



TC01499

Appeal number: TC/2010/07237

EXCISE GOODS – Importation in excess of indicative limits – Seizure of vehicle – Refusal to restore vehicle – Reasonableness and proportionality of decision – Appeal dismissed

FIRST-TIER TRIBUNAL

TAX

MARCIN TULIK

Appellant

- and -

DIRECTOR OF BORDER REVENUE

Respondents

**TRIBUNAL: DR K KHAN (Judge)
RICHARD THOMAS**

Sitting in public in London on 9 September 2011

The Appellant in person with an interpreter, Wioletta Rapsiewicz

Mr David Bedenham, Counsel, for the Respondents

DECISION

Introduction

5 1. This is an appeal against the decision of the Respondents of 18 August 2010,
on a review under Section 14 of , and Schedule 5 to, the Finance Act 1994, to uphold
the decision not to restore a seized vehicle. The vehicle was a Chrysler Voyager,
registration number NIL03575 (“the Vehicle”) which was seized by the Respondents
10 on 20 July 2010. The vehicle was used in the carriage of goods that were liable for
forfeiture, namely 17,860 cigarettes on which the evaded excise duty was £2959.58.

Background facts

15 2. On 20 July 2010 at Dover Eastern Docks the Appellant was intercepted by UK
Border Agency (“UKBA”) officers while driving the vehicle. He was returning from
Poland.

20 3. The Appellant stated that he had 20 blocks of cigarettes (4,000) which were
for personal use.

25 4. On searching the vehicle the officer found more than 70 blocks of cigarettes
(over 17,000). The officer asked the Appellant why he said he had 20 blocks when in
fact he had 70 blocks of cigarettes. He said it was because he knew he had too many.
He told the officer that they were for himself and his family.

30 5. The Appellant stayed for an interview and during the interview he was asked
again why he only declared 20 blocks of cigarettes. He said again it was because he
knew he had too many cigarettes and there were too many questions. He said the
cigarettes were for five people consisting of him, friends and family. He was
uncertain about how many cigarettes each person would get but stated that he smoked
three big boxes a week. He also said he had paid approximately £2,000 for the
cigarettes using his own money. He said the other recipients of the cigarettes would
not be paying for their cigarettes.

35 6. The Appellant did not have any open cigarettes on his person. He explained
that his girl friend smokes five packets per week and between himself and his girl
friend the cigarettes would last approximately two months.

40 7. He explained that he worked as a carpenter earning £150 a day although
sometimes he got only £70. He also bought and sold cars. He said that he had no
savings.

45 8. He understood that buying cigarettes in Poland was cheap. A packet of
cigarettes in England cost £6 where as in Poland cost £2.50. He explained that he had
been abroad six or eight times in the previous six months.

9. He said he did not know the guidelines for bringing cigarettes back in the UK and he did not know it was an offence to sell imported cigarettes in the UK without first paying the UK duty.

5 10. He had lived in this country for four years but had received no benefits and last year earned £30,000 but did not know how much tax he had paid.

11. The officer was satisfied that the cigarettes were held for a commercial purpose and not for own use and therefore seized them pursuant to Section 139
10 Customs and Excise Management Act 1979 (“CEMA”) as being liable for forfeiture under both Regulation 88 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 and section 49(1)(a)(i) of CEMA. The car was seized under section 139(1) of CEMA as being liable to forfeiture under section 141(1)(a) because it was used for the carriage of goods liable to forfeiture.

15 12. The vehicle was offered back for restoration on payment of £3,478. The Appellant was issued with a Seizure Information Notice and a Customs Notice 12A (“Goods and/or Vehicles seized by Customs”). The Notice explained that it was possible to challenge the legality of the seizure in a Magistrates Court by sending
20 Customs a notice of claim within one month of the date of the seizure.

13. The legality of the seizure was not challenged and the goods were condemned as forfeit by the passage of time under paragraph 5 of Schedule 3 CEMA.

25 Correspondence

14. On 22 July 2010 UKBA wrote to the Appellant stating that the vehicle would be restored upon payment of £3,478.

30 15. On 22 July 2010 the Appellant wrote to the review officer asking if he could pay a lesser amount for the restoration of the vehicle as he could not afford the amount asked. The review team treated this letter a request for a review and responded in a letter dated 5 August 2010 and confirmed the statutory requirement for review to be conducted by 9 September 2010.

35 16. On 18 August the review officer wrote to the Appellant stating that the vehicle would not be restored, and that the officer at Dover had been wrong to offer to restore the vehicle for a fee, as this was contrary to the Agency’s policy.

40 The Law

17. The relevant legal provisions are as follows:

45 (a) Section 2(1) of the Tobacco Products Duty Act 1979 provides that:

“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.”

5 (b) Regulation 4 of the Excise Goods (Holding, Movement, Warehousing and REDS) Regulations 1992 (“REDS Regulations”) and Regulation 12 of The Tobacco Products Regulations 2001, each as amended by the Excise Goods, Beer and Tobacco Products (Amendment) Regulations 2002, provide that:

10 “(1A) In the case of excise goods [tobacco products] acquired by a person in another Member State for his own use and transported by him to the United Kingdom, the excise duty point is the time when those goods are held or used for a commercial purpose by any person.

15 (1B) For the purposes of paragraph (1A) above –

- 20 (b) “own use” includes use as a personal gift,
(c) if the goods [tobacco products] in question are –
- (i) transferred to another person for money or money’s worth (including any reimbursement of expenses incurred in connection with obtaining them), or
- 25 (ii) the person holding them intends to make such a transfer,

30 Those goods [those tobacco products] are to be regarded as being held for a commercial purpose.

(d) if the goods [tobacco products] are not duty and tax paid in the Member State at the time of acquisition, or the duty and tax that was paid will be or has been reimbursed, refunded or otherwise dispenses with, those goods [those tobacco products] are to be regarded as being held for a commercial purpose.

40 (e) without prejudice to sub-paragraph (c) and (d) above, in determining whether excise goods [tobacco products] are held or used for a commercial purpose by any person regard shall be taken of –

- 45 (i) that person’s reasons for having possession or control of those goods [those products];

- (ii) whether or not that person is a revenue trader (as defined in section 1(1) of the Customs and Excise Management Act 1979);
- (iii) that person's conduct, including his intended use of those goods [those products] or any refusal to disclose his intended use of those goods [those products];
- (iv) the location of those goods [those products];
- (v) the mode of transport used to convey those goods [those products];
- (vi) any document or other information whatsoever relating to those goods [those products];
- (vii) the nature of those goods [those products] including the nature and condition of any package or container,
- (viii) the quantity of those goods [those products] and in particular, whether the quantity exceeds any of the following quantities –

...

3 kilograms of any other tobacco products ...

...

- (ix) whether that person personally financed the purchase of those goods [those products];
- (x) any other circumstance that appears to be relevant [emphasis added].”

Note, the above text is from the REDS Regulations. The text of the Tobacco Products Regulations 2001 is identical except as shown in square brackets above.

(c) Regulation 16 of the REDS Regulations provides that:

“Excise goods, [sic] in respect of which duty has not been paid, [sic] shall be liable to forfeiture where a breach of regulation 6 above (which states that “excise duty shall be paid before the excise duty point”) or any other regulation contained in part IV, V, or VI of these Regulations, or of any condition or restriction imposed by or under such a regulation, relates to those excise goods.”

(d) Section 49(1) of CEMA states:

“Where –

5 (a) except as provided by or under the Customs and Excise Acts 1979, any imported goods, being chargeable on their importation with customs or excise duty, are, without payment of that duty –

10 (i) unshipped in any port,

Those goods shall ... be liable to forfeiture.”

(e) Section 139(1) of CEMA provides:

15

“Anything 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.”

20 (f) Section 141(1) of CEMA states that “... where anything has become liable to forfeiture under the Customs and Excise Acts –

25 (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 become so liable, and

30 (b) any other thing mixed, packed or found with the things so liable,

shall also be liable to forfeiture”.

(g) Section 152 of CEMA establishes that:

35

The Commissioners may as they see fit—

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

(h) Finally, relevant parts of sections 14 to 16 of the Finance Act 1994 provide:

45

Section 14:

“(2) Any person who is –

- 5 (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,
- (b) a person in relation to whom, or on whose application, such as a decision has been made, or
- 10 (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,

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

15 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 –

- 20 (a) confirm the decision; or
- (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.”

25 Section 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 –

- 35 (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;
- 40 (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a further review of the original decision; and
- 45 (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 (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.

10 (6) On an appeal under this section the burden of proof as to –

(a) the matters mentioned in subsection (1)(a) and (b) of section 8 above;

15 (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), shall lie upon the Commissioners; but it shall otherwise be for the appellant to show that the grounds on which
25 any such appeal is brought have been established.”

The Appellant's case

30 18. In the Notice of Appeal dated 17 September 2010, the Appellant stated that he wanted to appeal against the non-restoration of the vehicle.

19. The Notice confirms the following:

35 (a) The Appellant understood the decision contained in the review letter of 20 July 2010 that the vehicle would be restored upon payment of a fee.

(b) The Appellant asked for a reduction or cancellation of the fee.

(c) The Appellant feels discriminated against because he is foreign and does not speak very good English.

40 (d) The Appellant would now like to pay the fee in return for restoration of his vehicle.

45 20. At the hearing the Appellant made several other points. These were relayed to the Tribunal by a friend on the basis that his English was not good enough. These included:

5 (a) He understood that he was doing something wrong but was happy to pay the fee for restoration but only received the review letter two days after the date of payment of the fee. He was informed by phone by an officer of UKBA that he should not pay the fee until he had received the review letter.

(b) He understood that there was a deadline for paying the restoration fee.

10 (c) He has purchased a new car for work purposes.

(d) He refutes the allegation that he had previously brought cigarettes to the UK in excess of the limits without paying duty.

15 (e) He is still paying taxes on the car which is registered in Poland. The UK Border Agency letter of 15 September 2010 which explains that the vehicle is not owned by him has not been accepted by the Polish authorities.

20 The Respondents' submissions

21. The Respondents say that the decision not to restore the vehicle is reasonable and proportionate. The review decision not to offer the vehicle for restoration was one that had been reasonably arrived at for the following reasons:

25 (1) The Appellant did not contest the legality of the seizure and has therefore conceded that the goods were not intended for own use. It is not for the Tribunal to consider own use in these proceedings.

30 (2) If the excise goods were held for profit, the vehicle should not normally be restored unless only a small quantity was involved and it was the first offence, but 17,000 cigarettes is not considered a small quantity.

35 (3) There were no exceptional circumstances which should result in restoration of the vehicle.

(4) The result was fair, reasonable and proportionate in all the circumstances.

40 22. The following points were made by Counsel at the hearing:

45 (1) The Appellant answered all questions as asked by the UKBA officer. This suggests that he had a good comprehension of the English for those purposes.

- 5 (2) The Appellant had another vehicle seized in March 2010 which was restored on payment of the duty. The quantity of cigarettes on that occasion was much less.
- 5 (3) The Appellant confirmed at the time he was stopped by the UKBA that he did not need an interpreter. He understood the questions asked.
- 10 (4) There is no evidence that the Appellant has suffered exceptional hardship as a result of the car being seized. In any event he has an alternative vehicle which he has purchased.
- 10 (5) Whilst there is no way of showing if the Appellant smuggled cigarettes previously, that does not impact upon this decision.
- 15 (6) The fact that the Appellant paid over £2,000 to purchase cigarettes and received no payment from his housemates, to whom the cigarettes were to be distributed, appears irrational.
- 15 (7) The fact that the Appellant is paying car taxes in Poland is not a matter of concern to the UKBA. They have issued a letter stating he does not own the vehicle. This is not a matter which impacts on the reasonableness of this decision.
- 20 (8) The Appellant has changed his story several times. He had said he paid for the cigarettes then for personal use, later they were for housemates who had not provided any money for their purchase.

Discussion

- 25 23. The jurisdiction of the Tribunal is conferred by section 16(4) of the Finance Act 1994. It is limited and allows the Tribunal to consider only whether or not the review decision was reasonable. The Tribunal must look to see whether the person making the decision in question could not reasonably have arrived at it, and if so, to quash the decision and to require that they conducted a further review of the original decision. In order to arrive at a reasonable decision it is important that irrelevant matters are not taken into account and conversely that relevant matters are considered.
- 30
- 35 24. The law makes a distinction between a man who is bringing cigarettes to the UK to distribute to members of his family and friends and for personal use where there is no payment or reimbursement and a person who is bringing cigarettes in order to sell them at a profit. In the latter case, this is smuggling and is not allowed in law without the imposition of penalties.
- 40 25. In this case, the Tribunal believe that the decision arrived at was not unreasonable. It is clear from the evidence that the decision arrived at was reasonable and proportionate in the circumstances. The evidence given by the Appellant was contradictory and unsatisfactory.
- 45 26. The review officer considered all the circumstances surrounding the seizure but correctly did not consider the legality of the seizure itself.

27. The quantity of cigarettes seized was substantial and in this situation, according to policy, the vehicle should not have been offered for restoration. In any event, the Appellant chose not to pay the restoration fee within the time limits which had been set. He was aware of those time limits and is not acceptable for him to say that he was not given an opportunity to pay the restoration fee. It is also not acceptable for him to say that he did not understand the procedure at the Border nor understand the questions which were asked of him by the UKBA officer. At no point did he request a translator and there is nothing in the notes of the officer to indicate that such a request was made.

28. Further there is nothing to suggest that the seizure of the vehicle would give rise to any exceptional circumstances. In fact the Appellant has already purchased a replacement vehicle. He has also been provided with proper documentation to present to the Polish authorities to show that he is no longer the owner of the vehicle and the fact that he has to continue paying taxes on the vehicle in Poland (if true) is not relevant to the officer's decision.

29. The Tribunal notes that the Appellant was a regular traveller who should have been aware of the legal restrictions in importing excise goods for commercial purposes and the process for challenging seizures and excise goods. In fact he stated that he knew that he was committing an offence in having a large quantity of cigarettes. It is clear, from the evidence that these cigarettes were not for own use which was a finding made by the review officer.

30. In the circumstances we find that the decision of the review officer to be reasonable and proportionate and the Appellant had no grounds to substantiate the claim of exceptional hardship. The Tribunal considers that a non-restoration is proportionate for an importation of cigarettes of the quantity involved which were not for own use. Any hardship suffered by the Appellant as a result of the non-restoration was not over and above the normal hardship that would normally be expected in the circumstances.

31. Accordingly the appeal should be dismissed.

32. 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.

DR K KHAN
TRIBUNAL JUDGE
RELEASE DATE: 10 October 2011