



**TC07959**

*Excise Duty – seizure of vehicle – restoration of vehicle offered for a fee – similar incidents involving vehicles owned by related company – whether or not decision of officer was reasonable – held yes – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC//2019/03812V**

**BETWEEN**

**TIM VAN VLAANDERN TRANSPORT SRO**

**Appellant**

**-and-**

**THE COMMISSIONERS FOR  
HER MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE PHILIP GILLETT  
DAVID BATTEN**

**The hearing took place on 10 September 2020 via video link.**

**Paul Martin Huetter, Managing Director of Transbritannia Transport GmbH, the parent company of the Appellant, appeared for the Appellant**

**William Dean, Counsel, instructed by The Director of Border Revenue, appeared for the Respondent.**

**With the consent of the parties, the hearing was held via video link, all parties attending remotely, with Mr Collins, the Border Force reviewing officer, sitting with Mr Dean because of issues with the Border Force firewall which prevented his direct access to the tribunal’s video platform from his own offices. A face to face hearing was not held because of the ongoing pandemic, which meant that a face to face hearing was not considered appropriate.**

**The documents to which we were referred were in a trial bundle consisting of 228 pages, an authorities bundle of 62 pages and the Respondent’s skeleton argument of nine pages.**

## **DECISION**

### **INTRODUCTION**

1. This appeal relates to a request for the restoration of a Czech-registered heavy goods vehicle and trailer, registrations 7C14055 and LL106KN respectively, which were seized on 26 November 2018 at Dover. The load contained boxes marked “Skyline-Rabbit-100 Advanced Pet Products” which were found to contain 850 kilograms of Turner hand rolling tobacco.
2. The trailer unit was registered in the name of Transbritannia Transport Gmbh (“Transbritannia”), a company registered in Austria. The tractor unit was registered in the name of Tim van Vlaanderen sro (“TvV sro”), a company registered in the Czech Republic, which is a 100% subsidiary of Transbritannia. The vehicle was operated by TvV sro.
3. The vehicle was seized because it contained undeclared goods which attracted duty of £199,217.85. The goods were also seized. There was no challenge to the legality of the seizure of the vehicle or the goods in the Magistrates’ Court and they were therefore deemed to have been lawfully seized.
4. The restoration of the vehicle was originally refused by Border Force but, on review, it was decided that the vehicle could be restored on the payment of a fee of £9,960, being 5% of the duty which would have been evaded.

### **LATE APPEAL**

5. The appeal against the decision of Border Force was received a few days late. However, the appeal appears to have been posted on the last day permitted for an appeal to be made and Border Force did not object to the appeal being admitted. The tribunal therefore decided to give permission for the late notification of the appeal.

### **SUMMARY OF DECISION**

6. The tribunal found that the decision of the reviewing officer, Mr Collins, was not one which the officer could not reasonably have arrived at, and that it was not therefore appropriate for the tribunal to exercise its powers under s16(4) Finance Act 1994 to direct that a further review be undertaken.

### **THE FACTS**

7. We received witness statements and oral evidence from Mr Huetter and Mr Collins and a written statement from Mr Jiri Truhlar, Executive Head of TvV sro. Mr Truhlar did not attend the hearing and was not therefore available for cross-examination. We also received a trial bundle of 228 pages. These included a number of documents in Czech but we were provided with an English translation of these documents certified as correct by Mgr Radka Benesova PhD, who was nominated for this purpose by a decree of the Regional Court in Ceske Budejovice, Southern Region of the Czech Republic.
8. Mr Dean submitted that in the circumstances the tribunal should ignore Mr Truhlar’s statement. However, we decided that although Mr Truhlar’s statement could not be tested by cross-examination we would take it into account to the extent that it did not contradict any other evidence presented to us.
9. There was no disagreement between the parties as to the underlying facts and we find the following as matters of fact.
10. The vehicle and trailer, registrations 7C14055 and LL106KN respectively, were seized on 26 November 2018 at Dover. When stopped, the driver, Roman Charousek, produced a

CMR which showed a load of 59 pallets of paper bound from Austria to Huntingdon in Cambridgeshire. The load was unsealed. It contained boxes marked “Skyline-Rabbit-100 Advanced Pet Products” which were found to contain 850 kilograms of Turner hand rolling tobacco. The remainder of the load matched the CMR description.

11. The trailer unit was registered in the name of Transbritannia and the tractor unit was registered in the name of TvV sro. The vehicle was operated by TvV sro.

12. The vehicle was seized because it contained undeclared goods which attracted duty of £199,217.85. The goods were also seized. There was no challenge to the legality of the seizure of the vehicle or the goods in the Magistrates’ Court. They were therefore deemed to have been lawfully seized.

13. Transbritannia was founded by Mr Huetter and has been trading since August 2000, initially transporting goods between Austria and Germany and the UK. Two subsidiaries were set up in 2008, in the Czech Republic, TvV sro, and in Hungary, Tim van Vlaanderen KFT (“TvV KFT”), in order to transport goods from those countries to the UK. The initial reason for setting up these as separate companies was a general concern about the political climate in those countries and Mr Huetter therefore thought that it would be better to operate via separate companies.

14. Transbritannia operates 180 trucks in total, but the operation in the Czech Republic has never been financially successful.

15. There were two previous attempts at smuggling which involved sro’s sister company, KFT, approximately one month earlier than the incident in question. The cargo on those occasions were 1.2 million cigarettes, seized on 15 October 2018, and 1.7 million cigarettes, seized on 16 October 2018. On those occasions, both vehicles were returned to the operator free of charge.

16. All correspondence regarding both seizures was dealt with by Transbritannia, acting on behalf of TvV sro and TvV KFT.

#### **(A) THE LAW**

17. Under s139(1) Customs and Excise Management Act 1979 (“CEMA”):

“[a]ny thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or constable...”

18. Section 141(1) then provides:

“where anything has become liable to forfeiture under the customs and excise Acts—

- (a) any ship, aircraft, vehicle, animal, container ... 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 thing so liable, shall also be liable to forfeiture.”

19. Excise goods liable to duty on which such duty has not been paid are liable to forfeiture by operation of regulation 88 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010. Accordingly, by reason of section 141(1), above, a vehicle used for the carriage of such goods is also liable to forfeiture. A procedure for condemnation of a thing liable to forfeiture is provided by Schedule 3 to CEMA.

20. Section 152(b) CEMA provides that the Commissioners

“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”.

21. On presentation of a request from the person whose property has been seized, the Commissioners can be required by s14(2) Finance Act 1994 to review “any decision under s152(b) of the 1979 Act as to whether or not anything forfeited or seized under the customs and excise Acts is to be restored to any person or as to the conditions subject to which any such thing is so restored”. On a review, the Commissioners may, pursuant to s15(1) Finance Act 1994 “confirm the decision” or “withdraw or vary the decision and take such further steps (if any) in consequence of the withdrawal or variation as they may consider appropriate”.

22. As was confirmed by the case of *HMRC v Jones and Jones* [2011] EWCA Civ 824, this tribunal cannot reopen the question of whether or not the goods or the vehicle were legally seized. Such a challenge can only be made through the Magistrates’ Courts and any such challenge must be made within one month of the seizure. If no such challenge has been made within that time limit the goods and vehicle are deemed to have been seized lawfully.

23. The question of whether or not the vehicle should be restored is therefore one subject to the discretion of Border Force.

24. The only remedies available through this tribunal are set out in s16 Finance Act 1994, which provides, as far as is relevant, as follows:

**“Appeals to a tribunal**

(1) Subject to the following provisions of this section, an appeal shall lie to an appeal tribunal with respect to any of the following decisions, that is to say—

(a) any decision by the Commissioners on a review under section 15 above (including a deemed confirmation under subsection (2) of that section); and

(b) any decision by the Commissioners on such review of a decision to which section 14 above applies as the Commissioners have agreed to undertake in consequence of a request made after the end of the period mentioned in section 14(3) above.

(2) An appeal under this section shall not be entertained unless the appellant is the person who required the review in question.

(3) ...

(3A) ...

(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) in the 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.

(5) In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal.”

25. Therefore, in accordance with the provisions of s16(4) Finance Act 1994, as set out above, this tribunal has no power to order the restoration of the vehicle as such. The only authority which this tribunal has in such cases is to direct that Border Force carry out a further review, and it can only do that if it finds that the decision of the reviewing officer is flawed.

26. This is generally taken to mean that we can only interfere with it if we believe that the reviewing officer took into account irrelevant information, ignored relevant information, or reached a conclusion that no reasonable officer, if properly directed, could have reached on the facts before them.

27. Importantly, it is not relevant whether or not we would have come to the same conclusions as the reviewing officer. We can only consider whether or not his decision was reasonable.

28. In addition, it is well established that we can only consider the facts as they were at the time the decision was taken. We cannot take into account subsequent events. We can consider facts which existed at the time the decision was taken but which were ignored by the reviewing officer, either at the time of the decision or at the time of the subsequent review, but we cannot take into account new facts.

## **BORDER FORCE POLICY ON RESTORATION**

29. When taking a decision as to whether or not a vehicle carrying seized goods should be restored to the owner Border Force officers are guided by, but not bound by, their internal policy. In this case Border Force helpfully provided a copy of that policy in so far as is relevant in this appeal.

30. Border Force had decided that the driver of the vehicle but not the operator were responsible for the smuggling attempt and they were therefore guided by section B of their policy, as follows:

“B. If the operator provides evidence satisfying Border Force that 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:

(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 for the trade value of the vehicle if lower) except that

(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 in the smuggling attempt (or for the trade value of the vehicle if lower).

(b) On a second or subsequent occasion the vehicle will not normally be restored.”

## DISCUSSION

31. As set out above, this tribunal has only supervisory powers in this situation and can only interfere with the decision of the reviewing officer if it considers that the decision was not one which could reasonably have been arrived at. This test of reasonableness is normally taken to be the *Wednesbury* test, ie, whether or not the reviewing officer took into account something which he should not have taken into account or did not take into account something which he should have taken into account or otherwise reached a decision which no properly directed officer could have reached.

### The Review Decision

32. Mr Collins set out the reasons for his decision in his review conclusion letter, which was dated 12 April 2019.

33. Mr Collins decided that in this case, the driver, but not the operator, was responsible for the smuggling attempt. This led him to consider paragraph B of the Border Force policy on restoration. He therefore asked himself the question as to whether or not the operator took **reasonable steps to prevent drivers smuggling**.

34. In making this assessment Mr Collins took into account the previous seizures, approximately one month earlier, involving the two TvV KFT lorries, both of which involved very significant quantities of cigarettes.

35. Mr Collins confirmed that at the time of making his decision he was aware that TvV KFT and TvV sro were two separate companies but considered that both were under the control of Transbritannia and that for these purposes it was appropriate to consider the three companies as being part of a single entity.

36. Transbritannia had provided evidence to demonstrate the checks which were in place but Mr Collins concluded that in spite of these checks something was clearly going seriously wrong. Mr Collins made reference to the following statements from Transbritannia:

(1) Mr Charousek had been self-employed before joining TvV sro and there was therefore no official confirmation from any other company that employed Mr Charousek previously. (Mr Charousek had been recommended to TvV sro by another driver and no further checks had been made.)

(2) The company was unable to check to see if Mr Charousek had a criminal record, since such searches were not possible under Czech law.

(3) There were no written instructions to drivers that illegal smuggling would be regarded as serious misconduct, although Mr Truhlar had stated that verbal instructions were given to drivers to this effect.

37. Given the serious issues which had arisen only one month previously Mr Collins stated that he would have expected the company to tighten its procedures and looked to have obtained proper references for all employees. He found no evidence that, following the previous seizures, procedures had been tightened up.

38. Taking this into account, and paying particular attention to the previous seizures, Mr Collins therefore came to the conclusion that, on the balance of probabilities, there were not sufficient measures in place to prevent drivers smuggling.

39. Mr Collins then went on to explain that normal policy would dictate that in such circumstances Border Force should offer to restore the vehicle for 100% of the duty evaded,

ie £199,217.85, or the trade value of the vehicle if lower. However, on this occasion, taking what he described as a balanced approach, he decided that he should offer to restore the vehicle for the payment of a fee of £9,960, being 5% of the duty being evaded.

40. He said that he had also looked at the degree of hardship being suffered but decided that no significant hardship in excess of what might be expected to arise from having a vehicle seized by Border Force would arise. He decided therefore that the degree of hardship which might be suffered was not exceptional. TvV sro was making losses, but it had been making losses before the seizure and these losses could not therefore be attributed to the seizure.

41. He therefore considered that the decision at which he had arrived was reasonable and proportionate.

### **Mr Huetter's Submissions**

42. Mr Huetter stated that although Mr Collins had said that the company had not carried out reasonable checks on the driver, he had not said what more Mr Huetter could reasonably be expected to do. The company could not access any criminal records of the driver and in this case the driver had not previously been employed by anyone, and the company could not therefore obtain any references. Mr Charousek had been recommended to the company by another driver who had worked for them for some time, and Mr Huetter therefore believed that he had carried out all the checks which might be considered reasonable in the circumstances.

43. Mr Huetter also said that he considered the system unfair because it penalised the operator of the vehicle, whereas the driver, who had actually been responsible for the smuggling attempt, effectively walked free. He maintained that it was simply not reasonable or realistic to expect the operator to police the activities of a driver.

44. The company had also provided a copy of the driver's contract of employment. Article 7(1) of that contract states that:

“The employee confirms that before signing this employment contract he was informed about the rights and duties following for him from this employment contract, particularly about the labour and wage condition on which he shall do the work, moreover he was properly informed about the regulations for assuring the occupational health and safety and about the legal regulations and internal regulations of the employer he has to observe during his work.”

We note however that this does not contain any specific reference to smuggling.

45. We noted that in the statement from Mr Truhlar, he stated that when Mr Charousek was taken on by the company it was at a time when it was difficult to find drivers for international truck driving.

46. We also noted, and it was confirmed by Mr Huetter, that, following these incidents, the company's employment procedures were changed. Prior to this all drivers, including Mr Charousek, had signed a document stating that they would work in accordance with Czech law and that smuggling migrants into the UK was strictly prohibited and was an offence. This document was however amended after the incidents such that the document also included a reference to the smuggling of tobacco.

47. Mr Huetter asked if Mr Collins had checked to see why both vehicles seized previously had been returned to Transbritannia free of charge, which should not have been the case if the company's procedures had been considered inadequate. Mr Huetter explained that his company had close connections with Border Force at Dover and with officials at the embassy

in Vienna and in the past had given significant information to Border Force about smuggling attempts and he wondered if this had been a factor in those previous decisions.

48. Mr Collins confirmed that he had checked the files concerning the previous seizures but had found no reference to Transbritannia providing information to Border Force and stated that he had no knowledge of such information. He assumed that both vehicles had been restored free of charge because the officer concerned had treated the two seizures as effectively being a single offence and had not therefore been concerned by any pattern of wrongful behaviour.

49. Finally, we noted that, in spite of Mr Huetter's statement that he could not reasonably be expected to do more checks on his drivers, we were not informed of any further incidents involving Transbritannia vehicles since these incidents.

### **Consideration**

50. As set out above we can only interfere with Mr Collins' decision if we consider it to be unreasonable.

51. Mr Collins explained his rationale to us very clearly. He stated that he had been guided by but had not been bound by Border Force policy and indeed, if he had been bound by the policy, he would have offered to restore the vehicle for a fee equal to 100% of the duty evaded, £199,217.85, or the trade value of the vehicle if that was less. In fact he had taken into account proportionality and had offered to restore the vehicle for a fee equal to 5% of the duty evaded, which we considered reflected a very balanced approach. He considered that this fee was sufficient to demonstrate that the company should take action to improve its hiring procedures but that it was not excessive.

52. The questions we need to consider therefore are:

- (1) Was Mr Collins correct to take into account the previous seizures involving TvV KFT, TvV sro's sister company, and
- (2) Was Mr Collins reasonable in coming to the conclusion that the company's checks on its drivers were inadequate.

53. Mr Collins effectively treated the three separate companies, TvV sro, TvV KFT and Transbritannia, as a single unit. Mr Huetter explained that TvV sro and TvV KFT were operationally independent from Transbritannia and should not therefore be treated as a single unit. It was however clear from the statements made by Mr Huetter that, although he was not directly responsible for hiring drivers or the day to day organisation of the subsidiaries, he was very directly responsible for the companies' policies on such matters. Furthermore, all correspondence with Border Force regarding all three seizures had been carried on by Transbritannia and not by the two subsidiary companies.

54. We therefore agree with Mr Collins that it was reasonable for him to treat the three companies as being a single unit for these purposes.

55. Was then Mr Collins reasonable to conclude that there was something seriously wrong with the company's procedures for checking the drivers they employed.

56. Three seizures of very large quantities of excise goods within the space of a little over a month indicates to us a company with serious issues in this area, especially when compared with the company's previously, and subsequently, untarnished record. This seems to show that far from being unable to control his drivers, as Mr Huetter suggested, he has in fact been extremely good at hiring the right drivers. He stated that he took the issue of illegal behaviour very seriously, and this is apparent from the company's record. It may be that



these incidents were the result of the short term difficulties in hiring drivers at that time, which Mr Truhlar mentioned in his witness statement, but other than these three incidents, occurring within the space of a little over a month, Mr Huetter seems to have been very good at hiring drivers and ensuring that they do not act illegally. We must therefore draw the conclusion that Mr Collins was right to consider that the company's procedures for hiring drivers, at least at this time, had been inadequate.

57. We therefore decided that Mr Collins' decision was not one which was arrived at unreasonably and that we should not interfere with it.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

58. 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.

**PHILIP GILLET**

**TRIBUNAL JUDGE**

**RELEASE DATE: 3 DECEMBER 2020**