



TC04579

Appeal number: TC/2014/3856

EXCISE DUTY – alcohol brought into UK by courier for owner – alcohol seized – condemnation proceedings not started – restoration for a fee. Held: (1) the issue of ‘own use’ was open to the tribunal – Jones distinguished, (2) the alcohol was for own use but was liable to duty and legally seized; the (3) the officer’s written decision on review was unreasonable, but (4) it appeared that the decision actually made was different from the written one, and that actual decision was not unreasonable. Directions made.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MR JW GOLDIE & MRS J GOLDIE

Appellants

- and -

THE DIRECTOR OF BORDER REVENUE

Respondents

**TRIBUNAL: JUDGE CHARLES HELLIER
WILLIAM HAARER**

Sitting in public in Plymouth on 27 July 2015

The Appellants in person

Nick Bradley, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

The Principle Facts

1. Mr & Mrs Goldie's daughter was getting married in May 2014. There was to be a celebration extending over a number of days. Mr and Mrs Goldie were frequent visitors to Spain. They decided to buy the wine and other alcoholic refreshment (we shall use 'wine' to encompass all of it) for the wedding in Spain. In January 2014 they bought the wine in Spain where it was put to one side by the vendor awaiting collection. English friends in Spain recommended a Courier to them. They contacted the Courier in Spain and explained that they wished the wine and some personal belongings to be brought to the UK.

2. The Courier asked them to provide written evidence of the use to which they would put the wine. They provided him with ample documentary evidence: invoices, invitations, catering contracts, church bookings etc. The Courier told them that what they had provided was sufficient.

3. The Courier picked up the wine and the personal belongings and drove to the UK. On arriving from the ferry at Poole on 29 March 2014 the Courier was stopped by customs officers. The Courier told them that the wine was for his clients' daughter's wedding. The officers concluded that the wine was liable to duty which had not been paid and seized it and the Courier's vehicle.

4. The Courier reported the seizure to Mr and Mrs Goldie. They contacted Border Revenue and wrote seeking restoration of the wine. On 14 April 2014 Border Revenue replied offering restoration for a fee of £1,847.17, an amount equivalent to the UK duty which would have been payable on the ordinary import of the wine. Mr and Mrs Goldie's daughter's wedding was to take place on a 17 May, so they scraped together the fee, hired a van, went to Poole, paid the fee and picked up the wine.

5. Mr and Mrs Goldie now appeal against the decision to charge a fee as a condition of restoration. They accept that because they were not travelling with the wine, duty was due on its importation, but they say that they took the advice of the Courier that they did not have to travel with the wine and that, so long as they provided sufficient documentary evidence of their ownership and use of the wine, it would not be liable to duty. Had they known that the wine would be duty-free only if they had accompanied it, they would have done so.

6. Mr and Mrs Goldie were hard hit by the need to pay the restoration fee. In the end they used a credit card. Their contract with the Courier was made in Spain and they have not been able to mount an action against the Courier to reclaim the cost to them of his erroneous advice.

The relevant law and its effect

7. Article 32 (1) of the EU directive 2008/118/EEC provides that:

Excise duty on excise goods acquired by a private individual for his own use, and transported from one Member State to another by him, shall be charged only in the Member State in which the excise goods were acquired.

5 8. In *Staatssecretaris van Financiën v BF Joustra* C -5/05 the CJEU considered whether the predecessor of this provision, Article 8 of Directive 92/12/EEC, applied to exempt goods from duty when the goods were acquired by an individual for his own use but transported by the transport undertaking to his Member State. At [33] the Court said that for Article 8 to apply a number of conditions had to be satisfied: the products:

10 "must have been acquired by "private individuals"
for "their own use", and
transported "by them"."

It held that if the products were transported, not by the individual, but by transport undertaking on his behalf, the third condition was not satisfied.

15 9. Article 33 now provides that if goods which had been released for consumption in one Member State are held for "commercial purposes" in another Member State, duty will become chargeable in the other Member State. The Article provides an extended definition of "commercial purposes":

20 For the purposes of this Article, "holding for commercial purposes" shall mean the holding of excise goods by a person other than a private individual or by a private individual for reasons other than his own use and transported by him, in accordance with Article 32.

25 10. The underlined words show that for the purposes of the article "commercial purposes" does not have an ordinary meaning but includes a situation in which an individual holds goods for his own use and for no purpose which would normally be called commercial, but in circumstances where he or she did not personally transport the goods across the border.

11. The U.K.'s domestic legislation enacts these provisions in Regulation 13 Excise Goods (Holding Movement and Duty Point) Regulations 2010/593.

30 12. Thus, because the wine was not transported by Mr and Mrs Goldie themselves to the UK but by a courier, the freedom from duty provided by Article 32 is not available and the wine was dutiable when it came into the UK. In ordinary language it was not then held for a "commercial purpose", but in the specialised language of the Directive and the Regulations, it is treated as if it was held for a commercial purpose.

35 13. Section 49 Customs and Excise Management Act 1979 ("CEMA") provides that if goods are imported without payment of any duty due on them, they are liable to forfeiture. We observe that section 49 provides for five other circumstances in which goods may be seized, including the import of prohibited goods. By section 139 anything so liable to forfeiture may be seized.

14. Thus because the wine was liable to duty which had not been paid at importation it was liable to forfeiture and could be seized. The seizure was clearly legal.

5 15. Schedule 5 CEMA provides a means of challenging the legality of the seizure by commencing what are called "condemnation" proceedings usually in the Magistrates Court. This provision would not have availed Mr and Mrs Goldie: the wine, having been transported by someone else, was properly liable to forfeiture. There was no point in their mounting a challenge of this nature and they did not do so.

10 16. Paragraph 5 of schedule 5 provides that if the procedure for challenging a forfeiture is not instigated within a set period, the goods seized are deemed to have been legally seized.

17. In this appeal however, paragraph 5 adds nothing to the operation of the earlier provisions. There is no doubt on the fact that the wine was legally seized because Mr and Mrs Goldie had not transported it themselves.

15 18. The effect of this deeming provision in this case is to treat the wine as lawfully seized. Deeming a finding by the Magistrates Court carries with it the findings necessary in the circumstances for the deemed conclusion. In these circumstances that means a finding that Mr and Mrs Goldie did not transport the wine themselves. It does **not** carry a finding that the wine was not for their own use.

20 19. The Respondent relies on the judgment of the Court of Appeal in *Revenue and Customs Commissioners v Jones* [2011]EWCA Civ 824. In that case tobacco was seized on the grounds that the officers seizing it considered that it was not for the importers' own use. The importers did not challenge the seizure under the Sch 5 procedure and as a result the tobacco was deemed to be lawfully seized. The 25 importers then sought to argue on a restoration appeal that the tribunal could find that the tobacco was for their own use.

20. The Court of Appeal held that the Revenue should succeed on the ground that the FTT had no power to reopen and redetermine the question whether or not the seized goods had been imported for the owners' own use.

30 21. In setting out his conclusion Mummery LJ says

“(2)The owners had the right to invoke the notice of claim procedure to oppose condemnation by the court on the ground that they were importing the goods for their personal use, not for commercial use.”

35 22. Mr and Mrs Goldie's case is quite different. A claim that the goods were for their own use would not have availed them. In *Jones* the determination of whether or not the tobacco was for own use would have determined the legality of the seizure – it was therefore a necessary implication of the deemed finding that it was legally seized. In Mr and Mrs Goldie's case a finding one way or the other on own use would have made no difference to the result. Such a finding would not be a necessary element of

the Magistrates' Court decision and cannot therefore be deemed to arise as a result of the Sch5 procedure not being followed.

23. Therefore it is open to us to decide that the wine was held for Mr and Mrs Goldie's own use. We find that it was.

5 24. In their letter refusing restoration the Border Revenue say that the effect of not
having brought condemnation proceedings under the schedule 5 procedure is that the
wine was to be treated as being for a commercial purpose. This is somewhat
misleading. It is true that as the words "commercial purpose" are used in the
legislation, and the fact that Mr and Mrs Goldie did not themselves transport the wine
10 means that it falls within the legislation's use of those words. But in the context of an
ordinary letter or statement to describe the wine as so held was wrong.

25. The Border Revenue's statement of case restates this inaccuracy. In paragraph
18 it is said that as a result of the deemed legality of the seizure "It is therefore
deemed that the Goods were not for the importer's own use and were imported for a
15 commercial purpose." In this case it is not a necessary precursor to the legality of the
seizure that the goods were not held for Mr and Mrs Goldie's own purpose.

26. But the wine was legally seized. Sections 14 to 16 FA 1994 provide that the
Border Revenue may restore a person's seized goods, or restore them on conditions.
That is what happened.

20 27. Section 14 requires the Border Revenue to review any such decision on request.
There was such a review. On 17 June 2014 Mrs Perkins of the Border Revenue wrote
to Mr and Mrs Goldie with her conclusion which maintained the earlier decision that
a fee equal to the duty on the wine should be paid as a condition for its restoration.

28. Section 16 of that Act permits an appeal to this tribunal against the outcome of
25 any such review. Mr and Mrs Goldie appeal under that provision.

29. This type of appeal is not however of an ordinary kind. The Act does not confer
on the tribunal an ability to change the Border Force decision or to make a new
decision. We are not given the power to say, for example, "we decide that the goods
should have been restored for a fee of £100". Instead we are required to decide
30 whether the decision made by the Border Force was unreasonable. If we decide that it
was unreasonable we can set it aside, and direct that a new decision be made. We can
make directions in relation to a new decision, but we cannot dictate what it must be.

30. So the question in this appeal is whether Mrs Perkins' decision of 17 June 2014
was unreasonable. What does unreasonable mean? It means taking into account
35 irrelevant matters, failing to take into account relevant matters, making a material
mistake of law, or coming to a conclusion which no reasonable person could have
reached on the material properly before them.

31. There is a further oddity about this process. We are a fact-finding tribunal. We
hear evidence and find facts. The reasonableness or otherwise of the officer's decision

is judged, not against the facts known to her at the time she made the decision, but against the facts as we find them.

32. So we now turn to Mrs Perkins' letter

The Review Letter

5 33. In her letter Mrs Perkins summarises her understanding of the facts. Mr and Mrs Goldie did not suggest that anything material was omitted from, or was mistaken in, her account save for Mrs Perkins' statement that the wine was held for a commercial purpose and not for their own use at the wedding.

34. Mrs Perkins letter says that she has not considered the legality of the seizure:

10 "If you are contesting the legality or correctness of the seizure – and that includes any claim that the goods are for "Own use" – then you should have appealed ...to a Magistrates' Court..."

35. Mrs Perkins amplified this statement when she wrote that her

15 "starting point is that the seizure of the excise goods was legal and that **they were held in the UK for a commercial purpose** (not for own use)" (the emboldening is that of the letter).

36. Mrs Perkins then referred to the contention that the wine was for and Mrs Golding's own use and says that by reference to *Jones*, that contention cannot stand.

20 37. This, for the reasons explained above, was a mistake. It is true that the Directive and Regulations use the words "commercial purpose" in such a way that for those purposes the wine is to be treated as held for commercial purpose. But in this case that conclusion does not preclude a conclusion that the goods were for Mr and Mrs Goldie's own use.

25 38. Mrs Perkins recites the Border Force policy on restoration, which is that legally forfeited goods should not normally be restored although restoration could be offered exceptionally. She says that she will have regard to that policy but would not be bound by it. There is nothing unreasonable in that.

30 39. Mrs Perkins then discusses, and discards, Mr and Mrs Goldie's lack of knowledge of the law and reliance on the Courier's advice as matters which should justify a lower fee. We cannot say that it was unreasonable.

35 40. Mrs Perkins then gives consideration to the hardship which Mr and Mrs Goldie would suffer by reason of the fee. She says that she had paid "particular attention to the fact that [they] saved hard to buy the goods and indeed to pay the courier" but that hardship was often a consequence of seizure and that only exceptional hardship could indicate restoration without a fee. She concludes that although Mr and Mrs Goldie suffered hardship it was not exceptional hardship which would merit a more lenient approach.

41. Leaving aside Mrs Perkins erroneous assumption that the wine was not for Mr and Mrs Goldie's own use, it does not seem to us that this decision, on the basis of the evidence available to Mrs Perkins was unreasonable - there was nothing relevant which she failed to take into account, nothing she took into account which she should not have done, and no other error of law. Duty was payable on the wine, the fee represented that duty. It was not unreasonable to seek to collect an amount equal to the duty by means of the fee. The decision, though perhaps harsh, was not wholly outside side the bounds of the decisions a reasonable person might make.

Matters arising from the Evidence not referred to in Mrs Perkins' Review letter

42. They were three additional factors which arose from the evidence of Mrs Perkins, and Mr and Mrs Goldie before us which were not referred to in Mrs Perkins' Review Letter:

(1) The Courier had been given a form 12A by the Border Force when the wine was seized. That form explains the process for challenging seizure. However Mr and Mrs Goldie said, and we accept, that the Courier did not give them the form.

43. In the circumstances we do not regard this as a relevant matter. Even if Mr and Mrs Goldie had received notice 12A, and had realised that they could instigate condemnation proceedings, it would have been a waste of time for them to do so since the goods were clearly forfeit because Mr and Mrs Goldie had not travelled with them. Whether or not they knew of the right to challenge seizure and the effects of not so doing made no difference. As a result the fact that they did not receive that notice does not seem to us to be relevant to the question of restoration.

(2) Mrs Goldie told us and we accept that she had worked in a coffee bar in order to pay for the wine for the wedding. Mrs Perkins told us that she had not been aware of this.

44. Whilst we regard this as relevant to Mr and Mrs Goldie's means and indicative of the hardship that having to pay the restoration fee would occasion, we conclude that even if Mrs Perkins had been aware of this she would inevitably have come to the same decision, and that in doing so she would not have reached a decision which was totally unreasonable. As a result we would not set aside the decision by reason of this fact.

(3) Mrs Perkins told us, and we accept, that the Courier's vehicle was restored without seeking a fee

45. Mrs Perkins told us that the fact that no fee had been charged for the restoration of the Courier's vehicle was a factor she had taken into account in her decision. If a fee had been charged to the Courier it seemed a double charge would be made if Mr and Mrs Goldie were also charged a fee.

46. Mr Bradley said that this was a reasonable relevant consideration. HMRC should collect some payment because duty was due. If it had not collected from the Courier it was right to consider collection from the owners the goods.

47. Mr Goldie says that if the Border Revenue's policy is to restore courier's vehicles free of charge, the effect is to shift the burden onto the innocent and unknowing rather than businesses like couriers who should know the rules.

Conclusions

5 (a) *the restoration without fee of the courier's vehicle*

48. We share Mr and Mrs Goldie's concerns if the Border Force policy is to restore couriers' vehicles without payment of any fee in this type of circumstance. It appeared to us unfairly to favour someone who should have known the rules.

10 49. However it does not seem to us that if this is the Border Force policy that that policy is relevant to the exercise of their discretion in relation to the owner of the goods. Thus even if that were their policy and it was unreasonable, that fact would be irrelevant to Mr and Mrs Goldie's circumstances.

15 50. On the other hand Mrs Perkins regarded it as relevant, and did take into consideration the fact, that the duty had not been recovered by charging a fee to the Courier. However, given that the wine was dutiable, and that it belonged to and was imported by Mr and Mrs Goldie, it did not seem to us wholly unreasonable to seek to recover that duty from them.

51. As a result we do not consider that this issue warrants allowing the appeal, although we note our concern as to the policy.

20 (b) *own use*

52. There was in our judgement an error of law in the Review letter. That was the stated assumption that the goods were not for Mr and Mrs Goldie's own use.

25 53. Mrs Perkins' unchallenged evidence however was that, in fact, in making her decision she had not relied on this assumption, but was concerned with the fact that the import was dutiable, and that duty had not been paid. In effect she had accepted that the wine was indeed for the wedding and thus for Mr and Mrs Goldie's own use.

54. Mr Bradley says that as a result her actual decision, rather than the one which appears on the face of the Review letter was unaffected by this error, and was therefore not unreasonable.

30 55. That of course raises the question as to whether the decision we are examining is the one actually made by Mrs Perkins or the one which appears on the face of the review letter. If the decision at issue is that which Mrs Perkins told us she made, then it seems to us that whilst it may bear harshly on Mr and Mrs Goldie, it is not outside the bounds of what a reasonable person might decide. But if the decision is that described in the letter then since it appears to regard the wine as not for Mr and Mrs Goldie's own use and to disregard its intended use for the wedding, it is unreasonable.

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56. This was not an issue which was discussed in any detail at the hearing. Our initial conclusion is that the decision to which section 15 of the Act refers is the actual decision made, so that given our acceptance of Mrs Perkins' evidence that in fact she did allow for the fact that the wine was for Mr and Mrs Perkins' own use at the wedding, we would dismiss the appeal.

57. If, on the other hand, we were persuaded that the relevant decision was the written one, we would hold that it was unreasonable because the letter failed to accept that the wine was genuinely for Mr and Mrs Goldie's own use at the wedding. In that case we would direct the Border Force to remake the decision on the basis that the wine was for Mr and Mrs Goldie's own use at the wedding. However, it seems to us to be very likely (although not perhaps inevitable) that if we did this, the Border Force would come to the same conclusion as before. That is because Mrs Perkins said that she had in fact made the decision on precisely that basis. And if the Border Force did come to the same conclusion when they remade the decision, then it seems to us that it would not be unreasonable for them to have done so. That is because the duty was in fact due on the wine and its seizure was lawful: it was due even though Mr and Mrs Goldie made a mistake and could have avoided the duty by travelling with the wine; the law does not relieve a person of duty when he or she makes a mistake; and it is not unreasonable for the Border Force to collect, by way of a fee, the duty that is due by reason of that mistake. Thus it seems to us that if we did remit the decision to be retaken it would be very unlikely that it would avail Mr and Mrs Goldie.

58. However, it would be unfair to deprive Mr and Mrs Goldie of the chance of arguing formally that the decision under appeal was the written one and that it should be retaken, even though it seems unlikely that it would have any real benefit. We therefore make the directions set out below which permit Mr and Mrs Goldie to argue if they so wish that the relevant decision was the written one and that it should be set aside and remade.

59. To that end we DIRECT as follows:

(1) Within 21 days of the release of this decision Mr and Mrs Goldie shall write to the tribunal (cc the Director of Border Revenue) with any arguments they may have that the relevant decision was the written one, or to say that they do not wish to pursue the appeal further;

(2) If Mr and Mrs Goldie say that they do not wish to pursue the argument, we shall dismiss the appeal,

(3) If Mr and Mrs Goldie write with their arguments in accordance with (1) then within 21 days after receiving them the Border Force shall send to the tribunal (cc Mr and Mrs Goldie) any submissions on the arguments advanced that they wish to make;

(4) Within 21 days thereafter Mr and Mrs Goldie may provide to the tribunal (cc the Director of Border Revenue) any submissions they wish to make in reply,

(5) The tribunal will then make its decision.

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**CHARLES HELLIER
TRIBUNAL JUDGE**

RELEASE DATE: 14 JULY 2015

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