TC01277

Appeal number: TC/2010/06624

Appeal against decision not to restore alcohol and vehicle – goods for commercial purpose – duty not prepaid – whether decision not to restore reasonable – appeal dismissed

FIRST-TIER TRIBUNAL

TAX

TUDOR WINES & SPIRITS LIMITED **Appellant**

- and -

THE DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: J. Blewitt (Judge)
T. Bayliss (Member)

Sitting in public at Birmingham on 8 June 2011

Mr. J. Vaghela for the Appellant

Miss D. Riley, Counsel instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. By Notice of Appeal dated 14 August 2010 the Appellant, through his agent Mr Vaghela of Vaghela & Co (Services) Ltd, appealed against the decision of the Respondents ("UKBA") dated 29 June 2010 not to restore alcohol and a vehicle seized from the Appellant on 30 March 2010.

Undisputed background facts

2. Mr S. Hothi, the Company Secretary of the Appellant Company was intercepted by an officer of the UKBA at Dover Eastern Docks on 30 March 2010. He was found to be carrying in a Mercedes Sprinter van:

(a) 1,899.6 litres of beer attracting unpaid excise duty in the sum of £1,886.47, and

(b) 297 litres of wine attracting unpaid excise duty in the sum of £635.64.

3. Mr Hothi was interviewed by an officer of the UKBA during which he provided a Duty Deferment document and receipt for the goods which had been purchased in Calais. In interview, Mr Hothi explained that he had also brought excise goods back to the UK in June 2009 but had not, on that occasion, been intercepted. Mr Hothi stated that he intended that some of the goods would be sold at the off-licence which is the Appellant Company in this Appeal.

4. The officer was satisfied that the excise goods were held for a commercial purpose and that Mr Hothi did not have the correct authorisation documents for the proper removal of excise goods into the UK. Consequently the goods were seized under section 139 (1) CEMA 19798 as being liable to forfeiture by virtue of both Regulation 16 of the REDS regulations, section 49 (1) (a) (i) CEMA 1979 and regulation 24 of the Excise Goods (Accompanying Documents) Regulations 2002. The vehicle was also seized under section 139 (1) CEMA 1979 as being liable to forfeiture under section 141 (1) (a) of the same Act, as it had been used for the carriage of goods liable to forfeiture.

5. By letter dated 6 April 2010, the Appellant's agent withdrew the Appellant's appeal to the Magistrates' Court, but sought restoration of the goods and the vehicle. The grounds relied upon were:

(a) The Appellant Company is a genuine VAT registered trader operating as an off-licence;

(b) The Appellant had no intention of avoiding the payment of duty on the goods purchased. It was a case of ignorance of the law and excise duty procedures as opposed to an attempt to smuggle alcohol;

(c) The non-payment of duty prior to importation was a genuine error due to the unawareness of the requirement to prepay the excise duty before bringing the alcohol into the UK;

(d) This is the first offence by the Appellant Company and leniency should be shown, as contrary to other fraudsters who have no intention to pay any duty or taxes.

(e) Documents were provided in support of restoration, including the supplier's sale invoice, DVLA registration document, valid certificate of insurance and valid MOT.

6. By letter dated 12 May 2010, the UKBA notified the Appellant of its decision to refuse restoration of the goods and the vehicle.

7. By letter dated 18 May 2010, the Appellant's agent requested a review of the decision dated 12 May 2010. The grounds relied upon were:

(a) The grounds stated in the letter of 6 April 2010 as summarised at paragraph 5 of this Decision;

(b) The seized goods were small in quantity and cost £2,607.00 (excluding VAT), bought from a genuine EU trader with VAT in the sum of £510.98 and this was the Appellant Company's first occurrence which was a result of ignorance of the law regarding prepayment of VAT. The Appellant's agent queried whether there was an issue as to double taxation as excise duty had already been paid in France;

(c) This is not a case where a fraudster would be attempting to smuggle £100,000s worth of alcohol into the UK without any intention to pay VAT, taxes etc as the Appellant is a genuine trader with no such intentions;

(d) The Appellant is prepared to pay the excise duty due on the goods seized whereby no loss of revenue would occur. The Duty Deferment document proves that there was no intention to avoid payment of duty;

(e) The only mistake was not to prepay the duty due to ignorance of law and procedure. "To err is human" and "to forgive is divine". This was the first occurrence;

(f) The vehicle seized was a commercial vehicle as opposed to a private vehicle attempting to smuggle goods. A minimum request is made for restoration of the vehicle;

(g) Unless the review is favourable, the Company will collapse and jeopardise its creditors', employees' and Director's livelihoods.

8. By letter dated 26 May 2010, an officer of the UKBA wrote to the Appellant's agent inviting any further information in support of the request for a review. No further information was provided by the Appellant or his agent.

9. By letter dated 29 June 2010, the Review Decision of Mr Raydon, Customs Review Officer for UK Border Force, was sent to the Appellant's agent, confirming that the goods and vehicle would not be restored.

The Appeal

10. The Notice of Appeal dated 14 August 2010 contended that the decision not to restore the goods and vehicle was wrong for the following reasons:

> (a) The Appellant had no intention to avoid paying excise duty as it has been a genuine VAT registered trader in the UK for some time. The trader is a one man band and not fully aware of the stringent importation rules and regulations. It is a case of ignorance of the law rather than avoidance of payment of duty;
>
> (b) The Appellant is willing to pay the duty owed for the restoration of the alcohol seized. It may also be the case that excise duty was already paid in France;
>
> (c) The confiscation and threatened disposal of the vehicle is causing hardship and possible cessation of the trader's activities and thus jeopardise the livelihoods of its employees and Director;
>
> (d) The amount of alcohol is under £3,000, which is hardly a case of someone attempting to import £100,000s worth of alcohol into the UK with no intention to pay VAT, taxes etc;
>
> (e) This is the first time the Appellant has been involved in such an incident and the law should give the Appellant the benefit of doubt and be lenient;
>
> (f) The Appellant contends that the alcohol and vehicle should be restored on payment of the excise duty not prepaid before importation.

Evidence

11. We heard evidence from Mr S. Hothi, the driver of the vehicle seized and Company Secretary of the Appellant Company.

12. Mr Hothi explained that the main suppliers for the Appellant Company were cash and carry warehouses in the UK. Mr Hothi stated that he had decided to go abroad in 2009 in order to familiarise himself with the price of alcohol which could be purchased in France and research the possibility of importing alcohol. Mr Hothi stated that on that occasion he had imported the guideline amount for personal use and that the goods imported were not sold in the off-licence.

13. Mr Hothi stated that he decided to go to France again in March 2010 as he had been told that the price of alcohol was good and a specific warehouse had been recommended to him. Mr Hothi stated that on arrival he did not find the prices to be as he had hoped, but he nevertheless purchased beer and wine. Mr Hothi stated that he had not informed his father, the Appellant Company Director, of his intention to purchase alcohol in France as his father was abroad at the time. Mr Hothi stated that his father was in the process of obtaining advice from their accountant Mr Vaghela, as he was considering trading in the wholesale of alcohol and that was the reason for obtaining the Deferment Document.

14. Mr Hothi stated that when he was intercepted by UKBA officers, he believed he had the correct paperwork to import the goods purchased in France but was made aware by the officers that the duty must be prepaid.

15. Mr Hothi stated that since the seizure the Appellant Company has ceased trading as the vehicle was essential to the purchase goods from UK warehouses. Mr Hothi agreed that UKBA officers had visited the Appellant's premises in March 2010, prior to his trip abroad, when goods were detained, a number of which were subsequently seized as invoices could not be provided.

16. Mr Hothi contended that he had made a genuine mistake due to his ignorance of the law and that had he known that the duty must be prepaid, he would have asked his accountant Mr Vaghela to make the necessary arrangements.

17. In cross examination, Mr Hothi stated that he agreed the notebook account of the interviewing officer who had intercepted him on 30 March 2010 as accurate, although he subsequently stated that he disputed that he had stated that he had imported 2 pallets in 2009. Mr Hothi stated that he had not signed the notebook due to feeling pressured during the interview, but that it was, in the main, an accurate account.

18. Mr Hothi agreed that the purpose of his trip on 30 March 2010 was to import alcohol for a commercial purpose and that he had taken the deferment document as he believed he was following the correct procedure, which was an impression he had formed from speaking to his father and Mr Vaghela in 2009. Mr Hothi stated he was led to believe that once the goods were sold by the Appellant Company, he was required to provide the receipts to his accountant who would arrange for the duty to be paid. Mr Hothi accepted that his understanding was incorrect, that he did not have the documents required for the importation of the goods and that the duty must be prepaid.

19. Mr Hothi accepted that no evidence had been provided in support of the assertion that the seizure of the goods and vehicle had caused financial difficulties to the Appellant. He stated that the Company ceased trading following the seizure and that he had left it to his accountant to inform the UKBA.

20. We also heard oral evidence from Mr Raydon, the Review Officer who explained that the Deferment Document did not allow the Appellant to import goods without payment of duty as the UKBA would not be aware of the fact that goods had been imported unless the importer was intercepted. Mr Raydon explained that the only option available to the Appellant would have been to obtain an Occasional Importer Licence, where the duty is prepaid and documents authorising the importation are provided. Mr Raydon stated that the reason for such stringent procedures being in place is as a result of the system for importing goods being manipulated by the use of VAT documents and Deferment Documents without payment of excise duty.

21. Mr Raydon referred us to his detailed Review Decision dated 29 June 2010 and took us through the reasons for his decision not to restore either the alcohol or the vehicle seized on 30 March 2010.

22. In respect of the goods, Mr Raydon explained that it was agreed by the Appellant that this was a commercial consignment. As a result of Mr Hothi not paying the excise duty prior to importation, or obtaining the correct authorising documents, the goods were liable to forfeiture.

23. In respect of the vehicle, Mr Raydon stated that he had considered if any steps had been taken by Mr Hothi to follow the correct procedure. Mr Raydon noted that the Appellant had an accountant, to whom Mr Hothi had spoken about the possibility of importing goods for sale in the off-licence, and Mr Raydon took the view that the Appellant's accountant and Mr Hothi should have been aware of the procedures to follow. Mr Raydon also took into account that Mr Hothi had been abroad the previous year in order to purchase goods and consequently concluded that Mr Hothi should have been aware of the rules and regulations governing importations. Mr Raydon stated that in such circumstances, the general policy of UKBA is not to restore the goods.

24. Mr Raydon stated that he found it significant that only 3 weeks prior to the Appellant's trip to France, UKBA records showed that officers had detained goods from the Appellant's premises as they were not satisfied that duty had been paid. Mr Raydon confirmed that a quantity of the goods detained were subsequently seized and that no challenge was raised by the Appellant to the seizure.

25. Mr Raydon stated that having considered these factors, he concluded that the Appellant must have known of the correct procedures to follow and therefore the goods were correctly seized. Mr Raydon considered the various grounds of appeal in support of the Appellant's application for restoration, but concluded that to make such a mistake, as contended on behalf of the Appellant, so soon after goods had been seized was either careless or deliberate, and in such circumstances to restore the goods would, in the Officer's view, encourage smuggling. The Officer also concluded that this was not a "first occurrence" as submitted by the Appellant's agent, as goods had been imported in June 2009.

26. The Officer went on to consider the issue of proportionality in order to assess whether there should be a deviation from the policy not to restore the goods/vehicle. Mr Raydon compared the value of the vehicle, estimated as £1,525, as against the unpaid excise duty in excess of £2,500 and concluded that non-restoration of the vehicle was proportionate.

27. Mr Raydon also considered the issue of hardship raised on behalf of the Appellant. At the time of making his decision, there was no evidence in support of the Appellant's contention that the non-restoration would cause financial difficulties. Mr Raydon accepted that no doubt a degree of hardship would be caused by the loss of the vehicle and the potential expense of its replacement/other transport arrangements. Mr Raydon concluded that the Appellant had chosen to become involved in a smuggling attempt and that the consequences in terms of hardship caused were not exceptional so as to justify deviating from policy. Mr Raydon invited the Appellant to provide any fresh information in support of his case which had not formed part of the Review.

28. In cross examination, Mr Raydon confirmed that he found that Mr Hothi, as driver of the vehicle and Company Secretary, was the haulier responsible for the importation and that no reasonable checks had been made by Mr Hothi to ensure that the correct procedures were followed. Mr Raydon explained that taken together with the trip in 2009 and the seizure of goods from the Appellant's premises on 9 March 2010 he remained of the view that the goods and vehicle should not be restored. Mr Raydon stated that despite the oral evidence of Mr Hothi that the Appellant had ceased trading, there was no evidence in support of this information or to corroborate the contention that it was as a direct result of non-restoration in this case that trading had ceased.

29. Mr Raydon confirmed that at the time of conducting his Review, he had full information before him regarding the seizure of goods on 9 March 2010. Mr Raydon agreed that this information, and that pertaining to Mr Hothi's trip in 2009, had formed part of his decision and that he had treated both factors as aggravating features.

Submissions

30. It was submitted by Miss Riley on behalf of UKBA that ignorance is no defence; the goods were imported for a commercial purpose and therefore correctly seized and deemed as forfeit.

31. Miss Riley invited us to take into consideration the fact that the Appellant had been involved in running a commercial business for approximately 18 months and had the advice and assistance of his accountant in doing so. Miss Riley noted that Mr Hothi had spoken to his accountant prior to his first trip abroad in 2009 and whether or not goods were imported commercially on that occasion, there had been discussions between the Appellant and Mr Vaghela about commercial importation. Consequently, Miss Riley submitted, the Appellant either must have been aware or should have been aware of the correct procedures to follow and the fact that the Appellant believed he only needed a Deferment Document was an indication of the lack of checks made by the Appellant to ensure he complied with legislative procedures.

32. Miss Riley submitted that the note of interview when Mr Hothi was intercepted was accurate and that Mr Hothi's evidence had changed during the hearing when he subsequently disputed the amount he had told the officer he had imported in June 2009. Miss Riley contended that the Review Decision must take account of evidence and information available at the time of the decision, and that the Appellant had never previously challenged the note of interview.

33. Miss Riley submitted that there was no evidence of hardship available to Mr Raydon when he undertook his review, that the issue of proportionality had been considered and that Mr Raydon's conclusion was reasonable. Miss Riley contended that there were factors present which Mr Raydon was entitled to treat as aggravating, such as Mr Hothi's trip abroad in 2009 and the seizure of goods from the Appellant's premises on 9 March 2010. It was also submitted that although the Appellant may

have been entitled to recover any duty paid in France, this was reliant on the Appellant following correct importation procedures and therefore did not render the decision not to restore the goods and vehicle unreasonable.

34. On behalf of the Appellant, Mr Vaghela accepted that the Appellant was importing the goods for a commercial purpose and that ignorance of the law is no excuse.

35. Mr Vaghela submitted that he was unaware of Mr Hothi's trip in March 2010 otherwise he would have reiterated the correct advice as to procedures to follow to his client. Mr Vaghela submitted that the seizure of the goods and vehicle on 30 March 2010 had contributed to the collapse of the Appellant Company and that as Mr Raydon had confirmed that his decision would not have changed, it was irrelevant whether or not this information was given to UKBA.

36. Mr Vaghela submitted that that Mr Raydon had taken into account irrelevant matters, namely Mr Hothi's trip abroad in 2009 and the seizure of goods from the Appellant's premises on 9 March 2010. Mr Vaghela contended that, as a result the decision not to restore the goods and vehicle was unreasonable and invited us to treat the appeal with leniency.

37. In response to a query from Mr Bayliss regarding the Notice of Appeal which refers to "the confiscation…is causing hardship and possible cessation of the trader's activities…" Mr Vaghela explained that at the time of lodging the appeal notice on 14 August 2010, he was unaware that the Appellant had ceased trading.

Decision

38. The issue for us to determine was whether Mr Raydon's decision on review not to restore the goods or vehicle to the Appellant was reasonable and whether Mr Raydon had considered all relevant matters and disregarded all irrelevant considerations in reaching his decision.

39. In reaching our decision we took into account the grounds of appeal relied on by the Appellant and all of the evidence, both written and oral, before us.

40. It was not in dispute that the Appellant was a VAT registered trader and that the goods seized on 30 March 2010 had been imported for commercial purposes, namely to be sold by the Appellant.

41. We found the submission that Mr Hothi was unaware of the rules governing the commercial importation of goods did not amount to an excuse and had properly been treated by Mr Raydon as a factor which did not justify restoration of the goods or vehicle given that Mr Hothi had the benefit of an accountant with whom he had discussed the possibility of purchasing alcohol abroad, and consequently he either was or should have been aware of the documents required and procedure to be followed. We found that Mr Hothi's evidence that he had gone to France in 2009 to research the prices of alcohol was a relevant consideration, irrespective of the amount of alcohol purchased on that occasion, in assessing the steps which he had taken to ensure

compliance with legislation. We found that the trip in 2009 and the seizure of goods from the Appellant's premises on 9 March 2010 were factors properly taken into account by Mr Raydon and correctly treated as aggravating features, being indicative of a previous occasions involving the importation or non-payment of duty on alcohol which at the very least ought to have put Mr Hothi on notice that there was a stringent regime to be followed. We found that the Officer's conclusion that the seizure on 30 March 2010 should not be treated as the first incident was reasonable and that in assessing the Appellant (through its Company Secretary Mr Hothi) as responsible for the smuggling attempt, we concluded that Mr Raydon's decision not to deviate from UKBA's restoration policy was reasonable.

42. We accepted the submission by Miss Riley that the tax paid on the goods in France may have been recoverable by the Appellant but that this does not affect the issue of restoration. We found that Mr Raydon had taken the correct approach in considering whether the Appellant made any checks to ensure he was complying with the correct procedure and that the responsibility ultimately rested with the Appellant.

43. We found that the Officer had properly addressed the issue of proportionality and that his conclusion (that not to restore the goods and vehicle was proportionate) was reasonable. We considered the submission on behalf of the Appellant that the value of the alcohol seized was relatively small. We found that Mr Raydon had correctly taken into account the value of the goods and vehicle in considering whether his decision not to restore the goods was proportionate and we did not accept the submission that smuggled goods must be of a high value or that a small value of seized goods justified restoration more than a high value.

44. We accepted that Mr Raydon had considered whether any exceptional hardship existed in this case. No evidence of any hardship was put before Mr Raydon, despite invitations to the Appellant on a number of occasions to provide any fresh evidence in support of restoration. We noted that the review decision itself made clear that further consideration would be given to restoration if fresh evidence was produced, yet at no time between cessation of trade in the summer of 2010 and the hearing was any information provided to Mr Raydon that the Appellant had ceased trading or that the cause of cessation was a result of seizure of the goods and vehicle. We noted that no evidence was provided at the hearing in support of Mr Hothi's assertions and we found that the reference made in the Notice of Appeal to "possible cessation" when, on Mr Hothi's evidence the Appellant had ceased trading prior to the Appeal Notice being lodged, caused us to question the reliability of the evidence. We found that Mr Raydon's decision that there was no evidence of any *exceptional* hardship such as could lead him to conclude that the good or vehicle should be restored was entirely reasonable and on the information available both at the time of the review decision and the hearing we could not see how any different conclusion could be reached.

45. In conclusion, we found that Mr Raydon had taken into account all relevant factors and disregarded all irrelevant matters in reaching his decision on review. We found that the decision not to restore the goods or vehicle was both reasonable and proportionate and that there was no evidence of any exceptional circumstances existing in this case.

46. The appeal is dismissed.

47. 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.

TRIBUNAL JUDGE
RELEASE DATE: 29 June 2011