



TC02108

Appeal number: TC/2011/07313

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

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

LEADSHAM TRADING COMPANY LIMITED Appellant

- and -

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

**TRIBUNAL: JUDGE ALISON MCKENNA
SHEILA CHEESMAN**

Sitting in public at Bedford Square on 11 June 2012

Gary Leadsham, a director of Leadsham Trading Company Limited, appeared for the Appellant

Victoria Forbes of counsel, instructed by the Director of Border Revenue, appeared for the Respondents

DECISION

Background

5 1. This appeal concerns the Appellant company's application for the restoration of a commercial vehicle, namely a Renault magnum unit and a Gray and Adams tri axle trailer ("the vehicle") belonging to the company. The vehicle had been stopped by officers of the United Kingdom Border Agency ("UKBA") at Dover on 15 December 2010 and found to contain 7,676,796 cigarettes which would attract customs duty of
10 £1,498,740.10.

2. There was some disagreement between the parties as to whether the driver of the vehicle was given a form telling him of his rights and how to apply for the restoration of the vehicle. In any event, Mr Leadsham contacted the relevant authorities and requested the restoration of the vehicle on 17 December 2010. There
15 followed a correspondence between Mr Leadsham and the UKBA, which we refer to below, culminating in a decision not to restore the vehicle. Mr Leadsham asked for the decision to be reviewed, as he was entitled to do.

3. UKBA's decision not to restore the vehicle was reviewed on 5 July 2011 and it follows that this was an appeal against the review decision of that date. The
20 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
25 decision not to restore.

4. The legality of the seizure of the vehicle was not challenged by Mr Leadsham 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.

30 5. Mr Leadsham told the Tribunal that the vehicle had already been sold. Ms Forbes explained that unfortunately this sometimes happens, even though restoration proceedings were pending. She explained that, if the appeal were successful and there was a decision to restore the vehicle, UKBA would undertake to pay the Appellant the value of the vehicle in lieu of restoration.

35 6. The Tribunal reserved its decision.

The Facts

7. The Tribunal heard that on 15 December 2010 at Dover Eastern Docks, a Mr Richard Dennis was intercepted whilst driving the vehicle on behalf of Leadsham Trading Company Limited. The vehicle documentation showed that it was carrying
40 33 pallets of dried food goods. However, an examination of the vehicle showed that it

contained almost 8 million cigarettes. On questioning, Mr Dennis told the UKBA officers that he had not been present during the loading of the vehicle, but that he had placed his own seal and padlock on the trailer after loading and had seen the pallets at the rear of the trailer.

5 8. Mr Dennis had produced a “CMR” (a consignment note required by the Carriage of Goods By Road Act 1965, confirming certain particulars) for the load, showing the collection and delivery addresses; he had no delivery note, invoice or packing list. Mr Dennis told officers that this was the first time he had collected goods from this particular address (although in his subsequent interview he said he had
10 picked up from there on a previous occasion) and he said that the vehicle had been empty on the outward journey.

9. The vehicle was seized on the basis that it had been used for the carriage of goods liable to forfeiture. There was no challenge to the legality of the seizure in a Magistrates Court hearing and accordingly the vehicle was deemed forfeit and its
15 ownership passed to the Crown.

10. Mr Leadsham (and a firm of solicitors instructed on his behalf) corresponded with UKBA, requesting the restoration of the vehicle and providing information about the company’s relationship with its drivers. The information provided by Mr Leadsham was that he does not have written contracts with his drivers; he takes up
20 employment references on them verbally; he makes no checks on the consignor or consignee; and he did not think it was possible to prevent smuggling.

11. Mr Leadsham was initially informed by letter dated 8 June 2011 that restoration would be made on condition of payment of £5,800. Mr Leadsham asked for a formal review of that decision. The review decision of 5 July 2011 was carried out by
25 UKBA officer Mr Raymond Brenton, who refused restoration. The letter of that date communicating the decision to Mr Leadsham sets out the factors taken into account in making that decision. These included the lack of appropriate checks made by the company on its drivers, the absence of clear contractual terms to the effect that smuggling would result in dismissal and the fact that Mr Leadsham had admitted in
30 correspondence being “reckless” in this regard; the absence of checks on business customers; the lack of documentation (including any invoice) regarding the contract with this consignor; the failure of the driver to make basic checks on the load (the cigarettes were said to be clearly visible and not concealed); the fact that this was an uneconomic journey in view of the fact that there was no outward load; and that the
35 revenue involved was more than £50,000.

12. The letter of 5 July informed Mr Leadsham that UKBA policy in these circumstances allowed for the discretionary restoration of the vehicle if there was evidence of basic reasonable checks having been carried out by the operator and/or driver to confirm the legitimacy of the load, to detect any illicit load and if the
40 operator was found to be neither responsible for nor complicit in the smuggling. In this case, he had concluded that neither the operator nor the driver had carried out basic checks. The review decision concluded that this was a case of smuggling for profit, involving the use of a commercial vehicle containing a substantial number of

cigarettes, and that the company was on the balance of probabilities either responsible for, or complicit in, the smuggling.

13. Mr Brenton's oral evidence to the Tribunal was given on oath. He confirmed that he had had regard to the HMRC policy document on restoration of vehicles and that his review decision not to restore the vehicle was in accordance with that policy. Mr Brenton was asked by the Tribunal what evidence he had taken into account in concluding that it was uneconomic for the vehicle to have made the outbound journey without a load. He said that this was based on his own experience of the transportation industry. He also told us he had never come across a haulier who had carried out so little in the way of checks.

14. 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 had considered whether there were humanitarian grounds for restoration. Mr Leadsham had informed UKBA in correspondence that he has a disabled daughter. Mr Brenton concluded that this was not a factor to be taken into account in respect of a commercial vehicle rather than a family car and concluded that there were no exceptional humanitarian grounds for restoration in this case.

15. Mr Leadsham also gave oral evidence to the Tribunal on oath. He told us that he is the managing director of the company. The other director is his daughter and the shareholders are himself, his wife and his daughter. He told us that he had been in the transport industry since he was 19 years old and had refused to become involved in smuggling because he had to care for his disabled daughter. He told us he was a member of the Road Haulage Association and received their guidance materials regarding the risks of smuggling.

16. Mr Leadsham said that he had taken a reference for Mr Dennis the driver from his own brother and did not need anything in writing. He had (after these events) produced a note to drivers warning them not to smuggle goods, but had not routinely asked them to sign to acknowledge receipt of the note (there was no designated space for a signature on the sample note he produced to the Tribunal) but he thought some drivers had signed. He said the documents for the vehicle in question here were retained within it so he did not have access to them. He had produced an e mail confirming the collection and delivery addresses sent from the freight forwarder. He told us that in the "real world" with a small business (4 vehicles) it was not unusual only to have an e mail confirmation by way of documentation for a contract. In this case he said there was no need for the e mail to detail the goods or the contract price because it merely confirmed a telephone conversation and he had written on the e mail the price agreed (£765). He said he trusted his customer. He said that in an ideal world the driver would watch the loading of the vehicle but health and safety rules usually meant he could not do so. He denied that the cigarettes were plainly visible and said that the driver had made a note of a discrepancy between the number of pallets on the documentation and the number of pallets loaded (this documentation was not in evidence before us).

17. With regard to the industry knowledge that Mr Brenton said he relied upon in relation to whether the outward journey was uneconomic, Mr Leadsham told us that in his view Mr Brenton knows nothing about the haulage industry. He told us that it is quite normal for empty vehicles to go across the Channel and return with goods and whilst it was not as profitable as he would like it to be, it was not uneconomic. He said the reality was that if you didn't ship out empty you would never work and that perhaps 50% of the time his vehicles leave the country empty.

The Law

18. 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

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

(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.

19. The test of reasonableness which the Tribunal must consider is 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 made an error of law. The Tribunal did not, accordingly, admit fresh evidence in the appeal hearing.

20. 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 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 proportionality between the means employed and the aim pursued by UKBA in forfeiting the vehicle.

5 **Conclusion**

21. We bear in mind the fact that it is the review decision itself which is capable of appeal to this Tribunal and not the terms of the letter in which that decision was communicated. We find that the review decision was based upon relevant facts and took appropriate account of policy guidelines.

10 22. There were, however, certain respects in which the Tribunal found itself disquieted by Mr Brenton's letter of 5 July. Firstly, his letter refers to the seizure of another vehicle belonging to this company on 10 February 2011. This event post-dated the relevant facts in this case and does not seem to us to be a relevant consideration in respect of the restoration of this vehicle. We note that the policy
15 provides for the fact of an earlier seizure to be taken into account in any subsequent restoration decisions, but not for subsequent seizures to be taken into account in considering a first occasion seizure. Secondly, whilst we accept that Mr Brenton's opinion that the outward journey with no load was uneconomic was based on his own industry experience, it seems to us that the evidential basis for such a conclusion
20 should have been made clear if it was to be taken into account and should have been explained to Mr Leadsham in the letter. Finally, we were concerned by some of the language in Mr Brenton's letter: "*your recklessness knows no bounds*" and "*your willful recklessness is a façade to disguise your complicity*" are not, in the Tribunal's view, appropriate terms to be included in a formal letter. We note that the inclusion
25 of immoderate language carries with it the risk of disturbing a sound decision through the appearance of bias. Having considered these matters carefully, we conclude that these factors do not serve to undermine the reasonableness of the decision itself which is based on relevant factors and addresses the key points without the need to take into account these three factors.

30 23. 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 £14,000. The revenue involved was some £1.5 million. 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
35 case proportionate. We do not find that there are any grounds of exceptional hardship for setting aside the review decision.

24. In all the circumstances we consider that UKBA's review decision of 5 July 2011 was reasonable and shall stand.

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25. 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.

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**ALISON MCKENNA
TRIBUNAL JUDGE**

RELEASE DATE: 28 June 2012

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