



TC05666

Appeal number: TC/2012/08114

CUSTOMS AND EXCISE – restoration of seized goods – s139 Customs and Excise Management Act 1979

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

R F M W LIMITED

Appellant

- and -

**THE DIRECTOR OF BORDER
REVENUE**

Respondents

**TRIBUNAL: JUDGE Rachel Mainwaring-Taylor
Mrs Carol Debell**

Sitting in public at Fox Court, London on 13th April 2016

Mr Peter Saxby, director of RFMW Limited, for the Appellant

Ms Carpenter of Counsel, for the Respondents

DECISION

Background

- 5 1. On 24th November 2011, 150 amplifiers ('the amplifiers') were seized by the UK Border Agency ('UKBA') at East Midlands Airport.
2. The amplifiers had been entered for export by NXG Electronics Limited ('NXG'). UKBA confirmed with the Department for Business Innovation and Skills ('BIS') that the amplifiers required an export licence. NXG, as the owner of the goods, was
10 issued with a seizure notice which explained how it could challenge the legality of the seizure. NXG did not challenge the legality of the seizure, but acknowledged that the amplifiers had been legally seized.
3. NXG subsequently went into liquidation and the insolvency practitioner, FA Simms & Partners Ltd, acting on behalf of the creditors, sought restoration of the
15 amplifiers. This application was refused by UKBA on 4th April 2012.
4. In a letter received by UKBA on 12th March 2012, Freedman Green Dhoka Solicitors ('FGD'), acting for the Appellant, sought restoration of the amplifiers. The Appellant had sold the amplifiers to NXG and, not having been paid in full for that sale, wished to recover the amplifiers. FGD suggested that since the purchase price
20 had not been fully paid, title to the amplifiers had not passed and the Appellant was the legal owner. This application for restoration was refused on 4th May 2012.
5. FGD requested a review of the decision not to restore. UKBA wrote to FGD on 19th June 2012 explaining the review process and inviting further information in support of the request. No further information was provided and UKBA wrote to
25 FGD on 24th July 2012 stating that following a full review it had decided to uphold the decision not to restore the goods.
6. On 17th August 2012, the Appellant appealed to the tribunal against the decision not to restore the amplifiers.

The law

- 30 7. Section 152 of Customs & Excise Management Act 1979 ('CEMA 1979') provides that where goods have been seized "the Commissioners may, as they see fit - ... (b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under the Customs & Excise Acts)".
8. Section 14(2) Finance Act 1995 provides as follows:
35 "(2) Any person who is -
(a) a person whose liability to pay any relevant duty or penalty is determined by, results from or is or will be affected by any decision to which this section applies,

(b) a person in relation to whom, on his application, such a decisions has been made, or

5 (c) a person on or to whom the conditions, limitations, restrictions, prohibitions or other requirements to which such a decision relates are or are to be imposed or applied,

may by notice in writing to the Commissioners require them to review that decision."

9. Section 15(1) Finance Act 1995 provides that:

10 "Where the Commissioners are required in accordance with this chapter to review any decision, it shall be their duty to do so and they may, on that review, either:

(a) confirm the decision; or

(b) withdraw or vary the decision and take such further steps (if any) in consequence of the withdrawal or variation as they may consider appropriate."

15 10. Section 16(4)-(6) Finance Act 1995 provides that:

20 "(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an Appeal Tribunal on an appeal under this section shall be confined to a power, where the Tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say -

(a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the Tribunal may direct;

25 (b) to require the Commissioners to conduct, in accordance with the directions of the Tribunal, a further review of the original decision;

30 (c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a further review, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.

(5) In relation to other decisions, the powers of an Appeal Tribunal on an appeal under this section shall also include a power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal.

(6) On an appeal under this section the burden of proof as to -

(a) the matters mentioned in sub-section (1)(a) and (b) of section 8 above.

(b) the question whether any person has acted knowingly in using any substance or liquor in contravention of section 114(2) of the Management Act and,

(c) the question whether any person had such knowledge or reasonable cause for belief as is required for liability to the penalty to arise under.... shall lie upon the Commissioners, that it shall be otherwise for the appellant to show that the grounds on which any such appeal is brought have been established."

10 Submissions

11. The Appellant submitted that UKBA's main ground for refusing restoration was that the amplifiers did not belong to the Appellant but to NXG. The Appellant believed UKBA had reached this conclusion based on the Appellant's terms and conditions, which implied that title had passed to NXG, ignoring the fact that these terms had been varied by mutual consent of the Appellant and NXG, as evidenced by an email dated 12th December 2011 from NXG requesting that UKBA restore the goods to the Appellant.

12. The Appellant further submitted that its significant co-operation with UKBA in relation to issues surrounding the amplifiers, the substantial loss to the Appellant if it cannot mitigate its loss by reclaiming the amplifiers and the fact that the Appellant reinvests into the UK economy should carry weight in the restoration decision.

13. UKBA submitted that:

(1) the goods were duly condemned as forfeit to the Crown and the legality of the seizure could not now be challenged.

(2) NXG agreed with the legality of the seizure.

(3) NXG was the owner of the goods, having taken possession of them following two payments to the Appellant, the terms and conditions being that "title and risk of loss pas to the buyer upon delivery of the product to the carrier".

(4) The Appellant appeared to accept that title to the goods was vested in NXG at the time of the seizure, but that it was varied after that (on 12th December 2011).

(5) The Appellant appeared to accept that its claim for restoration was made in order to mitigate its loss.

14. In the circumstances, UKBA argued, the goods had been forfeited to the Crown. The Appellant was owe a sum of money by the NXG (the outstanding balance of the purchase price). NXG was in liquidation and the Appellant was among its creditors. The Appellant was not entitled to claim back the amplifiers in satisfaction of its debt.

Such action would not account for the part payment already made by NXG. The Appellant was not the owner of the goods at the time they were seized or now. The reasons given by the Appellant were not valid grounds for restoration.

Discussion

5 15. It is not for the tribunal to consider the legality of the seizure. The tribunal has no power in relation to the decision not to restore unless it is "satisfied that the...person making the decision could not reasonably have arrived at it" (section 16(4), Finance Act 1995).

10 16. The burden of proof is on the Appellant to show that the decision was unreasonable, on grounds that the decision maker took into account irrelevant factors or failed to take account of a relevant fact.

15 17. In this case, the Appellant did not put forward any argument that the decision not to restore was unreasonable. It suggested that a different decision would have been "morally correct" and that UKBA was mistaken in concluding that the Appellant was not the legal owner of the goods.

20 18. We find as fact, based on the evidence before us that title to the amplifiers passed to NXG, in accordance with the terms and conditions, upon the amplifiers being delivered at the carrier and that if an attempt was made by NXG, in its email of 12th December 2011, to transfer title back to the Appellant, it was ineffective since the amplifiers, having at that point been seized, were not within NXG's gift.

19. We conclude that UKBA's decision not to restore the amplifiers was not unreasonable.

20. Accordingly, the appeal is dismissed.

25 21. 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)"
30 which accompanies and forms part of this decision notice.

**RACHEL MAINWARING-TAYLOR
TRIBUNAL JUDGE**

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