



**TC02416**

**Appeal number: TC/2011/02958**

*TYPE OF TAX – Excise Duty – Restoration of car on payment of a fee –  
whether reversible and proportionate – Yes - Appeal Dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**DOMATIC MARCIN MEDWID**

**Appellant**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY'S  
REVENUE & CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE DR K KHAN  
SUSAN HEWETT OBE**

**Sitting in public on 16 November 2012**

**The Appellant was not represented and did not appear**

**David Sawtell instructed by the General Counsel and Solicitor to HM Revenue  
and Customs, for the Respondents**

## DECISION

### Introduction

5 1. The Appellant, appeals against a Review Decision by Mr David Harris, Customs Review Officer, UK Border Force. The Decision is contained in a letter dated 15 February 2011. The letter confirmed a previous decision to offer to restore an Audi motor car Registration X718 YCK (“the vehicle”), for a fee of £1,200 which had been used to import goods, namely 8,440 cigarettes which were seized by the Respondents on 8 September 2010.

2. We heard evidence from Mr David Harris. A bundle of documents was produced as evidence which included various correspondences, some of which were translated from Polish. The Appellant is Polish and lives in that country.

### Background facts

15 3. The facts are not in dispute and we find them to be as follows:

4. On 8 September 2010 Mr Piotr Kaminski was stopped while driving the vehicle at Dover Eastern Docks. His passengers were Mr Pavel Kaminski and Mr Eugeniusz Kaminski.

5. Mr Medwid had purchased the vehicle some 9 days before it was intercepted. The registered keeper was Mr MJ Knight.

6. UKBA officers were shown a P&O ticket showing entry at 9.25 and scheduled departure from the UK at 17.30. Further checks revealed that the vehicle had travelled to the UK on 2 August at 00.55 and returned to France at 07.30 the same day. The vehicle came back to the UK at 12.25 on 2 August, returning once more to France at 19.45. There were several trips made on that day.

7. On 8 September, Mr P Kaminski was asked whether the group had any tobacco or cigarettes and he replied “15 packets of cigarettes”. When the vehicle was searched a total of 8,440 cigarettes were found to have been concealed in cavities within the passenger door, tailgate and beneath the boot lining and rear seat. On interview, Mr P Kaminski said that the goods were owned by all three people in the car and when asked why they were concealed, he said, “so the Germans couldn’t find them”.

8. The officer was satisfied the goods were held for a commercial purpose and were seized under Section 139(1) Customs & Excise Management Act 1979. (“CEMA”).

9. There was no challenge by the Appellant or the passengers in the car to the legality of seizure by way of condemnation proceedings within the statutory time limit. The goods were therefore condemned under Paragraph 5, Schedule 3 of CEMA.

## Relevant Correspondence

10. On 19 October 2010, the Appellant wrote to UKBA challenging the legality of the seizure. The letter was outside of the statutory time limit. Since the goods had been condemned by passage of time, the letter was treated as a request for restoration.

5 11. On 9 November 2010, the Respondents sent the Appellant a Questionnaire concerning the vehicle and the circumstances surrounding its' loan to another. The questionnaire asked 19 questions which mainly concerned the vehicle and the goods. The completed questionnaire was returned to the Respondents on 19 November.

10 12. On 9 December, the Respondents issued a letter to the Appellants refusing the Appellant's restoration request.

13. On 27 December 2010 the Appellant requested a review of the non restoration decision. The review letter dated 15 February 2011 made an offer to restore the vehicle upon payment of a fee of £1,200.

15 14. On 3 March 2011 the Appellant wrote to the Respondents making various representations including that there had been no attempt to conceal the cigarettes and stating that the reason the vehicle was loaned to the Kaminski brothers was "to purchase vehicles and trailers at low prices in England", as part of a business dealing in used cars.

## Questionnaire

20 15. The Appellant's answers to the Questionnaire are relevant. It is relevant to this Appeal to look at the answers given by the Appellant to the questionnaire in November 2010.

(1) Question 4 – How long was the vehicle borrowed for?

25 Answer "We did not decide that. But I reckoned with the fact that they can return only at Christmas or even later, it all depended for how to develop trade in vehicles and trailers in the future. We plan to also open a workshop in England and fix broken cars"

(2) Question – Have you lent the vehicle to anyone before? If so to whom and for what reason?

30 Answer (in summary) I could not lend the car to anyone, we have a car rental business and we have a few other cars including a bus and a little truck.

(3) Question – Have any of the Kaminski Brothers borrowed the vehicle before?

35 Answer – "I do not remember but it seems to me that yes – Paul had once lent me for about 5 hours his car (the Audi)".

(4) Question 8 – Why did you say they needed the vehicle?

Answer – “Paul crashed his car some time ago. But it was mainly about the fact that it would be easier to move them in England by car with driving on the right side”.

(5) Question 11 – Did you know the vehicle was to be taken abroad?

5 Answer – “Yes”

(6) Question 12 – Did you make any financial arrangements with the Kaminski brothers for the use of the vehicle?

Answer “Nothing concrete on the basis of friendly relations”

10 (7) Question 14 – What period did you agree to lend the vehicle to the Kaminski brothers?

15 Answer (In summary) – Specific dates were not decided and the car was lent for as long as they required it. I demanded the return of the car because he didn’t take three caravans that I bought on eBay and did not go to see Mazda MX5 which I was going to buy. He didn’t send me any suggestions of cars which he found and contact with me was avoided. Only recently did he tell me about everything.

16. It should be noted that the original decision of UKBA was not to restore the car, on review the original decision changed to restoration for a fee. The issue is whether there should be restoration with or without a fee.

## 20 **The Law**

17. Section 49 (1 CEMA) provides that goods which are imported without payment of duty are liable to forfeiture.

25 18. Section 141(1 CEMA) provides that, where a thing has become liable to forfeiture, then (a) any vehicle used for the carriage, handling, deposit or concealment of that thing, and (b) any other thing mixed, packed or found with that thing is also liable to forfeiture.

19. Section 139 (1) of CEMA) provides that anything liable to forfeiture may be seized by HMRC officers.

20. Section 152 of CEMA establishes that;

30 “the Commissioners may, as they see fit - ....

(b) restore subject to such conditions (if any) as they think proper, anything forfeited or seized under the Customs & Excise Acts”.

35 21. Section 16 Finance Act 1994 (“FA 1994”) provides that an appeal should lie to the Tribunal against a decision on review under Section 15 FA 1994. Section 15 provides for the review of decisions which come within Section 14 FA 1994.

22. Section 14(1) (d) includes any decision specified in the schedule 5 FA 1994. Paragraph 2(1) (r) of Schedule 5 specifies any decision under section 152 (b) CEMA “as to whether or not anything forfeited or seized under the Customs & Excise Acts is to be restored to any person or as to the conditions subject to which any such thing is so restored”.

23. This means that Section 152 (b) gives the Commissioners discretion as to whether or not to restore seized vehicles or goods; Section 14 to 16 FA 1994 gives a right of appeal to the Tribunal against a refusal to restore or the conditions of restoration.

24. Section 16 FA 1994 limits the jurisdiction of the Tribunal in respect of ancillary matters. Section 16(4) provides

“(4) 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 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 from such time as the tribunal may direct;

(b) to require Commissioners to conduct, in accordance with the directions of the tribunal, a further review of 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 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.

25. The pre-conditions for the Tribunal is exercise of one or more of its three powers, that the person making a decision could reasonably have arrived at it, requires the Tribunal to look carefully at the decision and consider whether a reasonable panel of Commissioners could have made that decision and whether they considered any irrelevant matter or disregarded something which they should have given weight or considered.

26. The Tribunal should consider matters such as blameworthiness and proportionality of the penalty imposed having regard to the individual circumstances of the case. The Tribunal would therefore make a determination as to the reasonableness of the Respondents’ decision in refusing restoration or adding conditions to any restoration. It is accepted that the Tribunal does not have jurisdiction to deal with matters of seizure, which fall to be dealt with in a Magistrates Court.

### **Appellant's Submissions**

27. The Appellant's submissions are summarised from their Notice of Appeal which is dated 14 March 2011. The following points are made

- (1) The confiscation should not take place.
  - 5 (2) The Kaminski brothers borrowed the car and the transporting of cigarettes did not exceed the indicative level for the average smoker (3,200 cigarettes)
  - (3) The car belonged to Mr Medwid and he was not present, participated or had knowledge that it was being used for the transport of cigarettes.
  - 10 (4) In reply to the observation that he took no reasonable action to prevent the use of the vehicle being used for smuggling he stated "I do not smoke, do not buy or sell cigarettes, and I do not know the difference between the prices of cigarettes.... The Kaminski's were friends of mine and I trusted them".
28. He confirmed that he is the owner of the car and as owner he was not informed of the seizure of the vehicle.
- 15 29. The Kaminski brothers were travelling to England to source cars for Mr Medwid's car business in Poland; he lent the car for this purpose.
30. The confiscation was wrong and unjust.

### **Submissions of the Respondents**

- 20 31. The Respondents have a stated policy in relation to restoration requests made by third parties who are not present at the time of the seizure. The third party must show that they were both innocent of and blameless for the smuggling attempt and in such case consideration would be given to restoration of the vehicle for a fee. It is required that the party be innocent and blameless and that they took reasonable steps to prevent smuggling in the vehicle. In such case restoration would be given free of charge.
- 25 32. Based on the Appellant's answers to the Respondents' questionnaire, the Respondents concluded that the Appellant had taken no reasonable steps to prevent the vehicle being used for smuggling by those to whom the vehicle was lent. The Appellant placed no restrictions on the use of the car. The vehicle appeared to have been lent for an indeterminate period.
- 30 33. The Decision not to restore the vehicle without payment of a fee to the Appellant is in line with the Respondents' publically stated policy and is a reasonable and proportionate exercise of their discretion.
- 35 34. The goods have been lawfully seized and condemned as not having being imported for own use. The amounts of tobacco products imported were above the guideline levels specified in the excised goods, and Tobacco Products (Amendment Regulation 2002).

35. The Respondents' decision to restore on payment of a fee is reasonable and proportionate in the circumstances and in line with stated policy with respect to seizure and restoration.

5 36. The Appellant has been treated no more harshly or leniently than anyone else in that position.

### **Discussion**

10 37. The Review Officer changed the original decision from not to restore to restoration with a fee. The fee was £1,200 which was less than the Glass's Guide trade price for the confiscated vehicle. The price given in the Guide was £4,000. It is also less than the Duty evaded which was £1,643.

38. In looking at the reasonableness of the decision, the Tribunal would look in particular at the blameworthiness of the Appellant and what reasonable steps were taken to prevent smuggling.

15 39. The vehicle was used for business purposes. The Appellant and the Kaminski brothers were in an informal business relationship which involved the sale, rental and repair of used cars. The Appellant owns several other vehicles. It was clearly purchased for the purpose of the business being conducted.

20 40. It appears that the Appellant had placed very little conditions on the use of the car. He knew the vehicle was been taken abroad and that it was entering and leaving the United Kingdom on the same day. When the car was seized, he did not find out about the seizure for over one month. It appears that he had placed no control on the use of the car and he was vague about the time given for using the car. He said the arrangement was just a "friendly arrangement" and there were no real restrictions on the use. It seems that the Appellant had given carte blanche to the borrowers to use  
25 the car as they wished. It was not the sort of situation where a person's car had broken down and a friend or relative offered the loan of a car to be used while the car was being repaired. It was a business relationship. There was nothing in the answers given on the Questionnaire to suggest that the Appellant had control over the car either before or after it was taken abroad.

30 41. In his oral evidence Mr David Harris, Review Officer, said that the Appellant may have been innocent but it was his view that no reasonable steps were taken to prevent smuggling. He would have expected that the purpose for lending the car would have been explained such that the Kaminski brothers would have known that taking out door panels and other parts of the car to fit contraband goods was not  
35 allowed. While the parties knew each other there was a business relationship between them. The car had been purchased some nine days before. It is reasonable to have expected the Appellant to find it unusual that the car had not been returned after one month when he knew that a day trip had been arranged. In reply to the question as to whether any financial arrangements had been made with the Kaminski brothers for the use of the car, the Appellant stated there was "nothing concrete". When asked in the  
40 questionnaire as to where the car was kept he said "nowhere".

42. The answers lead the Tribunal to the conclusion that though there was a lack of complicity on the part of the Appellant in the smuggling it cannot be said that he was entirely blameless because he had taken no reasonable steps over the control and use of the car, and therefore no steps to prevent the smuggling. He knew that they were travelling to London; though he did not know they were intending to smuggle cigarettes into the country. He authorised the use of the car but had no control over the use of the car for over one month. He did not know where the car was parked, where the keys were kept or indeed who was using the car at any given time. He simply had taken no responsibility for the use of the vehicle and was reckless with regard to how it was being used or having any control as to when it would be returned to him. The Tribunal concludes that the behaviour of the Appellant was not reasonable in the circumstances.

43. There is a second issue which must be addressed. That is the question of proportionality. Is it reasonable that the vehicle would be returned on payment of a fee or is it reasonable that it would be returned without the payment of the fee? In the Tribunal's view, it is proportionate that it be returned only on payment of a fee given the fact that the Appellant is not entirely blameless.

44. As Officer Harris explained, the Appellant falls in the middle ground of not being entirely blameless and not being entirely complicit. In taking this into account he has effectively reduced the excise duty charged to £1,200 instead of £1,643 and has not asked that the full Glass's Guide price of £4,000 be paid for the return of the car. He has accepted the invoice provided by the Appellant stating that the car was purchased for £1,500 and has added an amount for depreciation of the car. The figure of £1,200 in the circumstances is fair and reasonable and proportionate. The offer of restoration with payment of a fee accords with the policy of the Commissioners in cases of this type where the Appellant is not entirely blameless.

### **Conclusion**

45. The Appeal is therefore dismissed. The Tribunal concludes that the decision of the Review officer is reasonable and proportionate and that all relevant factors have been considered. The Appellant can have restoration of his vehicle but on payment of a fee. He may well seek to have that fee paid by the parties who were involved in the smuggling of the cigarettes.

46. 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 K KHAN  
TRIBUNAL JUDGE**

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**RELEASE DATE: 11 December 2012**