



TC03970

Appeal number: TC/2013/09354

EXCISE DUTY – Border Force refused to restore car used in smuggling attempt – whether decision was one which the Border Force could not reasonably have arrived at – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**MARIA KRÓL
t/a EUROSERVIS MOBILE MARIA KRÓL**

Appellant

- and -

THE DIRECTOR OF BORDER REVENUE

Respondent

**TRIBUNAL: JUDGE BARBARA MOSEDALE
MRS SHAMEEM AKHTAR**

Sitting in public at Bedford Square, London on 12 August 2014

The appellant did not appear and was not represented

Mr J Fletcher, counsel, for the Respondent

DECISION

1. The appellant, Ms Król, indicated to the Tribunal by letter dated 28 July 2014
5 that she did not intend to attend the hearing in person or by telephone and said she
agreed to the Tribunal considering her case without her participation.

2. We were satisfied that Ms Król was notified of the hearing and indeed was well
aware of it; we were also satisfied that it was in the interests of justice to proceed in
the absence of the appellant as the appellant had been given the opportunity to attend
10 in person or by telephone and had chosen not to do so. We had the appellant's
various written representations to consider on her behalf before us.

Background

3. Ms Maria Król purchased a Mercedes Benz Vito car registration number WB
47213 on 20 April 2012. On 18 July 2013 this car was stopped at Dover. The driver
15 was a Mr Slawomir Stanislaw Król and the passenger his son, Mr Dominik Michal
Król. The car had been driven from Poland and its occupants stated that their
destination was Leicester. The undisputed records from the Border Force show that
the occupants denied carrying cigarettes or tobacco; however, the vehicle contained
'framed artwork' which following x-rays was shown to have anomalies; on being
20 unwrapped the artwork was found to conceal some 95,200 cigarettes on which some
£22,000 in excise duty was unpaid.

4. The car was seized as the officer formed the view it was liable to forfeiture as
having been used in an attempt to smuggle goods. The basis of his decision was the
quantity of cigarettes involved, the fact they were hidden in the car, and of mixed,
25 non-EU brands: all this suggested that they were intended for re-sale and subject to
excise duty the payment of which had been evaded.

The law

5. Ms Król wants her car back. An appeal against its seizure, however, must be
made to the magistrates' court within strict time limits. Ms Król did not make such an
30 appeal and indeed a lawyer acting on her behalf accepted that it would probably have
been unsuccessful because the car was in fact used in a smuggling attempt.

6. Ms Król did request the Border Force to exercise its discretion to restore the car
to her despite its lawful seizure. The Border Force refused this by letter dated 30
August 2013 and this decision was upheld on review dated 6 November 2013. She
35 now appeals against that decision to this Tribunal.

7. The Border Force's decision to refuse to restore the car to Ms Król is termed a
decision on an 'ancillary matter' under the applicable legislation, which is the Finance
Act 1994.

8. This provides as follows:

5 “16(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the power 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, 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;

10 (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a further review of the original decision, and

(c) ...[not relevant]”

9. In other words, this Tribunal does not have the power to order the Border Force to restore the car to Ms Król. All we can do is consider whether its decision to refuse to restore it was *unreasonable*. If we find the decision was unreasonable, we can
15 order the Border Force to reconsider the matter. Such a reconsideration might result in a change of mind. But if we do not find that the Border Force’s decision was unreasonable, the appeal is unsuccessful and the review decision refusing restoration stands.

10. So far as the original decision to seize is concerned and the forfeiture of the car,
20 it is, as the appellant accepts, too late to challenge that. This Tribunal must proceed on the basis that it was a lawful seizure and in particular that the car was used to smuggle into the UK the cigarettes.

Ms Król’s case

11. In brief, it was Ms Król’s case that she ran a car hire business and merely rented
25 the car out to Mr S Król and could not be held responsible for the use to which the car was put when in the possession of Mr S Król.

12. Ms Król sent to the Tribunal a certified translation from Polish of a rental agreement between herself and Mr Slawomir Król dated 2 July 2013 for rental from
30 15 July 2013 until 22 July 2013. The contract comprised two pages and the terms, so far as relevant, were:

“§1 the car and Trailer Rental company hereby agrees to rent the following vehicle: Mercedes Benz Vito, registration number WB 47213from 15-7-13 to 22-7-13.....

§2 The rented vehicle can be used only in accordance with the law....

35 §3-5 [not relevant]

§6 The Renter is obliged to return the vehicle at the rental company’s seat til 22-7-13. In case the vehicle is not returned till the said date the police will be notified.

§7-8 [not relevant]

40 §9...

2. [The Renter] ...will use the vehicle in accordance with the law, will not use the vehicle for illegal purposes;
- 3...
- 4...
- 5 5. will observe and will no violate customs regulations of the European Union
6. ...
7. will return the vehicle in an intact condition
- 10 8. in the event the vehicle is stopped by the police, the renter shall immediately notify the owner.”

13. Concerns were raised by Mrs Perkins, the review officer, after the date of the review decision as to the validity of this contract: see §§26-27 below. For the reasons given below, we reject those concerns and therefore we accept that this contract was signed between Ms Król and Mr S Król.

15 *Was Mrs Perkin’s decision unreasonable?*

14. Mrs Perkins was the Border Force officer who reviewed the Border Force’s decision not to restore the car to Ms Król. She gave evidence to the Tribunal. We accepted her evidence, although, as explained below at §26-7, we did not consider her concerns about the signatures to be justified.

20 15. Mrs Perkin’s decision of 6 November 2013 ran to some 11 pages, setting out her understanding of the law, the policy of the Border Force and the facts in some detail. A very brief summary of the reasons for her decision to refuse restoration was that she was satisfied that the seizure of the car was lawful on the basis the cigarettes it contained were smuggled (as brought into the UK to be sold commercially), and that
25 an application of the Border Force’s policy was that car should not be restored, and that there were no exceptional circumstances justifying a departure from policy.

First offence and small quantity?

30 16. In particular, Mrs Perkins considered the Border Force’s policy that in some cases of smuggling it might be appropriate to restore the vehicle if it was a first offence and the quantities involved were small. Mrs Perkins chose not to restore the vehicle under this policy because she considered that it was probably not a first offence and in any event the quantity involved was not small.

17. There is nothing in the appellant’s case which challenges this part of Mrs Perkins’ decision.

35 18. We find it was accepted by the appellant that the car had been rented to Messrs Król before the rental during which it was seized; the records of the Border Force, which we accept, show that one or both Messrs Król had been in the car on a journey to the UK twice previously (in one case a few months, and the other a few weeks, before the journey at issue in this appeal). While on those occasions the car was not

stopped, the visits to the UK, like the planned visit in this case, was brief. Further, in this case, the cigarettes were concealed indicating planning. We consider that a suspicion that this was not a first offence was in the circumstances reasonable.

5 19. In any event, it was very clear that the quantity involved was not on any measure 'small'. The amount involved was over 100 times the Border Force's published view on what was for personal use; the street value of the cigarettes was over £33,000.

20. We consider her decision not to apply that policy in this case the only possible decision she could reasonably have reached.

10 *Not for profit?*

21. She also briefly considered the policy in some cases to restore goods where the smuggling was on a 'not for profit' basis, in other words, where the smuggler intends to resell the goods at cost. She did not apply this policy as there was no evidence that the intended sale was on a not for profit basis.

15 22. There is nothing in the appellant's case to challenge this part of the decision other than an objection to the Tribunal relying on what Messrs Król said because, says Ms Król, they did not speak English and did not have the assistance of an interpreter when stopped by Border Force officers.

20 23. We find from the Border Force's records, which we accept, that Mr S Król had said he spoke 'a little' English and appeared to understand the simple questions asked, such as his destination. We find the two Messrs Król had denied having cigarettes in the car before the search, and, following the search, denied that the cigarettes belonged to them. They indicated that they belonged to 'firma' which was the same description which they applied to Ms Król when asked who owned the car.

25 24. There was therefore no suggestion from the appellant or the Messrs Król that the cigarettes were imported on a 'not for profit' basis and indeed it was reasonable to infer from the large quantity that they were imported to be sold at a profit. We consider that Mrs Perkins' decision not to apply this policy in the appellant's favour was the only one which she could have reached in the circumstances.

30 *Innocent third party?*

35 25. The greater part of Ms Perkin's consideration concerned the Border Force's policy to restore vehicles (if not adapted for smuggling) to third party owners who were not present at the seizure if it is shown (a) they are innocent and (b) have taken all reasonable steps to prevent smuggling and (c) restoration would not be tantamount to restoring the vehicle to the smuggler.

Innocent?

26. Mrs Perkins does not address this requirement and therefore it appears she accepted (or at least did not challenge) Ms Król's case that she was innocent of the smuggling attempt.

5 27. After her review decision, however, Mrs Perkins raised with Ms Król (who had asked for a further review) a query about Mr Slawomir Król's signature on the documents signed by him at the time of the seizure in comparison with the above mentioned car rental document. She suggested the signatures were not by the same person. The implication must be, if Mrs Perkins was right and the signatures were not
10 by the same person, that the lease document was forged and Ms Król was not innocent in the smuggling attempt.

28. Ms Król denied there was any discrepancies in the signatures. We are not experts in handwriting nor did we have the benefit of such expertise in the hearing. However, we considered the matter. We reject the suggestion that the same person
15 signed 'Maria Król' as signed 'Slawomir Król' on the lease agreement as the 'K's were formed quite differently; further, in respect of three of the documents signed by Mr Król in the presence of border force officers, these were obviously signed by the same person but nevertheless these signatures showed a great deal of variety ('Slawomir K' in one place, 'Król Slawomir' in the second and 'Slawomir Król' in
20 the third). Examination of the signature on the car rental document showed a very similar method of writing the "Sl" of Slawomir to the other three signatures. Therefore, we reject Mrs Perkins' suggestion that Mr S Król had not signed the car rental agreement. There was no other reason for considering the car rental agreement not to be genuine, and therefore we proceed on the basis that it was genuine.

25 29. However, this has no effect on our consideration of the reasonableness of the review decision, as consideration of the alleged discrepancy in signatures took place after the review decision. On the contrary, the review decision proceeded on the basis that Ms Król was, as she said, innocent in the smuggling attempt. We accept Mrs Perkins' evidence that she did not consider this alleged discrepancy when reaching the
30 review decision under appeal and in any event that her decision (to refuse restoration) would have been the same.

Taken all reasonable steps to prevent smuggling?

30. Mrs Perkins' review decision did not consider the appellant to be blameless. In particular, her view was that Ms Król had failed to undertake any checks on the use to
35 which the vehicle would be put. Further, Ms Król had not taken any legal action against Mr S Król subsequent to the seizure to enforce the contract which (as can be seen from §12 above) required Mr S Król to return the vehicle on 22 July 2013 and to only use it for lawful purposes.

31. Ms Król's view was that she was blameless. Her view is that it is impossible to
40 check on the use to which the hire cars will be put and all she can do to protect the business is to include (as she did) a contractual term that its use would be lawful.

32. While we accept that a car hire company could not prevent its cars being used for unlawful purposes, nevertheless it can make an attempt to check on the bona fides of its customers and the use to which they will put the vehicle. Ms Król does not suggest that she asked any questions about the use to which Mr S Król would put the car. Therefore, we agree with Mrs Perkins' conclusion that Ms Król showed a lack of reasonable due diligence.

33. Mr Fletcher, on behalf of the Home Office, suggested a sensible precaution for a car hire business would have been to ask for a deposit. This might also help prevent smuggling as would-be smugglers would be financially at risk if the car was seized. However, nowhere does Ms Król suggest that she did take a deposit, and it is not a term of the contract, so we find that she did not. This consideration only reinforces our view that Mrs Perkins' conclusion that Ms Król failed to take all reasonable steps to protect her business from clients using her cars for smuggling.

34. That conclusion means that Mrs Perkins correctly and reasonably applied the Border Force's policy on restoration when she refused restoration.

Tantamount to restoring car to smuggler?

35. There was, however, another ground on which restoration was refused. Mrs Perkins considered restoring the vehicle to Ms Król would be tantamount to restoring it to those complicit in the smuggling,

36. Who was complicit in the smuggling? As we have said, Mrs Perkins reasonably proceeded on the assumption that Ms Król was not complicit. But she did proceed on the basis that Messrs Król were complicit. Her view was that Mr S Król and his son Mr D Król lied to the border force officers when they said there were no cigarettes in the car and lied (after the cigarettes were discovered) when they said the cigarettes did not belong to them.

37. Was the view that Messrs Król were complicit reasonable?

38. Ms Król did not expressly challenge this view but in a letter written after the review decision said (as reported above) that what Messrs Król said to the Border Force was unreliable as they did not speak English and had been denied interpreters.

39. As we have said at §23 above, Messrs Król implicated Ms Król ('firma') when questioned by the officers and it was Ms Król's case that what Messrs Król said here was unreliable because they could not speak English. But we concluded from reading the notebook, that it was more likely than not that Messrs Król understood the simple questions that the border force officer asked. If we accept Ms Król's case, as we have, that she was innocent of the smuggling, we have to reject what Messrs Król said about the cigarettes' ownership. We therefore reject as reliable their denial of knowledge of the cigarettes. Therefore, we find it was reasonable for Mrs Perkins to conclude that Messrs Król were knowingly involved in smuggling.

40. But would restoring the vehicle be tantamount to restoring it to Messrs Król? Mrs Perkins took into account that not only did the appellant and the smugglers have the same surname, but in addition their addresses were very similar. Indeed, we find it likely on the evidence that they all lived in the same apartment block, albeit not the same flat. Mrs Perkins also took into account that Ms Król had loaned the vehicle to Mr S Król in April 2013 before her business commenced in May 2013, suggesting an informal relationship between them.

41. She considered that in these circumstances a restoration to Ms Król would be tantamount to a restoration to Mr S Król.

42. Was this view reasonable?

43. We consider it was reasonable in these circumstances. We also note that even after the review decision was communicated to her, Ms Król has not taken the opportunity to allay Mrs Perkins' concerns about the relationship. Ms Król has admitted that there is indeed a 'distant' relationship between her and Messrs Król and there is proximity of address. The same letter goes on to refer to Mr Król as a member of her family and says, apparently referring to Messrs Król "Their need to possess a car for longer journeys and the must (sic) to rent it from outside sources were one of the reasons why she started the company." This suggests (at the very least) that the relationship was sufficiently close for Messrs Król to have influenced Ms Król's decision to start a business.

44. Moreover, as Mr Fletcher pointed out, Ms Król's continued failure to take legal proceedings against Messrs Król is consistent with a close family relationship, particularly when no other reasonable explanation has been given. While we had no evidence of Polish law, it seems more likely than not that Messrs Król were in breach of the contract under Polish law because they had breached the express terms of the contract and in particular used the car for unlawful purposes and failed to return it on the due date. Yet a letter from Ms Król after the date of the review decision contains the bizarre statement that she was unable to claim financial recompense from Mr Król because the location of the car was known and it had not been stolen or lost. This was also inconsistent with the earlier, similarly difficult to understand, statement from her legal representative, that Ms Król was merely awaiting the outcome of these restoration proceedings before commencing proceedings against Mr Król.

45. We also agree with Mr Fletcher that Ms Król's comments in her more recent letters show that she is still in communication with Mr S Król and appear to attempt to exculpate him by referring to his (alleged) inability to understand what happened when the car was stopped. Again this supports the inference that there is a subsisting family relationship between them.

46. In these circumstances, we consider that the only reasonable conclusion which Mrs Perkins could reach was the one which she did reach, which was that if the car was restored to Ms Król, Messrs Król would regain access to it.

47. Mrs Perkin's decision that application of the policy of the Border Force meant that the car should not be restored therefore appears to us reasonable, and letters from Ms Król after the date of the decision, could only have reinforced that decision.

Other considerations

5 48. It is not only the policy of the Border Force which matters. Mrs Perkins must make her own decision on restoration taking into account all relevant matters. We find she considered whether there were other circumstances justifying restoration and in particular whether there was exceptional hardship.

10 49. Mrs Perkins accepted that the seizure of the car led to some financial hardship for Ms Król but was not satisfied as to the degree of it. She considered that hardship was inevitable when a vehicle was seized and therefore ordinarily financial hardship would not be a reason for restoration but exceptional hardship might be. As she was given no evidence of the financial effects of the seizure, she was unable to take a view on the degree of hardship and, we find, reasonably considered that financial hardship
15 did not justify restoration.

50. Mrs Król challenged the review decision and therefore had yet another opportunity to provide the financial information which Mrs Perkins asked for (such as accounts). Ms Król's reply, however, was that the finances of the company were confidential. In other words, she chose not to evidence her claim of financial
20 hardship. We therefore find she has failed to prove she suffered any hardship at all and it was entirely reasonable for Mrs Perkins to find exceptional hardship was not made out. We also agree with Mr Fletcher that it would reasonably have been expected that, if the loss of the vehicle caused financial hardship to Ms Król, she would have taken proceedings against Messrs Król but she had chosen not to do so.

25 51. We consider for all the above reasons that Mrs Perkins' decision was reasonable and therefore under s 16(4) Finance Act 1994 we are not satisfied that Mrs Perkins' decision was one which could not reasonably have been arrived at. Therefore, we dismiss the appeal.

30 52. 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)"
35 which accompanies and forms part of this decision notice.

**BARBARA MOSEDALE
TRIBUNAL JUDGE**

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RELEASE DATE: 29 AUGUST 2014