TC03980

Appeal number: TC/2014/01150

EXCISE DUTY – Appeal against decision not to restore excise goods seized on entry into the UK – Whether the decision could reasonably have been reached – Yes – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

AMUCHA LTD **Appellant**

- and -

DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE JOHN BROOKS
MR SIMON BIRD

Sitting in public at Eastgate House, Cardiff on 12 August 2014

The Appellant was not represented

Gregory Gordon counsel, instructed by the Director of Border Revenue for the Respondents

DECISION

1. This is the second appeal by Amucha Limited (the "Company") against the decision of the UK Border Force ("UKBF") not to restore, 1,176 litres of beer and 198 litres of palm wine seized when brought into the United Kingdom from Nigeria on 14 June 2012.

2. The first appeal, *Amucha Ltd v HMRC* [2014] UKFTT 2 (TC) also before us (Judge Brooks and Mr Bird), was against the decision of the UKBF contained in its letter of 17 October 2012 which, after a further review, had upheld the non-restoration of the goods. In addition to the goods stated above 186 litres of Alomo Bitters had been seized although the appeal against the non-restoration of these was withdrawn at the first appeal hearing. It was not disputed in that appeal, and it is still accepted, that the quantities of beer imported did not match the amounts declared and that the wrong tariff code had been used for the palm wine which although stated on its labels to have an ABV of 1.2% was found when tested to be 1.6%.

3. Having found that the UKBF in reaching its decision had failed to consider any explanation other than deliberate evasion of duty we allowed the Company's appeal and directed that a further review be undertaken taking account of our findings of fact in particular:

(1) This was the first time that Mr Amucha or the Company had sought to import excise goods into the United Kingdom;

(2) Mr Amucha's explanation for the use of the wrong Commodity Code based on the alcohol content as stated on the label of the palm wine (ie that he could not be expected to that its alcohol content was not as stated on the label) ; and

(3) That the failure to declare the correct quantities of beer cannot properly be described as an "arithmetical error" but appears to have arisen as a result of the confusion by Mr Amucha in his replies to Grange Shipping rather than a deliberate attempt to evade excise duty.

4. In accordance with our decision a further review was undertaken by UKBF Officer Raymond Brenton who, in a letter dated 23 January 2014 to the Company, upheld the decision not to restore the goods.

5. The Company appealed to the Tribunal on the grounds that:

> "We feel they [the UKBF] didn't look at all at the Court advice to review our case properly
>
> After the Tribunal decided that the Border Force should review our case, we received a letter from the Border Force. In this letter the officer reviewing the case does not give proper explanations in why my goods cannot be restored. He just keeps on mentioning the Alomo Bitters even though in court I declared I was not contesting them but the other goods.

> He mentioned the ABV of the palm wine even though this was printed by the makers and not me, so how was I supposed to test it in a lab before importing it.
>
> Finally I strongly feel that Border Force has disposed of my goods without noticing me so I would like proof of my goods still being here physically."

6. In the absence of anyone to represent the Company when the hearing was about to commence the clerk of the Tribunal unsuccessfully attempted to contact Mr Amucha by telephone. However, after waiting for 30 minutes in case Mr Amucha had been delayed, especially as the hearing was at a different venue in Cardiff from the previous appeal which Mr Amucha had attended, and as the Notice of Hearing notice had been sent to the same address as that stated on the Notice of Appeal we were satisfied that the Company had been notified of the hearing. We also considered that it was in the interests of justice to proceed with the appeal in the absence of any representation on behalf of the Company and therefore did so in accordance with rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

7. As we set out the underlying facts and relevant legislation in some detail (at paragraphs [5] to [19] and [20] to [28] respectively) of the first appeal we do not consider it necessary to repeat them here. However, it is worth noting that the bill of lading and "packing list" sent to Grange Shipping Limited, which was instructed by the Company to arrange for the goods to be imported, included the eight Cartons of Sardines This list raised concerns with Grange Shipping and an email, sent to Mr Amucha on 16 May 2012, explained that health certificates, catch certificates and other analytical documents were required to import the sardines. These were not provided and the sardines were destroyed by the Suffolk Port Health Authority.

8. In his letter of 23 January 2014 to the Company UKBF Officer Brenton explained that he had carried out a re-review in accordance with the decision of the Tribunal and come to the conclusion that the goods should not be restored. After setting out the background to the case and summarising the restoration policy of not normally restoring seized excise goods Officer Brenton stated that he was "*guided* by the restoration policy but not *fettered* by it."

9. The letter continues (with emphasis as stated in the letter):

> I have read the Tribunal's findings carefully and the related evidence to see whether a case for disapplying the policy of non-restoration has been presented. Having considered all evidence before me I am not persuaded of any exceptional circumstances that would result [in] the goods being restored. Furthermore the following circumstances form positive *additional* reasons for concluding that the goods should not be restored:-

He then sets out the decision of the Tribunal in the first appeal as set out in paragraph 3, above, before continuing:

> In bullet point one I am in full agreement with the judge. As this was your Company's first time for importing excise goods into the UK I

> would have expected you to have 'dotted the I's and crossed the T's' with regard to assuring that the correct processes were in place when embarking on the importation of goods liable to excise duty from Nigeria, a '3rd Country' [a country outside the EU]. On the evidence before me this was not so. Although the Tribunal accepted your explanation with regard to the Palm Wine, nevertheless the ABV was incorrect. Furthermore the appeal with regard to Almo Bitter was withdrawn as these clearly were mis-manifested.
>
> As far as bullet point 3 of the decision the Tribunal were clearly unconvinced of your explanation for the mis-declaration of the beer which totalled 1,176 litres rather than the 96 litres entered on the import documentation presented to BF. In an invoice signed by you and dated 26 April 2012 each type of beer is clearly itemised as 40 cartons [40 x 12 @ 60cl] which tally with the goods seized. The Tribunal were satisfied that this was not "*a deliberate attempt to evade excise duty*." However, with all the evidence before me I am of the opinion that on the balance of probability that your company was reckless in this importation.

The Officer's letter then refers to s 167 of the Customs and Excise Management Act. This provides that a person who "knowingly or recklessly" makes or signs or causes to be made or signed any declaration notice, certificate or other document which is untrue shall be guilty of an offence punishable on summary conviction with a fine of £1,000 and/or six months imprisonment. The letter then goes on to conclude:

> … that there is no reason to disapply the policy of refusing to restore the goods in all of the circumstances.

10. As we explained in the first appeal the jurisdiction of the Tribunal in a case such as this is limited. As Judge Hellier helpfully explained in *Harris v Director of Border Revenue* [2013] UKFTT 134 TC:

> "[5] … we are not given authority by Parliament to make a decision that [the goods] should or should not be restored. The decision as to whether or not to restore these is left in the hands of [the UKBF]: only they have the power or duty to restore [them]. Instead we are required to consider whether any decision they have made is reasonable. If it is not reasonable we can set the decision aside and require them to remake it; we can give some instructions in relation to the remaking of the decision, but we cannot take the decision ourselves. If we set aside a decision and [UKBF] make a new decision, then the taxpayer may appeal against that decision and the same process follows.
>
> [6] 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. There can be circumstances where different people could reasonably reach different conclusions. The mere fact that we might have reached a different conclusion is not enough for us to declare that a conclusion reached by [UKBF] should be set aside."

11. Lord Phillips of Worth Maltravers MR (as he then was) said in *Lindsay v Commissioners of Customs and Excise* [2002] STC 508 at [40]:

> "… the Commissioners will not arrive reasonably at a decision if they take into account irrelevant matters, or fail to take into account all relevant matters"

12. Therefore the question for us is not whether we consider the Company was reckless in its importation of the goods but whether there is evidence on which the UKBF could reasonably come to such a conclusion.

13. Mr Gregory Gordon, who appeared on behalf of the UKBF, accepted that the position may have been different if only the palm wine had been imported but submitted that there was evidence of recklessness if the importation was looked at as a whole and in the round, in particular:

(1) although we had, in the first appeal, accepted Mr Amucha's explanation for the wrong tariff for the palm wine the ABV was nevertheless incorrect;

(2) it had been accepted that the Alomo Bitters were mis-manifested and the appeal had been withdrawn with regard to those goods;

(3) the quantity of beer had been mis-declared and the difference between the amount imported (1,176 litres) and amount declared (96) litres was significant;

(4) Mr Amucha had signed an invoice detailing the correct amounts (40 x 12 at 60cl); and

(5) despite the concerns of Grange Shipping the Company had imported sardines as which were dealt with by the Port Health Authority.

14. In our judgment, despite Mr Amucha's objection in his grounds of appeal to the UKBF taking account of the Alomo Bitters for which restoration is no longer sought, it was not unreasonable for the UKBF to consider the importation as a whole and not consider each item or type of goods separately given that these were all imported together in a single container.

15. We therefore find that there was evidence on which the UKBF could conclude that the Company was reckless in the importation of the goods. Also, having taken account of all the circumstances of the case, we find that the UKBF did not take into account irrelevant matters, or fail to take into account all relevant matters. It therefore follows that the decision not to restore the goods was reasonable.

16. Accordingly we dismiss the appeal.

17. 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 BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 2 September 2014