TC05032

Appeal number: TC/2015/05489

Excise Duty – seizure of vehicle containing rebated heavy oil, and restoration on payment of a fee – whether restoration decision (in particular the fee charged) could reasonably have been arrived at – vehicle stopped and tested within a few miles of having been purchased from unconnected third party and after the appellant had fuelled it with diesel from a bona fide commercial source –restoration fee equivalent to £250 penalty for using rebated heavy oil as a road fuel, £250 penalty for putting rebated fuel into a road vehicle and £40 as the duty applicable to a full tank of fuel – held decision could not reasonably have been arrived at, further review to be carried out on the basis of the Tribunal's findings of fact

FIRST-TIER TRIBUNAL
TAX CHAMBER

BLUND AHMAD **Appellant**

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**
SHAMEEM AKHTAR

Sitting in public in Centre City Tower, Birmingham on 9 March 2016

The Appellant appeared in person

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

DECISION

Introduction

1. This appeal relates to a decision of HMRC to require the payment of a fee of £540 for the restoration of the appellant's vehicle to him following the detection of red diesel in its running tank by a Road Fuel Testing Unit at the inbound section of the port of Cairnryan, Stranraer.

The facts

2. We received a bundle of documents in evidence, along with a witness statement of officer Elizabeth Elliott, the review officer whose decision is under appeal. We also heard oral evidence from the appellant and officer Elliott. We find the following facts.

3. The appellant was looking to buy a larger vehicle for his growing family, and found an advert on the Gumtree website for a vehicle (a Volkswagen Transporter passenger van) which was for sale in Northern Ireland. The price was about £1,000 to £2,000 less than normal for a vehicle of its age, mileage and condition but that was because of some fault with the engine which the appellant believed could be fixed by a friend of his. He telephoned the seller and agreed a price in the range £2,800 to £3,000 on the basis of the answers he was given over the telephone about the vehicle and its condition.

4. The appellant arranged with the seller of the vehicle that he would fly over from Birmingham to Belfast and meet the seller, with the vehicle, at the airport in Belfast. He duly did so, taking an early flight on 9 July 2015 which cost him approximately £40 to £60 (a copy of his boarding pass was included in the documents before us). He took with him the necessary cash to pay for the vehicle.

5. When he met the seller, there was some issue with the vehicle, which did not conform fully to the description that had been given. As a result, the sale price was reduced by agreement to £2,200. The appellant paid the cash and took the vehicle. The fuel warning light was on so the appellant bought £20 worth of diesel fuel (just over 17 litres) at a garage on the short journey from the airport to the ferry terminal. A copy of his debit card purchase receipt, timed at 9:55 am on that morning, was included in the bundle before us.

6. The appellant had by now missed the Liverpool ferry and therefore bought a crossing with Stena on the 11.30 am ferry from Belfast to Cairnryan (Stranraer, in south west Scotland). A copy of his Visa debit card slip, showing a purchase from Stena for £152 just after 10.20 am on that morning, was included in the bundle before us together with a boarding slip for the crossing showing the appellant's name.

7. As he was leaving the ferry at the other end, the appellant was stopped by an HMRC Road Fuel Testing Unit at around 2.15 pm. The officer in charge appears to have been officer R Stevenson. A copy of his notebook was included in the documents before us, but he did not attend to give evidence. The appellant told the

officers he had bought the vehicle that day. The officers checked the Police National Computer and found the details of the current registered keeper of the vehicle still shown as the person in Ballykelly from whom the appellant had bought it. The officer's notebook records that the appellant "would not confirm how much he paid for the vehicle"; the appellant claims that he did, though he had been unable to provide the officer with any receipt for the amount he had paid, because he had not sought any receipt from the seller.

8. A sample of fuel was drawn from the vehicle's running tank and tested. It was orange in colour and tested positive for Quinizarin, Euromarker and SET. The appellant was offered a sample and declined it. The notebook stated there was "½ tank" of fuel (which we take to be an approximate reading), and that the "tax" (presumably road tax) could not be checked because there was "no access to system".

9. On the appellant's account (which we accept), he showed the officer all his evidence of the above events, including his boarding pass, receipt for purchase of the fuel, receipt for the ferry, the tear off slip from the vehicle registration document with his details filled in (a copy of which was also included in our bundle) and a copy of the Gumtree advertisement (which was not).

10. In any event, in view of the undoubted presence of rebated diesel fuel in the vehicle's running tank (which the appellant does not dispute), the officer seized the vehicle as liable to forfeiture and offered its immediate restoration on payment of the sum of £540. This figure was arrived at by taking the standard £250 penalty for using rebated heavy oil as road fuel, the standard £250 penalty for putting rebated fuel into a road vehicle and £40 as the amount, based on the capacity of the vehicle's running tank, equivalent to the duty on rebated fuel which was presumed to have been used as road fuel (in fact the duty element came to £44.80 on the officer's calculations, but in view of the cash held by the appellant, this was rounded down to £40).

11. The appellant was able to pay the restoration fee in cash straight away, out of the excess cash he had taken with him to buy the vehicle. On his account (which we accept), the officer ended up believing his story, but said he had no choice about charging the fee, "it was the law".

12. There was some confusion over the appellant's home address. The officer's notebook contains an address in Preston for the appellant. The appellant maintains he gave his Birmingham address as he was not living in Preston any more and did not want that address to be used, in case correspondence went astray. He explained to the Tribunal that he had been living and working in Birmingham until he lost his job; after a trip back to Iraq, he had moved to Preston to live with family around the end of 2014 or beginning of 2015 with a view to obtaining work there; he had been unsuccessful, and had moved back to Birmingham in mid 2015. The officer's notebook did not state that the appellant had given the Preston address, it merely recorded that address; to the extent it is relevant, we accept the appellant's evidence that he asked the officers to use his Birmingham address, and we infer they preferred to use the address shown on his driving licence, which was still the Preston address.

Mr Adkinson sought to persuade us that this inconsistency should be regarded as casting doubt on the appellant's credibility, but we reject that suggestion.

13. Having paid the £540 restoration fee and driven away in the vehicle, the appellant wrote a few days later to HMRC appealing for the refund of the £540 "fine", and sending them copies of the relevant part of the vehicle's registration document, his air ticket to Belfast, the receipt for the fuel he had bought in Belfast and the receipt for the ferry ticket. HMRC received this letter on 15 July 2015. HMRC treated this (correctly, in our view) as an application for a formal review of the decision to restore the vehicle on payment of the £540 fee and officer Elliott issued her formal review letter on 26 August 2015.

14. In her letter, she fully upheld the original decision. The core of her reasoning was set out in the following paragraphs:

> "There is no doubt that rebated fuel was detected in the running tank of your vehicle and it was being misused as road fuel. The vehicle was therefore seized.
>
> The detection officer treated the matter as a "first offence" and therefore in those circumstances, I agree the decision to restore the vehicle was correct.
>
> I then considered the analysis of the restoration amount;
>
> An amount equal to the penalties under Section 13 (1)(a) and (b) of the Hydrocarbon Oil Duties Act 1979 was charged, i.e. £250 in relation to using rebated heavy oil as road fuel and £250 in relation to putting rebated fuel into a road vehicle. I agree those amounts were correctly charged.
>
> An amount equivalent to Duty due on rebated fuel used as a road fuel, based on the capacity of the vehicle's running tank, was calculated to be £44.80, reduced to £40 to accommodate your cash payment.
>
> In summary, I conclude the decision to restore the vehicle involved in this dispute to you is correct."

15. Earlier in her letter, she had also said: "For the purposes of the restoration of the vehicle it does not matter who fuelled the vehicle with the rebated oil."

16. In response to our question, officer Elliott confirmed that for the purposes of restoration, in such circumstances any question of "fault" on the part of the appellant was "entirely irrelevant". We pressed Mr Adkinson on this point, putting the hypothetical example of, for instance, a judge buying a used vehicle from a manufacturer's main dealership, being stopped as he drove away, and red diesel being found in the running tank of the vehicle he had just bought. On officer Elliott's view, it would be entirely correct for the vehicle to be seized and for the owner to be required to pay over £500 to have it restored. Mr Adkinson's comment was that the rules were strict, for good reason; a buyer might have civil remedies against his seller,

but he would have no acceptable answer to the simple fact that rebated fuel was being used by him in his vehicle.

17. Officer Elliott also confirmed that she did not know whether the positive tests indicated the degree of concentration of illicit fuel in the vehicle tank, i.e. whether the tests showed (or were capable of showing) that the appellant's account was credible or not.

The law

18. As there was no great disagreement about the law, we do not need to set it out in full here. As set out in section 16(4) Finance Act 1994 ("FA94"), the Tribunal's powers in this appeal are:

> "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. In reaching our decision, it is also quite clear (following the case of *HMRC* v *Jones & Jones* [2011] EWCA Civ 824) that as the appellant never challenged the lawfulness of the seizure, the factual basis on which the seizure occurred cannot now be challenged. As the appellant did not dispute the presence of red diesel in his vehicle's running tank when he was driving it, this adds nothing in the present case.

20. We note that, whilst section 9 of FA94 provides authority to charge penalties (and that would have been the provision relevant to this case if the appellant had been charged penalties rather than had his vehicle seized), that section is subject to section 10, which provides a "reasonable excuse" defence.

Discussion and decision

21. In Mr Adkinson's submission, officer Elliott's decision to uphold the original restoration decision (subject to the payment of the £540 restoration fee) was well within the range of reasonable decisions, and therefore unimpeachable by the Tribunal. In his submission, the appellant's story simply did not make sense. He was a

man on jobseekers allowance with no known income or savings who had flown to Northern Ireland to buy a second-hand vehicle on the basis of an internet advertisement which had never been produced, using cash for which no source had been demonstrated. He had misstated his home address to the HMRC officers. His account should simply not be believed.

22. Even if his story was accepted, he was in any event driving a vehicle using duty rebated fuel. A decision to restore his vehicle to him on payment of an amount equal to the penalties and duty which he should have paid was within the reasonable range of decisions, and in line with HMRC policy as explained by officer Elliott. There was nothing exceptional about this case which required a different outcome.

23. We disagree. There is ample evidence to support the appellant's account of events, which we accept. We find him to have been the unwitting victim of a third party's unlawful act in fuelling the vehicle with rebated diesel before he bought it.

24. The decision of the seizing officer in this case (upheld on review) effectively amounted to the indirect imposition of the two penalties which formed the basis of calculation of the restoration fee, along with the imposition of duty on a full tank of fuel.

25. Where a decision is under consideration (as here) to impose a restoration fee wholly or partly equivalent to statutory penalties for which there is a "reasonable excuse" defence, we consider the availability (or otherwise) of that defence ought properly to form part of the decision making process.

26. Similarly, where a decision is under consideration (as here) to impose a restoration fee wholly or partly equivalent to the duty "lost" as a result of a notional tank full of illicit fuel, due consideration ought to be given to the question of whether the vehicle owner knew or ought reasonably to have known of the illicit fuel, together with any facts which cast doubt on the (otherwise legitimate) assumption that any illicit fuel in the tank is the residue of a whole tankful.

27. In the present case, on the face of HMRC's review letter, they did neither. Quoting HMRC's "policy" (no copy of which was provided to us), they stated that "for the purposes of the restoration of the vehicle it does not matter who fuelled the vehicle with rebated oil". If that, without any qualification, is an accurate statement of HMRC's policy, then we do not see how it can be a reasonable one. In her witness statement, however, officer Elliott indicated that there was some discretion to disregard the policy by her statement that "I did not consider there to be any exceptional circumstances to warrant any deviation from HMRC's restoration policy". She did not expand on this in her oral evidence, beyond stating that HMRC's policy for "first offences" was to offer restoration on payment of a fee calculated in line with what had been done in this case. Whilst for some reason HMRC have not seen fit to share a full statement of their policy with the Tribunal (and we can see no reasonable basis for such omission), we infer it must therefore contain some discretion to disregard the normal guidelines in exceptional cases. If it does not do so, it would undoubtedly be unreasonable.

28. In the present case, if HMRC had sought to impose penalties on the appellant for using rebated heavy oil as a road fuel and for putting rebated fuel into a road vehicle, on the exceptional facts as we have found them the appellant would have had a defence of "reasonable excuse". A decision which effectively seeks to impose the same penalties on a "strict liability" basis by indirect means must, therefore, in our view be unreasonable. These observations apply to £500 of the £540 restoration fee.

29. So far as the remaining £40 element of the restoration fee is concerned, we have accepted the appellant's evidence that he put 17.11 litres of diesel fuel from a bona fide source into the vehicle shortly after he bought it. We have further found that the appellant neither knew nor reasonably could have known that the tank contained illicit fuel when he bought the vehicle. In those circumstances, we consider that a decision which effectively required the appellant to account for duty on a full tank of illicit fuel as a condition of restoration of his vehicle must be unreasonable.

30. It follows that, in terms of section 16(4) FA94, we consider HMRC could not reasonably have arrived at the decision under appeal.

31. We accordingly direct, pursuant to section 16(4)(a) FA94, that the disputed decision (i.e. that contained in HMRC's review letter dated 26 August 2015) should cease to have effect forthwith, and (pursuant to section 16(4)(b)) we require HMRC to carry out a further review of that decision. In doing so, we direct that they should take into account the findings of fact contained in this decision, in particular our findings that the appellant did not know and could not reasonably have known that the vehicle was fuelled with rebated diesel when he bought it, and that he would have had a valid "reasonable excuse" defence to the imposition of the two £250 penalties which were taken into account as part of the calculation of the restoration fee.

32. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 19 APRIL 2016