[2016] UKFTT 0542 (TC)

TC05291

Appeal number: TC/2016/00269

CUSTOMS & EXCISE – forfeiture of vehicle – adapted for the purpose of concealing goods-application for restoration

FIRST-TIER TRIBUNAL
TAX CHAMBER

PPHU ARTEX **Appellant**

- and -

BORDER FORCE **Respondents**

TRIBUNAL: JUDGE MARILYN MCKEEVER
MR NICHOLAS DEE

Sitting in public at Fox Court, 30 Brooke Street, London EC1 7RS on 12 July 2016

Mr P Corben instructed by Pembridge Solicitors for the Appellant

Mr T Rainsbury, instructed by the General Counsel and Solicitor to Border Force, for the Respondents

DECISION

1. *Background*

2. This case is an application for restoration of a Scania lorry (the vehicle) which was seized by officers of the Border Force on the grounds that it had been adapted or altered for the purpose of concealing goods.

3. *Preliminary matter*

4. The decision letter which was the subject of the appeal was dated 16 November 2015. The Appeal should have been made by 16 December, but was not, in fact sent until 13 January 2016.

5. Mr Corben, for the Appellant applied for permission to appeal out of time. He explained that the Appellant had appointed a UK firm of solicitors to represent them at the end of October 2015 and had requested Border Force to deal with the firm. The Review Letter was sent to the Appellants in Poland and not to their solicitors. It took the Appellant time to realise what they had received, have it translated and respond to it. It was also to be noted that this was around the Christmas holiday period. The vehicle is valuable and the Appellant should have the opportunity to present its case.

6. Mr Rainsbury, for the Respondent opposed the application. He submitted that the delay was not trivial. It was a delay of several weeks. The Appellant had not provided an adequate explanation for the delay or any evidence about when the letter was received and they had replied, in time, to the original decision letter.

7. The Tribunal was mindful of the importance of adhering to time limits. However, the delay, whilst not trivial was relatively short, especially bearing in mind that it was over the Christmas period and the balance of prejudice was clearly in favour of the Appellant. The Appellant would be significantly prejudiced by a refusal of permission to appeal late as he would be unable to argue for the return of the vehicle, whereas Border Force would suffer little or no prejudice if permission were given.

8. The Tribunal decided to give permission to bring the appeal out of time.

9. *The Law*

10. Section 88 of the Customs and Excise Management Act 1979 (CEMA) provides, so far as relevant:

> "*Where-…*
>
> *(c) a vehicle is or has been within the limits of any port…*
>
> *while constructed, adapted, altered or fitted in any manner for the purpose of concealing goods, that… vehicle shall be liable to forfeiture."*

11. Section 139(1) of CEMA provides that:

> *"Any thing liable to forfeiture under the Customs and Excise Acts may be seized or detained by any officer…"*

12. Schedule 3 of CEMA provides that a person has one month from the date of seizure to challenge the legality of the seizure and paragraph 5 of Schedule 3, importantly, provides that if no notice is given within the time limit *"the thing in question shall be deemed to have been duly condemned as forfeited."*

13. Section 152 of CEMA provides that:

> "*The Commissioners may, as they see fit-…*
>
> *(b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized…"*

14. Finance Act 1994 (FA94) provides for a person to require a review of a decision under Section 152 CEMA and Section 16 FA 94 provides for an appeal against the review decision to the Tribunal. The restoration of a forfeited thing is an "ancillary matter" and Section 16(4) provides that in such cases:

> *"the powers of an Appeal tribunal…shall be confined to a power , where the tribunal are satisfied that the Commissioners or any other person making that decision, could not reasonably have arrived at it, to [make certain orders]."*

15. In the present case, the legality of the forfeiture was not challenged under Schedule 3 of CEMA and so under paragraph 5 of that Schedule, the vehicle is deemed to be duly forfeited. Accordingly, the legality of the forfeiture cannot be revisited in these proceedings and the only question we may consider is whether the decision under appeal is one which no reasonable officer, properly directing himself could have made.

16. *The Facts*

17. The Appellant is a transport company based in Poland. The Appellant did not own the vehicle, but had leased it for a period of three years up to 12 December 2017.

18. The Owner of the vehicle was a company called Europejski Fundusz Leasingowy SA which bought the vehicle in December 2014 from a company called Marida. The vehicle had been manufactured in 2008.

19. The vehicle was stopped at Dover on 5 August 2015. It contained windows and building materials.

20. The vehicle was closely examined and a number of alterations and adaptations were discovered. We heard witness evidence from Mr Robinson who was one of the team of officers who carried out the search. The vehicle was curtain sided. He

explained that there is a frame, called an "I-beam" under the floor of the trailer to which the wheels are attached. The following structures were noted:

- There were two three inch square box sections which ran lengthways and were welded to the I-beam under the floor. Mr Robinson did not know why they were there. They would have added extra weight and increased fuel consumption.
- There were also two four inch square box sections running cross-ways and fixed to the I-beam with mastic. From his experience, they did not look as if they were factory fitted.
- There were two further box sections resting on the lengthways box sections. All of the box sections were under the floor of the trailer.
- There were a number of bolts in the floor which were in an irregular configuration and which did not seem to be securing anything.
- It appeared that the floorboards, which were not uniform, had recently been taken up and the "groove" in the tongue and groove boards had been refilled with fresh filler.
- The frame which was holding windows which were part of the cargo had been cut to fit *in situ*.

21. No illicit goods were found in the vehicle and the box sections were tested for traces of drugs and explosives with negative results. However, the officer seized the vehicle under section 139(1) CEMA on the basis that it had been " adapted [or] altered for the purpose of concealing goods". The Border Force officers gave one of the two drivers a Notice of Seizure and form BOR162, a warning letter about seized goods, form BOR 156, a seizure information notice, Notice 12A which gives information about what a person can do if they have had goods seized and Notice 1 which sets out what goods can and cannot be brought to the UK.

22. The Appellant did not challenge the legality of the forfeiture and, accordingly, the vehicle was deemed to be duly condemned as forfeit and that cannot now be challenged.

23. On 11 August 2015, a fax was sent by the Appellant stating "I would like to inform you that all modifications on SCANIA BI8517S has been done before purchase at Marida company. As proof we are sending all documents. I hope it will help to release our Car as soon as possible…"(sic). The copy documents provided included the invoice for the lessor's purchase of the vehicle, an authority for the Appellant to use the leased vehicle and a vehicle inspection report which seems to have been issued at the time Europejski purchased the vehicle. A document describing changes to the vehicle was annexed to the inspection certificate. The annexe described the changes as follows: "The base for transporting containers has been dismounted, and a trailer with tarpaulin was amounted (sic) on the vehicle. The following was changed: Subtype: from other to trailer. Purpose: from transport of containers to universal." The report went on to state that "the changes made are in compliance with the provisions of the act and the regulation on technical conditions."

24. The Border Force wrote to the Appellant with its decision on 29 September 2015, refusing to restore the vehicle.

25. The letter stated:

"Because the vehicle was adapted to conceal smuggled goods it was liable to forfeiture under Section 88 of the Act…Our policy is normally to refuse to restore vehicles that have been seized under Section 88. In all cases any other relevant circumstances will be taken into account in deciding whether restoration is appropriate…

I conclude that there are no exceptional circumstances that would justify a departure from the Commissioners' policy as I am not satisfied with the explanation given as to the reasons for the adaptations made to the vehicle as further box sections were added to non load bearing areas of the trailer…"

26. So the officer had considered the Appellant's contention that the modifications had been carried out before the lessor acquired the vehicle but concluded that the additional box sections were not consistent with the conversion from container lorry to general purpose lorry recorded in the inspection report. Mr Corben confirmed that he did not know whether the Appellant was aware of the specific adaptations discovered by Border Force. There was no witness or other evidence from the Appellant which indicated if he knew about the box sections and, if so, whether he believed that they had been added in the course of the conversion process.

27. On 26 October 2015, the Appellant wrote to the Border Force requesting a review. The letter stated

- The Appellant had never used or intended to use the vehicle for any smuggling or concealment of goods
- Any adaptations were perfectly legal in Poland
- The vehicle was needed for the Appellant's business and its seizure was generating "huge losses and adversely affects business development".

28. A subsequent letter from the Border Force invited the Appellant to send in any further evidence or information it would like to provide in support of the application and warned that if information was not provided then, it could not be taken into account in the review. No further information was provided.

29. The review letter which is the subject of this appeal was issued on 16 November 2015 by Mr David Harris, who also gave evidence at the hearing. The review letter set out all the correspondence which had been considered, specifically including the Appellant's communications of 11 August 2015 and 26 October 2015. Mr Harris also stated he had considered the evidence from the seizure and all the representations and materials available before and after the time of the decision.

30. It goes on to say:

"Summary of the Border Force Restoration Policy for vehicles adapted for the purposes of smuggling according to section 88 CEMA '79.

The general policy is that seized vehicles should not normally be restored. However each case is examined on its merits to determine whether or not restoration may be offered exceptionally." (emphasis in original)

31. Mr Harris pointed out that the burden of making the case for restoration falls on the Appellant and it is not for Border Force to prove unlawful activity. Where the vehicle is properly seized, Border Force have a wide discretion to restore the vehicle or not and the only question is whether that discretion was properly exercised.

32. Mr Harris concluded that he had not been provided with any details of exceptional circumstances which might lead to the vehicle being restored. "This is plainly a very sophisticated concealment and it would not be correct for me to release such an adapted vehicle back onto the streets for possible illicit use".

33. Mr Harris also considered the degree of hardship involved. He determined that the inconvenience and expense caused by the loss of the vehicle was a natural consequence of the seizure and although it was a hardship, it was not the *exceptional* hardship which would be needed to justify a departure from the policy.

34. Accordingly, the decision not to restore the vehicle was upheld.

35. *The Appellant's submissions*

36. Mr Corben argued first, that the review officer had misdirected himself on the Border Force policy on restoration. He had only provided a summary of the policy and stated that a vehicle adapted for smuggling would not normally be restored unless there were exceptional circumstances. This is too restrictive an interpretation of the general policy.

37. Secondly, Mr Corben submitted that the review officer had failed to take account of relevant matters, namely the fact that the Appellant had not made the adaptations and that they had never used it for smuggling and never intended to.

38. Thirdly, the review officer had failed to take account of the fact that the Appellant would suffer the "double whammy" of having to continue to make the payments on the lease of the vehicle as well as paying for a new lorry and that this amounted to exceptional hardship.

39. *The Respondent's submissions*

40. The Appellant cannot challenge the seizure and had failed to discharge the burden of proof, which is the normal civil standard, in showing that the officer's decision was unreasonable in the sense of the well-known "Wednesbury Principles".

41. The review officer applied the correct policy, being guided by it but considering the case in its merits.

42. The review was carried out impartially and fairly, the decision was not "against the spirit of section 88 CEMA and the Appellant was given every opportunity to provide an explanation.

43. The reviewing officer was entitled to proceed on the basis that the vehicle had been adapted for use in smuggling and there were no exceptional circumstances to justify restoration, nor was there any *exceptional* hardship.

44. *Discussion*

45. It is important to recognise that the Tribunal's jurisdiction in this case is purely supervisory. We cannot make the decision afresh. We can only interfere if the Border Force's decision is one that they could not reasonably have made. It is also important to note that the starting point in considering this is that it must be assumed that the vehicle was properly condemned as forfeit, on the basis that it was adapted or altered for the purpose of concealing goods. That is the effect of paragraphs 3 and 5 to schedule 3 of CEMA. The burden is on the Appellant to show that the decision was unreasonable.

46. The first point to consider is what the Border Force policy was and whether the correct policy was applied. Mr Corben submitted that the policy was set out in Notice 12A which was given to the driver at the time of seizure. The Notice said that vehicles used for smuggling would not normally be restored. It did not say anything about vehicles adapted for smuggling. Mr Corben therefore argued that the summary of the policy set out in the decision letter was incorrect and the decision maker had applied the wrong policy.

47. Mr Harris explained that Notice 12A was merely intended to give guidance to the public about the policy but was not the policy itself nor the basis of it. The policy on restoration was an internal Border Force document which dealt with many different circumstances and scenarios but was not in the public domain as it would be a "smuggler's charter". He confirmed in evidence that the summary of the policy applying in these particular circumstances set out in the decision letter was the correct one and that this was the policy he had applied whilst taking account of all the relevant facts in this case.

48. We noted that the summary policy referred to a vehicle adapted for the purpose of "smuggling" whereas section 88 CEMA refers to a vehicle adapted for the purpose of "concealing goods". We do not consider that this is material; it is reasonable to assume that the deliberate concealment of goods is for a nefarious purpose.

49. We accept that the Border Force's policy was correctly summarised in the decision letter and that the officer did apply the correct policy in considering the Appellant's case.

50. The Appellant contended that the officer failed to take account of its claim that the adaptations were made by someone else before it acquired use of the vehicle and that they never used or intended to use the vehicle for smuggling. Although these points were not specifically mentioned in the review letter, it did mention that the

Appellant's letters in which these claims were made had been taken into account. In any event, the legislation does not require that there should have been an actual smuggling attempt or even an intention to smuggle; it is enough if the vehicle has been adapted for the purpose of concealing goods. Nor does it matter whether the adaptations were carried out by the person from whom the vehicle was seized or by someone else. It is unclear whether the Appellant actually knew about the adaptations, but if it had wanted to contend that they were not for the purpose of concealing goods, eg they were part of the standard process of converting a trailer from container to general use, the time to do that was within a month of seizure. Paragraph 5, schedule 3 of CEMA prevents that issue being revisited at this hearing.

51. Having said that, the culpability or otherwise of the Appellant is a relevant factor to consider in relation to restoration. We found that the officer did take the Appellant's claims of innocence into account, but there was no *evidence* from the Appellant to support those claims.

52. Similarly, the officer considered the question of financial hardship and on the basis that seizure of a working vehicle will normally cause some hardship, there must be something beyond normal hardship to justify a departure from the policy. We do not accept that having to make lease payments on the seized lorry as well as replacing the lorry must inevitably amount to "exceptional hardship". Again, the Appellant failed to discharge the burden of proof to show that it did suffer hardship which was beyond the norm.

53. *Decision*

54. We have found that the Respondents properly considered the correct policy in relation to restoration. The officer took into account the relevant matters and did not take into account irrelevant matters. The decision which he reached was within the range of reasonable decisions which an officer of the Border Force was entitled to make.

55. Accordingly, for the reasons set out above, we dismiss the appeal.

56. 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.

MARILYN MCKEEVER

TRIBUNAL JUDGE
RELEASE DATE: 2 AUGUST 2016