TC03736

Appeal number: TC/2013/03758

Excise duties – Restoration – Reasonableness of decision not to restore vehicle and trailer seized in course of smuggling tobacco into UK – Yes – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MINDAUGAS LELEŠIUS **Appellant**

- and -

THE DIRECTOR OF BORDER REVENUE **Respondent**

TRIBUNAL: JUDGE ANNE SCOTT
MRS GILL HUNTER

Sitting in public at Bedford Square, London on 24 April and 12 May 2014

Having heard Mr A dos Santos for the Appellant and Mr W Hansen, Counsel instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The appeal is dismissed. This appeal related to the review decision of Officer Harris dated 11 April 2013 ("the decision"). That decision was a review of a decision of the National Post Seizure Unit ("NPSU") of Border Force dated 30 January 2013 not to restore the seized Mercedes tractor unit DCJ 668 and car transporter BU754 (together "the vehicle").

Primary Facts

2. The primary facts were not in dispute. On 5 July 2012, the vehicle was stopped at Tilbury Docks. On inspection, 170,080 cigarettes were found concealed in the two fuel tanks in the Mercedes tractor unit. Those cigarettes should have attracted £41,027.20 of duty. The vehicle was driven by Darius Lukošius who was an employee of the appellant. He was accompanied by Viktoras Sutkus. They were arrested, made no comment to answers in interview and Mr Lukošius was ultimately prosecuted and sentenced.

3. The vehicle was seized under Section 139(1) of Customs and Excise Management Act 1979 (CEMA) as it was liable to forfeiture under Section 141(1)(a) because it was used for the carriage of goods liable to forfeiture. The legality of the seizure was not challenged in the Magistrates Court within the requisite time limit of one month. On 9 July 2012, the appellant wrote requesting the release of the vehicle.

Arguments

4. The arguments for the appellant were that:-

(a) Until receipt of the decision, the appellant knew only that the tractor unit had been "adapted to conceal smuggled goods". Through his solicitor, the appellant told Border Force on 14 March 2013 that he did not know how the cigarettes were smuggled and that "any adaptation in this case must be of relatively simple nature". He was given no details of the nature of the adaptation before the decision was issued. Accordingly since he had not had the opportunity to address that issue the decision had been arrived at unreasonably,

(b) the reasoning given in the decision was insufficient to justify the conclusion that the adaptation itself demonstrated complicity in or deliberate ignorance of the driver's enterprise,

(c) the information furnished by the appellant had not been properly weighed in the balance,

(d) the appellant had set out a clear case for hardship and the disproportionality of non-restoration and that had not been addressed,

(e) no consideration had been given to the ease of removal of the adaptation before restoration,

(f) the appellant had been wholly unaware of the smuggling.

5. In summary, the respondent's argument was that the decision not to restore the vehicle was a reasonable decision based on the known facts at the time. The review officer reasonably considered that this had been no casual concealment or one that could easily have been made without the knowledge of both the operator and the driver. The adaptation would have taken time and the delay should have come to the attention of a reasonably careful operator monitoring the movements of the vehicle. Hardship had been considered and there was no evidence of exceptional hardship in this case.

Evidence

6. We heard evidence from the appellant and Officer Harris.

Further Findings in Fact

7. The cigarettes had not been found easily. It was only following a scan of the load, which had been found to be inconclusive, that a full examination took place which resulted in the discovery of the fuel tank concealment. Access to the concealment was only made possible by the removal of rivets concealed under the rear tank support straps. 80% of the tanks, which each have a capacity of 600 litres each, had been adapted for concealment. The fuel input had had to be diverted.

8. The respondent's request for information from the appellant dated 8 August 2012 was generic and did not disclose the nature of the adaptation to the appellant. The decision described the nature of the concealment and adaptation. It was only on the first morning of this appeal that the appellant was given photographs which showed the graphic detail of the adaptation.

9. The request for the review decision dated 14 March 2013 did make it explicit that the appellant stated that he did not know how the cigarettes had been smuggled and that, in the appellant's opinion, any adaptation must have been of a relatively simple nature.

10. The driver was employed by the appellant from 13 January 2012. Prior to employment the appellant had requested and received a reference dated 10 January 2012. That reference covered a period of just less than a year and was very good. When furnishing the reference to the respondent no explanation was proffered for the gap in employment for the period from 22 June 2011 until 13 January 2012.

11. The appellant did inspect the vehicle prior to departure and noticed nothing unusual in relation to the fuel tanks.

12. Approximately one month after the vehicle was seized, the appellant arranged to talk to the driver, because he was dismissing him, and in the course of that conversation the driver told him that the original fuel tanks had been removed and the adapted tanks inserted in their place.

Reasons for Decision

13. The function of a tribunal in a case such as this is supervisory only.

14. Since the seizure was not challenged, the Tribunal can only consider the correctness or otherwise of the discretionary review decision not to restore the seized vehicle. The Tribunal's powers in this context are limited to those set out in the statute and are as set out in Section 16(4) of the Finance Act 1994 (see Annex 1 hereto).

15. The Tribunal has no inherent jurisdiction as to fairness etc and is confined by the jurisdiction given by statute. Essentially the decision on review must stand unless "… the Tribunal are satisfied that the … person making that decision could not reasonably have arrived at it". It does not matter whether the Tribunal would have reached a similar conclusion itself. The question is simply whether the decision was within the range of decisions that could reasonably have been arrived at.

16. The burden of proof lies with the appellant.

17. We were asked to find that the appellant was a credible witness and indeed we were commended to consider that he was honest. That was not easy in a number of respects. One example would be that originally the appellant stated that he did not know the timing of the alleged change over of the tanks and could only speculate. He then declined to agree, or not, with where it might have been achieved. It was specifically put to him by Mr Hansen that it had been done before the driver left the yard and he replied to the effect that he could not say but he had not noticed anything amiss. That does not sit well with his later evidence when, in response to questions from the Tribunal, he said that he had asked the driver where it had been done and had been told that it was near the driver's home. He was then asked if he had asked when it had been done and he replied in the affirmative stating that the driver had told him that it had been done when he left the business premises.

18. The sequitor to that, is that since he told the Tribunal that he spoke to the driver approximately one month after the seizure, we find that it is disingenuous at best, for his lawyer to be instructed to write to the respondent some six months later on 14 March 2013 stating:- "It is unknown to Mr Lelešius how these cigarettes were smuggled…".

19. When that was explicitly put to the appellant by the Tribunal he said that since the driver was patently dishonest because he engaged in smuggling he was not sure if he had told the truth. Even if true, that does not account for the differing accounts referred to in paragraph 17 above.

20. On 2 August 2012, the appellant's representatives wrote to NPSU asking for the vehicle to be restored to the appellant and pointing out that the loss of the vehicle was causing "considerable hardship". On 8 August 2012, an officer wrote to the appellant's representatives requesting 11 pieces of information, which are agreed by the parties to be generic. At the bottom of that list in bold print it stated:– "**If we do not receive sufficient information we may be unable to consider your client's restoration request for the vehicle."**

21. It then went on to say: -" It is for your client to make a case for restoration. This is your client's opportunity to bring to our attention anything else that your client would like us to consider in making a decision. If your client has any other information or paperwork relating to the above vehicle which support your request for restoration, please forward them to us at the above address as soon as possible."

22. On 9 August 2012, the respondent wrote to the appellant's representatives stating that the enquiry was ongoing but reiterating the requests for information in the letter of 8 August 2012. Nothing was received.

23. On 14 November 2012, the respondents again wrote to the appellant's representatives and yet again reiterating the information required. It stated clearly:- "If we do not receive sufficient information we may be unable to consider your client's restoration request for the vehicle." Nothing was received.

24. The decision refusing restoration was issued on 30 January 2013. It was only following that, that on 14 March 2013, the appellant's representatives requested a review of the decision and sent a letter answering only some of the questions and providing a little more information.

25. On 21 March 2013, an officer wrote explaining the review process and inviting any further information in support of the request for a review. Amongst other things it states "This is your last opportunity to provide….such information". Nothing was received.

26. The information provided with that letter of 14 March, 2013 was therefore the only information furnished by the appellant which was available to Officer Harris. It was incomplete. In particular there are the following gaps:-

(a) He had been asked for a copy of the driver's terms and conditions…only one page of the original was included and although there is what appears to be an English translation running to three pages with a provision on the third page relating to travel abroad a copy of the original is not included.

(b) He had been asked for copies of references from "the driver's previous employers" but, as indicated in paragraph 10 above, only one was provided, covering a very short period and there was no explanation covering the period between employments.

(c) He had been asked for details of the physical checks made of the load etc. The issue here was not the load itself but that should have alerted the appellant, or those advising him, to the need to explain what checks were made of the vehicle. He simply stated that the vehicle was rarely in the yard of the company and it was usually visually inspected when leaving the company's territory.

(d) No real detail was provided in regard to the questions about what was done to prevent vehicles being used for smuggling or procedures to stop drivers smuggling other than one bland clause in the English version of the employment contract. That does not refer explicitly to smuggling.

(e) As far as hardship is concerned, there was very little detail available to Officer Harris.

27. We have some difficulty with the details furnished in regard to hardship since the evidence on that was also somewhat inconsistent. In the supporting letter sent with the letter of 14 March 2013, the appellant stated that he was "forced to dismiss some of my honest and competent employees … If I don't get back the aforementioned vehicle, I will be forced to dismiss the rest of my employees …". In evidence it was established that although Mr Lelešius stated that he had three

employees, one of whom was the driver, in fact the other two "employees" were the accountant he employed to produce the company's accounts and a firm that he was required to retain, in terms of Lithuanian law, but neither had day to day involvement with the business. The driver had been the only employee. However, that was not known to Officer Harris at the time.

28. We find that this is a very clear case where the key fact is that a sophisticated smuggling attempt has been foiled by the respondent. The cigarettes have been forfeited and condemned to the Crown. The vehicle is liable to forfeiture by virtue of section 141 of CEMA. By virtue of section 152(b) HMRC can decide to restore and have an unfettered discretion as to the terms upon which any such restoration is made.

29. It was a matter of agreement between the parties that the excise fraud had been established and that the respondents were within their powers to seize the vehicle. The question for us was whether Officer Harris' decision not to restore was one which could reasonably have been arrived at. Although it was argued that we should look at three sub-tests, namely, whether the decision was reasonable, whether anything irrelevant was taken into account, and whether the procedure was flawed, nevertheless we find that there are in fact four elements to the review:

i. was anything irrelevant taken into consideration,

ii. was anything relevant omitted from consideration,

iii. was any mistake of law made, and

iv. was the decision one which could have been made by a reasonable decision-maker?

(i) – *were irrelevant considerations taken into account?*

30. Of the primary facts taken into consideration by Officer Harris, none appear to us to be irrelevant to his consideration of the matter and, in particular, as to whether or not the appellant knew of the adaptation. Indeed the real problem for Officer Harris was the paucity of the information provided by the appellant, at a very late stage after numerous prompts.

(ii) – *were relevant considerations omitted*?

31. It was argued that Officer Harris had failed to consider the possibility that the tanks had been replaced as opposed to simply being adapted and that he had failed to consider the time that it would take to replace the tanks. It was in that context that we were asked to consider the appellant to be an honest witness since he had said at the hearing that it would take approximately 20 minutes. For the reasons set out above we did not find the appellant to be a credible witness. Officer Harris did confirm that it had occurred to him that it was a possibility that the tanks had been replaced but that he considered that the vehicle would have had to have gone off route to do so and that therefore the appellant should have been aware of that given that he had the GPS system. We accept that. We make no finding on the timescale involved.

32. The first suggestion from the appellant that the tanks could have been easily changed by removal of the supporting straps was in the Notice of Appeal dated 25 May 2013 and that was in the context where in the same paragraph it states "It is not known by the Appellant exactly how the cigarettes were smuggled…".

33. It was in regard to the question of knowledge of the adaptation that it was argued for the appellant that there had been a procedural irregularity in that the appellant had not known the nature of the adaptation and therefore could not answer the point. We found Officer Harris to be a wholly credible witness and we accepted his assertion that he would have expected the appellant to have questioned the driver as to the method of smuggling. In fact, as it transpired at the hearing, as opposed to the information provided to Officer Harris, the appellant did do precisely that and knew exactly how the smuggling had been achieved and that within approximately one month of the seizure, at the very latest.

34. We could not identify any consideration which Officer Harris should have taken into account which he did not. The appellant had been given numerous opportunities to furnish more detailed information and had quite simply failed to do so.

(iii) – *a mistake of law*

35. We could not identify any mistake of law.

(iv) – *a reasonable decision*

36. We accept, as did the appellant, that the concealment was indeed a sophisticated adaptation which would have taken time to construct. Although it would now appear that some months before the review decision was taken the appellant knew, or purportedly knew, that the tanks had been replaced. He did not offer that argument, as a fact, until the matter had come to hearing. He only offered it as a possibility in the Notice of Appeal. In those circumstances and in the absence of any other information available to Officer Harris we find that looking at the totality of the facts, it seems to us that there was sufficient evidence for Officer Harris to be able reasonably to conclude that it was likely that the appellant knew, or should have known, of the adaptation and that in all probability it was permanent.

37. We accepted Officer Harris' evidence that he had considered the possibility of restoring the vehicle if the adaptation was removed but he did not explore the cost of so doing because by then, having reviewed all the information, he believed that on the balance of probability the appellant knew or should have known of the adaptation.

Hardship

38. Officer Harris stated clearly that he had paid particular attention to the degree of hardship caused by the loss of the vehicle. It is generally accepted that hardship is a natural consequence of having a vehicle seized and it would have to be exceptional hardship for the vehicle to be restored under that part of the policy. It is self-evident that the loss of the only vehicle owned by the appellant would inevitably cause hardship. Unfortunately the appellant did not furnish any detail to Officer Harris as to the nature of his disability or what precluded him from engaging in other economic activity. It transpired in the course of the hearing that he had previously had a

business selling cars. No further evidence was produced at the hearing to substantiate the assertion that the appellant was suffering exceptional hardship. Officer Harris was very clear that he had considered the disproportionality of non restoration in the light of the information available to him. We accept that.

39. We find it curious that if the appellant was indeed suffering exceptional hardship he did not press the respondents to come to an early decision and furnish them with as much information as he could, as soon as he could. In particular he would have been expected to have told them that he could not possibly have known about the replacement of the tanks, if that is what he believed, even if only as a possibility.

Conclusion

40. This Tribunal has not been given authority by Parliament to make a decision that the vehicle should or should not be restored. Only the respondent has the power or duty to restore it. It is important to remember that a conclusion that a decision is not unreasonable is not the same as a conclusion that it is correct. The mere fact that we might have reached a different conclusion is not enough for us to declare that the conclusion reached by the respondent should be set aside. In point of fact since the trailer had not in any way been adapted perhaps it could have been restored but that is not a question for us. It had been considered as a possibility and rejected as such by Officer Harris.

41. We find that Officer Harris set out clearly in the decision the facts that he had considered and those are primarily detailed in the sections headed "Background" and "Correspondence" which we consider to form an integral part of the decision.

42. Looking at the totality of the evidence in this case and the repeated failure of the appellant to produce any detailed information to the respondent, given the significant quantity of cigarettes, the sophisticated adaptation, and the significant loss of duty had the import not been foiled, we find that the application of the policy in this case treated the appellant no more harshly or leniently than anyone else in similar circumstances.

43. We do not find it proved that Officer Harris' decision was unreasonable.

44. We therefore dismiss the appeal.

45. 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, LLB, NP
TRIBUNAL JUDGE

RELEASE DATE: 18 June 2014

Annex 1

Section 16(4):

"(4) In relation to any decision as to an ancillary mater, 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.