[2018] UKFTT 89 (TC)

TC06347

Appeal number: TC/2016/05831

EXCISE DUTY RESTORATION OF VEHICLES – refusal of application for the restoration of vehicles forfeited because they were being used for the transportation of goods on which duty had not been paid – was the refusal unreasonable - No

FIRST-TIER TRIBUNAL
TAX CHAMBER

ENTERPRISE KATARZYNA GLOWACKA-PERET **Appellant**

- and -

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

TRIBUNAL: JUDGE TONY BEARE

Sitting in public at Taylor House, 88 Rosebery Avenue, London, EC1R 4QU on 8 February 2018

The Appellant did not appear and was not represented

Ms Natasha Barnes, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal made by the Appellant under Section 16 Finance Act 1994 (the "FA 1994") against a review decision by the Respondents of 27 September 2016 confirming their decision of 8 July 2016 to refuse the restoration to the Appellant of a DAF HGV tractor unit (the "tractor") and attached curtain side trailer (the "trailer") which were seized on 15 June 2016 at Harwich International Port.

2. The Appellant did not attend, and was not represented at, the hearing. I noted that this was as a result of a positive decision by the Appellant, as recorded in the correspondence leading up to the hearing. I was therefore satisfied that it was in the interest of justice to proceed with the hearing.

3. The notice of appeal given by the Appellant to the Tribunal is dated 13 November 2016. This is outside the 30 day time limit in which the notice of appeal was required to be given. However, the Appellant explained the reasons for the late notice in its notice of appeal and the Respondents have not objected to the appeal on those grounds. I was therefore content to permit the appeal to proceed.

4. The agreed facts in this case are as follows:

(a) At the time of the seizure, the tractor was owned by a leasing company named Getin Leasing 2 S.K.A ("Getin") and was on lease to the Appellant whereas the trailer was owned by the Appellant itself;

(b) On 15 June 2016, the driver of the tractor and trailer, a Mr Urbaniak, was intercepted at Harwich International Port having travelled from Hook of Holland. The driver presented the Border Force officers who had apprehended him with a CMR describing the load he was carrying as OXOVIFLEX, bound for Crown Paints in County Tyrone, Northern Island. The load was being transported by the Appellant on behalf of Carignola sro, a company in the Czech Republic ("Carignola");

(c) Samples of the liquid were drawn from each of the 26 containers found in the trailer and the liquid, which was light green in colour, was found to be diesel fuel in respect of which duty was payable;

(d) Consequently, the liquid, together with the tractor and trailer, were seized as being liable to forfeiture;

(e) As no valid notice of claim contesting the seizure was received within the one month period following the seizure was given to the Respondents, the assets in question were deemed to have been duly condemned as forfeited pursuant to paragraph 5 Schedule 3 Customs & Excise Management Act 1979 (the "CEMA 1979");

(f) On 1 July, 2016, the Appellant's representative, CSK Sp.z.o.o, submitted a request for the restoration of the tractor and trailer and, on 8 July 2016, this was refused by the Respondents;

(g) On 3 August 2016, the Appellant requested a review of that decision and, on 27 September 2016, the reviewing officer, Brian McCann, upheld the refusal to restore; and

(h) Following correspondence between the Respondents and Getin, as the owner of the tractor, the Respondents restored the tractor to Getin in early 2017, in return for the payment of a restoration fee of £860. The trailer has not been restored to the Appellant.

5. The relevant law may be summarised as follows:

(a) Section 152(b) CEMA 1979 provides that the Respondents may, as they see fit, restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under the customs and excise Acts;

(b) Section 14(2) FA 1994 provides that a person in relation to whom, or on whose application, a decision under Section 152(b) CEMA 1979 has been made may require the Respondents to review that decision;

(c) Section 16(1) FA 1994 provides that the person who required the review may then appeal against the review decision;

(d) Section 16(4) FA 1994 provides that, in relation to any such appeal, the powers of this Tribunal are confined to a power, where this Tribunal is satisfied that that the decision could not reasonably have been arrived at, to direct that the decision is to cease to have effect from such time as this Tribunal may determine, to require the Respondents to conduct, in accordance with the directions of the Tribunal, a further review of the original decision or, in the case of a decision which has already been acted on or taken effect, to declare the decision to have been unreasonable and to give directions to the Respondents as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in the future; and

(e) The above provisions make it clear that the decision as to whether or not to restore a forfeited asset is a matter for the Respondents to determine at their discretion and that I can disturb that decision only if it is unreasonable in the sense described in the leading case of *Associated Provincial Picture Houses, Limited v Wednesbury Corporation [1948] 1 K.B. 223* (*Wednesbury*"). In other words, I am not permitted to consider the relevant facts de novo and determine whether or not I agree with the conclusion that the Respondents have reached. Instead, I need to consider whether, in reaching that conclusion, the Respondents have taken into account matters that they ought not to have taken into account or disregarded matters that they ought to have taken into account. For example, in this context, where the Respondents allege that they have reached their present decision not to restore the relevant goods to the Appellant on the basis of their general policy in this area, I am entitled to consider whether the Respondents have indeed applied their general policy and whether that general policy is reasonable in the *Wednesbury*

sense but, as long as both of those are the case, the Respondents' decision cannot be impugned simply because I or some other person might have reached a different conclusion on the same facts.

6. The position of the Respondents in relation to this appeal may be summarised as follows:

(a) The Respondents' refusal to restore the tractor and trailer to the Appellant was made after considering the correspondence provided on behalf of the Appellant by the Appellant's representative and after applying the Respondents' general policy in relation to restoration;

(b) A redacted copy of that general policy, as it was in force at July 2016, was attached as an exhibit to the witness statement of Mr Stephen Kent and Mr Kent also appeared as a witness at the hearing. He explained that the Respondents' general policy in relation to a forfeited asset which is owned by a third party such as a finance company is to restore the asset to the third party and not to the haulage company that was using the asset at the time when the asset was seized and that the Respondents' general policy in relation to other forfeited assets is that restoration is to be made only in exceptional circumstances. In the words of the policy document that was attached as an exhibit to Mr Kent's witness statement, "[s]eizure and non-restoration in these cases reflect not only the revenue loss but also the health and safety dangers which smuggling of road fuels poses to other maritime or road traffic, to the environment and to the travelling public". Mr Kent conceded that the reference to exceptional circumstances could conceivably include the case of a person who did not know the nature of its cargo but said that that would be the case only if that person had taken taken reasonable steps to ascertain the nature of the cargo and was still ignorant despite doing so. He pointed out that ignorance would not amount to exceptional circumstances if that was not the case because otherwise every smuggler would be able to obtain restoration by deliberately shutting its eyes to the nature of the cargo that it was transporting and then relying on its ignorance; and

(c) The Respondents consider that the general policy has been followed in this case in that, in the case of the tractor, the tractor was owned by Getin at the time of the seizure and has accordingly been restored to Getin and, in the case of the trailer, the Appellant has not established that it took reasonable steps to establish that it was transporting OXOVIFLEX, as described in the CMR, and not something else such as diesel, so that there are no exceptional circumstances which would justify the restoration of the trailer to the Appellant;

7. The position of the Appellant in relation to this appeal may be summarised as follows:

(a) It was neither the consignor nor the consignee of the cargo. It did not store, pack, load, or enter into any other actions in relation to, the cargo. It did not know that the cargo was diesel fuel and it had no reason to assume that the cargo was diesel fuel or indeed anything other than OXOVIFLEX;

(b) It and its driver have never been involved in smuggling and it is well-trusted, has a good reputation, operates legally and transparently and has never been involved in dealing in undeclared goods;

(c) It had operated a few transport orders for Carignola before the taking on the job which led to the forfeiture and it did not expect the cargo to be illegal.

(d) The order given by Carignolo did not raise any suspicions and it had no grounds to suspect the truthfulness of the information set out in the CMR;

(e) OXOVIFLEX is a new specialised product and is not widespread so that it didn't know what OXOVIFLEX was; and

(f) It did not think that opening the containers to check their contents was an option and it would have been afraid that, in doing so, it might damage the contents. So it had no means to verify that the cargo was indeed OXOVIFLEX.

8. My conclusions in relation this appeal are as follows.

9. First, as regards the tractor, I do not see how the decision on the part of the Respondents to deny restoration to the Appellant and instead to restore the tractor to Getin, as the third party owner of the tractor, can be said to be unreasonable. It is wholly in accordance with the Respondents' general policy and that general policy seems to me to be entirely reasonable in that, by definition, the owner will not have been responsible for the vehicle at the time of the seizure and, once the vehicle has been restored to the owner, the owner and the haulage company can then reach an agreement as to how the vehicle should be dealt with going forward.

10. The position in relation to the trailer is more nuanced in that the trailer was owned by the Appellant at the time when it was seized and the Appellant clearly believes that, as an innocent party, it should fall within the exceptional circumstances justification for restoration.

11. However, at the hearing, Ms Barnes made a number of points in that regard.

12. First, she pointed out that is not sufficient for the Appellant to allege that it had no reason to believe the cargo to be other than OXOVIFLEX, as stated in the CMR. Instead, the onus is on the Appellant to show that it took reasonable steps to establish that that was the case.

13. Secondly, she pointed out that the Appellant's decision not to attend the hearing and give evidence in respect of which it could be cross-examined meant that limited weight should be given to the assertions made by the Appellant in its correspondence.

14. Thirdly, she noted that those statements raised a number of questions which Ms Barnes would have wanted to raise in cross examination. For instance, how many previous orders had the Appellant previously taken from Carignola and what due diligence did the Appellant do in relation to Carignola before accepting those other assignments and this assignment? More generally, what was the basis on which the Appellant reached its expectation that the cargo was OXOVIFLEX and not something else? Then, pointing to the notes made by the Respondents' officers at the time of the seizure – as set out on page 232 of the hearing bundle – Ms Barnes noted that, given that the trailer was not sealed and that none of the containers on the trailer was marked in any way, she would have wanted to ask the Appellant whether the fact that the containers were not marked might reasonably have raised suspicion that the goods within the containers were not as stated in the CMR and why, given that the trailer was not sealed, no checks were carried out on the liquid in the containers. Ms Barnes also said that she would have wanted to ask the Appellant why it did not request from Carignola some evidence of a contract between it and the manufacturer of OXOVIFLEX.

15. Finally, Ms Barnes produced the results of some research in relation to OXOVIFLEX which she had done in short order on the morning of the hearing. That search result said, under the heading "Product description", that OXOVIFLEX is an oily liquid which is colourless or light straw coloured and, under the heading "Storage conditions", that containers and tanks must be properly marked. Ms Barnes said that she would like to have asked the Appellant why it had not done a perfunctory search like this before accepting the assignment because, had it done so, the fact that the liquid in the containers was light green and that the containers were not marked might reasonably have raised suspicion that all was not as it seemed.

16. To this I would add that, in the restoration request of 1 July 2016, the Appellant's representative stated as follows:

> "My Principal asked Carignola a few times during transporting the objective cargo to provide her with written proof, ex. e-mail or fax, to confirm what kind of cargo had been loaded, but Carignola ignored her requests and behaved different than usual. We believe that Carignola acted on purpose by putting my Principal off her guard, i[e] by offering frequent haulages with constant collaboration and showing professionality at the beginning. We are of the opinion that Carignola acted maliciously and sneaky in order to obtain my Principal's trust and when it happened Carignola used unawareness of the Enterprise"

If this was the case, then I believe that it was incumbent on the Appellant to refuse to accept the assignment in the absence of the relevant evidence. It was not sufficient for the Appellant simply to take at face value the representation from Carignola as to the nature of the cargo, particularly as, by the Appellant's own admission, Carignola was behaving "different than usual" in relation to the assignment.

17. After weighing up the parties' respective arguments, although I should stress that I have no reason to doubt that the Appellant genuinely did not know that it was transporting diesel fuel and not OXOVIFLEX, I do not think that this is sufficient of itself to render the Respondents' refusal to restore the trailer unreasonable.

18. The Respondents' general policy in these circumstances is to restore the vehicle only in exceptional circumstances and they take the view that ignorance of the nature of the cargo that is being transported is not enough in itself to constitute exceptional circumstances because, otherwise, it would be open to every person in this situation to claim that it had no knowledge of the nature of the cargo that it was transporting. Instead, the applicant needs to show that it took reasonable steps to ascertain the nature of the cargo.

19. I do not consider that approach to be unreasonable in the *Wednesbury* sense. On the contrary, it seems to me to be entirely reasonable.

20. And, applying that standard in this case, I agree with Ms Barnes that the Appellant has not established that it took reasonable steps to satisfy itself that the cargo that it was transporting conformed to the description in the CMR. The number of unanswered questions as set out above, the fact that, by its own admission, the Appellant noted that Carignola was behaving differently from usual and refusing to provide any evidence as to the nature of the cargo and the fact that the Appellant was not at the hearing to be cross-examined in relation to the assertions that it made in the correspondence, means that, in my view, it has not satisfied me that this falls within the category of exceptional circumstances as required by the Respondents' general policy in this area.

21. For the above reasons, I dismiss the Appellant's appeal against the decision by the Respondents not to restore the tractor or the trailer to the Appellant.

22. 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.

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 15 FEBRUARY 2018