



TC03000

Appeal number: TC/2012/04748

Excise Duty – Seizure and forfeiture of vehicle under Section 141 CEMA 1979 given its use in the carriage of non-duty paid alcohol - appeal against vestation subject to condition(s) – Appeal dismissed

**FIRST-TIER TRIBUNAL
EXCISE DUTY**

PAUL SHERIDAN

Appellant

- and -

THE DIRECTOR OF BORDER REVENUE

Respondent

**TRIBUNAL: JUDGE IAN W. HUDDLESTON
MS CELINE CORRIGAN**

Sitting in public at Bedford House, Bedford Street, Belfast on 22 February 2013

The Appellant appeared in person

Yvonne Mullan BL instructed by General Counsel and Solicitor to H M Revenue & Customs for the Respondents

DECISION

Appeal

5 1. The decision under appeal is the Respondent's review decision, as contained in a
letter dated 8th March 2012 in which they notified DWF LLP, as the then
representatives of Mr Paul Sheridan (the "Appellant"), that after conducting a review
they would only restore a Volvo tractor unit (the "cab") registration number 03LH500
and tri-axle curtain side trailer (the "tractor"), registration number TL15 (the cab and
10 trailer collectively described hereafter as "the vehicle") as seized on the 20th October
2011 on the payment of a restoration fee of £17,525.

Facts

2. The Appellant was stopped on the 13th October 2012 at Dover Eastern Docks by
officers of UKBA whilst driving the vehicle. The vehicle was carrying a load which
15 had been manifested as "foodstuffs" yet documented as beer. On an examination of
the travel documentation, it showed that the load was consigned from Les Vins du
Tunnel, 1384, Route de Saint – Omer, 62100 Calais, France and was en route to Safe
Cellars, Orne Mil/Majestic, Greenacres Road, Oldham, OL4 3NT,. The load in
question was covered by an ARC document dated 10th October 2011.

20 3. On examination the UKBA officers discovered 23,885.28 litres of beer attracting
unpaid excise duty of £23,508.81.

4. Initially the Appellant agreed to a voluntary interview but at that interview
refused to answer the questions put to him. At the conclusion of the interview, the
officer detained the goods and the vehicle for further investigation.

25 5. That investigation showed that the ARC documentation was dated 10th October
(timed at 15.33) yet on the current trip the ARC was 3 days old. Records also showed
that the Appellant had travelled inbound to the UK on the 11th October 2011 at 07.45
in the same cab but with a different trailer (trailer reference WB4) but again with a
load manifested as "foodstuffs". This movement was within the timeframe of the
30 ARC which was intercepted on the 13th October 2011 at 02.03. The trailer, as then
stopped was marked TL15 by means of a trailer plate stuck to the trailer bulkhead
with tape and was believed by HMRC to have been an attempt to match the trailer
number with the paperwork. HMRC suspected that the Appellant had mismanifested
the intercepted trailer.

35 6. At the conclusion of the investigation, the Officer was satisfied that the beer was
being transported for a commercial purpose but that none of the proper methods of
transporting excise goods to the UK had been used and therefore seized the goods
under Section 139 of the Customs and Excise Management Act 1979 ("CEMA") as
being liable to forfeiture under Section 49 (1)(a) of that Act and Regulation 88 of the
40 Excise Goods (Holding, Movement and Duty Point) Regulations 2010. In a similar
vein, the vehicle (encompassing the cab and trailer unit), was also seized under

Section 139 CEMA as being liable to forfeiture under Section 141 (1)(a) because they had been used for the "carriage, handling, deposit or concealment of the goods which were liable to forfeiture". The Appellant was provided with form ENF156 ("Seizure Information Notice") and Customs Notice 12(A) ("Goods and or Vehicles seized by Customs") explaining the procedure by which someone can challenge the legality of a seizure through the Magistrates Court by submitting a notice of appeal within 1 month of the date of seizure. No such challenge was lodged in respect of either the goods or the vehicle and accordingly by the passage of time, both were condemned as forfeit to the Crown by virtue of paragraph 5 of Schedule 3 of CEMA.

10 *Correspondence*

7. In a letter dated 24th November 2011, the Appellant's representatives wrote to the Respondents asking for the cab unit and trailer to be restored and submitted information (such as proof of ownership etc) in support of that application. On the 19th December 2011, the Respondents replied offering restoration of the vehicle subject to the payment of a fee of £17,525. By a letter dated the 20th January 2012, the Appellant's representatives requested a review of that decision. The circumstances were, therefore, subsequently reviewed by the review officer, Mr Raymond Brenton. Mr Brenton appeared before the Tribunal to give evidence. On the 8th March 2012, he wrote to the Appellant's representatives confirming that having conducted a review, he upheld the original decision and would recommend restoration of the vehicle on payment of a fee of £17,525. The Appellant appealed to the Tribunal by virtue of a Notice of Appeal dated 30th March 2012 seeking "restoration of the vehicle 03LH500 and the trailer TL15...free of charge or acceptance that Appellant was not "knowingly involved".

25 *The Legislation*

8. Section 36 of the Alcoholic Liquors Duty Act 1979 encapsulates the statutory power for the levy of excise duty on beer being imported into the United Kingdom. Regulations 13 and 88 of the Excise Goods (Holding Movement and Duty Point) Regulations 2010 provide for the duty point at which that excise duty becomes leviable and makes certain provisions for "own use" exceptions for private individuals.

9. Section 88 of the Alcoholic Liquors Duty Act 1979 provides that goods, which are subject to excise duty which has not been paid, are liable to forfeiture.

10. Section 49 (1)(a) of CEMA, also, provides that where goods are imported without payment of duty then those goods are liable to forfeiture and Section 139 (1) of CEMA provides that they may be detained.

11. Section 141 (1) of CEMA provides that "*where anything has become liable to forfeiture under the Custom and Excise Acts...any...vehicle...which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture...shall also be liable to forfeiture*".

12. Section 152 of CEMA establishes that "*the Commissioners may...restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under the Customs and Excise Acts*".

5 13. Finally, we come to Sections 14 – 16 of the Finance Act 1994. Section 14 provides that a person who is subject to (in this case forfeiture proceedings) may request the Commissioners to review that decision.

14. Section 15 provides, and here I paraphrase, that the Commissioners upon any such review may confirm the decision, withdraw or vary it. In the present instance it is obvious that Mr Benton, as the reviewing officer, confirmed the original decision.

10 15. Section 16 (4)-(6) provides as follows:

15 (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...as such, the powers of this Tribunal, therefore, are essential ones of review.*

20 Section 16 (6) provides that the burden of proof in relation to the reasonable cause of belief lies upon the Commissioners but otherwise lies upon the Appellant to show the grounds on which any appeal is brought had been established.

The Respondents Case

25 16. It is important to note at the outset that no challenge to the legality of the seizure was brought through the Magistrates Court and that therefore both the goods and the vehicle have been condemned as lawfully seized by virtue of the passage of time pursuant to paragraph 5 of Schedule 3 to CEMA. As we explained to the Appellant as part of the appeals process, that issue cannot be reopened by this Tribunal as we simply do not have the jurisdiction to reconsider the legality of the forfeiture and seizure of goods - *Gora and others v Customs & Excise* (2004) QUB 93 applied.

30 17. That approach has been put beyond doubt by the Court of Appeal's decision in *HMRC v Lawrence and Joan Jones* 2011 EWCA Civ 824.

35 18. The Appellant had, we suspect, hoped that this Tribunal was an opportunity to reopen that issue but we explained the state of the law to the Appellant and the lack of jurisdiction on the question of the legality of the seizure. The Appellant accepted that position.

Reasonableness of the Review Decision

40 19. As indicated at paragraphs 15 and 16 above, the actual jurisdiction of this Tribunal in a case such as this is to test of the reasonableness (or otherwise) of the review officer's decision. In that regard, the Respondents called Mr Brenton as the officer who had conducted the review.

20. Mr Brenton explained the current policy adopted by UKBA which broadly provides for the following principal options:

5 A - if the operator provides evidence that neither the operator nor the driver were responsible and have carried out appropriate checks regarding the legitimacy of the load then on a first offence the vehicle would normally be restored for 20% of the revenue involved in the smuggling attempt or for 100% of the trade value of the vehicle (if lower).

10 B - if the operator provides evidence that the driver (but not the operator) is responsible for the smuggling attempt then normally the vehicle will be restored free of charge unless the situation is more complex.

15 C – where the operator fails to provide evidence satisfying UKBA that the operator was neither responsible for nor complicit in the smuggling attempt then:-

20 (i) where the revenue involved is less than £50,000 and if it is the first occasion, the vehicle will normally be restored for 100% of the revenue involved or the trade value of the vehicle (if less);

(ii) if the revenue involved is £50,000 or more or it is seized on a second or subsequent occasion within six months, the vehicle will not normally be restored.

25 21. It is accepted law that UKBA can maintain such a policy and that the Review Officer can be guided by it but must not be fettered by it and must consider all matters afresh when conducting a review.

30 22. That brings us then, to Mr Brenton's evidence. In his evidence in chief, Mr Brenton explained the reasons which led him to his conclusion. In summary these were as follows:

35 (a) UKBA's record showed that there had been previous interceptions of the Appellant in the same vehicle. Those records showed that he had been intercepted on the 10th August 2011 with alcohol but that the load in question was not delivered until the 16th August 2012; and that he had been intercepted on the 1st September 2011 with alcohol which had not been delivered until the 8th September 2011. From this pattern, Mr Brenton expressed the view that UKBA's experience showed that delayed movements of this type are indicative of multiple uses of the transport documentation or ARCs within the elapsed time period between issue and ultimate delivery;

40 (b) Specifically in relation to the current trip, Mr Brenton noted that the ARC was dated 10th October 2012 (timed at 15.33) - which meant that the ARC was 3 days old. As against that records showed that the Appellant had travelled inbound on the 11th October 2011 at 07.45 in the same vehicle

but with a different trailer unit with a load again manifested as "food stuffs". Mr Brenton took the view that this movement was again within the lifetime of the ARC which was intercepted on the 13th October 2011 at 02.03. He also noted that the trailer was marked TL15 by means of a trailer plate which was stuck to the trailer bulkhead with tape which he believed to be an attempt to match the trailer number with the paperwork;

(c) the Review Officer gave weight to the fact that the Appellant refused to answer the officers question after initially agreeing to be interviewed about the importation of the excise goods;

(d) Mr Brenton gave evidence that he also considered the history of the tachograph charts when removed from the intercepted vehicle. Those showed that the tachograph head had not been recording. Council regulation EC3821/85 and Transport Act 1968 which require the operational use of tachograph records in commercial vehicles of this type and the failure to comply, he said, gave further grounds for suspicion;

(e) Mr Brenton gave evidence that UKBA's records showed that the consignor, Les Vins du Tunnel, as shown on the paperwork, had previously been involved in evasion of excise duty as had both the consignee, Safe Cellars and the UK importer.

Mr Brenton therefore gave evidence that taking all these factors into account, and having considered whether or not it was a second smuggling attempt, he ultimately decided that as it was the first recorded offence by the Appellant that he would agree with the original decision ie. suggest restoration of the vehicle for a fee of 100% of the revenue involved (which in this case was circa £23,000) or (if less) the trade value of the vehicle (which by reference to Glass' Guide, he concluded was £17,525).

Mr Brenton gave evidence to say that he had considered the degree of hardship which would be suffered by the Appellant in those circumstances but concluded that it was not exceptional hardship over and above what would normally flow from the circumstances (ie. seizure of the vehicle) that the Appellant had not demonstrated, on the facts of the case, any exceptional hardship which would justify him altering the decision. Thus, applying *Lyndsey v Custom and Excise Commissioners (2002)* he considered that the restoration fee was both reasonable and proportionate.

The Appellant's Case

23. The Appellant appeared in person and having cross examined Mr Brenton gave his own evidence under testimony. In summary there was a dispute in relation to some of the evidence given by Mr Brenton.

24. Mr Sheridan gave evidence that rather than the tachograph being "blank" that he had, in fact, removed the appropriate tachograph from the lorry when it had been detained and that he retained that information. It appeared, however, that that information (ie. the correct and full tachograph information) had not previously been furnished to UKBA until after the commencement of the appeal.

25. As to the actual events, the Appellant gave evidence that he had been telephoned by Duncormick Freight on his way out to France. When there, his original consignment was cancelled and he was redirected to a broken down lorry outside Calais. Having been unable to assist the driver of that lorry, they swapped trailers and the Appellant took the trailer TL15 and headed towards the boat where the load was scanned and the seizure occurred.

26. As regards his decision not to proceed to give a detailed interview, the Appellant gave evidence that he had been advised to do that by his legal representatives. After the seizure was confirmed, he went to London to meet with his solicitors and thereafter entered into correspondence with UKBA.

27. In relation to the question of the delays between the consignment and delivery, the Appellant explained that the period was calculated by reference to the "book in slot" in the receiving warehouse and allowed for flexibility. On the specifics, he gave evidence that it was his intention to make the delivery in Oldham on the 14th and return to London where he would leave the vehicle and had booked a flight, from Stanstead, to his home in Ireland. In short, he advanced the argument that there was nothing exceptional in terms of the delay.

28. As to the issue of valuation, the Appellant gave evidence that he had in fact acquired the vehicle some considerable time earlier for €13,000 (roughly equivalent to £11,000) and therefore the £17,525 restoration fee was too high.

Decision

29. As explained at paragraphs 14 and 15 the jurisdiction of this Tribunal is supervisory. We must assess what the reviewing officer considered - whether he considered all material facts and/or whether he omitted to consider something that was material.

30. The Appellant has advanced an explanation of events which has sought to address some of Mr Brenton's concerns. The dispute regarding the availability of the tachograph readings being one example.

31. As HMRC indicated, however, an opportunity was provided to, and availed of, by the Appellant and his representatives to put forward their version of events to explain and justify reasons why restoration should occur and, indeed, the terms that ought to apply to that restoration. Mr Brenton, we find, took into account all of the matters which were drawn to his attention. It appears that some of those considerations were to be further refined. Specifically, the discussion regarding the tachograph readings and their possible impact on the distances travelled by the cab unit within the lifespan of the ARC documentation we find was not made clear until the commencement of the proceedings before this tribunal.

The question for us, however, is if Mr Brenton acted reasonably in all the circumstances known to him. Having considered the evidence before us and having heard Mr Brenton's evidence and that of Mr Sheridan, we find that Mr Brenton did act

reasonably and see no reason to overturn his decision. The onus of proving otherwise falls squarely on Mr Sheridan and we do not feel that he has discharged it.

5 32. As regards the specifics of the restoration fee as challenged by the Appellant, we also find that Mr Brenton acted reasonably. The referral to Glass's Guide as the industry standard for placing a valuation on the cab unit and trailer. We were furnished with copies of the relevant extracts from Glass's Guide. No doubt Mr Sheridan may have been able to acquire the vehicle more cheaply elsewhere but no actual evidence was provided to us of that fact and in the absence of that, we find that
10 Glass's Guide was an appropriate and objective way of assessing the value.

15 33. By virtue of the statutory powers vested in him, Mr Brenton had the ability to undertake a review and could decide de nouvo whether to restore the vehicle or not. He concluded, applying UKBA's standard policy, that on the facts of the case, he would recommend restoration but subject to the payment of a fee. That fee was accessed by reference to Glass's Guide which we conclude to be a reasonable approach to be adopted by him.

34. In all the circumstances, therefore, we conclude that the appeal ought to be dismissed.

35. No order as to costs.

20 36. 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
25 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

30 **IAN HUDDLESTON**
TRIBUNAL JUDGE

RELEASE DATE: 22 October 2013