



TC03087

Appeal number: TC/2012/04810

Restoration – red diesel found in vehicle hired to third party – whether hire company aware or should have been aware – no – whether HMRC’s decision to restore the vehicle to Appellant for a fee of £1260 subsequently reduced to £500 was a reasonable exercise by the Respondents of their discretion under s 152(b) of CEMA 1979 – no – Appeal allowed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CSC TRANSPORT LTD

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S Respondents
REVENUE & CUSTOMS**

**TRIBUNAL: JUDGE MICHAEL S CONNELL
LIZ POLLARD**

Sitting in public at City Exchange, Albion Street, Leeds on 14 August 2013

Mr D Turner Managing Director and Carla Ridgeon of the Appellant Company

**Ms G Nolan Counsel instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

1. This is an appeal by CSC Transport Limited (“the Appellant”) against the decision of the Commissioners for Her Majesty’s Revenue & Customs (“the Respondents”) to offer for restoration a White Ford Transit 100 T350L van, registration NA57 EWR (“the Vehicle”) to the Appellant for a fee of £1,260.00 reduced to £1,120.00.

Background

2. On 10 October 2011 the Vehicle owned by the Appellant, but hired under a long term hire agreement to Mr Andrius Balkauskas (trading as ‘Help in Hand’), was stopped by Nottinghamshire police. The vehicle was tested by the Nottingham Road fuel testing team and a fuel sample was found to contain red diesel.

3. The Vehicle was seized under s 139 of the Customs and Excise Management Act 1979 (“CEMA”) as liable to forfeiture under s 141 (a) of CEMA 1979, because it was used for the carriage, handling, deposit or concealment of rebated fuel. The Vehicle was restored to Mr Balkauskas upon payment of £500 in civil penalties.

4. On 24 November 2011, the Vehicle was again stopped at a Police Roadside check on the A19 Toll Bar. A sample of the fuel was taken from the tank by the Road Fuel Testing Unit (“RFTU”), which again tested positive for red diesel.

5. The Respondent’s Officers noted that the original seal from the seizure on 10 October 2011 was still intact. The driver of the Vehicle identified himself as Mr Irmantas Liausas, who worked for Mr Balkauskas

6. Mr Liausas was interviewed under caution. He said that he had been driving the Vehicle for about a week and did not know it was running on red diesel. He also said that he worked for ‘Andruis ‘ – he did not know his surname. He had worked for about five months collecting charity bags

7. The officers contacted Mr Balkauskas and he assumed responsibility for the Vehicle but said that he could not pay the Civil Penalties, which totalled £500.00 at that time. The Appellant, the owner of the Vehicle, was also contacted. Miss Carla Ridgeon an office manager/receptionist of the Appellant advised the Officer that Mr Balkauskas was a long-term hirer of the Vehicle and six other vehicles. Miss Ridgeon said that the penalty was the hirer’s responsibility and the Appellant would not pay the restoration fee.

8. On non-payment of the restoration fee, on 24 November 2011 the Vehicle was seized by the Respondents pursuant to s 139 CEMA, as liable to forfeiture pursuant to s141(1)(a) CEMA.

9. On 25 November 2011 a visit was conducted to the premises of the Appellant where the fuel in the running tanks of its vehicles was tested. All proved negative. During the visit by the Respondent’s Officers the Appellant said they were aware of

the possible misuse of the Vehicle prior to seizure on 24 November 2011, having been informed by Nottinghamshire Police that the vehicles hired to Mr Balkauskas may have been used for criminal purposes.

5 10. On 26 November 2011 a Notice of Seizure, Notice of Sampling and an offer of restoration letter was issued to Mr Balkauskas.

11. On 6 December 2011 a Notice of Seizure and an offer of restoration was also sent to the Appellant and Mr Liausas including information of the Review Officer's office address, should a review of the decision be required, and that any request for a review should be submitted within forty-five days.

10 12. On 5 February 2012 Miss Ridgeon, on behalf of the Appellant, having heard nothing from HMRC or the police authorities, contacted the Respondents in order to locate the Vehicle.

13. On 5 February the Appellant was advised that the restoration fee, including storage charges of £420 and removal fees of £200, had increased to £1,260.

15 14. By letter dated 27 February 2012, the Appellant requested a review of the decision to restore the Vehicle for a fee of £1,260.00.

15. The Respondents' policy on the restoration of a seized vehicle to a third party owner who in their view has failed to take reasonable steps is that:

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- on the first detection, ..., the vehicle should be seized and restored for whichever is the lower of, 200% of the total revenue evaded on the forfeited goods or the trade buying in price of the vehicle, whichever is the lower.
 - On the second detection ...the vehicle should be seized and restored for whichever is the lower of 200% of the revenue evaded on the
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16. Although the request for a review was received out of time, the Respondents agreed to reconsider the decision as the Vehicle was still in their possession.

30 17. On 20 March 2012 the Respondents advised the Appellant that in their view the Appellant had not taken reasonable steps to prevent the misuse of the Vehicle and the decision to restore the Vehicle for a fee was upheld.

35 18. The Reviewing Officer explained that, when visited by the Respondents Officers on 25 November 2011, the Appellant said that they were aware of the misuse of the Vehicle prior to its seizure on 24 November 2011, but that no action was taken to review the hire agreement until afterwards when Mr Balkauskas failed to pay his bill.

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19. The Reviewing Officer reminded the Appellant that it had been correctly advised of the accruing storage charges that would be applicable whilst the vehicle remained in the Respondents possession.

5 20. On 20 March 2012, during the review of the decision by the Respondents, it was noted that the Appellant had been charged an incorrect storage charge. The Appellant was therefore advised that the fee had been reduced to £1,120.00.

10 21. Some considerable time after the Appellant lodged its appeal with the Tribunal Service, whilst in the process of preparing the case for hearing, the Respondents discovered that because Mr Balkauskas had paid the civil penalty in respect of the first offence on 10 October 2011, the Appellant had not been advised of the offence. The Reviewing Officer, having reconsidered matters, concluded that the Respondents should have made the Appellant aware of the first offence at the time and that
15 accordingly the penalty fee should be reduced.

22. On 6 March 2013 the Respondents wrote to the Appellant to say that because the Appellant had not been advised of the first offence the Respondents would, exceptionally, remove the storage fees and removal fees and restore the Vehicle for
20 the original civil penalty of £500 with a view to the appeal being withdrawn. The Appellant did not respond to the Respondents letter.

The Law

23. Section 139 of CEMA 1979 provides that:

25 *‘..anything liable to forfeiture under the Customs and Excise Acts may be seized by an Officer’.*

24. Section 141(1)(a) of CENA 1979 provides:

30 *‘Where anything has become liable to forfeiture under the Customs and Excise Acts – any vehicle...which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture, either at the time it was so liable or for the purposes of the commission of the offence for which it later became liable...shall also become liable for forfeiture’.*

35 25. The Hydrocarbon Oil Regulations 1973 Regulation 47(3) states:

‘(3) An authorised person may examine any vehicle and may inspect, test or sample any oil in or on or forming part of the fuel supply of any vehicle’.

26. The Hydrocarbon Oil Duties Act 1979 Section 12(2) states:

40 *(2) No heavy oil on whose delivery for home use rebate has been allowed shall-*

(a) be used as fuel for a road vehicle; or

(b) be taken into a road vehicle as fuel,

Unless an amount equal to the amount for the time being allowable in respect of rebate on like oil has been paid to the Commissioners in accordance with regulations made under 24(1) below for the purposes of this section’.

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27. The Hydrocarbon Oil Duties Act 1979 Section 13(1) states:

any person:

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- (a) Uses heavy oil in contravention of Section 12(2) above; or*
 - (b) is liable for heavy oil being taken into a road vehicle in contravention of that subsection,*
 - (c) his use of the oil [or his becoming so liable (or, where his conduct includes both, each of them)] shall attract a penalty under Section 9 of the Finance Act 1994’.*

15 28. The Hydrocarbon Oil Duties Act 1979 Section 13(6) states:

‘Any heavy oil:

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- (a) taken into a road vehicle as mentioned in section 12(2) above or supplied as mentioned in subsection (2) or (3) above; or*
 - (b) taken as fuel into a vehicle at any time when it is not a road vehicle and remaining in the vehicle as part of its fuel supply at a later time when it becomes a road vehicle,*
 - (c) shall be liable to forfeiture’*

29. The Finance Act 1994 Section 9(2) states that:

25 *‘any person to whose conduct this Section applied shall be liable:*

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- (a) in the case of conduct in relation to which provision is made by subsection (4) below [or by or under any other enactment,] for the penalty attracted to be calculated by reference to an amount of, any duty of excise, to a penalty of whichever is the greater of 5% of that amount and £250.00 ;and*
 - (b) in any other case, to a penalty of £250.00’.*

30. The Finance Act 1994 establishes the statutory two-tier system of formal reviews and appeals. Section 15 of the said Act empowers the Review Officer to confirm, vary or withdraw a reviewable decision on behalf of the Commissioners.

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The Appellant’s case

40 31. The Appellant filed its Notice of Appeal with the Tribunal Service on 27 March 2012. The stated grounds of appeal were:

- (a) The Respondents have had one of our vehicles for three months ...we cannot possibly afford to pay the restoration fee.
- (b) We feel it unfair that we must pay the fee when it was ‘Help in Hand’ who had the vehicle for hire.
- 45 (c) We are the victim in this case.

32. At the hearing of the appeal Miss Ridgeon said that the Vehicle had been on permanent hire to Mr Balkauskas, along with six other vehicles. Mr Balkauskas had been hiring the vehicles for over a year without any problems. They trusted Mr Balkauskas, and being unaware of the first offence left it to Mr Balkauskas to pay the civil penalty (in respect of the second offence). She said that shortly after the Vehicle was seized by the Respondents, they had to report all the vehicles on hire to Mr Balkauskas as stolen, as he had not paid his bills and had ceased corresponding with the Appellant. The vehicles were then returned to the Appellant's yard premises, after working hours and without its knowledge.

33. Miss Ridgeon explained that she had been contacted by Nottinghamshire police prior to the seizure of the Vehicle and had been informed that the Vehicle had been 'involved in crime' in Nottingham. This was not a reference to red diesel being used in the Vehicle. It transpired that the description of the vehicle did not match that of the White Ford Transit 100 T350L van on hire to Mr Balkauskas and that the Vehicle's registration plate may have been copied. Nottinghamshire police said that its Criminal Investigation unit would need to inspect the vehicle seized by the Respondents. Miss Ridgeon said that from that point on, she assumed that the police were in contact with the Respondents and that eventually the Vehicle would be returned to them.

34. Miss Ridgeon said that, prior to the Vehicle being seized on 25 November 2011, they were completely unaware of the first offence or red diesel being used in the Vehicle. When she tried to locate the Vehicle she was, as she described, 'passed from pillar to post' between the police and the Respondents for several weeks. Whenever she rang the police they told her to contact the Respondents and vice versa each saying that they could not discuss the matter and could not release any information.

35. Miss Ridgeon said that until late November 2011 they had absolutely no reason to suspect that Mr Balkauskas or any of his employees had been using red diesel in the Vehicle. Had they known, they would have terminated the hire agreement immediately. Up until that point Mr Balkauskas had paid hire charges in full and complied with the hire agreement relating to the Vehicle and hire agreements in respect of all other vehicles.

36. Mr Balkauskas's vehicle hire contracts were renewed on a weekly basis. The name of the driver was taken for insurance purposes. The Appellant had sixty-five vehicles and each Monday every vehicle was dipped and tested for red diesel using a test kit recommended by the Respondents. None of the vehicles had ever tested positive.

40 **The Respondents' case**

37. In reviewing the decision, the Review Officer is only obliged to consider the circumstances surrounding the seizure but not the seizure itself.

38. A review was conducted following the decision to restore the Vehicle for a fee. In reviewing the decision, the Review Officer duly noted the grounds for forfeiture of the Vehicle in that the Vehicle had tested positive for red diesel.

5 39. The Review Officer considered that the decision to restore the Vehicle to the Appellant for a fee was more than reasonable and proportionate in line with the Respondent's policy. The Appellant may not have taken reasonable steps to prevent misuse of the Vehicle. No action had been taken to review the hire agreement until Mr Balkauskas failed to pay his bill.

10 41. The Respondents contend that the decision to offer restoration for a fee was in line with publicly stated policy and was a reasonable exercise by the Respondents of their discretion under s 152(b) CEMA. The Appellant has failed to show any reason why the Respondents should depart from their stated policy.

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Conclusions

42. We accept the Appellant's evidence, that they were unaware of the misuse of the Vehicle prior to 25 November 2011. The Vehicle was reported as stolen shortly after being seized by the Respondents. The Appellant's had been diligent in their efforts to prevent misuse of their vehicles, and it is difficult to see what more they could have done, having been unaware of the first offence, until notified by the Respondents following the second offence.

43. For the above reasons we take the view that the Respondents decision to restore the Vehicle to the Appellant on payment of a civil penalty of £500 was not a reasonable exercise by the Respondents of their discretion under s 152(b) CEMA, and that the Vehicle should be restored to the Appellant.

44. 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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**MICHAEL S CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 27 November 2013

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