TC04633

Appeal number:TC/2014/04828

EXCISE DUTY – restoration of goods – wine held by a supermarket chain without payment of excise duty – review decision refusing restoration set aside by tribunal on appeal – second review decision refusing restoration – whether second review ought to have been conducted on basis of the first tribunal's findings of fact – application to strike out part of HMRC's statement of case

FIRST-TIER TRIBUNAL
TAX CHAMBER

HJS DEVELOPMENTS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Manchester on 23 June 2015

Mr Liban Ahmed of Controlled Tax Management Limited for the Appellant

Miss Joanna Vicary of counsel instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

Introduction

1. This is an application made in an appeal which concerns a decision by the respondents to refuse restoration of 32,245 bottles of wine ("the Goods") seized at the premises of Curley's Supermarket Limited in Belfast. The seizure took place on 9 November 2011 and was on the basis that excise duty had not been paid on the Goods. The respondents' decision not to restore the Goods was confirmed in a review dated 24 May 2012 ("the First Decision").

2. An appeal against the First Decision was allowed by the tribunal (Judge Cannan and Mrs Webb) in a decision released on 25 April 2014 ("the First Tribunal"). The respondents then conducted a further review dated 2 July 2014 which confirmed the decision not to restore the Goods ("the Second Decision"). The appeal is against the Second Decision.

3. In its notice of appeal dated 28 July 2014 the appellant appeals against the Second Decision essentially on the following grounds:

(1) The respondents were not entitled to make findings in the Second Decision as to the adequacy of due diligence carried out by the appellant which are inconsistent with findings of fact made by the First Tribunal.

(2) In any event, the appellant did carry out adequate due diligence.

4. The present application is dated 13 November 2014 and the appellant sought to strike out the respondent's statement of case. The application was subsequently narrowed and the appellant now seeks to strike out those paragraphs in the statement of case which rely on findings of fact which are inconsistent with the findings of the First Tribunal. In summary the appellant contends that it is an abuse of process for the respondents to support the Second Decision by reference to findings of fact which are inconsistent with the findings of the First Tribunal.

5. Mr Ahmed and Miss Vicary both provided skeleton arguments and made oral submissions. Before dealing with those submissions I shall set out the circumstances in which the issues arise in more detail. This decision should be read together with the decision of the First Tribunal.

The Circumstances

6. Paragraphs [4] to [27] of the decision of the First Tribunal contained its findings of fact. The First Tribunal had heard evidence from Mr McCann, the review officer who made the First Decision, and from Mr Kennedy the senior buyer of the appellant. Mr Kennedy's evidence addressed in detail the nature of the appellant's business, the transactions which led to the purchase of the Goods, the circumstances of seizure and

7. the decisions on restoration, including the First Decision. At [16] the First Tribunal recorded the following findings of fact:

> "*16. It is no part of the respondents' case that the appellant could have carried out any more due diligence or commercial checks than it did in relation to JM&D or the Goods. Nothing the appellant could reasonably have been expected to do would have identified the fact that excise duty had not been paid on the Goods.*"

8. Those findings of fact were made in the context of the appellant's case on the appeal that it had carried out all appropriate due diligence checks in relation to its supplier. Mr Kennedy gave oral evidence in relation to due diligence and was not cross-examined.

9. The First Tribunal identified the respondents' policy on restoration of excise goods seized where duty was unpaid on those goods. For example at [49] the First Tribunal described the policy as "… *one of no restoration of excise goods save in exceptional circumstances*". It was satisfied that the First Decision was unreasonable because Mr McCann had misunderstood the policy. At [53] the First Tribunal recorded that "*[he] regarded it as a blanket policy that where excise duty was unpaid, the goods should not be restored. He did not properly address his mind to whether there were any exceptional circumstances*".

10. It was Mr McCann's failure to consider whether there were any exceptional circumstances which led the First Tribunal to find that the First Decision was unreasonable. The First Tribunal considered whether the decision on a further review would inevitably result in another refusal to restore. It could not be satisfied that it would, because there was no evidence as to what might amount to exceptional circumstances. The First Tribunal stated as follows:

> "*57. In order to identify what is exceptional it is necessary to have some understanding of what amounts to the norm. The appellant was an honest legitimate trader doing all it could to avoid holding excise goods where duty had not been paid. It had procedures in place but it could not be expected to identify that the goods it was purchasing were non duty paid, or that there was any real risk that the goods were non duty paid. The extent to which legitimate and careful traders such as the appellant innocently purchase non duty paid goods would no doubt be a material consideration in deciding whether the circumstances were exceptional.*
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> *58. What is to be treated as exceptional circumstances may well to some extent depend on the need for the policy to achieve its aims. Whilst we had some submissions from Miss Vicary as to the main objectives of the policy and how it was intended to achieve those objectives, we had no evidence to support those submissions. We do not accept that these are simply matters of "common sense" where we can take judicial notice.*
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> *59. Similarly the possibility of restoring the Goods subject to conditions may need to be explored, together with the existence of remedies the appellant may have against its supplier.*

60. We do not have any material before us which bears on these issues. Hence we cannot say that the decision on a further review would inevitably be to refuse restoration."

11. The reference in [60] to whether the decision on a further review would inevitably be to refuse restoration was in the light of what the First Tribunal had said at [56]:

"*56. If we were satisfied that that the decision on a further review would inevitably be the same then we should not allow the appeal (See John Dee Ltd v C & E Comms [1995] STC 941). However on the basis of the evidence before us we cannot be satisfied what should be treated as exceptional circumstances.*"

12. It was in those circumstances that the First Tribunal at [61] directed that there should be a further review:

"*61. In the circumstances we direct that:*

(1) Mr McCann's decision on review shall cease to have effect.

(2) The decision of Officer Killen, which remains in force, shall be the subject of a further review by an independent officer who has not previously been involved in the appellant's case.

(3) *The further review should take into account the full extent of the respondents' policy, and expressly consider whether the grounds relied on by the appellant amount to exceptional circumstances and if not, why not.*"

13. On 2 July 2014 Mr Allan Donnachie, an Appeals and Reviews Officer, conducted the further review. His conclusion was that the decision refusing restoration should be maintained. I must set out his reasoning in detail.

14. Mr Donnachie quoted an extract from the respondents policy in this area which bears on exceptional circumstances as follows:

"*The presence of any of the following factors is likely to weigh heavily against any exceptional circumstance that might otherwise warrant departure from the policy:*

1. evidence of previous offences

2. previous failure to comply with the legal requirements relating to importation, holding or movement of goods

3. evidence that the goods are for commercial use

4. large quantities of goods that would be likely to damage legitimate trade if put to commercial use."

15. The emphasis is that of Mr Donnachie, which he said highlighted the fact that the Goods met two of the four criteria under which HMRC consider it unlikely that restoration will be appropriate.

16. Mr Donnachie then went on to consider exceptional circumstances. In that context he stated "*… I have examined the evidence available to me and find the following…*". He appears to have been satisfied that the appellant honestly believed the Goods were duty paid; it was innocent of any wrongdoing; it had fully cooperated with HMRC's investigations; and that refusal to restore the goods was a significant financial penalty on the appellant which is a well established family business in Northern Ireland with a blemish free record in its dealings with HMRC.

17. Mr Donnachie's examination of the evidence focussed on the due diligence carried out by the appellant in relation to its supplier and the Goods. He referred to material that was before the First Tribunal and also to some documents that were not in evidence before the First Tribunal. He plainly did not consider himself bound by the findings of fact made by the First Tribunal. In the light of the material available to him Mr Donnachie concluded:

> "*Taking into account the evidence actually supplied in relation to the due diligence that you claimed to have carried out in relation to all new suppliers, I consider that there is insufficient evidence to demonstrate that you carried out sufficient checks into your suppliers to satisfy yourselves that the goods that you intended to purchase were legitimate and UK duty and tax paid when there is no evidence that you did in fact carry out such checks.*"

18. Mr Donnachie also suggested that the failure to carry out sufficient due diligence was exacerbated by what the appellant knew in relation to pricing. Some of the wine was purchased at £2.27 and £2.33 per bottle when the excise duty and VAT per bottle would itself total £2.17.

19. It was Mr Donnachie's finding that the appellant had not carried out appropriate due diligence checks which led him to conclude that there were "*... no exceptional circumstances that would cause the Commissioners to deviate from the general policy of not restoring seized goods where the circumstances indicate that any of the four factors detailed above relate to the seized goods in question*".

20. As stated above, the notice of appeal against the Second Decision was lodged on 28 July 2014 and the present application was made on 13 November 2014. HMRC were given an opportunity to respond in writing to the application. They did so by way of a letter from Mr Donnachie dated 16 January 2015 which was addressed to the appellant and copied to the tribunal. In fact the letter was not a response as such to the application, but more of a repetition of the reasons for the Second Decision. That is not intended as a criticism of Mr Donnachie. It is not his role to conduct this appeal on behalf of HMRC. The letter did at least, for the first time in these appeals, set out in much more detail the respondents' policy on restoration of excise goods and the reasons the policy is intentionally robust.

21. It may be open to question whether the Second Decision took into account the "*full extent of the Respondent's policy*". That might be why Mr Donnachie set out the full extent of the policy in his subsequent letter dated 16 January 2015. However without hearing from Mr Donnachie I am not in a position to decide whether that is the case. In any event that matter is not within the scope of the present applications.

Reasons

22. Unfortunately it is inevitable that different decision makers may take different views as to whether restoration should be offered. The jurisdiction of the tribunal in relation to restoration decisions under section 16(4) Finance Act 1994 is supervisory. The question for the tribunal includes whether the decision which was reached was one which was open to the decision maker, taking into account all relevant factors. In other words whether it was within the bounds of reasonableness.

23. In reaching a decision on restoration it is necessary for the decision-maker to take a view of the facts. On an appeal against such a decision, it is open to the tribunal to hear evidence and make different findings of fact. If it does so, it must then consider the significance of those different findings in assessing the reasonableness of the decision as a whole. If the tribunal's findings could cause a decision maker to reach a different view on restoration then the appeal will be allowed and in the ordinary course a further review will be directed. In some cases it may be inevitable that the decision on a further review would result in a refusal of restoration in which case the appeal will be dismissed.

24. The appellant's case is essentially that Mr Donnachie was wrong to go behind the findings of fact made by the First Tribunal. If the respondents are right, the tribunal in this appeal would need to hear all the evidence again, with some additional evidence, and make new findings of fact without regard to the findings of the First Tribunal. Mr Ahmed who appeared for the appellant submitted that the respondents had already had an opportunity to cross examine the appellant's witness in relation to due diligence at the First Tribunal. They did not do so, and they should not now be permitted to rely on a lack of due diligence. They should accept the findings of the First Tribunal that the appellant had carried out all reasonable due diligence. Mr Ahmed asked me to strike out those paragraphs in the respondents' statement of case which alleged a lack of due diligence.

25. At [51] and [52] the First Tribunal said this about the First Decision:

> " *51. The respondents do not take issue with the facts underlying the grounds of appeal set out at paragraph 2 above. The appellant criticises the review decision, with some justification, that it did not include any reference to the weight which might be attached to the specific grounds of appeal. Further there was no reasoning as to what might constitute exceptional circumstances and why the grounds of appeal did not amount to exceptional circumstances.*
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> *52. Notwithstanding those criticisms, a fair reading of Mr McCann's review letter suggests that he applied the appropriate policy and took into account all the circumstances urged upon him in the letter requesting a review. There was nothing else that he should have taken into account and he did not take into account any irrelevant factors.*"

26. Against that background Miss Vicary on behalf of the respondents submitted that the respondents had not simply failed to cross-examine Mr Kennedy at the First Tribunal. They were only seeking to defend a decision where the review officer had already come to a conclusion about the factual background.

27. It is true that Mr McCann had not raised any issues about the factual grounds being raised by the appellant. When matters proceeded to the First Tribunal the respondents were supporting his decision. It turned out that Mr McCann had

misunderstood and misapplied the policy. His understanding was that if duty had not been paid then the goods should not be restored.

28. At the First Tribunal the respondents were clearly prepared to adopt Mr McCann's acceptance of the appellant's case on the facts. If the respondents had sought to take issue with the appellant's factual case on due diligence when Mr McCann had accepted that case it may well have undermined Mr McCann's First Decision. As a result the respondents were in the position that if Mr McCann's decision was for some reason unreasonable, they could not then argue that on any view of the circumstances, including a failure to conduct reasonable due diligence, the decision on a further review would be the same and the appeal should be dismissed.

29. It seems to me that the respondents must be taken to have made a conscious decision not to pursue any factual issues before the First Tribunal, including the adequacy of the appellant's due diligence. They were content for the First Decision to stand or fall on the argument as to whether the exercise of discretion by Mr McCann was a reasonable application of the policy based on the facts being put forward by the appellant.

30. Miss Vicary submitted that the First Tribunal had found that Mr McCann had misunderstood the respondents' policy. The First Tribunal directed a further review of the restoration decision, but did not place any restriction on the factual matters that the officer conducting the further review was entitled to consider. In those circumstances the respondents should not be constrained by the findings of fact of the First Tribunal. Otherwise, the respondents would be constrained to act within the scope of the original review officer's mistake. In other words, in circumstances where the review officer had not properly applied the policy, the respondents should not be bound by the officer's failure to address issues of fact relevant to the application of the policy, in particular the existence of exceptional circumstances. It was suggested that Mr McCann's mistake had "hampered" the evidence before the First Tribunal and the conclusions it had drawn.

31. In fact it appears that there was very little new material before Mr Donnachie which was not before the First Tribunal. There was reference to a small number of emails and a Companies House search but I was not shown copies and I am not satisfied that they were very significant in the context of the evidence as a whole. It seems to me that it was more a matter of Mr Donnachie reaching a different conclusion to Mr McCann on the evidence which was before them both.

32. Paragraph 61(3) of the decision of the First Tribunal required the further review to "*expressly consider whether the grounds relied on by the Appellant amount to exceptional circumstances and if not why not*". It is clear that the First Tribunal expected the further review to be carried out in the light of its findings of fact. There had been no issue in relation to any of the factual grounds relied on by the appellant at any stage prior to or during the First Tribunal hearing. The expectation of the First Tribunal was that those grounds were to be taken as having been established. The issue between the parties was whether those grounds amounted to exceptional circumstances, and if not why not. That is why the First Tribunal did not expressly direct that the review officer should take into account the findings of fact which the First Tribunal had made.

33. I do not consider that the respondents were entitled to assume that in conducting a further review the review officer should make his own findings of fact in relation to

due diligence. Even if the respondents thought that might be the right course I would have expected them to apply to the tribunal for further directions.

34. The present application describes the respondents' approach as an abuse of process. Mr Ahmed submits that the appellant has already adduced evidence which has been accepted by the First Tribunal to the effect that it carried out reasonable due diligence. It is now being put to the trouble and expense of making good the same case in the present appeal. Further, there is no guarantee that evidence relevant to the pricing point raised for the first time in Mr Donnachie's letter dated 2 July 2014 would still be available.

35. Mr Ahmed relied on a decision of the VAT and Duties Tribunal in *Purves v Commissioners for Revenue & Customs [2005] UKVAT (Excise) E00924*. In that case HMRC had refused to restore 10,000 cigarettes imported by Mr Purves on returning from Spain to the UK. At the time of the decision in Purves it was thought that the tribunal had jurisdiction to consider in relation to restoration whether the goods were being imported for own use. It is now clear that the tribunal does not have such jurisdiction, but that is not relevant for present purposes.

36. There were three tribunal hearings in Purves. At the first hearing the tribunal accepted Mr Purves evidence that the goods were imported for his own use. For that and other reasons the tribunal directed a further review, taking into account the points made in its decision. In the further review restoration was again refused and Mr Purves again appealed successfully. The tribunal directed a third review and that regard should be paid to its findings, including the fact that the goods were for his own use.

37. The third review decision confirmed the refusal of restoration. The review officer reached conclusions as to the circumstances which were inconsistent with the findings of the first two tribunals. He also had access to records which had not been made available to those tribunals and which, apparently because of their sensitivity, he had not produced to the third tribunal.

38. In his appeal against the third review decision Mr Purves gave identical evidence to that he had given on the two previous occasions. The tribunal said as follows at [24]:

> "*24. Mr Purves's evidence was, so far as we could tell, identical to that apparently given before the first tribunal and the second tribunal respectively. We accept that evidence. We see no reason to make fresh findings of fact about it. We are content to adopt the findings of fact made by the first tribunal, just as the second tribunal did. We think that it would be undesirable for one tribunal to accept the evidence of a witness, and for the next or next but one tribunal to reject identical evidence or make alternative findings, without cogent grounds for doing so. We identify no such grounds here.*"

39. At [37] the tribunal stated that for the purposes of a further review directed by the tribunal, if HMRC wish to take into account evidence which was not before that tribunal then it should either appeal the decision or seek directions from the tribunal:

> "*… this is because the further review directed by the tribunal is under the control of the tribunal. The further review is to be "in accordance with the directions of the tribunal" – see section 16(4)(b) of the Finance Act 1994.*"

40. Section 16(4)(b) FA 1994 provides as follows:

> "*16(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 person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say —*
>
> *(a …*
>
> *(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;*"

41. Miss Vicary accepted the proposition derived from Purves that the further review is under the control of the tribunal. If that is right, and for present purposes I am prepared to accept that it is, then in so far as either party requires clarification of the decision or the directions given, that party can apply under Tribunal Rule 5(2) to amend, suspend or set aside directions given for the purposes of the further review. Rule 5(2) would provide a mechanism to deal with any perceived difficulty or uncertainty arising out of directions made by the tribunal pursuant to section 16(4)(b) Finance Act 1994. It provides as follows:

> "*(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.*"

42. The tribunal in Purves held that having conducted the further review on a basis inconsistent with a direction of the previous tribunal, the review officer could not have reasonably arrived at his decision. Accordingly the appeal was allowed.

43. Miss Vicary accepted that the decision in Purves was correct on its own facts. Where there had been a contested hearing in relation to the underlying facts, it would be wrong to ask the tribunal to reach a different conclusion at a subsequent hearing. However she submitted that in the present case the underlying facts were not in dispute at the First Tribunal because of the misunderstanding of Mr McCann.

44. As I have said, the appellant's arguments rest on what is described as an abuse of process. I was not referred to any authorities on abuse of process, such as *Johnson v Gore-Wood [2002] 2 AC 1* where the law was summarised by Lord Bingham at 31A-F. In that context the crucial question is whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise an issue which could have been raised previously. I do not consider that those authorities assist in the present situation. The regime incorporates the possibility of further proceedings covering a similar subject matter. If the point had been raised before the First Tribunal, the First Tribunal could have given a direction as to how its findings of fact should impact on the further review.

45. It seems to me that the real issue is what direction the First Tribunal would have given if it had been asked to consider whether or not the further review should be bound by its findings of fact as to due diligence.

46. Miss Vicary's case is essentially that the failure of the respondents to contest the appellant's case on due diligence arose because of Mr McCann's misunderstanding of the respondents' policy. She submitted that it was right that there should be a proper investigation of the facts by Mr Donnachie and if necessary by the tribunal on the appeal against his decision.

47. Mr Ahmed's case is essentially that the respondents have had their opportunity to contest the appellant's case on the facts when Mr McCann made the First Decision and on the appeal before the First Tribunal. It is unfair to put the Appellant to the time, expense and trouble of making out that case yet again before the tribunal on this appeal.

48. Putting myself in the position of the First Tribunal, if the point had been raised at the hearing or following release of its decision I would have directed that the further review should proceed on the basis of the First Tribunal's findings of fact. It would not be right for the respondents to effectively have three bites of the cherry. Mr McCann had originally accepted the appellant's case on due diligence. The respondents did not seek to challenge the appellant's case on due diligence at the First Tribunal. Mr Donnachie's review would be their third opportunity to contest the appellant's case.

49. The fact that Mr McCann accepted the appellant's case whilst misunderstanding the respondents' policy does not weigh heavily. The role of a review officer is to reach conclusions as to the circumstances based on the evidence before him. He must then apply the respondents' policy to those circumstances.

50. The process of finding facts ought to be a separate part of the review exercise to the process of applying the policy to those facts. What facts are relevant will no doubt be governed by the nature of the policy. It seems to me that on any view the circumstances in which a trader comes into possession of excise goods which are duty unpaid would be relevant to the existence of exceptional circumstances for the purposes of the policy.

Conclusion

51. In conclusion, I am satisfied that the Second Decision should have considered itself bound by the First Tribunal's findings of fact unless there was some new evidence available which could not with reasonable diligence have been placed before the First Tribunal. There was no such evidence.

52. The hearing before me did not focus on the appropriate remedy or direction should I reach such a conclusion. Mr Ahmed sought a direction striking out specific paragraphs of the statement of case. It is [26] to [29] which deal with Mr Donnachie's findings of fact in relation to due diligence. It is not clear to me where such a direction would leave the Second Decision of Mr Donnachie which is the matter under appeal. In the circumstances I shall give separate directions for submissions as to the appropriate remedy or direction in light of this decision, with a further hearing if necessary.

53. It is also the case that the appellant still does not know the answer to the question he has been posing throughout. Namely, do HMRC accept that there would be exceptional circumstances on the facts of this case if the appellant had taken all reasonable care in carrying out due diligence checks on its supplier? If the answer to

that is no, then the appellant has made plain its intention to challenge any such decision and, if it is consistent with HMRC's policy, then to challenge the reasonableness of the policy itself. That was the subject of a separate application by the appellant to amend its grounds of appeal. The respondents did not object to that application and I shall give separate consequential directions.

54. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 14 SEPTEMBER 2015