



TC04423

Appeal number: TC/2013/08187

*EXCISE DUTY – seizure of tobacco and vehicle – reasonableness of
decision to refuse restoration of tobacco and a vehicle – appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

RIKKI WADE

Appellant

- and -

DIRECTOR OF BORDER FORCE

Respondent

**TRIBUNAL: JUDGE VICTORIA NICHOLL
MR WILLIAM HAARER**

Sitting in public at Keble House, Exeter on 14 April 2015

Mr David Wade, lay representative for the Appellant

**Ms Tear, Counsel, instructed by the Cash Forfeiture and Condemnation Legal
Team of the Home Office, for the Respondent**

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DECISION

Introduction

1. This is an appeal against the decision of the Respondent (“Border Force”) to refuse to restore tobacco and a vehicle seized at Coquelles on 6 August 2013 to the Appellant (“Rikki Wade” to distinguish him from Mr Wade his representative).

The facts

2. On 6 August 2013 Rikki Wade was stopped as he drove his Citroen ZX (“the vehicle”) through the UK Controls at the Eurotunnel terminal in Coquelles, France. Rikki Wade’s father, David Wade, and Mr Mark Taylor were passengers in the vehicle. They were returning to England after a trip to Adinkerke in Belgium to buy hand-rolling tobacco and cigarettes.

3. The three passengers were interviewed together by Officer Varty and then they were interviewed separately. Rikki Wade told the officer who interviewed him that he had bought 10 pouches of hand-rolling tobacco for his personal use. He went on to say that this was 1000 individual packets of 50g, that he smokes 1 to 2 pouches a week, that the tobacco would last him 6 to 7 months and that he had paid £530 cash for the tobacco. Rikki Wade had in fact bought 100 individual packets of 50g, making a total of 5kg. Each of the passengers was asked who had paid for the channel tunnel ticket. Rikki Wade said that Mr Taylor had paid for the ticket but that the cost would be split 3 ways. In Mr Taylor’s interview he said that he had booked and paid for the travel on the internet and would not be recovering the cost from the two other passengers.

4. After a discussion between the three officers who had carried out the interviews with the three passengers, Rikki Wade’s tobacco and vehicle were seized on the basis that the officers were satisfied that the goods purchased were for commercial purposes and not for own use. The 5kg of hand-rolling tobacco and 6000 cigarettes purchased by Mr Taylor were also seized, but it was accepted that the tobacco and cigarettes purchased by Mr David Wade were for own use.

5. On 7 August 2013 Rikki Wade wrote requesting a review of the seizure decision, asking for restoration of the goods and vehicle and giving notice of a claim that the goods and vehicle were not liable to forfeiture. He claimed that he needed his car as he works 15 miles from home, on a low wage, in an area where there is no public transport.

6. In a letter dated 17 September 2013 Border Force advised that they had considered their restoration policy but decided that the goods and vehicle should not be restored. A request was made by letter dated 28 September 2013 for a review of this decision. Mr Wade had asked for copies of the notebooks of the interviews but these were not supplied until after the final date on which the review could be requested. The decision of 17 September 2013 was reviewed by Review Officer Perkins. Review Officer Perkins considered the evidence in the notebooks of the interviews with Rikki Wade and Mr Taylor but did not speak to the officers concerned

as she did not consider it to be her role to identify or clarify any inconsistencies. Review Officer Perkins also considered the contents of the correspondence between the parties as part of her review. The conclusion of the review was set out in Review officer Perkins' letter dated 12 November 2013 and was that the decision not to restore should be upheld.

7. Condemnation proceedings were commenced in the magistrates' court as Rikki Wade had challenged the legality of the seizure. The case was heard on 15 May 2014 and an order for condemnation was made which confirmed the legality of the seizure. It was noted that Rikki Wade had purchased his vehicle some 2 months prior to the trip in August 2013 and that it was worth £520.

The law

8. Section 2(1) of the Tobacco Products Duty Act 1979 provides that:

“There shall be charged on tobacco products imported into or manufactured in the United Kingdom a duty of excise at the rates shown...in the Table in Schedule 1 to this Act”

9. Regulation 13 of the Excise Goods (Holding, Movement, and Duty Point) Regulations 2010 provides that:

“(1) where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.

(2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person:

- (a) making the delivery of the goods; and
- (b) holding the goods intended for delivery; or
- (c) to whom the goods are delivered.

(3) For the purposes of paragraph (1) excise goods are held for a commercial purpose if they are held --

- (a) by a person other than a private individual; or
- (b) by a private individual ("P"), except in the case where the excise goods are held for P's own use and were acquired in, and transported to the United Kingdom from, another member State by P.

(4) For the purpose of determining whether excise goods referred to in the exception in paragraph (3)(b) are for P's own use regard must be taken of:

- (a) P's reasons for having possession or control of those goods;
- (b) whether or not P is a revenue trader
- (c) P's conduct, including P's intended use of those goods or any

refusal to disclose the intended use of those goods;

(d) the location of those goods;

(e) the mode of transport used to convey those goods;

(f) any document or other information relating to those goods;

5 (g) the nature of those goods including the nature or condition of any package or container;

(h) the quantity of those goods and, in particular, whether the quantity exceeds any of the following quantities --

... 1 kg of any other tobacco products;

10 (i) whether P personally financed the purchase of the goods;

(j) any other circumstances that appear to be relevant.

(5) For the purposes of the exception in paragraph (3) (b)-

15 (a) "excise goods" does not include any goods chargeable with excise duty by virtue of any provision of the Hydrocarbon Oil Duties Act 1979 or of any order made under section 10 of the Finance Act 1993;

(b) "own use" includes use as a personal gift but does not include the transfer of the goods to another person for money or money's worth (including any reimbursement of expenses incurred in connection with obtaining them)."

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

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

a contravention of any provision of these Regulations, or

25 a contravention of any condition or restriction imposed by or under these Regulations,

those goods shall be liable to forfeiture"

11. Section 139 (1) of the Customs and Excise Management Act 1970 ("CEMA 1979") provides as follows:

30 "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. Section 141(1) of CEMA provides that where any thing has become liable to forfeiture:

35 "(a) any ship, aircraft, vehicle, animal, container (including any article of passengers' baggage) or other thing whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture, either at a time when it was so liable or for the purposes of the commission of the offence for which it later became so

liable,
...shall also be liable to forfeiture”

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

5 “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...”

14. If a notice of claim is given under Paragraph 1 Schedule 3 CEMA 1979
10 condemnation proceedings are heard in the Magistrates’ Court.

15. Section 152 CEMA 1979 provides:

“The Commissioners may as they see fit –

(a)...

15 (b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under [the Customs and Excise Acts]...”

16. Section 14(2) Finance Act 1994 makes provision for a person to require a review of a decision made under section 152(b) CEMA 1979 not to restore anything seized from that person.

17. Section 16 Finance Act 1994 makes provision for a person to appeal against any
20 review of a decision under section 152(b) CEMA 1979. It specifies that the power of an appeal tribunal shall be confined to a power, where the tribunal are satisfied that the review decision is one that the reviewing officer making that decision could not reasonably have arrived at on the basis of the information provided, to do one or more of the following:

25 (a) Direct that the decision, so far as it remains in force, is to cease to have effect;

(b) Require a further review of the original decision in accordance with such directions as the tribunal considers appropriate;

30 (c) Where the decision has already been acted on or taken effect, declare the decision to have been unreasonable and to give directions as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in the future.

35 18. The jurisdiction of this tribunal is therefore supervisory and limited to determining whether the decision by Border Force was reasonable. This tribunal has no power to order the restoration of the goods and vehicle, but it can require Border Force to carry out a further review of its decision not to restore and give directions. In considering whether the decision was reasonable the legality of the seizure cannot be raised as this
40 was determined in the proceedings before the magistrates’ court. This was confirmed by Mummery LJ in *HMRC V Jones and Jones [2011] EWCA Civ 824* at paragraph 73.

Submissions

19. Mr Wade put forward a number of issues on behalf of Rikki Wade. Rikki Wade did not give evidence. These relate to errors in statements, procedure, maths and the Respondent's statement of case which he claimed prejudiced Rikki Wade's position.
5 Mr Wade did not challenge the legality of the seizure and accepts that this cannot be challenged in this tribunal following the order made by the magistrates' court.

20. The issues raised on behalf of Rikki Wade were that the main reasons for concluding that the goods were not for own use were cited in Border Force's letter of 12 September 2013 as:

10 "You didn't know how many pouches you had purchased you claimed 1000 in fact it was 100.

You claimed the tobacco would last 6-7 months when in fact at your consumption rate they would last one year.

15 There were discrepancies between the three travellers regarding the reimbursement of Mr Taylor for the cost of the ticket."

Mr Wade submits that while the record of the interview with Rikki Wade on 6 August 2013 does record that he referred to his purchase of hand-rolled tobacco as containing 1000 pouches rather than the 100 pouches, this was a simple error on his part and was not in his favour as regards
20 quantity in any event. Similarly, although the record of the interviews was not made available to the three travellers until after the deadline for their application to request a review of the decision not to restore, Mr Wade recalls that the officer suggested that the tobacco would last 1.5 – 2 years rather than the 1 year referred to in the letter. Lastly, it was clear in the
25 three travellers' minds that they would split the cost of the tickets and fuel three ways.

21. Mr Wade referred to a number of points of procedure and errors in the correspondence as unacceptable. These include the fact that the reason for the seizure was not made clear to Rikki Wade until the letter dated 12 September 2013 and that
30 Mr Wade was allowed to keep the tobacco that he had bought even though it was significantly more. Mr Wade also referred to mathematical discrepancies in the letters of 13 and 19 September 2013 to Mr Taylor which were unprofessional and to the unfounded suggestion that Mr Taylor had not been clear about the frequency of his travel.

35 22. Mr Wade submitted that statements in the Respondent's statement of case, including that there had been previous seizures from the Appellants and that "the Appellants attempted to mislead the Officers by not declaring that they had any excise goods when specifically asked; They gave incorrect account of their frequency of travel" were both unfounded and intended to make Rikki Wade and Mr Taylor look
40 like criminals when they had done nothing wrong.

23. Ms Tear submitted on behalf of Border Force that Review Officer Perkins had carried out a comprehensive review and wrote in extraordinary length how she had

5 applied Border Force’s policy. The review decision set out an accurate description of the goods and events and the inaccuracies referred to by Mr Wade did not affect Review Officer Perkins’ decision. This is supported by Review Officer Perkins’ evidence to the tribunal. The condemnation proceedings had determined that the goods purchased by Rikki Wade and Mr Taylor were not for personal use and were held for commercial purposes. As excise duty had not been paid on these goods they were liable to forfeiture and the seizure of the vehicle in which they were being transported was therefore legal. Ms Tear noted that neither party, nor the tribunal, has any jurisdiction to question these findings on the legality of the seizure.

10 **Discussion**

24. The question for this tribunal is whether Border Force’s decision was unreasonable in the sense that no reasonable adjudicator properly directed could reasonably reach that decision. We considered whether Review Officer Perkins had made a mistake of law and whether she had taken into account some irrelevant matter or had disregarded something to which she should have given weight.

25. We also considered the proportionality of the decision not to restore the vehicle, but noted its low value. In *Lindsay v Commissioners of Customs and Excise* [2002] EWCA Civ 267 it was stated that:

26. “Given the extent of the damage caused to the public interest, it is, in my judgment, acceptable and proportionate 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.”

27. The general policy of Border Force policy for the restoration of private vehicles used for the improper importation or transportation of excise goods is that they “should not normally be restored. The policy is intended to be robust so as to protect legitimate UK trade and revenue and prevent illicit trade in excise goods. However vehicles may be restored at the discretion of Border Force subject to such conditions (if any) as they think proper (e.g. for a fee) in circumstances...” The circumstances in which vehicles may be restored include where the goods are destined for supply on a “not for profit” basis and where the goods are destined for supply for profit, but the quantity of goods is small and it is a first occurrence. Accordingly the officer is not fettered by the strict policy as it requires due consideration of the circumstances in order to determine whether restoration would be appropriate.

28. In applying this policy Review Officer Perkins considered the circumstances, and whether there was exceptional hardship to make restoration appropriate in this case. The correspondence considered as part of the review included the errors noted by Mr Wade and set out in paragraph 20 above. These errors in the correspondence, and the delay in providing copies of the notebooks of the interviews, were unhelpful to Rikki Wade but, as they concerned the question of the legality of the seizure, they were challenged by Mr Wade with the benefit of the notebooks in the condemnation proceedings. However, as the legality of the seizure and the fact that the goods were held for a commercial purpose was determined by the condemnation proceedings and was deemed to be so at the time of the review, these points did not form part of the

basis on which Review Officer Perkins reached her decision. It was correct that Review Officer Perkins' starting point was that the seizure of the goods was legal and that they were held for a commercial purpose.

5 29. The Respondent's statement of case did include statements that were not accurate or fair, but it was produced after the date of the decision and its contents could not therefore have prejudiced the decision not to restore.

10 30. The decision not to restore was made by Review Officer Perkins in accordance with the policy on the basis that the goods were for a commercial purpose, that the combined quantity of tobacco being transported was large (more than 5 kg of hand-rolling tobacco or 6000 cigarettes) and that the degree of hardship caused to Rikki Wade was not exceptional as a result of the seizure of his vehicle. This decision was reasonable and proportionate having regard to the circumstances and it did not take into account irrelevant or inaccurate matters.

Decision

15 31. For the reasons set out above we accept that Border Force could reasonably reach the decision not to restore the goods and vehicle to Rikki Wade and dismiss the appeal.

20 32. 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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**VICTORIA NICHOLL
TRIBUNAL JUDGE**

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RELEASE DATE: 26 May 2015