



TC02338

Appeal number: TC/2012/05770

EXCISE DUTIES – restoration – reasonableness of decision on review not to restore vehicle and trailer after initial decision to restore subject to payment of the duty – whether driver and haulier complicit in attempted smuggling – whether haulier taken appropriate steps to discourage smuggling – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DANNY MCCONNELL
t/a DONEGAL EXPRESS FREIGHT LIMITED **Appellant**

- and -

DIRECTOR OF BORDER REVENUE **Respondent**

TRIBUNAL: JUDGE MALCOLM GAMMIE CBE QC
CAROLINE DE ALBUQUERQUE

Sitting in public at Bedford Square, London WC1 on 22 October 2012

Mr Ian Stebbings of Counsel instructed by Altion Limited for the Appellant

Ms Vicky Hale of the UK Border Agency for the Director

DECISION

The seizure of the vehicle

- 5 1. On 14 March 2012 at Dover Eastern Docks, Marc Uinsin Mac Laibheartaigh (or
Mark Vinceni Mac Clafferty) was intercepted by Officers of the Respondent while
driving a vehicle with registration Ooke4144 pulling trailer unit AS12. Its load was
manifested as beer and the vehicle belonged to the Appellant.
- 10 2. The vehicle was searched and this revealed some 49.6 Kg of hand-rolling tobacco
in the two spare tyres on the trailer and inside two fire extinguishers in the driver's
cab. The Respondent's Officer was satisfied that the tobacco was held for
commercial purposes and that excise duty had been sought to be avoided.
Consequently the Officer seized the tobacco. He also seized the vehicle as liable to
15 forfeiture under section 141(1)(a) Customs and Excise Management Act 1979
("CEMA") in that it had been used for the carriage of goods liable to forfeiture.
3. The Appellant did not challenge the forfeiture of the vehicle in the Magistrates
Court. As a result the goods and vehicle were condemned as forfeit by virtue of
paragraph 5 of Schedule 3 of CEMA.

The initial decision to restore the vehicle on payment of the duty

- 20 4. At the time of the seizure on 14 March 2012 the Officers concerned issued a
Seizure Information Notice (BOR156), which was signed by Mr Laibheartaigh. At
the same time they issued a letter stating that the vehicle would be restored on
payment of the evaded duty of £7,534.24. The letter stated that if on any future
occasion the vehicle was detected carrying goods that were liable to forfeiture, the
25 vehicle might not be restored. The letter went on to say that if the Appellant did not
agree with the decision, he could write to request a formal Departmental review,
setting out the reasons why he did not agree with the decision.
5. On 21 March 2012 the Appellant's representative wrote to the address provided in
the UKBA's letter of 14 March 2012 requesting a review of the decision only to
30 restore the vehicle on payment of the evaded duty. Restoration was sought either for
no payment or for a lesser payment. This was on the basis that the Appellant was not
at fault in the matter.

The refusal to restore the vehicle on review

- 35 6. The UKBA acknowledged the Appellant's request for a review on 23 March
2012. The UKBA's letter indicated that if the Appellant had any further evidence or
information that he would like to provide in support of his review request, he should
send it to the Review Officer. It noted that if he did not take this opportunity, the
evidence or information in question would not be taken into account in the review.
- 40 7. On 27 April 2012 Mrs Helen Perkins, the Reviewing Officer, wrote
communicating her decision on review. She concluded that the decision to restore the
vehicle for a fee of £7,534.32 should be varied to one of non-restoration.

8. Mrs Perkins' letter ran to 16 pages (with appendices). After setting out the facts of the seizure, she set out the UKBA's restoration policy for commercial vehicles. This emphasised that each case is considered on its individual merits to decide whether exceptions should be made. Subject to that point, the basic policy is that a vehicle adapted for smuggling will not normally be restored. Otherwise, the policy depends upon who is responsible for the smuggling attempt: whether it is neither the operator nor the driver; the driver, but not the operator; or the operator.

9. Mrs Perkins concluded that, on the balance of probabilities, the Appellant and Mr Laibheartaigh were complicit in the smuggling attempt. This was based on a number of factors, the principal ones being as follows—

(1) The same driver and vehicle had been intercepted twice before, on 10 May 2011 and 28 June 2011, on both occasions with undeclared goods.

(2) On three other occasions, namely, on 24 August 2011, 25 October 2011 and 22 February 2012, the Appellant's vehicles had been seized in respect of improper importations.

(3) The failure to take reasonable steps to prevent his drivers from smuggling.

10. Mrs Perkins indicated that if the Appellant had any fresh information that he would wish her to consider, he should write to her. In response to that invitation, the Appellant's representative wrote again on 31 May 2012 enclosing a letter from Mr Laibheartaigh in which he stated that, "I own and take full responsibility for all tobacco seized with this trailer". Mrs Perkins reconsidered the matter and on 14 June 2012 wrote to the Appellant's representative confirming her previous decision. It is against her decision on review that the Appellant appeals.

The Appellant's evidence

11. The Appellant gave evidence and was cross examined by Ms Hale. Based on his witness statement and oral testimony we record the following material that is of relevance to our decision—

(1) Mr McConnell is a self-employed haulage contractor based in County Donegal in Ireland. He operates three vehicles. He used to drive vehicles himself but he no longer does so. When he is engaged by a customer to transport goods he contacts a driver and gives them instructions to collect and deliver the goods in question.

(2) Other than Mr Laibheartaigh, the basis on which Mr McConnell finds and engages drivers was not explored in evidence. Mr McConnell had known Mr Laibheartaigh for some time and they lived in the same area. It appears that Mr Laibheartaigh was engaged as a 'freelance' driver. There was no written contract of engagement.

(3) Mr McConnell explained that all drivers were given verbal instructions regarding the job they were being engaged to perform. Mr McConnell's business was conducted from his home and he had no staff although he received a small amount of administrative assistance on a part time basis from his daughter.

5 (4) He said that as a small businessman he did not have the financial resources to run his business differently, in particular to provide written contracts or otherwise produce written instructions for drivers. We observe, however, that apparently he did have the financial resources to replace the several vehicles that had been seized and not restored (see paragraph 9 above). He also agreed in answer to one of Ms Hale's questions that it would not have involved a significant commitment of resources to produce written contracts, instructions or other written materials for drivers.

10 (5) Mr McConnell said that he was fully aware of the strict rules and regulations involved in transporting goods. He also said that he ensured that all drivers engaged by him were fully briefed before setting off, including the need to check the trailer to ensure that it is properly sealed and also ensuring that the paperwork is correct. He said that he warned
15 drivers that they must not pick up any other goods.

(6) In relation to the vehicle and journey in question, he asked Mr Laibheartaigh to collect goods for a Turkish customer from Calais and deliver them to the UK warehouse. He knew Mr Laibheartaigh well. In his witness statement Mr McConnell said that he had worked with Mr
20 Laibheartaigh "over the past year" but it seems that he had known Mr Laibheartaigh for some longer time. He also said in his witness statement that he had never had any problems with Mr Laibheartaigh. It appeared, however, that on 28 June 2011 Mr Laibheartaigh had been stopped in the same vehicle. Excise goods were found and the vehicle seized. On that
25 occasion the vehicle had been restored on payment of the duty. Mr McConnell said that Mr Laibheartaigh had paid him the necessary amount that Mr McConnell had used to recover the vehicle.

(7) Mr Laibheartaigh had also been stopped in the same vehicle on 10 May 2011 and was found to have a small amount of dutiable goods in excess of
30 those declared (4.3kg of hand-rolling tobacco as against 3kg declared). On that occasion the Respondent's Officers had only issued Mr Laibheartaigh with a warning and had allowed him to proceed. Mr McConnell said that Mr Laibheartaigh had never told him of this incident.

(8) As regards the 28 June 2011 incident, Mr McConnell had spoken to Mr
35 Laibheartaigh and had received an assurance that it would not happen again. Mr McConnell said that he believed that Mr Laibheartaigh was an honest and trustworthy individual. He had not sought references before engaging him as a driver because he had known him long enough to make an assessment of his character. A reference from another employer would
40 have added nothing to his knowledge of the man. However, since the incident on 14 March 2012 Mr McConnell had not used him as a driver and had only seen him on two occasions: on 15 March, when Mr Laibheartaigh had informed him of the seizure and subsequently when he obtained the letter from Mr Laibheartaigh admitting responsibility for the
45 attempted smuggling.

(9) As regards the three other seizures referred to in paragraph 9(2) above, these all concerned other drivers. Mr McConnell said that he regarded the

seizures of 24 August 2011 and 25 October 2011 as illegal seizures. That of 22 February 2012 was being contested.

(10) Finally, Mr McConnell said that his livelihood depended upon the vehicles and that the loss of the vehicle and trailer was therefore causing him hardship.

The Respondent's evidence

12. For the Respondent Mrs Helen Perkins gave evidence and was cross examined by Mr Stebbings. For the most part Mrs Perkins confirmed the reasons for varying the original decision and refusing restoration as set out in detail in her letter of 27 April 2012. Her reasons were framed by reference to the Respondent's stated policy. We set this out below. Here, we note the following from her evidence—

(1) Mrs Perkins considered that she had taken into account everything that was known to her at the time and that was relevant to her consideration of the matter. She believed that she had reached a reasonable conclusion, even though that varied the original decision and, unusually, involved the withdrawal of the offer to restore the vehicle for payment.

(2) She had noted in particular where the tobacco had been concealed and the fact that it would have taken time to conceal the tobacco in that manner. Access to the vehicle would also have been needed to recover the goods if the attempted smuggling had been successful. She therefore considered it a reasonable conclusion that the driver and the Appellant were complicit in the attempted smuggling.

(3) She accepted in cross-examination that the indicators used to assess whether an operator had taken reasonable steps to prevent a driver from smuggling could never guarantee a non-smuggling outcome if, for example, a driver just ignored the terms of his contract or any instructions that he was given. She believed, however, that if the recommended steps were taken it would reduce the risk of smuggling. In the present case, the particular factors that she had taken into account were the absence of any written contracts and of any reasonable steps to deter smuggling, the fact of the additional seizures and the high value of the goods involved.

(4) As regards the seizure on 22 February 2012, she had taken this into account (even though it was still being contested). She was not the reviewing officer for that case and had not looked at the detail of that case or the earlier seizures beyond informing herself of the basic facts of the seizure, such as what goods had been seized and the amounts involved. She had assumed from the fact of seizure that there had been some attempt at smuggling.

(5) Finally, as regards hardship, Mrs Perkins' letter of 27 April 2012 had noted that considerable inconvenience could result from the seizure and that some hardship was a natural consequence of the seizure. No specific hardship case had been made at the time of her review although her letter had noted that *exceptional* hardship would have to be shown to secure restoration free of charge as the Appellant was seeking.

The law

13. Neither party thought it necessary to make submissions on the law involved in this case. Section 152(b) of CEMA provides that the Respondents may, as they see fit, restore subject to such conditions, if any, as they think proper, any thing forfeited or seized. On review section 15 Finance Act 1994 allows the reviewing Officer to uphold, vary or cancel the original decision. From that review an appeal lies to this Tribunal. Section 16(4) Finance Act 1994 provides that:

“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 the Commissioners 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 the Commissioners to conduct, in accordance with the directions of the tribunal, a further review of the original decision; and

(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 the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.”

14. For the Tribunal to be able to exercise in connection with the current appeal its powers outlined in paragraph 13 above it must first be satisfied that Mrs Perkins could not reasonably have arrived at the decision she did on review not to restore the Appellant’s vehicle seized on 14 March 2012. This involves considering whether Mrs Perkins took into account some irrelevant matter or ignored some relevant matter or otherwise erred in law in arriving at her decision or reached a decision that no reasonable person could have reached. In this connection Mr Stebbings did not seek to attack the basic policy in these matters to which Mrs Perkins had regard in reaching her decision.

Our conclusion

15. The Respondent’s policy in these matters depends upon who is responsible for the smuggling attempt. In the present case, Mr Laibheartaigh has admitted responsibility and the only issue is whether Mr McConnell was complicit in the smuggling attempt or not. The difference in policy between these two is as follows:

“B: If the operator provides evidence satisfying UKBA that the driver, but not the operator, is responsible for or complicit in the smuggling attempt then:

(1) If the operator also provides evidence satisfying the UKBA that the operator took reasonable steps to prevent drivers smuggling then the vehicle will normally be restored free of charge unless:

5 (a) The same driver is involved (working for the same operator) on a second or subsequent occasion in which case the vehicle will normally be restored for 100% of the revenue involved in the smuggling attempt (or for the trade value of the vehicle if lower) except that

(b) If the second or subsequent occasion occurs within 6 months of the first, the vehicle will not normally be restored.

(2) Otherwise,

10 (a) On the first occasion the vehicle will normally be restored for 100% of the revenue involved (or the trade value of the vehicle if lower).

(b) On a second or subsequent occasion the vehicle will not normally be restored.

15 C: If the operator fails to provide evidence satisfying UKBA that the operator was neither responsible for nor complicit in the smuggling attempt then:

(1) If the revenue involved is less than £50,000 and it is the first occasion, the vehicle will normally be restored for 100% of the revenue involved (or the trade value of the vehicle if less).

20 (2) If the revenue involved is £50,000 or more or it is seized on a second or subsequent occasion within 6 months, the vehicle will not normally be restored.”

16. The hearing of an appeal in which the Appellant gives evidence and is cross-examined will tend to identify facts that were not available to the Reviewing Officer at the time of the review. In the present case, however, there appears to be nothing of
25 significance that emerged in Mr McConnell’s evidence to undermine the basis upon which Mrs Perkins approached the matter. Despite what he said in his witness statement, Mr McConnell had first-hand experience of at least one previous smuggling attempt by Mr Laibheartaigh. The most that might be said is that Mr McConnell chose to accept Mr Laibheartaigh’s word that Mr Laibheartaigh would not
30 attempt to smuggle goods again. If he was not complicit, he was to be disappointed.

17. Even if we accept the propositions that the recommended steps to prevent drivers smuggling can never be an absolute deterrent and that Mr McConnell ordinarily spoke to drivers to warn them against smuggling, Mrs Perkins could still reasonably conclude that Mr McConnell had taken no reasonable steps to prevent smuggling.
35 Paragraph B(2)(b) of the policy would then indicate that the vehicle will not be restored. If on the other hand having regard to the manner in which the tobacco was concealed Mr McConnell was complicit in the smuggling attempt, paragraph C(2) of the policy would lead to the same result.

18. A contrasting case to the present one is *Logistika Peklaj AS* (TC02041) [2012]
40 UKFTT 355 (TC). That case illustrates the type of reaction to a driver’s smuggling attempt that was sufficient for this Tribunal to conclude that the reviewing Officer’s decision should be set aside and a new review conducted. The scale of the haulage company’s operation in that case was larger than Mr McConnell’s business, but Mr McConnell’s business still appears to be sufficiently successful to have survived

several vehicle seizures and every haulage business of whatever size has to conduct its operations within the framework of the known rules and policy guidelines or otherwise bear the risks involved in this type of business.

5 19. We are therefore unable to conclude that Mrs Perkins misdirected herself or that she otherwise arrived at a conclusion that no reasonable person could reach. We accordingly dismiss the appeal.

10 20. We noted at the hearing that Mr McConnell is in a worse position by having exercised his right of review than if he had accepted the initial decision to restore the vehicle on payment of the duty. Mr Stebbings accepted that the Reviewing Officer's power to vary the initial decision included the power to vary it by reaching a less favourable conclusion. In this respect, Mr Laibheartaigh's answers to questions when the vehicle was seized meant that the Officers who issued the first decision would not have been in possession of all the facts regarding previous seizures that were available to Mrs Perkins on review. For his part, Mr McConnell would have known those facts and therefore the potential risk involved in seeking a review. Nevertheless, we think that it would be appropriate if the UKBA's literature referred explicitly to the possibility that on review restoration may be refused, even if initially offered, if the facts justify such a conclusion.

15 21. 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.

30 **MALCOLM GAMMIE CBE QC**
TRIBUNAL JUDGE

RELEASE DATE: 26 October 2012