



TC02078

Appeal number: TC/2011/04111

EXCISE DUTY – Restoration appeal – excise goods (alcohol) purchased from a cash and carry in the UK and found in a vehicle transporting them within the UK – whether the decision not to offer the vehicle for restoration was unreasonable – held on the facts it was not – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PREMIL FERNANDO

Appellant

- and -

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

**TRIBUNAL: JUDGE JOHN WALTERS QC
MRS JO NEILL**

Sitting in public in London on 28 March 2012

**The Appellant appeared in person
David Bedenham, Counsel, for the Respondent**

DECISION

Introduction

- 5 1. The appellant, Mr Premil Fernando (“Mr P Fernando”) appeals against a decision (“the Review Decision”) of the Respondent Commissioners (“HMRC”) by Mr J. Harris (Higher Review Officer), dated 30 March 2011, to uphold on review a refusal to restore Mr P Fernando’s Volkswagen Transporter, registration number DK 54 HPX (“the Vehicle”).
- 10 2. The Vehicle was seized on 23 February 2011 together with 1,341.12 litres of mixed beer and 162 litres of wine (“the Excise Goods”) which were found in it.
3. The legality of the seizure of the Vehicle has not been challenged, and cannot be challenged in this appeal. This is made clear by authority binding on this Tribunal (*Commissioners for HM Revenue and Customs v Jones and Jones* [2011] EWCA Civ 824). The jurisdiction of this Tribunal on an appeal against a decision not to restore a vehicle is conferred by section 16, Finance Act 1994 and is limited to considering whether that decision could not have been reasonably arrived at.
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The evidence

- 20 4. We heard oral evidence from Mr P Fernando, Mr Joseph Fernando (“Mr J Fernando”), his passenger on 23 February 2011, Police Constable Jeffery Rice, and HMRC Officer Edward Keith Ward. We had before us witness statements made by PC Rice, Officer Ward and Officer Harris (who made the Review Decision), Higher Officer Louise Bines adopting Officer Harris’s decision made on 30 March 2011, and a letter dated 18 January 2012 signed by Mr J Fernando. We also had before us a bundle of documents. We outline the relevant evidence below, which we accept unless indicated otherwise.
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5. Mr P Fernando owns and runs a small retail business in Bristol called ‘Corner News’. The business sells alcohol among other things. Mr Fernando usually buys alcohol for the business from one or more cash and carry outlets in the Bristol area.
- 30 6. However, on 23 February 2011 he went, in the Vehicle, with Mr J Fernando as his passenger, from Bristol to London. He said he went to London to see his friend Manoj who lives in Southall. In London he heard (from his friend Manoj) that there was a cash and carry outlet in Barking where alcohol could be obtained cheaply. He said he was keen to purchase stock and went to Barking (a long distance from Southall) to a cash and carry outlet called Imageway Cash & Carry Ltd. in Creek Road, Barking (“Imageway”). There he purchased the Excise Goods for cash (takings from his business) and obtained till receipts for them. He asked for a VAT receipt but the staff at Imageway refused to give him a VAT receipt because he did not have with him documentation showing that he was registered for VAT. Also, the purchase took place when the staff at Imageway were closing the cash and carry. Mr P Fernando loaded the Excise Goods into the Vehicle and drove away, intending to return to Bristol.
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7. At 9.52 p.m. Mr P Fernando in the Vehicle was stopped on the westbound carriageway of the M4 motorway near Membury Services by PC Rice of the Wiltshire Constabulary. The reason PC Rice stopped the Vehicle was that it appeared to him to be overloaded. PC Rice spoke to Mr P Fernando, who was the driver of the Vehicle, and, on checking the Vehicle found the Excise Goods which were weighing it down. He escorted the Vehicle to a weighbridge at Badbury in Wiltshire and at 10.16 pm on the same day weighed the Vehicle on the weighbridge and found it to be overweight. PC Rice's evidence is that Mr P Fernando had told him that he had purchased the Excise Goods from Linx Cash & Carry Ltd ("Linx") (another cash and carry also in Creek Road, Barking) but was unable to produce any paperwork for the Excise Goods and was 'not very sure of the address of 'Links' Cash and Carry only knowing that it was in Barking' (a quotation from PC Rice's witness statement).

8. Because of this, PC Rice contacted HMRC and, as a result of his conversation with one Sue Turner of HMRC, PC Rice detained the Vehicle and the Excise Goods on behalf of HMRC.

9. Mr P Fernando's evidence is that he did not mention Linx Cash & Carry Ltd to PC Rice. Mr J Fernando's evidence is that he (*i.e.* Mr J Fernando) mentioned Linx Cash & Carry Ltd to PC Rice by mistake and the cash and carry where the Excise Goods were bought was actually Imageway. He had said 'Linx' because he had seen the name. (Creek Road, Barking is not a long road and Officer Ward confirmed in his evidence that the premises of Imageway and the premises of Linx are close to each other in Creek Road.)

10. On 24 February 2011 Mr P Fernando returned to Barking to try (without success) to obtain a VAT invoice for the Excise Goods from Imageway.

11. On 3 March 2011 at 12.20 p.m. Officer Ward attended a secure storage site in Swindon, to which the Vehicle and its contents had been removed. He made a tally of the Excise Goods within the Vehicle as follows:

25 cases (containing 24 cans) of Stella Artois

2 cases of Carling

15 cases of Holsten

2 cases of Guinness Draught

6 cases of Zwlec

2 cases of San Miguel

7 cases of Grolsch

28 cases of Fosters

2 cases of Tennants Super

- 2 cases of Heineken
- 18 cases of 1664
- 3 cases of Special Brew
- 7 boxes (containing 6 bottles) of Blossom Hill California Soft & Fruity Wine
- 5 2 boxes of Lindemans Rosé
- 7 boxes of Echo Falls Rosé
- 6 boxes of Echo Falls Red
- 7 boxes of Echo Falls White
- 2 boxes of Gallo Rosé
- 10 4 boxes of Hardys White

12. Later on 3 March 2011 Mr P Fernando advised Officer Ward that he was going to appeal for the restoration of the Vehicle but not the Excise Goods. Officer Ward advised Mr P Fernando that the Vehicle could not be restored because of the quantity of Excise Goods involved and he would receive a letter advising him of HMRC's
15 decision, which he could appeal. Officer Ward issued Mr P Fernando with a Seizure Information form together with Notice 12A (What you can do if things are seized by HM Revenue & Customs) and a 'Warning' notice (Form C 162 (Duplicate)).

13. Later on the same day (3 March 2011) Mr P Fernando faxed a letter to Officer Ward's office stating that the Excise Goods had been purchased from Imageway,
20 giving the address as Creek Road, Barking. He stated in the letter:

'After the purchase when I made the payment I asked for the VAT receipt and they refused to make one because I didn't have my VAT registration with me. And they agreed to give me the VAT receipt if I bring the VAT registration the following day. When I refused to take the goods without the VAT receipts they refused to refund the money I have paid and I didn't have a
25 choice but had to bring the goods with me to Bristol as it was the closing time for the Cash & Carry.

After the incident I went back to the Cash & Carry for the VAT receipt and they refused to give me that because I mentioned them [*sic*] I needed that for the Custom [*sic*].

I only got the cash receipt with me and I can not provide you the VAT receipts due to that
30 reason.'

14. Mr P Fernando also provided to Officer Ward a till receipt for 7 cases of Blossom Hill White, 7 cases of Echo Falls Red and 14 cases of Echo Falls Rosé totalling £399, and a till receipt for 2 cases of Guinness Draught totalling £35. These till receipts (copies of which were before the Tribunal) were incomplete, not showing the name or
35 any other details of the seller, but showing sales on 23 February 2011 at 6.05 p.m. (in the case of the Guinness Draught the receipt appears to show 5.05 p.m., but no point

was taken on this by Mr Bedenham, for HMRC). Mr P Fernando said in evidence that these were the only till receipts he could find to provide to HMRC and suggested that others might have been left in the Vehicle. No other till receipts were shown to the Tribunal.

5 15. We notice that whereas 7 boxes of Blossom Hill wine, 7 boxes of Echo Falls Red and 2 cases of Guinness Draught were included in the tally made by Officer Ward, only 7 boxes of Echo Falls Rosé (not 14) were included in that tally.

16. Mr P Fernando supplemented his letter of 3 March 2011 with one dated 4 March 2011.

10 17. On 7 March 2011, Higher Officer M.A. Parr of HMRC wrote to Mr P Fernando stating his decision not to restore the Vehicle, having regard to the departmental policy and informing him that he could request a review of the decision. Mr P Fernando did this, and the result was Officer Harris's letter dated 30 March 2011 containing the Review Decision against which the appeal is brought.

15 18. HMRC's policy was described by Officer Harris as being a general policy not normally to restore vehicles used for the improper importation or transportation of excise goods, which was intended to be robust to protect legitimate UK trade and revenue and prevent illicit trade in excise goods.

20 19. Officer Harris described the general policy as being to seize smuggled excise goods, and any vehicle used to smuggle or transport them.

25 20. Exceptions to the general policy of non-restoration were stated to be when an individual has goods seized for the first time and the quantity is no more than three times the 'guide levels' (the guide level for beer is 110 litres) then a seized vehicle can be restored after payment of a sum equivalent to 100% of the total revenue evaded on the forfeited goods. Also given as instances where restoration would be considered were cases where there was an ongoing need of the vehicle for a specific humanitarian purpose (which were not relevant to the present case).

30 21. Officer Harris stated that he was guided by the policy but considered every case on its individual merits, examining all the representations and other material available to HMRC both before and after the time of the original decision (by Officer Parr). Officer Harris stated that he was of the opinion that Mr P Fernando's individual circumstances did not merit the return of the Vehicle 'in regard to any exceptional hardship or any humanitarian issues'. He stated that he did not regard either the inconvenience or the expense of Mr P Fernando being deprived of the Vehicle as
35 exceptional hardship over and above what one should expect. He endorsed Officer Parr's decision not to offer the Vehicle for restoration because (a) Mr P Fernando was not able to produce any paperwork for the load to the police, (b) the beer in the Vehicle was well over 3 times the guide levels (1341 litres as compared to 330 litres), and (c) the cash receipts later supplied were for a different cash and carry to the one
40 originally advised to the police.

The submissions

22. Mr Bedenham submitted that HMRC had had regard to all the circumstances (especially that no paperwork had been produced to Officer Rice in relation to the Excise Goods in the Vehicle and that the till receipts eventually provided by Mr P Fernando were incomplete) in reaching the conclusion that the Excise Goods were not duty-paid and were accordingly liable to seizure. He emphasised that the legality of the seizure was not in issue in the appeal and the Excise Goods must therefore be taken to have been legally seized on the basis that they were not duty paid and were held by Mr P Fernando for a commercial purpose (*viz*: they were intended to be used as stock in his business).

23. Mr Bedenham submitted that the question of restoration was a matter for the discretion of HMRC and that the policy implemented had been approved by the Court of Appeal in *Lindsay v Customs and Excise Commissioners* [2002] 3 All ER 118. He submitted that the evidence showed that Mr P Fernando was not wholly blameless and ought to have known that something was amiss, even if (which HMRC did not accept) he did not in fact know that anything was amiss. He referred us to the Tribunal decision in *Aykut Ates v Commissioners of Customs and Excise* (2002) Decision 00188, where the appeal was allowed but where (at [20]) the Chairman, Dr Avery Jones, had examined the question of proportionality in the context of restoration cases and had observed that ‘when dealing with owner-drivers we fully understand the logic of the preventative effect of a policy of “use it and you will lose it”’. He submitted that Mr P Fernando, as a man in the business of retailing *inter alia* alcohol, needed to be, and ought to have been, mindful of the danger of buying duty-free alcohol for his business. He had run a risk and, having been found out, he ought not reasonably to expect the restoration of the Vehicle. He submitted that the question to be answered by the Tribunal was whether HMRC had acted reasonably in concluding that Mr P Fernando was not entirely innocent and had not taken all reasonable care to avoid dealing in duty-free goods.

24. Mr P Fernando’s case was that this was not a case of smuggling at all. He had bought the beer and wine genuinely (i.e. not thinking they were duty-free) from Imageway. He had not had papers with him to prove the purchase, to give to PC Rice because Imageway had refused to give him a VAT invoice in the circumstances described. In any event, this was his ‘first offence’ and he was suffering exceptional hardship in the way of serious prejudice to his business and finances.

Discussion and Decision

25. We do not accept Mr P Fernando’s arguments that this was not a case of smuggling at all. A consequence of this Tribunal not having jurisdiction to investigate the legality of the seizure is that we must take the Excise Goods as having been legally seized – *i.e.* that they were legally seized on the basis that they were not duty-paid, in other words, that they were smuggled.

26. We agree with Mr Bedenham that the question for us is whether in refusing to restore the Vehicle, Officer Parr and Officer Ward had reasonably concluded that Mr P Fernando was not entirely innocent and had not taken all reasonable care to avoid dealing in duty-free goods.

27. The general policy of non-restoration of private vehicles in which duty-free excise goods held for a commercial purpose are found is a reasonable policy for HMRC to adopt given the need for vigilance to protect the revenue and legitimate trade in alcohol in the UK. Mr P Fernando as early as 3 March 2011 advised Officer Ward that he would not seek restoration of the Excise Goods. This was before they had been condemned as forfeit and this fact, in the Tribunal's judgment, indicates at least a degree of suspicion on Mr P Fernando's part that the Excise Goods were indeed duty-free (and not duty-paid).

28. The significance of this is not in relation to whether in fact the Excise Goods were duty-free (a fact that, as we have said, we have no jurisdiction to investigate) but is in relation to Mr P Fernando's state of mind regarding the possibility of duty having not been paid on the Excise Goods. We consider this fact is evidence of Mr P Fernando accepting at this early stage that there was a real possibility, even probability, that the Excise Goods were not duty-paid. We find as a fact that Mr P Fernando had doubts about the duty-paid status of the Excise Goods.

29. We ask ourselves why this was. We consider on the balance of probabilities that it was because he had not been able to get satisfactory documentation in relation to the sale of the Excise Goods from the cash and carry warehouse. We accept that he attempted to get a VAT invoice and that his attempts were thwarted as he said (on 23 February 2011 because he could not show documentation to the effect that he was VAT-registered, and on 24 February 2011 because the warehouse refused to cooperate when they learned he needed a VAT invoice for HMRC's purposes). But we find as a fact that he took the Excise Goods from the warehouse with incomplete and highly unsatisfactory documentation in the form of (some) mutilated till slips. As a business man of experience, he must be taken to know the importance of getting receipts for significant purchases. The purchase of the Excise Goods was significant on any reckoning. Yet all he obtained were (some) till slips which did not have the name of the selling warehouse on them.

30. Furthermore, the only till receipts which we have seen were for only a small part of the purchase of the Excise Goods and were not even consistent with Officer Ward's tally – we refer to 7 boxes of Echo Falls Rosé being included in the tally, and one of the till receipts referring to 14 cases of Echo Falls Rosé. We cannot attribute much (if any) weight to the possibility that there were other (and better) till receipts in the Vehicle when it was seized – it was Mr P Fernando's business (and in his interest) to keep safe all till receipts.

31. We do not attach significance to the confusion over whether Mr P Fernando had bought the Excise Goods from Imageway or Linx. Both, apparently, were cash and carry warehouses on the same short street in Barking and it is understandable that Mr P Fernando (or Mr J Fernando) may have made a mistake in telling PC Rice that the Excise Goods had been bought from Linx, and not Imageway. The precise name of the warehouse was probably not important to Mr P Fernando at the time.

32. But we conclude for the reasons given above that we cannot find Officer Harris's decision not to offer the Vehicle for restoration to have been unreasonable. He

reasonably concluded (particularly from the evidence of the till receipts) that Mr P Fernando was not entirely innocent and had not taken all reasonable care to avoid dealing in duty-free goods. Further, he reasonably concluded that (as we find) there were no exceptional circumstances in play which would have required a departure from the general policy of non-restoration. The financial and physical inconvenience of being deprived of the Vehicle cannot rank as an exceptional circumstance for these purposes.

33. For these reasons, we dismiss the appeal.

Information relative to appealing this Decision

34. 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 findings of this decision notice.

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**JOHN WALTERS QC
TRIBUNAL JUDGE**

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RELEASE DATE: 14 June 2012