[2017] UKFTT 0376 (TC)

TC05841

Appeal number: TC/2015/07116

EXCISE - 320,000 cigarettes discovered concealed beneath legitimate load of wine in coil well of trailer - Seizure of appellant's truck hauling trailer - Whether decision not to restore the vehicle unreasonable? - No - Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

LILI EU TRANSZ EU KFT **Appellant**

- and -

THE DIRECTOR OF BORDER REVENUE

Respondent

TRIBUNAL: **JUDGE CHRISTOPHER MCNALL**
MRS SONIA GABLE

Sitting in public at the Tribunals Service, Alexandra House, 14-22 The Parsonage, Manchester M3 2JA on 14 March 2017

Dr Lajos Péter Turi, Attorney (Ügyvéd) of Turi Ügyvédi Iroda (Turi Lawyers' Office), Kisvárda, Hungary, on behalf of the Appellant

Mr Rupert Davies, of Counsel, instructed by The Director of Border Revenue, on behalf of the Respondent

DECISION

Introduction

1. The Appellant is a Hungarian haulage company. It is based in North-Eastern Hungary, near to the Ukrainian and Romanian borders, and it has 8 to 10 trucks.

2. On the evening of 6 May 2015 one of these trucks, a DAF FT XF tractor unit ('the Truck') was intercepted at the Port of Dover, inbound from the Continent. It was being driven by the Appellant's employee, Mr Otto Németh. The Truck was hauling a sealed curtain-sided trailer ('the Trailer'). This was not a conventional flat-bed trailer. It had a coil 'well' or 'trench', triangular in cross-section, running its entire length and being at least 30 cm deep. As the name suggests, this well is designed to allow the transport of coils, laid on their sides. When not in use for the transport of coils, the coil well can be plated over to produce a flat floor.

3. It had been plated over on this occasion so as to facilitate the carriage of a legitimate palletised load of Hungarian wine which had been originally loaded in Budapest on 4 May and which was destined for customers in the North West of England. However, beneath that legitimate load officers at Dover found approximately 320,000 cigarettes ('the Tobacco Goods') which had been concealed in the plated-over coil well.

4. The Tobacco Goods are excise goods, and the seizing officer was satisfied that the Tobacco Goods, from their quantity, were being imported for a commercial purpose and were liable to forfeiture.

5. As well as the Tobacco Goods, both the Truck and the Trailer were seized under section 139(1) of the *Customs and Excise Management Act 1979* ('the 1979 Act') as being liable to forfeiture under section 141 of that Act. Mr Nemeth was issued with the Forms BOR 156, BOR 162, Explanatory Notes to the Seizure (in England and Hungarian), Notice 1, and Notice 12A.

6. No challenge to the seizure was made in the Magistrates' Court. Nothing was heard from the Appellant for almost two months after the seizure. On 2 July 2015 a request for restoration - both of the Truck (the request made on behalf of the Appellant) and the Trailer (the request made on behalf of a Romanian company, said to have been the Trailer's owner, Black & White Transport srl) - was made. Having requested further information in the meanwhile, Border Force refused the request to restore on 6 October 2015.

7. A request for departmental review was made on 12 October 2015. On 9 November 2015, that department review, conducted by Officer Raymond Brenton, a Higher Officer, upheld the original decision. Officer Brenton's review decision of 9 November 2015 ('the Review Decision') is the decision which is the subject matter of this appeal.

8. The Review Decision treated this as a case falling within category C of the Border Force's policy: that is, a case in which 'the operator is responsible'. It was

treated as a case in which the Appellant operator had failed to provide evidence to satisfy the Border Force that the Appellant operator was neither responsible nor complicit in the smuggling attempt. It went on to treat this as a case in which the amount of revenue involved was more than £50,000, and hence within sub-category C2 of the policy. The Border Force's policy in a case of that kind is the vehicle will not normally be restored, subject to considerations of proportionality. The Review Decision indicates (although, at first glance, not entirely clearly) which parts of the policy were applied by setting out the whole of the policy, but putting C and C2 in bold.

9. The Review Decision did not consider the legality or correctness of the seizure itself.

10. This was not treated as a case in which the Truck (as opposed to the Trailer) had been adapted for the purposes of smuggling.

11. The Notice of Appeal is dated 10 December 2015. The Appeal is advanced only in relation to the Truck. No appeal has been advanced by Black and White Transport in relation to the Trailer.

12. The Grounds for Appeal are put, in full, as follows:

> "My client had no information about the illegal transportation. My client took every required action in order to prevent such an illegal transportation. The truck was sold without notifying my client and after contacting Border Force my client was also not informed about the selling of his vehicle. We were informed only after a couple of months about the selling. The selling took place so fast that we could not react. After the sale, my client has not received any part of the amount received for the truck. Furthermore, we have no information about the affected trailer".

13. The appeal seeks restoration of the Truck, or, if that is not possible, the price of the Truck.

The Law

14. This is a civil and not a criminal case. The appellant therefore bears the evidential burden. The appellant must show, to the appropriate standard of proof, that the decision not to restore the truck was wrong in law or was so unreasonable that no reasonably informed reviewing officer would have come to the same conclusion: see *McGeown International* [2011] UKFTT 407 (TC) (Judge Huddlestone) at Para [46].

15. If the appellant is to succeed in this appeal, the standard of proof which it must meet is the civil standard - that is, the balance of probabilities. This is a lower standard of proof than the criminal standard of proof (which is 'beyond reasonable doubt'). Hence the civil standard is easier for an appellant to discharge than the criminal standard.

16. Section 141(1) of the *Customs and Excise Management Act 1979* provides that, where any thing has become liable to forfeiture (here, the Tobacco Goods) '*any vehicle ... or other thing whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture*'.

17. Hence, both the Trailer as well as the Truck hauling it were liable to forfeiture under section 141.

18. Section 152 of the 1979 Act is a mitigating provision which entitles the Commissioners, *'as they see fit'*, to *'restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under the Customs and Excise Acts'*. Hence, when it comes to restoration, section 152 confers a broad discretion on HMRC.

19. The Review Decision is an 'ancillary matter' for the purposes of section 16 of the *Finance Act 1994*.

20. Our powers in this appeal are therefore limited to those which are set out in section 16(4) of the Finance Act 1994:

> "In relation to any decision as to an ancillary matter ... or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not have reasonably have arrived at it, to do one of 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 from such time as the tribunal may direct;
>
> (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a further review of the original decision;
>
> (c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a further review, 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 comparable circumstances arise in future"

21. In broad terms, this means that the review decision can only be challenged on public law principles: see the judgment of Dyson J. (as he then was) in *Pegasus Birds v Customs and Excise Commissioners* [1999] STC 95 at 101. In essence this refers to the principles articulated by the Court of Appeal (Lord Greene M.R., with whom Somervell LJ and Singleton J agreed) in the leading case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223:

> "The court is entitled to investigate the action of the [decision-maker] with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account..." (at pp 233-234)

22. Thus, it is important to emphasise that we are not concerned with reviewing the *merits* of the review decision, but rather the lawfulness of the decision-making process itself. We have to consider whether the decision reached by HMRC was one that HMRC could not reasonably have arrived at. In other words, we have to consider whether HMRC's decision was outside the range of possible reasonable decisions. It does not matter if this Tribunal would have reached the same or a different conclusion: see the comments of the Upper Tribunal (Sir Stephen Oliver QC and Judge Aleksander) in *Hunova-Trans KFT v HMRC* [2011] UKUT 194 (TCC). Finally,

we have no jurisdiction to order restoration of any vehicle or the payment of any compensation in lieu.

23. Section 16(6) of the 1994 Act puts the burden on the Appellant. It must show (albeit, only on the balance of probabilities) that the decision was unreasonable in a public law sense.

24. There was no challenge to the seizure in the Magistrates' Court. The effect of that has been set out in decisions of the Court of Appeal in *HMRC v Lawrence Jones and Joan Jones [2011] EWCA Civ 824* and the Upper Tribunal in *Race v HMRC [2014] UKUT 331 (TCC*). Those decisions bind us.

25. In *Jones*, the Court of Appeal held unanimously (at Paragraphs 66 to 71) of its decision that:

> (1) The legality of seizure was for decision by the Magistrates' courts in condemnation proceedings and not for this Tribunal;
>
> (2) In the scheme of the legislation governing the procedures relating to imported goods seized by HMRC, Parliament has provided different avenues for challenging condemnation and forfeiture on the other hand (via the courts), and the restoration procedure on the other (via an appeal to this Tribunal against the refusal of HMRC to restore goods).

26. In *Race*, Mr Justice Warren was clear that the reasoning of the Court of Appeal in the *Jones* case meant that the First-tier Tribunal cannot go behind the deeming effect of Paragraph 5 of Schedule 3 of the 1979 Act when it comes to an assessment to excise duty: see Paragraphs [26] and [33] of the decision.

27. Hence, if no challenge is made in the Magistrates' Court to the seizure, in the limited time-window for such a challenge, then the goods are deemed to be for commercial use.

Findings of fact

28. On behalf of the Appellant, we heard oral evidence from Mr Molnár, a director; and Mr Németh, the driver. Both had also filed short witness statements.

29. We also heard oral evidence from the reviewing Officer, Officer Brenton, who had also filed a witness statement.

30. On the basis of their evidence, and the documents placed before us, we make the following additional findings of fact.

31. The Trailer - SM-39-MOL - was let out to the Appellant by a Romanian company, Black & White Transport SRL, with effect from 16 March 2015 (the English translation wrongly has this at 6 March 2015) for a fee of 500 Euros a month. The terms of that agreement are contained in a document in the Hungarian language ('*Bérleti Szerződés*') at page 114 of the hearing bundle ('the Trailer Lease'). That document was also put before us in English.

32. The freight order was apparently placed by a Hungarian company, Várda-Garden 2001 Kft, on 28 April 2015. The freight order identified this particular Truck and this particular Trailer.

33. Pursuant to that order, the Trailer was collected by Mr Nemeth and loaded with a legitimate palletised load of wine at Törléy's warehouse in Dunaharaszti near Budapest on 4 May 2015.

34. Whether *the Trailer* had been modified or adapted for smuggling or not (which is not a question which we are called upon to decide) this was not treated by Border Force as a case in which *the Truck* had been adapted for smuggling.

35. It was treated by Border Force as a case falling within category C - the operator (that is, the Appellant haulage company) was responsible. The counterpart of that is that Border Force did not treat this as a case in which neither the driver nor operator were responsible for the smuggling attempt (Category A) nor as a case in which the driver but not the operator was responsible (Category B).

36. Border Force treated this as a case where the operator had failed to provide evidence to satisfy Border Force that the operator was neither responsible nor complicit in the smuggling attempt. Within Category C the policy leads to two possible outcomes. If the amount of revenue involved is less than £50,000 and it is the first occasion, then the vehicle will be restored for the lesser of 100% of the revenue involved or the trade value of the vehicle. If the amount of revenue involved is £50,000 or more, or this is a second or subsequent seizure within 6 months, the vehicle will not normally be restored.

Discussion

The duty assessment

37. The duty assessment was said in the Review Decision to have been £75,226.23. The assessment calculation was not in the hearing bundle. We directed that the assessment calculation should be provided and it was. It amounts to £75,215.89 (a trivial discrepancy - about £11 - from the figure originally stated). It is a calculation on the basis of Excise Duty of £189.49 per 1,000 cigarettes plus 16.5% of the Recommended Selling Price (which is set out, brand by brand) per packet of 20. Irrespective of the discrepancy, we are satisfied that the revenue involved comfortably exceeds £50,000. Therefore, if this case was properly regarded by HMRC as being within Category C, then it was within sub-category C2.

The coil well

38. This was not a conventional flat bed trailer. It had a coil well. The very presence of a coil well offers a ready-made opportunity for concealment.

39. The coil well is not a secret feature. We accept Officer Brenton's evidence that the triangular profile of the 'trench' shows and is visible externally underneath the floor of the Trailer. That also accords with common sense given that the lip of the coil well is otherwise level with the floor surface of the Trailer.

40. But, even if it were not so visible, the presence of a coil well is still visible and apparent internally, since the floor panels which cover the well are configured differently to those in a flat-bed trailer without a coil well. The panels covering the coil well are a series of small narrow panels, laid transversely across the width of the well, rather than larger panels laid longitudinally. This is because those panels often

need to contain some form of bracing to provide strength and rigidity if the Trailer is loaded with a conventional load over the well rather than loaded with coils.

41. We do not accept that the Appellant company did not know that this Trailer had a coil well and we reject Mr Molnar's evidence on that point. The denial is simply implausible from an experienced haulier which had entered into a liability to pay 500 Euros a month for this Trailer.

42. We find that the Appellant did know that this Trailer had a coil well. Even if it did not know before the Trailer Lease was signed, it had already, by the time of the seizure, had plenty of time (over 6 weeks) to discover the fact.

The Trailer Lease

43. It seems likeliest, both on the evidence, and on inherent probabilities, that the Tobacco Goods were put into the Trailer before it was loaded in Budapest on 4 May. The inherent likelihood is that the Tobacco Goods were concealed in the coil well not long before 4 May 2015.

44. The Trailer Lease gave the Appellant company the exclusive right to this particular Trailer from 16 March 2015. That is, the Appellant had exclusive control of the Trailer for approximately 6 weeks before it was loaded with wine. The Appellant was also liable under the terms of the Trailer Lease to pay 500 Euros per month to Black and White for the Trailer.

45. We do not accept Mr Molnar's evidence that he could not remember where this Trailer had been between 16 March and 4 May. He said that he did not know how many times he had used this specific trailer. He was not being asked to engage in a test of memory. The Appellant company, if it is a reputable and well-run company, dealing with a valuable, expensive, and income-producing asset, should have known where the Trailer was and had been at all times, and should have been able to point to documents (a paper trail) to prove it.

46. Mr Molnar's evidence was vague and unsatisfactory. He said that *'maybe someone else was using it, maybe another company'*. It is difficult to understand why, if the Appellant was genuinely liable to pay this (not insubstantial) sum every month, it did not apparently even know where the Trailer was, what was happening to it, or who was using it. It was a fair point that the appellant had not put this forward as an explanation at any point until Mr Molnar was actually in the course of giving oral evidence.

47. We did not believe him. It simply makes no commercial sense for the Appellant to have assumed liability to pay 500 Euros per month for this Trailer but then to have had no use of it. Moreover, the terms of the Trailer Lease (even coming from a different legal system) are sufficiently clear to show that it is functionally equivalent to a lease of this particular trailer, identified by number and VIN. It is not a lease simply of a trailer in general.

48. The Appellant did not place any evidence - whether oral or documentary - before us to show that this Trailer was being sub-let by the Appellant to someone else between 16 March and 4 May.

49. Ignorance - even if genuine - does not assist the Appellant in this case. This is because even if we were to give the Appellant the benefit of the doubt, and accept as true its evidence that it genuinely did not know where this Trailer was in the weeks before it made this journey, then that simply means that the Appellant was not exercising reasonable care over the Trailer. In turn, that must mean that the Appellant was not taking reasonable precautions to prevent the Trailer being used for smuggling.

50. We do not consider that the Appellant's arguments as to the circumstances in which the Trailer was said to have been loaded at the wine warehouse in Budapest change the position. The very fact that the driver is not permitted to enter the warehouse during loading is itself suggestive of a system of loading which is designed to exclude the presence of unauthorised persons and to reduce the possibility of unlawful activity.

51. The only way in which the Appellant's argument can make any sense is if the cigarettes were packed in the warehouse, by the seller of the wine, with the Appellant and its driver both as completely innocent agents.

52. That is a far-fetched hypothesis and we reject it. If the Appellant was indeed an unwitting and wholly innocent participant in this smuggling, and stood to lose its valuable Truck, then it is surprising that no evidence at all was placed before us of any complaint by the Appellant to the wine wholesalers (a well-known Hungarian firm) or to the Hungarian authorities.

53. Moreover, in order to be correct, the successful operation of such a smuggling operation depends on a number of factors. Using the trailers of unwitting and innocent hauliers to transport hundreds of thousands of cigarettes across Europe would be an industrial-scale and complex logistics operation. There would have to be highly organised and efficient illicit activity in the wine warehouse, both in terms of storing cigarettes before loading and then in loading them into the correct selected trailers. Any loading would have to be done whilst the driver is waiting outside, and hence done so quickly that he does not become suspicious.

54. If neither the hauliers nor drivers were involved, then the operation, in order to achieve its purpose, would have to involve extensive intelligence-gathering, in advance, and before the trailer came into the warehouse. For instance, its destination would have to be known. The trailers would have to be tracked, to make sure that they arrived at the unloading point when it was anticipated that they would be. The whole endeavour would fail if a trailer was re-routed.

55. This is just a theory, and there is simply no evidence at all to support such a theory. We reject it.

56. We likewise reject any theory that the cigarettes had been loaded by some malicious third party. It is again far-fetched. For reasons which we have already explored, we do not accept the appellant's ostensible ignorance as to the whereabouts of the Trailer between 16 March and 4 May. But even had we given the appellant the benefit of the doubt, we have still found that a failure to know where the Trailer was, or what was happening to it, clearly demonstrates a failure to exercise proper and reasonable care to prevent smuggling.

Compliance with regulations

57. The Appellant's evidence as to its knowledge of and compliance with relevant regulations was unsatisfactory. We reject its evidence that it always pays close attention to fully complying with the Regulations. It does not.

58. Mr Molnar's vigilance as to smuggling was so poor that he asked, in the course of cross-examination, whether it was the Appellant's responsibility to check the load, and to check that the load matched the documents. That was a surprising question for an experienced haulier to ask, even rhetorically. The impression was that the Appellant company, as with its apparently lax attitude towards the Trailer, was not paying any attention to the composition of the load.

59. Although Mr Molnar asserted that his firm followed the rules, he accepted without hesitation when it was put to him that it did not. Article 8 of the Convention on the Contract for the International Carriage of Goods by Road (CMR) was put to Mr Molnar. Article 8(1) provides that, on taking over the goods, "the carrier shall check (a) the accuracy of the statements in the consignment note as to the number of packages and their marks and numbers; and (b) the apparent condition of the goods and their packaging". Article 8(2) says that, if the number of packages and their marks and numbers cannot reasonably be checked, then the driver "shall enter his reservations in the consignment note together with the grounds on which they are based". The consignment note in this instance was not so endorsed by the driver, even though, on the basis of Mr Nemeth's evidence, it should have been.

60. Mr Molnar asserted that it was his duty to transport the goods. That is entirely correct. But, if transporting the goods internationally, he was also obliged to comply with Article 8 of the CMR, whether or not it was convenient to him. His evidence on Article 8, and the obligations imposed on him, was quite telling. In relation to those rules, he remarked: '*This is quite silly. Who goes through this?*'

61. He also remarked, with some agitation, that '*lots of rules should be complied with but in practice it is different*'. We took the gist of his complaint to be that the rules are made by bureaucrats and do not reflect the reality of running a haulage company. But nonetheless we cannot rewrite those rules, and they apply equally to all hauliers across Europe.

The driver

62. We assessed Mr Nemeth as giving his evidence honestly and candidly. There is no evidence that he knew about the smuggling. When he was questioned at Dover, he did not attempt to hide that he had 2 plastic carrier bags of cigarettes under his bunk which he was bringing in for 'a colleague in Reading'.

63. In our view, Border Force had correctly treated Mr Nemeth as not having had knowledge of the smuggling attempt. He denied such knowledge or involvement, and we believed him. This remains so even though we accept that his evidence as to the circumstances in which the Trailer was loaded was not entirely consistent.

64. He was an experienced driver, and had been working for the Appellant since 2011.

65. But we do find that the driver knew (or, if he did not actually know, reasonably should have known) that this was a Trailer with a coil well, with plating over a void. We reject his evidence that he did not know. On his evidence, he picked up the Trailer when it was empty and unsealed: before it was loaded. He checked it, including checking its tyres, the boxes underneath the trailer used for storage of tools and the like, and the safety bars. In doing so, he would have seen the coil well. Even if had he had not seen it from the outside, the presence of the coil well was easily visible internally.

66. Given that the coil well offers a ready-made opportunity for concealment, we consider that a reasonable driver would have checked to see if there was anything in the void. This was a quick and straightforward task, simply involving removing the covers with an Allen key. It would not have taken long at all to do this when the Trailer was still empty.

67. We accepted his evidence that he was planning to unload the Trailer and leave it in Liverpool, at a place to be notified to him by the Appellant. Our impression of his credibility, and his non-involvement in the smuggling, was strengthened by his comment that the Trailer, once unloaded, was going to be left unlocked in Liverpool.

Proportionality

68. In our view, the Review Decision considered proportionality in a sufficiently appropriate way. The Truck was estimated to be worth £34,000 (based on a Glass' Guide estimate) and therefore non-restoration was deemed proportionate, bearing in mind the total revenue at stake (approximately £75,000). No evidence was placed before us that the estimated figure was wrong at all; let alone so radically wrong as to put proportionality genuinely in issue.

69. We are also satisfied that hardship was considered appropriately. It is a statement of the obvious that refusing to restore an income-producing commercial vehicle seized from a haulier occasions hardship - it has one less vehicle with which to conduct its business. However, there was nothing put before the Border Force of which we were made aware to indicate that the Appellant was suffering hardship over and above the ordinary.

70. In the circumstances, we do not see any justiciable error in the manner in which the Review Decision was arrived at, or the matters taken into account. The Review Letter was clear, and Officer Brenton's evidence as to his reasoning and decision-making process was clear and consistent with that letter.

Decision

71. Therefore, and for the above reasons, the appeal is dismissed.

72. A footnote: although this appeal was not successful, we record our thanks to Dr Turi, a Hungarian advocate, who addressed us, through an interpreter, on behalf of the Appellant. It is very unusual for a foreign lawyer to appear before the Tribunal, especially a lawyer from a civilian system. We are grateful to him for his courteous and well-focussed submissions.

73. 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.

Dr Christopher McNall

TRIBUNAL JUDGE
RELEASE DATE: 4 MAY 2017