



TC05310

Appeal number: TC/2015/06066

Excise Duty - restoration - Customs and Excise Management Act 1979 sections 88 and 139 - seizure and confiscation of vehicle - refusal of restoration - Polish owner denied knowledge of concealed tobacco - s 16 Finance Act 1994 - whether the review officer had taken into account irrelevant considerations or disregarded relevant considerations in reaching her decision - no - whether refusal reasonable and proportionate in the circumstances - yes - appeal disallowed

FIRST-TIER TRIBUNAL

TAX CHAMBER

TRAFFIC LOGISTICS SP. ZO.O

Appellant

- and -

THE DIRECTOR OF BORDER REVENUE

Respondent

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER DUNCAN MCBRIDE**

Sitting in public at Fox Court, Brooke Street, London EC1N 7RS on 8 April 2016

The Appellant did not attend and was not represented

Jessica Tate, Counsel, instructed by the General Counsel and Solicitor to The Director of Border Revenue for the Respondent

DECISION

The Appeal

1. This is an appeal by Traffic Logistics Sp.zo.o, a company based in Poznan, Poland, (“the Appellant”) against the decision of the Respondent following a departmental review, under s 14(5) and Schedule 5 of the Finance Act 1994 (“FA 1994”) to restore for a fee of £2,539 (reduced from £12,697) the Appellant’s vehicle, a Fiat Ducati van registration number PO477VT (“the vehicle”) used in an attempt to evade duty on excise goods. The vehicle was seized on 23 June 2015.
2. It is not open to the Appellant to raise the liability to forfeiture or legality of seizure of the vehicle as a ground of appeal. As the legality of the seizure of the vehicle was not challenged by the Appellant or any other party at the Magistrates’ Court, the vehicle was condemned as lawfully seized and liable to forfeiture under paragraph 5 of Schedule 3 to the Customs and Excise Management Act 1979 (“CEMA”) (deemed condemnation). A Tribunal has no jurisdiction other than to find that the vehicle was lawfully seized.
3. The Appellant appeals pursuant to s 16 FA 1994 and contends that the Respondent erred in refusing to restore the vehicle without payment of a fee. The proprietors of the Appellant Company say that they were unaware tobacco had been concealed inside a transformer which they were delivering to an address in the UK.
4. The issue is whether the decision to refuse restoration of the vehicle for a fee of £2,539 was a decision which the reviewing officer could not reasonably have arrived at. In order for the decision to have been reasonable the reviewing officer must have considered all relevant matters and must not have taken into consideration irrelevant matters.
5. The Appellant did not attend the hearing. The proprietors of the Company had been notified of the time, date and venue of the appeal hearing. The Tribunal was therefore satisfied that the Appellant had been given notice of the appeal hearing date and that it was in the interests of justice to proceed

Evidence

6. The Appellant is a Polish Company. The proprietor of the Company Mr Janusz Stobinski who, although having requested an oral hearing and having provided dates to avoid, did not attend. The hearing bundle included the witness statement by the reviewing officer, Ms Deborah Hodge, together with relevant exhibits, which included a copy of the notes made by the Border Force officer who made the initial interception and inspected the vehicle, a copy record of the interview of the driver and correspondence between the Appellant and the National Post Seizure Unit of the Border Force. The bundle also included information regarding the Respondent’s policy relating to safeguards against illicit smuggling. Ms Hodge gave oral evidence.

Background

7. On 23 June 2015 at the port of Dover, Mr Miroslaw Jablonski (“the driver”) was intercepted by Border Force Officers while driving the vehicle at Eastern Docks, Dover.
- 5 8. On initial questioning the driver stated that he loaded the vehicle and that his firm was Traffic Logistics Sp.zo.o. When the officer asked the driver whether he had any cigarettes, tobacco or alcohol he replied “no”.
9. The officer was then informed by another officer that 52,000 Marlboro Gold cigarettes had been found inside a transformer within the vehicle. The potential lost revenue was calculated at £12,697.
- 10 10. The officer was satisfied that the excise goods were held for a commercial purpose, being not for own use. The officer informed the driver he was seizing the cigarettes and vehicle as liable to forfeiture because the goods were improperly imported, concealed in a manner intended to deceive a customs official and were not declared.
- 15 11. The goods were then seized under s 139 CEMA as being liable to forfeiture under both regulation 88 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 and s 49(1)(a)(i) of CEMA. The vehicle was also seized under s 139(1) as being liable to forfeiture under s 141(1)(a) because it was used for the carriage of goods liable to forfeiture.
- 20 12. The driver was given Form 156, “Seizure information notice” and Notice 12A, “What you can do if things are seized by H M Revenue & Customs”. Notice 12A explained that one can challenge the legality of the seizure in a Magistrates’ Court by sending a notice of claim to the UKBF within one month of the date of seizure.
- 25 13. The officer who had searched the vehicle then cleared it of the contents inside the cab and of the bedding into a clear plastic bag and sealed it. He then placed a portable fridge into a clear plastic bag and sealed it. These items were then left in the vehicle at the driver’s request. The personal effects paperwork was completed and a copy handed to the driver.
- 30 14. The Appellant did not challenge the legality of the seizure within thirty days, and accordingly the vehicle was duly condemned as forfeit to the Crown by the passage of time under paragraph 5 of Schedule 3 of CEMA.
15. By notice on 23 June 2015 the driver, on behalf of the Appellant, was offered restoration for a fee of £12,697.
- 35 16. On 20 July 2015 Mr Stobinski director of the Appellant requested restoration of the vehicle, stating that the Company had been hired by a company named “Artak” and they were not involved in the illegal transport of goods. He stated that they have been in the road transport business for many years and made deliveries to the UK

“hundreds of times”. The letter was acknowledged on the same date by the Respondent also requesting further information.

5 17. On 1 September 2015 the Respondent sent the review decision to the Appellant upholding the original decision of restoration for a fee of £12,697 having concluded that Traffic Logistics Sp.zo.o were responsible for the smuggling attempt and it was their first such occasion within twelve months.

10 18. On 3 September 2015 Mr Stobinski sent further information relating to the review request attaching Polish documents and stating that the driver was a long-time friend and experienced driver so no formal interview was conducted with him. He also stated that the Company only operates four vehicles and does not issue any written instructions or procedures to staff. Mr Stobinski said that they rely on their drivers experience to prevent any incidents. The Appellant said that the order for delivery of the transformer was sent to them by email and only credit checks were conducted. 15 The goods were reloaded from the consignor’s vehicle at Schenker, Poland on 12 June 2015. No physical checks were made of the goods, it was shrink film wrapped and impossible to inspect. No seals were put on it. No checks were done on the consignee because they are a major operator. Mr Stobinski said that they take all normal precautions to prevent unauthorised use of the vehicles.

20 19. On 22 September 2015 the Review Officer responded to state that no information to demonstrate reasonable checks were made by the Appellant and that the original decision was to be upheld.

20. The Appellant lodged a Notice of Appeal with the Tribunal dated 30 September 2015.

21. The Appellant’s stated grounds of appeal were:

25 “We are a small shipping company. We have been contracted to carry a load from a destination in Poland to the UK. Pursuant to the shipping order, the goods (a power transformer) were loaded on one of our vehicles at the depot of a major shipping operator (Schenker).

30 The appearance of the transformer suggested that it was new or refurbished. It was wrapped in shrink-film and secured with wooden planks. The transformer consisted of a heavy metal cover attached with several tens of big screws with nuts. There was no practical way for us to inspect the contents of the transformer. In addition, it is not customary for a shipping company to inspect the genuineness of the goods we are hired to carry.

35 In its response to our appeal for review, the Border Force supported its original decision stating that we “have not provided any information to demonstrate that reasonable checks of the load were made”.

In our view, in this case we were not in a position to inspect the goods and therefore, we think HMRC’s decision is wrong.

We have no connection whatsoever to the company who hired us, or to the addressee. All we have done was to carry goods according to the shipping order. Therefore, in our opinion, our vehicle which was seized by the Border Force should be released.”

5 22. On 9 October 2015 the Review Officer wrote to the Appellant with a re-reviewed decision. Having considered the Notice of Appeal the Review Officer was satisfied that neither the operator nor the driver was responsible for or complicit in the smuggling attempt but that all reasonable checks were not undertaken. However, as this was a first occasion, restoration would be for a fee of 20% of the revenue involved. The fee for restoration was amended to £2,539. Further conditions imposed were that:

- 10 • Neither Border Force, nor anyone acting on its behalf, gives any warranty or makes any representation as to the quality, fitness or condition of the vehicle or as to its freedom from damage or defect, however arising;
- 15 • Anyone using the vehicle on the public roads is responsible for ensuring that it is roadworthy and covered by any necessary MOT certificate, Vehicle Excise Duty (“road tax”) and insurance before it is used;
- The vehicle must be accepted as it stands;
- The vehicle must be collected at no expense to the Crown;
- 20 • The person collecting the vehicle must produce satisfactory photographic proof of identity, such as a passport or company pass; and
- The vehicle will be released to someone other than the owner (e.g. an agent or employee) on production of written authority from the owner (Border Force may keep the document).

25 23. On 4 December 2015 Mr Stobinski confirmed that the Appellant would be pursuing its appeal as he sought restoration without payment of a fee.

Relevant legislation

24. The relevant legislative provisions are as follows:

Section 2 of the Tobacco Products Duty Act 1979 provides:

- 30 (1) There shall be charged on tobacco products imported into or manufactured in the United Kingdom a duty of excise at the rates shown in the Table in Schedule 1 to this Act

35 Regulation 13 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 provides:

- 5
- (1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.
- (2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person -
- 10 (a) Making the delivery of the goods;
 (b) Holding the goods intended for delivery; or
 (c) To whom the goods are delivered.
- (3) For the purpose of paragraph (1) excise goods are held for a commercial purpose if they are held -
- 15 (a) By a person other than a private individual; or
 (b) By a private individual (“P”), except in a case where the excise goods are for P’s own use and were acquired in, and transported to the United Kingdom from, another Member State by P.
- (4) For the purposes of determining whether excise goods referred to in the exception in paragraph (3)(b) are for P’s own use regard must be taken of -
- 20 (a) P’s reasons for having possession or control of those goods;
 (b) Whether or not P is a revenue trader;
 (c) P’s conduct, including P’s intended use of those goods or any refusal to disclose the intended use of those goods;
 25 (d) The location of those goods;
 (e) The mode of transport used to convey those goods;
 (f) Any document or other information relating to those goods;
 (g) The nature of those goods including the nature or condition of any package or container;
 30 (h) The quantity of those goods and, in particular, whether the quantity exceeds any of the following quantities –
 10 litres of spirits
 20 litres of intermediate products (as defined in article 17(1) of Council Directive 92/83/EEC),
 35 90 litres of wine (including a maximum of 60 litres of sparkling wine),
 110 litres of beer,
 800 cigarettes
 400 cigarillos (cigars weighing no more than 3 grammes each),
 200 cigars,
 40 1 kilogramme of any other tobacco products;
 (i) Whether P personally financed the purchase of those goods;
 (j) Any other circumstance that appears to be relevant.
- (5) For the purpose of the exception in paragraph (3)(b) -
- 45 (a) “excise goods” does not include any goods chargeable with excise duty by virtue of any provision of the Hydrocarbon Oil Duties Act 1979 or any order made under section 10 of the Finance Act 1993;
 (b) “own use” includes use as a personal gift but does not include the transfer of the goods to another person for money or money's worth (including any reimbursement of expenses incurred in connection with obtaining them).
- 50

Regulation 88 of Excise Goods (Holding, Movement and Duty Point) Regulations 2010 provides:

88. If in relation to any exercise goods that are liable to duty that has not been paid there is -
- 5 (a) a contravention of any provision of these Regulations; or
(b) a contravention of any condition or restriction imposed by or under these Regulations,
- Those goods shall be liable to forfeiture.

10 Section 49(1)(a) of CEMA provides:

- (1) Where -
- (a) Except as provided by or under the Customs and Excise Acts 1979, any imported goods, being goods chargeable on their importation with customs or excise duty, are, without payment of that duty -
- 15 (i) Unshipped in any port,
(ii) Unloaded from any aircraft in the United Kingdom,
(iii) Unloaded from any vehicle on, or otherwise brought across the boundary into, Northern Ireland, or
- 20 (iv) removed from their place of importation or from any approved wharf, examination station or transit shed; or
- (b) Any goods are imported, landed or unloaded contrary to any prohibition or restriction for the time being in force with respect thereto under or by virtue of any enactment; or
- 25 ..., those goods shall, subject to subsection (2) below, be liable to forfeiture.

Section 88 of CEMA provides as follows:

Forfeiture of ship, aircraft or vehicle constructed, etc. for concealing goods.

Where -

- 30 (a) a ship is or has been [in United Kingdom waters]; or
- (b) an aircraft is or has been at any place, whether on land or on water, in the United Kingdom; or
- (c) a vehicle is or has been within the limits of any port or at any aerodrome or, while in Northern Ireland, within the prescribed area,
- 35 while constructed, adapted, altered or fitted in any manner for the purpose of concealing goods, that ship, aircraft or vehicle shall be liable to forfeiture.

Section 139(1) of CEMA provides that:

- 40 Any thing liable to forfeiture under the Customs and Excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard.

Section 141(1) of CEMA states that:

Where any thing has become liable to forfeiture under the Customs and Excise Acts -

- 5 (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 things so liable, shall also be liable to forfeiture.

10 Section 152 of CEMA establishes that:

The Commissioners may, as they see fit -

- (b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under the Customs and Excise Acts.

15 Sections 14 and 15 of the Finance Act 1994 provide that:

Section 14 (2):

- (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,
- 20 (b) a person in relation to who, 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,

25 may by notice in writing to the Commissioners require them to review that decision.

Section 15(1):

Where the Commissioners are required in accordance with this Chapter to review any decision, it shall be their duty to do so and they may, on that review, either -

- (a) confirm the decision; or
- 30 (b) withdraw or vary the decision and take such further steps (if any) in consequence of the withdrawal or variation as they may consider appropriate.

Section 16(4) to (6) provides that:

- (4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the power 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, to do one or more of the following, that is to say -

- 5 (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 further review of the original decision; and
- 10 (c) in that case of a decision which has already been acted on or taken effect and cannot be remedied by a further review, 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 do not occur when comparable circumstances arise in future.
- 15 (5) In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include a power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal.
- (6) On appeal under this section the burden of proof as to -
- (a) the matters mentioned in subsection (1)(a) and (b) of section 8 above,
- (b) the question whether any person has acted knowingly in using any substance or liquor in contravention of section 114(2) of the Management Act, and
- 20 (c) the question whether any person had such knowledge or reasonable cause for belief as is required for liability to a penalty to arise under section 22(1) or 23(1) of the Hydrocarbon Oil Duties Act 1979 (use of fuel substitute or road fuel gas on which duty not paid).
- 25 Shall lie upon the Commissioners, but shall otherwise be for the appellant to show that the grounds on which such application is brought have been established.

Jurisdiction of the Tribunal

25. The Respondent's power regarding restoration of goods or vehicles which have been forfeited or seized is set out under s 152(b) of the CEMA. Once the power is exercised, whether in the form of a positive decision to restore on terms or a refusal to restore, the individual affected has a right of appeal to the Tribunal. The powers of the Tribunal are limited in the terms set out in s 16(4) of Finance Act 1994 which provides that:

30

35 “(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) 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 further review of the original decision; and

(c)”

5 26. The precondition to the Tribunal’s exercise of its powers, namely, that the person making a decision could not reasonably have arrived at the decision, falls within the guidance given by Lord Lane in the decision in *Customs and Excise v JH Corbitt (Numismatists) Ltd* [1980] STC 231 at page 239:

10 “....if it were shown the Commissioners had acted in a way in which no reasonable panel of Commissioners could have acted; if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight. The tribunal might also have to consider whether the Commissioners had erred on a point of law.”

15 27. We were referred to the Court of Appeal decision case of *Gora and others v Customs and Excise Commissioners* (CA) [2004] QB 93 which provided guidance on the jurisdiction of the Tribunal in relation to its powers under s 16 of the Finance Act 1994. Lord Justice Pill at paragraphs 37 - 39 considered in detail the jurisdiction of the Tribunal. The Commissioners for Customs and Excise conceded in that case that it was proper for the Tribunal to examine the policy adopted by the Commissioners in restoration cases against the principles of proportionality. Further the Commissioners
20 accepted that Appellants in restoration proceedings were entitled to raise the issue of blameworthiness. Counsel for the Commissioners then submitted that:

25 “Strictly speaking it appears that under section 16(4) of the 1994 Act the Tribunal would be limited to considering whether there was sufficient evidence to support the Commissioners’ finding of blameworthiness. However, in practice, given the power of the Tribunal to carry out a fact finding exercise, the Tribunal could decide for itself this primary fact. The Tribunal should then go on to decide whether in the light of its findings of fact, the decision on restoration was reasonable. The Commissioners would not challenge such an approach and would conduct a further review in accordance with the findings of fact of the Tribunal.”

30 Lord Justice Pill accepted the Commissioners’ view of the jurisdiction of the Tribunal:

35 “... subject to doubting whether, its fact-finding jurisdiction having been accepted, it should be limited even on the “strictly speaking” basis mentioned at the beginning. That difference is not, however, of practical importance because of the concession and statement of practice made by the Commissioners later in the sub paragraph.”

28. The test is whether the Commissioner making the decision could reasonably have arrived at that decision. At para 38 of *Gora* Pill LJ agreed with the following proposition put forward by Counsel for the Commissioners:

40 “... For the purpose of deciding whether the policy was unreasonable, it is submitted that the Tribunal should not substitute its view for that of the Commissioners as to the appropriate policy in this area of administration. It should ask itself applying judicial review principles, whether the policy was one that could reasonably be adopted. In a

context where Article 1 Protocol 1 of the ECHR was engaged, the principles of judicial review would include that of proportionality.”

29. The Tribunal can therefore exercise its fact finding power to consider all the facts of this case, assessing whether the facts upon which the Respondent acted were
5 correct and the reasonableness of the decision, on the basis of facts that may not have been before the Respondent at the time of the decision and whether the review decision meets the principles of proportionality.

30. For the purposes of s 16 FA 1994 the term “unreasonable” has a Wednesbury meaning, as defined by Lord Greene MR in *Associated Provincial Picture Houses Ltd*
10 *v Wednesbury Corporation* [1948] 1 KB 223, when he held:

“A person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matter which he is bound to consider. He must exclude from the consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting ‘unreasonably’.”

31. Lord Lane in *Customs and Excise Commissioners v J H Corbitt* [1980] 2 WLR
15 653 further described the test of a review of a decision by the Tribunal:

“It could only properly [review the discretion] if it were shown that the Commissioners had acted in a way in which no reasonable panel of Commissioners could have acted, if they had taken into account some irrelevant matter or had disregarded something to
20 which they should have given weight.”

32. The issue of proportionality was considered in *Lindsay v Customs and Excise Commissioners* [2002] EWCA Civ 267. There, at para 55, it was stated that the aim of the Commissioners’ policy is the prevention of the evasion of excise duty that is imposed in accordance with European Community law. That is a legitimate aim under
25 art 1 of the First Protocol to the Convention. The issue is whether the policy is liable to result in the imposition of a penalty in the individual case that is disproportionate having regard to that legitimate aim, and in determining that issue a Tribunal may decide whether the reviewing officer when reaching a decision failed to have regard to all material considerations.

30 **The Appellant’s case**

33. As the legality of the seizure of the vehicle was not challenged by the Appellant or any other party at the Magistrates’ Court, the vehicle was condemned as lawfully seized and liable to forfeiture under paragraph 5 of Schedule 3 to CEMA (deemed
35 condemnation). Following the decision of *Revenue and Customs Commissioners v Jones and Another* [2012] 2 WLR 544, the Tribunal does not have the jurisdiction to consider the lawfulness of the seizure of the vehicle.

34. The Appellant’s Notice of Appeal dated 30 September 2015, sets out the grounds of appeal.

35. Following the further review by the officer, the Appellant’s position is that it
40 wishes to pursue its appeal and seek restoration without a fee. No grounds were put

forward as to why the decision to restore the vehicle subject to a reduced fee was unreasonable.

The Respondent's Case

5 36. The Respondent contends that the review decision was one that could reasonably
have been arrived at because the reviewing officer reasonably applied the policy of
the Respondent as set out in 'Restoration Policy of Commercial Vehicles' (see
paragraph 37 below). The Review Officer was guided by the restoration policy but not
fettered by it in that she considers every case on its individual merits. She considered
10 the decision afresh, including the circumstances of the events on the date of seizure
and the related evidence, so as to decide if any mitigating or exceptional
circumstances existed that should be taken into account. She examined all the
representations and other material that was available to the UKBF both before and
after the time of the decision. She considered all the Appellant's letters when applying
the UKBF restoration policy.

15 The Policy

37. The applicable policy was set out in the initial Review Decision of the 1
September 2015 and states as follows:

20 "The policy for the restoration of commercial vehicles that have been used for smuggling
excise goods is intended to tackle cross border smuggling and to disrupt the supply of
excise goods to the illicit market. "Commercial vehicles" include not only 'Heavy Goods
Vehicles' but any vehicle considered to be moving primarily for a commercial and
business purpose. Each case is considered carefully on its individual merits so as to
decide whether exceptions should be made and any evidence of hardship is always
considered.

25 A vehicle adapted for the purposes of smuggling will not normally be restored.

Otherwise the policy depends on who is responsible for the smuggling attempt:

A. Neither the operator nor the driver are responsible; or

B. The driver but not the operator is responsible; or

C. The operator is responsible.

30 A. If the operator provides evidence satisfying Border Force that neither the operator nor
the driver were responsible for or complicit in the smuggling attempt then:

35 (1) If the operator also provides evidence satisfying Border Force that both the
operator and the driver carried out basic reasonable checks (including conforming
to the CMR Convention) to confirm the legitimacy of the load and to detect any
illicit load, the vehicle will normally be restored free of charge.

(2) Otherwise,

- (a) On the first occasion the vehicle will normally be restored for 20% of the revenue involved in the smuggling attempt (or for 100% of the trade value of the vehicle if lower).
- (b) On a second or subsequent occasion (within 12 months) the vehicle will not normally be restored.
- 5
- B. if the operator provides evidence satisfying Border Force the driver, but not the operator, is responsible for or complicit in the smuggling attempt then:
- (1) If the operator also provides evidence satisfying Border Force that the operator took reasonable steps to prevent drivers smuggling then the vehicle will normally be restored free of charge unless:
- 10
- a 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
- 15
- b If the second or subsequent occasion occurs within 12 months of the first, the vehicle will not normally be restored.
- (2) Otherwise,
- a On the first occasion the vehicle will normally be restored for 100% of the revenue involved (or the trade value of the vehicle if lower).
- 20
- b On a second or subsequent occasion the vehicle will not normally be restored.
- C. If the operator fails to provide evidence satisfying Border Force that the operator was neither responsible for nor complicit in the smuggling attempt then:
- 25
- (1) If the revenue involved is less than £50,000 and it is the first occasion, the vehicle will normally be restored for 100% of the revenue involved (or the trade value of the vehicle if less).
- (2) If the revenue involved is £50,000 or more or it is seized on a second or subsequent occasion within 12 months, the vehicle will not normally be restored.”
- 30

Reasonableness of Review Decision

38. The Tribunal’s jurisdiction is a supervisory one and, from the case law in *Customs and Excise Comrs v. J H Corbitt (Numismatists) Ltd* [1980] STC 231, *Customs and Excise Comrs v. Peachtree Enterprises Ltd* [1994] STC 747 and *Kohanzad v. Customs and Excise Comrs* [1994] STC 697 the following approach is uncontroversial:

35

- i. The Tribunal cannot substitute its own decision for that of the Review Officer.

ii. The question for the Tribunal is whether the Review Officer's decision was unreasonable in the sense that no reasonable adjudicator properly directing himself could reasonably reach that decision.

5 iii. To enable the Tribunal to interfere with the Review Officer's decision it would have to be shown that the Review Officer took into account some irrelevant matter or had disregarded something to which he should have given weight.

10 iv. In exercising its supervisory jurisdiction the Tribunal must limit itself to consider the facts and matters which existed at the time the challenged decision of the Review Officer was taken. Facts and matters which arise after that time cannot in law vitiate an exercise of discretion which was reasonable and lawful at the time it was effected.

 v. The burden of proof lies on the Appellant to satisfy the Tribunal that the decision of the Review Officer was unreasonable.

15 39. The Review Officer considered the Appellant's restoration request and was guided by the restoration policy but not constrained by it and considers every case on its individual merits. The decision as considered afresh including the circumstances of the events on the date of seizure and the related evidence provided both before and after the review decision, so as to decide if any mitigating or exceptional circumstances existed that should be taken into account. In considering restoration the officer did not consider the legality or correctness of the seizure itself as this is a matter for condemnation proceedings.

 40. The officer's starting point was that the seizure of the vehicle was legal and the excise goods were held for a commercial purpose (not own use). This is not in issue between the parties and is the position in law.

25 41. The Respondent contends that the further review decision of 9 October 2015 was one that could reasonably have been arrived at.

 42. It is accepted from the information received by the Appellant that neither the operator nor the driver was responsible for or complicit in the smuggling attempt.

30 43. The Appellant, in his letter of 3 September 2015, admitted that the driver was a friend, no formal interview was conducted, no written instructions or procedures are issued to staff, no proper due diligence is carried out by the Company and no physical checks of the goods are made. In light of that information it is reasonable for the Review Officer to conclude that not all reasonable checks were undertaken by the Appellant.

35 44. The Respondent therefore reasonably applied the policy which is set out above: neither the operator nor the driver was responsible for or complicit in the smuggling attempt but not all reasonable checks were undertaken. Therefore restoration was offered for 20% of the revenue involved.

 45. There are no exceptional factors that militate towards restoration free of charge.

Conclusion

46. The function of the Tribunal is to determine whether the Respondent's decision to restore the vehicle to the Appellant for a fee was a decision which could not have been reasonably arrived at.
- 5 47. The duty to take reasonable steps to prevent smuggling applies not just for movements to and from the UK: all countries now expect operators to take reasonable steps to prevent smuggling. Although those checks are often primarily concerned with preventing the smuggling of drugs, guns, explosives and other terrorist materials and people - they also have an important purpose in preventing the smuggling of excise goods.
- 10
48. The burden of proof is on the Appellant. In order to succeed in his appeal the Appellant has to satisfy the Tribunal that the Respondent could not reasonably have arrived at the decision made by the Review Officer, Ms Hodge in her letter of 9 October 2015 within s 16(4) of the 1994 Act.
- 15 49. The Appellant admitted that no written instructions or procedures are issued to staff, no proper due diligence is undertaken by the Company and no physical checks of the goods are made. Neither the operator nor the driver was responsible for or complicit in the smuggling attempt but not all reasonable checks were undertaken by the Appellant and on that basis the Respondent reasonably applied its policy in offering restoration for 20% of the potential lost revenue involved.
- 20
50. There are no exceptional factors that militate towards restoration free of charge.
51. We do not accept that the Appellant suffered exceptional hardship over and above what one should expect in the circumstances. The Company had other vehicles. Replacement of a seized vehicle with another does not necessarily require replacement with a vehicle of equal value if a cheaper vehicle will perform adequately. There was no reason why the Company could not continue to run its business.
- 25
52. We concur with the Respondent's submissions and our conclusion is that the Reviewing Officer was justified in her conclusions. She was guided by established policy, took into account all relevant matters and did not take into account any irrelevant factors when arriving at her decision to refuse restoration of the Appellant's vehicle. There were no exceptional factors that militated towards dis-applying the Respondent's policy and restoring the vehicle without a fee. The decision appealed against is therefore in our view reasonable and proportionate, and not one that could not have been reasonably arrived at.
- 30
- 35
53. For the above reasons we accordingly dismiss the appeal
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
- 40

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.

5

**MICHAEL CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 9 AUGUST 2016

10