TC04205

Appeal number: TC/2013/03074

EXCISE DUTY – Restoration of Vehicle – Reasonableness of decision not to restore tractor unit adapted for smuggling – unit seized in course of smuggling 40,000 cigarettes into UK – haulier not complicit in smuggling or adaptation – Border Force's decision based on conclusion that haulier did not act responsibly– decision failed to take account of relevant factors - decision did not take into account nature and scale of haulier's business – further review directed – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MAREK SZCZEPAŃSKI **Appellant**

- and -

DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE SWAMI RAGHAVAN
MRS CAROLINE DE ALBEQUERQUE

Sitting in public at Bedford Square, London on 25 July 2014

The Appellant in person

Will Hays, counsel, for the Respondents

DECISION

Introduction

1. Mr Szeczepański, the owner of a small haulage business in Poland, appeals against a review decision of the Border Force of 11 February 2013 which refused restoration of a DAF tractor unit, registration number EL869GP ("the unit").

2. The unit, which was driven by the appellant's employee, was seized on 2 August 2012 because it was found to be carrying, within a concealed compartment in the fuel tank, goods liable to forfeiture (40,000 cigarettes liable to a duty of £10,661.16.)

3. The appellant argues he knew nothing of the smuggling or the adaptation. He had been let down by the driver whom he had trusted. The driver had been allowed to keep the unit at the driver's home as that was closer to the loading/ unloading point and this must have allowed him the chance to make the adaptation. The appellant argues that losing the unit has caused him exceptional hardship.

4. The Border Force argues the decision not to restore was in accordance with their policy which is that they do not normally restore vehicles where the vehicle had been adapted for smuggling. They say the situation did not fall within circumstances which warranted an exception being made. In particular the appellant had not acted as reasonable haulier would have acted by letting an employee take the unit home. This gave such an employee the opportunity to make a sophisticated adaptation such as the one made in this case. Further they say that the appellant did not act as reasonable haulier would have done in that he did not monitor fuel consumption (which the Border Force say would have revealed that something was untoward with the fuel tank). While it is accepted the appellant has suffered hardship the Border Force say this is not exceptional hardship.

Evidence

5. We had before us a bundle of documents produced by the Border Force. This included the Border Force's notes of the initial interception and interview of the driver and correspondence between the appellant and the Border Force. It also included copies of documents produced by the appellant. We heard oral evidence from the appellant. He was cross-examined by the Border Force. We also heard oral evidence from the review officer, Mr Raymond Brenton and his evidence was subject to cross-examination by the appellant. Both witnesses answered the Tribunal's questions. Although the appellant had some facility in English a court interpreter was appointed at the appellant's request and was present throughout the hearing to interpret the proceedings to the appellant and to interpret his evidence from Polish.

Facts

Background

6. On 2 August 2012 the unit, leased to the appellant's company, towing trailer index EL376EV was intercepted by Border Force officers at the Port of Dover. The unit was driven by Mr Dariusz Franczak, an employee of the appellant. The load was manifested as white electrical goods and documentation was produced. A search by Border Force officers and dog unit revealed a cut under the supporting strap to the fuel tank. Upon closer inspection, an adaptation to the fuel running tank which contained 40,000 cigarettes was found.

7. The officer noticed the fuel tank on the driver's side had a cut under the supporting strap. The driver when asked said there was diesel in the "cuts". When the officer said "What about where the cut-outs are, you can't have diesel in there?" the driver is reported by the officer as saying "I don't know that's my boss, we swap trailer and unit in France."

8. The straps were removed showing access to the tank via removal of star screws which allowed the removal of the end section of the tank. 40,000 cigarettes were found within the concealment.

9. The officer was satisfied that excise goods were held for a commercial purpose but none of the proper methods of removing excise goods to the UK were used. He seized the goods and the vehicle.

10. On 3 September 2012 the appellant wrote an e-mail asking for the unit to be restored.

11. On 13 September 2012 an officer wrote back asking for provision of various information: (this included documents relating to the employment contract with the driver, checks relating to the employee, to the goods, to the consignor, the consignee and other measures taken by the haulier to prevent vehicles being used for smuggling.)

12. The appellant sent in a number of further documents in Polish. It is not clear exactly when these were sent but we find they were sent before 26 September 2012 given an e-mail from the Border Force (Mr N Dillon) to the appellant in which it was stated:

> "Thank you for your e-mails of 14/18 & 19 September 2012. As you did not provide English translations of the documents that you provided we have had to request translations of these documents ourselves. This will obviously delay a decision being made on your request. Therefore it is unlikely that you case will have been considered within the next 25 days."

13. The appellant's e-mail of 14 September 2012 had asked whether the appellant had to translate documents into English and whether the translation had to be

confirmed by a Certified Translator. His e-mail of 18 September 2012 asked whether there was any news on the questions he had asked. We were not shown any e-mail of 19 September 2012.

14. The documents comprise 26 pages in Polish and a four page "loading instructions" document in English addressed to the appellant dated 9 September 2014. The first document which is dated 2012-05-21 has the appellant's name and the driver's name printed on it.

15. On 14 December 2012 an officer replied refusing restoration of the unit. On 2 January 2013 the appellant wrote an e-mail asking for a review of the decision in which he stated:

> "Before this situation the driver ask me for possibility to park the tractor at home, because he lived far away from the company, and very close to loading or unloading place. Now I can realize why. My company has no influence and no knowledge about any changes of the car for smuggling…The driver has been employed because he worked in England few years before. He speak English fluently. Now after seizure the car, he left my company and my problems. Unfortunalelly I dont have any documents to prove this. It was only verbally agreement [sic]".

16. On 14 January 2013 an officer wrote explaining the review process and inviting any further information in support of the request for a review. No further information was received and on 11 February 2013 Mr Brenton issued the review decision which is the subject of this appeal to the appellant. (Excerpts from the decision are set out and discussed at [51] onwards.)

The appellant's background and business

17. The appellant described his business as that of importation and exportation. He had been operating the business from May 2007. Before that, after leaving the army in 1997 he worked as a driver, driving in Poland first and then to England from 2000. He was allowed to park the vehicle he used at home. From 2007 he was driving to other countries in Europe.

18. He had two vehicles capable of pulling a large trailer each. He drove one and the driver he employed used the other one. Before he employed Mr Franczak, he had employed another driver. The previous driver did not take the unit he drove home. He lived in the city in a block of flats so that was not possible because of a lack of suitable parking. In contrast Mr Franczak lived in a village and had a courtyard. The appellant allowed him to park there on a regular basis.

19. Deliveries ran to particular schedules. The appellant would have a good idea when his driver would depart Poland and when he should arrive at his destination. He would know if the driver had gone off route for an extended period. If the driver did not arrive on time the appellant would ask questions.

20. The lorries typically picked up fridges, washing machines, cookers, from Poland, delivered them to their destination and then returned with empty pallets on the way back. Typically not more than one round trip was made a week. The appellant estimated there were usually three return trips made a month.

Checks on the driver

21. The appellant heard about Mr Franczak through a friend who was also looking for a driver. The appellant heard from the friend that there was a driver who was back from England and was looking for work.

22. Mr Franczak had been working for the appellant for around three to three and a half months before the seizure of the unit. After that incident he left the business.

23. Mr Franczak asked the appellant if he could take the vehicle home around mid July 2012 after he had been working for a month and a half to two months. He had taken the vehicle home 2/3 times before the incident involving the seizure and as far as the appellant had been concerned there had not been any problems.

24. The appellant's other vehicle (the one that he drove himself) was kept in a car park. This was not where the appellant lived (which was a village called Skrajne).

25. The loading and unloading place was in Radom, in Poland. The distance from Skrajne to Radom is approximately 150km. The village where Mr Franczak lived was a little less than 100km from Skrajne.

26. The appellant could not remember the name of the village where Mr Franczak lived but it was on the appellant's way to Radom. Taking into account the incident happened nearly two years before the hearing and that it was quite plausible that the appellant would describe locations by reference to where they were on routes he drove rather than by name we did not think the appellant's inability to recollect the name of the village led to any concerns about the reliability of his evidence.

Fuel consumption /checks

27. Mr Franczak was responsible for filling the vehicle up with fuel. He had a Euroshell card and would pay using this fuel card. He would fill the entire tank up in Poland as petrol was cheaper there.

28. The fuel consumption of the vehicle depended on its loading. It took 1350 litres and with that could be driven for approximately 3,500km.

29. The appellant would check the paperwork relating to fuel consumption afterwards. If it was too much he would then ask questions of the driver.

Border Force's policy on restoration for Commercial Vehicles

30. As summarised in Mr Brenton's letter Border Force's policy on restoration of commercial vehicles is that a vehicle which has been adapted for the purposes of

smuggling "will not normally be restored." Mr Brenton's summary then goes to say that "otherwise, the policy depends on who is responsible for the smuggling attempt." The policy then sets out different outcomes depending on whether "A: Neither the operator nor the driver are responsible; or B: The driver, but not the operator is responsible; or C: The operator is responsible." The notion of whether an operator is "responsible" is articulated at B as being dependent on the operator providing evidence satisfying the Border Force that "the operator took reasonable steps to prevent drivers smuggling."

31. We note that the outcome of possible decisions range from deciding to restore the vehicle free of charge to not the restoring the vehicle. In between are various intermediate options of restoring for a fee calculated by reference to varying percentages of the revenue involved and the trade value of the vehicle. The policy seems to us to be graduated taking account of various factors such as complicity in the smuggling, whether reasonable checks had been taken in relation to the load, whether reasonable steps to prevent drivers smuggling had been taken, the number of occasions of smuggling, and the amount of revenue involved.

What appellant thinks about smuggling /and what he thinks now about the incident

32. The appellant talked to other commercial drivers. He was aware that smuggling went on, and that while some drivers were trustworthy others were not. He was aware that smuggling could be facilitated through concealments in vehicles. He told us he would not now let a driver park at home after what has happened. He would not want the same situation to arise again because of lack of control where someone parks at home.

33. Officer Brenton's evidence was that he thought the concealment was a sophisticated adaptation, and that it would take a long time to put in place. It was not simply a case of putting in a replacement tank (because the tank retained the manufacturer's DAF symbol). In Officer Brenton's opinion the adaptation would require someone to have knowledge about closed diesel systems and in having to bleed air out of the system.

34. Officer Brenton explained the basis for why he thought Mr Franczak's statement that there had been a trailer swap in France was not credible. The explanation relied on making the assumption that from Dover there would be a destination within the UK for the load so it was highly unlikely logistically for the driver to make the trips noted by Border Force's monitoring systems as having occurred and be in France to swap over trailers.

35. Officer Brenton considered that the appellant's behaviour was not that of a responsible haulier. This aspect lies at the heart of this appeal and we consider this further in the discussion section below. Officer Brenton explained that if the appellant had had strict controls and if he had monitored fuel consumption then the possibility of restoration, possibly for a fee could be look at. That course depended on how responsible he believed the person was.

36. Having heard the appellant's oral evidence on the approach that he had taken in relation to controls and monitoring Officer Brenton said he gave little weight to that evidence.

Law

37. Section 2 of the Tobacco Products Duty Act 1979 provides that tobacco products imported into the United Kingdom are chargeable to a duty of excise.

38. Under s49 Customs and Excise Management Act 1979 ("CEMA") goods which have not been properly imported and on which duty is due but has not been paid are liable to forfeiture and may be seized under the provisions of s139 CEMA.

39. Under s88 CEMA a vehicle is liable to forfeiture where it is or has been within the limits of any port while adapted for the purpose of concealing goods.

40. Under s141(1) CEMA a vehicle is also liable to forfeiture if it is used for the carriage of the seized goods.

41. Section 152 CEMA provides:

> "The Commissioners may, as they see fit-…b) restore, subject to any conditions (if any) as they think proper, anything forfeited or seized under [the customs and excise] Acts."

Law relating to Tribunal's powers on appeal against the decision

42. The powers of the Tribunal in relation to the Border Force's decision are set out in s16(4) of the Finance Act 1994. This provides:

> "…the powers of an appeal tribunal on an appeal…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 the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate 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 review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in the future".

Appellant's arguments

43. Letting an employee park the vehicle at home where this was closer to the pick up destination was not unreasonable. The adaptation could have been made en route (by swapping over a tank which had been adapted elsewhere in advance). It is normal in Poland even for big companies to let employees take vehicles home (this allows them to spend more time with their family). Indeed when the appellant was a driver he kept his vehicle at home (this was in the period 1997 to 2007).

44. The hardship the appellant was suffering was exceptional. He has had his other tractor unit taken away by the bank in order to satisfy the payments on the vehicle that had been seized by the Border Force and not restored.

Respondents' arguments

45. The Border Force's policy on restoration was a reasonable one. The decision reached was an entirely reasonable one. The issue of whether the trailer was swapped over in France was irrelevant (the issue was whether the haulier had behaved responsibly). The conclusion the haulier did not behave as a responsible one would, was reasonable. It is much easier to interfere with a unit when it is left overnight at home than within the strictures of a delivery schedule. The conclusion that any hardship the appellant had suffered was not exceptional hardship was a reasonable conclusion.

Witnesses

46. The appellant struck us as an open straightforward man who gave his answers succinctly and directly. He readily conceded matters in cross-examination and he stated when he was not sure or could not remember even if this would not have on the face of it appeared to be particularly helpful to his case. For instance he agreed that if had not had left vehicle at home the problem he faced with the seizure incident would not have happened (see [32] above). He was a credible witness.

47. Mr Brenton was also a credible witness. He conceded his letter could have been worded more clearly (see [64] below).

Discussion

48. We ought to mention at the outset that there was one matter which the appellant seemed very concerned to address which we do not think is an issue between the parties. The appellant was concerned to emphasize that he could show he was not in France as the driver had said and that the appellant did not swap the trailer. He asked for a tachograph inspection to show this. But the appellant should note that Mr Brenton agreed that the appellant did not swap the trailer over. Mr Brenton thought it unlikely given the times at which the vehicle and driver crossed the UK border on the same day that there had been such a swap. He agreed with the appellant that Mr Franczak's account was not truthful. It was not therefore necessary to inspect the tachograph. The evidence that the appellant supplied in relation to his own driver's card is similarly not relevant. We therefore put that to one side.

49. Before the Tribunal can exercise any of the powers set out in s16(4) it must be satisfied that:

> "the Commissioners or other person making [the] decision could not reasonably have arrived at it...".

50. It is not for the tribunal to re-make the decision afresh but to consider whether in reaching its decision the Border Force took account of all relevant matters, did not take into account irrelevant matters and did not make an error of law.

Officer Brenton's decision not to restore

51. In his decision (in which certain passages were emphasised in bold as reflected below), after setting out a summary of the policy (see above at [30]), Mr Brenton stated:

> "**This was no casual concealment or one that could easily be made without the knowledge of both the operator and the driver."**

52. The decision then sets out the driver's answers to questions the inspecting officers had asked (set out above at [7]) and then went on to say:

> "I cannot accept that the replies were credible. I assume the driver would fuel his unit and be well aware of the tank's capacity. This adaptation would have dramatically reduced the amount of fuel that the vehicle could take and greatly reduce the distance travelled on a tank of fuel. Also commercial records available to me show that Mr Franczak travelled Dunkirk to Dover at 18:26 hours [this seizure]. He may have swopped [sic] trailers in France but it is unlikely for him to have swapped units.
>
> However, I find your explanation no more credible particularly as the only evidence you have submitted with regards to the adaptation in your vehicle is an e-mail stating: (*excerpt then set out (see [15] above*)).
>
> I cannot accept that you without any written contract or agreement allow an employee, for his convenience, take a leased unit worth in excess of £26,000 to his home because **he lived far away from the company, and very close to the loading or unloading place**. This action on your part is beyond reckless. However, in your submissions you state that you have only 2 units and as a responsible haulier I would have expected rigorous controls on fuel expenditure and usage and distances covered per fuelling. I am sure a simple comparison between one vehicle and the other would have highlighted a disparity between them.
>
> Taking all the above into account I am unconvinced of your protestations…"

Border Force's policy on restoration of commercial vehicles adapted for smuggling

53. We have considered whether the policy under which Mr Brenton operated in relation to vehicles where adaptations for smuggling had been made was reasonable.

54. To the extent there is a distinction drawn between the policy in relation to non-adapted vehicles and those which are adapted (in the latter case there being effectively a starting point of non-restoration) we do not think this is an unreasonable distinction to draw. It is consistent with the legislation providing that adaptations made to vehicles for concealment of goods may by themselves provide a basis for liability for forfeiture for such vehicles (s88 CEMA). The fact such adaptations have been made indicates an intention on the part of those who instigate and make use of the adaptations to conceal the goods. It also indicates a higher likelihood that repeated smuggling is intended with the heightened risks to revenue that involves.

55. However it is right that the decision on restoration ought nevertheless to have regard to the particular circumstances of the matter for instance the unfairness of seizing a vehicle which has, unbeknownst to an owner, been adapted even though the owner acted responsibly. We think this concern is addressed to the extent that the reference to "normally" leaves scope to consider the particular circumstances of the case and admits the possibility that a vehicle may be restored even where adaptations for smuggling are made. The policy does not however elaborate on what those circumstances might be.

Officer's application of the policy

56. It appears to us that Mr Brenton in setting out the policy situations A through C for cases of non-adapted vehicles (see [30] above) had taken the view that the policy for that situation was something he should have regard to even though it did not strictly apply. That appears to us to have been a reasonable starting point in the absence of any guidance on what might constitute an exception to the policy of not restoring in cases where the vehicle had been adapted for smuggling.

57. We agree the officer could reasonably have thought from the seizing officer's notebook entries that the concealment was a sophisticated one and that it was not one that could easily be carried out en route.

58. We also agree that the officer's view that the version of events given by the driver upon questioning was incorrect was not unreasonable.

59. However, it then appears to us that the basis for the decision not to restore becomes confused. There appear to be two strands to Mr Brenton's decision which have become tangled together.

60. The first was that the sophistication of the concealment was such that it could not easily have been made without the knowledge of both the operator and the driver. But nothing is then said on whether Mr Brenton thought the appellant (as the operator) *did* in fact know of the concealment. Such a finding would not square well with what is said later in the decision to the effect that the driver's statements that it was the appellant who was involved in swapping the trailer and unit in France were not credible. It also sits oddly with the decision saying later that it was "beyond reckless" to allow the driver to take the unit home (which suggests the appellant ought to have known of the concealment rather than suggesting that the appellant did know

about the concealment.) Also the criticism made as to the lack of controls around fuelling is effectively saying the appellant ought to have noticed something untoward. It does not support a finding that he did know of the concealment. While Mr Brenton's statement that the concealment is not one that could easily have been made without the knowledge of the driver seems reasonable the further view that it could not have easily been made without the knowledge of the operator appears to be unsubstantiated and inconsistent with the tenor of other aspects of the decision.

61. To the extent the words in bold in the decision not to restore (at [51] above) implied that it was relevant that the appellant as operator had knowledge of the concealment when no finding had been made on this point, and where the remainder of the letter tended to point to the fact this was not the officer's view we think this was an irrelevant factor for the officer to have taken into account.

62. We did not understand the Border Force's position at the hearing to be that the appellant was complicit in the smuggling. We are satisfied the appellant was a credible witness and we find as fact that the appellant was not complicit in the smuggling and did not have any knowledge of the adaptation to the seized unit.

Was it reasonable for officer to conclude the appellant was "beyond reckless"?

63. The second strand in the decision from the terms of the letter (the third paragraph in the extract set out at [52] above) appears to be a combination of two matters which have themselves rather confusingly become intertwined. These were:

> (1) not believing the appellant's explanation that he had allowed the driver to keep the unit at home (after explaining why the driver's replies were not credible the letter states "…I find [the appellant's] explanation no more credible…"; the letter also did not accept that it was plausible that the appellant took the vehicle home because there was no written contract or agreement); and
>
> (2) coming to the view that the appellant was "beyond reckless" in allowing the vehicle to be taken home and that he did not act responsibly in carrying out fuel checks.

64. Mr Brenton fairly accepted in his answers to the Tribunal's questions that this section of the decision could have been expressed more clearly. We understood from his answer that the point he wished to make was that the appellant was reckless in allowing the vehicle to be taken home without a written agreement and for the reason that the place that where the driver lived was closer to the loading /unloading place.

65. Our focus must, we think, be on the decision as it is expressed in the decision letter sent to the appellant and not in how it may be subsequently understood with the benefit of further oral explanation. We think the confusion in this section of the decision means that it is flawed because it is internally contradictory. On the one hand it purports to challenge whether the vehicle was in fact allowed to be taken home but then on the other to accept it was taken to the driver's home but that allowing this to happen was beyond reckless on the appellant's part .

66. However even putting that to one side and interpreting the decision in the way we think Mr Brenton intended it to be read we think the decision is additionally flawed in its conclusion that it was "beyond reckless" for the appellant to allow the driver to take the unit home.

67. We do not disagree that it was reasonable of the officer to have regard to whether the appellant acted responsibly as a haulier. But in our view the officer's consideration on this aspect failed to take account of two relevant factors.

68. The first was the nature and scale of the business. The documentation and controls that might reasonably be expected to be put in place by a haulage company with significant coverage and many drivers is bound to be different from a small operation such as that of the appellant. This was a relevant factor that ought to have been taken into account when considering whether the appellant's standards fell short of how a responsible haulier would operate. As a result we think the officer had unrealistically high expectations of the level of documentation and controls that a responsible haulier whose business was similar in nature and scale to the appellant would implement in relation to background checks on the driver and in letting an employee keep the unit at home.

69. Another relevant factor, in assessing what steps a responsible haulier would adopt was the absence of any evidence that Mr Franczak, the appellant or his previous drivers had been involved in smuggling before. If a haulier had been put on notice that their vehicles or drivers had been involved in smuggling before it might be expected that a responsible haulier would as a result implement more rigorous controls.

70. It seemed to us that the officer's starting point was that a haulier should be suspicious as to attempts to modify the vehicle. However the fact an employer in the appellant's circumstances might cede to a request by an employee to keep the unit at home where his home was closer to the pick up and set down points seemed entirely plausible and not unreasonable. It would earn goodwill with the employee, and would also save on fuel. It did not earn the conclusion that granting such a request was "beyond reckless". We come to this view without placing any reliance on the appellant's point that when he was a driver he was allowed to keep his vehicle at home. The appellant's subjective views of what was reasonable do not help us in assessing the objective standard of how a responsible haulier in the circumstances of the appellant would have behaved. Even if another haulier allowed their driver (in that case the appellant) to keep his unit at home this would not help us on whether they had acted responsibly in doing so.

71. The appellant's explanation for how he had come to hire the driver and why he had hired him (he had heard about him through a friend also in the haulage business and the driver had done journeys before to England and spoke English) was plausible and reasonable as was his explanation of why he allowed the driver to leave the unit at home.

72. The Border Force's argument that there is a difference between letting the driver take the unit to do deliveries and letting the driver take the unit home is

overstated. Both imply a level of trust. It would not necessarily be at the forefront of a haulier's mind that if an employee wanted to park the unit closer to home for reasons which made sense from the haulier's view and the driver's view that this action would be for the purpose of facilitating an adaptation particularly as there had not been any evidence of previous incidents of smuggling in the appellant's business or by Mr Franczak.

73. For a number of reasons we also have concerns with the officer being so certain that the appellant would have been able to notice something untoward by reference to fuel consumption (the decision states "I am sure a simple comparison between one vehicle and the other would have highlighted a disparity between them"). First, this assumes the adaptation had been there for some time, when the possibility could not be ruled out that it was done just before the trip resulting in the seizure. Second, given the loads and driving profile would be different as between the appellant's vehicle and the one Mr Franczak was using we do not think the officer could be certain that a simple comparison between the two vehicles would have revealed something untoward. Third, once armed with the knowledge that a fuel tank adaptation had in fact been made and making a not unreasonable assumption that that would manifest itself in an altered pattern of fuel consumption it is easy to see how one might then pay more attention to scrutinising such fuel consumption. However a responsible haulier in the appellant's position whose vehicles had not been misused would not have the benefit of such hindsight. He would not have had any reason to think such an adaptation would be made to the fuel tanks on one of his vehicles and his systems of fuel monitoring (aimed at highlighting whether a driver had gone off route) would not necessarily lead him to a suspicion that an adaptation had been made. A responsible haulier would be concerned about the amount of fuel used, the distances covered and the scheduling of deliveries. Unless there had been prior incidents or warnings given the haulier would not necessarily be on the look out for the increased frequency of refuelling that might arise from the fuel tank's capacity being reduced by an adaptation.

74. In fact the appellant did monitor fuel consumption through reviewing usage of the fuel card. His fuel monitoring procedures did not strike us as unreasonable. They are consistent with him, as the business owner, wanting to keep an eye on fuel usage and making sure the vehicle was not used at his expense for other purposes. Together with his knowledge of delivery schedules it would mean that he could, as he told us, raise questions if he noted anything unusual. It would become apparent to him if the vehicle was being misused. The fact that this level of fuel monitoring would not necessarily have identified an adaptation to the fuel tank cannot be taken to indicate the appellant did not act responsibly.

75. The appellant in his evidence said that he would do things differently now. He would not let an employee keep the vehicle at home. That is not surprising given his experience but we do not think that fact is relevant in considering whether prior to the seizure the appellant had taken reasonable steps to avoid his vehicle being used for smuggling.

76. When the factor of the nature and scale of the appellant's business is taken into account we think it would certainly be possible to reach the conclusion that the way the appellant carried on his business was consistent with the conduct of a responsible haulier. Our view is that when this factor is taken into account the appellant's control and monitoring did not fall short of what could be expected of a responsible haulier.

Was it reasonable to conclude the hardship was not exceptional

77. On the basis of the evidence before the officer and the evidence we heard we agree with the Border Force; it was not unreasonable to conclude the hardship the appellant suffered was not exceptional hardship.

Lack of consideration of documents appellant was told Border Force would translate

78. The decision's treatment of the documents the appellant supplied in Polish in response to the Border Force's request for information of 13 September 2012 is unsatisfactory and is another reason why the decision is flawed in our view. The appellant having written to the Border Force to ask whether he was to provide certified translations of the Polish documents, received a reply from the Border Force which clearly indicated to the appellant that the Border Force would organise translations of the document. We were not referred to any such translations having been carried out and the review decision makes no mention of considering any such translated documents. Nevertheless the appellant would have been left with the impression that Border Force would be translating the documents he sent in and at no point can we see anything which suggests that Border Force reneged on this. However the Border Force's decision of 14 December 2012 makes no mention of the documents the appellant sent in. Further Officer Brenton's review decision simply states the documents did not come in with English translations. While the review decision notes Border Force's response of 23 September 2012 (in which it was indicated that Border Force would be carrying out the translations) no consideration was given in the review decision to the fact that the appellant would quite reasonably have expected that Border Force would do what it said it was going to do and translate the documents.

79. A decision which has reasonably been arrived at will need to have considered the representations and materials put forward by or on behalf of the appellant. Before concluding the review decision Border Force ought, in our view, to have waited until the translations had been obtained internally. Alternatively, if despite what it had told the appellant, it was the case that Border Force was not going to carry out the translations, it ought to have alerted the appellant to this fact and it ought to have given the appellant a chance to get them translated himself before any review decision was concluded.

80. The failure to consider the fact that documents which had been sent in by the appellant following a request for information from the Border Force were left without being translated (because the appellant having enquired about getting them translated himself had been told the Border Force would translate them into English) means the decision is one that could not reasonably have been arrived at.

Conclusion

81. Our conclusion is that the decision is one that could not reasonably have been arrived at. The decision took account of irrelevant factors (that the sophistication of the adaptation meant the appellant as operator knew about it, and that the operator ought to have picked up on the adaptation through monitoring of fuel consumption) and ignored relevant factors principally the relevance of the nature and scale of the appellant's business in assessing the standards according to which a responsible haulier would operate, but also the lack of evidence of any previous involvement of the appellant or his drivers with smuggling. It also failed to consider the fact that documents which had been sent in by the appellant had not been considered in circumstances where the appellant, given representations made by the Border Force to him, would reasonably have expected that the documents would be considered before the review was concluded.

82. The decision must be re-made taking into account the findings in this decision of the Tribunal.

83. In particular the further review should take account of the following:

(1) The Tribunal found the appellant to be a credible witness of fact.

(2) The appellant was not complicit in the smuggling and had no knowledge of the smuggling attempt or the adaptation.

(3) There was no evidence that the appellant or the driver had been found to be involved in any previous incidents of smuggling.

(4) The appellant had no particular reason to suspect that his vehicle would be adapted for the purpose of smuggling.

(5) The assessment of whether reasonable steps had been taken to prevent smuggling ought to take into account the nature and scale of the appellant's business.

(6) The driver did not come to the appellant out of the blue but was referred by a friend of the appellant who was also in the haulage business. The driver was English speaking, had worked in England and there was a rational basis for hiring him to do deliveries into the UK.

(7) The driver had been working for a reasonable period of time (2 to 2 and half months) before being allowed to take the vehicle home. In this period the driver would have done around six return journeys. With the monitoring the appellant carried out on fuel usage and delivery timings the appellant would be able to notice if any significant detours / breaks had been taken. Having carried out a number of return journeys for the appellant for this length of time without any incident it was reasonable that a level of trust had been built up between the appellant and the driver in these circumstances.

(8) The driver's home was closer to the loading/ unloading place than the place where the appellant kept his vehicle.

(9) It made commercial sense to allow the driver to take the vehicle home both in terms of fuel savings and in terms of employee goodwill in the reduced time the driver would spend away from home.

(10) The controls over fuel checking were reasonable for a haulage business with one owner and one employee.

(11) The absence of formal documentation on a fuel checking procedure is not significant in assessing a business of the appellant's size.

(12) The time at which the adaptation was made was not known. It was possible that the adaptation had been made prior to the journey which led to the seizure.

(13) The appellant supplied various documents in Polish which he thought were relevant to Border Force's request for further information. It was reasonable of him not to have supplied English translations of those because the e-mail he received on 26 September 2012 from Border Force would have given him the impression that Border Force would translate the documents.

84. The appeal is allowed.

85. We should make it clear to Mr Szczepański what the effect is of his appeal before this Tribunal being allowed. This is that the Border Force's decision must be remade taking into account the matters directed to be taken into account by this Tribunal. The Tribunal does not have the power to order that the vehicle is restored. Mr Szczepański should be aware that the further review of the decision may not necessarily lead to a different result.

86. But, if he disagrees with such further review decision he will have the ability to appeal against that decision to the Tribunal (and the Tribunal will have the same powers in relation to the Border Force's decision as it does in relation to this appeal).

Directions

87. Under the powers available to us under s16(4) Finance Act 1994 we direct as follows:

(1) Border Force's decision of 11 February 2013 shall cease to have effect from the date of release of this decision of the Tribunal.

(2) The Respondents shall conduct a review of the decision under appeal which takes into account the Tribunal's decision and in particular the findings listed above at [83] no later than four weeks from release of this decision.

88. 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.

SWAMI RAGHAVAN
TRIBUNAL JUDGE

RELEASE DATE: 30 December 2014