[2016] UKFTT 813 (TC)

TC05538

Appeal number:TC/2015/05464

EXCISE DUTY – road vehicles seized from the appellant – decision to restore the vehicles upon payment of a fee – whether the decision was reasonable – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

FIESTA SHOWLAND TRANSPORT **Appellant**

- and -

COMMISSIONERS FOR HM REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE JONATHAN CANNAN
MISS SUSAN STOTT FCA CTA

Sitting in public in Manchester on 2 November 2016

No appearance by the Appellant

Mr Simon Charles of counsel instructed by the Solicitor's and Legal Services Office of HM Revenue & Customs for the Respondent

DECISION

Background

1. Following a visit by officers of the Respondents' Road Fuel Testing Unit on 14 May 2015, three vehicles belonging to the Appellant were found to have traces of Kerosene and red diesel in their fuel tanks. The vehicles were seized and restored to the Appellant upon payment of a restoration fee of £2,200.

2. On 27 May 2015 the Appellant requested a review of the decision to impose a restoration fee. By way of a review dated 6 July 2015 the decision to impose a restoration fee was confirmed. The Appellant now appeals to this Tribunal.

3. Notice of the hearing was sent to the Appellant on 31 May 2016. On 11 October 2016 the Appellant asked whether it would be possible to postpone the hearing because its director had work commitments. That application was refused and the refusal was notified to the Appellant by letter from the Tribunal dated 18 October 2016. On the same date the Appellant notified the Tribunal that its director would not be attending the hearing and also criticised the fairness of the procedure.

4. We were satisfied that the Appellant had been notified of the hearing and that it was in the interests of justice to proceed.

Statutory Framework

5. The *Hydrocarbon Oil Duties Act 1979* ("the 1979 Act") restricts the use of Kerosene and other rebated fuel oils in road vehicles. It also makes provision for such oils to be liable to seizure and forfeiture, together with any vehicle used for the carriage of such oils. The 1979 Act also makes provision for assessments to recover the rebate on rebated oils used in a road vehicle and for penalties where rebated fuel oil is taken into a road vehicle and used in a road vehicle. Liability for such assessments and penalties is strict, in the sense that it does not rely on intention or knowledge on the part of the person responsible.

6. Section 152 of the 1979 Act provides for restoration of anything seized as follows:

> "*152 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]…*"

7. The review and appeals procedure in relation to decisions concerning restoration of things forfeited or seized under the 1979 Act is contained in *Finance Act 1994*. *Section 14 Finance Act 1994* makes provision for a person to require a review of a decision under *section 152(b) CEMA* in relation to restoration of anything seized from that person.

8. *Section 16 Finance Act 1994* sets out the jurisdiction of the tribunal on an appeal against the review carried out in the present case. The decision to impose conditions on restoration and to confirm that decision on review is an ancillary matter. As such the jurisdiction of the tribunal is limited to considering whether the decision of the review officer was reasonable. S*ection 16(4)* 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) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;*
>
> *(b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and*
>
> *(c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.*"

9. In the present appeal therefore we are concerned with whether the review decision confirming the restoration fee was reasonable.

Discussion

10. There is no issue that three vehicles belonging to the Appellant were found to contain Kerosene and traces of what is known as "red diesel" (ie rebated fuel oil) in their fuel tanks. The Appellant has raised a number of issues as to various matters taken into account by the review officer and we shall identify these in due course. The evidence before us comprised a witness statement and oral evidence from the review officer, Ms Louise Bines, notebooks and seizure documentation from the date of seizure, analysis of the samples taken from the seized vehicles and certain correspondence and documentation provided by the Appellant. Based on the evidence before us we make the following findings of fact.

11. The Appellant's vehicles were on a site at Dunorlan Park, Tunbridge Wells on 14 May 2015. The Appellant provides transport for the Netherland Circus. Six of the Appellant's vehicles were on site and five were tested. No keys were available for the sixth vehicle. Three of the vehicles tested positive for Kerosene and two tested positive for red diesel.

12. It is not disputed that the Appellant's vehicles had been tested by the Respondents several weeks earlier and no irregularities had been found. The Appellant has suggested that in fact fifteen vehicles were tested on 14 May 2015 but we think it likely that was on the occasion of the earlier test rather than on 14 May 2015.

13. During the course of the visit the Appellant's supervisor Mr Frank Turner was interviewed under caution. He informed the officers:

(1) The Appellant provided transport services only for the Netherlands Circus, and it owned some 20 vehicles ranging from transit vans to trailer units.

(2) There were six vehicles on site that day and the vehicles tested by the Respondents were all owned by the Appellant.

(3) The vehicles were normally fuelled by a mechanic called Pavel and fuel was sourced from petrol stations local to where the circus was performing at the time.

(4) Kerosene was kept on site to use in heaters for the Big Top and red diesel was kept for use in generators.

(5) He was shocked that Kerosene had been found in any vehicles. Fuelling the vehicles was taken very seriously. He thought that there must have been a "third party error".

(6) He thought that the three vehicles that tested positive must have been filled up at the same place, or at least with the same fuel because on occasion fuel is transferred between vehicles on the site.

14. The three vehicles that tested positive were then seized and restored upon payment of a restoration fee of £2,200. The restoration fee was calculated as follows:

(1) Penalties of £250 per vehicle (£750) for taking rebated oil into a road vehicle.

(2) Penalties of £250 per vehicle (£750) for using rebated oil as road fuel.

(3) Duty on full tanks of fuel for each vehicle totalling £700.

15. On 27 May 2015 Mr Turner wrote to the Respondents seeking to appeal the "£2,200 penalty". Mr Turner stated that the Kerosene had been put into the vehicles without the Appellant's knowledge and that he believed that it had come from one of the weekly petrol station visits made to fuel the vehicles. He enclosed copies of recent fuel receipts and explained that vehicles were taken to petrol stations every Saturday to fill their tanks. Those vehicles were then used to fill up other vehicles belonging to the Appellant so as to avoid taking all the vehicles off site. He criticised the Respondents for doing very little to find the source of the problem.

16. The decision to charge a restoration fee was confirmed in a review letter from Ms Bines dated 6 July 2015. Ms Bines set out the factual background, correcting an assertion by Mr Turner that fifteen vehicles had been tested on 14 May 2015. She thought it likely that the Kerosene contamination was caused by decanting or

transferring fuel between vehicles following the refuelling of a vehicle at a garage. In other words she considered that the source of the Kerosene was indeed a local garage. She accepted that the contamination "may not have been deliberate" and that there had been "no attempt … to run the vehicles on illicit fuel". However she could find no reason to vary the Respondents' policy in this area. The decision to impose a restoration fee was therefore upheld.

17. Ms Bines did not set out in her letter the Respondents' policy, but it was set out by the Respondents in their Statement of Case for this appeal. For a first offence, of which this was one, the policy was to seize the vehicle(s) and to restore for the value of the civil penalties, 100% of the revenue evaded and any storage and/or removal costs, up to the value of the vehicle.

18. The grounds of appeal set out in the notice of appeal may be summarised as follows:

(1) It was three out of fifteen vehicles that tested positive for Kerosene, rather than three of five as referred to by Ms Bines.

(2) Ms Bines was wrong to take into account that the Appellant stored red diesel and frequently decanted fuel. The Appellant did not use illegal fuel in its fleet.

(3) The Respondents have failed to investigate the source of the Kerosene.

(4) The decision was unfair and failed to take into consideration the Appellant's account of events.

19. As stated above, our jurisdiction in this appeal is limited. If we are satisfied that the review decision in unreasonable then we can direct the Respondents to carry out a further review of the decision.

20. The officer's notebook from the date of the visit, which was signed by Mr Turner to acknowledge that it was correct, records Mr Turner stating that there were six vehicles belonging to the Appellant present on the site at the time of the visit. We find that as a fact. As we have said, it seems likely that there were fifteen vehicles present at the time of the previous visit. In any event, it would make no difference to the decision in relation to restoration if there had been fifteen vehicles present. Three vehicles would still have tested positive for Kerosene.

21. Ms Bines referred in her decision letter to the fact that the Appellant stored red diesel and Kerosene at the site. She did not draw any adverse inference from that fact, indeed she stated that it was stored for legitimate use. It was right that she should record that fact, because one possibility might have been that Kerosene stored on site had been used to refuel a vehicle by mistake. However Ms Bines did not reach that conclusion. She considered it more likely that the source of the contamination was a local garage. That is exactly what the Appellant contends and we do not consider that Ms Bines can be criticised for treating it as the most likely cause of the Kerosene found in the vehicle fuel tanks.

22. It is said that the Respondents have failed to properly investigate the source of the Kerosene. We do not accept that criticism. It is for the Appellant to explain the presence of Kerosene in the fuel tanks. The Appellant's explanation has been accepted by the Respondents although they have not identified the local garage responsible. The extent to which the Respondents carry out further enquiries is a matter for them and is of no relevance to the restoration decision. In any event, Ms Bines told us and we accept that three petrol stations in the vicinity of the site had been tested on 15 May 2015 with negative results.

23. We consider that the decision fully takes into consideration the Appellant's account of the circumstances in which they refuel their vehicles. Ms Bines accepted that the Appellant had not deliberately put rebated fuel into the vehicles. We consider that her review took into account all relevant factors and did not take into account any irrelevant factors.

24. Finally it is said that the decision to impose a restoration fee was unfair. We do not accept that is the case. As we have stated, the penalties imposed by Parliament for taking rebated fuel into a road vehicle and for using rebated fuel in a road vehicle do not depend on knowledge or intention on the part of the person responsible. They involve what is called strict liability. Similarly, the Respondents are entitled to make an assessment to recover the rebate on such fuel put into a road vehicle. In theory the Respondents could have restored the vehicles for no fee, but then proceeded to impose the penalties and make the assessments against the Appellant. The effect is the same.

25. The policy applied by HMRC is to restore vehicles for a fee equivalent to the penalties and assessments that could otherwise be imposed. We do not consider that the policy is unreasonable or that the application of the policy in the circumstances of the present case is unreasonable.

Conclusion

26. For the reasons given above we dismiss the appeal.

27. 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: 7 DECEMBER 2016