



TC05761

Appeal number: TC/2016/03695

EXCISE DUTY – seizure of commercial coach – whether decision to refuse restoration was reasonable

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ALINA LOGHIN

Appellant

- and -

THE DIRECTOR OF BORDER REVENUE

Respondents

TRIBUNAL: JUDGE VICTORIA NICHOLL

Sitting in public at Fox Court, London on 16 March 2017

Ms Padure, Solicitor from Ennon & Co Solicitors, for the Appellant

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

DECISION

1. This is an appeal by the Appellant (Ms Loughin) under section 16 of the Finance Act 1994 against a decision dated 7 June 2016 to refuse to restore a Setra Coach with registration VS 33 LAV (“the Coach”) seized by the Respondents (Border Force) on 9 January 2016.

Background and facts found

2. I heard oral evidence from Ms Loughin, with the assistance of a Romanian speaking interpreter, and from her representative, Ms Padure. I also heard oral evidence from Border Force Review Officer Deborah Hodge. I found the following facts from the evidence in the tribunal bundle and the oral evidence.

3. On 9 January 2016 the driver of the Coach, Pado-Emanuel Popa, was intercepted while driving from Romania through the port at Dover. There were two other drivers, Iurie Ciobanu and Ghenadie Graur. The passengers left the Coach and it was searched. It was found that the Coach had been adapted and that 36,000 Kent cigarettes had been hidden behind panels in areas adjacent to the steps to the upper deck and the bunk area, and in a cut out behind a mirror. The cigarettes were seized under section 139(1) Customs and Excise Management Act 1979 (“CEMA”) as being liable to forfeiture under both Regulation 88 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 and section 49(1)(a)(i) CEMA. The Coach was seized under section 139(1) CEMA and section 141(1)(a) CEMA as it had been used for the carriage of goods liable to forfeiture.

4. A form 156 “Seizure Information Notice” and “Notice 12A” were issued. Ms Loughin did not challenge the seizure of the Coach in condemnation proceedings and so it was duly condemned as forfeited one month after the date of seizure.

5. On 8 February 2016 Ms Loughin’s legal representatives, Ennon & Co Solicitors, wrote to Border Force enclosing copies of the notices issued and asked for the Coach to be restored. The letter advised that the Coach is owned by Ms Loughin and lent under a car hire rental agreement to Gisan Tur SRL. Border Force responded on 11 February 2016 asking for a copy of the rental agreement, a copy of any letter terminating the rental agreement or relinquishing rights to the Coach as a result of the seizure and details of any steps taken to prevent the use of the Coach for smuggling. A further chasing letter was sent by Border Force on 9 March 2016 noting that a decision would be made on the information already held unless a response was received by 21 March 2016.

6. On 5 April 2016 Ms Loughin’s representative sent a copy and translation of the vehicle registration certificate, a hire agreement stamped to show that it had been lodged with the Vaslui Public Finance Department and an insurance certificate.

7. On 15 April 2016 Border Force wrote to advise Ms Loughin of its decision not to restore the Coach, noting that Ms Loughin had failed to provide any of the documents requested.

8. On 25 May 2016 Ms Loughin's representative requested a statutory review of the decision. The letter enclosed a letter of termination of the hire agreement and a written record of the verbal agreement that Ms Loughin made with Gisan Tur SRL regarding steps to prevent smuggling. Both letters were translated in May 2016 but
5 the termination letter was manually dated 13 January 2016. The representative challenged the statement in the decision that Ms Loughin had failed to provide any of the documents requested as it had sent three documents with its letter of 5 April 2016. The letter then noted that Ms Loughin is employed full-time in Italy and that neither she nor her Coach had been involved in a similar incident in the past.

10 9. At the hearing it became apparent that Ms Loughin works as perfume sales assistant in Italy. In December 2014 she entered into an arrangement with Gisan Tur SRL on the advice of a friend, Vasyli Ciobanu. Vasyli Ciobanu does not own or hire a coach himself but he introduced Ms Loughin to Gisan Tur SRL. Gisan Tur SRL is registered as a passenger and transport company in Romania since 2001. The
15 arrangement provided for documents to be signed in relation to the hire of the Coach. The agreement between Gisan Tur SRL and Ms Loughin was signed on 6 January 2015. It provided for the payment of 100 Romanian leu ("RON") per month for the fixed term of 5 years. Ms Loughin did not ever arrange to insure the Coach as she said that this was managed by Gisan Tur SRL, but the certificate of registration shows that
20 the Coach was registered in her name on 19 December 2014 and the insurance certificate shows that the insurance renewal date is 19 December, even though the agreement with Gisan Tur was not signed until 6 January 2015.

10. Gisan Tur SRL has not made any contact with Border Force about the seizure or restoration of the Coach. Nor is there any correspondence between Gisan Tur SRL
25 and Ms Loughin in the tribunal bundle, other the letter of termination and letter setting out the written record of the verbal terms submitted on 25 May 2016. Ms Loughin has received the agreed payments from Gisan Tur SRL in cash in Romania.

11. The decision of 15 April 2016 was reviewed by Review Officer Deborah Hodge of Border Force (Officer Hodge) under section 15(1) Finance Act 1994 and she
30 informed Ms Loughin by letter dated 7 June 2016 of her decision to uphold the original decision not to restore the Coach. The letter noted that Border Force's restoration policy for seized commercial vehicles had been applied. The letter concluded that, on the balance of probabilities the operator was involved or at least complicit in the smuggling, and that Ms Loughin had not demonstrated that she was
35 an innocent 3rd party. Officer Hodge was not satisfied with the legitimacy of the hire arrangements.

12. Ms Loughin's representative submitted a Notice of Appeal on 7 July 2016.

The law

13. Regulation 88 of the Excise Goods (Holding, Movement, and Duty Point)
40 Regulations 2010 provides that:

“If in relation to any excise goods that are liable to duty that has not been paid there is -

- (a) a contravention of any provision of these Regulations, or
- (b) a contravention of any condition or restriction imposed by or under these Regulations,

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those goods shall be liable to forfeiture”

14. Section 49(1) CEMA states:

“Where-

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(a) Except as provided by or under the Customs and Excise Acts 1979, any imported goods, being chargeable on their importation with customs or excise duty, are, without payment of that duty –

(i) unshipped in any port, [or]

...

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(f) any imported goods are concealed or packed in any manner appearing to be intended to deceive an officer, those goods shall, subject to subsection (2) below, be liable to forfeiture.”

15. Section 139 (1) CEMA provides as follows:

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“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.”

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

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“(a) any ship, aircraft, Coach, 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

...shall also be liable to forfeiture”

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17. Paragraph 1 Schedule 3 CEMA provides for notice of the seizure to be given in certain circumstances. Paragraph 3 Schedule 3 CEMA then states:

“Any person claiming that anything seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of the date of the seizure, give notice of his claim in writing to the Commissioners...”

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If a notice of claim is given under Paragraph 1 Schedule 3 CEMA condemnation proceedings are heard in the Magistrates’ Court. If no notice of

claim is given the goods and vehicle are deemed to be duly condemned as forfeit (*Revenue and Customs Commissioners v Jones and another* [2011] EWCA 824).

18. Section 152 CEMA provides:

5 “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]...”

10 19. Section 14(2) Finance Act 1994 makes provision for a person to require a review of a decision made under section 152(b) CEMA not to restore anything seized from that person. If such a review is required it is to be carried out in accordance in accordance with the provisions of section 15(1) Finance Act 1994.

15 20. Section 16 Finance Act 1994 makes provision for a person to appeal against any decision on the review of such a decision. 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:

20 (a) Direct that the decision, so far as it remains in force, is to cease to have effect;

(b) Require a further review of the original decision in accordance with such directions as the tribunal considers appropriate; and

25 (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.

The tribunal does not however have power to order BORDER FORCE to restore a vehicle or to substitute its own decision on restoration as the decision is “as to an ancillary matter” within section 16(4) Finance Act 1994.

30 21. The burden of proof of satisfying the tribunal, on the balance of probabilities, that “the Commissioners or other person making that decision could not reasonably have arrived at it” and that the tribunal’s power set out in section 16(4) Finance Act 1994 should be exercised is on the appellant, Ms Loughin,

Submissions

35 22. Ms Loughin submits that she is an innocent third party to this smuggling attempt and that she had no reason to suspect that it was planned. The operator, Gisan Tur SRL, is responsible for the smuggling or complicit with it.

23. Ms Loughin submits that she took reasonable steps to prevent smuggling by entering into a verbal agreement with Gisan Tur SRL requiring “the interdiction of involvement” in smuggling which assured her that any use of the Coach would be in good faith.

5 24. Ms Loughin submits that Border Force failed to request information and/or to interpret the evidence provided correctly regarding the validity of the hire arrangements. The agreement was attractive to Ms Loughin as it provided her with a monthly income of 100 RON per month, which was roughly £17 at the date of the decision, and provided that Gisan Tur SRL was responsible for the maintenance,
10 repair and parking of the Coach. The monthly fee payable represents approximately 10% of the minimum monthly salary in Romania.

25. Border Force submits that its policy in relation to the restoration of seized commercial vehicle is that if it has been adapted to facilitate smuggling it should not normally be restored. The information provided by Ms Loughin was considered, but it
15 was not sufficient for Border Force to exercise its discretion to restore the Coach.

26. Border Force submits that Ms Loughin should have taken reasonable steps to prevent misuse of the Coach and that the letter recording the earlier verbal agreement is not sufficient. Border Force questions the authenticity of the hire arrangements and notes both the very low monthly fee payable for the hire and absence of contact from
20 the operator. Border Force has observed an increasing number of cases in which a vehicle is registered in the name of an individual who is claimed to be an innocent third party so that Border Force’s policy is not applied to the operator. In this context it was noted at the hearing that Border Force usually receives contact from the operator of a vehicle that has been seized and that the absence of contact is suspicious.

25 **Discussion**

27. The tribunal’s jurisdiction under section 16 Finance Act 1994 is supervisory and limited to determining whether the decision by Border Force was reasonable. In *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1980] STC 231 Lord Salmon commented that the tribunal cannot substitute “its own discretion merely because it prefers its own discretion to that exercised”. As Lord Lane explained, 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.”

35 28. In considering the Officer Hodge’s review decision, I noted first the facts which are not disputed by the parties (the “agreed facts”):

25.1 The Coach had been adapted for the purpose of smuggling and “the driver/s and /or the operator was involved in the smuggling attempt”;

40 25.2 The forfeiture of the cigarettes and seizure of the Coach were legal and the lawfulness of these acts is not challenged;

5 25.3 The hire agreement between Ms Loughin and Gisan Tur SRL for the hire of the Coach for 100 RON per month for a period of 5 years was signed and lodged with the Vaslui Public Finance Department. Ms Loughin has an outstanding tax liability to the Romanian tax authority but it was not known at the date of the hearing if it is connection with the income payable under the hire agreement; and

25.4 Gisan Tur SRL is a Romanian transport company that is recorded as being registered since 2001.

10 26. Ms Padure spent much of the hearing seeking to prove the terms and registration of the hire agreement and, indeed, had requested a postponement prior to the hearing in order to wait for confirmation from Vaslui that the agreement is registered with the Finance Department. Ms Padure also questioned why Border Force had not requested specific information. This ignored Border Force's case that it is not the existence of the hire agreement that is in question (as noted in paragraph 25.3 above), but its authenticity, and that the burden of proof is on Ms Loughin. In this respect there were
15 a number of issues which troubled Officer Hodge and contributed to her suspicions and decision. I found that these troubling issues were relevant to the decision because they all point to something being amiss and therefore, at best, do not support Ms Loughin's claim that she is an innocent third party who took reasonable steps to
20 prevent smuggling:

26.1 Ms Loughin claims that she spent her savings of 16,000 euros on the Coach as an investment, but she did not produce evidence of the purchase or payment.

25 26.2 Ms Loughin was registered as the owner of the Coach on 19 December 2014 but she says that she did not insure it as this was done by Gisan Tur SRL. The hire agreement was said to "avoid the maintenance, repair and parking" that Ms Loughin would otherwise have to manage and the agreement with Gisan Tur SRL was signed on
30 6 January 2015. It would appear reasonable to assume, on the balance of probabilities, that Gisan Tur SRL was involved in the registration and insurance of the Coach from 19 December 2014, which was when Ms Loughin's involvement was first registered.

35 26.3 A coach is a depreciating asset and yet Ms Loughin hired it out for a fixed monthly rental of 100 RON (c£17 – see page 65) for 5 years. This represents a very low return on her 16,000 euros savings.

40 26.4 Both Ms Loughin sought to justify the low return on the investment by reference to it being a percentage of the Romanian minimum wage. This comparison would be relevant for a payment for services rendered, but it is difficult to see how it explains a low return on an important personal investment.

26.5 Gisan Tur SRL is claimed to be a reputable transport company and yet it did not make contact with Border Force about the seizure of one of its coaches.

45 26.6 Ms Loughin said that she was paid in cash by Gisan Tur SRL and that she had no invoices or receipts, despite the size of its operations.

5 26.7 A very brief standard form hire agreement was used for the hire of the Coach. It did not contain reference to the steps to be taken to avoid the use of the Coach for smuggling. The terms of the verbal agreement recorder in writing after the seizure are no more than confirmation that the hirer is not to use the Coach for smuggling. It does not represent reasonable steps to prevent the use of the Coach for smuggling or Ms Loughin turned a blind eye to the use to which the Coach was put.

10 27. The policy applied by Officer Hodge is that a vehicle that has been adapted for smuggling should not normally be restored. The policy is reasonable because it does not fetter Border Force's discretion to allow a vehicle to be restored if there are exceptional circumstances or hardship, but it is intended to be robust to protect legitimate UK trade and revenue and prevent illicit trade in excise goods. I considered whether Officer Hodge's decision had taken account of everything to which she should have given weight and disregarded irrelevant matters in applying the policy. I
15 found that both the agreed facts and troubling issues listed above were relevant and appropriately taken into account, and that irrelevant matters were disregarded. At the end of the review decision Ms Loughin was invited to submit any further evidence available and Officer Hodge said that she would consider fresh information. The further information provided concerned only Gisan Tur SRL's business webpage.

20 28. On the basis of the information considered and the application of the general Border Force policy not to restore a vehicle that has been adapted for smuggling, I find that decision is not one that Officer Hodge could not reasonably have arrived at.

25 29. There is no exceptional hardship in this case as the risks and penalties are the same for all owners of commercial vehicles. Ms Loughin has not been treated any more harshly or leniently than anyone else in similar circumstances.

Decision

30. The appeal is refused.

30 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.

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**VICTORIA NICHOLL
TRIBUNAL JUDGE**

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RELEASE DATE: 11 APRIL 2017