



TC03191

Appeal number: TC/2013/01477

Excise duty – restoration – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BRIAN CHILVERS

Appellant

- and -

THE DIRECTOR OF BORDER REVENUE

Respondents

**TRIBUNAL: JUDGE CHARLES HELLIER
MS ELIZABETH BRIDGE**

Sitting in public at 45 Bedford Square WC1B 3DR on 13 December 2013

The Appellant did not appear and was not represented

**Will Hays, counsel, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

1. Mr Chilvers appeals against the decision of the Respondent relayed in a letter of
5 8 February 2011 not to restore 15 kg of tobacco and 1400 cigarettes which had been
seized by the Respondent's officers on 31 October 2012.

2. At the time fixed for the hearing Mr Chilvers was neither present nor
represented. At our request our clerk telephoned him. Mr Chilvers said that he was
aware that the hearing was listed but that an emergency had occurred at work and he
10 could not attend. He told our clerk that he was happy for the hearing to go ahead in
his absence.

3. We were satisfied that Mr Chilvers had had proper notice of the hearing and that
it was just to proceed in his absence.

The Facts

15 4. We had before us a bundle of documents including copies of notes made by the
officers involved in the seizure and correspondence from Mr Chilvers. Mrs Deborah
Hodge, who wrote the letter of review refusing restoration was present and had
provided a witness statement.

5. The following facts were uncontentious. On 31 October 2012 Mr Chilvers
20 entered the UK Control Zone at Coquelles in France. He was driving a car and was
accompanied by his wife and his daughter. He was stopped by the Respondent's
officers. He was questioned by the officers. On examining his car they found that
there were 300 pouches of tobacco and 1400 cigarettes. He and his wife were then
interviewed by the officers. They signed copies of the officers' notebooks at the end
25 of the interviews.

6. The tobacco, the cigarettes and the car were seized by the officers, but the car
was restored to Mr Chilvers because his daughter had a heart condition.

7. Mr Chilvers initially challenged the seizure but later abandoned the claim. He
requested restoration of the tobacco and cigarettes. The respondents refused the
30 request. Mr Chilvers sought a review. That review was provided in a letter of 8
February 2013 by Mrs Hodge. Following the review Mr Chilvers provided further
information to the Respondent, but in a letter of 19 February 2013 Mrs Hodge
indicated that the further information did not persuade her to alter her decision.

8. In her letter of 8 February Mrs Hodge set out the history of the seizure and the
35 facts known to her. She makes a number of inferences from those facts. In his grounds
of appeal Mr Chilvers makes no challenge to the facts recited by Mrs Hodge save in
relation to a question of a number of journeys to the continent by people with the
surname Chilvers in other cars. We shall return to the issue of the disputed journeys
later.

9. No challenge having been made, and no doubt having been cast by any of the evidence before us on the unchallenged facts cited by Mrs Hodge (i.e. other than in relation to the disputed journeys), we find those facts to be as stated by her in her letter of review. We shall refer to those that are relevant to this appeal in what follows. There is no need to prolong the decision by setting the facts out in any further detail.

The statutory framework.

10. Section 2 of the Tobacco Products duty Act makes tobacco products such as hand rolling tobacco and cigarettes liable to excise duty. Regulation 13(1) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 provides that the duty becomes due when such goods having already been released for consumption outside the UK, are held for a commercial purpose in the UK; regulation 13(3) provides that goods are treated as held for a commercial purpose if held by an individual otherwise than for his own use.

11. Where goods liable to excise duty are imported without payment of that duty they become liable to be seized and forfeited. Section 139 Customs and Excise Management Act 1979 (“CEMA”) provides:

“(1) Any thing liable to forfeiture under the Customs and Excise Acts may be seized or detained by any officer or constable or any member of Her Majesty’s armed forces or coastguard.

12. If the Respondent’s officers seize goods, Schedule 3 CEMA provides a means for the owner to require the legality of the seizure to be adjudicated by a Court in the UK. Paragraph 3 of that schedule set out the procedure for instigating that process:

“3. Any person claiming that anything 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 at any office of customs and excise.”

13. Paragraph 5 of the schedule provides that if the owner does not give such notice "the thing in question shall be deemed to have been duly condemned as forfeited."

14. Section 152 CEMA gives the Respondent a power to restore, subject to any conditions it thinks proper, things which have been forfeited or seized. Section 14 Finance Act 1994 requires the Respondent to conduct a review of any decision in relation to that restoration power if so required by the owner, and section 16 of that Act permits the owner to appeal to this tribunal against any decision made (or deemed to have been made) on that review.

15. Section 16(4) FA 1994 limits this tribunal's power on such an appeal to a consideration of whether or not the Respondent's decision was reasonable, and also limits the tribunal’s powers, if it decides that the decision could not reasonably have

been arrived at, to direct that the decision be remade, or remade subject to particular directions. By section 16(6) the onus of proof is on the appellant.

16. If proceedings are brought under paragraphs 3 of Schedule 3 to contest the seizure, and the court before which they are brought decides that the things were properly forfeit, that finding, and the findings of fact necessary to it, are binding on this tribunal, and the tribunal consequently has to consider whether or not any decision in relation to restoration is unreasonable on the basis of those findings.

17. If the owner does not give the notice required by paragraphs 3 and 4 Schedule 3 requiring the adjudication of the matter by a court, then the effect of paragraph 5 is that, because the statute provides that the thing is duly condemned as forfeit, this tribunal must address the reasonableness or otherwise of the Respondent's restoration decision on the basis that the thing was duly forfeit.

18. That basis means that such findings as would be necessary for such a conclusion must also be taken to have been made: thus if goods potentially liable to duty have been seized on the basis that they are liable to duty, the tribunal must work on the basis that they were in fact and law liable to such duty - because otherwise they could not have been duly forfeit. Thus, as in this case, where the liability of goods to duty is, in the circumstances, dependent upon a conclusion that the goods were not for the owner's own use, then this tribunal must judge the reasonableness or otherwise of the Respondent's decision against the background that they were not for his own use - that question cannot be reopened (see *HMRC v Jones* 2011 EWCA 824, but also *HMRC v Mills* [2007] EWHC 2241, which was not considered in *Jones*, where a finding of not for own use was, on the particular facts of that case, not a necessary requirement for legal seizure, so that the issue was open for adjudication by the tribunal).

25 **Mr Chilvers' grounds of appeal**

19. In his notice of appeal Mr Chilvers sets out in five paragraphs his grounds of appeal. In the remainder of this decision we set out each of those grounds and address them in turn.

30 (1) *"Minor inaccuracies in respect of verbal amounts given on quantities of goods that have been wrongly interpreted as concealment."*

20. In her letter Mrs Hodge refers to the following inconsistencies:

(1) At page 5 in the bottom paragraph:

35 "You initially told the officer that you had 'the limit, 60 pouches'. This was not the truth. When asked by the officer whether you had 60 pouches between you or 60 pouches each, you replied that you had 60 pouches each. This was not the truth either because you had 300 patches of tobacco divided between two of you. Your claim that you "forgot" is not plausible."

(2) On page 6 Mrs Hodge says:

"You failed to disclose all your excise goods, thus misleading the officer about the true quantity of them. If there was nothing to hide there was no need to mislead the officer, and, on those grounds alone, I have good reason to doubt your credibility. Further as you were carrying receipts for the full quantity, you clearly knew that you were misleading the officer.

"Next, you told the officer that you had last travelled in April but had just bought wine on that trip. This was not true is either because you later admitted that you had also travelled in September 2012, a month earlier and claimed that you had not bought the tobacco purchased on that trip; it belonged to your son. You said you had driven the car to Cite Europe but had not gone on to Belgium to buy tobacco. However, according to the receipts for that day the tobacco was purchased at 12:58 and the Carrefour receipt for wine was timed at 15:49 so it seems more likely that you went to Belgium before buying the wine at Carrefour.

"... You told the officer that you had last smoked 2 days previously and that you didn't have an open pouch of tobacco on you. This is inconsistent with your claim of smoking 50 roll-ups a day and leads me to conclude that you do not smoke at all. This view is reinforced by your claim to have been buying tobacco in the local shop for £12 or £13 when the current price of a 50g pouch is closer to £16."

21. Mr Chilvers does not in his grounds of appeal dispute the inconsistencies on which Mrs Hodge relies. We find her recital at the facts to be accurate. It seems to us that Mrs Hodge's reaction to such inaccuracies is quite a reasonable one. The giving of conflicting accounts may reasonably be taken in such circumstances to be an attempt to conceal the true reasons for importation.

22. We are unable to find that Mrs Hodge's decision was unreasonable on this ground of appeal.

(2) *"Smoking habit information has been used to denounce the personal use plea against the volume of tobacco involved. The gift element was not considered in these calculations."*

23. Mrs Hodge said this about Mr Chilvers contention that the hand rolling tobacco was to be used as a gift:

"In your letter dated 1 November 2012 you explained that the goods were for personal use and Christmas gifts. This was expanded in your letter dated 9 November 2012, when you introduced the concept that a proportion of the goods were to be given as Christmas gifts to the residents of the retirement apartments for which you are the manager. If this were the case, I am surprised that you did not mention this to the Officer on the day [of seizure] when you said the goods were for you and also your wife clearly told the Officer that none of the tobacco was to be given away. I consider it unlikely that many of the 30 residents of your retirement flats smoked tobacco and you have not provided any evidence

to support your claim. I think it more likely that you intended to sell the tobacco elsewhere for a profit.”

24. Mr Chilvers later provided the Respondents with a letter from a Paul Lawrence, who was a director of the property managing agents for the establishment at which Mr Chilvers worked. He said he had known Mr Chilvers for several years and would attest to his integrity, honesty and managerial skills. He says that he was aware of his trip abroad to purchase tobacco with the intention to present all residents with it as Christmas gifts as well as a "retirement farewell present". He said that it was customary to give the same gift to all even though not all smoked or drank and that “it is the value and quality of the gift that creates the aura”.

25. In her later letter in response to this Mrs Hodge says that nothing in this correspondence changed her decision.

26. Mr Hay drew our attention to the fact that the officers’ notebooks show that at the time of seizure Mr Chilvers made no mention of the use of the tobacco for Christmas gifts.

27. It seems to us that Mrs Hodges reaction to Mr Chilvers’ contention that the pouches of tobacco were to be used as gifts for the residents of the retirement home was a reasonable one. She was entitled to conclude that this was an unconvincing account for the reasons she gave.

28. As a result the conclusions that there was too much tobacco for Mr Chilvers and his wife to smoke, and accordingly that the tobacco cannot all have been for his own use were reasonable ones which she was entitled to draw.

29. We are unable to find that Mrs Hodge’s decision was unreasonable on this ground of appeal.

(3) *“The volume of trips information and the vehicles used to justify smuggling is wrong. I notified the review Officer of this wrong information (copy letter attached) but this information was ignored.”*

30. This ground relates to a passage in Mr Hodge’s 8 February letter of review in which she said:

“In addition to this trip [i.e. that of 31 October 2012] you had receipts dated 1 October 2011, on which day in vehicle registration number GL08TLN travelled. The receipts showed that 110 pouches of Amber Leaf tobacco and 800 Silk Cut cigarettes were purchased. You also had receipts for 30 November 2011 on which day your vehicle registration number T710 REL travelled. On that occasion you purchased 150 pouches of Amber Leaf tobacco and 200 and cigarettes. When 29 September 2012 the receipts found showed that 120 pouches of Amber Leaf and 600 cigarettes had been purchased at a cost of £735.89. On that day vehicle JC09 NDC travelled in the name of Chilvers.

“Your vehicle T710 REL is also shown as having travelled on 4 February 2012 and vehicle JC09 NDC also travelled from Dover to Calais on 14 September

2012, 15 April 2012, 4 December 2011 and 20 November 2011. It would appear that you and/or your son are regular visitors to the continent."

31. She then indicates that it could be a reasonable to conclude that that Mr Chilvers may have been importing large quantities of goods on those other occasions.

5 32. It was clear that it was to this passage that Mr Chilvers was referring in his grounds of appeal because the letter to which he referred was a letter of 13 February in reply to Mrs Hodge's letter of review which included the following passage:

10 "I would respectfully inform you that the information that has been given to you is incorrect. There are four trips and two vehicle Reg's that are nothing to do with me or anyone I know. They are: JC09MDC and GL08TLN. The disputed dates are: 20/11/11, 4/12/11, 15/4/12 and 14/9/12.

"My own records show 3 day trips in 2012 (4/2/12, 29/29/12 and 31/10/12) and 2 day trips in 2011 (1/10/11 and 30/11/11). These were all undertaken in my own vehicle Reggie: T710REL."

15 33. Mr Chilvers also submitted a schedule in which he summarised the trips mentioned by Mrs Hodge and his contentions as to whether or not he travelled on those dates. In addition he provided the Respondents with copies of his diary entries for 29 September 2011, 10 August 2012 and 14 September 2012 showing that he had been on duty at work on those days. He also sent them copies of letters from DLVA
20 confirming that he was not the registered keeper of JC09 or GL08. The table was in the following form (we have added a column for the registration of the car from HMRC's record):

| Disputed? | Date | Car (added column) | Car known? | Driver known? | Comment |
|-----------|----------|--------------------|------------|---------------|--------------------------------------|
| Disputed | 29/9/11 | GL08 | No | No | Diary – at work |
| | 1/10/11 | GL08 | No | No | In T710 |
| Disputed | 20/11/11 | JC09 | No | No | Sunday |
| | 30/11/11 | T710 | Yes | | |
| Disputed | 4/12/11 | JC09 | No | No | Sunday |
| | 4/2/12 | T710 | Yes | | No purchase made. Day trip to Calais |
| Disputed | 15/4/12 | JC09 | No | No | Sunday |

| | | | | | |
|----------|----------|------|-----|----|-----------------|
| Disputed | 10/8/12 | JC09 | No | No | Diary – at work |
| Disputed | 18/8/12 | JC09 | No | No | Saturday |
| Disputed | 14/9/12 | JC09 | No | No | Diary – at work |
| | 29/9/12 | JC09 | No | No | Trip in T710 |
| | 31/10/12 | T710 | Yes | | |

34. We had in the bundle copy print outs from HMRC’s records of cross channel journeys. These showed the journeys recorded by GL08, T710 and JC09. Mrs Hodge told us, and we accept, that they were compiled from number plate recognition devices for channel tunnel journeys, and from the names of the persons booking tickets for ferry journeys. The name on the tickets for GL08 and JC09 was “Chilvers”. No name appeared on the T710 record since the record was compiled from the number plate recognition of channel tunnel journeys. It was from these records that Mrs Hodge had drawn the information for her comments in the passage recorded above. We understood that Mrs Hodge had ascertained from the DVLA that the registered keepers of GL08 and JC09 were Claire Chilvers and J Chilvers respectively.

Travel in JC09

35. It seems likely to us that J Chilvers is Mr Chilvers’ son and is the keeper of JC09. That is because Mr Chilvers accepted that he travelled on 29 September 2012 with his son, and although Mr Chilvers says that he believes he travelled in T710 he provides no evidence of travel in that car on that journey, while HMRC's records do not indicate that that car travelled on that date but that JC09 did. As a result we consider it likely that Mr Chilvers' son travelled the continent in JC09 on the other dates noted in HMRC’s record namely 20 November 2011, 4 December 2011, 15 April 2012, 10 August 2012, 18 August 2012, 14 September 2012 and 29 September 2012.

36. The conclusion that Mr Chilvers' son travelled on these dates does not necessarily mean that Mr Chilvers also travelled. We accept that on 10 August 2012 and 14 September 2012 Mr Chilvers was, as his diary entries show, at work. We do not think it would be reasonable to conclude that Mr Chilvers travelled with his son on all the remaining dates.

Travel in GL08.

37. Mrs Hodge draws a link between (i) HMRC's records of the journey of GL08 on 1 October 2012, (ii) its keeper’s name, Claire Chilvers (drawn from the DLVA

records), and (iii) the receipt found in Mr Chilvers' car for purchases on the continent on that date, to conclude that Mr Chilvers travelled in GL08 on that date.

38. Mr Chilvers says that the trip was done in T710. HMRC's records showed no record of T710 travelling on that date.

5 39. It seems to us, that on this evidence, it is likely that Mr Chilvers is mistaken and that he did travel in GL08 and not T710 on that day.

40. We accept however that he did not travel on 29 September 2011 when his diary entry shows that he was at work.

How Mrs Hodge used the information

10 41. In the quoted passage Mrs Hodge draws the conclusion that "you and/or your son are regular visitors to the continent" and indicates that it would be reasonable to conclude that large quantities of goods had been imported on other occasions. This, implicitly she regards this as being a reason which supports the decision not to restore the goods.

15 42. We note that in her review letter Mrs Hodge does not say that Mr Chilvers himself travelled in the relevant cars in each of the date specified, but concludes that Mr Chilvers and/or his son were regular visitors. It seems to us that Mr Chilvers own schedule acknowledges that he was a regular visitor: indicating two trips in 2011, and three in 2012.

20 43. We conclude that the inferences of regular visits made drawn by Mrs Hodge both expressly in her letter of 8 February 2012 and implicitly in her reply to the further information that she had not changed her mind, were not unreasonable.

44. We are unable to find that Mrs Hodge's decision was unreasonable on this ground of appeal.

25 (4) "*The original decision and the subsequent revised decision is based entirely on conjecture with no evidence to conclude that the goods seized were to be used for commercial purposes or for profit.*"

30 45. We have explained the effects of paragraph 5 CEMA. Mr Chilvers did not pursue the question of the legality of seizure in the appropriate courts. The goods are therefore deemed to have been duly seized. In the circumstances of this case that means that they must be taken to not to have been for his own use. If they were not for his own use the only alternative use was for commercial purposes (see para [10] above).

35 46. Thus the assumption of which Mr Chilvers complains is compelled by the legislation.

47. We are unable to find that Mrs Hodge's decision was unreasonable on this ground of appeal.

(5) *“As I have complied with all the EU directives (832/33) and regulation 13 in respect of purchasing & transporting excise goods from an EU member state to the UK I respectfully maintain that this UK BA's decision not to restore my goods or offer recompense is excessively harsh and wrong.”*

5 48. The decision not to restore must be considered in the light of requirements which flow from paragraph 5 schedule 3 CEMA that the goods were not held for Mr Chilvers' own use. Thus Mr Chilvers cannot be treated as falling within regulation 13(3) as he contends. Thus it cannot be said that Mr Chilvers had complied with the relevant statutory provisions - for he was importing goods without paying duty on them. For such a contravention a penalty is to be expected.

49. It seems to us that Mrs Hodge was entitled to conclude that the non-restoration of the goods was not in the circumstances of this case a penalty which went further than was necessary or which was so harsh as to be disproportionate all wrong. Her decision was reasonable.

15 50. We are unable to find that Mrs Hodge's decision was unreasonable on this ground of appeal.

Conclusion

51. We conclude that it has not been shown that Mrs Hodge's decision was one which she could not reasonably have reached.

20 52. We therefore dismiss the appeal.

Rights of Appeal

53. 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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**CHARLES HELLIER
TRIBUNAL JUDGE**

RELEASE DATE: 6 January 2014

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