



TC05215

Appeal number: TC/2015/06392

Excise duty – seizure of vehicle – whether refusal of restoration of vehicle reasonable – no, appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MR IOAN SAVA

Appellant

- and -

DIRECTOR OF THE BORDER REVENUE

Respondents

**TRIBUNAL: JUDGE ABIGAIL MCGREGOR
DUNCAN MCBRIDE**

Sitting in public at Fox Court, London on 21 April 2016

Mihaela Padure, Solicitor for the Appellant

Miss Griffiths, presenting officer for the Border Force, for the Respondents

DECISION

1. This is an appeal by the Appellant ("**Mr Sava**") under section 16 of the Finance Act 1994 against the review of a decision to refuse to restore a Mercedes Sprinter Van registration SV-11-MVS (the "**Vehicle**") that was seized by the Respondent ("**Border Force**") on 23 May 2015 as it was being used to carry goods liable to forfeiture.

2. As further explained in paragraph 18 below, the Tribunal's powers in relation to the seizure of the Vehicle are limited to considering whether the decision of the Border Force not to restore it was a reasonable one. The Tribunal cannot make a new decision on the restoration of the Vehicle or make any decision in relation to the legality of the seizure.

Background

3. The background facts to this case are not disputed:

(1) the Vehicle was stopped at the port of Dover by the Border Force on 23 May 2015;

(2) the Vehicle was being driven by Mr Valentin Bocanet;

(3) Mr Sava was the owner of the Vehicle, but was not in the Vehicle at that time;

(4) 8.55Kg of rolling tobacco and 2000 cigarettes and the Vehicle were seized by the Border Force;

(5) Mr Sava did not challenge the legality of the seizure of the Vehicle in the magistrates court;

(6) Mr Sava requested restoration of the Vehicle by letter dated 1 June 2015;

(7) the Border Force requested Mr Sava to fill out a questionnaire on 19 June 2015, which Mr Sava did on 26 June 2015 (the "**Questionnaire**");

(8) the Border Force refused the restoration of the vehicle by letter dated 20 July 2015;

(9) Mr Sava requested a review of that decision on 12 August 2015;

(10) the Border Force confirmed the non-restoration decision on 25 September 2015; and

(11) Mr Sava appealed that decision by Notice of Appeal dated 16 October 2015.

4. The arrangements between Mr Sava and Mr Bocanet for the use of the Vehicle, however, are not agreed. This issue is discussed further below.

Evidence

5. Mr Sava gave oral evidence at the hearing, through an interpreter. Ms Perkins, officer of the Border force, also gave oral evidence. Both were cross examined.

6. Copies of certain documents were also provided in the bundle for the hearing, including:

(1) the Questionnaire and subsequent letters submitted by Mr Sava to support his request for restoration, alongside supporting documentation such as copies of a loan agreement and a car rental agreement (which were provided with certified translations); and

(2) the decision and review letters from the Border Force.

7. The relevant parts of evidence are referred to in the discussion below.

The Law

8. Section 139(1) of the Customs and Excise Management Act 1970 ("**CEMA 1979**") provides as follows:

"Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or constable, or any member of Her Majesty's armed forces or coastguard."

9. Section 141(1) of CEMA provides that where any thing has become liable to forfeiture:

“(a) any ship, aircraft, vehicle, animal, container (including any article of passengers' baggage) or other thing whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture, either at a time when it was so liable or for the purposes of the commission of the offence for which it later became so liable,

...shall also be liable to forfeiture"

10. Section 152 CEMA 1979 provides:

The Commissioners may as they see fit –

(a) ...

(b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under [the Customs and Excise Acts]..."

11. Section 14(2) Finance Act 1994 makes provision for a person to require a review of a decision made under section 152(b) CEMA 1979 not to restore anything seized from that person.

12. Section 16 Finance Act 1994 makes provision for a person to appeal against any review of a decision under section 152(b) CEMA 1979. It specifies that the power of an appeal tribunal shall be confined to a power, where the tribunal are satisfied that the review decision is one that the reviewing officer making that decision could not

reasonably have arrived at on the basis of the information provided, to do one or more of the following:

- (a) Direct that the decision, so far as it remains in force, is to cease to have effect;
- 5 (b) Require a further review of the original decision in accordance with such directions as the tribunal considers appropriate;
- (c) Where the decision has already been acted on or taken effect, declare the decision to have been unreasonable and to give directions as to the steps to be taken for securing that repetitions of the unreasonableness
10 do not occur when comparable circumstances arise in the future.

Submissions

Arguments on behalf of Mr Sava

13. Ms Padure submitted that the decision on review not to restore the Vehicle:

- (1) was unreasonable because:
 - 15 (a) Mr Sava acted in good faith, i.e. had no prior knowledge of the smuggling attempt by Mr Bocanet and did his best to co-operate with the authorities once he was made aware of the problem;
 - (b) Mr Sava made no financial gain from the arrangements with Mr Bocanet or from the smuggled goods;
 - 20 (c) Mr Sava had not been aware of a previous occasion on which Mr Bocanet had been stopped in the same Vehicle and goods seized from him;
 - (d) the confusion and discrepancies in Mr Sava's responses to the Border Force (between the Questionnaire and the subsequent
25 correspondence) was as a result of bad or inappropriate advice and advisers when the Vehicle had first been seized; and
 - (e) the presence or absence of a car rental agreement between Mr Sava and Mr Bocanet would not, of itself, have made a difference to the decision being made by the Border Force, it was only the discrepancy in
30 Mr Sava's responses that influenced the decision; and
- (2) has put Mr Sava in a position of exceptional hardship because:
 - (a) he uses the Vehicle to make his living;
 - (b) the Vehicle was worth €40,000; and
 - 35 (c) he needed to continue to make payments on the loan he took out to buy the Vehicle (and for which the Vehicle had been security) (the "**Loan Agreement**") but is now not able to make the payments because he no longer has the Vehicle to generate income.

Arguments on behalf of the Border Force

14. Miss Griffiths submitted that the review decision was one that could reasonably be arrived at because (in summary):

- (1) the Border Force reasonably applied their policy on restoration;
- 5 (2) the inconsistencies in Mr Sava's statements led to a reasonable inference of a lack of credibility;
- (3) the relationship between Mr Sava and Mr Bocanet was such that restoring the Vehicle would be tantamount to restoring it to the person who committed the smuggling; and
- 10 (4) Mr Sava had not submitted any evidence to support his claim for exceptional hardship.

15. The Border Force policy on restoration states that:

15 "The general policy is that private vehicles used for improper importation or transportation of excise goods should not normally be restored. The policy is intended to be robust so as to protect legitimate UK trade and revenue and prevent illicit trade in excise goods. However vehicles may be restored at the discretion of Border Force subject to such conditions (if any) as they think proper (e.g. for a fee) in circumstances such as the following:

- 20 • If the excise goods were destined for supply for profit, the quantity of excise goods is small, and it is a first occurrence.
- If the vehicle was owned by a third party who was not present at the time of the seizure, and can show that they were both innocent and blameless for the smuggling attempt, then consideration may be given to restoring the vehicle for a fee; if
25 in addition to being both innocent and blameless the third party demonstrates that they had taken reasonable steps to prevent smuggling in the vehicle, then consideration may be given to restoring it free of charge. **However, a vehicle will not normally be restored to a third party in a situation where that would be tantamount to restoring it to the person responsible for the smuggling attempt."**

35 16. The arguments submitted on behalf of the Border Force were that the decision not to restore was in accordance with this policy and was reasonable because:

- (1) The decision maker had considered all of the evidence available, including all the documentation that had been submitted by Mr Sava, the officer's notebook and other available materials, such as commercial records
- 40 (2) The amounts of tobacco and cigarettes were not small (over 7 times the recommended limit of rolling tobacco) and it was not a first occurrence because Mr Bocanet had been stopped in the same Vehicle and had goods seized in 2014.

(3) It was reasonable to doubt the credibility of Mr Sava because of inconsistency between:

- 5 (a) the Questionnaire, which stated that the lending of the Vehicle was a one-off and there was no financial arrangement between Mr Sava and Mr Bocanet in relation to the loan of the Vehicle;
- (b) evidence from a previous seizure of goods from Mr Bocanet when he was driving the same Vehicle, which suggested at least one prior lending of the Vehicle;
- 10 (c) the letter of 12 August 2015, to which Mr Sava had attached a certified translation of a car rental agreement covering the period 1 April 2015 and 1 September 2015 which set out a monthly fee for renting the Vehicle;
- (d) the evidence given in the hearing by Mr Sava, in which he stated that there was an agreement in place for the renting of the car between Mr Sava and Mr Bocanet but the amount he paid for the car depended on the length of time that Mr Bocanet borrowed the car for on each occasion; and
- 15 (e) Mr Sava's failure to provide any evidence of the implementation of the car rental agreement, e.g. payments flowing from Mr Bocanet to Mr Sava, receipts or bank statements;

20 (4) Mr Sava and Mr Bocanet were close friends who had known each other since childhood and the commercial records show that Mr Sava, Mr Bocanet and Mr Tataru (the lender under the Loan Agreement) had made 80 trips across the Channel in various combinations over a period of a year, and therefore the relationship between Mr Sava and Mr Bocanet was such that restoring the Vehicle to Mr Sava was tantamount to restoring the Vehicle to the person who

25 undertook the smuggling activity.

17. On the question of hardship, Miss Griffiths submitted that:

- (1) there is inevitable hardship in the seizing of a vehicle;
- 30 (2) Mr Sava had not been able to provide any evidence of why the hardship he experienced as a result was exceptional, including any evidence of his or his family's financial position; any payments that he had made under the Loan Agreement, or the schedule of payments due, despite several requests for this information from Border Force; and
- (3) Mr Sava has access to other similar vehicles.

35 Discussion

Reasonableness of decision

18. The jurisdiction of this tribunal under section 16 Finance Act 1994 is supervisory and limited to determining whether the decision by Border Force was reasonable. In *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd*

40 [1980] STC 231 a review of the exercise of discretion should consider whether "the

commissioners had acted in a way which no reasonable panel of commissioners could have acted; if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight."

19. We therefore considered the facts in order to determine whether the decision not to restore the Vehicle was reasonable. In considering the facts we noted that as Mr Sava had not challenged the legality of the seizure in proceedings before the magistrates' court, the Vehicle is "deemed" to have been duly condemned as forfeit. This was confirmed by Mummery LJ in *HMRC V Jones and Jones* [2011] EWCA Civ 824 at paragraph 73. We also noted that Pill LJ accepted in *Gora v C&E Comms* [2003] EWCA Civ 525 that "given the power of the Tribunal to carry out a fact-finding exercise, the Tribunal could decide for itself [the] primary fact. The Tribunal should then go on to decide whether, in the light of its findings of fact, the decision on restoration was reasonable."

20. In *Gordon Grimshaw* [MAN/2004/8070], Judge Bishop stated that it "cannot be an unreasonable inference that travellers who give conflicting information ... are not telling the whole truth". We find that the same principle applies to the owners of seized vehicles. Mr Sava did not provide any reasonable explanation of why the answers he gave were so inconsistent. The suggestion that it was somehow caused by translation problems was not supported by Mr Sava's statement that he had had assistance from translators in order to submit the Questionnaire and subsequent documents or that the answers made perfectly good sense as a response to the questions asked, they were just not the same on the three different occasions. Secondly, Mr Sava made statements in his oral evidence that he was simply 'trying to give the right answer' and that part of the reason that he had originally not mentioned the car rental agreement with Mr Bocanet was because he was still waiting for his car rental business licences in Romania at the time he answered the Questionnaire. Neither of these responses suggested that he was at all times telling the truth. If he had simply told the truth from the beginning, the Border Force may not have taken the inference of a lack of credibility.

21. We therefore find that the Border Force's doubt of the credibility of Mr Sava and the car rental agreement was not an unreasonable inference to have made or an unreasonable factor to have taken into account when considering the question of restoration.

22. We did not find any merit in Ms Padure's argument that the presence or absence of a car rental agreement would not have influenced the decision, only the inconsistency in Mr Sava's statements. The fact is that Mr Sava did make inconsistent statements and it was the inconsistency, rather than the subject matter of the statements, that led to the reasonable inference of a lack of credibility.

23. The submission on Mr Sava's behalf that he made no financial gain from the arrangements with Mr Bocanet is an unusual one. It either suggests that there was not really a car rental agreement (which would support the Border Force's case) or that the car rental arrangement was such that Mr Sava did not make any profit out of it, which undermines Mr Sava's statements regarding the car rental business he was

operating. In either case, the suggestion does not support Mr Sava's case and it is not necessary, in light of our remaining findings, to find whether it was correct.

24. In relation to the submission that Mr Sava had acted in good faith and made no financial gain from the smuggling, while there is no suggestion that Mr Sava was aware of the smuggling activity being undertaken by Mr Bocanet on this particular journey, it became clear from Mr Sava's evidence that their relationship was and is a close one, closer than a mere business relationship, and that the lending of a vehicle for further journeys across the Channel had continued immediately after this offence. Border Force submitted that commercial records showed that a vehicle using the same number plate as the Vehicle had crossed the channel with a week or so of the seizure. Mr Sava argued that this was not in fact a vehicle with the same number plate, but another vehicle which had used one of a carnet of tickets he had acquired on behalf of Mr Bocanet before the Vehicle had been seized and which were associated with the Vehicle's number plate. Since we did not see the commercial records or the carnet of tickets, we cannot find any fact relating to that crossing, However, Mr Sava's statements further support the closeness of the relationship between the two men but also suggested a financial involvement in Mr Bocanet's journeys across the channel which undermines Mr Sava's position that he was an independent third party who had simply lent a vehicle. These were matters that it was reasonable for the reviewing officer to take into account in assessing the restoration of the Vehicle to Mr Sava and concluding that it would be tantamount to restoring the Vehicle to Mr Bocanet.

Hardship

25. It was incumbent on Mr Sava to provide evidence to the Border Force, or to the Tribunal, to support his claim for exceptional hardship. The evidence submitted by Mr Sava was limited to the Loan Agreement and the demand for payment resulting from it, which were supplied after the review decision. These were not supported by any evidence of the flow of payments in relation to the loan.

26. Ms Perkins' evidence included the statement that commercial records showed that in the month or so after the seizure of the Vehicle Mr Sava had made the Channel crossing several times in another very similar vehicle. Mr Sava confirmed in evidence that he had made these crossings and he also owned that vehicle.

27. No evidence was provided of Mr Sava's general financial position or the impact of the seizure on that position. In oral evidence Mr Sava justified the lack of bank statements or receipts by explaining that the Romanian economy made much less use of bank accounts than the UK and that payments were usually made in cash. However Mr Sava also suggested that he would be in a position to provide more evidence of his financial position if his appeal was allowed. The Tribunal cannot make conditional decisions of this nature and Mr Sava has been given ample opportunity, following requests from Border Force, to provide this evidence in advance of the hearing and failed to do so.

28. We find that Mr Sava did not provide any credible evidence that the seizure of the Vehicle imposed a greater hardship on him than it would on any other person to

5 support a claim for exceptional hardship, particularly in light of his own admission that he already owned another similar vehicle to the one seized. We therefore find the Border Force's decision was not an unreasonable one in this regard and that the subsequent provision of the loan agreement and the demand for payment was insufficient evidence to support a change to that decision.

Decision

29. We find, taking into account all the facts and circumstances of this case, that the decision not to restore was one that the reviewing officer could reasonably have arrived at and therefore the decision stands. Mr Sava's appeal is dismissed.

10 30. 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 15 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

20 **ABIGAIL MCGREGOR**
TRIBUNAL JUDGE

RELEASE DATE: 29 JUNE 2016