TC04093

Appeal number: TC/2013/07834

Excise Duty – Seizure of 30 pallets of vodka bearing counterfeit duty stamps – Seizure of vehicle – Whether decision to refuse restoration reasonable – Yes – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

NORTHERN TRAILER REPAIRS & SERVICING LTD **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE JOHN N. DENT
MR R. PRESHO

Sitting in public at North Shields on 7 October 2014

Mr C. Morrison, Counsel for the Appellant

Mr A. Scott, Counsel instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant seeks to appeal the decision taken by the Respondent on review and notified by letter dated 10th October 2013 not to restore a Scania tractor unit registration number AY55 KJX ("the unit"), and a trailer registration NTRS14 ("the trailer") seized at Upminster on 16th January 2013

2. The Director and majority shareholder of the appellant company, David Lawson, and the Director and Operational Manager of the company, Graham Robson, attended the hearing and gave oral evidence. For the Respondents we heard oral evidence from the review officer Louise Bines.

The background

3. There was no dispute about the law or about the policy, nor indeed about most of the facts, the dispute being about the application of the facts, and whether the decision was reasonable and proportionate.

The facts

4. On 5th October 2012, the unit and trailer were seized whilst being used by a Robert Wood, who ran an operation under the name Global Freight Services Europe Ltd. The unit was restored free of charge to Haydock Finance, and the trailer, free of charge, to the Appellant. Part of the restoration agreement was that Haydock Finance undertook that neither Global Freight, nor any employee of such, would have any rights to possession of the asset. The unit was restored to Haydock Finance, and was bought by the Appellant on 21st November 2012. The trailer was restored to the Appellant on 28th November 2012, and the Appellant was warned by letter of how any future seizures of vehicles the owned or operated might be dealt with should they be intercepted in the future loaded with smuggled goods. When the trailer was collected by Mr. Robson he was told by a representative of HMRC to be very careful, and not to deal with Robert Wood.

5. Robert Wood had been known to Mr. Lawson for 30 years. The Appellant was made aware that Haydock Finance would sell the unit, and Mr Wood told the Appellant that he wished to rent it from the Appellant, along with the same trailer. On 1st December 2012 Global Freight agreed to hire the unit from the Appellant for £400 per week and the trailer for £85 per week.

6. On 16th January 2013 the unit and trailer were seized after the Respondents identified 30 pallets of vodka in the trailer, worth over £200,000, and suspected of being counterfeit. The unit was driven by Mr. Wood, who stated that he owned the vehicle.

7. The Appellant requested restoration, but the Respondents refused to restore. They considered that as the Appellants had knowledge of a previous excise offence they would have had reservations about hiring the vehicle again to a known excise offender, or have placed strict conditions on the term of hire. They decided that as this was a second seizure of the same vehicle and trailer in a three month period, the

goods were identified as being counterfeit, and the vehicle had been purchased by the Appellant following recommendation from the excise offender despite having been warned of the consequences of a further seizure, they would refuse restoration. Upon review the decision was upheld.

The law

8. The decision not to restore falls to be reviewed by the Tribunal pursuant to s. 16(4) of the Finance Act 1994 as it is an "ancillary matter" as defined in s. 16(8) and of a description specified in Schedule 5 s.2(l)(r) of that Act. Under that section the Tribunal must decide whether the decision was reasonably arrived at. If it decides that it was not, it can:

a. direct that the decision ceases to have effect;
b. require the Respondents to review the decision in accordance with directions;
c. in the case of a decision already acted upon, declare the decision unreasonable and give directions for steps to be taken to ensure that there is no repetition of the unreasonable decision

9. The appropriate test to be applied when determining the reasonableness of the decision is whether the Commissioners acted in a way in which no reasonable panel of commissioners could have acted; if they have taken account of an irrelevant matter or if they disregarded something to which they should have given weight (as per Lord Lane in *Customs and Excise v JH Corbitt (Numismatists) Ltd [1980] STC 231*, quoted in the matter of *Elliot v Commissioners of Customs and Excise EE00843*

HMRC Policy

10. The basis of HMRC's ultimate decision not to restore the unit and trailer was their stated policy on such matters.

11. The review letter sets out HMRC's Policy for the restoration of vehicles that have been used for improper importation or transportation of excise goods as follows:

A vehicle used for the improper importation or transportation of excise goods should not normally be restored.

If officers are satisfied that the operator is involved in the offence, the vehicle may be considered for restoration to the finance company, if the finance company can demonstrate they have done all that can be reasonably expected to ensure they are leasing vehicles to legitimate companies for a legitimate purpose. Relevant factors may include:

- A demonstrably good track record of no (or few) previous seizures
- A requirement that those they lease vehicles to are members of a recognized trade association

- Specifying in the lease agreement that seizure would breach the contract.

The Respondent's case

12. The Respondent contended that the decision not to restore the Tractor Unit was reasonably reached. There had been no challenge by way of condemnation proceedings before a magistrates' court.

13. They set out the correspondence, which had taken place prior to the review decision.

14. They contend that the decision not to restore the vehicle was in line with public policy and was a reasonable exercise by the Respondents of their discretion under Section 152(b) Customs and Excise Management Act 1979, and that the Appellant had failed to show any reason why the Respondents should depart from their stated policy.

The Appellant's case

15. Counsel for the Appellant set out the background from the Appellant's point of view. Following the initial seizure, steps had been taken by the Appellant on the new hire, and a signed affidavit obtained from Mr Wood. He argued that this fulfilled the requirement of taking reasonable steps. He pointed out that the conditions of hire included a clause that the vehicle should not be used in such a manner as would involve seizure, in the event of which the hirer would indemnify the Company.

16. He argued that the Appellant had a demonstrably good track record, and that there had been only one previous seizure. He said that the conditions of hire contained a clause that seizure would breach the contract, and that the affidavit provided strict conditions as to use. Short of declining to trade with Mr Wood, the most that could be done was what was done at the time.

The Evidence

17. Mr Lawson said in evidence that a friend in the trade, Mr Davidson, told him about the tractor unit being available from Haydock Finance, and said it was not Mr Wood who had told him. It was Davidson who had told Owen, his then General Manager, and Owen had told him. Mr Robson said in evidence that Mr Wood had told Mr Lawson that the unit was available.

18. Mr Lawson told us that he had known Mr Wood for about 30 years. Once the trailer was seized in October 2012, he decided that any person who hired a trailer would have to sign an affidavit guaranteeing that it would not be used for illicit purposes. The seizure had affected turnover and pay rises. He had not made the authorities aware of the affidavit, as he did not know it was relevant. All hirers of trailers, even substantial companies, had to sign the affidavit before a trailer would leave the yard. He had got the document off the internet. He did not get a solicitor to draft it because of cost. He did not know why it was not dated.

19. Mr Robson had collected the trailer from Wetherby after the first seizure, and had had a conversation about it with HMRC. He was told by HMRC to be careful, and not to deal with Mr Wood. He did not recall why the vehicle had been seized. He and another employee had drafted the affidavit, and he himself had typed it out. He did not know the meaning of the words in the affidavit "Further affiant saith not." This document was just for Robert Wood, and not for other renters of trailers.

20. Ms Bines confirmed that she had not seen the affidavit before the date of the hearing

The jurisdiction of the Tribunal

21. Our jurisdiction is limited to judging the reasonableness of Ms Bines' decision. The test which we apply is to determine whether or not the Commissioners have acted in a way in which no reasonable panel of Commissioners could have acted; if they have taken account of any irrelevant matter or have disregarded something to which they should have given weight.

Conclusions

22. There was evidence before Ms Bines that the operator driver was involved or complicit in the excise offence. The issue, therefore, was whether the Appellant had done all that could be reasonably expected of it to ensure that they were leasing the unit and trailer to a legitimate company for a legitimate purpose.

23. We found the evidence of Mr Lawson and Mr Robson contradictory and unsatisfactory. They were suggesting that the "affidavit", which was unsworn and undated, and clearly downloaded from an American source on the internet, had been prepared prior to Mr Wood taking out a new hire agreement of the unit and trailer. In our view, any reasonable company would have grave doubts about whether to hire a trailer to Mr Wood again, having been warned not to do so by HMRC. In the event, the Appellant invested £20,000 in buying the tractor unit, which had also been seized, so that they could hire it out to Mr Wood along with the trailer. That seems to us not to be the action of a company doing all that can be reasonably expected to ensure it is leasing vehicles to legitimate companies for a legitimate purpose. It seems apparent that the Appellant was taking a risk.

24. Although the conditions of hire contained a clause that seizure would breach the contract, this is a general term, and does not show that sufficient action was taken by the Appellant to ensure that Mr Wood was not going to repeat the behaviour previously demonstrated. We were not satisfied, on balance, that the "affidavit" had been completed before the new hire agreement, as the evidence given was contradictory and unsatisfactory. In any event, in our view, the Appellant should not have hired out the unit and trailer to Mr Wood until it was satisfied that there would be no further breach. We also felt that, having invested £20,000 in the unit, it would have seemed sensible to have such a document professionally prepared.

25. We are able to look at the additional evidence about conditions of rental and the "affidavit" provided after the review was concluded. In our view, it is not so

compelling as to provide us with a reason why the decision of the reviewing officer should be overturned. Indeed, it begged the question of why the Appellant had not immediately drawn the attention of HMRC to the "affidavit", if it existed at the time. The inconsistencies of the evidence surrounding the "affidavit" drew us to conclude that it was unlikely that it had existed at the time of the new rental agreements.

26. In summary, we concluded that it was entirely reasonable for the reviewing officer to come to the decision to which she came, and that she did not act in a way that no reasonable panel of Commissioners could have acted.

27. We looked at the question of hardship. Loss of a vehicle is, of course, likely to cause hardship. However, we concluded that on the facts that the Appellant, having a fleet of 80 trailers, would not suffer exceptional hardship from the loss of one tractor unit and one trailer. The seizure of the vehicle was, in our finding, proportionate.

28. We therefore disallow the appeal

29. 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.

JOHN N. DENT
TRIBUNAL JUDGE

RELEASE DATE: 23 October 2014