[2016] UKFTT 0104 (TC)

TC04895

Appeal number: TC/2014/05329

EXCISE - Restoration of Vehicle - Seizure of appellant's commercial vehicle - Whether decision not to restore the vehicle was reasonable - No - Appeal allowed - Further review directed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR JOSEPH JORDAN **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE CHRISTOPHER MCNALL
MISS SUSAN STOTT FCA CTA

Sitting in public at Tribunal Hearing Centre, Royal Courts of Justice, Chichester Street, Belfast BT1 3JF on 12 January 2016

Mr Danny McNamee, of McNamee McDonnell Duffy Solicitors LLP, for the Appellant

Mr Richard Chapman, of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. On 24 February 2014, officers of HMRC's Road Fuel Testing Unit visited premises at 49 Ballybeg Road, Coalisland, Belfast ('the Site') where it was suspected an illicit fuel laundering enterprise was in operation.

2. On arrival at the Site, they found a curtain-sided trailer HGV, registration MX53 OWR, parked with its rear doors facing a shed. Inside the shed was a fuel tanker vehicle ('the Vehicle') registration OIL 480. Photographs of the Site were apparently taken by Officer Malone, but those were not put into evidence before us.

3. The Vehicle belonged to the Appellant, who was (and still is) a Registered Dealer in Controlled Oils, trading as 'Jordan Fuels', carrying on business in the sale and supply of fuel.

4. The Vehicle was delivering fuel through a delivery hose into a large - 11,100 litres - steel tank inside the rear of the curtain-sided trailer. HMRC's officers found a delivery docket in the Vehicle for 1,500 litres of kerosene to a Mr Tom Carroll.

5. Another vehicle - P373 RSF - was also present.

6. A Mr Kieran Jordan was at the Site. He is the Appellant's son, and was the driver of the Vehicle. He was working for the Appellant. The Appellant was not present. Mr Kieran Jordan maintained in interview that he was delivering 500 gallons of red diesel.

7. Another young male, apprehended 45 minutes later and identified as one Stephen McBride, ran off across the fields from the rear of MX53. He was interviewed very briefly by Officer Talbot, but then asked to speak to a solicitor, and was left with the Police Service of Northern Ireland ('PSNI').

8. Initial samples were taken from the three vehicles present at the Site: the Vehicle (running tank, pots 1 and 2, and hose); MX53 (running tank and steel tank); and P373 (running tank, pots 1 and 2).

9. By a Notice of Seizure dated 25 February 2014, HMRC seized the Vehicle, together with 2,300 litres of kerosene and 4,700 litres of marked gas oil.

10. The appellant gave written notice challenging the legality of the seizure within one month of the Notice of Seizure. However, the condemnation proceedings were withdrawn, and an order for condemnation duly signed.

11. In the meanwhile, formal testing of the fuel samples had been undertaken. The sample taken from the running tank of the Vehicle (sample 214071) contained UK rebated kerosene *'and less than 1% of UK rebated gas oil'*.

12. Pot 1 on the Vehicle (sample 214069) contained UK rebated kerosene, albeit with a sulphur level exceeding BSEN 590 limit for road fuels. Pot 2 on the Vehicle (sample 214070) was wholly unobjectionable. It contained UK rebated gas oil.

13. The only *laundered* fuel detected as present was in Pot 2 of vehicle P373 (sample 214066) where the sample was assessed as consistent with containing laundered UK rebated gas oil.

14. On 3 July 2014, Officer Killen decided not to restore the Vehicle. He decided that the heavy oil fuel in the Vehicle was liable to forfeiture under sections 13(6) and 24A of the Hydrocarbon Oil Duties Act 1979 ('HODA') because it was found to contain rebated fuels.

15. He decided that the Vehicle was liable to forfeiture under section 141(1)(a) of HODA because it too was used to carry the fuels that were liable to forfeiture. The officer was therefore satisfied that the fuels and Vehicle had been correctly seized under sections 139 and 141 of the Customs and Excise Management Act 1979 ('CEMA').

16. A review was requested. The review was conducted by Officer Bines, a Higher Review Officer, and the outcome of that review was communicated by way of a letter dated 8 September 2014 ('**the Review Letter**').

17. After setting out the background, the results of the fuel tests, and the applicable legislation, the Review Letter stated as follows:

> "Your letters have offered no mitigation as to why vehicle OIL 480 was detected using rebated fuel in the running tank or had traces of contaminated fuel in pots 1 and 2 on the tanker.
>
> A male ran off across fields when officers arrived which further leads me to believe illegal activity was taking place.
>
> The delivery docket in vehicle OIL 480 was for kerosene but the fuel coming out of the delivery hose was red diesel.
>
> The running tank of OIL 480 also contained rebated fuel.
>
> The hosing connecting vehicle OIL 480 to MX53 also contained rebated fuel."

18. The Review Letter concluded by refusing restoration, but said that if the appellant had any fresh information he would like Officer Bines to consider then he should write to her. No fresh information was in fact provided.

19. By a Notice of Appeal dated 29 September 2014, the appellant's representatives applied to this tribunal. The Grounds for Appeal were extremely short. In full, they were as follows:

> "The decision of the Reviewing Officer not to restore the vehicle is unreasonable in circumstances where the appellant was involved in what he believed to be an entirely legitimate commercial transaction for the delivery of marked gas oil to the premises in question."

20. The appellant's position was clarified in a document described as 'Outline of Case' helpfully provided to the tribunal by his representative Mr McNamee in advance of the hearing. It reads, in full:

> "The Appellant would submit that the Respondent has not properly applied or applied in a disproportionate matter the Respondent's policies in relation to the restoration of vehicles in circumstances such as are demonstrated in this case.
>
> The Appellant will argue that in circumstances where he believed his vehicle was being used in a properly legitimate commercial transaction that he should (not) be deprived of the said vehicle in circumstances where he had absolutely no culpability in relation to either the alleged fuel laundering or any other wrongdoing at the site at which his vehicle had arrived to undertake a legitimate delivery.
>
> The Appellant would submit that for these reasons and for any other reasons put forward at the oral hearing that the decision not to restore was disproportionate and incorrect."

21. The Appellant's representatives submitted a Skeleton Argument, dated 28 November 2014. That took no issue with the factual grounds as set out in the Respondent's Skeleton Argument, and we accordingly find those facts as set out in Paragraph 2 of the Respondent's Skeleton Argument.

22. In their Statement of Case, the Respondents relied on the following matters:

(1) A man ran away from the delivery site upon the arrival of HMRC Officers;

(2) The delivery docket in the Vehicle was for kerosene but the load coming from the delivery hose was red diesel;

(3) The delivery was being made into a tank concealed in the rear of a curtain-sided trailer;

(4) The running tank of the Vehicle contained rebated fuel;

(5) A follow-up visit made to the Appellant's premises resulted in another vehicle owned by the Appellant being found to have rebated fuel in the running tank which was subsequently seized and restored for a fee.

The oral evidence

23. The appellant gave oral evidence before us. Since he had forgotten his reading glasses, his witness statement was read to him by Mr McNamee. Mr Jordan confirmed that it was true.

24. In response to questions from Mr McNamee, Mr Jordan confirmed that he was and is a Registered Dealer in Controlled Oils ('RDCO'). The last renewal of his licence was 6 months ago - that is, after the date of the incident which is the subject matter of this appeal.

25. He explained the presence of rebated fuel in the running tank of the Vehicle (sample 214071) in this way. He said that it is virtually impossible to avoid some contamination of fuel, since different fuels are, at different times, discharged through one delivery hose, which itself holds about 100 litres. He referred to this as 'wet line contamination'. He accepted that there could be 'a wee bit of contamination' but said that there was nothing, in practical terms, which could be done about it.

26. He was cross-examined. Jordan Fuels is a small business, with just one employee, his son Kieran, who drives the lorry and does most of the deliveries, although Mr Jordan sometimes does deliveries himself. He accepted that he is the person responsible for the conduct of the business and does the 'back-office' work. He had taken the order which led to this delivery from one Tom Carroll. He had dealt with Mr Carroll once before. This delivery was to be cash on delivery. Mr Carroll gave a delivery address, and said that someone would be there, although he did not say that he would be there. Mr Jordan had asked for Mr Carroll's VAT number. Mr Carroll had said that would be supplied on delivery. The VAT number was not on the appellant's computer system since the first delivery had been kerosene, and no VAT number was required for kerosene. Following the seizure, Mr Jordan did not end up getting paid, although he had tried chasing for it. Letters had been sent which had been returned. Those letters were not in evidence before us.

27. The order was for 500 gallons (equating to approximately 1350 litres) of marked gas oil. The reason it said kerosene on the docket which was found was that it had come from the computer: Mr Carroll's first order had been for kerosene and that was what it said on the system. The appellant intended that it would be altered later, by Kieran, when delivery was completed. Mr Jordan did not really know why he had not crossed out kerosene himself. It was put to him that he was trying to make it look as if the delivery was one of kerosene and not marked gas oil. He denied that. There was no quantity on the docket since that would be printed out or stamped by the meter on the Vehicle when the delivery was completed - that is, when it was in fact known how much had been delivered.

28. Although much had been made of this docket, both in the decision, the review, and cross-examination, the actual docket was not in evidence before us.

29. The Appellant did not think that the circumstances of the delivery were unusual. When fuel was being delivered to farms, the farmer could ask for the Vehicle to be parked wherever he wanted. Sometimes a tank would be in the yard and then would be moved to a field. He did not agree that the circumstances of this delivery reflected an attempt to conceal it. He had gone into a shed to make a delivery 'many times'. All in all, he had no suspicions, in advance, about the delivery.

30. He did not know Stephen McBride.

31. He had bought the Vehicle in 2007 for about £17,000 or £18,000 at the time. It was second-hand. He estimated that it was probably worth about £10,000 now. He could not recall the mileage. It was in good condition. He had two lorries presently,

and was reasonably busy, but not full to capacity. He had had to go and buy another vehicle.

32. Miss Bines' written evidence is contained in a witness statement dated 29 July 2015.

33. At the beginning of her oral evidence, and of her own initiative, she hastened - quite properly - to correct a mistake in her witness statement. Paragraph 2 of her witness statement stated that the Site - 49 Ballybeg Road - was the Appellant's address. It was not.

34. During the course of her cross-examination, Officer Bines accepted that vehicle P373 RSF, which was present at the site of the seizure, and which was also seized, did not in fact belong to the appellant, although the officer who had made the seizure had thought that it did belong. That vehicle, and the results of testing fuel in its running tank, and Pot 2 on the back of it, were referred to in the decision, and the review. Officer Bines accepted that the impression had been given, or taken, that the other vehicles at the site belonged to the appellant.

The Policy

35. The Decision Letter and the Review Letter both make express reference to the Respondent's policy.

36. This policy is entitled 'Civil sanctions: vehicle and equipment seizure for oils offences', and is dated July 2014: 'the Policy'.

37. When Mr McNamee sought to ask Officer Bines questions about the Policy (a copy of which had come into his hands in relation to another appeal) Officer Bines complained that Mr McNamee was not supposed to have the policy. We do not consider that to be a fair complaint. If the Respondent is to make decisions which, in their very terms, purport to apply a policy, then we do not readily ascertain any basis upon which that policy can be withheld from an appellant.

38. It was suggested to us by Mr Chapman that there were elements of the policy which, if released, could be injurious to the public interest more generally, in giving those involved in oils offences details of the Respondent's likely response to any given infraction. However, having considered the terms of the Policy, we are not persuaded - at least not in the circumstances of this case - that admonition holds good.

39. For the purposes of this decision, given the manner in which the Policy has been treated, and the evidence of Officer Bines, we consider it necessary to set out some account of it.

40. The Policy begins by stating that *'Every detection of the misuse of rebated fuel or the smuggling of fuel should result in the seizure of the vehicle concerned. We'* [that is, HMRC] '*should then consider terms of restoration and our policy on restoration is set out'*.

41. The Policy then, in broad terms, splits into two parts. The first deals with 'misuse of rebated fuels', where the Policy is to provide increasingly hard restoration terms (being financial in nature) for the first two detections with a strict non-restoration policy for the third detection.

42. The second part of the Policy deals with 'Laundering Plants'. It reads:

> "Laundering plants are an attack on the system used to control rebated fuels. They are deliberate and calculated and involve considerable investment by the perpetrators of the fraud. Prosecution should always be considered in cases of laundering plants. However, as a matter of course when a laundering plant is detected, in addition to seizure of the oil, all related plant, equipment and vehicles are to be seized and not restored. Vehicles will be subject to the usual rules on proportionality..."

The law

43. The law was not in dispute.

44. Sections 12(2), 13(1) and 13(6) of HODA provide that no heavy oil on whose delivery home use rebate has been allowed shall be used as fuel for a road vehicle, or be taken into a road vehicle as fuel. Contravention renders the user liable to a penalty, and forfeiture of the heavy oil.

45. The seizures were made pursuant to sections 139 and 141(1)(a) of CEMA.

46. Section 152(b) of CEMA gives HMRC a discretionary power to restore any thing forfeited or seized, subject to such conditions (if any) as they think proper.

Discussion

Presence of rebated fuel in the running tank of the Vehicle

47. It was common ground between the parties that there was rebated fuel present in the running tank of the Vehicle, as shown in sample 214071. The sample '*contained UK rebated kerosene and less than 1% of UK rebated gas oil'*. It had 'marked 10%' coumarin and 'marked 10%' solvent yellow markers.

48. Officer Bines' position was that there should not have been any rebated fuel at all present in the running tank of the Vehicle, and that its presence, in and of itself, justified non-restoration. Her position was one of zero tolerance, and does not yield to the maxim 'the law takes no account of trivialities' (*de minimis curat non lex*).

49. As Officer Bines readily conceded, she is not a chemist, and so could not explain the difference between a 10% mark, and a greater percentage mark.

50. Apart from the test result itself, there was no evidence of a scientific or empirical character - for example, from a Government chemist - explaining what the result of the test on sample 214071 - actually meant or signified. We were told that

the running tank holds 500-600 litres, but we do not know the sample size, or the amount which the tank held at the time. We cannot therefore assess the integrity of the sampling methodology.

51. It seems to us that the Respondent has not put forward sufficient evidence to justify any conclusion that sample 214071 was evidence of deliberate misuse of rebated fuel, as opposed to accidental 'wet line contamination'. Insofar as we are required to decide the same, we accept the Appellant's evidence on this point as credible, and honest.

The Docket

52. We accept the Appellant's evidence on this point. His explanation as to the absence of a quantity on the docket was entirely plausible: it is not stamped until the delivery is completed. Until then, it is not known how much fuel has been delivered.

53. His evidence as to why, knowing that the order was for red diesel, he had not crossed out 'kerosene' on the docket caused us more occasion to reflect. We have decided to accept the Appellant's evidence was truthful. Not only did we find the Appellant - by his demeanour and his readiness to engage with questions asked of him in cross-examination - a plausible and honest witness, but we do not understand (and no submissions were made on the point) why, if he was indeed intending - dishonestly - to make a delivery of red diesel look like one of kerosene, he would have gone to the trouble of printing off anything at all so as to leave a paper trail.

Application of the Policy

54. The Decision Letter stated: "*Where the offence committed relates to the deliberate misuse of rebated fuels, e.g., fuel laundering, the Department's general policy is that the seized apparatus (including vehicles) should not normally be restored but each case is examined on its merits to determine whether or not restoration may be offered exceptionally*".

55. Officer Bines did not set out the policy in the Review Letter. But she confirmed that, for the purposes of her review, she had treated the circumstances as falling within the Respondent's 'fuel laundering' policy, as opposed to falling under the Respondent's 'misuse of rebated fuels' policy. She also acknowledged that her understanding of the policy, at the time of her review in early September 2014, was that all vehicles at laundering sites were not to be restored.

56. In our view, this means that (what we accept to have been) the reviewing officer's genuine view of the policy in September 2014 was materially mistaken. When it came to fuel laundering, the Policy only required 'related' vehicles to be seized and not restored. It did not mention non-restoration of all vehicles. Hence, the reviewing officer's starting point, which has to feature strongly in any analysis, was wrong.

57. Perhaps more fundamentally, it is not clear to us why this was treated as a fuel laundering case at all, rather than a misuse of rebated fuels case. As we read it, the

Policy requires the detection of 'a laundering plant', and, even then, only authorises the non-restoration of 'related' vehicles.

58. No laundering plant was detected. The only evidence of laundering was the presence of laundered fuel in Pot 2 of vehicle P373. But that vehicle was not being fuelled by the appellant. Nor did it belong to him. There was no evidence that it had any association with him at all. All that linked him and it was the mere fact of its presence at the Site.

59. The Vehicle itself did not contain any laundered fuel - whether in its running tank, or the pots. Nor was there any laundered fuel in the hose.

60. In order for a decision to be rational, in a judicial review sense, the policy must be applied accurately by the decision-maker. The decision-maker cannot do that if the decision-maker's understanding of the policy is materially mistaken, as it was here.

61. The review decision was therefore irrational, in a judicial review sense.

Errors of material fact

62. The following errors also emerge:

(1) The mistaken belief (see the original version of Paragraph 2 of Officer Bines' witness statement) that the raid was conducted at the Appellant's site, when it was not;

(2) The mistaken apprehension that vehicle P373 therefore had something to do with the Appellant, when it did not;

(3) The mistaken apprehension that there were 'traces of contaminated fuel in pots 1 and 2 on the Vehicle' when both pots contained UK rebated gas oil (samples 214069 and 214070) but (arguably) only Pot 1 was contaminated (with excess sulphur). Pot 2 simply contained UK rebated gas oil, without any contamination.

63. The finding of a factual error in a decision, without more, is not sufficient to justify a review. As Carnwath LJ (as he then was) noted in *E v Secretary of State for the Home Department* [2004] EWCA 49l; [2004] QB 1044:

> "... the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result ... First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not been have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the [tribunal's] reasoning."

64. The first, second and third requirements of the list (which, we remind ourselves, is not to be taken as a "precise code") are satisfied.

65. The issue comes down to: did these mistakes play a material part in the reasoning?

66. In our view, they did. They are referred to in the review, and indeed given some prominence. The reviewing officer undoubtedly was labouring under the mistaken belief that the Site belonged to the appellant, and that the vehicle P373 (in which there was laundered fuel) had something to do with the appellant.

67. Ultimately, although the review is a discretionary decision, the outcome clearly involves a consideration of the quality and weight of factual matters taken into account when a decision is reached. A matter taken into account, believing it to be true when in fact it is not, renders the discretionary exercise fundamentally flawed.

The role of Mr McBride

68. Finally, weight was given to the circumstance of Mr McBride's hurried departure from the Site when, in our view, it should not have been. If he had indeed been interviewed by the police following his request to see a solicitor, Officer Bines had not seen any record of that interview. So, she did not know what explanation (if indeed any) Mr McBride gave for his behaviour.

69. Although Officer Bines said in her oral evidence that she had not taken account of this feature in her decision making, she had done so. It is mentioned in the Review Letter: "A male ran off across fields when officers arrived which further leads me to believe that illegal activity was taking place" (emphasis supplied). This reasoning and conclusion was also expressed in her witness statement.

70. We do not consider that Mr McBride's actions lead inexorably to that conclusion. It was not disputed that Mr McBride ran away. Like Officer Bines, we consider Mr McBride's behaviour to have been extremely suspicious. But it calls for an explanation from him, and not from the appellant. In the absence of any knowledge as to what Mr McBride said in his PSNI interview, neither Ms Bines nor the present Tribunal know why he ran away. Nor (at the very least) could Ms Bines or the Tribunal assess the cogency or plausibility of his explanation. It would be wrong to speculate. It would likewise be wrong to draw from that the conclusion that there was illegal activity taking place at the Site.

71. Accordingly then it seems to us that the manner in which the review treated Mr McBride's presence or involvement was, in and of itself, irrational so as to justify a further review.

Proportionality

72. The appellant advanced criticism of HMRC's consideration of proportionality. For the sake of completeness, we do not accept that criticism. It is obvious that depriving a business of one of its vehicles will occasion some disruption or hardship.

That is the very nature both of seizure and non-restoration. The lawfulness of the Policy in that regard is not challenged.

73. When it comes to the consideration of proportionality, it must be the responsibility of the taxpayer to draw to HMRC's attention any particular facts (supported with evidence, if appropriate) which the taxpayer considers to be relevant to the issue of proportionality in their individual case. It would not be enough for the appellant to say, as he has done in this case, 'your decision is disproportionate', without saying *why*. If an appellant fails to say why, then it would be difficult to criticise HMRC if it came to review the case on the footing that there were no particular circumstances which proportionality demanded be taken into account.

74. Indeed, Officer Bines extended such an invitation to the appellant. He did not take her up on it. We are not persuaded that there was insufficient time to do this before lodging the Notice of Appeal; or that, if this has been done, it would have frustrated Mr Jordan's appeal. The Review decision was sent on Monday 8 September 2014, deemed served by post on Wednesday 10 September 2014. The Notice of Appeal was dated 19 days - or almost three weeks - later. The appellant had already instructed lawyers in relation to the seizure and the refusal to restore. It is therefore surprising that neither he nor his representatives sought to advance any evidence as to any disproportionate hardship which the non-restoration of the vehicle was causing to his business. It is simply not fair - either to the Respondent, or to the Tribunal - for evidence on this point to emerge only during the course of cross-examination. If they are to allege disproportionality, appellants must be astute to put forward evidence.

Our jurisdiction and Disposal

75. Our jurisdiction is to be found in section 16 of the Finance Act 1994. It is of a supervisory character. We cannot (for example) order restoration of the Vehicle.

76. We consider that HMRC should conduct a further review of the original decision not to restore the Vehicle, in the light of the admitted facts, and in the light of the findings of fact that we have made in this decision.

77. 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.

Dr CHRISTOPHER MCNALL
TRIBUNAL JUDGE

RELEASE DATE: 17 FEBRUARY 2016