



TC04385

Appeal number: TC/2014/02215

EXCISE DUTY – Seizure of mixed wines found on a trailer and mixed beers found on another trailer – Duplicate use of ARC numbers – Whether the decisions not to restore goods proportionate and reasonably made – Yes – Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

WORX FOOD AND BEVERAGE BV

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: JUDGE JOHN BROOKS
CHRISTOPHER JENKINS**

Sitting in public at the Royal Courts of Justice, London on 19 March 2015

The Appellant did not appear and was not represented

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

DECISION

1. Worx Food and Beverage BV (“Worx”) appeals against the decision of HM Revenue and Customs (“HMRC”) contained in a letter dated 24 March 2014 (the “Decision Letter”), in which it was notified that, after conducting a review, 26 pallets of mixed wines found on a trailer and 39 pallets of mixed beers found on another trailer would not be restored to Worx. Although separate appeals were made in relation to the goods found on each of the trailers, on 30 May 2014, the Tribunal directed that both appeals be consolidated

2. Mr Mathew Donmall of counsel appeared on behalf of HMRC. Worx, however, were not represented. In the absence of any representation on behalf of Worx the clerk to the Tribunal made an unsuccessful attempt to contact the company via its former solicitors. These had written to the Tribunal on 5 March 2015 to explain that although they were no longer instructed in the matter Worx wished to continue with its appeal. Notice of the hearing had been sent to those solicitors on 2 January 2015, when they were still acting.

3. In the circumstances, as we were satisfied that reasonable steps had been taken to notify Worx of the hearing and it was in the interests of justice to do so, we heard the appeal in the absence of Worx in accordance with rule 33 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber Rules) 2009.

Law

4. Sections 36 and 54 of the Alcoholic Liquor Duties Act 1979 provides that excise duty is charged upon beer and wine imported into the UK. An excise duty point arises when excise goods are released for consumption in the UK or where excise goods have been in a duty suspension arrangement when they leave that arrangement in accordance with regulations 5 and 6 respectively of the Excise Goods (Holding, Movement and Duty Point) Regulations.

5. Under s 49(1) of the Customs and Excise Management Act 1979 (“CEMA”) imported goods chargeable on their importation to excise duty which are “unshipped in any port” without payment of that duty are “liable to forfeiture.”

6. Regulation 88 of the Excise Goods (Holding, Movement, and Duty Point) Regulations 2010 provides:

If in relation to any excise goods that are liable to duty that has not been paid there is –

- (a) a contravention of any provision of these Regulations, or
- (b) a contravention of any condition or restriction imposed by or under these regulations,

Those goods shall be liable to forfeiture.

7. Section 139(1) CEMA provides that:

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.

5 8. Any challenge to a seizure on the grounds that the item seized is not liable to forfeiture must, by virtue s 139(6) and schedule 5 to CEMA, be notified to HMRC within one month of the date of the seizure. Where notice is given condemnation proceedings shall be commenced by HMRC in the Magistrates' Court to determine whether the item seized was liable to forfeiture (see paragraph 6, schedule 5 CEMA).
10 However, if HMRC are not notified of a challenge within one month the item seized "shall be deemed to have been duly condemned as forfeited" (see paragraph 5, schedule 5 CEMA).

9. It is clear from the decision of the Court of Appeal in *HMRC v Jones & Jones* [2012] Ch 414 that the Tribunal does not have the jurisdiction to consider the
15 lawfulness of a seizure on the grounds that it was not liable to forfeiture irrespective of whether such a finding was made by a Magistrates' Court or deemed to have been made by virtue of the legislation.

10. Where goods have been seized s 152 CEMA establishes that:

The Commissioners may, as they see fit –

20 (a) ...
(b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under the Customs and Excise Acts."

11. However, where a decision is made not to restore something that has been seized s 14(2) of the Finance Act 1994 provides that:

25 Any person who is –
(a) a person whose liability to pay any relevant duty or penalty is determined by, results from or is or will be affected by any decision to which this section applies,
(b) a person in relation to whom, or on whose application, such a
30 decision has been made, or
(c) a person on or to whom the conditions, limitations, restrictions, prohibitions or other requirements to which such a decision relates are or are to be imposed or applied,
35 may by notice in writing to the Commissioners require them to review that decision.

12. Section 15(1) of the Finance Act 1994 states:

Where the Commissioners are required in accordance with this Chapter to review any decision, it shall be their duty to do so and they may, on that review, either –

40 (a) confirm the decision; or
(b) withdraw or vary the decision and take such further steps (if any) in consequence of the withdrawal or variation as they may consider appropriate.

13. Section 16(4) of the Finance Act 1994 sets out the powers of the Tribunal on an appeal against a decision as follows:

5 (4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this sections 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 -

10 (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 further review of the original decision; and

15 (c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a further review, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.

14. The Court of Appeal considered the issue of proportionality in *Lindsay v HMRC* [2002] STC 588 (“*Lindsay*”), a case involving the seizure of a vehicle. Lord Philips MR (as he then was), giving the leading judgment, said, at [52]:

25 “The commissioners’ policy involves the deprivation of people’s possessions. Under art 1 of the First Protocol to the convention such deprivation will only be justified if it is in the public interest. More specifically, the deprivation can be justified if it is ‘to secure the payment of taxes or other contributions or penalties’. The action taken must, however, strike a fair balance between the rights of the individual and the public interest. There must be a reasonable relationship of proportionality between the means employed and the aim pursued (*Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, para 61; *Air Canada v United Kingdom* (1995) 20 EHRR 150, para 36). I would accept Mr Baker’s submission that one must consider the individual case to ensure that the penalty imposed is fair. However strong the public interest, it cannot justify subjecting an individual to an interference with his fundamental rights that is unconscionable.”

15. However, it is not necessary for HMRC to establish fraud or involvement in wrong-doing to refuse to restore goods. As Judge Mosedale said in *Malt Beverages BVBA v HMRC* [2013] UKFTT 33 (TC) at [30]:

40 “[HMRC] does not need to be satisfied that the appellant was involved in wrong-doing in order to refuse to restore. The policy is not to restore goods which were imported without payment of duty due, save in exceptional circumstances. This is a reasonable policy to discourage evasion of excise duty.”

Evidence

45 16. In addition to a bundle of documents which included the Decision Letter and supporting documentation, Notices of Appeal and correspondence between the parties, we were provided with the witness statement of Louise Bines, the HMRC officer who had carried out the review and written the Decision Letter in this case. She orally confirmed her witness statement was true at the hearing.

17. On the basis of this evidence we make the following findings of fact.

Facts

18. On 20 November 2013 HMRC officers attended Falcon Haulage at Ensign Industrial Estate in Purfleet, Essex. They examined four unattached trailers and spoke with Mr Alan Lane, the transport manager of Falcon Haulage who, in his office, held five unique administrative reference codes (“ARCs”) for the loads on the unaccompanied trailers. This appeal is concerned with the loads on two of those trailers.

19. The first trailer (“Trailer 1”), a red curtain-side trailer with no index plate was carrying 26 pallets of mixed wines. Although no documentation was found on Trailer 1 Mr Lane produced an ARC number, 13BEH07BJ6L80017DJFK2, for the goods that were on it. When the officers interviewed the driver of another vehicle that was parked on the premises he produced a CMR. This referred to ARC number 13BEH07BJ6L80017DJFK2, the same ARC number produced in relation to Trailer 1.

20. The second trailer (“Trailer 2”), also a red curtain-side trailer but with index plate TR1, was found to be loaded with 30 pallets of mixed beers. Mr Lane produced paperwork, which he said related to Trailer 2, bearing the ARC number 13FRG0074000072697697. However, in a nearby street a different vehicle was identified. This was carrying two CMRs. One of the CMRs, which was found hidden in a fridge in the cab of the vehicle, referred to ARC number 13FRG0074000072697697, the same ARC number as had been produced in respect of Trailer 2. The other CMR found on the vehicle referred to a different ARC number. When interviewed the driver of this vehicle said that he had been told to use the ARC which was identical to that relating to Trailer 2 if he was stopped in France and the other if stopped in the UK.

21. The goods on Trailer 1 and Trailer 2 were seized by the officers who issued seizure information notices. The seizure information notice in respect of Trailer 1 stated that the mixed wine had been “seized as duplication of ARC 13BEH07BJ6L80017DJFK2” and for Trailer 2 that the seizure had been because of “Duplicate ARC 13FRG0074000072697697”.

22. On 16 December 2013 solicitors acting for Worx wrote to HMRC seeking restoration of the goods on Trailers 1 and 2 and, in the same letter, also challenged the legality of the seizures requesting that condemnation proceedings be commenced (in accordance with schedule 5 CEMA).

23. Although condemnation proceedings were commenced by HMRC at Basildon Magistrates’ Court, Worx subsequently withdrew from the proceedings and the goods were therefore duly condemned as forfeited.

24. HMRC, in a letter dated 23 December 2013, refused the request for restoration and, by a letter of 30 January 2014, the solicitors acting for Worx asked for a review of that decision. Further documents, including purchase orders, delivery notes and invoices were provided to HMRC on 10 February 2014. This information was considered by Louise Bines, an officer of the HMRC Specialist Investigations Appeals, Review and Tribunals Team who carried out the review. She had not had any previous involvement in the seizure of the trailers or with the original decision not to restore the goods.

25. Having completed her review Ms Bines wrote the Decision Letter to the solicitors acting for Worx upholding the decision not to restore the mixed wines found on Trailer 1 and the mixed beers found on Trailer 2. After setting out the background circumstances the letter explained that HMRC's restoration policy regarding alcohol goods as follows:

The general policy is that alcohol and tobacco seized as liable to forfeiture should not be restored. This policy should be applied firmly but not rigidly. Each case should be considered on its merits to determine whether restoration may be offered and under what terms but restoration of goods would generally be the exception and not done as a matter of course.

The letter continued (with emphasis as stated in the letter):

It is for me to determine whether or not the contested decision should be confirmed, varied or withdrawn. I am *guided* by the Commissioners' policy but I consider every case on its individual merits. I have considered the decision afresh; including the circumstances surrounding the seizure and the related evidence, so as to decide if any mitigating or exceptional circumstances exist that should be taken into account. I have examined all the representations and other material that was available to the Commissioners both before and after the time of the decision.

In considering restoration I have looked at all of the circumstances surrounding the seizure but **I have not considered the legality or the correctness of the seizure** itself. If anyone is contesting the legality or correctness of the seizure then the matter should have been appealed to a Magistrates' Court within 1 month of the date of seizure.

After referring to the duplicate ARC numbers found in relation to Trailer and Trailer 2 Ms Bines concluded that:

... this is indicative that duplicate movements of goods and trailers are being made using ARC references, and as such, the validity of the goods has been brought into question.

She therefore decided not to restore the goods from Trailers 1 and 2.

26. On 23 April 2014 two separate appeals were made by Worx to the Tribunal. One in relation to Trailer 1 and the other in respect of Trailer 2. As noted above, at paragraph 1, these appeals were consolidated in accordance with a direction of the Tribunal released on 30 May 2014. Although not identical, the grounds of appeal in relation each of the appeals against the decision not to restore the goods from the trailers are written in broadly similar terms. Both assert ownership of the goods concerned and state that reasonable checks have been undertaken in relation to their transport. Also, both appeals seek to challenge the underlying facts in relation to the seizures and therefore the seizures themselves.

Discussion and Conclusion

27. In the light of the relevant legislation and authorities described above it is clear that the jurisdiction of the Tribunal in an appeal such as this is limited and that the issue for us to determine is not whether the mixed wines on Trailer 1 and mixed beers on Trailer 2 should be restored to Worx but whether, having regard to our findings of

fact, the decision taken by HMRC not to restore these goods is one that could reasonably have been reached. It is not sufficient that we might ourselves have reached a different conclusion nor is it open to us to consider any challenge to the basis or legality of the seizure or the underlying facts necessary to the conclusion that the goods are condemned as forfeited which, in the present case, includes the duplicate use of ARC numbers.

28. As regards whether a decision is one that could reasonably have been reached, Lord Phillips MR said, at [40], in *Lindsay*:

“... the Commissioners will not arrive reasonably at a decision if they take into account irrelevant matters, or fail to take into account all relevant matters”

29. It is apparent from the Decision Letter and witness statement of Ms Bines that no irrelevant matters were taken into account and that all relevant matters were. In the absence of any exceptional circumstances we find the decision not to restore the goods on Trailer 1 and Trailer 2 to be reasonable and proportionate having regard to all the circumstances of the case.

30. As such, and for the above reasons, the appeal is dismissed.

Right to apply for Permission to Appeal

31. 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 BROOKS
TRIBUNAL JUDGE**

RELEASE DATE: 5 May 2015