Finance.

8. On the morning of 10 May 2017 Mr Eaton received a telephone call from an acquaintance whom he knows by the name of Babu. His full name is Laxmichand Shah. Mr Eaton had known Mr Shah for approximately 2 years, having met him on holiday in Morocco. Mr Shah is a photographer.

9. Mr Shah asked Mr Eaton if he would transport a load for him from Ravensden, Bedford, to Manchester. Mr Shah said that he had arranged for another driver to transport the goods for him but his vehicle had broken down and he had therefore approached Mr Eaton. Mr Eaton said that he could fit this into his work schedule and

agreed to take on the job. He did not ask any questions about the goods to be transported.

10. The same day, Mr Eaton drove to the address he had been given at Unit 3, Willow Farm, Ravensden and found a farm with a small number of light industrial units. After Mr Eaton had turned his vehicle around two people appeared from Unit 3 and they opened the shutter doors of the unit to permit Mr Eaton to reverse his vehicle into the unit. Just as he had finished reversing his vehicle into the unit, his friend, Mr Shah, drove in to the estate and Mr Eaton descended from his cab and had a conversation with Mr Shah about his photography and other topics unrelated to the goods to be transported.

11. While he was talking to Mr Shah the two men who had opened the unit doors had opened the sides of Mr Eaton's trailer and removed the side pillars and commenced loading the goods.

12. At this point, HMRC arrived and having carried out a search of the vehicles and the premises arrested all four men, including Mr Eaton. He was then taken to Kempston Police Station, where he was interviewed. The notes of his interview are consistent with two letters which he subsequently wrote to HMRC and with the evidence which he gave to us.

13. Mr Eaton said that, at the time of his arrest, he had not been given any documents relating to the goods, did not know the nature of the goods and did not even know the address to which they were to be delivered, but he stated that he would have asked for full documentation before he left the unit. Whether this would have revealed anything about the true nature of the goods we do not know.

14. Mr Eaton explained that when he is looking to fill a part load or a return load he will operate through a website which advertises such jobs, and through which he can make a bid for the work. When he operates through this website he has no knowledge of the nature of the goods he is being asked to transport until he picks them up, at which time he will expect to be given papers stating the nature and quantity of the goods, as well as the delivery address.

15. He did not therefore think it odd that Mr Shah had not told him what the goods were, but he did think that picking the goods up from a small industrial estate attached to a farm was unusual. He did however realise that the pick-up location was not a bonded warehouse and he was not therefore expecting to be given bond papers.

16. Following the seizure, Mr Crotch wrote to Mr Eaton on 15 May 2017 explaining that the vehicle had been seized as being liable to forfeiture in accordance with the provisions of s141 CEMA. This letter also advised Mr Eaton that if he considered that the vehicle should not be liable to seizure then he should write to HMRC at an address in Glasgow. Mr Crotch said that he enclosed leaflet 12A with his letter, which explains the options open to Mr Eaton in such circumstances, but Mr Eaton could not recall seeing this leaflet. Mr Eaton did however write a letter to HMRC a few days later,

which Mr Crotch thought had been sent to an address in Plymouth, an office of UK Border Force, an address which Mr Eaton could only have obtained from leaflet 12A.

17. Neither Mr Eaton nor Mr Crotch could make any statement on this subject with any certainty and we cannot make any finding of fact on the basis of the evidence.

18. Following the receipt of the letter from Mr Crotch, Mr Eaton wrote to HMRC, on 24 May 2017, stating that:

(1) He was not aware that there was any illegal activity involved.

(2) He had no part in bringing the goods into the UK.

(3) He had not been involved in the financing of the goods or the storage at the warehouse.

(4) He was there merely as an HGV driver who had been asked to pick up a stranded load and deliver it to a destination in Manchester.

19. These statements are closely in line with the notes of Mr Eaton's interview at Kempston Police Station and with the evidence which he gave to us, and we accept it as factually correct.

20. Mr Crotch did not know if this letter was a request to challenge the legality of the seizure in the Magistrates' Court or a request for restoration under HMRC's discretion. He therefore spoke to Mr Eaton by telephone to clarify this. Mr Crotch said that following these discussions he believed Mr Eaton had asked for the letter to be treated as a request for restoration. Mr Eaton did not share this view of the discussions but it was clear that he did not fully understand the difference between proceedings before the Magistrates' Court and asking for restoration. Importantly, and somewhat surprisingly, Mr Crotch did not have his notebook with him and was therefore unable to relate the precise words from the telephone discussions.

21. Nevertheless, the net result of this was that Mr Crotch treated the letter as a request for restoration.

22. Mr Crotch then discussed this with Mr Cumberland, the officer who would make any decision regarding restoration and, on 14 June 2017, Mr Cumberland wrote to Mr Eaton offering to restore the vehicle and trailer for a fee of £14,603, an amount equal to 100% of the duty involved in the seizure of the beer.

23. At the time of writing this letter, Mr Cumberland had not even read the letter from Mr Eaton dated 24 May 2017 and therefore treated Mr Eaton as if he was complicit in the attempt to evade excise duty.

24. On 19 June 2017, Mr Eaton replied to Mr Cumberland's letter, again setting out his claim that he was not involved with any illegal activity and asking for a review. This review was carried out by Elizabeth Elliott who upheld the original decision by Paul Cumberland. The letter confirming this was dated 13 July 2017.

25. As stated above, Ms Elliott did not attend the hearing and could not therefore be questioned as to her rationale for upholding Mr Cumberland's decision. Her witness statement was relatively brief on the reasons for her decision and her letter simply said that she considered Mr Eaton's explanation were "not credible". Again we do not know if she actually read Mr Eaton's letters or if she relied on discussions with her colleagues.

26. We find this inability to question Ms Elliott totally unsatisfactory, especially given that it is technically her decision which is the subject of this appeal.

THE LAW

27. 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 or the vehicle 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.

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

> "**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—
>
> > (a) any decision by the Commissioners on a review under section 15 above (including a deemed confirmation under subsection (2) of that section); and
> >
> > (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) …
>
> (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 further review 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 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.

(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."

29. 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. The only authority which this tribunal has in such cases is to direct that HMRC carry out a further review, and it can only do that if it finds that the decision of the reviewing officer is flawed.

30. 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.

31. 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.

32. 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.

DISCUSSION

33. We will first address the issue of whether Mr Eaton's first letter was a request for proceedings in the Magistrates' Court or a request for restoration under the discretion of HMRC.

34. Mr Eaton's letter was not clear on this front and Mr Crotch's recollections of their conversation were not clear, especially given that he had not brought his notebook with him.

35. However, we understand that no evidence was produced to show that the goods in question had been subject to excise duty and it is therefore highly likely that any

proceedings in the Magistrates' Court to challenge the legality of the seizure would have been unsuccessful. Treating the letter as a request for restoration was therefore probably the better outcome for Mr Eaton.

The Restoration Decision

36. As set out above, our powers in cases such as these is limited to considering the reasonableness of HMRC's decision. We can clearly only judge this against any policy guidelines which HMRC might use when considering restoration.

37. HMRC do have written policies on restoration but for reasons which we cannot understand HMRC did not produce copies of these written policies in its evidence to the tribunal. This is extremely unsatisfactory and makes our consideration of their decision much more difficult than it needs to be. In similar cases before the tribunal, UK Border Force has produced summaries of its policies, and Mr Crotch confirmed that HMRC's policies on restoration and those of UK Border Force were very similar. Because of HMRC's decision not to present their policies in evidence we were put at a significant disadvantage and we can only ask that in future cases involving restoration HMRC see fit to present their policies on restoration in evidence.

38. Nevertheless, the tribunal was able to ask questions of Mr Cumberland to establish the rationale for his decision.

39. Mr Cumberland confirmed that the only way he could have arrived at a decision to restore the vehicle for a fee equal to 100% of the duty involved was if he considered that Mr Eaton was complicit in the attempt to evade excise duty. He also confirmed that this was his view at the time he took the decision.

40. He based this conclusion on the fact that Mr Eaton had been arrested and that criminal investigations were still ongoing. He did not take into account any of the representations made by Mr Eaton in his first letter to HMRC and indeed he confirmed that at the time he made his decision he had not even read the letter. We find this hardly credible.

41. Mr Cumberland also agreed that if he had considered that Mr Eaton was not complicit in the attempt to evade excise duty then the policy would have been to restore the vehicle for a fee equal to 20% of the duty involved, or without payment of a fee if Mr Eaton had made reasonable basic checks about the load.

42. We are quite clear that on this evidence alone, Mr Cumberland failed to take into account relevant facts, ie the letter from Mr Eaton, which would render his decision unreasonable were this to be the decision which is the subject of this appeal.

43. We must therefore consider the decision which is the subject of this appeal, which is that of Ms Elliott.

44. We have little information as to why Ms Elliott reached the decision which she did and must therefore do our best to infer as much as we can from her witness statement and her letter upholding the decision.

45. In her witness statement Ms Elliott explains that in coming to her conclusion she considered:

(1) The information supplied by the HMRC officers involved,

(2) The information supplied by Mr Eaton, and

(3) The circumstances surrounding the seizure of the vehicles.

46. In her review conclusion letter dated 13 July 2017 she listed the issues she had taken into account, which was relatively complete, and concluded "your contention that you believed this was like any normal load is not credible".

47. Ms Elliott does not state it explicitly but the only way in which she could have come to the conclusion that the vehicle should be restored for a fee equal to 100% of the duty involved is if she believed Mr Eaton was complicit in the attempt to evade duty.

48. We can only say that, having considered the same evidence which Ms Elliott states she has considered in her review conclusion letter we do not understand how she came to the conclusion that Mr Eaton's explanation was not credible. We find Mr Eaton's explanation entirely credible and, as stated above, from the evidence which we have received, we have found that Mr Eaton was totally unaware of any illegal activity being carried on.

49. We do not therefore consider that Ms Elliott's decision was one which could have been reached by a reasonable person, who is properly directed.

Summary

50. As set out above, the only authority which this tribunal has in such cases is to direct that HMRC carry out a further review of their decision, and it can only do that if it finds that the decision of the reviewing officer is flawed.

51. 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.

52. 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.

53. In our view, the decision of Mr Cumberland was flawed because he failed to take into account the statements made by Mr Eaton in his initial letter to HMRC. In fact he did not even read this letter before making his decision. He did not therefore take into account what can only be considered highly relevant information. However, it is not Mr Cumberland's decision which is the subject of this appeal, it is that of Ms Elliott.

54. As regards the decision of Ms Elliott we find that her conclusion that Mr Eaton's explanation was not credible was totally at odds with the facts which we have found. We cannot understand how any reasonable officer, properly directed, could have come to this conclusion. We therefore find that Ms Elliott's decision was also flawed.

DECISION

55. For the above reasons we decided that this appeal should be ALLOWED.

56. Therefore, in accordance with the provisions of s16(4) Finance Act 1994, we DIRECT that:

(1) HMRC should carry out a further review of their decision.

(2) This review should be carried out by an officer with no previous involvement with this case.

(3) This review should take into account the facts which we have found that Mr Eaton had no knowledge that he was involved in any illegal activity and was not complicit with the attempt to evade excise duty.

57. 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.

PHILIP GILLETT

TRIBUNAL JUDGE

RELEASE DATE: 7 NOVEMBER 2019