[2016] UKFTT 0739 (TC)

TC05467

Appeal number: TC/2016/01120

EXCISE DUTIES – whether refusal to restore vehicle was unreasonable – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

LIDER EXPRESS Sp. z.o.o **Appellant**

- and -

THE DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE ANNE FAIRPO
PETER DAVIES

Sitting in public at Fox Court, London on 11 August 2016

The Appellant did not appear and was not represented

Ms Van Woodenberg, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The appellant did not attend and was not contactable.

2. It was clear from the file that the appellant had been notified of the hearing and had not objected to the listing.

3. HMRC argued that the hearing should take place in the absence of the appellant on the basis that it was obvious that the appellant had been notified of the hearing and had made no objection to its proceeding, having been warned of the consequences of not appearing.

4. We had due regard to the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules"). We decided that it was in the interests of justice to proceed with the hearing in the absence of the appellant in accordance with Rule 33 of the Rules since there was no explanation as to the non-appearance by or for the appellant. The appellant's attention is drawn to Rule 38 of the Rules in the event that there was good cause for the non-attendance at this hearing.

Introduction

5. This is an appeal against a refusal by the Respondents (HMRC) to restore a vehicle seized under section 141(1) of the Customs and Excise Management Act (CEMA) 1979.

Background

6. Between 30 September 2015 and 9 October 2015 five tractor units were seized, each carrying 21,924 litres of beer, at the UK border:

(1) Unit registration number EW15N37 – seized 30 September 2015 (this unit is also referred to as having registration number EWI 5N37 in some documentation provided; for consistency, this decision will refer to this unit as EW15N37 throughout)

(2) Unit registration number SK3713Y – seized 1 October 2015

(3) Unit registration number PO3M904 – seized 2 October 2015

(4) Unit registration number PO3M486 – seized 2 October 2015

(5) Unit registration number PO4M378 – seized 9 October 2015

7. The load on each unit was each incorrectly referenced on manifests as either foodstuffs or water and the loads were not accompanied by the required Administrative Reference Codes (ARCs) and there was no evidence that duty had been paid. The duty on the loads, in total, exceeded £140,000.

8. The haulier of each of the units was a Polish company, Sped-Pol, although some of the documentation (the CMR) relating to two of the loads referred to the haulier being another company, Patfrigo.

9. The consignor and consignee for each of the loads were the same, the consignor being KM Treid Sistem EOOD and the consignee being Nasha Josh.

10. The goods, tractor units and trailer units involved were seized as it was determined that the loads were of excise goods held for a commercial purpose where none of the proper methods of importing excise goods into the UK had been used. The tractor units, the subject of this appeal, were seized under section 141 CEMA 1979 as having been used in the carriage of goods subject to forfeiture under section 139 CEMA 1979.

11. On 23 October 2015, the appellant requested restoration of the tractor units, explaining that they had leased the units to Sped-Pol and that the leases had been terminated as soon as the appellant became aware of the seizures.

12. On 5 November 2015, the Respondents (BF) replied with a refusal to restore the units on the basis that they did not consider that the appellant was an "innocent third party".

13. On 17 December2015, the appellants requested a review of the refusal to restore. On 23 December 2015, BF asked the appellants to provide further information in support of the request.

14. On 21 January 2016, BF wrote to the appellants upholding the refusal to restore.

15. On 20 February 2016, the appellants appealed the refusal to restore.

Relevant law

16. Section 141(1) CEMA 1979 provides that:

> (1) Without prejudice to any other provision of the Customs and Excise Acts 1979, where any thing has become liable to forfeiture under the customs and excise Acts—
>
> (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; and
>
> (b) any other thing mixed, packed or found with the thing so liable,
>
> shall also be liable to forfeiture.

17. Section 152 CEMA 1979 provides that:

> The Commissioners may, as they see fit—

(a) . . . [compound an offence (whether or not proceedings have been instituted in respect of it) and compound proceedings] or for the condemnation of any thing as being forfeited under the customs and excise Acts; or

(b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under those Acts

Appellant's evidence and submissions

18. The Appellant provided documentary evidence, translated into English, and further information in their grounds of appeal and correspondence with BF.

19. The documentary evidence provided was as follows:

Purchase documents

(1) A VAT invoice dated 23 September 2015 from DREW-NOW Kazimierz Nowak for unit PO3M486, price 55,530 PLN (including VAT of 23%)

(2) A VAT invoice dated 23 September 2015 from DREW-NOW Kazimierz Nowak for unit PO4M378 price 55,530 PLN (including VAT of 23%)

(3) A VAT invoice dated 25 September 2015 from F.H.U. Kosak Karol for unit SK3716Y, price 84,870 PLN (including VAT of 23%) (in correspondence, the appellant noted that this vehicle had been re-registered with registration number PO3M904)

(4) A VAT invoice dated 25 September 2015 from P.T.H.U. Stanistawa Cedro for unit EWI5N37, price 55,530 PLN (including VAT of 23%)

(5) A VAT invoice dated 25 September 2015 from "POLMAX" Andrzej Smoluch for unit SK3713Y, price 85,485 PLN (including VAT of 23%)

20. The appellant confirmed that each of the purchases was paid for in cash.

Rental agreements and termination letters

(1) A rental agreement dated 25 September 2015 between the appellant and Sped-Pol Sp. z.o.o. for unit PO3M486, termination letter dated 7 October 2015

(2) A rental agreement dated 25 September 2015 between the appellant and Sped-Pol Sp. z.o.o. for unit PO4M378, termination letter dated 16 October 2015

(3) A rental agreement dated 30 September 2015 between the appellant and Sped-Pol Sp. z.o.o. for unit PO3M904, termination letter dated 9 October 2015

(4) A rental agreement dated 26 September 2015 between the appellant and Sped-Pol Sp. z.o.o. for unit EWI5N37, termination letter dated 7 October 2015

(5) A rental agreement dated 25 September 2015 between the appellant and Sped-Pol Sp. z.o.o. for unit SK3713Y, termination letter dated 8 October 2015

21. Each of the rental agreements is in the same format, for the period from the date of the agreement to 31 December 2015, for a rental fee of "net 5 500 PLN", for

"needs of running the national or international transport", and stating that "To all matters not settled herein provisions of Code of Civil Procedure shall apply". In each rental agreement, the appellant "declares that it is the owner of the vehicle under consideration or has got approval to administer this vehicle".

22. The appellant explained that the vehicles had been acquired in order to fulfil the leases to Sped-Pol, and that it was normal practice to only acquire vehicles once a customer lessee had been identified.

Correspondence and grounds of appeal

23. The appellant explained that under Polish law the appellant had no responsibility for the goods carried nor the use to which the lessee put the units and that Polish law did not include any mechanism that would allow a vehicle leasing business to supervise the use of its vehicles.

24. In correspondence with BF, the appellant stated that they were not associated with the haulier, nor the drivers or forwarder of goods. Their only connection with the haulier was the lease agreements. The appellant further explained that they had checked the haulier's credentials before the unit leases were concluded, by "obtaining information from the National Court Register of Entrepreneurs … and from the Office of Economic Information". They had confirmed that the haulier was not in arrears in respect of tax and that there were no proceedings against the haulier or its management. The appellant stated that they had no information to indicate that the haulier had ever been involved with any infringement of customs regulations. The haulier had informed them that the vehicles would be used for transportation to Eastern Europe.

25. The appellant stated in their grounds of appeal that, after the units had been seized, they had asked Sped-Pol to assist with the recovery of the units, and that Sped-Pol had undertaken to prepare and submit the application for recovery, and had also recommended an adviser to assist with the application.

26. In correspondence with BF, the appellant stated that as Sped-Pol had not provided details of the seizures when requested, the appellant had terminated all lease agreements and also "stopped the entire business cooperation" with Sped-Pol. They also stated that they had terminated the lease agreements as soon as they became aware of the seizure.

27. It was submitted by the appellant that they had done all that was possible and could reasonably be expended to ensure that the units were not used unlawfully and could not foresee that the lessee would act unlawfully. The appellant explained further that the loss of the vehicles had caused substantial financial problems and for all these reasons sought the return of the vehicles without charge.

Respondents evidence and submissions

28. For the respondents it was submitted that the refusal to restore had been reasonably made.

29. BF policy is that leased vehicles will be restored (as relevant in this matter):

(1) Free of charge, where the claim is received from an innocent third party which has not been reckless, and where the vehicle has not been adapted for smuggling;

(2) To a leasing company, for a fee, where the company has demonstrated clear title to the unit and has not been connected with the smuggling

30. BF submitted that the appellant was not an innocent third party in these arrangements, and that the units were not genuinely leased to Sped-Pol, for the following reasons:

(1) The units were purchased with cash and leased to Sped-Pol almost immediately;

(2) There was no information provided to explain how the cash for the purchases had been funded;

(3) The rental agreements were very minimal, and contained no checks or undertaking that the lessee would not engage in smuggling;

(4) Sped-Pol's registered office is at the same address as that of the appellant (J.H. Dabrowskeigo 75/70, 60-523 Poznan, Poland);

(5) The restoration requests were sent in an envelope which was printed with the name and address of Patfrigo, one of the hauliers referenced in documentation found with the loads;

(6) The directors of the appellant and Patfrigo have the same surname, 'Wyszowski' (as evidenced by company information searches);

(7) Patfrigo has been involved in 25 previous seizures at the UK border (as evidenced by extracts from BF database).

31. The review officer had considered the question of hardship raised by the appellant but had concluded that hardship is a natural consequence of seizure and only exceptional hardship is a possible ground for restoration. No exceptional hardship had been evidenced by the appellant.

32. It was submitted that the refusal to restore was reasonable in the circumstances.

Discussion

33. The Tribunal's jurisdiction in this matter is limited to the question of whether the decision not to restore the vehicle was unreasonable (per *Revenue and Customs Commissioners v Jones and another* [2011] ECWA Civ 824).

34. We note that the burden of proof is on the appellant to show that it would be unreasonable not to restore the vehicle. In this case, we are not satisfied that the appellant has discharged this burden of proof: in particular, we note that the appellant has not, for example, explained the identical addresses for themselves and Sped-Pol, nor the apparent family connection between themselves and Patfrigo through the common surname. We also noted that, although the appellant states that they had stopped all "business cooperation" with Sped-Pol as soon as they were aware of the seizures, they had nevertheless also asked Sped-Pol to assist with the recovery of the units.

35. In the circumstance, we consider that the decision not to restore the vehicle, and the subsequent upholding of that decision, was reasonably made.

36. The appeal is dismissed.

37. 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.

ANNE FAIRPO
TRIBUNAL JUDGE

RELEASE DATE: 2 NOVEMBER 2016