[2018] UKFTT 102 (TC)

TC06360

Appeal number: TC/2016/01047

EXCISE DUTY RESTORATION OF VEHICLE – application for the restoration of a vehicle forfeited because it was being used for the transportation of goods on which duty had not been paid – was the offer by the Respondents to restore the vehicle in return for a fee of £8,325.00 unreasonable – Yes – Direction for a further review

FIRST-TIER TRIBUNAL
TAX CHAMBER

TRANSPORT CIEZAROWY JJ PLOTKA **Appellant**

- and -

THE DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE TONY BEARE
CAROLINE DE ALBUQUERQUE

Sitting in public at Taylor House, 88 Rosebery Avenue, London, EC1R 4QU on 21 February 2018

Mr Adam Gosiewski for the Appellant

Mr James Jackson for the Respondents

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DECISION

1. This is an appeal made by the Appellant under Section 16 Finance Act 1994 (the "FA 1994") against a review decision by the Respondents of 24 March 2016 to restore to the Appellant a MAN TGA 18 tractor unit (the "tractor") upon the payment of £8,325.00. The immediate background to the appeal is that, on 16 November 2015, the Respondents reached a review decision that the tractor, together with a curtain side trailer (the "trailer"), both of which had been seized by the Respondents, would be restored to the Appellant only upon payment of a fee of £15,850.00. In its notice of appeal against that review decision to the Tribunal dated 17 February 2016, the Appellant alleged that both items should be restored to the Appellant for no consideration. Subsequent to the Appellant's notifying the Tribunal of its appeal against the review decision of 16 November 2015, the Respondents issued a further review decision dated 24 March 2016. That further review decision took into account the fact that the Appellant's lease of the trailer had expired on 2 January 2016. Accordingly, in that further review decision, the Respondents amended the terms of their restoration offer so that restoration of only the tractor was offered and the consideration for the restoration was reduced commensurately from £15,850.00 to £8,325.00. The further review decision was said by the Respondents to cancel and replace the original review decision of 16 November 2015 and informed the Appellant that, if it wished to appeal against the further review decision, it should notify its appeal to the Tribunal within 30 days of 24 March 2016. We have not been provided with any such notice of appeal.

2. The above facts raise a preliminary point of procedure before we can consider the merits of the Appellant's case.

3. Both parties have proceeded on the basis that the Appellant's appeal relates to the offer to restore the tractor to the Appellant for £8,325.00 (ie the offer set out in the further review decision of 24 March 2016) and not to the offer to restore both the tractor and the trailer to the Appellant for £15,850.00 (ie the offer set out in the original review decision of 16 November 2015). However, as noted above, the only notice of appeal to the Tribunal contained within the hearing bundle was the notice of appeal in relation to the original review decision of 16 November 2015 and that original review decision of 16 November 2015 was purportedly cancelled by the further review decision of 24 March 2016. The Respondents appear to be willing to treat the notice of appeal of 17 February 2016 in relation to the original review decision of 16 November 2015 as extending to the subsequent review decision of 24 March 2016 – which is entirely sensible, given that the only difference between the two review decisions is the removal of the trailer (and the commensurate reduction in the payment required from the Appellant) in the further review decision. We are content to proceed on the same basis and to construe the notice of appeal of 17 February 2016 as extending to the further review decision of 24 March 2016.

4. Turning to more substantive issues, the relevant facts are as follows. On 14 June 2015, the driver of the tractor and trailer, a Mr Dym, was intercepted at Dover whilst transporting beer. Mr Dym spoke no English and therefore the oral communication which ensued between him and the officer who apprehended him

remains open to some doubt. Suffice it to say that, despite the fact that Mr Dym was carrying papers showing that the beer was on its way from a bonded warehouse in Poland to a destination in Dublin – and was therefore not liable to any UK taxes or duties – the officer who intercepted him formed the impression that his final destination was Birmingham. The beer was therefore seized pursuant to Section 139(1) Customs & Excise Management Act 1979 (the "CEMA 1979") on the basis that it was liable to forfeiture under both Regulation 88 Excise Goods (Holding, Movement and Duty Point) Regulations 2010 and Section 49(1)(a)(i) CEMA. The tractor and trailer were also seized pursuant to Section 139(1) CEMA 1979 on the basis that they were liable to forfeiture under Section 141(1)(a) CEMA 1979.

5. As no valid notice of claim contesting the seizures was received by the Respondents within the one month period following the seizure, the assets in question were deemed to have been duly condemned as forfeited pursuant to paragraph 5 Schedule 3 CEMA 1979.

6. On 11 July, 2015, the Appellant's representative, Mr Gosiewski, submitted a request for the restoration of the tractor and trailer and, over the ensuing months, Mr Gosiewski provided further information in relation to the Appellant's claim.

7. On 8 September 2015, the Respondents offered to restore the tractor and trailer on payment of a fee of £15,850.00.

8. On 23 October 2015, Mr Gosiewski wrote, on behalf of the Appellant, to the Respondents, requesting a review of that decision. Enclosed with that letter was, inter alia, evidence that the tractor and trailer were booked on a Stena Line ferry from Holyhead to Dublin at 20.30 on 14 June 2015, which was entirely consistent with the documentation carried by Mr Dym at the time of the seizure, indicating that the beer was destined for a business called Planet Beers in Dublin.

9. On 16 November, 2015, the Respondents wrote to the Appellant to the effect that the result of the review was to confirm the offer mentioned in paragraph 7 above. Finally, on 24 March 2016, the Respondents amended their review decision to reflect the fact that only the restoration of the tractor remained in issue (with the result that the consideration required to be paid by the Appellant was reduced commensurately).

10. The relevant law may be summarised as follows:

(a) Section 152(b) CEMA 1979 provides that the Respondents may, as they see fit, restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under the customs and excise Acts;

(b) Section 14(2) FA 1994 provides that a person in relation to whom, or on whose application, a decision under Section 152(b) CEMA 1979 has been made may require the Respondents to review that decision;

(c) Section 16(1) FA 1994 provides that the person who required the review may then appeal against the review decision; and

(d) Section 16(4) FA 1994 provides that, in relation to any such appeal, the powers of this Tribunal are confined to a power, where this Tribunal is satisfied that that the decision could not reasonably have been arrived at, to direct that the decision is to cease to have effect from such time as this Tribunal may determine, to require the Respondents to conduct, in accordance with the directions of the Tribunal, a further review of the original decision or, in the case of a decision which has already been acted on or taken effect, to declare the decision to have been unreasonable and to give directions to the Respondents as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in the future.

11. The above provisions make it clear that the decision as to whether or not to restore a forfeited asset is a matter for the Respondents to determine at their discretion and that we can disturb that decision only if it is unreasonable in the sense described in the leading case of *Associated Provincial Picture Houses, Limited v Wednesbury Corporation [1948] 1 K.B. 223* (*Wednesbury*"). In other words, we are not permitted to consider the relevant facts de novo and determine whether or not we agree with the conclusion that the Respondents have reached. Instead, we need to consider whether, in reaching that conclusion, the Respondents have taken into account matters that they ought not to have taken into account or disregarded matters that they ought to have taken into account. As long as that is not the case, then the Respondents' decision may be impugned only if it is one that no reasonable person could have reached upon consideration of the relevant matters. The Respondents' decision cannot be impugned simply because we or some other person might have reached a different conclusion on the relevant facts as properly understood. Moreover, if we find that the Respondents have acted unreasonably in the *Wednesbury* sense as described above, we cannot substitute our own conclusion for the impugned decision. We can direct only that a further review takes place in accordance with our directions.

12. Our conclusions in relation this appeal are as follows.

13. It became evident fairly early in the proceedings that a very serious miscarriage of justice has occurred in this case.

14. The Appellant has provided compelling evidence to the Respondents that the tractor was indeed en route for Dublin at the time when it was seized and that the beer that it was transporting was within the scope of the exemption from UK taxes and duties. The CMR (at page 54 of the hearing bundle), the EDE (at page 48 of the hearing bundle) and the Stena Line ferry confirmation reference number 51926416 (at page 81 of the hearing bundle) together make it absolutely clear that this was the case.

15. On pages 6 and 7 of their review letter of 16 November 2015, the Respondents gave four reasons for forming their view that this was not the case. These are as follows:

(a) When he was intercepted, Mr Dym originally said that he was going to Birmingham and mentioned Dublin only after the seizure had occurred. (Mr Dym is reported to have said "Abliden Birmingham" when he was intercepted and the

Respondents have interpreted the word “Abliden” as meaning “unloading” in Polish). In the view of the Respondents, the subsequent reference to Dublin by Mr Dym “can only be seen as in hindsight and wholly implausible”;

(b) The Respondents made enquiries with Stena Line in relation to the ferry confirmation number 51926415 and that booking “relates to a totally different vehicle and a totally different sailing”;

(c) The Respondents also made enquiries with a Mr Rafal of Planet Beers in relation to the same confirmation number and “Mr Rafal said that the driver did not have those details with him”; and

(d) On 16 June 2015, a full lorry load of beer was intercepted at the port of Harwich with identical documentation except for a different haulier’s being recorded on the CMR. “This is yet more evidence that the probable destination for the goods seized in [the Appellant’s] case was destined for the UK illicit market”.

16. In our view, each of these reasons is flawed in some way.

17. As regards the reason given in paragraph 15(a), Mr Gosiewski has made it clear throughout, and reiterated at the hearing, that Mr Dym simply does not understand any English. So anything that he is alleged to have said at the point when the seizure occurred must be treated with the appropriate caution. Moreover, Mr Gosiewski pointed out that, due to restrictions on the length of time that drivers can remain at the wheel, it is necessary for drivers to make frequent rest stops and that, in this case, Mr Dym was going to make such a rest stop in Birmingham on his way to Holyhead. So it is not surprising that Mr Dym would have mentioned Birmingham (as his next most immediate stop) in response to a question as to where he was going. In addition, the Polish translator at the hearing explained that the Polish word for unloading is not “Abliden”, as alleged by the Respondents. (It occurs to us in retrospect to wonder whether what Mr Dym was trying to say was “Dublin” and that this emerged as “Abliden” because of his poor English). In any event, whatever it is that Mr Dym is alleged to have said, the fact that he could not speak or understand English is a matter that should have been taken into account by the Respondents in reaching their decision.

18. As regards the reason given in paragraph 15(b), it was pointed out by Mr Gosiewski at the hearing that the Stena Line confirmation number to which the Respondents refer in their letter is one digit removed from the actual Stena Line confirmation number provided by the Appellant to the Respondents on 23 October 2015 – ie 51926415 and not 51926416. So it is not surprising that Stena Line would have stated that the confirmation number to which the Respondents refer in their letter of 16 November 2016 was for a different vehicle and sailing. The Respondents were both looking at the wrong confirmation number (and therefore taking into account a matter that they should not have been taking into account) and not looking at the right confirmation number (and therefore failing to take into account a matter that they should have been taking into account).

19. As regards the reason given in paragraph 15(c), apart from the fact that the same error in the Stena Line confirmation number appears, we are at a loss to understand the statement that "Mr Rafal said that the driver did not have those details with him". As already noted, the tractor was seized at Dover and never reached Dublin and so Mr Rafal never had the opportunity to meet Mr Dym or to see what details Mr Dym was carrying. So, in making that statement, the Respondents were taking into account a matter that they should not have been taking into account.

20. Finally, as regards the reason given in paragraph 15(d), we were not directed by the Respondents at the hearing to any of the documents that might support the relevant allegation (and those documents were not contained within the hearing bundle) but, in any event, we do not see how the fact that, in relation to another load of beer arriving two days later in Harwich, there might have been identical documentation but with a different haulier necessarily impugns the documentation that has been provided to the Respondents in this case. It might have been the case that the documentation for that second load was flawed in some way. But, based on the other allegations that were made by the Respondents in their letter of 16 November 2015, it is quite possible that the documentation was not in fact identical.

21. The above, coupled with the documentation that was shown to us at the hearing, means that we have no hesitation in concluding that:

(a) Mr Dym was on his way to Dublin at the time when he was intercepted, carrying the appropriate papers, and that therefore no smuggling was occurring when the tractor was seized;

(b) In reaching their decision to require the Appellant to pay for the restoration of the tractor, the Respondents have both taken into account matters that they should not have taken into account and failed to take into account matters that they should have taken into account; and

(c) Therefore, the Respondents have reached a decision that they could not reasonably have arrived at, in the *Wednesbury* sense described above.

22. Although it is now too late for the Appellant to challenge the conclusion that the tractor was duly condemned as forfeited, the fact that both the Appellant and the driver were wholly innocent of any smuggling leads inexorably to the conclusion that the tractor should at this stage be restored for no consideration. However, as noted above, we are limited in the powers that we are able to exercise under Section 16 FA 1994. So we are not able to order that restoration be made on such terms. Instead we are merely entitled to direct that a further review of the decision should be made in accordance with our directions.

23. Accordingly, we hereby direct that a further review of the decision to require the Appellant to make a payment of £8,325.00 in consideration for the restoration of the tractor be made and that such further review be conducted properly, as suggested by the comments that we have made above. In other words, the further review should take into account the correct Stena Line confirmation number, should discount the

statement purportedly made by Mr Rafal of Planet Beers, should treat with appropriate caution anything which Mr Dym is alleged to have said when he was intercepted and should appropriately consider both the veracity and the relevance of the allegation made in relation to the load intercepted at Harwich.

24. Moreover, given the length of time that it has taken for this appeal to be heard, the egregious errors that the Respondents have made in their conduct of this matter, the fact that the Appellant has had to incur considerable expense in pursuing its appeal (including the cost of flying Mr Plotka and Mr Gosiewski over to London for the hearing) and what we believe to be the clear and obvious outcome of that review, we direct that the outcome of that review be notified to the Appellant no later than 21 days after the date that this decision is issued.

25. There is one other point that we would like to make. Although we did not have the benefit of hearing evidence from Mr Dym at the hearing, Mr Gosiewski alleged that, when Mr Dym was intercepted, in addition to his not being provided with an adequate interpreter, he was subjected to intimidating and threatening behaviour by the Respondents. The Respondents may wish to investigate this allegation and, if the treatment of Mr Dym fell short of the standards that might be expected from officers of the Respondents, whether such practice is more widespread.

26. 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.

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 28 FEBRUARY 2018