



TC02959

Appeal number: TC/2012/09506

***EXCISE DUTY RESTORATION OF VEHICLE –exceptional
circumstances and proportionality considered - decision not to restore was
not one which could not reasonably have been arrived at – appeal dismissed***

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JAMES AMPS

Appellant

- and -

DIRECTOR OF BORDER REVENUE

Respondents

**TRIBUNAL: JUDGE SWAMI RAGHAVAN
GILL HUNTER**

Sitting in public at Bedford Square, London on 3 October 2013

Mr James Amps in person

Ms Naomi Carpenter, counsel for the Respondents

DECISION

Introduction

5 1. Mr Amps appeals against a decision of the Border Force of 24 August 2012 refusing to restore his car.

2. The car, a Volvo V50, registration number RJ06 UOV was seized on 29 May 2012 following the seizure of 24kg of hand rolling tobacco contained within 4 boxes each containing 120 pouches upon which excise duty of £3,938.64 had been evaded.
10 The appellant was driving the car. His father was a passenger.

3. The appellant argues:

(1) that a number of assumptions the Border Force made which led it to the conclusion that the importation was not for own use were incorrect.

(2) the car was needed for transport to work, safe and reliable transport of his children and partner. Not having the car had put a strain on the family, and
15 although they had another car this was not reliable and not suitable for family use.

(3) he had been deterred by the Border Force from challenging the legality of the seizure through condemnation proceedings in the Magistrates' Court and had been led to believe by the officers involved in the seizure that the car, being
20 a family car, would be restored.

4. The Border Force argues the decision not to restore was in accordance with its policy. The hardship resulting from the seizure of the car was not exceptional and the decision was not one which had been arrived at unreasonably. They do not accept
25 they deterred the appellant from taking proceedings in the Magistrates' court or that the appellant had been told by the officers who carried out the seizure that his car would be restored.

Permission to extend time to appeal

5. The appellant filed his notice of appeal with the Tribunal on 15 October 2012. It
30 ought to have been filed no later than 23 September 2012. The appellant had sought to appeal on 18 September 2012 but had received a letter from the Tribunal dated 5 October 2012 telling him he had not included the correct appeal form. The Border Force did not object to the late appeal. Taking account of Mr Amps' explanation for the delay, the short length of delay, and the Border Force's non-objection, we decided
35 to give Mr Amps permission to extend the time he had to appeal to 15 October 2012.

Evidence

6. We had before us a bundle of documents produced by the Border Force. This included copies of the manuscript notes of the initial interception and interview of the

appellant and his father by two Border Force officers and the correspondence between the appellant and the Border Force. The correspondence included copies of photographs which the appellant had sent to the Border Force of the appellant's other car. The original colour versions of the photos were handed up to us at the hearing.
5 We received a witness statement and heard oral evidence on behalf of the Border Force from Higher Officer Raymond Brenton. The officer who made the decision which is the subject of the appeal (Officer P Genender) had left the Border Force. Mr Brenton's evidence dealt with the review decision and Mr Amps had the opportunity to ask Mr Brenton questions. Mr Amps represented himself and gave evidence which
10 was subjected to cross-examination.

Facts

7. On 29 May 2012 the appellant's car was stopped by Border Force officers at Dover. The appellant had been to Dunkirk with his father Mr Frederick Amps.

8. They had bought 4 boxes of tobacco at £510 each at a total cost of £2,040. Each
15 box contained 120 pouches of hand-rolling tobacco. The total weight of tobacco was 24kg. The appellant paid for half of it in cash using savings. His father paid for the other half.

9. The appellant and his father were interviewed separately. The officers came to the view the tobacco was not for own use and was held for commercial purpose. The
20 tobacco was seized under s139(1) of the Customs and Excise Management Act 1979 (CEMA) as being liable to forfeiture and the car was seized as being liable to forfeiture because it was used for the carriage of goods liable to forfeiture.

10. The appellant was given information notices (form 156 "Seizure Information Notice" and Notice 12A "What you can do if things are seized by H. M. Revenue &
25 Customs") which explained he could challenge the legality of the seizure in the Magistrates' court by sending a Notice of Claim to the Border Force within one month of the date of seizure. No such challenge was made.

11. On 1 June 2012 the appellant e-mailed the Border Force to ask for the car to be returned to him as soon as possible. He attached registration details of the car. His e-mail stated:
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"The family car plays a vital part in our everyday life from getting me to and from work at all times of the day as I work shifts. The car is also used to take my 2 children and partner to school, nursery & work.

35 Not having the car is all ready putting unnecessary pressure and stress on our family and my partner needs the car to visit her family on the Isle of Wight mid June."

12. On 18 June 2012 the Border Force acknowledged the appellant's request for restoration of the car.

13. On 10 July 2012 Officer Govier of the Border Force wrote to the appellant
40 refusing to restore the vehicle. The officer explained in the decision:

5 “...there are no exceptional circumstances that would justify a departure from the Commissioners’ policy as you stated in your e-mail the car is vital to your everyday life but records show that you have access to another car and therefore I can confirm that on this occasion the vehicle will not be restored.”

14. On 14 July 2012 the appellant wrote the Border Force to request a review of the decision and in which he made representations on why the car should be returned which included various photographs of the second car. These are outlined and
10 discussed in more detail below.

15. On 19 July 2012 the Border Force wrote to acknowledge the appellant’s request for review and to inform him that the department had a statutory requirement to conduct the review by 1 September 2012. The letter invited the appellant to send in any further evidence or information that he wished to provide in support of his
15 request.

16. On 24 August 2012 Officer Genender of the Border Force wrote to the appellant to inform him that the decision was not to restore the vehicle. This decision, which is the decision the appellant appeals against, is described in more detail at [39] to [44] below.

20 *Law*

17. Under s 2(1) of the Tobacco Products Duty Act 1979, excise duty is charged on tobacco products imported into the UK.

18. Regulation 88 of the Excise Goods (Holding, Movement, and Duty Point) Regulations 2010 (“the 2010 Regulations”) and s49 CEMA provide for liability for
25 forfeiture of tobacco in cases where no duty has been paid on it and where it is held for a commercial purpose. Commercial purpose is defined in Regulation 13 of the 2010 Regulations as excluding goods held by a private individual for own use.

19. Under s 141(1) CEMA a vehicle is liable to forfeiture if it is used for the carriage of the seized goods.

30 20. Paragraph 1 Schedule 3 CEMA 1979 provides for notice of the seizure to be given in certain circumstances. Paragraph 3 Schedule 3 CEMA 1979 states:

35 “Any person claiming that any thing seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of the date of the seizure, give notice of his claim in writing to the Commissioners ...”

21. Where notice of a claim is given under paragraph 1, condemnation proceedings are commenced in the Magistrates’ court. Where no notice of claim is given Paragraph 5 Schedule 3 CEMA 1979 provides:

5 "If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of any thing no such notice has been given to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with the thing in question shall be deemed to have been duly condemned as forfeited."

22. Section 152 CEMA provides:

10 "The Commissioners may, as they see fit,
...b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized"

23. The provisions of the Borders, Citizenship and Immigration Act 2009 enable the Respondent to exercise customs functions at the UK border and provide for legislative references to the Commissioners to be read accordingly.

15 24. The powers of the Tribunal in relation to the Border Force's decision are set out in s16 (4) of the Finance Act 1994. This provides:

20 "...the powers of an appeal tribunal on an appeal...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 review or further review as appropriate of the original decision; and

25 c) in the case of a decision which has already been acted on 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 the Commissioners as to steps to be taken for securing that repetitions of the unreasonableness do not occur when

30 comparable circumstances arise in the future."

Appellant's arguments

Tobacco was not "for profit"

25. The tobacco was not imported "for profit" and the whole 24kg should not be attributed to him as only one of the 4 boxes of tobacco was for him. The rest was for
35 his father, mother, partner and sister. The Border Force are wrong to assume the average number of cigarettes that can be obtained from a pack of tobacco is 90 as it can vary from 30 to 150. Mr Amps was not asked to prove he could roll 30 cigarettes from a pouch. The Border Force are also wrong in their assumption that Mr Amps would not make a cost saving if he rolled 30 cigarettes from a pouch given the
40 average cost of cigarettes and rolling tobacco in the UK.

26. The Border Force assume that the average person smokes 13.9 cigarettes per day whereas Mr Amps had stated he had smoked 10 to 20 cigarettes per day. The difference between the average and 20 cigarettes would leave Mr Amps with 30 pouches which is more than accounted for by Mr Amps giving his sister pouches throughout the year.

27. He received a leaflet from the Border Force which stated that a person could bring in an unlimited amount of most goods into the UK as long as they were for own use and transported by the person and which defined “own use” as own consumption or gifts.

28. If he was going to smuggle tobacco why would he have risked using the more expensive car out of the two cars available to him?

Other car unsuitable / not reliable enough for family use

29. The other car the appellant owned was a 1999 registered Volvo V40 with a reconditioned engine and 123,000 miles on the clock. It is not at all reliable and often has periods when it is not working, but the appellant said he kept it taxed. He said that when it was working he did not use it to transport his young children (3 and half years and 7 months) as it was not fit for purpose. He said it was the car he used to go to work and that the seized vehicle was used to take the older child to pre-school and for family trips, outings and shopping etc. as it was much safer for the children and more reliable.

Impact on others

30. The appellant had to borrow his 67 year old mother’s car to transport his family which was having an effect on her general mobility. He said his partner was due to return to work from maternity leave and that they would then need two vehicles in the family.

Value of vehicle disproportionate to tobacco

31. He said the seized vehicle was worth about £7,000 which far exceeds the amount of tobacco which it carried.

Impact on family finances

32. If the car was not restored he would have to meet an outstanding car loan of about £4,000 which would put immense pressure on his family.

Respondents’ arguments

33. The appellant may not raise issues relating to “own use” before the Tribunal as confirmed by the Court of Appeal decision in *HMRC v Jones and another* [2011] EWCA Civ 824.

34. The decision not to restore the car was one that could reasonably have been arrived at. It was in accordance with the Border Force's policy in relation to "for profit" as distinct from "not for profit" cases, and took account of the large quantity imported. The quantity of 24kg of handrolling tobacco was 24 times the guideline amount for importation from the EU (which was 1 kg). Not restoring the car was reasonable and proportionate in light of the value of the car when compared with the duty evaded. The reviewing officer paid particular attention to the degree of hardship caused by the loss of the vehicle and the inconvenience and expense was not exceptional hardship over and above what one should expect in the circumstances.

10 *Discussion*

35. The Tribunal's powers under s16 (4) Finance Act 1994 are set out above at [24].

36. Before the Tribunal can exercise any of the powers set out in s16 (4) Finance Act 1994 it must however be satisfied in relation to the decision that "the Commissioners or other person making [the] decision could not reasonably have arrived at it".

37. The role of the Tribunal is not to re-make the decision afresh but to consider whether in reaching its decision the Border Force took account of all relevant matters, did not take into account irrelevant matters and did not make an error of law.

38. In examining the Border Force's decision there are some issues the Tribunal may not consider. To the extent the appellant argues that the tobacco was not held for a commercial purpose this is not something the Tribunal is able to consider following the Court of Appeal decision in *Jones*. That issue and any issue as to the legality of the seizure had to be addressed in condemnation proceedings before the Magistrates' Court.

25 *Officer Genender's decision not to restore of 24 August 2012*

39. The letter contained a summary of the Border Force's policy on restoration.

40. The general policy is stated to be that private vehicles used for the improper importation or transportation of excise goods should not normally be restored. The policy draws a distinction between "not for profit" cases which are described as cases where the goods are not for own use but are to be passed on to others on a not for profit reimbursement basis and "for profit" cases. In "for profit" cases the vehicle is not normally restored but the circumstances of the quantity of excise goods being small and the importation being a first occurrence are cited as an example where the Border Force might decide to restore subject to conditions e.g. a fee.

41. Having stated that the decision was not going to consider the correctness of the circumstances surrounding the seizure the decision then proceeded in a number of paragraphs to examine information on quantities, consumption rates and the period over which hand rolling tobacco goes stale to reach the conclusion that the supply was "for profit". The appellant takes issue with a number of assumptions explained in

these paragraphs. We also understood through the questions he put to Mr Brenton in cross-examination that he was questioning Mr Brenton's ability to speak to such matters given Mr Brenton said he was not a smoker.

5 42. At the hearing the Border Force sought to explain that the credibility of explanations given was something which would be taken into account. However when we look at the letter we cannot see that this is dealt with anywhere. The letter simply states what was stated in the officers' records of the interviews.

10 43. In the letter the reviewing officer went on to explain that as the appellant had not claimed the excise goods were to be passed on to others on a "not for profit" reimbursement basis she was concluding they were held "for profit". Although the case was a "first offence" the officer did not apply the part of the policy of considering to restore vehicles because the quantity imported, at 24kg, did not qualify as a small quantity.

15 44. While the Border Force's policy is not something which binds this Tribunal it is relevant to our consideration of the decision to look at whether the officer acted in accordance with the stated policy on the basis that if she did not this would on the face of it indicate the decision was not one which could reasonably have been arrived at. We find that her decision not to restore the car was in accordance with the stated policy.

20 45. We note that a large part of the appellant's arguments represent a challenge to the facts which are part of the deemed fact of forfeiture. They amount to him saying the importation was for his own use. These are Mr Amps' arguments on how many cigarettes could be obtained from a pouch, how many would be smoked a day and that the tobacco was to be given as gifts to family members. His arguments that if he was going to smuggle he would not have risked his better car, and the Border Force's assumptions about the lack of financial viability to the number of roll ups he could get out of a tobacco pouch are also arguments which go to whether it is correct that the goods were imported for a commercial purpose. As explained above we do not have jurisdiction to consider findings of fact which are part of deeming the goods to be
30 forfeit.

46. To the extent there is a dispute between the appellant and Border Force over whether there were conflicts in explanations given, these relate to "own use" and are not matters which it is possible for us to revisit. While these matters featured in the decision in explaining why it was thought the importation was not for "own use"
35 those are not matters we can resolve without going beyond our jurisdiction.

47. In relation to the leaflet the appellant says he was given we do not think this furthers his case. The statements he has quoted make it clear the way the importation is treated depends on whether it is for "own use". Whether the importation was for own use is not an issue we are able to reopen.

Unfairness in being pressured to not take condemnation proceedings and being told car would be restored

48. The appellant says he was deterred by the Border Force mentioning the amount of £2,500 and he thought he needed this amount, which he could not afford, to pursue
5 condemnation proceedings in the Magistrates' court. He also says he was repeatedly told he would get the car back through the "restoration route".

49. In the form Mr Amps filled out on 15 September 2012 when seeking to appeal to the Tribunal Mr Amps stated:

10 "I was told by UK Border Force staff that the vehicle would be restored on receiving an appeal letter from myself. They advised me to appeal on grounds that the vehicle was vital to my everyday family life, which I did as this was a true representation of my situation in any case. It was mentioned on numerous occasions that it would be restored. It was also mentioned several time that if I wished to appeal
15 against the seizure of tobacco at Magistrates' Court that it would cost me in the region of £2,500. UK Border Force were fully aware that I purchased my portion of tobacco from savings, I feel they applied unnecessary pressure as they kept mentioning Magistrates' Court would cost me in the region of £2,500. Due to the fact that it had been stressed to me that I WOULD be getting the vehicle back, I decided to
20 follow the restoration route instead of court because I do not have that kind of money available".

50. The Border Force dispute that they pressurised Mr Amps and that the seizing officers made representations suggesting the car would be restored. They say Mr
25 Amps has not made any complaint to this effect and that he did not make any reference to these points in his correspondence prior to receiving the decision. They point out the reference to the figure of £2,500 would be to the potential cost consequence if the appellant had been unsuccessful in the Magistrates' Court and the Respondents' costs were awarded against him. These were not costs that it was
30 necessary to incur to proceed with condemnation proceedings and would not arise if it turned out the appellant was successful.

51. There is no mention in any of the correspondence put before us indicating Mr Amps was pressured into not pursuing condemnation proceedings, or that he was told
35 he would get his car back. Beyond telling us that the representations referred to in his letter of 15 September 2012 were made by the officers who carried out the seizure and that these were stated to be "off the record", Mr Amps was unable to give us further details about the representations to him that the car would be restored in terms of when, where and how these were made.

52. While it is not implausible that the officers conducting the seizure may have
40 mentioned the procedure for restoration, and that if they did so informally they may not have recorded this in their interview notes, and further that in mentioning the procedure for restoration, Mr Amps may have formed the impression in his mind that his car would be restored, we think it is unlikely that the officers would have assured Mr Amps that he would get his car back.

53. We accept that it is a matter of some regret to Mr Amps that he did not take condemnation proceedings and that after receiving the review decision and currently he feels that he was pressured into not taking proceedings and that he had in his mind formed the impression that he would have been successful in pursuing the restoration route.

54. However, we are not satisfied that there is a sufficient basis upon which to make a finding of fact that Mr Amps was told his vehicle would be restored on the occasion of the seizure or on numerous other unspecified occasions as he states. There is also insufficient evidence before us to enable us to make a finding of fact that Mr Amps was told he would need £2,500 to pursue condemnation proceedings or that he was otherwise pressured by the Border Force not to take the steps which would have resulted in condemnation proceedings being taken.

55. We do not therefore go on to consider what the consequences would be for his appeal had he been able to establish such facts in terms of whether any unfairness could be addressed within the jurisdiction of this tribunal.

Was the decision arrived at unreasonably?

56. The officer did not apply the part of the policy which related to “not for profit” importations. It was not unreasonable of her to do this in our view as there was no evidence that the tobacco was bought for reimbursement at cost. Mr Amps says the statement in the decision that he did not claim the goods were to be passed on to others is incorrect because he did intend to pass it to others. The point here is there was no evidence he was intending to pass it to others for reimbursement at cost. We are unable to look at whether it is correct that Mr Amps was passing the goods to others as a gift because the fact of whether they were intended to be passed to others as gifts or not is implicit in the deemed fact of forfeiture and is therefore outside our jurisdiction.

57. We do not consider that the officer was unreasonable in forming the view that 24kg was a large quantity. It was not unreasonable to look at the total quantity that the vehicle was used to import when deciding whether something counted as a large quantity. Mr Amps allowed his vehicle to be used to transport 24kg of hand rolling tobacco. Even if the amount were apportioned to the 1 box Mr Amps said was for him this would still, at 6kg, be a quantity which significantly exceeded the guideline amount of 1kg which was in operation at the relevant time.

58. In terms of considering the proportionality of refusing to return the vehicle the officer’s letter proceeded on the assumption the vehicle was worth £5,325 in Glass’s guide. At the hearing the Border Force did not take issue with the value the appellant placed on the vehicle and we accept the appellant’s valuation which was £7,000. Mr Amps draws a comparison between this value and the amount of the tobacco, but in considering proportionality we think a more appropriate comparison is between the duty evaded which was £3,938.64 and the value of the vehicle. We do not consider it was unreasonable to have reached the view that refusing to restore a £7,000 vehicle in circumstances where the duty evaded was in that amount was not disproportionate.

59. Consistent with the reasons why we do not think it is unreasonable to attribute the whole quantity to Mr Amps, we do not think it is unreasonable to attribute the whole amount of duty evaded to him for the purposes of assessing proportionality. In any case our view that the non-restoration was not disproportionate would not be different if the comparison of the value was with a quarter of the duty evaded.

Exceptional hardship?

60. We heard evidence from Mr Amps as to his current circumstances as well as his circumstances at, and in the months following, the seizure of the car. We accept his evidence that prior to the seizure the car was used for family purposes and for getting to work and that previously Mr Amps was not working locally and worked shifts as a leisure manager. He had access to his 67 year old mother's car. We accept Mr Amps' oral evidence that his other car was sent to scrap earlier this year, that he currently does not own another car but uses his sister's car "as and when" and that at the moment he works locally. Mr Amps did have a back operation which affected him for 3 months and impacted on his ability to use public transport but he was now mobile again.

61. We do not consider that the Border Force was unreasonable in reaching the conclusion it did on 24 August 2012 in finding that Mr Amps' circumstances and the impact on his family did not give rise to exceptional hardship. We also do not consider that in relation to Mr Amps' circumstances since then and currently that there is exceptional hardship such that the Border Forces' decision not to restore the Volvo which was seized is one that could not have been arrived at reasonably.

62. When Mr Amps did have another car we accept his evidence that it was taxed and that it had a valid MOT. The photographs we were shown did not indicate to us that the car was unsuitable for family transport. Even if it is the case that the other car was, despite having a valid MOT, unreliable, there is no evidence to suggest that adequate public transport was not available to the appellant or that the level of his income and that of his partner would not allow the appellant to make use of a suitable cheaper vehicle. In fact the appellant has been able to borrow vehicles from relatives.

63. While there is hardship through not being able to use the car the appellant and his family were accustomed to using we cannot say that the conclusion that the hardship was not exceptional is a conclusion that could not reasonably have been reached by the Border Force.

Conclusion

64. The factors the Border Force took account of were relevant and no irrelevant factors were taken account of in the officer's consideration of the decision not to restore the car (having taken as a starting point that the importation was not for "own use" which is a matter which we cannot go behind).

65. It has not been demonstrated to us by the appellant that the Border Force's decision was one it "could not reasonably have arrived at" and accordingly the appellant's appeal is dismissed.

5 66. 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)" 10 which accompanies and forms part of this decision notice.

**SWAMI RAGHAVAN
TRIBUNAL JUDGE**

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RELEASE DATE: 16 October 2013