



**TC02883**

**Appeal number: TC/2012/09165**

***EXCISE DUTY – Commercial Vehicle seized – Whether £5,000 fee was within range of reasonable decisions? – Yes in the circumstances***

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**D &W TRANSPORT SERVICES**

**Appellant**

**- and -**

**DIRECTOR OF BORDER REVENUE**

**Respondents**

**TRIBUNAL: JUDGE ADRIAN SHIPWRIGHT  
CAROLINE D'ALBUQUERQUE**

**Sitting in public at 45 Bedford Square, London WC1B 3DN on 4 June 2013**

**Douglas Smith, principal for the Appellant**

**Rupert Jones, counsel, instructed by the Director of Border Revenue for the Respondents**

# DECISION

## Introduction

1. This decision concerns the appeal by D & W Transport Services (“the Taxpayer”) against the Respondents’ decision on review to restore the vehicle (“the Vehicle”) described below only on payment of a fee of £5000.
2. The decision on review was notified to the Taxpayer by letter dated 4 September, 2012. It is this decision that is the subject of this appeal.

## Background

3. There was no real dispute as to the factual background. We had the advantage of hearing from Mr. Doug Smith, the principal of the Taxpayer and Officer Brian Rayden of the Border Force who was the officer who carried out the review. We are grateful to them for what they said and their assistance in this matter.
4. The documents and the witness evidence together were the evidence before us.

## The Issue

5. The issue in this appeal is whether the decision by HMRC to restore the Vehicle only on the payment of a fee of £5000 falls within the range of reasonable decisions which could reasonably have been arrived at and not outside that spectrum.

## The Law

6. This case comes before as under sections 14 - 16 FA, 1994.
7. The Tribunal’s powers in this context are limited to those set out in the statute. The Tribunal has no inherent jurisdiction as to fairness etc. merely what it is given by statute.
8. Essentially the decision on review stands unless “... The Tribunal are satisfied that the... person making that decision could not reasonably have arrived at it”. It does not matter whether the Tribunal would have reached a similar conclusion itself. The question is whether the decision was within the range of decisions that could reasonably be arrived at.
9. If the Tribunal is satisfied that it was not a decision that could be reasonably arrived at it has certain specific powers but no other powers.
10. There is no jurisdiction for the Tribunal to consider the legality of the seizure and accordingly we have not consider that matter.
11. The only issue before us is as set out above.

## Factual matters

12. From the evidence we make the following findings of fact.

13. A Renault tractor unit and curtainsider trailer (together “the Vehicle”) was seized in the UK Control Zone at Coquelles, France on 27 February, 2012.

14. There were no condemnation proceedings in respect of the Vehicle.

5 15. At the time of the seizure of the Vehicle it was being operated by A & R Haulage (“A&R”).

16. Mr. Smith of the Taxpayer wrote to the Respondents asking for the Vehicle to be restored. This was because the Taxpayer was the owner of the Vehicle.

10 17. Mr. Smith’s produced copies of the Vehicle Registration Document for the tractor unit and the invoice for the purchase of the trailer as evidence of title. The title to the Vehicle was not a matter in dispute before us.

18. The Respondents had sought to deal in the first instance with A & R. However, the Respondents received no response from A & R.

19. The Respondents sought details of A & R and why they were using the Vehicle and what due diligence had been carried out on A & R.

15 20. Mr Smith, the Principal of the Taxpayer, replied to the Respondents that he had rented the Vehicle to Michael Shilling whom he believed worked for A&R. Mr Smith did not have a detailed knowledge of the affairs of A&R. He was acquainted with Mr Shilling. Mr Smith said in his Grounds of Appeal that he did not know A&R.

20 21. Mr Smith also told the Respondents that he had made a normal credit check of A&R through the bank. He accepted that he “just asked about finances”

22. Mr Smith had been ill. He had diabetes and had had a “mini-stroke”. He had been out of action for ten months.

23. He hired out the Vehicles for income whilst he was out of action. This was for £400 pw. There was no written contract.

25 24. Mr Smith said he had only been paid for three months. He went to the police when he was not paid but the said it was a civil matter which was not within their jurisdiction.

25. Mr Smith told us, and we accept, that he did know anything about the smuggling. He also told us he did not consider he had done anything wrong.

30 26. Mr Smith had worked with Excise Goods and knew about the matters that applied to them. He was familiar with bonded warehouses and the like.

### **Arguments of the Parties**

27. In essence, the Taxpayer argued that, in the circumstances, given that he had been out of action and had rented out the Vehicle for income whilst he could not work it was wrong to impose this fine on him.

35 28. Mr Smith did not see why he should be penalised when he considered that he had done nothing wrong.

29. The Grounds of Appeal were as follows.

“I leased the Vehicle to Mr Michael Shilling (of whom I did adequate checks).

I cannot be responsible for who Mr Shilling worked for. I do not know A&R Haulage.

Therefore if there is any fee to be paid it should be down to Mr Shilling or A&R Haulage.

5 Due to ill health, I decided to rent the Vehicle out to bring in an income while I was unable to work.

Since the Vehicle was seized Mr Shilling has refused to pay anymore hire. I have lost enough money in the last six months, without having to pay the £5,000 for my Vehicle for which I have done nothing wrong”.

10 30. The Respondents argued that the decision reached was the only reasonable decision that could be made.

a. The Respondents reasonable policy on the restoration of commercial Vehicles to third party finance or rental companies was applied having full regard to the particular circumstances of the case.. This ordinarily required a restoration fee of £5,000 (or the value of the Vehicle if lower which was agreed not to the case here) to be paid.

b. There was an exception where it could be shown that all had been done that could be reasonably be expected to ensure that the leasing was to a legitimate firm for use for a legitimate purpose.

20 31. A credit check would reveal financial issues but nothing about previous criminal history or dealings with HMRC.

32. Reasonable steps to prevent smuggling should have been taken but were not taken by Mr Smith.

25 33. Mr Smith had not done everything he should have done by way of due diligence. This was not a criticism of how it came about but it was careless. The contract was substantial and in respect of HGV Vehicle that could well be crossing borders. Hence the need for due diligence.

34. There was no written contract and no lessee check. There was no provision as to

a. What could be carried;

b. The consequences of smuggling;

30 c. Who might operate the Vehicle;

d. Ensuring valid insurance and compliance with its terms.

35. Checks should have been made by direct questions as to various matters. These would include whether Excise Goods were to be carried and compliance with the various regulations and CMR's etc. One would also expect there to have been checks with insurers, Trade

Federations and the Criminal Records Bureau as well as HMRC. This was especially the case as A&R was not known to Mr Smith.

36. In summary, Mr Smith just did not do enough to fulfil his obligations.

### **Discussion**

5 37. We sympathise with Mr Smith and wish him good health for the future. However, our jurisdiction is set out in the legislation and that is the extent of our powers.

38. As we said when we set out the issue the question for us is whether the decision by HMRC to restore the Vehicle only on the payment of a fee of £5000 falls within the range of reasonable decisions. It is irrelevant whether we would have reached the same conclusion.

10 39. We found Mr Braden to be thorough and fair. We are satisfied that he considered every matter that was relevant and disregarded everything that was irrelevant in reaching his decision on review and we so find. It was also done in a reasonable way ad we so find.

40. The amount of the fee was the standard amount that the Respondents imposed for the restoration of a third party's Vehicle where it has been used for smuggling.

15 41. The Respondents look to the due diligence in respect of smuggling in deciding whether to reduce the amount of the fee. This is because the policy "...is intended to tackle cross border smuggling". This seem proportionate and reasonable to us.

42. Given that Mr Smith says he only did financial checks it is hard to see that the due diligence aspect of smuggling and the like had been addressed by him.

20 43. Given that the amount of the fee and the circumstances in which was imposed we find to be proportionate and reasonable. We do not consider that it has been shown by the Taxpayer (who has the onus of proof) that this was outside the range of decisions that could be reasonably arrived at. We are not satisfied that the "... person making that decision could not reasonably have arrived at" the decision appealed against. Accordingly, the decision  
25 stands and we have no jurisdiction to alter it.

### **Result**

44. As we are not satisfied that it has been shown that "the... person making that decision could not reasonably have arrived at" the decision appealed against the Taxpayer has not discharged the burden on him.

30 45. Accordingly the appeal is dismissed.

46. 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  
35 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.

**ADRIAN SHIPWRIGHT  
TRIBUNAL JUDGE**

**RELEASE DATE: 18 September 2013**