TC05753

Appeal number: TC/2016/02103

EXCISE DUTY – seizure of goods – refusal of restoration – whether decision was reasonable – yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DOZY FOODS LIMITED **Appellant**

- and -

ADVOCATE GENERAL FOR SCOTLAND **Respondents**
on behalf of
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

TRIBUNAL: JUDGE ANNE SCOTT
MEMBER: MR TONY HENNESSEY

Sitting in public at Eagle Building, Glasgow on Monday 13 February 2017

No appearance by or for the Appellant and having heard Mrs D Brogan of Morton Fraser LLP, for the Respondents

DECISION

Introduction

1. This was an appeal of the review decision dated 31 March 2016 by Officer Brenton of Border Force not to restore seized goods.

Preliminary and procedural matters

The Respondent

2. Mrs Brogan made application in terms of Rule 9 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") to substitute the respondents, designed as "Director of Border Revenue" in the Statement of Case, with "Advocate General for Scotland on behalf of the Secretary of State for the Home Department", being the appropriate designation in Scotland. That application was granted.

Absence of the Appellant

3. The appellant was not present. On 8 February 2017 the director of the appellant wrote to the Tribunal stating that he had been involved in a car accident on 3 February 2017, had sustained a neck injury and was undergoing treatment. He sought a postponement of the hearing. That application had been vigorously opposed by the respondents on the basis that the hearing was listed locally for the appellant and there was no suggestion that the director would be unable to travel or to give evidence and there was no medical evidence.

4. Both parties were notified on 10 February 2015 that the application to postpone the hearing had been refused by a Judge but that a further application could be made at the start of the hearing. The Tribunal administration contacted the appellant by telephone on 10 February 2017 and reiterated that the hearing would be proceeding as scheduled. He confirmed that he did not intend to attend but gave no further details.

5. The first decision for the Tribunal therefore was whether or not to proceed with the hearing. Mrs Brogan reiterated the points made to the Tribunal previously and pointed out that Officer Brenton had incurred substantial expense in arranging to fly from the south-west of England for this hearing and that the appellant had had the opportunity to furnish medical evidence or more detail but had not done so.

6. The appellant had previously been represented by solicitors who had lodged in process extensive detail of the appellant's argument with supporting documentation. We had due regard to Rules 2 and 33 of the Rules, a copy of which are annexed hereto at Appendix A and decided that it was fair, just and proportionate to proceed with the hearing.

The facts

7. The underlying facts are not in dispute. On 30 November 2015 at the Port of Felixstowe a consignment, including alcohol, imported from Nigeria on

2 November 2015 was examined by Border Force Officer Mark Bartell. That examination was suspended pending checks on the goods actually declared. The documentation for the goods showed the consignor to be Jincal Multi Services Limited ("Jincal"). The director of the appellant had ordered the goods whilst in Nigeria and then returned to the UK.

8. Jincal had issued an invoice, number 4014 dated 31 September 2015 which identified a total quantity of 1,169 items to a value of £2,906.26. No deposit was paid. The invoice was sent by the appellant to the shipping agent J.S. Forwarding who arranged for payment of Customs Duty of £1,801.05 and VAT of £761.83 on behalf of the appellant.

9. The invoice showed the appellant as having an address at 32C Broomlands Street, Paisley although the packing list attached to that showed the address as being at No. 23 Broomlands Street.

10. The Bill of Lading stated that the goods were "Food Stuff and Drinks", that there were 1169 packages and the goods were shipped on 3 October 2015. The Bill of Lading gave the appellant's address as both 32C Broomland Street and 23 Wellmeadon Street, Paisley.

11. On 8 December 2015, on examination of the goods by Border Force Officer King, the non-alcoholic goods were as stated on the invoice but there were an additional 250 items amounting to 3,820.2 litres of undeclared alcohol, being mixed beers and spirits to a value of £1,215, on which duty had not been paid. That duty amounted in total to £2,151.16. The Officer seized the goods.

12. On 9 December 2016, seizure letters and notices were issued.

13. On 14 December 2015, the director of the appellant wrote to the respondents referring to the seizure notice, requesting a review of the case and asking for restoration of the goods which were seized on 11 December 2015 at Felixstowe Port. Those goods are the goods referred to in paragraph 11 above.

14. That letter stated that the appellant was aware that the review process could not reconsider the decision on the legality of the seizure and argued that the grounds for restoration were that there appeared to be a clerical error in the computation of the quantities but that any such error was the fault of the shipper, his agents and/or employees and the appellant's own agents. An offer to pay outstanding duties or taxes was offered.

15. On 22 December 2015, the National Post Seizure Unit of the respondents wrote to the appellant indicating that they would consider the restoration request on production of proof that the goods were owned by the appellant and that payment had been made.

16. The appellant subsequently furnished a further invoice from Jincal, number 4265 and dated 4 January 2016 covering the 250 items which had been discovered by the Border Force officer.

17. On 14 January 2015, Border Force wrote to the appellant refusing restoration.

18. On 16 February 2016, the appellant's solicitors wrote requesting a statutory review and the basis for that request had altered insofar as it was now argued that the extra 250 items had been out of stock at the point at which the original goods were due to be shipped and had arrived just immediately before the goods were transported to Port Harcourt. Jincal had apparently forgotten to inform the appellant of those items and it was a human error. For that reason the new invoice had been issued.

19. The solicitors also furnished what was described as a credit agreement between Jincal and the appellant dated 4 May 2015. That was produced to support the contention that the goods were owned by the appellant in that paragraph 4 stipulated "That the BUYER shall upon receipt of the goods and invoices pay the SUPPLIER the amount stated in the invoices". and at 6 "That the title and risk on the goods pass to the buyers upon the supplier delivering the goods to the Nigeria Port and shipping same from Nigeria en route to the UK". That agreement purports to have been drafted by solicitors operating from the same address as Jincal, which is possible.

The Law

20. Section 16(4) Finance Act 1994 sets out the Tribunal's powers in an appeal in relation to restoration and that is as follows:-

> "… the powers of an appeal tribunal … 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 on 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 as 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 computable circumstances arise in future."

21. Therefore we are restricted to considering whether the respondents could not reasonably have arrived at the decision which has been appealed. (The burden of proof rests with the appellant.)

22. In doing so we must consider whether anything relevant was omitted from consideration or anything irrelevant taken into consideration, and whether any mistake of law was made.

Discussion and Decision

23. In reaching our decision it is quite clear (following the case of *HMRC v Jones & Jones*[1] that as the appellant never challenged the lawfulness of the seizure, the factual basis on which the seizure occurred cannot now be challenged. There is absolutely no doubt that a very substantial quantity of alcohol was imported into the UK and it was not declared and no duty was paid.

24. We simply do not find the appellant's first argument that there was a clerical error by either the shipper or his own shipping agent to be credible. His own shipping agent had only the information provided by the appellant, which was the invoice. That invoice made it explicit that there were only 1,169 items. The Bill of Lading also stipulated 1,169 items, gave the weight and said "SHIPPER'S LOAD, STOW, WEIGHT AND COUNT". The packing list carries the same information. Those are not all clerical errors. Of course, there were 250 further items.

25. Furthermore the subsequent argument that, in its haste, Jincal had simply added the extra items because they had come into stock just before shipping and then had forgotten to amend the invoice does not make sense. The appellant sent the invoice to J.S. Forwarding and does not appear to have questioned the absence of the 250 items from the shipment. Even if the items had just come into stock that begs the question why Jincal did not issue an invoice until three months later.

26. Officer Brenton who gave very clear, credible and logical evidence made the very valid point that when he had looked at the invoice, he would have expected there to have been an invoice for the total order placed by the appellant and showing any "missing" items as being "to follow" or something similar. Lastly, in our view, the shipping costs for two loads would have been disproportionate and it seemed inherently unlikely that it would have been anticipated that there would be two separate shipments.

27. We do not find this second argument credible. On the balance of probabilities we find that the goods were deliberately concealed.

28. Officer Brenton had meticulously looked at all relevant circumstances. He had checked the web entry for Jincal which showed that it was involved in civil engineering. It would have been expected that if it was a general merchant then that information would have been available on the internet. That gave him cause for concern. The multiplicity of addresses for the appellant was a further concern to him and the appellant's explanation that the appellant had moved from Wellmeadon (sometimes Wellmeadow) to Broomland Street does not sit well with the Bill of Lading which shows that the address is Broomland Street but the appellant is to be notified at Wellmeadon Street.

29. As far as addresses are concerned, Officer Brenton could trace no evidence whatsoever that the appellant had ever been at 23 Wellmeadow Street, Paisley and

[1] 2011 EWCA Civ 824

there are no commercial premises showing the name of Dozy Foods Limited at 32C Broomland Street, Paisley.

30. Officer Brenton had also checked on the firm of solicitors who had apparently produced the agreement between the parties and although there is a firm of solicitors by that name at that address, notwithstanding the fact that there are photographs of the individual solicitors, there is no solicitor with the initials given in the agreement.

31. The purported agreement between the parties, did support the argument that the appellant owned the goods in question, because title to the goods passed before payment. The remaining provisions of the alleged contract are couched in most unusual terms for a document drafted by lawyers – an example is the section headed "Grievance Handling" where at 3 it read "Any grievance shall be first subjected to amicable settlement within 3 (three) weeks of its occurrence".

32. Officer Brenton considered it odd that Jincal's trading address is the same as that for the solicitors. He doubted that it was a legitimate agreement. Looking at the terms of the agreement, such as:-

> "7. That the parties shall jointly bear any reasonably (sic) loss that may occur in the course of the business.
>
> 8. That the parties have undertaken to be truthful in dealing with each other"

we understand his concerns.

33. There is no evidence that the appellant had used the Economic Operator Registration and Identification Scheme when importing goods although it had been issued with an EORI number.

34. The policy applied by HMRC is that, in general, seized goods should not normally be restored. It is clear that in this case, Officer Brenton examined the case on its own merits to determine whether or not restoration should be offered exceptionally. We accept his evidence that he looked at all of the circumstances surrounding the seizure including hardship. Hardship is an inevitable consequence of any seizure. We agree that there is no evidence of exceptional hardship.

35. In this case it is obvious that Officer Brenton considered every piece of information furnished to him by the appellant and its solicitors, that he properly and fully investigated all relevant information and that although he was guided by the restoration policy, he was not fettered by it and he considered the matter afresh.

36. We find that the seizure of the goods in this matter was not disproportionate. The cost to the appellant of the goods was only £1215 which is approximately one half of the duty evaded.

37. We are satisfied that the respondents' decision on review refusing restoration was reasonably arrived at within the meaning of section 16(4) FA 1994. Accordingly the appeal is dismissed.

38. 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 SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 6 APRIL 2017

2.—Overriding objective and parties' obligations to co-operate with the Tribunal

(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.

33.— Hearings in a party's absence

If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal—

(a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and

(b) considers that it is in the interests of justice to proceed with the hearing.