



TC01594

Appeal number TC/2010/3911

EXCISE DUTY – RESTORATION OF MOTOR VEHICLE-*large quantities of cigarettes imported which were concealed in the vehicle—cigarettes imported for onward sale at a profit – was the non-restoration of the vehicle proportionate to the Appellants’ contravention? – yes – did the non-restoration create exceptional hardship? – no – was the decision not to restore the vehicle reasonable? – yes – Appeal dismissed.*

FIRST-TIER TRIBUNAL

TAX

MR & MRS REPEC

Appellant

- and -

DIRECTOR OF BORDER REVENUE

Respondents

**TRIBUNAL: MICHAEL TILDESLEY OBE
WILLIAM HAARER**

Sitting in public at The Tribunals Service, 2nd Floor, Keble House, Southernhay Gardens, Exeter EX1 1NT on 10 November 2011

The Appellants did not appear

Matthew Cannings, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

The Appeal

1. The Appellants appealed against the Respondents' decision on review dated 26 March 2010 refusing restoration of BMW 535D motor vehicle, registration number PN55 ZTJ¹.

2. The grounds of Appeal were as follows:

(1) The Appellants had made a mistake with the importation of the cigarettes and did not intend to repeat the same mistake.

(2) The seized vehicle was the only asset they owned which they intended to sell to pay off their rent arrears.

(3) The Appellants did not consider that they should receive the same harsh treatment as that applied to criminal groups which made a living from illegal smuggling.

Issue in Dispute

3. On 28 January 2010 Border Agency Officers at Ramsgate Ferry port stopped the Appellants who were in their vehicle with Mr Repec as the driver. The Appellants advised the Officers that they had been in Poland stopping with their family and were now travelling back to Exeter where they both worked. When questioned Mr Repec stated that there was no alcohol, tobacco or cigarettes in the vehicle. The Officers searched the vehicle and discovered cigarettes concealed in the doors. Mr Repec accepted that he had put the cigarettes in the doors and then denied that there were any further excise goods in the vehicle. The Officers advised Mr Repec that they would be continuing with their search of the vehicle, at which point Mr Repec stated that there were further cigarettes in various bags located in the vehicle. The Officers found a quantity of 59,100 cigarettes in the vehicle. The Officers seized the vehicle and the cigarettes and issued the Appellants with various Notices which explained their rights to challenge the seizure.

4. On 28 January 2010 the Appellants applied for restoration of the vehicle which was refused on 24 February 2010. On 23 March 2010 the Appellants applied for a review of the non-restoration decision. On 26 March 2010 Mrs Hodge conducted the review and confirmed the decision not to restore the vehicle.

5. The issue was whether Mrs Hodge's refusal of restoration of the vehicle was a decision which no reasonable body of Commissioners could have arrived at. In order for the decision to have been reasonable Mrs Hodge must have considered all relevant matters and must not have taken into consideration irrelevant matters.

¹ The Review Decision letter dated 26 March 2010 gives the registration number as DN 55 ZTJ not PN55 ZTJ which was the registration number cited in the other documents.

The Hearing

6. The Appellants did not attend the hearing. The Respondents advised the Tribunal that the Appellants had been intercepted by Officers of the Border Agency on 31 October 2011 when they gave their address as 14 Greenlea Crescent, Southampton
5 SO16 2PG. At the time they were stopped the Appellants was driving another vehicle which was registered in their name.

7. The Respondents applied for the Appeal to be heard in the Appellant's absence. The Tribunal after hearing representations and examining the facts decided to proceed with the hearing in accordance with rule 33 of the Tribunal Rules 2009.

10 8. The Tribunal was satisfied that the Appellants had been duly notified of the hearing because:

(1) On 20 July 2011 the Tribunal informed the Appellants of the hearing by letter posted to 35 Polsloe Road, Exeter EX1 2HW, which was an address given by the Appellants.

15 (2) The Appellants have not informed the Tribunal of a change of address since February 2010 when they said they had moved temporarily to 163 Magdalen Road, Exeter. The Respondent's statement of case was originally posted to the Appellants at the Magdalen Road address but was returned marked *gone away*.
20 The only other address given by the Appellants was the one at 35 Polsoe Road, Exeter where subsequent correspondence from the Tribunal and the Respondents have been sent, and not returned.

(3) The Southampton address had only recently come to light from the Respondents' enquiries. There was no information about when and if the Appellants moved to Southampton, and no written communication from the
25 Appellants that this was their new address.

(4) Under rule 13(5) of the 2009 Tribunal Rules the Tribunal is entitled to assume that an address provided by a party is and remains the address to which documents should be sent until receipt of written notification to the contrary.

30 9. The Tribunal decided that it was in the interests of justice to proceed with the hearing because:

(1) The Appellants' case as set out in their Notice of Appeal was not strong.

(2) The Respondents were in a position to proceed with the hearing with their witness present.

35 (3) The Appellants have the safeguard that they may apply for the decision to be set aside, although there is no guarantee that such an application if made would be granted.

The Jurisdiction of the Tribunal

10. The Respondents' power regarding restoration of goods and vehicles which have been forfeited or seized is set out under section 152(b) of the Customs and Excise
40 Management Act 1979. Once the power is exercised whether in the form of a positive

decision to restore on terms or a refusal to restore, the person affected has a right of appeal to the Tribunal. The powers of the Tribunal are limited in the terms set out in section 16(4) of Finance Act 1994 which provides that:

5 “confined to a power, where the Tribunal are satisfied that the Commissioners or other person making the 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;
- 10 b) to require the Commissioners to conduct, in accordance with the directions of the Tribunal, a further review of the original decision;
- 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 that decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of unreasonableness do not occur when comparable circumstances arise in future”.
- 15

11. The precondition to the Tribunal’s exercise of one or more of its three powers, namely, that the person making a decision could not reasonably have arrived at it, 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:

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“.....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”.

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12. The Tribunal is entitled to make its own findings on the primary facts which are to be taken into account by the Respondents when exercising their powers regarding restoration of goods. The findings of fact include blameworthiness and the proportionality of the penalty imposed to the policy aims pursued having full regard to the individual circumstances of the case. The Tribunal, however, has no fact finding jurisdiction for the purpose of challenging the legality of the seizure and forfeiture of the goods. The Tribunal will then apply its findings of fact to determine whether the Respondents acted reasonably in refusing restoration.

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Findings of Fact

35 13. The Tribunal makes the following findings of fact:

- (1) On 28 January 2010 the Respondents seized the Appellants’ motor vehicle and the 59,100 cigarettes which were found in the vehicle.
- (2) The Appellants have not appealed to the Magistrates’ Courts against the legality of the seizure of the excise goods (cigarettes), and as a result those goods are condemned as forfeit to the Crown.
- 40 (3) The excise duty due on the cigarettes was £9,578.

(4) The value of the vehicle seized was £19,100.

(5) The quantity of cigarettes seized was 10 times the indicative quantity of cigarettes for personal use of two persons.

(6) The value of the cigarettes was worth over £16,000 in the UK shops.

5 (7) There were at least 15 different brands of cigarettes in the consignment seized.

(8) The cigarettes were concealed in the door panels of the vehicle.

(9) The Appellants lied on two occasions about the existence of cigarettes in their vehicle to the Respondents' Officers when stopped.

10 (10) The Appellants knew that they were doing something wrong which was confirmed in their letter to the Respondents dated 28 January 2010.

14. Since the Appellants have not appealed against the seizure, the Tribunal is required to assume that the cigarettes were imported for a commercial purpose. The question then is whether the importation was on a profit or a not for profit basis. The
15 Tribunal considers the large quantity of cigarettes imported and the extensive range of brands were strongly indicative of a commercial importation for profit. This conclusion was confirmed by the Appellants' actions of concealing the cigarettes and lying to the Officers which demonstrated that the Appellants knew that they were doing something wrong. The Tribunal is, therefore, satisfied that its findings
20 supported Mrs Hodge's determination that the Appellants' importation of cigarettes was a commercial one for profit.

15. Given the finding of an importation for profit the Tribunal considers that the non restoration of the vehicle was a proportionate response to the Appellants' contravention despite the facts that this was their first *offence* and the value of the
25 vehicle exceeded the value of the duty evaded. Support for the Tribunal's view on proportionality is found in the Court of Appeal decision in *Lindsay v Customs and Excise Commissioners* [2002] EWCA Civ 267 where at paragraph 63 Lord Phillips said:

30 "Those who deliberately use their cars to further fraudulent commercial ventures in the knowledge that if they are caught their cars will be rendered liable to forfeiture cannot reasonably be heard to complain if they lose those vehicles. Nor does it seem to me that, in such circumstances, the value of the car used need be taken into consideration. Those circumstances will normally take the case beyond
35 the threshold where that factor can carry significant weight in the balance. Cases of exceptional hardship must always, of course, be given due consideration".

16. The Tribunal finds that the Appellants put forward no grounds to support a finding of exceptional hardship. The Tribunal agrees with Mrs Hodge's view that the
40 loss of the vehicle was a necessary consequence of the Appellants' unlawful actions and did not constitute exceptional hardship.

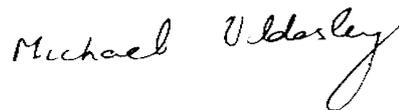
17. The Tribunal is satisfied that Mrs Hodge carried out a thorough review of the circumstances of the Appellants' importation of cigarettes. The Tribunal found no evidence that she relied upon irrelevant considerations. The Tribunal's own findings of fact supported her conclusions that there were no exceptional circumstances to justify restoration of the vehicle and that the cigarettes were purchased by the Appellants for onward sale at profit. The Tribunal is satisfied that Mrs Hodge addressed the issue of proportionality in her review decision and applied the law correctly. The Tribunal's findings of fact support her conclusion that the non-restoration of the vehicle was proportionate. The Tribunal agrees with Mrs Hodge's assessment that there were no circumstances justifying exceptional hardship.

Decision

18. The Tribunal is satisfied for the reasons set out above that the Respondents' decision on review dated 26 March 2010 refusing restoration of BMW 535D motor vehicle, registration number PN55 ZTJ, was reasonably arrived at within the meaning of section 16(4) of the Finance Act 1994. The Tribunal, therefore, dismisses the Appeal.

19. A party who was not present at the hearing may apply for the decision to be set aside, provided an application is made in writing to the Tribunal and is received no later than 28 days after the date on which the Tribunal sent notice of the decision.

20. 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.



TRIBUNAL JUDGE
RELEASE DATE: 22 November 2011