



**TC05440**

**Appeal number: TC/2015/02320**

*Excise duty – seizure of vehicle – whether decision to restore vehicle on the payment of a fee reasonable – yes, appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MR JASON TEFVIK**

**Appellant**

**- and -**

**DIRECTOR OF BORDER REVENUE**

**Respondents**

**TRIBUNAL: JUDGE ABIGAIL MCGREGOR  
CAROLINE DE ALBUQUERQUE**

**Sitting in public at Fox Court, London on 17 June 2016**

**Mr Walker, instructed by Amity Lawyers for the Appellant**

**Mr Tom Rainsbury, of Counsel, instructed by the Director of Border Revenue,  
for the Respondents**

## DECISION

1. This is an appeal by the Appellant ("**Mr Tefvik**") under section 16 of the Finance Act 1994 against the review decision to restore for a fee a Mercedes Benz C250 (the "**Vehicle**") that was seized by the Respondent ("**Border Force**") on 2 October 2014 as it was being used to carry goods liable to forfeiture.

2. As further explained in paragraph 19 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 the Vehicle other than on the payment of a fee 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 and timeline relating to this case are not disputed:

- 15 (1) the Vehicle was stopped at the port of Dover by the Border Force on 2 October 2014;
- (2) the Vehicle was being driven by Ms Natalie Sheppard and there were four further passengers;
- (3) Mr Tefvik was the owner of the Vehicle, but was not in the Vehicle at that time;
- 20 (4) 20.25Kg of rolling tobacco and the Vehicle were seized by the Border Force on that date;
- (5) Mr Tefvik served a notice of claim to challenge the legality of the seizure of the Vehicle in the magistrates court on 10 October 2014;
- 25 (6) Mr Tefvik requested restoration of the Vehicle by letter dated 10 October 2014;
- (7) the Border Force requested Mr Tefvik to fill out a questionnaire on 4 November 2014, which Mr Tefvik did on 18 November 2014 (the "**Questionnaire**");
- 30 (8) the Border Force refused the restoration of the vehicle by letter dated 11 December 2014;
- (9) Mr Tefvik requested a review of that decision on 28 January 2015;
- (10) the Border Force varied the original decision, offering restoration for a fee of £3,654;
- 35 (11) Mr Tefvik appealed that decision by Notice of Appeal dated 24 March 2015;
- (12) The Tribunal stood over this appeal pending the outcome of the related condemnation proceedings;

(13) Mr Tefvik confirmed on 10 December 2015 that he intended to proceed with the appeal.

4. There was some uncertainty over what happened in relation to the condemnation proceedings. The respondent's statement of case stated that the appellant had failed to attend the hearing and the goods and Vehicle were duly condemned. Whereas the appellant stated that he had withdrawn the proceedings before the hearing. From the point of view of this Tribunal, the difference is immaterial and both parties agree that the goods and Vehicle were duly condemned.

5. The following facts were also not in dispute:

(1) Mr Tefvik and Ms Sheppard were, at the time of the seizure of the Vehicle, in a relationship, in which they did not live together but she often stayed at Mr Tefvik's house;

(2) Ms Sheppard was insured to drive the Vehicle at the time of the seizure of the Vehicle and had regular and unfettered access to it; and

(3) Mr Tefvik and Ms Sheppard's relationship came to an end shortly after the seizure of the Vehicle, but they remained friends for a time afterwards.

### **Evidence**

6. Mr Tefvik gave oral evidence at the hearing and was cross examined.

7. Ms Karen Norfolk, Border Force Officer, also gave oral evidence at the hearing and was cross examined. Ms Norfolk did not make the review decision under appeal, but as the person who had made the decision had since retired, Ms Norfolk had taken on responsibility for this case and adopted the review decision as her own.

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

(1) the Questionnaire submitted by Mr Tefvik and the letters sent by Mr Tefvik's solicitors to support his request for restoration; and

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

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

### **The Law**

10. 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."

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

5                   “(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”

12. Section 152 CEMA 1979 provides:

10                   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]...”

13. 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.

14. 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;

25                   (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 do not occur when comparable circumstances arise in the future.

## **Submissions**

### *Arguments on behalf of Mr Tefvik*

15. Mr Walker submitted that the decision on review to restore the Vehicle only on payment of a fee was unreasonable because:

35                   (1) Mr Tefvik did not know that Ms Sheppard was taking the Vehicle abroad or that she was using the Vehicle to bring in excise goods;

(2) the relationship between Mr Tefvik and Ms Sheppard, at the time of the seizure of the Vehicle, was one of love and trust and, since Mr Tefvik had no

reason to suspect that Ms Sheppard was using the Vehicle for the purposes of going abroad and bringing in excise goods, the nature of their relationship meant there would have been no reason for Mr Tefvik to implement procedures to prevent the Vehicle from being used for smuggling;

5 (3) the nature of Mr Tefvik's work, running fish and chip shops and ice-cream vans, was such that he was often out of the house for long hours and was therefore not always aware of Ms Sheppard's whereabouts or plans;

(4) Ms Sheppard was removed from the insurance for the Vehicle from 5 December 2014 and returning the Vehicle would therefore not be tantamount to restoring it to the person responsible for the smuggling attempt; and

10 (5) there was no inconsistency between Mr Tefvik's:

(a) statements regarding his relationship with Ms Sheppard - the different references referred to the nature of their relationship at different times; and

15 (b) behaviour at the Border Force window and his written statements, because he was simply angry on the day and focusing on getting his car back.

#### *Arguments on behalf of the Border Force*

16. Mr Rainsbury drew attention to two points of law:

20 (1) because, as set out in paragraph 14 above, the Tribunal is limited to considering whether the decision that is under appeal was a reasonable one, the Tribunal must limit itself to the facts and matters that existed at the time of the review decision; and

25 (2) the burden of proof is on Mr Tefvik to show that the grounds on the basis of which he is making the application were established at that time (Finance Act 1994, s 16(6)).

17. The Border Force policy on restoration states that:

30 "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:

- 35
- 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
- 40 consideration may be given to restoring the vehicle for a fee; if in addition to being both innocent and blameless the third party

5 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.**”

18. Mr Rainsbury submitted that the review decision was one that could reasonably be arrived at because:

- (1) the review was carried out impartially and fairly;
- 10 (2) the reviewing officer identified and reasonably (but not rigidly) applied the Border Force policy on restoration;
- (3) it was reasonable to conclude that the Vehicle had been used to carry tobacco that was destined for commercial sale;
- 15 (4) it was reasonable to reject Mr Tefvik’s account that he was not aware that the Vehicle had been used to travel abroad and import excise goods because:
  - (a) the nature of the relationship between Mr Tefvik and Ms Sheppard gave rise to strong inference that Mr Tefvik would have known that she was using the Vehicle to make trips abroad to acquire tobacco;
  - 20 (b) Mr Tefvik’s credibility is to be doubted because there were inconsistencies in his statements:
    - 25 (i) the application for restoration submitted on 10 October 2014 stated that Mr Tefvik had lent his car to ‘a friend’; the Questionnaire referred to her as ‘friend and ex-unmarried partner’ and the request for a review submitted on 28 January 2015 referred to her as someone with whom he was ‘in a relationship’;
    - 30 (ii) the Questionnaire refers to Ms Sheppard being lent the car because ‘she needed to work on a night shift’; the application for review stated that the car was available to her on a regular basis whenever her car was not available or unusable; in his evidence at the Tribunal, Mr Tefvik stated that her car was unreliable; and
    - 35 (iii) Mr Tefvik’s position is that he was innocent and blameless but this is inconsistent with his behaviour when he attended the Border Force window on the day of the seizure when he was rude and aggressive towards the Border Force officer.
  - (c) Mr Tefvik’s position that he knew nothing about the use of the car to go abroad is implausible because she had used his car 5 times in the 6 weeks ending on the date of seizure to go abroad; and
  - 40 (5) the burden was on Mr Tefvik to produce evidence that he had been innocent and blameless and he had not submitted any evidence to support his position.

## Discussion

### *Reasonableness of decision*

19. The jurisdiction of this Tribunal under section 16 Finance Act 1994 is supervisory and limited to determining whether the decision by the Border Force was reasonable. In *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1980] STC 231, the court found that 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."

20. The discretion of the Border Force is (as set out in paragraph 12 above) is broad. They "may as they see fit ... restore, subject to such conditions (if any) as they think proper, anything forfeited or seized". The Border Force policy (as set out in paragraph 17 above) is a starting point for the reviewing officer who must then go on to consider the case on its merits and after a full examination of the facts and circumstances ensure that a proportionate decision is reached.

21. Before we proceed to consider the question of reasonableness, we will deal with Mr Rainsbury's submission that the Tribunal must limit itself to the facts and matters that existed at the time of the review decision. The legal position on this issue is helpfully summarised by Judge Hellier in *Harris v Director of Border Revenue* [2013] UKFTT 134 (TC):

"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 [at [39]] 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. Therefore we find that we are not limited to considering the facts and evidence that were in front of the review officer at the time of the review. We have therefore considered all the facts and evidence before us in order to determine whether the decision to restore the Vehicle subject to the payment of a fee was reasonable.

23. The review officer found commercial records available showed that the Vehicle had been used by Ms Sheppard (and others) on 6 occasions in the 5 weeks up to the date of seizure. Some of these dates are supported by evidence of receipts found in the Vehicle by officers of the Border Force on the date of seizure (and included in the bundle of evidence provided to the Tribunal). The review officer stated that he found

it 'difficult to accept' that Mr Tefvik was not aware that the Vehicle was being taken abroad.

24. The review officer also took into account that Mr Tefvik had taken steps after the event to prevent Ms Sheppard from using the car again and had provided evidence of those efforts, in the form of insurance certificates. It was on the basis of this evidence that the review officer decided to vary the earlier decision and offer restoration for a fee.

25. We do not consider that either of these matters that were considered by the review officer was irrelevant to the question of whether Mr Tefvik was innocent and blameless of the smuggling attempt.

26. Considering Mr Rainsbury's submission that Mr Tefvik had been inconsistent, we do not find that the differences in reference to Mr Tefvik's relationship with Ms Sheppard is a relevant consideration. The three occasions where the relationship was described by Mr Tefvik were in slightly different contexts and can reasonably be explained by the fact that she had been his partner at the time of the seizure, but ceased to be so shortly after. The comments made about the reason Ms Sheppard used the car were not necessarily inconsistent with each other either because Mr Tefvik had made it clear that she was free to use the car when she needed. Similarly we do not find that Mr Tefvik's anger at the Border Force window, in itself, contradicts his position that he was innocent and blameless of the smuggling attempt.

27. While it is not inevitable that all spouses or partners should be treated as being aware of the activities of their spouse or partner, we accept Mr Rainsbury's submission that the burden is on Mr Tefvik to show that the inference that he was so aware was an unreasonable one

28. The submission by Mr Walker to challenge this inference was that Mr Tefvik worked long hours away from the house and therefore would not have been aware of Ms Sheppard's movements. However, the indicated time of absence was from around 9 am to 11:30 at night, which would have suggested that Mr Tefvik was indeed at home at the time Ms Sheppard departed from the house in the Vehicle on the date of seizure, because she was stopped in Dover on her way back into the UK at 10:25 am and therefore must have left the house while Mr Tefvik was still at home.

29. We find that Mr Tefvik has not met the burden of proof to show that the inference drawn by the review officer, from the commercial records and the nature of the personal relationship between Mr Tefvik and Ms Sheppard, was an unreasonable one.

### **Decision**

30. We find, taking into account all the facts and circumstances of this case, that the decision to restore the vehicle only on the payment of a fee was one that the reviewing officer could reasonably have arrived at and therefore the decision stands. Mr Tefvik's appeal is dismissed.

31. 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.

10

**ABIGAIL MCGREGOR  
TRIBUNAL JUDGE**

**RELEASE DATE: 25 OCTOBER 2016**

15