# TC02786

**Appeal number: TC/2012/07594**

***Excise duty – restoration – tobacco smuggling by driver of HGV – driver previously dismissed by related employer for tobacco smuggling – re-employed after pleas from wife – Appellant's tractor unit seized as well as tobacco – legality of seizure not challenged – UKBA decided to offer to restore tractor unit upon payment of evaded duty – whether such a decision could reasonably have been arrived at – held yes – appeal dismissed***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**VAUGHAN TRANSPORT SYSTEMS LIMITED** **Appellant**

**-and-**

**DIRECTOR OF BORDER REVENUE** **Respondent**

**TRIBUNAL**: **JUDGE KEVIN POOLE**
**NORAH CLARKE**

**Sitting in public at Eastgate House, Newport Road, Cardiff on 14 May 2013**

**Andrew Chucas, Group Business Manager, for the Appellant**

**Amrisha Parathalingam of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

### Introduction

1. This is an appeal against a decision of the Respondent acting through the UK Border Agency ("UKBA") in relation to an offer to restore a seized tractor unit which was used, without the knowledge or complicity of its owner, for the smuggling of tobacco. The offer of restoration was made subject to payment of £3,319, being the amount of Excise Duty sought to be evaded as a result of the smuggling attempt.

2. The particular feature of this appeal was that the smuggler in question had previously been caught smuggling whilst in the employment of a related company to the Appellant and had been dismissed as a result. He was subsequently re-engaged in response to desperate pleas from his wife and he was caught smuggling again very shortly afterwards.

### The facts

3. The facts are not contested. On 31 January 2012 one Johannes van Beurden was driving a Volvo tractor unit belonging to the Appellant, his employer, when he was intercepted by UKBA officers at Dover Eastern Docks upon returning from a trip to Europe. Upon being searched, his cab was found to contain 21.85 kg of hand rolling tobacco, concealed inside false fire extinguishers.

4. The tobacco and the tractor unit were seized by officers on behalf of UKBA. Mr van Beurden was given the appropriate forms by them. He never passed them on to the Appellant, indeed he did not return to the Appellant's premises on or after that day and it was only by a report from another of its drivers who happened to be passing through Dover the same day that the Appellant learned of the seizure. In the circumstances, in spite of his denial of any knowledge of the concealed tobacco, we find that it was reasonable of UKBA to take the view that he had been caught whilst attempting to smuggle the goods into the UK without paying the appropriate duty.

5. The Appellant has not contested the legality of the seizure of its tractor unit. It has a closely related sister company called S&K Haulage (Glamorgan) Limited, which engaged in detailed correspondence with UKBA after the seizure became known to them.

6. UKBA initially refused to restore the Volvo tractor unit to the Appellant. Upon review, they amended their decision, such that they agreed to restore it upon payment of the duty evaded by Mr van Beurden, namely £3,319. It is against that decision that the Appellant now appeals.

7. It is clear that the Appellant and S&K (which are closely related and share a common managing director) both take the matter of smuggling very seriously and make great efforts to ensure that their drivers do not become involved in such activities. They consult regularly and actively with law enforcement and related agencies. UKBA accept that they generally take reasonable steps to prevent their drivers from becoming involved in smuggling. We heard evidence of earlier

occasions on which drivers have been summarily dismissed for such activity, including one case where the smuggling was discovered by the Appellant or S&K and reported to the police even though UKBA had not intercepted the goods. In short, the Appellant is to be commended for its general approach to smuggling, which comes at some personal cost to its senior management, who have suffered vandalism to their property and personal threats as a result.

8. Mr van Beurden had previously been employed by S&K from 13 September 2009 until 23 September 2011. He had been summarily dismissed on the latter date because of what was described in correspondence as a "seizure incident in which he had paid the requested duty". No further details of that event were available to us. He had been re-employed by the Appellant on 7 November 2011 after extensive appeals from his wife, who maintained that the previous incident had been a "one-off" to raise some money at a particularly desperate time in their lives. He was given a second chance, and required to sign a specific undertaking in relation to smuggling (though it is quite clear that the Appellant already takes great pains to emphasise to its drivers that they will lose their jobs if caught smuggling).

9. Within a few weeks, Mr van Beurden had abused the trust placed in him by attempting to smuggle the tobacco on 31 January 2012.

10. The basis of UKBA's ultimate decision not to restore the tractor unit was their stated policy on such matters. In relation to the restoration of commercial vehicles not specifically adapted for smuggling and where the driver (but not the operator) was responsible for or complicit in the smuggling attempt, they summarised their policy as follows in a situation where (as here) the operator satisfies UKBA that it took reasonable steps to prevent drivers smuggling. In such a case, the vehicle would normally be restored free of charge unless:

> (1) the same driver is involved (working for the same operator) on a second or subsequent occasion in which case the vehicle will normally be restored for 100% of the revenue involved in the smuggling attempt (or the trade value of the vehicle, if lower) except that
>
> (2) if the second or subsequent occasion occurs within 6 months of the first, the vehicle will not normally be restored.

11. In the present case, Mr van Beurden had been employed by S&K when the first seizure occurred, and he was employed by the Appellant on 31 January 2012 when the second seizure occurred. Thus strictly speaking the situation fell outside paragraph (1) of UKBA's policy above. However, given the close relationship between S&K and the Appellant, we consider it was reasonable of UKBA to consider the employer to be effectively the same person for the purposes of their policy.

12. We note that strictly speaking as the second seizure took place within 6 months of the first, UKBA might have taken the view that the case fell within (2) of the above policy rather than (1). No evidence was offered as to why the more lenient approach was taken, but we infer that it was because of:

(1) the obviously active approach that the Appellant and S&K generally take in relation to the prevention of smuggling,

(2) the fact that Mr van Beurden had actually been dismissed as a result of the first seizure, and

(3) the fact that (on the evidence put before us) neither the Appellant nor S&K was made aware at the time of the first seizure that UKBA's policy on a subsequent seizure within six months involving the same driver would result in non-restoration on any basis.

13. We consider this to show an entirely proper carefulness and flexibility in applying the provisions of a generally worded policy to the circumstances of a particular case.

14. Mr Chucas pointed out that their experience in this case meant that they had had to review their previous practice of trying to be a "good employer" who would make judgments on prospective employees who had "made mistakes" in the past but were now trying to turn over a new leaf and take advantage of a second chance. They had taken on ex-offenders (not smugglers) in the past on this basis, but were no longer doing so as a direct result of this case. There was evidence before us of the extensive efforts that the Appellant and S&K make in an attempt to stamp out smuggling amongst their drivers, often without particularly pro-active help or support from government agencies. There is obviously a great deal of frustration that they are trying to do the right thing but they are not getting all the help they need. Short of sitting in the cab with each driver on Channel crossings, they cannot be totally confident that no smuggling attempts will be made; they have to trust their drivers to an extent, based on personal judgment and past record. The penalty for them on getting that judgment wrong seems to them to be a draconian one.

**The law**

15. There was no dispute that the tractor unit in question was liable to forfeiture, so we do not set out at length the full detail of the relevant provisions. The key provision in this case was section 141(1) Customs & Excise Management Act 1979 ("CEMA"), which provides as follows:

> "(1) Without prejudice to any other provision of the Customs and Excise Acts 1979, where any thing has become liable to forfeiture under the customs and excise Acts –
>
> (a) any ship, aircraft, vehicle, animal, container (including any article of passengers' baggage) or other thing whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture, either at a time when it was so liable or for the purposes of the commission of the offence for which it later became so liable; and
>
> (b) any other thing mixed, packed or found with the thing so liable,

shall also be liable to forfeiture."

16. The provision governing restoration is that contained in section 152 CEMA, which provides:

> "The Commissioners may, as they see fit –
>
> (a) ……
>
> (b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under [the customs and excise Acts]"

17. UKBA issued a decision, on behalf of the Respondent, on 3 April 2012. In that decision, it was stated that the Appellant's tractor unit would not be restored.

18. The right to require a review of a decision on restoration is contained in section 14 Finance Act 1994 ("FA94"), which provides, so far as relevant, as follows:

> "**14 Requirement for review of a decision under section 152(b) of the Management Act etc**
>
> (1) This section applies to the following decisions by HMRC, not being decisions under this section or section 15 below, that is to say –
>
> (a) any decision under section 152(b) of the Management act as to whether or not anything forfeited or seized under the customs and excise acts is to be restored to any person or as to the conditions subject to which any such thing is so restored;
>
> (b) …..
>
> (2) Any person who is –
>
> (a) a person whose liability to pay any relevant duty or penalty is determined by, results from or is or will be affected by any decision to which this section applies,
>
> (b) a person in relation to whom, or on whose application, such a decision has been made, or
>
> (c) a person on or to whom the conditions, limitations, restrictions, prohibitions or other requirements to which such a decision relates are or are to be imposed or applied,
>
> may by notice in writing to the Commissioners require them to review that decision."

19. It is common ground that the Appellant gave an appropriate notice requiring a review of the Respondent's decision. UKBA carried out that review on behalf of the Respondent, as required by section 15 FA94. On 4 July 2012, the review decision was issued. It represented a change of position, as it included an offer to restore the tractor unit on payment of the duty which Mr van Beurden had attempted to evade.

20. The right of appeal against such a decision is contained in section 16 FA94, which provides (so far as relevant) as follows:

> "**16 Appeals to a tribunal**
>
> (1) An appeal against a decision on a review under section 15 …. may be made to an appeal tribunal within the period of 30 days of the date of the document notifying the decision to which the appeal relates.
>
> …..
>
> (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 persons 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 review or further review as appropriate 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 review or further review as appropriate, 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 to not occur when comparable circumstances arise in future."

21. It is not disputed that the decision to restore the tractor unit only upon payment of a fee is a "decision as to an ancillary matter" for the purposes of section 16(4) FA94.

22. Pursuant to section 7 of the Borders, Immigration and Citizenship Act 2009, the functions of HMRC in relation to such matters are exercisable by the Respondent, and references to HMRC or the Commissioners in the relevant legislation are to be construed as including the Respondent.

23. The Tribunal's jurisdiction in this appeal is therefore limited. If we decide that the Respondent's decision was within the range of reasonable decisions he could have taken, we have no power to interfere with it, even if we would have made a different decision ourselves. Even if we decide that the Respondent could not reasonably have arrived at the decision he did, then we do not have power to substitute our own decision, we only have power to require the Respondent to carry out a further review of the decision in accordance with our directions.

24. So the first question we must consider is whether the Respondent, through the UKBA, could reasonably have arrived at the decision he did.

25. Some reference was made, in the correspondence from solicitors on behalf of the Appellant, to an earlier case *Alexander James Anderson v HMCE* [2003] E00442. In particular, the Tribunal was quoted as saying:

> "To demand that a party prove that they have taken all reasonable steps may go too far in an individual case.
>
> ….
>
> It is disproportionate that the actual smuggler escapes merely by having his goods forfeited whereas the appellant is fined.
>
> ….
>
> [UKBA] should have in mind the appropriateness and proportionality of penalising an innocent party while failing to prosecute the actual delinquent."

26. In *Anderson* (which is not binding on this Tribunal in any event), the decision in question was based on HMCE's finding that the haulier had not issued its formal written contract of employment (which incorporated warnings against smuggling) to the driver in question, even though he had been in their employment on a casual basis for 6 to 8 weeks. They had thus "failed to take all reasonable steps" to prevent the driver from smuggling.

27. The facts in this case are very different. Whilst acknowledging the worthiness of giving individuals a second chance, we are forced to the conclusion that it was not unreasonable of the Respondent to take the view that re-employing a known smuggler was sufficient reason for them to impose a fee for the restoration of the tractor unit in this case.

28. With some regret, therefore, we must dismiss the appeal.

29. 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.

**KEVIN POOLE**
**TRIBUNAL JUDGE**

**RELEASE DATE: 16 July 2013**