



TC04231

Appeal number: TC/2013/04294

***EXCISE DUTY RESTORATION OF VEHICLE — decision not to restore
was not one which could not reasonably be arrived at – appeal dismissed***

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DARREN HOPE

Appellant

- and -

DIRECTOR OF BORDER FORCE

Respondents

**TRIBUNAL: JUDGE BARBARA KING
MR ROLAND PRESHO**

Sitting in public at North Shields on 19 December 2014

Darren Hope, the appellant, in person

Rupert Davis, of counsel, for the Respondents

DECISION

Introduction

1. Mr Hope appeals against a decision of the Border Force of 22 May 2013 refusing to restore 17.5 kilograms of hand rolling tobacco, 90 litres of wine and a Saab car, registration number W11 OPE. All these items were seized on 25 January 2013.

2. There are separate appeals heard on the same day and before the same Tribunal by Darren Hope and by Stephen Patterson against the amount of duty and penalty charged to each of them. These separate appeals were under Tribunal numbers TC/2013/03934 and TC/2013/06191 for Mr Hope and TC/2013/04032 for Mr Patterson.

Evidence

3. We had sight of a bundle of documents produced by the Border Force, which contained copies of the manuscript notes of the initial interception and interview of both Darren Hope and Stephen Patterson by two Border Force officers.

4. The bundle of evidence also contained correspondence from Darren Hope, his wife Nichola Hope and Stephen Patterson and the Border Force. Graham Crouch, a higher officer of Border Force carried out a review decision on 22 May 2013 and upheld the decision not to restore either the tobacco the wine or the vehicle. He attended the Tribunal and gave evidence in accordance with his statement dated 9 July 2013.

5. One of the officers on duty on 25 January 2013, Officer E Butcher gave oral evidence. Darren Hope and Stephen Patterson both gave oral evidence.

Facts

6. On 25 January 2013 a Saab registration number W11 OPE was stopped by Border Force officers at Dover. Darren Hope was driving and his passenger was Stephen Patterson. They stated that they had been to France and Belgium and had bought wine and tobacco.

7. The total spend on tobacco had been £1242.50 and on wine had been £240. The 17.5 kilograms of hand rolling tobacco was in 350 pouches, each weighing 50 grams. The 90 litres of wine was in a total of 120 bottles- 60 white, 30 red and 30 rose.

8. Darren Hope and Stephen Patterson both stated that each owned precisely half of the tobacco and half of the wine and all of it had been paid for in cash. In addition Stephen Patterson had purchased a bottle of whisky at a cost of £7.90. The vehicle also contained a sleeve of cigarettes (200) which was unopened and was said to have been bought at a pub in the North East of England before they had travelled across the channel.

9. The officers came to the view the hand rolling tobacco and wine was not for own use and seized these items together with the vehicle.

10. Following a letter signed by Darren Hope on 8 February 2013 condemnation proceedings were started in the Dover Magistrates' Court. At some point before the hearing listed for 17 October 2013 Darren Hope consulted a solicitor and he then decided not to attend the hearing.

5 11. On 17 October 2013 Dover Magistrates' Court made an 'Order of Condemnation' and the tobacco, the wine and the Saab vehicle registered number W11 OPE were all condemned as forfeit. This Tribunal has no power to reopen the decision made by the Magistrates' court. See *HMRC v Jones* [2011] EWCA 824, [2012] Ch414, and *Race v HMRC* [2014] UKUT 0331(TCC).

10 12. The ruling by the Magistrates' court means that it has been decided as a legal fact that the goods were held for a commercial purpose. It is therefore a legal fact that all of the hand rolling tobacco and all of the wine was not for personal use.

15 13. Darren Hope and Stephen Patterson had claimed in Dover that they owned half each. Stephen Patterson did not involve himself in the proceedings before the Magistrates court but the ruling by the court has been made in respect of the total 17.5 kilograms of tobacco and all 120 bottles of wine. This means that neither Darren Hope nor Stephen Patterson can now use the argument that any of these goods were for personal use.

Discussion

20 14. The decision of 22 May 2013 took into account Officer Butchers notes of what she said had taken place at Dover. Darren Hope challenged that account to the extent that he does not think he tried to hide any of the tobacco from the officer, nor did he try to hide any of the receipts. Darren Hope had no explanation as to why he initially told the officer that his wife did not work and then stated that she worked part time in his father's shop. In January 2013 Mr Hope was in work as a self employed builder and had two children. Since that date he has started working in his father's newsagents shop and he now has three children.

30 15. Stephen Patterson told the Tribunal that he is now aged 38 and has not worked since he was aged 23. He obtained the money for the trip to Belgium from a combination of a win on the horses and gifts given at Christmas. He has a partner and two children. In January 2013 he was claiming Incapacity Benefit because he had back problems. Despite his back problems he chose to travel in a vehicle from Tyneside to Belgium purely to buy tobacco, wine and whiskey. He stated that he first bought one box of hand rolling tobacco containing 120 x 50 gram pouches and then he bought half the 110 further pouches. He also bought the bottle of Kentucky Whiskey for £7.90. On the ferry he bought half the quantity of wine amounting to 60 bottles or 45 litres. His total spend therefore came to over £740 and by the time the goods were seized he had no money left at all. In January 2013 he claimed he smoked 35 30 to 40 roll your own cigarettes per day. He told the Tribunal he has now stopped rolling his own but still smokes 15 to 20 cigarettes per day.

16. We did not find Mr Patterson to be a credible witness. We did not believe that someone on his level of income and with his medical condition and responsibilities had been able to fund half of the expenditure on the tobacco and wine.
- 5 17. In order to assess the credibility of Mr Hope, we looked at the correspondence which passed between Darren Hope and the Border Force. Mr Hope agreed that his wife Nichola Hope had written some letters on his behalf but he had then signed them. He had not however always seen emails written by her.
- 10 18. An email by Nichola Hope dated 28 January 2013 states that the vehicle is a business car 'owned by my business'. The DVLA V5 registration document shows that Darren Hope is the registered keeper.
- 15 19. A purchase invoice dated 30 April 2012 shows that a Saab was sold to Darren Hope. The invoice was illegible in places but appeared to show that another vehicle with the registration number W11 OPE was allowed in part exchange for the Saab. Darren Hope gave evidence that W11 OPE is a personalised number plate given by his son's grandfather to his son, aged 11 as at the date of this Tribunal, and that arrangements were made to transfer the number from the previous car to the Saab.
- 20 20. The letter dated 8 February 2013 from Darren Hope again refers to the vehicle being 'owned by his wife's business and being essential to the daily running of her business'. The letter describes further hardship being caused to the family because the vehicle has been used to take Mrs Hope's mother to and from medical appointments, and to do errands for Mrs Hope's grandmother.
21. The letter goes on to state that the vehicle is worth £6,000 and that it is unfair to seize a vehicle of this worth for what is a first offence.
- 25 22. The Border Force wrote a letter dated 14 February 2013 to Mrs Hope stating that as the V5 registration document and the purchase invoice were not in her name, they required a request for restoration from the owner.
23. Darren Hope sent an email dated 18 February 2013 stating that the purchase invoice was in his name as his wife was too busy to collect the car when it was purchased and he collected it on her behalf.
- 30 24. This letter is treated as a Notice of Claim by the Border Agency and condemnation proceedings are started. In letter dated 5 March 2013 the Border Agency reply to Mr Hope stating that the vehicle will not be restored and pointing out that the documentation indicates that the vehicle is owned by Darren Hope and there is no proof of 'business' usage for the vehicle
- 35 25. The letter from Darren Hope dated 8 April 2013 refers to several Tribunal decisions and appears to have been written after Darren Hope has taken legal advice. The letter does not now state that Nichola Hope owns the vehicle but that 'the car whilst being in my name is primarily used by my partner Nichola Hope.'

26. In oral evidence to this Tribunal Darren Hope stated that his wife Nichola Hope works part time in his father's shop and that he, Darren Hope, now works in that shop. His wife has never had a business of her own and all references to her using the Saab for business was when she made journeys in connection with her part time work in the shop.

27. We find that the repetition of the phrase that she 'had her own business' in respect of his wife's employment was not a slip of the tongue or a simple misunderstanding of the definition of a word. We find that Mr Hope was deliberately trying to mislead.

28. Mr Hope had had the benefit of legal advice at some point in 2013 and if he had wished to produce evidence that the Saab was 'owned' by Nichola Hope or held by him 'in trust' for her, he had had ample opportunity to produce such evidence. We find that the wording used in the letter of 8 April 2013 is more likely to have been the true situation ie 'the car whilst being in my name is primarily used by my partner Nichola Hope.'

29. Mr Hope went on to say that, shortly after the Saab was seized, a Freelander vehicle was bought for the use of Darren Hope and his family. Initially Mr Hope stated that this vehicle was bought by another family member for the benefit Mr Hope and his family. He was not sure in whose name the car had been registered. When Mr Hope realised that this meant his family had had access to another vehicle from shortly after the seizure of the Saab and this might countermand his claim that the family were suffering exceptional hardship, he tried to say that the Freelander was not bought until much later and that he may only have had the use of it on loan for a period of time before it was bought. Mr Hope also changed his story as to how the Freelander was purchased by stating that he or his wife had had to obtain a loan to buy it.

30. In respect of the use of vehicles Mr Hope stated that his father has a vehicle for use in connection with the newsagent shop but whilst he, Darren Hope, is now insured to drive it, Nichola Hope is not insured to drive it.

31. Overall we did not find Mr Hope to be a credible witness.

Powers of the Tribunal in relation to the Border Force's decision not to restore.

32. In respect of 'restoration' we do not have full appellate jurisdiction and cannot order a vehicle to be restored. The powers of this Tribunal in relation to the decision not to restore are supervisory only –that is we can look at what was taken into account when the decision was reviewed and if we are satisfied that the decision is not one which could reasonably be arrived at, we can make directions and order a further review to take place. We are looking at whether the decision has taken into account some irrelevant matter or had disregarded something to which they should have given weight. *Customs and Excise v JH Corbitt (Numismatists) Ltd* [1980] STC 231.

Arguments by Mr Hope as to why the vehicle should be restored

33. The arguments put forward by Mr Hope were that (a) he only bought precisely half of the 17.5 kilograms of hand rolling tobacco and therefore the value of that is

disproportionate to the value of his car (b) he only bought 45 litres of wine which is not large, (c) both the tobacco and wine were only for his own use and for the use of his wife, (d) this is a first offence, (e) the vehicle belongs to his wife, (e) the family have suffered exceptional hardship, (f) the rules about what amounts of tobacco and alcohol can be imported are not made clear to those travelling abroad and (g) he did not try to conceal any of the goods.

The policy Border Force Policy in respect of vehicles.

34. In *Lindsay v Commissioners of Customs and Excise* [2002] EWCA Civ 607 it was held that subject to exceptional individual considerations, whatever they are worth, the vehicles of those who smuggle for profit, even for a small profit, should be seized as a matter of policy and the general policy of the Border Force is that where a vehicle is legally seized in connection with those goods, then the vehicle should not normally be restored.

35. Was it reasonable for the Border Agency to use that part of the policy which relates to goods 'smuggled for profit' rather than the part of the policy which relates to goods smuggled on a potentially 'not for profit' basis.

36. We find that it was not unreasonable for the Border Agency to apply the 'for profit' part of the policy. Mr Hope had connections with a retail outlet and had previously been prepared to buy goods on the black market. Mr Patterson did not provide evidence to show that he could afford to spend the sum of money he claimed to have spent without intending to obtain a profit out of it. Neither suggested that they were giving any of the goods to others at cost.

37. We agree that it was not unreasonable for the Border Force to consider that 17.5 kilograms was not a small amount and we were not persuaded by any evidence from Mr Hope or Mr Patterson that 17.5 kilograms should be classed as a small amount. The consideration of a 'first offence' is only made when the amount is small. We find that the decision has been made in accordance with the policy and is not unreasonable.

Ownership of the vehicle by another.

38. The policy will allow for restoration if a vehicle was 'owned by a third party who was not present at the time of the seizure, and can show that they were both innocent and blameless for the smuggling attempt'. Mrs Hope did not attend to give evidence and had not provided the Border Force with any further evidence after their request on April 2013. We find that it was not unreasonable for the Border Force not to consider restoration on this ground. In any event a vehicle will not normally be restored to a third party in a situation where it is tantamount to restoring it to the person responsible for the smuggling attempt.

Exceptional hardship or any other exceptional circumstance?

39. No evidence was provided to show the nature of the 'business' alleged to have been run by Mrs Hope. Mr Hope stated that his father had a vehicle which could be used in connection with the shop and there was no explanation as to why Mrs Hope could not have been insured to use this in connection with her work at the shop.

40. Mr and Mrs Hope live in Gateshead where there is good public transport but in any event it now appears that a vehicle was purchased for the use of Mr Hope and his family shortly after the Saab was seized. We find that it has not been shown that there was exceptional hardship.

5 41. Following the decision of the magistrates court, the officer cannot now take into account any argument that the goods were for the personal use of Mr Hope and his wife and for Mr Patterson and his partner.

10 42. Mr Hope claimed that the lack of 'limit guidance' misleads people about what goods can be imported without payment of extra duty. Mr Hope and Mr Patterson were however aware of the phrase 'for own personal use' and we find that it has not been shown that any of the literature produced by the Border Force is misleading about the meaning of that phrase. It was open to both of them to prove to the magistrates that the goods were for their own personal use, but they did not do so.

Was the decision proportionate

15 43. We did not believe the evidence of Mr Hope and Mr Patterson that each had bought precisely the same amount of tobacco and wine but whatever the true position the total amounts were in the vehicle and we find that it was reasonable for the officer to take into account all of it when the decision was made not to restore the vehicle.

20 44. The value of the Saab has been put at £6,000, whilst the duty evaded is a total of £3098. The value of the vehicle is relatively high compared to the duty but overall we find that the decision is not disproportionate or otherwise unreasonable. It is not a decision which no reasonable officer could take.

Has Darren Hope now produced any evidence which was not taken into account but which now should be taken into account?

25 45. We find that the further evidence about Mrs Hope not having her own business and the Freelander being bought for the use of Mr Hope's family was not available at the time of the review decision but, in the main, it is evidence which is unfavourable to Mr Hope's case and we do not direct that a further review be carried out to take it into account

30 46. We find that the Border Agency's decision to refuse restore the vehicle was not one which was unreasonably made and there are no exceptional circumstances.

47. We therefore dismiss the appeal.

35 48. 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.

5

**BARBARA KING
TRIBUNAL JUDGE**

RELEASE DATE: 19 January 2015