TC01936

Appeal number: TC/2010/03225

Excise Duty – Non restoration of jewellery – the Review Officer's conclusion that there had been a deliberate evasion of the payment of duty and that the Appellant was a party to it – was this view reasonable – Yes – Appeal dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

NIMCO MOHAMMED **Appellant**

- and -

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

TRIBUNAL: LADY MITTING (JUDGE)
BEVERLY TANNER (MEMBER)

Sitting in public in Birmingham on 27 March 2012

The Appellant did not appear and was not represented.

David Griffiths, counsel instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant was appealing against a Decision taken on re-rereview against the refusal of the Commissioners to restore to her certain items of jewellery seized at Birmingham Airport Cargo Centre on 6 August 2007.

2. When the case was called on the hearing, the Appellant was not present and was not represented. In all previous hearings she had attended with Counsel so we went to some lengths before deciding to proceed in her absence. The decision before us was a re-rereview dated 27 September 2011 which had been served by post on her then solicitors, Messrs Carltons (Mr Chohan acting). The hearing notice had also been served on Carltons as the authorised representatives on 7 December 2011. Carltons had notified the Tribunal that they were without instruction and coming off the record by letter dated 3 January 2012. On the morning of the hearing we did not know whether the Appellant had herself seen a copy of the re-rereview letter or whether she had been told of the hearing date. Mr Griffiths, counsel for the Commissioners, and the Tribunal Centre both spoke to Mr Chohan who was very helpful and was able to confirm that he had given a copy of the 27 September letter to the Appellant and he had also advised her of the date and time of the hearing. We were therefore satisfied that it would be perfectly fair for us to proceed in her absence and that it would be in the interests of justice so to do.

3. There is quite a history to the Appellant's appeal and to understand fully the issue before this tribunal it is necessary to record this history in some detail.

Chronology and the first Tribunal Hearing

4. On 6 August 2007 at Birmingham Airport Cargo Centre Customs Officers intercepted a package addressed to the Appellant from Dubai. The C3 Customs declaration with the package stated that it contained 36 children's dresses and four women's gowns. The Officers discovered 17 gold bangles, eight pendant sets consisting of gold pendants, pairs of earrings and rings; and a five-piece silver earring and ring set in three polythene bags of clothing within the package. The Officers seized the jewellery.

5. The Appellant, having instigated and then withdrawn condemnation proceedings appealed against the Commissioners' refusal to restore the jewellery to her, this refusal being contained in a review letter of Officer Hodge dated 20 December 2007. The Appeal came before the Tribunal (Michael Tildesley OBE Judge) on 11 December 2009, the Decision being released on 19 January 2010. In paragraph 6 of the Decision the Tribunal set out their findings of fact and in paragraph 7 they set out what they concluded from those facts. We now set out verbatim those two paragraphs.

> *"6. The Facts Found*
>
> The Tribunal found the following facts:

The Appellant was a Somalian[1] National seeking asylum in the United Kingdom.

The Appellant's friend, Katro, was due to get married in the United Kingdom. The wedding ceremony took place on 10 August 2007 at the Regent Park Banquet Hall in Birmingham.

According to Somalian customs, the wedding would be celebrated over three days, followed by a gathering of the female guests with the bride at which gifts would be given to the bride.

The Appellant and her three friends, Nimro, Rado, and Bakeen decided to give jewellery as a wedding present to Katro. They also agreed to purchase jewellery and gowns for themselves to wear at the wedding, and dresses for their children. Between them they had 24 children. of whom 15 were girls.

The Appellant and her friends decided to ask the Appellant's aunt, Safiya Aden, to buy the dresses and jewellery in Dubai where the prices were much cheaper than in the United Kingdom. The Appellant's friends forwarded $2,500 to the Appellant's aunt so that she could purchase the goods. The aunt gifted the Appellant with her share of the dresses and jewellery.

On 1 August 2007 the aunt took the goods into the Offices of FEDEX in Dubai for onward transportation to the United Kingdom. According to the Appellant, the aunt left it to FEDEX employees to complete the necessary documentation with the aunt paying FEDEX the amounts due including the duties, if any, on the goods. The aunt was illiterate and did understand the documentation which was completed in English. The FEDEX employees, however, included amongst their number, Somalian speaking individuals.

The documentation sent with the package consisted of the package label, a pro-forma invoice and a C3 Customs Declaration. The package label addressed to the Appellant named the goods as *children's dress, 70 per cent polyester and 30 per cent* cotton, and *woman's long gown dress, 100 per cent polyester,* with a Customs value of $152. The pro-forma invoice likewise referred to the goods as children's dress and long gowns (40 items) with a value of $152 plus £172 for freight charges. The original invoice documentation did not record the jewellery. The C3 Customs Declaration was completed in Dubai, and made no mention of the jewellery. The C3 document also contained two further errors, the Appellant was declared to be a diplomat which she was not, and the box *dealing with goods obtained under a tax free scheme upon which duty was payable* was ticked no.

On 6 August 2007 a Customs Officer searched the package on its arrival into the United Kingdom. The Officer discovered the jewellery within three polythene bags of clothing. He seized the jewellery because it had

[1] The Appellant's representatives used the description "Somalian" rather than "Somali".

not been declared. The clothing was allowed to proceed. The Officer did not record that the jewellery was concealed.

On being informed by HMRC that the jewellery was being held at Birmingham Airport, the Appellant contacted her aunt in Dubai. According to the Appellant, FEDEX accepted responsibility for failing to declare the jewellery, and purportedly sent a letter of apology by fax to the Appellant. No letter of apology was adduced in evidence before the Tribunal.

The Appellant appeared to rely on a commercial invoice exhibited at page 18 of the bundle. This invoice recorded the Appellant's aunt as the exporter of the goods, and the Appellant as the consignee. The invoice itemised four categories of goods: the children's dresses, the long gowns, 16 bracelets valued at $1200, and eight Jondals' sets (one ring, one necklace and two earrings) valued at $1800. The quantity of jewellery on the invoice did not correspond with that seized by HMRC. The signature on the invoice was indecipherable with no information about the identity of the signatory. There was nothing on the face of the invoice linking it with FEDEX. Further the Appellant produced no document evidencing such a link.

HMRC arranged for an independent valuation of the jewellery, which came out at £5,713.16 as at 12 October 2007. The duty owed on the jewellery was £1,167.62.

The Appellant had offered to pay the outstanding duty in return for the jewellery. HMRC declined the offer.

7. The Tribunal decides the following on the facts found:

There had been a failure to declare the jewellery on the documentation in respect of its importation into the United Kingdom.

The Appellant did not satisfy the Tribunal on the balance of probabilities that FEDEX employees in Dubai were responsible for the error regarding the non-declaration of jewellery items. The Appellant's explanation that her aunt was illiterate and left the form filling to FEDEX employees was undermined by the admission that FEDEX employed Somalian speaking individuals. Further, the Appellant did not provide documentary evidence from FEDEX admitting responsibility for the error. There was no persuasive evidence linking FEDEX with the invoice at page 18 of the bundle. Finally, the Appellant's account of what happened in Dubai was second hand and of no evidential value.

The Tribunal is satisfied that the jewellery was purchased for the personal use of the Appellant and her friends, and as a wedding gift. The Tribunal finds that the wedding took place on the 10 August 2007. The Appellant supplied photographs of the wedding ceremony in which she identified her friends, and a receipt dated 10 August 2007 for the hire of Regent Park Banquet Hall. There was a close relationship in time between the purchase of the jewellery and the date of the wedding. Finally, the Tribunal

considers the Appellant to be a truthful witness on the reasons for the purchase of the jewellery.

The Tribunal finds no persuasive evidence that the jewellery had been concealed within the package. HMRC Brief for the condemnation proceedings exhibited a page 37 in the bundle alleged that the jewellery had been concealed or packed in a manner intended to deceive an Officer. Officer Hodge, the review Officer, fairly testified that she could find no corroboration for the allegation of concealment. The notebook of the Officer who seized the jewellery did not record such an allegation. Officer Hodge was unable to contact the Officer as he has now retired from the Service."

6. Whilst agreeing with the bulk of the review Decision, the Tribunal did not agree with Mrs Hodge in two respects. Mrs Hodge had concluded that the jewellery was imported for commercial disposal whereas the Tribunal accepted that it was for the Appellant's personal use and as a wedding gift. Secondly she believed the jewellery had been deliberately concealed whereas the Tribunal found there was no persuasive evidence of concealment. In these two respects, the Tribunal held Mrs Hodge's decision to have been unreasonable and in line with its jurisdiction, the Tribunal directed a re-review.

7. The re-review was carried out by Officer Brenton and was dated 3 March 2010. Adopting the Tribunal's findings, Mr Brenton also refused restoration giving particular weight to paragraphs 7(1), 7(2) and 7(4) of the Tribunal Decision. He was also particularly influenced by the fact that the so-called letter of apology from FedEx had still never been produced. He referred to the Appellant having perjured herself if in fact that letter was found not to exist.

8. The Appellant appealed against Officer Brenton's decision and this is the appeal which is now before us.

The Current Appeal

9. The appeal first came up for hearing on 22 February 2011. The Appellant announced at the hearing that the letter of apology had been found and that a copy was with her solicitors. Her counsel, Mr Brunt, knew nothing of this and neither did Officer Brenton. We were told that the original letter had been sent to the Appellant's first set of solicitors who had sent a copy to the Appellant's husband which he had lost. The Appellant's husband had found the letter after the last Tribunal hearing and had at some stage given it to Carltons. After a lengthy adjournment whilst enquiries were made of Carltons a copy arrived at the Court and we, and more importantly, Mr Brenton saw it for the first time. The document was a faxed copy of the "Commercial Invoice" referred to in paragraph 6(10) of the first Tribunal Decision. Added on the bottom of it were the words

"We apologize that we did not include the jewellery in the list of the invoice"

This addendum was not signed or dated and there was no indication who had written it or how it had come to be written but the fax date was 3 October 2007; i.e. two months post seizure.

10. The hearing was adjourned to allow the Appellant to establish the authenticity of the apology which, without more, clearly could not have been accepted by the Tribunal or the Commissioners.

11. The hearing resumed on 25 August 2011, nothing having been heard by the Commissioners from the Appellant until 21 August when they received an affidavit from a Mrs Halima Abdi Warfa annexing a further copy of the annotated commercial invoice. The affidavit read:

> "I Mrs Halima Abdi Warfa, care of High Light Air Freight, PO Box 251348 Dubai, UAE make this statement in connection with the above case
>
> 1. I am making this statement to clarify the authenticity of a commercial invoice, bill number 9178 9488 7948. ('The document') This document is attached to my statement and marked as exhibit 1.
>
> 2. I am a director of High Light Air Freight and Shipping Services, my office contact number is +9714 225 2503. My company as a contract with FEDEX who we put all our work through them.
>
> 3. The document was produced by my employer, Mark Torres on the 1 August 2007. Unfortunately he omitted to include the Jewellery in the document under the full description of goods section.
>
> 4. On the 3 October 2007 I wrote on the document under the full description of goods section the following "We apologise that we did not include the jewellery in the list of the invoice." The amended document was then faxed to the Appellant and her legal representatives on the same day. The original document was also sent to her solicitors by FEDEX.
>
> 5. I confirm that the copy of the document that is attached to this statement is a true copy of the original document that I amended. "

Mr Brenton had, yet again, not seen this document until the day of the hearing and it quite clearly raised more questions than it answered. Yet again we had no alternative but to adjourn to allow Mr Brenton to make enquiries and on our direction to carry out a re-rereview in the light of all the documentation received since his earlier review. His re-rereview was dated 27 September 2011 and for the reasons which we set out in the following paragraphs, he again refused restoration.

The re-rereview

12. First, Mr Brenton pointed out that from the date of the seizure until 22 August 2011, it had always been the Appellant's case and confirmed in a witness statement before the first Tribunal from the aunt that all the documentation had been completed by FEDEX when the aunt went into their offices. The witness statement of Mrs Warfa quite clearly contradicts this. If her evidence is to be believed, FEDEX had nothing to do with the completion of the documents and the error was not theirs.

13. Secondly, Mr Brenton highlighted the incorrect assertion in the C3 that the Appellant was a diplomat. Without more, this could be seen as an error but in the

context of the form, Mr Brenton dismissed this possibility. Page 2 of the C3 contains a list of tick box questions. In every one, bar this one, the 'No' box had been ticked. Only in response to the question whether the recipient was a diplomat, had the 'Yes' box been ticked. Mr Brenton saw this answer as a quite deliberate attempt to have the goods imported without interception and examination.

14. Thirdly, Mr Brenton analysed the so called 'commercial invoice'. It had been produced originally to the UKBA as an Air Waybill which it was not. There were no company stamps or any other indication on it that it had been completed by High Light. The shipper/exporter was shown as the aunt and the address given for the aunt were the contact details for High Light. The consignee was named as the Appellant. The quantity of jewellery listed did not tally with the jewellery found on interception and to a layman, the handwriting on this 'Commercial invoice' was identical to that on the C3 form.

15. Fourthly, Mr Brenton recited that all the previous evidence had been to the effect that the fault had been that of FEDEX and their Somalian speaking employee. However, for the first time in Mrs Warfa's statement it appears that it was a Mark Torres of her firm who incorrectly completed the C3 form. On 1 September 2011, Mr Brenton spoke to FEDEX in Dubai and was able to establish that the only staff working on their premises are employees of FEDEX. No-one from High Light works within their premises and although FEDEX did have an account with High Light, that account had been suspended. Mr Brenton had also spoken to the Mr Torres referred to in Mrs Warfa's statement. Mr Torres, quite understandably, had no recollection of this transaction but told Mr Brenton that he would always complete all documentation as accurately as possible as he was aware of the consequences of incorrect declarations. He would write down exactly what the customer related to him and he could never remember omitting anything. Mr Brenton formed the view that Mr Torres was truthful and that his answers were as accurate as he could remember. Mr Brenton also obtained a sample of Mr Torres' writing and such was the similarity that he took the view albeit as a layman, that Mr Torres did complete the C3. Such was the similarity in the writing, Mr Brenton was also firmly of the view that it was Mr Torres who completed the addendum on the commercial invoice accepting the error. Mr Brenton believed that he was instructed to do this, probably by Mrs Warfa.

16. Mr Brenton had been asked by the Tribunal specifically to consider the veracity of Mrs Warfa's affidavit. Because Mr Brenton was firmly of the view that it was Mr Torres who had written the addendum and not Mrs Warfa he could not accept the truthfulness of her statement.

17. In conclusion, Mr Brenton stated his belief that the importation had been a deliberate act of evasion and that the production of the commercial invoice was an attempt to distance the Appellant from any involvement in the deceit. He believed that she was fully complicit in it and that her previous evidence, both under oath to the first tribunal and in the form of witness statements had been incorrect. Having found that there had been a deliberate failure to declare the jewellery, he had no hesitation in saying it should not be restored.

Our Conclusions

18. Our jurisdiction is limited to considering the reasonableness of Officer Brenton's refusal to make restoration. We are not able to substitute our own decision for that of Mr Brenton and only if we consider his decision to have been unreasonable can we allow the appeal. We must be satisfied that Officer Brenton considered, and gave proper weight to all relevant factors and that he took into account nothing that was irrelevant.

19. We find the re-rereview letter written by Mr Brenton to be clear and well argued. He has made extensive enquiries and has formed a reasonable and balanced view of the outcome of those enquiries. He is clearly correct in his view that the oral and documentary evidence is contradictory and unreliable. His conclusion that there was a deliberate attempt to import the jewellery without payment of duty is, in our view, a totally reasonable and almost certainly correct view. What followed the importation looks so like an attempt to cover up the initial deceit that again his view cannot be faulted.

20. There remains the question of the Appellant's involvement. There are only two possibilities. She was either a knowing party to the deceit or she was its innocent victim, accepting without question and repeating what she had been led by her aunt to believe to be the truth. We find this latter scenario is improbable and indeed she was not present before us to put that case to us. Mr Brenton concluded that she was a knowing participant. To reach this view he took into account all the available evidence drawing from it logical and coherent conclusions. His view that the Appellant was a culpable participant in a deliberate attempt to import jewellery without the payment of duty is not a decision which can be seen to be unreasonable. Given the reasonableness of his view, it is clearly fair and proportionate to refuse restoration.

21. The appeal is dismissed.

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.

TRIBUNAL JUDGE

RELEASE DATE: 4 April 2012