



TC05657

Appeal number: TC/2016/02758

*EXCISE DUTY– restoration – goods deemed condemned – refusal to restore
– decision based on failure to prove ownership – whether unreasonable –
held, no – appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

AUREL IONUT IPATE

Appellant

- and -

THE DIRECTOR OF BORDER REVENUE

Respondents

TRIBUNAL: JUDGE Rachel Mainwaring-Taylor

Sitting in public at Fox Court, London on 9th November 2016

**Christopher Snell of Counsel, instructed by Rainer Hughes, Solicitors, for the
Appellant**

Tom Rainsbury of Counsel for the Respondent

DECISION

Background

1. On 7th August 2015 the Appellant was stopped at the Port of Dover, driving a Renault tractor unit registration B97101BB and a Curtainside trailer registration 62893 (together 'the Vehicle').
2. The Appellant handed the stopping officer a CMR and delivery note both showing the same ARC number, source, destination and account. The CMR was dated for the previous day (6th August 2015) and the ARC was valid for a date of dispatch of 6th August 2014 at 16.00.
3. Records showed that the Vehicle had travelled earlier on the same day at 03.30 from Calais to Dover, also within the life of the ARC and that this was therefore a double use of the ARC.
4. The goods were seized under section 139 of the Customs and Excise Management Act 1979 ('CEMA 1979') as being liable to forfeiture under regulation 88 of the Excise Goods (Holding Movement and Duty Point) Regulations 2010 and section 48(1)(a)(i) and (e) of CEMA 1979. The Vehicle was seized under section 141 of CEMA 1979 because it was used for the carriage of goods liable to forfeiture.
5. A Form 156 'Seizure Information Notice' and 'Notice 12A' was issued, notifying the Appellant of the right to challenge the seizure in the Magistrates' Court.
6. The Appellant challenged the legality of the seizure of the Vehicle in the Magistrates' Court.
7. On 26th August 2015 Rainer Hughes wrote to the Respondent ('Border Force') on behalf of the Appellant requesting restoration of the Vehicle.
8. On 27th August 2015 Border Force replied requesting proof of ownership of the Vehicle and a signed authority for the Appellant to be represented by Rainer Hughes.
9. On 10th September 2015 Border Force wrote to Rainer Hughes requesting further information.
10. On 19th February 2016 the Appellant sent the required authority to Border Force.
11. On 15th March 2016 Border Force wrote to Rainer Hughes refusing restoration.
12. On 18th March Rainer Hughes wrote to Border Force requesting a review of the decision.
13. On 21st March 2016 Border Force wrote to Rainer Hughes explaining the review process and inviting further information in support of the Appellant's request.

14. On 26th April 2016 Border Force wrote to Rainer Hughes refusing to restore the Vehicle (the 'review decision').

15. On 17th May 2016 Rainer Hughes appealed to the tribunal against the review decision on behalf of the Appellant.

5 **Relevant law**

16. Section 139(1) of CEMA 1979 provides that:

"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."

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17. Section 141(1) of CEMA 1979 provides that:

"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-

15 (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...

20 shall also be liable to forfeiture".

18. Section 152(b) of CEMA 1979 provides that the Commissioners may, as they see fit "restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized".

Evidence

25 19. The Appellant provided no evidence.

20. Officer Karen Norfolk of Border Force provided a witness statement and gave oral evidence at the hearing.

21. Border Force provided a bundle of documents including the correspondence referred to above.

30 **Submissions**

22. Mr Snell lacked instructions to do any more than present the Appellant's grounds of appeal, namely that it was unreasonable of Border Force to refuse restoration on the grounds that the Appellant had failed to prove he was the legal owner of the Vehicle.

23. In the grounds of appeal, it was argued that the term "proprietor" was defined as including a "person for the time being possessed of...goods" (section 1 of CEMA 1979). It was acknowledged that this provision relates specifically to goods, but argued that for the sake of consistency it should be extended to vehicles too, so that the proprietor of a vehicle included the person for the time being possessed of it. It was argued that the Appellant should be viewed as the proprietor of the Vehicle because he was possessed of it at the time of the seizure.

24. It was also argued that the Appellant was the bailee of the Vehicle at the time of the seizure and that this gave him a possessory right to the Vehicle and goods seized. As a bailee, the Appellant had a duty to account to the owner of the Vehicle in circumstances where the items were taken from him and to prevent the Appellant from having the Vehicle restored to him was unjust as it prevented him from discharging his liability.

25. Border Force submitted that the legality of the seizure was a question for the Magistrates' Court and that the Tribunal had no jurisdiction to consider it. A restoration decision does not consider this issue and is made on the assumption that the seizure will be found to be lawful. Border Force cited the decision in *William Young* TC/2013/08110 as authority that this was the correct approach.

26. Border Force submitted that the review was reasonable. The Review Officer applied Border Force's reasonable policy on the restoration of commercial vehicles, but was not fettered by it. Border Force outlined the issues for consideration in the policy, which is to be robust in order to discourage smuggling, whilst considering the merits of and hardship suffered in each case.

27. It is also Border Force's policy not to restore seized goods or vehicles unless ownership has been established. Border Force submitted that this policy had been endorsed in *Worx Food & Beverage BV v The Director for Border Revenue* [2014] UKFTT 774 (TC) at paragraph 58:

"Our starting point is that UKBF's general policy of restoring goods only when satisfied that a person has provided ownership is self-evidently reasonable. The UKBF stores many thousands of items; it has to be a precondition of release that a person claiming a seized item must first show that it belongs to them."

28. Border Force submitted that the Review Officer examined the correspondence to see how the evidence presented affected the application of the policy. The Appellant provided no evidence of ownership and therefore restoration was not appropriate. Notwithstanding this, the restoration was deemed inappropriate in any event: the Officer considered that the Appellant was complicit in the illicit movement given the double use of the ARC number and that the Appellant had produced no evidence to suggest that he was not complicit.

Discussion, findings of fact and conclusion

29. The Tribunal's jurisdiction in this matter is limited to consideration of whether the review decision was unreasonable. The burden is on the Appellant to show that the decision was unreasonable on the grounds that the Review Officer took account of irrelevant factors or failed to take into account relevant factors.

30. The Appellant's argument is that it is unreasonable of Border Force to refuse restoration on the grounds that no evidence or ownership has been provided.

31. In this case, looking at the review decision of 26th April 2016, it does not seem to me that the decision to refuse restoration was based solely on the lack of evidence of ownership. The letter sets out the background to the seizure and the correspondence in relation to the restoration request as well as the Border Force Restoration Policy. It states that the Officer has considered all the circumstances of the seizure but not the legality of it, which is a matter for the Magistrates' Court. Lack of evidence of ownership is given as the Officer's first consideration and reason for refusing restoration. Officer Norfolk goes on to state that even were she to accept the Appellant's title to the Vehicle, she would refuse restoration on the grounds that he was complicit in the smuggling since, upon request, he had provided no evidence to the contrary.

32. Whilst I am not bound by the decision in *Worx*, I agree that proof of title is a reasonable precondition of restoration. Without it, items might be restored to the wrong party.

33. The Appellant appears to suggest in the grounds of appeal that the fact that he was in possession of the Vehicle at the time of the seizure should be sufficient evidence of his title to it or that his assumed status as bailee should be accepted as entitling him to the Vehicle. I am not persuaded by this argument. Possession is clearly not the same as ownership; a thief may be in possession of an item but that does not mean it belongs to him. The purpose of requiring proof of ownership is to ensure items are not restored to the wrong party. It is a reasonable requirement.

34. I find that:

- (1) the Appellant failed to demonstrate that he was the legal owner of the Vehicle; and
- (2) it was not unreasonable of Border Force to refuse restoration on this grounds.

35. The appeal is dismissed.

36. 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.

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RACHEL MAINWARING-TAYLOR
TRIBUNAL JUDGE

RELEASE DATE: 10 FEBRUARY 2017

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