



TC02259

Appeal number: TC/2011/02232

TYPE OF TAX – s. 16 Finance Act 1994 – was Reviewer’s decision to restore vehicle on payment of its trade value reasonable – yes.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SENASIS PILIAKALNIS UAB

Appellant

- and -

UNITED KINGDOM BORDER AGENCY

Respondents

**TRIBUNAL: JUDGE ALISON MCKENNA
CAROLINE DE ALBUQUERQUE**

Sitting in public at Bedford Square on 7 September 2012

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

The Appellant did not appear.

DECISION

The Appellant's Non-Attendance at the Hearing

1. The Appellant did not attend the hearing listed for 7 September 2012. Although a firm of solicitors acting on the Appellant's behalf initially contacted UKBA in August 2010, subsequent correspondence had come from the Appellant directly and the Notice of Appeal had been filed by the Appellant company and indicated it would be representing itself. The Tribunal's letter to the Appellant's given address in Lithuania, notifying it of the hearing date, had been returned with a mark which the Tribunal was told meant "gone way". E mails from the Tribunal to the Appellant's given e mail address had bounced back as non-deliverable. Ms Forbes informed the Tribunal that UKBA had not heard from the Appellant with regard to the hearing.

2. The Tribunal considered rule 33 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 together with its overriding objective under rule 2 and concluded that reasonable steps had been taken to notify the Appellant of the hearing (by contacting it at the address given) and that it would be in the interests of justice now to proceed to hear the appeal in its absence.

Background

3. This appeal concerns the Appellant company's application for the restoration of a commercial vehicle, namely a VW Crafter van ("the vehicle"). The vehicle had been stopped by officers of the United Kingdom Border Agency ("UKBA") at Dover Ferryport on 9 July 2010 and found to contain 432,000 cigarettes which would have attracted customs duty of £69,564.

4. Initially, UKBA decided not to restore the vehicle. The Appellant asked for the decision to be reviewed, as it was entitled to do. Representations were made by the company in a letter dated 6 January 2011 to the effect that the driver had taken all reasonable steps to prevent smuggling and had no knowledge of the presence of cigarettes in the load. The Appellant contended that the company was an innocent party in this matter.

5. UKBA's decision not to restore the vehicle was reviewed on 18 February 2011, taking into account the representations made. A fresh decision was made to restore the vehicle on terms as to payment of £7,375.00 which was the trade value of the vehicle. It follows that this is an appeal against the review decision of that date.

6. 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.

7. The legality of the seizure of the vehicle was not challenged by the Appellant in the Magistrates Court. Consequently the legality of the seizure and the deemed forfeiture was not an issue before us in these proceedings.

The Facts

8. The Tribunal heard that on 9 July 2011 the vehicle was intercepted at Dover whilst being driven on behalf of the Appellant company. The vehicle documentation showed that it was carrying grass seed. However, an examination of the vehicle showed that it contained 432,000 cigarettes.

9. The “CMR” (a consignment note required by the Carriage of Goods By Road Act 1965, confirming certain particulars) for the load, showed the collection address as an Agricultural Institute in Poland and the delivery addresses as a garden centre in Boston Lincolnshire.

10. 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 ownership passed to the Crown.

11. As noted above, initially restoration of the vehicle was refused, but this decision was altered on review. The review decision of 18 February 2011 was carried out by UKBA officer Mr Sked. The letter of that date to the Appellant sets out the factors taken into account in making that decision. The letter also informed the Appellant that UKBA policy in these circumstances allowed for the discretionary restoration of the vehicle on terms as to payment 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 neither the driver nor the operator were found to be responsible for or complicit in the smuggling. In this case, the officer had concluded that, as neither the haulier nor the driver were responsible, and as this was the first occasion of smuggling by the Appellant, the vehicle could be restored on payment of the value of the vehicle or the 20 % of the lost revenue, whichever was the lower. In this case the value of the vehicle was the lower sum. The review acknowledged that there was discretion to restore the vehicle without requiring payment, but stated that this discretion was not being exercised because there was no evidence that satisfactory checks had been carried out on the identities of the consignor or consignee.

12. Officer Brenton attended to give oral evidence to the Tribunal as Officer Sked is on sick leave. Officer Brenton’s evidence was given on oath. He confirmed that he agreed with Officer Sked’s decision, having regard to the policy document on restoration of vehicles. He confirmed that the review decision was in accordance with that policy. He stated that a basic check on the internet had shown him that the Agricultural Institute in Poland was dedicated to scientific research and did not appear to sell seeds. One phone call by Officer Sked to the garden centre had confirmed that they were not expecting the consignment of grass seed from Poland. He told the

Tribunal that these were the sort of basic checks that UKBA expected hauliers to make in order to prevent smuggling.

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 or to restore on terms as to payment. 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.

14. 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.

15. 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.

16. Ms Forbes informed the Tribunal that if UKBA's decision was upheld by the Tribunal then the vehicle would be held for a period of 45 days before being disposed of, unless the required payment were received.

Conclusion

17. We find that the review decision dated 18 February 2011 was based upon relevant facts and took appropriate account of policy guidelines.

18. We have, as we are required to do, considered the issue of proportionality in this case. We note the value of the trade vehicle was said to be £7,375. The lost revenue involved was over £69,000. 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 decision to restore the vehicle on payment of the value of the vehicle only a proportionate decision. There is no evidence of exceptional hardship for setting aside the review decision.

19. In all the circumstances we consider that UKBA's review decision of 18 February 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: 13 September 2012