[2016] UKFTT 0238 (TC)

TC05014

Appeal number: TC/2015/04310

CUSTOMS DUTY – restoration application – carrier contracted to transport car mats-load consisted of raw tobacco-carrier and driver not complicit in smuggling attempt-restoration agreed for a fee-whether fee should be charged-amount of fee

FIRST-TIER TRIBUNAL

TAX CHAMBER

KAJATRANS **Appellant**

- and -

DIRECTOR OF BORDER REVENUE **Respondent**

TRIBUNAL: JUDGE MARILYN MCKEEVER
MS JACQUELINE DIXON

Sitting in public at The Royal Courts of Justice, London on 9 March 2016

Mr J Tyler, Counsel for the Appellant

Mr D Sternberg, instructed by the General Counsel and Solicitor to HM Revenue and Customs, Counsel for the Respondents

© CROWN COPYRIGHT 2016

1. *Introduction*

2. The Appellant is a company registered in Poland which operates a transport business. It agreed to transport a load of car mats from the Czech Republic to London. The load was picked up in a Peugeot Boxer Van registration number SK108GC ("the vehicle") leased by the Appellant. On arrival in Dover, the vehicle was stopped by the Border Force and the load was found to consist of raw tobacco.

3. The vehicle was seized and duly condemned as forfeited. The Appellant applied for the vehicle to be restored.

4. This case concerns an appeal against the decision by an officer of the Border Force to restore the vehicle only on payment of a fee of £15,000. The Appellant contends that the vehicle should be restored without payment of any fee.

5. The issues for determination by the tribunal are first whether the Respondent's decision was unreasonable (in the sense discussed below) because, as the Appellant contends, the Appellant can show that adequate measures for the prevention of smuggling were in place and secondly whether the calculation of the fee for the return of the vehicle was flawed.

6. *Preliminary issue*

7. The Appellant sought to introduce a statement by one Dariusz Dominiak on the morning of the hearing. Bundles including all documents to be relied upon were to be submitted by 8 January and the Respondent opposed the introduction of the Statement.

8. Mr Sternberg, for the Respondent said the Appellant had given no forewarning of the statement, had not applied for an extension of time to submit documents and had provided no explanation of why it was submitted late. Mr Sternberg referred to the decision of the Court of Appeal, published only a few days before the hearing, in *BPP Holdings v Revenue and Customs Commissioners* [2016] EWCA Civ 121 which stressed the importance of complying with rules and directions. The Court said:

9. "There is nothing in the wording of the relevant rules that justifies either a different or particular approach in the tax tribunals of FtT and the UT to compliance or the efficient conduct of litigation at a proportionate cost. To put it plainly, there is nothing in the wording of the overriding objective of the tax tribunal rules that is inconsistent with the general legal policy described in *Mitchell* and *Denton*. As to that policy, I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals and while I might commend the Civil Procedure Rules Committee for setting out the policy in such clear terms, it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and timeliness. It should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's. If it needs to be said, I have now said it."

10. Mr Tyler, for the Appellant, acknowledged the importance of complying with directions but said that he had not been able to give any forewarning and that there was a good reason for the late submission.

11. Mr Tyler submitted that the statement was relevant as it went to the issue of the checks which the Appellant had carried out on the consignor company. He explained that the individual worked for an intermediary which the Appellant had used to find the job in question. A criminal investigation is under way in the Czech Republic and the Appellant's lawyers had wanted to be sure the individual was not involved in smuggling before seeking the statement. The statement had only been obtained two days before the hearing. There was accordingly a good reason why it was submitted late. It was very short and could be dealt with without additional cost or time.

12. The Tribunal considered that there was a good reason for the statement to be submitted late and in view of its relevance and brevity we decided to allow it to be added to the hearing bundle of documents.

13. The Law

14. The law is not in dispute.

15. The Appellant accepts that the vehicle has been duly condemned as forfeited.

16. Under section 152 of the Customs and Excise Management Act 1979 (CEMA) the Commissioners have a discretionary jurisdiction to "restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under the Customs and Excise Acts."

17. The Finance Act 1994 sets out the Appellant's rights of appeal and the Tribunal's jurisdiction.

18. Section 16(4) Finance Act 1994 provides:

"(*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 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 review or further review as appropriate] of the original decision; and

(c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by [a review or further review as appropriate], 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."

19. A decision under section 152 CEMA is an ancillary decision and, accordingly, the tribunal's jurisdiction is confined to considering whether they are satisfied that it

is "unreasonable" within the well-known "Wednesbury principles". That is to say, the Appellant must show that HMRC's decision maker had taken irrelevant matters into account, or had failed to take relevant matters into account or had come to a decision which no reasonable officer could have made.

20. The Appellant also wished to adduce evidence not before the original decision maker on the basis that the tribunal is entitled to find the primary facts itself and to consider whether in the light of its findings of fact, the decision was reasonable, whether or not those facts were before the decision maker. This is the effect of the Court of Appeal's decision in *Balbir Singh Gora v CEC* [2003] EWCA Civ 525 which was explained *in Harris v Director of Border Revenue* [2013] UKFTT 134 where Judge Hellier said:

21. We are required to determine whether or not the UKBA's decision was "unreasonable"; normally such an exercise is performed by looking at the evidence before the decision maker and considering whether he took into account all relevant matters, included none that were irrelevant, made no mistake of law, and came to a decision to which a reasonable tribunal could have come. But we are a fact finding tribunal, and in *Gora and Others v Customs and Excise Commissioners* [2003] EWCA Civ 525 Pill LJ approved an approach under which the tribunal should decide the primary facts and then decide whether, in the light of the tribunal's findings, the decision on restoration was in that sense reasonable. Thus we may find that a decision is "unreasonable" even if the officer had been, by reference to what was before him, perfectly reasonable in all senses.

22. Chronology

23. On 24 March 2015 Mr Nowotnik, an employee of the Appellant was driving the vehicle and was stopped at the port of Dover. The International Consignment Note ("CMR note") stated that the consignment consisted of three pallets of car mats, gross weight 1,030 Kg. Upon examination by Border Force officers, the load was found to consist of raw tobacco. The tobacco and the vehicle were seized and the Appellant does not dispute that the vehicle was duly forfeited.

24. On 26 March 2015, the Appellant requested restoration of the vehicle. On 30 April 205, an officer of the Border Force replied, refusing restoration.

25. The Appellant's agent requested a review of this decision on 2 June 2015 (wrongly referred to as 22 May in the review letter). Officer Crouch of the Border Force completed the review and wrote to the Appellant's agent on 15 June 2015 ("the review letter") concluding that the vehicle should be restored for a fee of £15,000.

26. The Appellant appealed against this decision on 9 July 2015.

27. By the time of the hearing, Mr Crouch had left the Border Force. Another review officer, Mrs Helen Perkins, reviewed Mr Crouch's decision and the documents on which he had based it. Mrs Perkins, who gave evidence at the hearing, concluded that Mr Crouch's decision to restore the vehicle for a fee was correct and reasonable and adopted that decision.

28. HMRC's restoration policy

29. HMRC has a published policy on its approach to requests for restoration of things under section 152 CEMA ("the policy"). There is no suggestion that the policy itself is unreasonable. The tribunal must decide whether, in the light of the facts of this case, HMRC applied that policy in a reasonable manner. It is for the

Appellant to prove, on the balance of probabilities, that HMRC has acted unreasonably.

30. Extracts from the policy were set out in the review letter. So far as relevant, it stated "If the operator provides *evidence* satisfying the Border Force that neither the operator not the driver were responsible for or complicit in the smuggling attempt then:

    1. If the operator also provides *evidence* satisfying Border Force that both the operator and the driver carried out basic reasonable checks (including conforming with the CMR Convention) to confirm the legitimacy of the load and to detect any illicit load, the vehicle will normally be restored free of charge.
    2. Otherwise

        (a) On the first occasion the vehicle will normally be restored for 20% of the revenue involved in the smuggling attempt (or for 100% of the *trade* value of the vehicle if lower)…."

31. The emphasis is in the original which highlights the need to make "basic reasonable checks" and to provide evidence that they have been carried out.

32. The facts

33. In the review letter, Mr Crouch concluded that the Appellant had provided sufficient evidence to show that neither it, as operator, nor the driver had been involved in the smuggling attempt and so the only issue was whether the operator and driver had carried out the basis reasonable checks, including conforming with the CMR Convention, to confirm the legitimacy of the load and to detect any illicit load.

34. The review letter, included as appendices a note about the CMR Convention and examples of reasonable checks which an operator or driver could take to prevent smuggling.

35. The CMR Convention ("the Convention") is, properly, the Convention on the Contract for the International Carriage of Goods by Road, which is embodied in UK law by the Carriage of Goods by Road Act 1965, as amended. Its terms are mandatory for commercial journeys which start or finish in the UK, subject to certain exemptions which are not applicable here. The Articles of the Convention which are relevant in the present case may be summarised as follows:

36. **Article 3**: the carrier is responsible for the acts or omissions of his employees

37. **Article 4**: The contract of carriage must be confirmed by a consignment note (the CMR note)

38. **Article 5**: the CMR note must be signed or stamped by both the sender and the carrier and a copy must accompany the goods.

39. **Article 6**: The CMR note must contain the following particulars:

    - The date of the note and the place at which it is made out
    - The name and address of the sender
    - The name and address of the carrier
    - The place and date of taking over the goods and the delivery address
    - The name and address of the consignee
    - The description of the goods and the method of packing

- The number of packages and any special marks or numbers
- The gross weight of the goods
- Charges relating to the carriage
- Customs instructions
- A statement that the carriage is subject to the Convention.

40. **Article 8:** On taking over the goods the carrier must check:

    (a) The accuracy of the statements in the CMR note as to the number of packages and their marks and numbers; and

    (b) The apparent condition of the goods and their packaging

41. Where the carrier has no reasonable means of checking the matters referred to in Article 8, he must enter his reservations in the CMR note and the grounds for them.

42. Appendix D to the review letter set out what HMRC consider to be indications of negligence in failing to establish the illicit nature of the load. These include:

    - The driver has made no attempt to check that what is contained in the load conforms with the description in the paperwork.
    - The operator has taken no steps to establish the credibility of the load being carried, the details of the owner of the goods nor the credibility of the destination to which the load is destined.
    - The driver and/or operator have made no attempt to check that the destination for the goods is expecting them
    - Checks aroused suspicions but there was no attempt to verify matters further.

43. Appendix E to the review letter sets out steps that an operator could take to prevent drivers smuggling. This might include evidence of the driver's contract of employment showing that the driver was required to check loads and that the carriage of smuggled goods was gross misconduct which would lead to dismissal.

44. Mr Crouch considered whether, on the basis of the information before him, basic reasonable checks had been made. He stated that "The operator and the driver did not comply with <u>any</u> of the of the procedures in paragraphs 4-7 [of Appendix C setting out the CMR requirements] and did not make the checks mentioned in [Article 8]"

45. Mr Crouch considered that the Appellant had also failed to comply with the CMR requirements in that he had not shown that he had queried to delivery address, which was shown on the CMR note as "N24 3QP Woodcroft 30". Nor had the Appellant checked the address in any detail or "he would have realised that he was supposed to deliver almost a tonne of tobacco (sic) to a private residential address". The letter should, of course, have referred to car mats, not tobacco, but the same point applies.

46. The driver had not made any note of reservations on the CMR note.

47. Mr Crouch did not accept that the Appellant had made adequate checks on the sender.

48. He also noted that the driver had booked the vehicle as freight but on disembarkation had entered the tourist lanes.

49. Mr Crouch concluded that there was no evidence that basic reasonable steps had been taken to prevent smuggling.

50. He stated that in applying the policy he had taken into account "the degree of failure in operator's duty to take reasonable steps to prevent smuggling by reference to any recklessness, negligence, carelessness, neglect, inattention or lack of concern".

51. The conclusion of the review was that the vehicle should be restored to the Appellant on payment of a fee of £15,000 which represented the trade value of the vehicle, being lower than 20% of the relevant duty.

52. The Appellant's case raises two issues. First, the Appellant contends that it and the driver *did* carry our basic reasonable checks which the reviewing officer had failed to take into account, rendering the review decision "unreasonable" in the Wednesbury sense and secondly that the calculation of the amount of the fee for restoration was flawed which vitiated the decision.

53. We now consider the evidence concerning the steps taken by the Appellant and the facts which we found on the basis of the evidence.

54. Mr Tyler submitted that Mr Nowotnik, the driver, was provided with CMR compliant instructions about checking and carrying loads, which he signed. We were provided with a copy of a document in Polish, signed by Mr Nowotnik and an English translation headed "Basic Duties of drivers performing international transport". This document set out, in particular, the obligation of the driver to record observations in the CMR note and that a failure of duty could result in the termination of the employment. This document was not dated and there was no evidence that is was comprised in Mr Nowotnik's contract of employment. Nor was Mr Nowotnik present to give evidence. Accordingly, we can put little or no weight on it as evidence.

55. Mr Tyler contended that Mr Nowotnik was aware of his obligations to make a note on the CMR when unable to inspect a load. We had a signed, but undated statement made by Mr Nowotnik in which he acknowledged that his employer required verification of the loaded goods. He stated that he was unable to verify the contents or nature of the load as the goods were shrink wrapped tightly when he arrived to load the goods which was consistent with the description of the goods by the Border Force officer who stopped Mr Nowotnik at Dover. He also stated that the sender had sealed the doors of the vehicle once the goods were inside.

56. Mr Nowotnik further stated that the reason why he had not entered his reservations in the designated space in the CMR note (box 18) was that "the column number 18 reserved for the objections has not enough space for entering my whole comments". We do not find this credible. There is adequate space in box 18 at least to record that he had reservations or to state that he was unable to inspect the load. Box 18 contained no note at all.

57. Even if we accept that Mr Nowotnik was unable to inspect the load as required by the CMR, he did not record his reservations on the consignment note which was itself a failure to carry out a requirement of the Convention under Article 8.

58. Mr Tylor submitted that the Appellant made adequate checks on the consignor. Mrs Wylegly, the owner of Kajatrans, explained in her email of 26 April 2015, how the Appellant had obtained the contract to carry the goods. Kajatrans had

taken a lease on the vehicle on the strength of an agreement they had entered into with another transport company, but the formalities they had to complete before they could provide services under that agreement would take several months. In order to fund the lease payments, the company registered with an online freight exchange called Trans.eu. The Appellant asserts that users of the Exchange were "thoroughly checked". We have no detail about the checks other than a reference in the Appellant's agent's letter of 2 June 2015 in which they requested a review of the original decision, which stated that an applicant to join the site must indicate three companies they were working with to confirm his "data and credibility". We do not know if formal references were sought.

59. The Consignor was a company called Ibensox SRO based in the Czech Repulic. The contract was arranged through a Polish intermediary, Oliwia Trans, which was registered on the trans.eu website. The Appellant's checks on the consignor and the intermediary consisted of checking the companies' entries in the respective national business registers. We were provided with copies of untranslated documents which purported to be those entries which included the names of the companies and what appeared to be their addresses. The review letter states that the Appellant subsequently discovered that the address given by Oliwia Trans was not its address.

60. The delivery job was found by Kajatrans' freight forwarder, Mr Dariusz Dominiak, who provided the statement which was the subject of the preliminary application. In that statement he said that Oliwia Trans had received positive feedback on the website and also "All terms of the transaction including the financial arrangements were discussed by telephone with a representative of Oliwia Trans Michael Romik. At the stage of the order matters (sic) nothing aroused my reservations." One might have thought that the very fact that everything was arranged over the telephone with no written confirmation or audit trail was, of itself, something which might have caused reservations. We would also note that it appears from a further document, which was mostly in Polish but appeared to be some sort of loading docket that payment for the contract was to be made in cash on loading.

61. Although the Appellant appears to have made *some* checks on the consignor they do not seem to have been very rigorous and the way in which the arrangements were made and the fact that payment was to be made in cash should have indicated that further enquiry was appropriate.

62. The Appellant submits that the destination and route of the Consignment was known from the outset and gave no cause for concern nor suggested further enquiries were necessary.

63. The CMR note does not state the name of the consignee and states its address only as "London England". The place of delivery is given as "N21 3QP Woodcroft 30". One might infer that this was London, but it was not stated. The most rudimentary enquiry would have shown that this address was in a residential area in north London. We accept that the address was sufficiently precise that the driver would have known his destination from the outset but we would have expected the Appellant to wonder why a tonne of car mats was being delivered to a residential address. Further, the CMR note stated that the consignment was loaded on three pallets. How were they to be unloaded? Was the consignee expecting them? There did not appear to be any contact details for the consignee or the place of delivery on the CMR note. The space for "sender's instructions"

contained two, consecutive numbers but these did not appear to be telephone numbers and certainly not UK mobile phone numbers or London landlines.

64. Mr Tyler challenged Mr Crouch's assertion that the Appellant had not complied with any of the procedures required by Articles 4 to 8 of the CMR convention. He pointed out that a CMR note had been prepared as required by Article 4 and that the stamps of the carrier and consignor on the note indicated that Article 5 had been complied with. Although some of the information required to be included in the CMR note had been omitted (eg the name of the consignee) the important items were included, including sufficient information about the destination of the goods.

65. The main factual dispute between the parties is whether "basic reasonable checks" to prevent smuggling were carried by the Appellant and specifically whether the Appellant has provided evidence that such checks were carried out.

66. Mrs Perkins, who had 15 years of experience in the Border Force dealing with applications for restoration of seized items gave evidence as to what a decision maker would look for and why she regarded Mr Crouch's decision as reasonable and was content to adopt it. She said that checks of the consignee are important because the haulier needs to know what the goods are and where they are going. One would expect there to be communication with the consignee to check that they are expecting the goods and to arrange a delivery time and check that appropriate equipment will be available to unload the consignment. All this helps to check the legitimacy of the load. Mr Nowotnik had no means of contacting the recipient and did not even know its name. The numbers in the box for sender's instructions may or may not have been phone numbers. As all events, the instructions were unclear. We accept that a careful operator who had checked the address and discovered they were to deliver three pallets of car mats to a private residence might have been alerted to consider if the load was in fact car mats and/or make further checks on the consignee and consignor.

67. The driver would have been expected to make a visual examination of the load. A careful operator would often check goods even if they were sealed as they are aware that transporting goods across borders involves a risk of smuggling. Checks on the goods helps to manage that risk for the haulier. If it was not possible to inspect the load, one would have expected some sort of observations to be made on the CMR note. None was made.

68. The checks made on Oliwia Trans and Ibensox at most indicated that the companies existed. Mrs Perkins acknowledged that arrangements for the carriage of goods were often made on websites such as trans.eu. The fact that there was positive feedback on the intermediary company on the website would not have had an impact on the decision. In her experience, when companies entered into contracts there would be an audit trail of some sort, for example, notes of telephone conversations, an order document or information about the consignment. There was nothing of that nature here. It would also be more usual for payment to be made on delivery of the goods.

69. Mrs Perkins highlighted the fact that there was no evidence before the decision maker that the driver had received any instructions about the prevention of smuggling or that his contract of employment had stated that a failure to take such measures would be treated as gross misconduct and could lead to dismissal. Mr Sternberg pointed out that the document before the tribunal, signed by Mr Nowotnik and containing such matters was undated and we could not know

whether that was part of his contract of employment or whether it had been signed before or after the events in question. We agree that even though, on the basis of the *Gora* case, the tribunal was entitled to take it into account, we could put little weight upon it.

70. Turning to the issue of the fee charged for restoration, the policy states that. where the operator and driver are not complicit in the smuggling attempt but there is not satisfactory evidence that reasonable steps were taken to prevent smuggling, the fee for restoring the vehicle is 20% of the duty involved in the smuggling attempt or the trade value of the vehicle whichever is less.

71. Mrs Perkins stated, and we accept, that the trade value of the vehicle is established using Glass's Guide and that this was £15,000.

72. The smuggled goods were raw tobacco. Raw tobacco is not subject to customs duty at the point of importation. Duty only becomes chargeable once the raw tobacco has been converted into a tobacco product eg cigarettes.

73. Mr Crouch had calculated the duty on the basis that the raw tobacco would be made into hand rolling tobacco. The CMR note states that the gross weight of the goods was 1,030 Kg, but it seems that actual weight of the tobacco was, in fact, 960 Kg. Mr Crouch had assumed that 960 Kg of raw tobacco would be converted into 960 Kg of hand rolling tobacco and, taking account of the VAT payable, and using the relevant rate of excise duty applicable at 18 March 2015, which was £185.74 per kilogram, he calculated that the total amount of duty involved was £213,972.48. Twenty percent of that figure is £42,794.50.

74. The trade value of the vehicle is the lower of the two figures by a very large margin, so the fee to be charged was fixed at £15,000.

75. Mrs Perkins informed us that the lowest rate of duty, which would be charged on chewing tobacco and certain other tobacco products, was £103.91 per Kilogram.

76. The Appellant's submissions regarding the decision to charge a fee

77. Mr Tyler submitted that the review decision was flawed because Mr Crouch had asserted that the Appellant had not complied with *any* of the procedures required by the Convention and had not provided satisfactory evidence that the company and driver had carried out reasonable checks on the consignor, consignee and load.

78. Further, the Border Force policy as set out in the review letter requires the decision maker to take into account the degree of failure in the operator's duty to take reasonable steps to prevent smuggling.

79. Mr Tyler contends that the Appellant had substantially complied with its duties under the Convention, a minor failure being the driver omitting to annotate the CMR note when he was unable to inspect the load. The Appellant had carried out checks on the intermediary company and the sender, it had adequate information on the consignee and about delivery and there was nothing to indicate it needed to make further enquiries, it had sourced the business through a reputable exchange and it had instructed its driver in his duties to prevent smuggling.

80. All this was evidence that the Appellant had made basic reasonable checks to prevent smuggling and if the decision maker had taken these matters into account, the only reasonable decision would have been to restore the vehicle free of charge.

81. Further, the policy requires the decision maker to have regard to the degree of failure, if there is any, of the operator and in this case there was a very low degree of carelessness.

82. The decision maker had also taken account of irrelevant matters. In the review letter he stated "I note that the driver had booked the vehicle in as freight but on disembarkation from the ferry, entered the tourist lanes, which in my view was a clear attempt to circumvent the controls and evade detection". Similarly in considering the hardship occasioned by the seizure of the vehicle, the letter stated "Your client chose to become involved in a smuggling attempt: if he finds that the consequences of those actions puts him in a difficult financial position, that was something he should have considered before choosing to become involved".

83. That the driver had made a mistake and entered the tourist lanes was irrelevant. In any event the Border Force had already decided that the Appellant and driver had *not* been involved in the smuggling attempt and Mr Tyler submitted that these comments go to the overall quality of the decision and the decision maker.

84. The Appellant's submissions on the calculation of the fee

85. Mr Tyler's first submission, which he rightly did not press, was that no duty had yet been evaded at the point of importation, so the duty involved in the smuggling attempt was nil and the Border Force's application of the restoration policy unreasonably failed to take account of this.

86. His second, more substantial, argument was that the amount of duty involved in the smuggling attempt was uncertain. The Respondent had assumed that 1Kilogram of raw tobacco would produce 1 Kilogram of rolling tobacco and had failed to consider what the realistic yield of processed tobacco products would have been from the goods seized. It had also failed to consider what type of tobacco product, dutiable at what rate, the raw tobacco could have been processed into. The calculation of the restoration fee was therefore flawed as it could not be said whether 20% of the duty was more or less than the value of the vehicle.

87. The Respondent's submissions regarding the decision to charge a fee

88. The Respondent submits that its decision is manifestly reasonable and that the Appellant has not produced any evidence to show it was unreasonable.

89. There is no evidence of due diligence by the operator or driver in checking the legitimacy of the load. There is no evidence that the Appellant made any enquiries about the load or its destination.

90. Even if the document signed by the driver regarding his duties was part of his employment contract, it was not before the decision maker and cannot undermine his decision.

91. The driver's statement that there was not room on the CMR note to record his reservations is not credible.

92. The Appellant had taken no steps to prevent smuggling.

93. The decision maker was entitled to come to the decision he did on assessing the evidence presented. He had considered all the relevant matters including the fact that no basic reasonable checks had been carried out, no enquiries had been made about the delivery address, no checks had been made on Oliwia Trans or Ibensox, the driver booked the vehicle as freight but entered the tourist lanes and the hardship caused by the seizure and the decision to restore the vehicle for a fee.

94. The burden of proof is on the Appellant to show that that the decision is unreasonable in the Wednesbury sense. It must produce *evidence* of the actions it took in order to show that the decision was unreasonable. Mr Sternberg contended that the Appellant's case consists of assertions and submissions. The Appellant did not call any witnesses to provide live evidence which would have enabled the assertions to be tested under cross-examination and allowed the tribunal to assess the credibility of the witnesses and the weight to be accorded to their evidence.

95. There was no evidence that basic reasonable checks were carried out, or that the driver had been trained in anti-smuggling procedures or that his contract of employment required him to carry out checks such as inspecting the load. There was no evidence about the checks which had been carried out on the consignee or the delivery address despite the suspicions which should have been aroused by the nature of the address, the lack of details and the cash payment. Nor were adequate checks carried out on the consignor. It is not sufficient merely to establish it exists.

96. Accordingly, on the basis on the information before the decision maker and the additional material before the tribunal it was reasonable to conclude that there was no evidence that the Appellant had carried out basic reasonable checks to prevent smuggling and so the decision to restore for a fee was reasonable.

97. The Respondent's submissions on the calculation of the fee

98. The trade value of the vehicle was not disputed.

99. The burden of proof was on the Appellant to provide evidence that the duty calculation was wrong. Its assertion about the possible yield in dutiable products was speculation. They had not shown that the decision maker had erred in assessing the fee.

100. Even if duty had been charged at £103.91 per kilogram, 20% of the duty would still have exceeded the value of the vehicle by a significant amount.

101. Discussion

102. The tribunal's jurisdiction in restoration cases is limited. We cannot consider what decision we would have reached on the evidence before us, but only whether, taking account of the evidence before us, the decision under appeal is unreasonable in the sense that the decision maker had taken into account irrelevant matters or had failed to take account of relevant matters or that the decision was one which no reasonable officer of the Border Force could have reached.

103. So was it reasonable for Mr Crouch to make the decision he did on the basis that the Appellant had failed to provide evidence that it had carried out basic reasonable checks?

104. Mr Crouch went too far in saying that the Appellant had not complied with *any* of the procedures laid down in the Convention. As set out above, there was a consignment note which contained some of the particulars required. However, there were serious flaws in compliance. In particular, the driver neither examined the load nor recorded any reservations on the CMR note. Nor did the CMR note contain the name or address of the consignee. The delivery address is not necessarily the same as the address of the consignee.

105. The decision also took into account the lack of checks made, before entering into the contract "to ascertain the validity of the persons involved in the transactions" and the lack of enquiries concerning the residential delivery address.

106. Mr Crouch had before him the documentary evidence which was before the tribunal with the exception of the document headed "basic duties of drivers performing international transport" signed by Mr Nowotnik.

107. Although the Appellant had checked the existence of companies, they had done nothing further, assuming that they must be reputable because they were registered on the trans.eu website.

108. There were a number of circumstances which should have raised suspicions which would at least merit further enquiry. These include:

- The fact that all the arrangements were done on the telephone and there were no written records or confirmations or any other sort of audit trail
- Payment was made in cash on collecting the load
- The identity of the consignee was unknown
- A tonne of car mats was to be delivered to a residential address and there was no information about how to contact the recipient
- The driver was unable to inspect the load but did not make a note of this on the CMR note saying there was not enough room.

109. There was little evidence of any positive steps which the Appellant had taken to prevent smuggling and there was no evidence of the procedures the Appellant had put in place regarding the driver. We do not place any weight on the undated document signed by Mr Nowotnik which was not before Mr Crouch.

110. We consider that Mr Crouch had ample grounds on which to conclude that the Appellant had not made basic reasonable steps to prevent smuggling and we cannot say that his decision was one which no reasonable officer could have come to.

111. Nor do we think that he failed to take account of any relevant matters.

112. There *were* some minor flaws in the decision letter. We do not think it was particularly relevant that Mr Nowotnik drove into the tourist lanes. It had already been decided by Border Force that the driver was not involved in the smuggling attempt, so he could not have been seeking to avoid detection. Similarly, the references in the section of the review letter dealing with hardship should not have referred to the Appellant choosing to become involved with the smuggling attempt. We do not consider that these vitiate the decision. They would appear to have been errors rather than irrelevant matters taken into account. If the decision had been made on the basis that the Appellant or driver was involved in the smuggling attempt, the Border Force's policy would have meant that restoration would have been refused. Mr Crouch was clearly applying the correct part of the policy.

113. The policy also requires the decision maker to take account of the degree of failure of the operator's duty. We consider that there was a significant degree of failure.

114. In relation to the amount of the fee, the Appellant challenges the computation but has produced no evidence to show that it is unreasonable.to suppose that the trade value of the vehicle is more than 20% of the amount of the duty evaded.

115. We do not know whether Mr Crouch's decision was based on any knowledge of the yield of rolling tobacco from raw tobacco. Neither Mr Crouch nor the tribunal know what products the goods would have been processed into. However, even if we assume that the finished product would have been liable for duty at the lowest rate, there would have had to be more than 40% wastage in the processing for 20% of the duty to be less than £15,000. Whilst we do not know whether that would have been the case, it does not seem to us that such a decision was one which no reasonable officer of the Border Force could have made and the Appellant, on whom the burden of proof lies, has not produced any evidence to the contrary.

116. Decision

117. For the reasons set out above, we conclude that Border Force's decision to restore the vehicle for a fee of £15,000 was a reasonable one both in relation to the decision as to restoration for a fee and as to the quantum of the fee.

118. Accordingly we dismiss the appeal.

119. 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.

MARILYN MCKEEVER

TRIBUNAL JUDGE

RELEASE DATE: 7 APRIL 2016

© CROWN COPYRIGHT 2016