



TC04615

Appeal number: TC/2013/07481

Excise Duty – seizure of vehicles – hardship – whether Border Force decision reasonable – held – Border Force decision reasonable, appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MR MARCIN SOLOWIEJ

Appellant

- and -

DIRECTOR OF BORDER REVENUE

Respondents

**TRIBUNAL: JUDGE RACHEL SHORT
GILL HUNTER (Member)**

Sitting in public at Fox Court, 14 Gray's Inn Road London on 23 February 2015

Mr Solowiej for the Appellant

Mr Evans instructed by the Director of Border Revenue for the Respondents

DECISION

1. This is an appeal against the Border Force's decision of 15 July 2013 not to restore to Mr Solowiej a Volvo tractor and trailer, Registration BSKAK92 and BSK59XP.

Preliminary Matters

2. This appeal was made late but the Border Force confirmed that they had no objection to the time limit within which the appeal should have been made being extended. This appeal was therefore treated as made in time.

10 *Background Facts*

3. Mr Solowiej was stopped and his vehicles were searched by the UK Border Force at Eastern Docks, Dover on 4 May 2013. Mr Solowiej was delivering a cargo from Germany to Blackburn. It was established that Mr Solowiej was both the driver and the owner of the haulage firm which owned the tractor and trailer.

15 4. On questioning by the Border Force Mr Solowiej said that he was not carrying any cigarettes and that he was not a smoker. An initial search uncovered 9 cartons of cigarettes in the cab of the tractor. Mr Solowiej said there were no more cigarettes on board but eventually 32 cartons were found amounting to 6,280 cigarettes. The cigarettes and the tractor and trailer were seized under s 139(1) Customs and Excise
20 Management Act 1979 on the basis that the cigarettes were for commercial use and the tractor and trailer had been used to transport them. Mr Solowiej was given a copy of leaflet 12A explaining his rights to contest the seizure.

5. Mr Solowiej had been charged with a previous offence on 23 March 2013 when he was intercepted carrying 20 cartons of cigarettes in the same vehicles. Because that
25 was a first offence Mr Solowiej was given the opportunity to pay the restoration fee for the vehicle and trailer which he did and they were returned to him

6. No application was made to the magistrates to contest the legality of this seizure but Mr Solowiej wrote to the Border Force on 16 May 2013 asking for restoration of the tractor and trailer setting out why he was suffering from hardship as a result of the
30 seizure; the vehicle was his only source of income to support his wife and children.

7. The Border Force notified Mr Solowiej on 15 July 2013 that they were refusing his request for restoration because this was Mr Solowiej's second offence and he had not demonstrated that he was suffering from exceptional hardship. Mr Solowiej requested a review of that decision on 20 July 2013 and provided further information
35 to the Border Force on 20 August 2013. That review was completed and confirmed the Border Force's original decision to Mr Solowiej on 27 September 2013. Mr Solowiej provided further information about his financial position to the Border Force on 25 October 2013, after the deadline for the review had closed. This included
40 further information about the health of his children, mother and mother in law and the credit agreements he had entered into for the purchase of the tractor and trailer.

8. Mr Solowiej appealed to the Tribunal on 27 October 2013.

The law

9. S 152 Customs and Excise Act 1979, sets out the Commissioners' powers to
5 restore goods which have been seized:

Powers of Commissioners to mitigate penalties, etc.

The Commissioners may, as they see fit—

10 (a) stay, sist or compound any proceedings for an offence or for the
condemnation of any thing as being forfeited under the customs and excise Acts;
or

(b) restore, subject to such conditions (if any) as they think proper, any thing
forfeited or seized under those Acts; or

(c) after judgment, mitigate or remit any pecuniary penalty imposed under those
Acts; or

15 (d) order any person who has been imprisoned to be discharged before the
expiration of his term of imprisonment, being a person imprisoned for any
offence under those Acts or in respect of the non-payment of a penalty or other
sum adjudged to be paid or awarded in relation to such an offence or in respect
of the default of a sufficient distress to satisfy such a sum;

20 but paragraph (a) above shall not apply to proceedings on indictment in
Scotland.

10. Finance Act 1994 s 16(4) sets out the scope of the tribunal's powers in
"ancillary" matters such as this:

Section 16 Appeals to a tribunal.

25 (16) (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 section 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
30 say—

(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

35 (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.

The Tribunal's jurisdiction under s 16 is supervisory; it cannot substitute its own discretion for the Border Force's but can consider whether the Border Force's decision was unreasonable, either because the Border Force took an irrelevant matter into account or disregarded a relevant matter. It is not open to the tribunal to consider whether the seizure of the goods was itself legal (see *Revenue and Customs Commissioners v Jones & Jones*, [2011] EWCA Civ 824).

Evidence

11. We saw correspondence between Mr Solowiej and the Border Force including the letters of 20 August 2013 and 25 October 2013 and the supporting evidence included with those letters;

(1) Medical certificates relating to the ill health of Mr Solowiej's daughter and his mother in law.

(2) Credit agreements for the loan financing of the two vehicles which had been seized, dated 29 February 2012 and 6 August 2012 and invoices for water bills in Poland.

12. On behalf of Mr Solowiej we were provided with five brief witness statements from family members supporting Mr Solowiej's own statement that he was suffering hardship as a result of the tractor and trailer having being seized. All of these were translated from the original Polish:

(1) Alinja Solowiej – Mr Solowiej's mother gave a statement dated 20 March 2014.

(2) Katarzyna Solowiej – Mr Solowiej's wife gave a statement dated 18 July 2014.

(3) Wojciech Grynczel, Mr Solowiej's brother in law gave a statement dated 19 July 2014

(4) Iwona Grynczel, Mr Solowiej's sister gave a statement dated 19 July 2014

(5) Monika Wyrzynska, Mr Solowiej's sister in law gave a statement dated 18 July 2014.

13. The Border Revenue provided the Tribunal with the documents signed by Mr Solowiej at the time when his vehicles were seized:

(1) The Seizure Information Notice signed by Mr Solowiej on 4 May 2013

(2) The Warning Letter about the seizure of the vehicles signed by Mr Solowiej on 4 May 2013

- (3) The Seizure Notice for the vehicles signed by Mr Solowiej on 4 May 2013
- (4) The Statement of Restoration Procedure provided to Mr Solowiej.

14. We were also provided with a witness statement of Mr Mark Collins dated 8
5 January 2014 and the notes of the interception and interview of Mr Solowiej and the
search of the vehicles, dated 4 May 2013 by Officers Hayes, Rison and Crush.
According to those notes Mr Solowiej when first questioned indicated that there were
no cigarettes in the vehicles. When nine cartons of cigarettes were found in the cab of
his tractor he said that there were no more cigarettes. After continuing their search
10 officers found a total of 32 cartons of cigarettes hidden in different places in the
vehicles: in the sleeves of a coat, in the locker above the dashboard of the cab, in the
food tray of the cab and in the trailer. In total 6280 cigarettes were found.

15. After all of the cigarettes had been found Mr Solowiej was asked whether he
wanted to stay for an interview but he said that he did not want to stay.

15 *Witness Evidence*

16. Mr Collins was the Border Force Higher Officer who was in charge of
reviewing Mr Solowiej's case. He provided a brief witness statement dated 8 January
2014 setting out the reasons why he was satisfied that the decision not to restore the
vehicles was correct and reasonable, which was taken as read. Mr Collins gave oral
20 evidence to the Tribunal and gave some examples of what he considered amounted to
“exceptional hardship” which might mean that a vehicle should be restored, but made
clear that in his view any seizure would give rise to hardship and the test for
“exceptional hardship” had to be applied by reference to other similar cases.

17. Mr Collins said that he had not seen the letter from Mr Solowiej of 25 October
25 2013 until some time after the decision not to restore had been made and suggested
that it had not been received by him (despite being addressed to the correct address in
Plymouth). On questioning he confirmed that nothing in that letter would have
changed his conclusion because the letter did not contain any fresh evidence, but only
further information about the points which had already been raised by Mr Solowiej.

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Border Force Arguments

18. On behalf of the Director of Border Revenue Mr Evans said that the vehicles
had been properly seized in accordance with s 139 Customs and Excise Management
Act 1979 because the circumstances in which the cigarettes being transported in them
35 were found indicated that they were to be used for commercial purposes. The
cigarettes had not been declared and Mr Solowiej had misled the officer of the Border
Force about the number of cigarette which he was carrying in his vehicles. Mr
Solowiej had concealed the cigarettes and was aware of the UK legislation as a result
of his previous smuggling offence in March 2013. The amount of cigarettes carried by

Mr Solowiej on this occasion was in excess of the guidelines for personal consumption.

19. Mr Solowiej had been provided with Notice 12A and information notice ENF 156 at the time of the seizure of the cigarettes and the vehicles. The “Commerciality Statement” had been read to Mr Solowiej but he had declined to stay for an interview.

20. Mr Evans said that the legality of the seizure itself had not been challenged by Mr Solowiej within the stipulated time limits and therefore the Tribunal had no choice but to accept that the seizure was legal. Since the time limit for making an appeal to the magistrate’s court to challenge the condemnation procedure had passed, the goods were deemed to be duly condemned as forfeited in accordance with s 139(6) Customs and Excise Management Act 1979. The only question for the Tribunal was whether, in deciding not to restore the vehicle to Mr Solowiej, the Border Force had acted reasonably.

21. Mr Evans on behalf of the Border Force said that their decision not to restore the vehicles to Mr Solowiej was reasonable and had been based on their internal guidelines. He pointed out that the purpose of the legislation was to tackle border smuggling. The Border Force’s guidelines took account of a range of relevant factors in coming to a decision about whether to restore a vehicle. These included whether the Appellant was the driver or the operator of the vehicles seized. In this instance Mr Solowiej was both the driver and the operator. The guidelines also took into consideration whether the offence was a first offence; vehicles would not usually be restored if the offence in question was a second offence within a six month period. Mr Solowiej had been involved in a similar offence only two months prior to this one.

22. The guidelines made clear that restoration would not normally be considered unless there was evidence of exceptional hardship; such as illness preventing the taxpayer from working. In Mr Evans’ view hardship was a natural consequence of having a vehicle seized and in this case the hardship suffered by Mr Solowiej and his family was not exceptional and no other exceptional factors were present.

23. The Border Force had also taken account of Mr Solowiej's lack of honesty when questioned by officers.

24. Mr Evans referred to the decision in *Lindsay v Customs and Excise Commissioners* (1 WLR [1766]) which considered whether seizure of vehicles used for smuggling would be considered disproportionate:

“It is, in my judgement, acceptable and proportionate that, subject to exceptional individual circumstances, whatever they are worth, the vehicles of those who smuggle for a profit, even a small profit, should be seized as a matter of policy”. Judge LJ at para [72].

25. The Border Force had not acted unreasonably in deciding not to return the vehicles which had been seized to Mr Solowiej and it was not disproportionate to seize the vehicles in these circumstances.

26. None of the additional evidence provided by Mr Solowiej in his letter of 25 October 2013 changed this conclusion.

Mr Solowiej's arguments

5 27. Mr Solowiej provided evidence and put his case through an interpreter at the Tribunal.

28. Mr Solowiej said that he had been confused when he was questioned at Dover and had not understood all of the questions which were asked. He said that the cigarettes had not been hidden; they had been in pockets in the cab of the lorry.

10 29. Mr Solowiej said that the confiscation of his lorry and trailer was disproportionate in the circumstances. Mr Solowiej said that he had a number of loans to pay off which he could not do without the vehicle being restored to him. His only other vehicle was an old van. His business included work in Russia and this was being hampered by what was going on in Ukraine. The seizure of the vehicles was a
15 disproportionate punishment and deprived him of the ability to make a living and had long standing financial implications for his whole family.

30. Mr Solowiej explained that he supported his wife and two children, one of whom was sick and his mother, all of whom lived with him. He also supported his mother in law who was sick. He referred us to the medical evidence which he had
20 provided and the evidence of his living expenses in Poland. He had been forced to smuggle cigarettes as a way of earning additional income to support the family. By reference to s 152 Customs and Excise Management Act 1979 he suggested that the hardship which had arisen as a result of the seizure of the lorry and trailer had not been properly considered at the time of the original decision to seize them.

25 31. Mr Solowiej accepted that he had done something wrong and said that he would not do the same thing again and wished that he had not done this. He had learned his lesson.

Decision

32. It is clear that the only question for the Tribunal is whether the Border Force
30 have acted reasonably in refusing to restore the vehicles to Mr Solowiej and whether the Tribunal can direct the Commissioners to conduct a review of that decision under s 16 Finance Act 1994. The Tribunal recognised that the decision not to restore these vehicles had left Mr Solowiej in very difficult circumstances, but the Tribunal had to consider whether these circumstances were sufficiently exceptional that the Border
35 Force had been unreasonable not to take account of them.

33. The Tribunal accepted that the Border Force had taken account of all relevant information, including the information contained in Mr Solowiej's letter of 25 October, even though that had been received after the deadline for responding to the Border Force's request for further information.

34. The Border Force had applied their own guidelines in considering whether restoration should be considered in these particular circumstances, taking account of the fact that Mr Solowiej was both the driver and owner of the vehicles and that this was a repeat offence. They had also considered whether exceptional circumstances existed in this case by reference to the information which Mr Solowiej had provided. While Mr Collins for the Border Force did not provide particularly convincing explanations of what exceptional circumstances might be, the Tribunal could not conclude that the Border Force were unreasonable in deciding that Mr Solowiej's financial position and family circumstances were not sufficient to put him in a position which was significantly worse than other importers who had had their vehicles seized.

35. The Tribunal considered that the Border Force had acted reasonably in coming to the decision not to restore the vehicles and had considered all relevant information and not taken account of any irrelevant information.

36. The Tribunal did not consider that the seizure of Mr Solowiej's vehicles had been disproportionate. It is clearly within the ambit of the legislation that vehicles used for smuggling cigarettes can be confiscated and, particularly in circumstances of a second offence, it is hard to conclude that the Border Force's decision went beyond what was necessary in order to comply with the purpose of the legislation, which was to discourage smuggling.

37. For these reasons this appeal is dismissed and the Border Force's decision not to restore the tractor and trailer to Mr Solowiej is confirmed.

38. 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.

RACHEL SHORT
TRIBUNAL JUDGE

RELEASE DATE: 10 SEPTEMBER 2015