TC02733

Appeal number: TC/2013/00276

EXCISE DUTY – restoration – decision not to restore tractor and trailer – decision sent by fax to Appellant – no request for review within 45 days – application made nine months later and refused by Border Force – whether appropriate to order review – no – held on evidence that Appellant received complete decision by fax – held in the alternative that receipt of incomplete fax should have put Appellant on enquiry as to nature of letter – absence of justification for ordering late review – absence of review precluded appeal against restoration

FIRST-TIER TRIBUNAL
TAX CHAMBER

MATSKAS TRANS LIMITED **Appellant**

- and -

THE DIRECTOR OF BORDER REVENUE **Respondent**

TRIBUNAL: JUDGE JOHN CLARK
JANE SHILLAKER

Sitting in public at 45 Bedford Square, London WC1B 3DN on 3 May 2013

Christina Angelides for the Appellant

Rupert Jones of Counsel, instructed by the Respondent

DECISION

1. The Appellant ("MTL") appeals against the refusal by the UK Border Force of a late request for a statutory review of a decision dated 27 February 2012 by Border Force to refuse restoration of a tractor unit and trailer seized on 21 December 2011.

2. For the purposes of considering the appeal, we were provided with a bundle of documents prepared by the Respondent ("BR"). This included a witness statement (with exhibits) given by Graham Crouch, a Higher Officer of Border Force currently employed as a Review Officer.

The relevant law

3. The effect of s 14 of the Finance Act 1994 ("FA 1994") is that a person affected by a decision as to whether or not seized items are to be restored may request a review of that decision. However, this is subject to s 14(3) FA 1994, which provides:

> "(3) The Commissioners [ie now, BR] shall not be required under this section to review any decision unless the notice requiring the review is given before the end of the period of forty-five days beginning with the day on which written notification of the decision, or of the assessment containing the decision, was first given to the person requiring the review."

4. Section 14A FA 1994 provides:

> "**14A Review out of time**
>
> (1) This section applies if—
>
> (a) a person may, under section 14(2), require [HMRC] to review a decision, and
>
> (b) the person gives notice requiring such a review after the end of the 45 day period mentioned in section 14(3).
>
> (2) [HMRC] are required to carry out a review of the decision in either of the following cases.
>
> (3) The first case is where [HMRC] are satisfied that—
>
> (a) there was a reasonable excuse for not giving notice requiring a review before the end of that 45 day period, and
>
> (b) the notice given after the end of that period was given without unreasonable delay after that excuse ceased.
>
> (4) The second case is where—
>
> (a) [HMRC] are not satisfied as mentioned in subsection (3), and
>
> (b) the appeal tribunal, on application made by the person, orders [HMRC] to carry out a review.
>
> . . ."

Arguments for MTL

5. Ms Angelides explained that Mr Teodoros Orphanidis was the director of MTL. MTL's vehicle had been stopped on 21 December 2012 at Dover. Instead of the type of cargo thought to be in the lorry, a quantity of cigarettes had been concealed within what appeared to be the cargo. No charges had been made against Mr Orphanidis, who had subsequently been released. He had been accompanied by another driver.

6. Exchanges of correspondence with the former UK Border Agency ("UKBA") had then taken place, in which MYL had requested restoration of the vehicle. On 27 February 2012 UKBA had indicated that it had faxed a letter saying that it had decided not to restore the lorry. Mr Orphanidis' case was that he had only received the first page; as he had not received the rest of the notes attached, he had been denied his statutory rights. He had asked UKBA if he could appeal out of time, but his request had been refused.

7. Ms Angelides emphasised that Mr Orphanidis was not shown that there were more pages of the decision letter. She referred to his inability to speak or understand English; he had an accountant who spoke English and had assisted him in dealing with the correspondence.

Arguments for BR

8. Mr Jones indicated that MTL's request for a late review was opposed by BR. The application was being made by MTL, and the burden of proof fell on MTL. The test was set out in s 14A FA 1994. Sub-section (4)(b) did not specify the test to be applied by the Tribunal; Mr Jones submitted that it was not the "reasonably" test. (This shorthand reference needs to be explained; the test is to examine whether the authority in question, here UKBA, had acted in a way that no reasonable authority could have acted, or whether it had taken into account some irrelevant matter or had disregarded something to which it should have given weight. For the reasons set out below, we accept that this is not the appropriate test for us to apply.) He further submitted that the Tribunal should be slow to interfere with the decision not to allow a review out of time; the import of the legislation was that the Tribunal should not interfere with decisions unless they were unreasonable.

9. He referred to the judgment of Laddie J in *Customs and Excise Commissioners v Ronald Angliss* [2002] EWHC 1311 (Ch) (unreported), in particular to [34]:

> "It follows that I do not accept the Tribunal's view that because Mr Angliss may have lost the right to appeal to the Tribunal, his Article 6 rights have been breached. It is to be noted that the Tribunal did not suggest that there was anything inherently unfair or unworkable in the three-stage appeal procedure created by 'CEMA' [the Customs and Excise Management Act 1979] and [FA 1994]. Nor was it suggested that the 45-day period for applying for a Review was in any way unfair or too restrictive. If anything it is generous to persons in Mr Angliss' position."

10. Mr Jones argued that these views fed into the factual argument; even if MTL's argument was correct (which was not accepted), it had had adequate time to seek information. He argued that MTL had received the three pages of the letter dated 27 February 2012; if this argument was not accepted, he argued that MTL had behaved unreasonably. We consider below his detailed arguments on these two factual issues.

Reasons for our conclusion

11. After hearing both parties' submissions, we retired to consider the matter and returned to announce our conclusion, which was that MTL's application for a review out of time had to be refused. We indicated that we would set out our reasons in this decision.

12. Before considering the factual issues, we need to address Mr Jones' submissions that the Tribunal should be slow to interfere with BR's decision not to admit MTL's "out of time" request for a review and that the implication of the legislation was that the Tribunal should be slow to interfere with decisions unless they were unreasonable.

13. Section 14A(2) FA 1994 requires BR to carry out a review of a decision ("the original decision") in either of two circumstances. The first (set out in s 14A(3)) is where BR is satisfied both that there was a reasonable excuse for the relevant person's delay in giving notice requiring a review, and that the notice was given without unreasonable delay after that excuse ceased. The second (set out in s 14A(4)) is where BR is not so satisfied, and following an application by the person concerned, the Tribunal orders BR to carry out a review.

14. Our reading of s 14A FA 1994 is that the Tribunal in dealing with an application under s 14A(4) is not required to review the decision-making process carried out by BR in arriving at the view that it was not satisfied as to the matters referred to in s 14A(3). Mr Jones' reference to being slow to interfere with BR's decision might appear to imply a contrary position. In our view, the Tribunal is required to consider the matter afresh, on the basis of the available evidence as to the circumstances leading to the delay in requiring a review to be undertaken.

15. In arriving at these conclusions, we taken into account the analysis by Laddie J in *Ronald Angliss*. At [21], he stated:

> "As the Tribunal noted at paragraph 14 of the decision under appeal, its authority is given by s 16 of [FA 1994]. It has no wider or inherent jurisdiction. In particular, the Tribunal has no power to carry out a review of the exercise of the Commissioners' [now the BR's] discretion to entertain applications for review out of time. It has no power to decide that the Commissioners should have treated circumstances as exceptional and thereby justified an extension of the 45 day limit. Inevitably it follows that the Tribunal has no power to intervene when an affected party has failed to seek a review in time even if it believes it would have been fair or reasonable to so."

16. In the light of these principles (and taking into account the fact that s 14A FA 1994 was added in 2009, well after *Ronald Angliss*), we consider the evidence relating to MTL's delay in seeking a review.

17. On the first factual issue, whether MTL had received the three pages of the decision letter, Mr Jones argued that there had been a long history of fax correspondence. In relation to that other correspondence, it had all got through, as MTL had responded. Further, the transmission details for the 27 February 2012 letter showed "OK – 3/3". He submitted that MTL had not provided enough evidence to displace this record.

18. As MTL is making the application, the burden of proving that it had not received the second and third pages of the faxed letter falls upon MTL. The UKBA's record sheet of the fax transmission shows the number of pages transmitted as three, and the result as "OK". As there was no evidence of any problems with receipt by MTL of any other faxes from UKBA, and clear evidence of response by it to all the faxed correspondence apart from the 27 February 2012 letter, we find on the balance of probabilities that all three pages of the letter did reach MTL.

19. Even if we were found to be wrong in arriving at the latter conclusion, the acceptance by MTL that it did receive the first page of the faxed letter raises other questions, as Mr Jones submitted. That page referred to UKBA's earlier letter concerning MTL's request for the restoration of its seized tractor and trailer, and set out details of "The Seized Things". Thus it contained no information as to UKBA's views on the request for restoration. Further, other than the details of UKBA and the sending office, the National Post Seizure Unit, it contained no indication of the individual in that office responsible for the letter, and in particular it contained no signature.

20. Mr Jones argued that receipt of a single page of this nature should have put MTL on "a trail of enquiry". Would the recipient not at least be prompted to ask whether something was missing? Mr Jones further argued that MTL would have been acting unreasonably if it did not pursue the matter, given that the history of the correspondence showed that MTL was receiving replies within days of its communications. If this letter was not a reply, what was it about? Why was there no answer to the request for restoration? In BR's view, it would have been unreasonable not to follow the matter up, if it were to be accepted that MTL had only received a single page as it contended.

21. We accept Mr Jones' argument on this second factual issue. If it were to be accepted that MTL only received one page of the 27 February 2012 fax, we consider it unreasonable for it not to have questioned UKBA as to the meaning of that communication.

22. After 27 February 2012, the first action taken by MTL in relation to the issue of restoration was a telephone conversation at some time before 16 November 2012 between Ms Angelides and Mr Gray of the Post Seizure Unit. On the latter date, she wrote a letter to the Post Seizure Unit, explaining that she had been asked to represent

MTL in relation to the issue of restoration; Mr Gray had informed her that a non-restoration order had been decided and that the truck and trailer had been auctioned. She stated that MTL had not received any correspondence from UKBA relating to its decision and therefore had not been in a position to submit an "appeal" within the time limit of 45 days. She stated that MTL had been "continuously sending letters that were never replied to as to the progress of your decision to restore or not".

23. In an email sent on 23 November 2012, Ms Angelides stated:

> "My client claims that he did not receive any notification of this decision and was therefore not in a position to appeal within the 45 day limit."

24. In an email dated 27 November 2012, Ms Angelides stated:

> "Having looked through the faxes sent by the post seizure unit there was a fax sent on the 28th [sic] February 2012 which was advising Mr T. Orphanides [*sic*] of [MTL] that the tractor unit and trailer were liable to forfeiture.
>
> However there was no written advise [*sic*] attached to the fax of any time limit to appeal neither the steps for your appeal procedures, it was simply a notification of your decision. In the circumstances my client was not fully informed of his rights and was not in a position to fully comprehend what to do next."

25. We find that there was a very substantial delay between 27 February 2012 and the point before 16 November 2012 at which Ms Angelides made contact with UKBA. There was no evidence that any correspondence had been exchanged in the intervening period. We further accept Mr Jones' argument that the approach taken on behalf of MTL in seeking to pursue its claim from November 2012 onwards was not consistent; although it had been claimed that MTL had received no notification of the decision, it was ultimately accepted that it had received some form of communication on 27 (rather than 28) February 2012.

26. We have set out above our findings on the evidence, that MTL did receive all three pages of the 27 February 2012 fax, or that in the alternative, its failure to act to enquire as to the meaning of a single unsigned page carrying no signature and setting out no conclusion amounted to unreasonable behaviour.

27. Taking into account the lengthy delay before any further action was taken to pursue MTL's claim, two questions arise. If our first (and principal) finding is correct, UKBA's letter did set out on its second and third pages the requirement that a request for review of the decision should reach UKBA within 45 days of the date of the letter. It also referred to the possibility, if there was no request for a review of the decision, that the tractor and trailer might be sold, and to the consequent implications for any third party who might have a claim to them. If MTL had that information in February 2012 and took no further action in respect of its claim until November 2012, would this Tribunal be justified in deciding under s 14A(4)(b) FA 1994 to order BR to carry out a review?

28. The second question is whether, if MTL did not receive the second and third pages of the 27 February 2012 faxed letter, its failure to take any action to follow up the matter until November 2012 amounted to behaviour so unreasonable that this Tribunal would not be justified in deciding to order such a review.

29. On the first question, our conclusion in the light of the substantial delay is that it is not appropriate to order BR to carry out a review; we do not consider that MTL had a reasonable excuse for the delay. On the second question, our conclusion is that if it were relevant to consider it, we would not be justified in arriving at a decision to order a review; again, the lack of prompt action following receipt of the first page of the faxed letter would mean that we did not consider MTL to have had a reasonable excuse for the delay in requesting a review.

30. Reference was made in correspondence to MTL being required to appeal within 45 days. This is not a correct description of the position; in *Ronald Angliss* at [22], Laddie J explained the limits on the Tribunal's powers:

> [22] . . . a person adversely affected by forfeiture or seizure cannot reach the Tribunal unless he has asked for a review by the Commissioners [now BR] of the Commissioners' First Decision [ie the decision whether the goods in question should be returned, and, if so, on what terms]. This is apparent not only from the wording of s 16(1) [FA 1994], but is also an inevitable consequence of s 16(2). The only person who can bring an appeal before the Tribunal is a person who asked for the Commissioners to carry out a review. If a review was not sought, there is no one who can bring an appeal."

31. In his judgment at [20], the procedure was described in the following terms:

> "These provisions thus provide for a precisely defined sequence of steps which can lead to an appeal before the Tribunal. To summarise, the essential sequence is (1) [BR] forfeit or seize goods, (2) [BR] can decide – the Commissioners' First Decision – whether to restore the goods and, if so, on what terms, if any, (3) a person adversely affected by the latter can ask [BR] to review, (4) the notice of application for a review must be lodged before the end of 45 days from the Commissioners' First Decision, (5) [BR] must give their decision – the Commissioners' Review – within 45 days of the notice of the application, failing which the Commissioners' First Decision will be deemed to have been confirmed and (6) an appeal lies to the Tribunal from the Commissioners' Review."

32. Thus the judgment of Laddie J in *Ronald Angliss* makes clear that no appeal can be made to the Tribunal if there has been no review of the original decision not to restore the items in question, ie in the present case the tractor and trailer. Section 14A FA 1994 enables the relevant person to apply after the normal 45 day time limit for a review, but this will only occur if either BR is satisfied as to the matters set out in s 14A(3) or the Tribunal is persuaded under s 14A(4) to order BR to carry out a review. As we are not persuaded, on the evidence before us, that MTL had a reasonable excuse for the delay, it follows that there will be no review and therefore no right of appeal.

33. MTL's application for a review out of time is therefore dismissed.

Right to apply for permission to appeal

34. 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.

JOHN CLARK
TRIBUNAL JUDGE

RELEASE DATE: 4 June 2013