TC05216

Appeal number: TC/2015/02571

VAT and Customs Duties – restoration of seized goods on condition of payment of fee equal to duty payable plus a supplemental fee – fee paid but subsequently found to have been excessive due to over-valuation of goods – refund of excess offered (and ultimately made) subject to prior signature of waiver of claims – whether imposition of such condition was a decision which could reasonably have been arrived at – section 16(4) Finance Act 2004 – no – subsequent review led to "withdrawal" of condition, even though payment had been made subject to it – whether direction under section 16(4)(a) or (b) could be made – no, because further review had resulted in withdrawal of condition – whether a general direction under section 16(4)(c) appropriate – no, because original decision had been subsequently remedied by re-review

FIRST-TIER TRIBUNAL
TAX CHAMBER

THOMAS MOORE **Appellant**

-and-

UK BORDER AGENCY **Respondent**

TRIBUNAL: **JUDGE KEVIN POOLE**

Sitting in Chambers on 28 June 2016

DECISION

Introduction

1. This decision is concerned with one outstanding aspect of an appeal which was brought against the respondent's decision to restore some tablets to the appellant (which had been seized in the course of their delivery by post to the appellant from overseas) on condition of payment of a fee.

2. The appellant appealed the decision but also paid the fee demanded and obtained restoration of his goods. Following the decision of the Tribunal on his appeal, the respondent amended their decision to reduce the amount of the fee payable. They did not simply return to the appellant the excess fee which he had paid, however; instead they required the appellant to sign what amounted to a waiver document as a precondition of repaying the excess fee.

3. The appellant signed the document under protest, received his repayment but persisted with his appeal. The respondent ultimately confirmed that their condition had been "unwarranted" and that it was "now withdrawn".

4. The matters complained of by the appellant have therefore in practical terms been disposed of, as between him and the respondent. The Tribunal was however concerned as to the wider implications of the respondent's actions, and their failure to acknowledge, when "withdrawing" the waiver condition in the case of the appellant, that the imposition of such a condition was, as a point of general principle, inappropriate in a case such as the present.

The facts

5. The appellant bought some Modafinil tablets over the internet and they were posted to him from India. They were seized on importation because there was no Customs Declaration attached to them when received. The respondent accepted that the Declaration may have become detached and accordingly "exceptionally" offered restoration of the goods if evidence of value was supplied in order to calculate the correct restoration fee (based on the unpaid VAT and duty). The appellant provided a print of part of the British National Formulary (whilst also saying that the tablets cost "nothing like" as much in India), from which the respondent calculated an estimated UK value of £1,116. Based on this value, the respondent calculated a restoration fee of £245.52 (made up of VAT at 20% on the value, totalling £223.20, plus a further 10% restoration fee of £22.32).

6. The respondent's decision to restore on payment of a fee of £245.52 was upheld on review and appealed to the Tribunal. At some point (it is not clear to me exactly when), the appellant paid the £245.52 required by the respondent, in order to obtain his tablets.

7. Ultimately, on 10 February 2015 the Tribunal heard the appeal. In its decision issued on 13 February 2015, it found as a fact that identical goods could be imported at a cost of $432, being "approximately £288". It calculated that the VAT due on

such amount would be £57.60, and when a 10% restoration fee or penalty was added, the sum would be £63.36. It directed the respondent to carry out a further review of its original restoration decision, based on this finding of fact.

8. On 11 March 2015, the respondent issued a further review of its original decision in accordance with the Tribunal's directions. The revised decision was that "the goods should be restored for a fee of £63.36". The decision went on to say that "on receipt of completed and signed Annex C [we] will arrange for £182.16 to be refunded to you."

9. The appellant appealed to the Tribunal against this amended decision (after an earlier letter dated 19 March 2015, which did not comply with the requirements for a notice of appeal, a valid notice of appeal was received at the Tribunal on 9 April 2015). The grounds of appeal were as follows:

> "The Respondent's representatives, having abused public resources, and my resources, appears to me to be asking for an undertaking from me in return for returning my money to me. The abuse to which the Respondent's representatives have subjected me is no unique and I want to be free to refer to it."

10. The respondent applied on 29 May 2015 for the appeal to be struck out, on the basis that:

> "- This new appeal appears to relate to the wording of Mr Brenton's letter and also a complaint about a Tribunal Judge;
>
> - The Tribunal service has no jurisdiction to direct the Respondents to compensate the Appellant;
>
> - We state that the Director of Border Revenue have acted in accordance with the Tribunals decision and has offered Mr Moore a refund;
>
> - We believe the Respondents have acted reasonably and in accordance with the Tribunals direction and we see no further area or issues, as directed, that has not be actioned appropriately;
>
> - In the interest of saving all the parties involved time and money, we Apply that this appeal should be Struck Out and or Dismissed."

11. The Tribunal belatedly sent a copy of this application to the appellant on 9 July 2015, asking for his written representations. The appellant responded by letter dated 14 July 2015 (received on 15 July), in which he appears to have demonstrated some misunderstanding of what the Tribunal was asking, and generally expressed dissatisfaction. He also said that he considered the Tribunal was "harassing" him, and he enclosed a copy of "the Respondent's Letter of Ex-gratia Acceptance, which in view of your behaviour I have no choice other than to file, both with you and the Respondent". Attached to this letter was a page from a letter sent by "Border Force", presumably to the appellant, which included the following:

> "Please complete and return the attached acceptance form so a payment can be issued as soon as possible. The payment will be made in full and final settlement of this case.
>
> Annex C – Letter of Ex-Gratia Acceptance
>
> Claim E345551
>
> I agree to accept the offer of £182.16 as full and final settlement of the matter relating to your goods.
>
> Signature of Claimant: [here the appellant had signed] Date 14 July 2015"

There followed the full name, address and bank account details of the appellant, filled in by him.

12. As the appellant had indicated his disagreement with the respondent's application to strike out his appeal, the matter was referred to me for consideration of the papers. By a decision issued on 19 October 2015, I dismissed the strike-out application. The key passages of my decision read as follows:

> "8. The decision which the Respondent has reached on the review following the Tribunal's decision in February 2015 requires the Appellant to accept the refund "in full and final settlement of the matter relating to your goods", a condition to which the Appellant appears to object.
>
> 9. It seems to me that the imposition of such a condition, forming part of the amended basis on which the Respondent agreed to restore the goods, is clearly a matter which falls within the Tribunal's jurisdiction and accordingly the application to strike out the appeal is misconceived.
>
> 10. If the Respondent considers it can justify the imposition of this condition as a decision which could reasonably have been reached, then it must do so in the context of the appeal proceedings. Whilst the point is not before me for decision in the context of this application, and there may be other factors which would affect my view of it, I should say that my provisional view is that where the Respondent has reached a view as to the level of restoration fee that should be paid, and has already received an amount in excess of that fee, I see it difficult to see how it can be justified to impose a condition of the type sought in this case before it is willing to refund the excess from what has already been paid."

13. The Respondent was consequently ordered to file its statement of case. By letter dated 4 November 2015 to the Tribunal, however, the Respondent said (after a brief justificatory statement) that "In this case, we agree that the 'precondition statement' was unreasonable and unnecessary as we are refunding money owed to Mr Moore. But as explained above, this was a standard template and it was not intended to mislead Mr Moore." As the appellant's money had apparently already been repaid

"without the need for him to comply with the 'preconditions'", the respondent invited him to withdraw his appeal.

14. The appellant declined to do so. In his letter dated 19 December 2015, he referred back to my decision issued on 19 October 2015, in which I had said that "it is at the very least arguable that the imposition of this new condition renders the review officer's decision unreasonable…".

15. I took the appellant to be saying that he had been repaid the excess amount due to him without having to sign the Respondent's waiver. I accordingly directed on 18 January 2016 that his appeal should be struck out unless the appellant showed cause within 14 days why it should continue. By letter dated 25 January 2016 (received on 26 January), the appellant confirmed that he had signed the waiver, and therefore he continued to object to HMRC's decision because he had only been able to obtain his repayment by doing so.

16. Accordingly, on 16 February 2016 I made further Directions. After a brief recapitulation of the position as I understood it, the preamble proceeded as follows:

> "…recognising that I have not heard any submissions from the Respondent, it seems to me that if the Appellant's account is broadly complete and accurate in all material respects, then the Respondent, by effectively imposing an unwarranted requirement to sign a waiver before paying back the refund to which the Appellant was unconditionally entitled, must be taken to have reached a decision which could not reasonably have been arrived at.
>
> Section 16(4) of the Finance Act 1994 states that on an appeal against such a decision:
>
> > "the powers of an appeal tribunal … 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."

It appears to me that the Respondent's decision (to impose an unwarranted precondition on the repayment of the excess fee already paid) is one which might be argued to remain in force, as its possible effect might be to preclude the Appellant from seeking additional compensation through the courts; whilst that might be a desirable outcome for the Respondent, it would seem to me to be an inappropriate one. If the Appellant can demonstrate he has suffered loss for which he should be compensated arising from the Respondent's wrongful withholding of his refund (about which I express no view), that is not a remedy which should be denied to him simply because the Respondent has withheld a refund to which he is unconditionally entitled until the Appellant has signed a waiver in terms which are satisfactory to it but to which it had no entitlement. It seems to me that this part of the Respondent's decision is susceptible to a direction under section 16(4)(a) above.

In addition, to the extent that the Respondent's decision to impose an unwarranted waiver of claims on the Appellant is one which has already been acted on and may not be capable of being remedied by a further review, it seems to me that it may well be appropriate for me to make a declaration and give directions under section 16(4)(c) above as to the steps which the Respondent must take in order to secure that the situation does not re-occur in similar circumstances in the future.

If the Respondent accepts that these two proposed directions are appropriate, then I will deal with matters on the papers and without a further hearing. If it does not, then it should be given the opportunity of making written submissions on the point before I make a decision about whether to convene a further hearing."

17. The Directions which followed provided:

"IT IS THEREFORE DIRECTED that

1. The Respondent shall deliver to the Tribunal, with a copy to the Appellant, such representations in writing as it wishes to make on the above proposed course of action, so as to be received by both of them within 28 days of the date of these Directions.

2. If no representations are received within such 28 day period, the Respondent shall be taken to be consenting to the above proposed course of action.

3. Further Directions (or, as appropriate, a Decision) will be issued following the expiry of such 28 day period."

18. In response, the respondent wrote to the appellant on 15 March 2016, as follows:

"I have been directed by the First Tier Tribunal, sitting on 16th February 2016, to revisit the re-review dated 11th March 2015 which concluded that the **goods** should be restored for a fee of £63.36.

> Your case was passed to an Officer of the NPSU who arranged for £182.16 to be refunded to you on completion of an Annex C form.
>
> I have now concluded that you should not have been requested to sign a form in which you accepted the refund as *'a full and final settlement of the matter relating to your goods'* as this was an unwarranted precondition of the payment of the fee already paid. That pre-condition is now withdrawn."

19. In its covering letter sending a copy of the above to the Tribunal, the respondent said that

> "…We hope that this will remedy the issues raised by the Appellant in relation to the Annex C Form.
>
> We have taken the step to remove the preconditions due to the nature of this particular case. And our response may well be different with other cases/appeals relating to Annex C.
>
> We note that all necessary remedies have been exhausted in relation to this Appeal and there are no further issues for the Tribunals Service to consider. We therefore kindly request that the Tribunals Service write to Mr Moore, with the view of asking him to withdraw from this Appeal."

20. On my instructions, the Tribunal responded by letter dated 4 April 2016 to the respondent:

> "Thank you for your email of 17 March 2016, which has been referred to Judge Poole. I am instructed to reply as follows.
>
> The Judge notes that you have formally withdrawn the condition which was previously imposed on the Appellant as a precondition of repayment of the excess amount accepted as due to him. As such, you appear to have accepted the Judge's view that the imposition of this condition was unwarranted (indeed you have said as much in your letter dated 15 March 2016 to the Appellant). In the circumstances, the Judge sees no need to make a Direction for a further review of the particular decision relating to this Appellant, as you have forestalled the need for any such Direction by your actions.
>
> As the disputed decision has been withdrawn, there appears to be no continuing matter to engage the jurisdiction of the Tribunal and accordingly the Judge proposes to strike out that part of the appeal in due course. In a situation where the appeal has effectively been vindicated, the Judge does not consider it appropriate to request the Appellant to withdraw it.
>
> There remains the ongoing matter of the Tribunal's general jurisdiction under section 16(4)(c) Finance Act 1994. The Judge does not consider your statement that "our response may well be different with other cases/appeals relating to Annex C" to be sufficient to dispose of the

matter satisfactorily. His provisional view is that if the Department has formed the view that a taxpayer has been required to overpay by way of a restoration fee, then the taxpayer should not be required to sign what effectively amounts to a blanket waiver of all other claims against the Department in relation to his goods before the agreed overpayment will be returned to him. He is minded to make a declaration and direction to that effect under Section 16(4)(c). Before doing so, he has asked that you be given the opportunity:

1. to make any representations either as to the proposition in general or as to the specific terms of a declaration and direction under section 16(4)(c); and

2. to indicate whether you are content for the matter to be resolved on the basis of your written representations and without the need to attend a hearing.

Can you please respond within 28 days. If you do not do so, the Judge will take it you are content to leave the matter for him to decide without a hearing on the basis of the documents he has already seen, and he will issue a declaration and direction in such form as he considers appropriate after full consideration of those documents.

As this wider matter is a matter of general application rather than being of direct relevance to the Appellant in this case, the Judge has directed that this correspondence should be copied to the Appellant only for his information; he will not be required to take any further part in the proceedings.

I look forward to hearing from you within 28 days."

21. No response has been received from the respondent to this correspondence.

The law

22. As mentioned above, the powers of the Tribunal on an appeal of this nature are set out in section 16(4) Finance Act 2004:

"the powers of an appeal tribunal … 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."

Discussion and decision

23. The decision with which I am concerned in this case is a decision to require the appellant to sign a waiver as a precondition of receiving a partial repayment of an earlier restoration fee in circumstances where the respondent had accepted that the appellant had overpaid because the original restoration fee was calculated by reference to a value which was found to have been too high. I consider that decision to have been one which could not reasonably have been arrived at.

24. As that decision has effectively been revoked in relation to this appellant by the respondent's confirmation that the precondition has been "withdrawn", I consider that decision to be no longer in force and therefore no direction under section 16(4)(a) Finance Act 2004 is appropriate. For the same reason, I do not consider it appropriate to require the respondent to conduct a further review of that decision under section 16(4)(b) Finance Act 2004.

25. There remains the question of whether a direction under section 16(4)(c) Finance Act 2004 is appropriate. It was stated in the letter sent on my instructions and referred to at [20] above that my:

> "… provisional view is that if the Department has formed the view that a taxpayer has been required to overpay by way of a restoration fee, then the taxpayer should not be required to sign what effectively amounts to a blanket waiver of all other claims against the Department in relation to his goods before the agreed overpayment will be returned to him.

I remain of that view. The letter also stated that I was:

> "… minded to make a declaration and direction to that effect under Section 16(4)(c)."

26. Although no representations have been received from the respondent, I have come to the view that because the decision in question in this case has, specifically as it applied to the appellant, been effectively remedied by the further review which resulted in the respondent's letter dated 15 March 2016, the Tribunal does not have the power to make a general direction of the type referred to in section 16(4)(c) Finance Act 2004.

27. In the light of the respondent's decision its letter dated 15 March 2016 to accept the appellant's argument in this appeal, there is accordingly no continuing dispute between the parties to be decided. As the respondent has amended its decision to one which calls for no intervention from the Tribunal, I consider it appropriate formally to DISMISS the appeal.

28. I should nonetheless emphasise I am satisfied that the original decision under appeal in this case could not reasonably have been arrived at, and any future similar decision in comparable circumstances would be susceptible to the same criticism. In those circumstances, the respondent may be well advised to review its processes and procedures to ensure that it does not seek to impose "Annex C" or similar preconditions on the future repayment of any excess restoration fees.

29. 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: 30 JUNE 2016