[2016] UKFTT 0631 (TC)

TC05367

Appeal number: TC/2015/01761

EXCISE - Seizure of appellant's commercial vehicle containing laundered fuel in running tank - Appellant was owner of adjacent shed in which laundering plant operating - Whether decision not to restore the vehicle unreasonable - Yes, because of failure to consider HMRC's policy on proportionality - Appeal allowed - Further review directed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR JACK WILLIS **Appellant**

- and -

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

TRIBUNAL: JUDGE DR CHRISTOPHER MCNALL
MS CELINE CORRIGAN

Sitting in public at Tribunal Hearing Centre, Royal Courts of Justice, Chichester Street, Belfast BT1 3JF on 15 December 2015

Ms Frances Lynch, of Counsel, instructed by McNamee McDonnell Duffy Solicitors LLP, for the Appellant

Ms Joanna Vicary, of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. On 9 October 2014, officers of HMRC's Road Fuel Testing Unit attended the appellant's premises - a small farm complex - in Dungannon. A Volvo tipper truck (**'the Vehicle'**) was parked outside a shed (**'the Shed'**). A sample was taken from its running tank. The fuel was lime in colour and tested positive to the silicon extraction test. The appellant had a key to the Shed and let the officers into it. The Shed contained a fuel laundering plant.

2. The appellant was then interviewed under caution by an officer. During the course of the interview the appellant, amongst other matters, confirmed the following:

(1) He was the owner of the Vehicle;

(2) The Vehicle was fuelled by *'a fella from the free state who uses the shed to launder the fuel and he fills the lorry with the fuel'*;

(3) The appellant was aware that the fuel in the Vehicle was laundered;

(4) The appellant was aware that the Shed was being used for the laundering of fuel;

(5) The appellant had seen the plant used for the laundering of fuel;

(6) The appellant had agreed with *'the fella'* that the man would operate the plant and would supply the appellant with diesel.

3. At the end of that interview, the appellant was informed that the Vehicle and the fuel in its running tank, stated as 200 litres, would be seized. He was given a Seizure Information Notice, a copy of which he signed.

4. Samples were sent to the Laboratory of the Government Chemist and those tests confirmed the presence of laundered fuel in the running tank of the Vehicle.

5. On 15 October 2014 the appellant, through his representatives, requested restoration of the Vehicle. The request was extremely short. The relevant passage reads:

> "We advise that our client is a self-employed lorry driver with no other vehicles and is therefore unable to make a living without the vehicle which has been seized".

6. On 24 November 2014 the request for restoration was refused.

7. On 9 December 2014 the appellant, through his representatives, requested a review of the decision not to restore. The appellant did not put forward any additional information. Therefore, the only material before HMRC at the time of the review going to the appellant's individual circumstances was the record of the interview, and the brief passage in the letter of 15 October 2014 referred to above.

8. The review was conducted by Officer Bines, a Higher Review Officer, and the outcome of that review was communicated by way of a letter dated 20 January 2015 (**'the Review Letter'**). After setting out the background, the substance of the interview, the results of the fuel tests, and the applicable legislation, the Review Letter stated as follows:

> **"HM Revenue & Customs Policy for the seizure and restoration of vehicles misusing duty – rebated fuel/marked fuel**
>
> The Commissioners' policy is to provide increasingly hard restoration terms for the first two detections with a strict non-restoration policy on third detection. However, restoration is always considered to uninvolved third parties such (as) hire and finance companies. Every case is decided on its own merits including any mitigating or militating (sic) circumstances and exceptional hardship is always considered.
>
> - First offence - Seizure of the vehicle and restoration for the value of the civil penalties, 100% of the revenue evaded on that occasion and any storage and/or removal costs incurred by the Department or the value of the vehicle whichever is the lower
> - Second offence - Seizure of the vehicle and restoration for the value of the civil penalties, 200% of the revenue evaded on that occasion and any storage and/or removal costs incurred by the Department or the value of the vehicle whichever is the lower
> - Third offence - Seizure of the vehicle and non-restoration
>
> Where the offence committed relates to the deliberate misuse of rebated fuels e.g. fuel laundering, the Commissioners policy is that vehicles should not normally be restored."

9. The Review concluded as follows:

> "There are several reasons that lead me to believe (the appellant) has knowingly mis-used fuel on this occasion.
>
> Mr Willis admitted in interview that he knew the laundering plant was being operated on the premises.
>
> Mr Willis admitted in interview that he knew the vehicle was fuelled with laundered fuel.
>
> A laundering plant was being operated on Mr Willis's premises.
>
> Mr Willis has provided no explanation for the presence of rebated fuel in the vehicle of his running tank.
>
> Formal analysis undertaken by the Laboratory of the Government Chemist has identified the fuel in the running tank of [the Vehicle] was consistent with laundered fuel.
>
> I am of the opinion that the application of the Commissioners' policy in this case treats (the appellant) no more harshly or leniently than anyone else in similar circumstances. Therefore I am upholding the original decision whereby (the Vehicle) will not be restored."

10. The Review Letter ended by saying that if the appellant had any fresh information he would like Officer Bines to consider then he should write to her. No fresh information was provided.

11. By a Notice of Appeal dated 10 February 2015 (but actually dated 2014, which is an obvious error) the appellant's representatives applied to this tribunal. The Grounds for Appeal, in full, are as follows:

> "The standard HMRC policy for restoration should have been applied. It is clear that the appellant here in being an elderly gentleman did not understand the questions he was being asked or the significance of the answers that he had given. The appellant would state that the reliance upon this interview to place restoration of our client's vehicle outside the normal policy is unlawful."

12. The appellant's position was clarified in a Skeleton Argument helpfully provided to the tribunal by his representative Mr McNamee in advance of the hearing. Although Ms Lynch, who appeared for the appellant, was not its author, she adopted that Skeleton Argument at the hearing before us. It is admirably concise. The appellant took no issue with the facts as set out in HMRC's Skeleton Argument dated 18 November 2015. The appellant did not seek to rely on any defence of ignorance as to the law. But it was said on behalf of the appellant that *'given his obvious limited ability to understand the nature of the enterprise which was taking place in his property'* he *'should be dealt with in a just and proportionate manner'*.

13. The Skeleton Argument went on to submit as follows:

> 'In the highly unusual circumstances of this particular case a proportionate decision is one which takes into account all of the characteristics of the appellant including his limited understanding and ability. HMRC's policy in this regard is that any vehicle or item which has been used in the process of fuel laundering should not be restored. The appellant takes no issue with this policy. The vehicle which is the subject of this appeal however is a vehicle which could not be used in the process of laundering fuel. This vehicle should have been dealt with in the normal manner regardless of the fact that it was found on the same premises as the laundering plant.
>
> Given the high value of the vehicle and the small amount of fuel which was found to be on the vehicle the loss to the appellant substantially outweighs any potential loss to the respondent.
>
> In all the circumstances it is submitted on behalf of the appellant that the refusal to restore the vehicle is disproportionate and should be withdrawn"

The evidence

14. We have already set out certain facts, taken from HMRC's Skeleton Argument, with which the appellant, in his own skeleton argument, takes no issue. Accordingly, we formally find those facts.

15. We have also had regard to the appellant's witness statement, dated 21 September 2015. He accepts that he had allowed his shed to be used for the purpose of fuel laundering. He accepts that he had actually purchased some of the fuel from the person who was laundering the fuel in his yard and put it in his lorry. He further stated that the only benefit obtained by him from the activity of the person laundering the diesel was *'getting in an odd bit of diesel for myself'*. He concludes by stating that *'the disproportionate effect of the non-restoration of this vehicle to me and my livelihood is unreasonable'*. However, he did not set out in any more detail what the effects of non-restoration were, and why these were unreasonable.

16. The appellant gave oral evidence before us. He was cross-examined. He gave evidence in a fluent and confident manner. He did not misunderstand the questions put to him. Nor was there anything to indicate that he was an individual who would have misunderstood the questions he was asked at the time of the seizure. The evidence he gave before us corresponded with the evidence he gave in his interview and his witness statement. Having had the opportunity to assess the appellant give evidence, we reject the submission that the appellant is a person of limited understanding and ability.

17. We do not accept the appellant's evidence that he had no understanding that the activity of the person in the Shed was in any way unlawful. The record of his interview was that he knew that the fuel in the Vehicle was laundered. That is to say, the appellant knew that the fuel in the Vehicle was fuel which had undergone the process of 'laundering'. We do not accept that the appellant - an individual of mature years who has been in the haulage business for 50 years - neither knew nor understood that the process being undertaken in the Shed was one which had an unlawful purpose. The very circumstances of the activity in the Shed were such as to excite suspicion in the mind of any reasonably honest person. A process was being undertaken, in the appellant's shed, by someone whose name the appellant claimed in interview not to know, and for whom the appellant did not even have any contact details.

18. The appellant's evidence was that the fuel which he received was 'in lieu of the shed'.

19. The appellant was not able to tell us much about his business, or how it had been affected by the non-restoration. There was nothing in evidence as to his financial circumstances. He said that at the time of the seizure he was working for *'maybe two or three days a week'*, if he was lucky, delivering stone from quarries to sites near Dublin. He said that he would be away for 2 to 3 days at a time. He said that he had been working *'the odd day'* since the Vehicle was seized, either hiring or borrowing a lorry, and *'seeing what (he) could do'*.

20. We are very sceptical as to the alleged scope of the impact of non-restoration on the appellant's livelihood. The appellant had not put forward any details, or evidence, as to the alleged deleterious effect on his business. It is a statement of the obvious that someone whose vehicle has been seized no longer has that vehicle at their disposal unless and until it is restored. That inevitably causes a degree of hardship. But it is

surprising that the appellant, if indeed losing 2-3 days' work a week (i) did not mention this at any time between October 2014 and December 2015 and (ii) did not put forward any documentary evidence whatsoever as to his losses, which, if right, must have accounted for a very significant part of his livelihood. There is no sufficient evidential basis upon which we could properly find that the appellant had suffered any significant damage to his livelihood by reason of the non-restoration.

21. When it came to the amount of laundered fuel the appellant was taking, the appellant said that his usual practice was to fill up the Vehicle in the south, and that he would only have 'a couple of cans' - maybe 40 litres - from 'the fella' in the Shed. However, despite being registered for VAT, he said that he did not have any receipts for the fuel which he claimed to have bought in the south.

22. We do not accept the appellant's evidence as to his alleged fuel purchases elsewhere. In his interview, he confirmed that he was registered for VAT. As a VAT registered trader, he would have a financial incentive, if purchasing fuel from any reputable outlet, whether in the south or in Northern Ireland, to obtain and keep such receipts. In the context of the seizure of his Vehicle, he would have had an incentive to produce any such receipts so as to support his claim that he was not getting much benefit from the laundering plant.

23. Miss Bines' written evidence is contained in a witness statement dated 25 July 2015. The material part of it is as follows:

> "12. I considered all the details of the case especially that the appellant had agreed to the shed being used as a fuel laundering plant in exchange for the laundered fuel to be used in his vehicle.
>
> 13. I considered the Commissioners' policy that relates to the deliberate misuse of rebated fuels e.g. fuel laundering and the policy states that vehicles should not normally be restored"

24. She was cross-examined as to her witness statement, and the Review Letter, and the policy which she had applied. During the course of her cross-examination, a copy of the policy was produced by counsel for the appellant. It was accepted that the document put before us was the policy which Officer Bines referred to in the Review Letter.

HMRC's Policy

25. The policy (**'the Policy'**) entitled 'Civil sanctions: Vehicle and Equipment Seizures for Oils Offences' is a version dated July 2014, and is drawn from HMRC's Intranet Guidance.

26. We do not accept that it was improper for the appellant, through his Counsel, to ask questions about that Policy, nor to put a copy of it before the tribunal. The Review Letter makes express reference to 'the Commissioners' policy' and it is only fair that the appellant should be able to assess whether the policy ostensibly applied by the Respondent in a Review Letter in fact corresponds with the underlying policy document.

27. We are satisfied that the policy as set out by Officer Bines in the Review Letter, as referred to above, is an accurate summary of the policy as contained in the longer policy document. Moreover, we are satisfied that there was nothing inappropriate or improper in the policy being summarised in the Review Letter, as opposed to the complete text of the policy being set out in its entirety.

28. The Policy contains the following statements:

> "Every detection of the misuse of rebated fuel or the smuggling of fuel should result in the seizure of the vehicle concerned. We should then consider terms of restoration and our policy on restoration is set out below.
>
> Note - all vehicles adapted for the misuse of controlled oils (e.g. false tanks) or for smuggling of fuel (e.g. concealments) are to be seized and not restored.
>
> **Misuse of rebated fuels**
>
> Where the offence committed relates to the misuse of rebated fuels by an end-user, HMRC's restoration policy is to provide increasingly hard restoration terms for the first two detections, with a strict non-restoration policy on third detection of misuse.
>
> [...]
>
> **Laundering plants**
>
> Laundering plants are an attack on the system used to control rebated fuels. They are deliberate and calculated and involve considerable investment by the perpetrators of the fraud. Prosecution should always be considered in cases of laundering plants. However, as a matter of course when a laundering plant is detected, in addition to seizure of the oil, all related plant, equipment and vehicles are to be seized and not restored. Vehicles will be subject to the usual rules on proportionality as explained below.
>
> **Proportionality**
>
> Issues of proportionality and human rights should always be considered on every occasion where a detection is made. It is of paramount importance where restoration would follow but is not being offered in a particular case that the Officer must be aware that their decision not to offer restoration must take into account the issues of proportionality and human rights (ECHR)"

29. Officer Bines confirmed that she had treated this case as falling within the 'Laundering plants' part of the Policy, rather than as falling within the 'Misuse of rebated fuels' part of the Policy.

The law

30. Section 152 of the *Customs and Excise Management Act 1979* entitles the Commissioners, 'as they see fit', to 'restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under the Customs and Excise Acts'.

31. It was accepted that this confers a broad discretion on HMRC.

32. It was likewise accepted (i) that it was lawful for HMRC to have made a policy in this regard, and (ii) that the Policy, read as a whole, is proportionate and falls within the margin of appreciation afforded to the UK as a member state.

5 **Discussion and Decision**

33. This appeal turns on whether the Policy was correctly applied by HMRC. There are a number of aspects to this question.

Which head of the Policy?

34. We reject the appellant's argument that this case should have been treated as a
10 'Misuse of rebated fuel' case (that is, with restoration offered on financial terms) and not as a 'laundering plant' case (that is, without restoration).

35. It was entirely reasonable to treat this as a laundering plant case. It was accepted by the appellant, as a fact, that the Shed contained a laundering plant. He knew it was there, and he knew what it was doing. The appellant was housing the laundering plant.

15 36. Without any hesitation, we reject the appellant's argument that he was not facilitating the fuel laundering. He was making the Shed available for use to house a fuel laundering plant.

'Related' vehicle

37. In our view, the Vehicle was correctly (or, if different, reasonably) treated as
20 'related' to the laundering plant within the meaning of the Policy. We do not accept that 'related' should be limited to vehicles which are being used in the laundering operation (for example to smuggle fuel) or which contain concealments.

38. In our view, 'related' has a wider meaning. Even on his own case, the appellant, was deriving a benefit from the fuel laundering. In his evidence before us, he said that
25 the laundered fuel which he was getting was 'in lieu' of his allowing 'the fella' to use the Shed. Put shortly, the appellant was getting something in return for letting 'the fella' use the Shed for fuel laundering.

39. Thus, and even though it was accepted by HMRC that the Vehicle was not being used to smuggle fuel, and did not contain any concealments, there was
30 nonetheless a clear factual link between the operation of the laundering plant and the Vehicle so as to bring the Vehicle, in our view, comfortably within the laundering plant part of the Policy.

Proportionality

40. Although we are satisfied as to the soundness of HMRC's approach in relation
35 to the above matters, we are troubled by the manner in which the issue of proportionality has been approached.

41. The Policy is clear in this regard: proportionality must be considered.

42. We do not consider that the Review Letter should be read as if it were an examination paper on the law of restoration, nor that it should be subject to over-forensic linguistic analysis.

43. However, we cannot identify in the Review Letter any real consideration of the proportionality part of the Policy. For the avoidance of doubt, we do not consider the expression *'I am of the opinion that the application of the Commissioners' policy in this case treats (the appellant) no more harshly or leniently than anyone else in similar circumstances'* answers the point. That does not go beyond generic. It makes no reference to 'the circumstances' referred to.

44. Of course, HMRC cannot consider proportionality in a vacuum or in the abstract. It must therefore be the responsibility of the taxpayer to draw to HMRC's attention any particular facts (supported with evidence, if appropriate) which the taxpayer considers to be relevant to the issue of proportionality in their individual case. It would not be enough for the taxpayer to say 'your decision is disproportionate' without saying *why*. If the taxpayer fails to say why, then it would be (at the very least) difficult to criticise HMRC for reviewing the case on the footing that there were no particular circumstances which proportionality demanded be taken into account.

45. Indeed, Officer Bines extended such an invitation to the appellant in this case. He did not take her up on it. But, when it came to the assessment of proportionality, a few things were known to HMRC: the matters set out in the letter of 15 October 2014, and the facts gleaned from interview; namely, the appellant was registered for VAT (which indicates that he is in business) and the value of the Vehicle.

46. We wish to be clear that it is not part of the task of this present tribunal to express any view as to whether a decision not to restore, taking account of those matters, would or would not have been proportionate.

47. But we have concluded that the failure to consider proportionality in the Review Letter, even though only limited information was provided, is an error of a kind which makes the decision on review unreasonable and which therefore engages our jurisdiction. In a nutshell, there is nothing in the Review Letter to indicate that HMRC considered proportionality when its own Policy required it do so.

48. Therefore, the Review Letter fails to apply the Policy in its entirety. It does not seem to us to matter whether this is characterised as an error of law of a 'hard-edged' character, which would compel our jurisdiction, or whether it simply means that something relevant has been left out of account, meaning that the decision was one which no reasonable decision maker, in a Wednesbury sense, could have arrived at.

49. We have carefully considered whether the failure to consider proportionality in this case is an error which actually made any difference. But, since no view on proportionality was expressed, we simply cannot say whether, had Officer Bines considered the matters from interview and the letter of 15 October, her decision not to restore would inevitably have been the same. We cannot embark on the exercise of

assessing HMRC's own view against our own if HMRC has not expressed any view on proportionality in the first place.

50. Therefore, the appeal is allowed.

Our jurisdiction and Disposal

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

52. We consider that HMRC should conduct a further review of the original decision not to restore the Vehicle.

53. In performing that further review, HMRC must consider whether it is 10 proportionate to refuse to restore the Vehicle, both in terms of its Policy, and in the light of the admitted facts and the findings of fact that we have made in this decision.

54. 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) 15 (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.

20

Dr CHRISTOPHER McNALL

25 **TRIBUNAL JUDGE**
RELEASE DATE: 19 JANUARY 2016