



TC02098

Appeal number: TC/2011/03603

TYPE OF TAX – s. 16 Finance Act 1994 – was Reviewer’s decision not to restore vehicle reasonable – yes.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

KENNETH DAVISON

Appellant

- and -

UK BORDER AGENCY

Respondents

**TRIBUNAL: JUDGE ALISON MCKENNA
IAN ABRAMS**

Sitting in public at Bedford Square on 17 May 2012

The Appellant appeared in person

Ms Holmes of counsel, instructed by the Director of Border Revenue, appeared for the Respondents

DECISION

1. This appeal concerns Mr Davison's application to the United Kingdom Border Agency ("UKBA") for restoration of his vehicle, namely a Citroen Picasso, which was seized at Coquelles, France on 10 January 2011. Customs officers had searched the vehicle and found it to contain 18.5 kilograms of rolling tobacco which, as we heard, was sufficient to roll some 33,000 cigarettes, and the importation of which should have attracted customs duty of £2397.42.

2. UKBA's decision not to restore Mr Davison's vehicle was reviewed on 18 April 2011 and it follows that this was an appeal against the review decision of that date. The Tribunal's jurisdiction in such an appeal is derived from s 16 (4) of the Finance Act 1994 which provides that, in order to succeed, the Appellant must satisfy the Tribunal that the reviewer could not reasonably have arrived at the review decision. If the Tribunal decides that the decision was unreasonable it may direct that the reviewer's decision ceases to have effect and/or require UKBA to conduct a further review of the decision not to restore.

3. The legality of the seizure of the vehicle was not challenged by Mr Davison in the Magistrates Court. Consequently it was deemed to have been duly condemned as forfeited. The legality of the seizure and the deemed forfeiture was not an issue before us in these proceedings.

The Facts

4. The Tribunal heard that Mr Davison was stopped by customs officers at Coquelles on 10 January 2011. He was in the company of a Mr Woods and they told officers that they had been on a "recce" to visit Royal Marine graveyards with a view to bringing new recruits to visit them on a later date. Both gentlemen told the customs officers that they were in possession of substantially less tobacco than proved to be the case. Mr Davison said in interview that 5 packets of tobacco were for himself; 4 were for Jeff Rock and 2 were for Sandra or Susan Robinson, a work colleague. He said he would pass the tobacco on at cost price and would be reimbursed for his petrol. Mr Woods had also stated that some of the tobacco was for himself and some for others.

5. The Citroen (of which Mr Davison was the registered keeper) was seized on the basis that it had been used for the carriage of goods liable to forfeiture. Mr Davison was issued with the standard form telling him that he could challenge the legality of the seizure in the Magistrates Court within one month. Mr Davison did not proceed to a Magistrates Court hearing and accordingly the vehicle was deemed forfeit and its ownership passed to the Crown.

6. Mr Davison wrote to UKBA requesting the restoration of the vehicle. Restoration was refused and Mr Davison asked for a review of that decision, as he was entitled to do. The review decision of 18 April 2011 was carried out by UKBA officer Ian Sked. The letter of that date communicating the decision to Mr Davison

sets out the factors taken into account, including the initial statements of Mr Wood and Mr Davison that they each only had four or five packets of tobacco; the larger quantity found in the vehicle when it was searched; the explanations given for the importation and the later explanation given in correspondence. He considered the individual circumstances of Mr Davison and had regard to the HMRC policy document on restoration of vehicles. He concluded that this was a case of smuggling for profit, with a substantial amount of tobacco involved and the aggravating feature of dishonestly by those who imported it. He concluded that if Mr Davison had not been intercepted on this occasion it was likely that the smuggling activity would have continued and that it was proportionate in all the circumstances not to restore the vehicle. He finally concluded that there were no humanitarian grounds for restoration.

7. By the time of the appeal hearing in May 2012 Mr Sked was on sick leave and we heard evidence from UKBA officer Mr Brenton, who had acquainted himself with Mr Davison's case and had adopted Mr Sked's witness statement of 13 February 2012. Mr Davison had been notified in advance that Mr Brenton would be giving the evidence in his appeal and had not objected to this.

8. Mr Brenton's evidence to the Tribunal was given on oath. He told us that the review decision not to restore the vehicle to Mr Davison was in accordance with UKBA policy. He explained that the relevant factors pointing to non-restoration were the quantity of the tobacco (which suggested that it was being imported for a commercial purpose) and the aggravating features of the dishonesty of Mr Davison and Mr Woods when questioned by officers. Mr Sked and Mr Brenton had both formed the view that the explanation given by Mr Davison and Mr Woods that they had been on a "recce" for a war graves visit for new recruits and had purchased the tobacco for family and friends on a non-commercial basis was not a credible explanation. The two men had not only given inconsistent accounts of where they had been but were also unable to recall the locations of the war graves they said they had visited. Furthermore, Mr Davison had also been unsure of the name of a woman for whom he said he had purchased the tobacco; there had been a suggestion from Mr Davison in interview that his petrol money would have been paid for by those for whom he imported the tobacco, which rendered the enterprise a commercial one. Mr Davison had also stated that some of the tobacco was for his personal consumption but he had declined the opportunity to smoke when offered it during his detention and had no smoking paraphernalia (such as a lighter) in his pockets when stopped so this was not believed. The relatively short duration of the visit (a 4 hour round trip) also suggested that it had been undertaken for the sole purpose of purchasing the tobacco.

9. Mr Brenton told us that he had also considered, in line with UKBA's policy, whether exceptional hardship would arise as a result of the forfeiture of the vehicle. He produced documentary evidence to show that four vehicles were registered at Mr Davison's address, of which the Citroen was one. He agreed with Mr Sked's decision that there were no humanitarian issues which suggested the vehicle should, exceptionally, be restored in this case.

10. Mr Davison gave evidence to the Tribunal on oath. He told us that he was currently employed as a security guard at the Norton Fitzwarren Royal Marines base

near Taunton. He had himself been a Royal Marine and had received both long service and good service medals. He accepted that 18.5 kilograms of tobacco had been in his vehicle, but said that he had not been aware of what was in Mr Woods' bag in the boot. He said he had known that Mr Woods had purchased some tobacco but he had not realised how much. He said he had been annoyed with Mr Woods when he realised how much tobacco he had placed into the vehicle but that the customs officer had not recorded this in his notes. He had, in later correspondence, attributed blame to Mr Woods for importing the majority of the tobacco. He said that one of the four vehicles referred to as registered to his address had been borrowed after the seizure of the Citroen Picasso. He explained that he was still paying the monthly finance payments for the Citroen which had been seized. He told the Tribunal he was sorry to have caused inconvenience but that the loss of the Citroen was causing him hardship and he wished it to be restored.

11. Mr Davison told the Tribunal he would like to apologise to the UKBA for having initially given the wrong name of the woman for whom he had purchased tobacco. He said she was the friend of a friend and he had been unsure of her name. He had subsequently written to UKBA with her correct name. Mr Davison told us that they had looked at some war graves but that he had not known the names of the places where they were located as he had focussed on the route. He said he had been confused and could not pronounce the names of the places they had been. He denied that the tobacco had been imported for a commercial purpose. He said he had been being "flippant" when he told the customs officer that he would be paid his petrol money and there had in fact been no agreement to this effect.

12. In the hearing before us Mr Davison did not produce any evidence, such as letters from the others said to be involved, to confirm his story. He did not in particular produce any evidence from the persons for whom he said he had purchased the tobacco on a non-commercial basis. He did not produce any evidence from Mr Woods or otherwise to substantiate the alleged purpose of the trip, indeed he said that he had told no one at work about his intentions in that regard.

30 *The Law*

13. UKBA has discretion under s 152(b) of the Customs and Excise Management Act 1979 to restore anything that has been forfeited or seized. The Finance Act 1994 provides a mechanism for appealing against an exercise of discretion not to restore. As noted above, s 16(4) of the Finance Act 1994 provides that

35 (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 [HMRC] or other person making that decision could not reasonably have arrived at it, to do ne or more of the following, that is to say –

40 (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 [HMRC] to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and

5 (c) in the case of a decision which has already been acted upon 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 [HMRC] as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in the future.

10 14. UKBA's policy is generally to restore private vehicles used for improper importation. However, its policy is not to restore such vehicles where there are aggravating features, including where the quantity of improperly imported rolling tobacco exceeds 6 kilograms and where the importation is considered to be for profit. This is subject to any exceptional circumstances of hardship.

15 15. Ms Holmes submitted that the test of reasonableness was one essentially derived from *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 namely that the Tribunal must ask itself whether the reviewer's decision was one that no reasonable reviewer could have come to because the reviewer had taken irrelevant matters into account, had not taken relevant matters into account, or had
20 made an error of law. We accept that submission.

16. The case law in relation to the restoration of seized goods was recently reviewed by the Upper Tribunal (Tax and Chancery Chamber) in *HMRC v Jones* [2010] UKUT 116 (TCC). The Upper Tribunal in that case reviewed the earlier authorities, including the Court of Appeal's decision in *Gascoine v Customs and Excise Commissioners* [2004] EWCA Civ 1162, in which it was confirmed that as forfeiture
25 potentially interferes with the Appellant's rights to property under article 1 to the First Protocol of the European Convention on Human Rights, issues of proportionality were a relevant consideration for the Tribunal. This means that, although each case must be considered on its facts, there must be a reasonable relationship of
30 proportionality between the means employed and the aim pursued by UKBA in forfeiting the vehicle.

Conclusion

17. Mr Davison did not, in his appeal before us, provide any evidence which would lead us to conclude that UKBA's decision not to restore the vehicle was unreasonable.
35 We concur with the reviewer's conclusion that the stories of Mr Davison and Mr Woods' stories were not credible and with his conclusion that, in the absence of any credible explanation, the motivation of the trip reasonably appeared to be that of obtaining tobacco for commercial sale. We take into account the relatively large amount of tobacco in the vehicle. We note that if the purpose of the trip was a
40 "recce" for a future visit with new recruits then Mr Davison would have needed to be able to find his way back to the graves he said he had visited and probably also to produce an itinerary for those concerned. He was clearly unable to do so. We conclude that because Mr Davison and Mr Woods both told untruths to the officers when stopped that they were in fact engaged in a joint enterprise in relation to the

importation of the total amount of tobacco. We do not accept that Mr Davison was tricked by Mr Woods, as he suggested in later correspondence. We note that Mr Davison told the officer that he would be paid for his petrol and agree with the reviewer's conclusion that this was a commercial factor. We were not satisfied by Mr Davison's later description of that statement as "flippant" and conclude that this was a relevant factor for the reviewer to take into account.

18. We have, as we are required to do, considered the issue of proportionality in this case. We note the value of the vehicle was said to be around £ 16,000 and that Mr Davison has not yet finished paying for it. We note that the customs duty due on the imported tobacco was substantially less than the value of the vehicle, however we take into account the likely profit to be made from importation of a large quantity of rolling tobacco for commercial purposes. We consider that the aim of preventing commercial importation without the payment of duty and of interrupting the onward sale of the tobacco, with associated future loss of duty, makes the non-restoration decision in this case proportionate. We do not find that there are any grounds of exceptional hardship for setting aside the review decision.

19. In all the circumstances we consider that UKBA's review decision of 18 April 2011 was reasonable and shall stand.

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.

**ALISON MCKENNA
TRIBUNAL JUDGE**

RELEASE DATE: 22 June 2012