



TC08276

EXCISE DUTY – RESTORATION OF VEHICLE – Rate of penalty – Reasonableness of review decision – Duties of operators – Adequacy of anti-smuggling precautions – appeal dismissed

Appeal number: TC/2020/00634 A/V

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Mrs LUCYNA BOSAK t/a FHU TRAMP

Appellant

- and -

THE DIRECTOR OF BORDER REVENUE

Respondent

**TRIBUNAL: JUDGE JOHN MANUELL
Mrs SONIA GABLE**

The hearing took place on 13 September 2021. The Tribunal heard Mr Michael Wiencek of Eurolex Partners LLP for the Appellant and Mr Christian Fox, Counsel, for the Respondent.

With the consent of the parties, the form of the hearing was by remote video link using the Tribunal video platform. The Tribunal had decided a remote hearing was appropriate. The documents to which we were referred consisted of the agreed bundle as prepared by the Respondent in electronic form.

The hearing was held in public and there were two observers.

DECISION

Introduction

1. The Appellant lives in Poland and operates an international road transport business. On 11 July 2019 the Appellant's Renault lorry was seized at the port of Dover. It had been intercepted with 549.5kg of undeclared unprocessed tobacco aboard, excise goods with a revenue value of £86,952.88. The Appellant, who it is accepted had no knowledge of the attempted smuggling, sought restoration of the vehicle, and then a review of the Respondent's decision that restoration should be for a fee of £17,390.58, being 20% of the revenue value. The review decision dated 18 October 2019 is the subject of the present appeal.

The issues

2. Because the legality of the seizure was not contested by the Appellant within the prescribed period, the seizure is deemed lawful and the vehicle is liable to forfeiture under paragraph 5 of Schedule 3, Customs and Excise Management Act 1979 ("CEMA"), i.e., is a deemed condemnation. The Tribunal has no jurisdiction to consider the legality of the seizure: see *HMRC v Lawrence and Joan Jones* [2011] EWCA Civ 824 and rightly that was not raised before us.

3. The only power which the Tribunal has in this appeal is to determine whether or not the review decision dated 18 October 2019 is reasonable and proportionate. If the Tribunal finds that it is not reasonable and proportionate it may direct that (a) the decision should cease to have effect, (b) a further review should be conducted by the Respondent and (c) where a further review would not be an adequate remedy, to declare the decision unreasonable and to give directions to avoid a repetition by the Respondent in comparable situations in future: see Finance Act 1994, sections 14 to 16.

The law

4. Neither the Tribunal's powers nor the applicable law was in dispute, so it is not necessary to set out extracts from the legislation in this determination. The relevant legislation includes Regulation 88 of the Excise Goods (Holding, Movement and Duty Point) Regulation 2010, sections 49(1), 139(1), 141(1), 152 of CEMA, and sections 8K, 8L and 8T of The Tobacco Products Duties Act 1979.

The Appellant's case

5. The Appellant's grounds of appeal were lengthy. In outline the Appellant contended that it was not responsible for the smuggling attempt. The Respondent unreasonably failed in the course of its investigations to contact Victoria Service which had placed the order for delivery. The Respondent ought to have published its policy in

advance which policy in any event failed to take account of the road haulier's culpability. The Appellant had no contractual relationship with Skippy's so it was not necessary for it to have checked the nature of Skippy's business. It had made sufficient checks with Victoria Service. The penalisation of the Appellant was disproportionate and unreasonable.

The Respondent's case

6. The Respondent contended that the review decision was reasonable because:

- (a) The Review Officer applied the Respondent's policy on the restoration of commercial vehicles (itself reasonable), but was not fettered by it. The case was considered on its merits and evidence of hardship was considered. The policy is that a vehicle adapted for smuggling will not be restored. Otherwise the policy requires consideration of culpability, i.e., whether (i) neither the driver nor the operator are responsible; (ii) the driver but not the operator is responsible or (iii) the operator is responsible.
- A. If the operator provides evidence that neither it nor the driver were responsible for or complicit in the smuggling attempt, and the driver carried out basic reasonable checks (including compliance with the CMR Convention) to confirm the legitimacy of the load and to detect any illicit load, the vehicle will normally be restored free of charge. If insufficient evidence is provided that reasonable checks were carried out, then on the first occasion restoration will be for 20% of the revenue involved in the smuggling attempt or 100% of the trade value of the vehicle if lower. On a second or subsequent occasion within 12 months the vehicle will not normally be restored.
- B. If the operator provides evidence that the driver was responsible for the smuggling attempt and the operator was neither responsible nor complicit, then if the operator also provides evidence showing that it took reasonable steps to prevent smuggling by drivers then the vehicle will normally be restored free of charge unless the same driver (working for the same operator) is involved in a second or subsequent occasion in which case the vehicle will normally be restored for 100% of the revenue involved in the smuggling attempt (or for the trade value of the vehicle if lower), except that if the second or subsequent occasion occurs within 12 months of the first the vehicle will not normally be restored.
- C. Where the operator has failed to provide evidence that the operator was neither responsible nor complicit in the smuggling attempt then if (i) the revenue involved is less than £50,000 and it is the first occasion the vehicle will be restored for 100% of the revenue involved (or the trade value of the vehicle if less);

- (ii) the revenue involved is £50,000 or more or it is seized on a second or subsequent occasion within 12 months, the vehicle will not normally be restored.
- (b) The policy was not published in advance of the seizure. There was no requirement to do so as it was clear to anyone that smuggling would have serious consequences. Here reasonable, basic checks would have revealed a smuggling attempt notwithstanding that the operator was not directly responsible.
- (c) The Review Officer considered culpability. The duty to take reasonable steps to prevent smuggling is expected by all countries, not just the United Kingdom.
- (d) The Review Officer accepted that neither the operator nor the driver were responsible for the smuggling attempt and went on to consider, in accordance with the policy, whether basic reasonable checks had been performed to confirm the legitimacy of the load. Such checks had not been made, demonstrated by the following facts:
- (i) There was no goods description as required by article 6(F) of the CMR, and no reservations noted as required by article 8(2). The load was described only as “2 pallets”;
 - (ii) The delivery note stated that the load was “Security Systems”, yet Skippy’s do not trade in such items and confirmed that they had nothing to do with the consignment, their address was incorrectly stated on the CMR and that they sell household goods and groceries. It was reasonable to expect the Appellant to check the consignee despite the fact that there was no direct contractual relationship. Limiting checks to the contracting parties was insufficient.
 - (iii) Suspicion should have been aroused because the goods were loaded outside DHL’s depot, transferred from the rear of another van. DHL have no knowledge of the matter.
- (e) Thus paragraph A(2) of the Respondent’s policy applied, a fee of 20% of the evaded revenue, being the lesser of that and the trade value of the vehicle.
- (f) When considering in the round whether the Appellant as an innocent party should be penalised for the smuggling attempt, the Review Officer summarised the position, noting that it was unreasonable for an experienced haulier to collect unseen goods from the back of an unknown van and to transport those goods without performing any checks on the consignor, collection or delivery addresses, which if performed would have served to alert the operator to the suspicious nature of the transaction. It is reasonable to penalise such an operator in order to prevent smuggling.
- (g) Restoration of the vehicle for a fee is proportionate to the revenue evaded (£86,952.88) and to the damage to the United Kingdom market had the tobacco been sold.

(h) The application of the policy in the present case treats the Appellant in the same way as anyone else in similar circumstances. The degree of failure to take reasonable steps to prevent smuggling was considered.

Burden and standard of proof

7. The burden of proof lies on the Appellant to show that the review decision under appeal was one which no reasonable reviewing officer could have reached. The standard of proof is the normal civil standard, the balance of probabilities.

Evidence

8. There was no dispute of fact as such however evidence was given by the Appellant, interpreted from Polish by the Tribunal's interpreter. (The Appellant joined the hearing by video link from Poland and it was not possible with the current remote system for the entirety of the proceedings to be interpreted to her. The Tribunal explained its independence and the procedure which would be followed. The Appellant was also represented by an experienced Polish speaking representative who has specialised in this area of law. It was accepted that these arrangements avoided the need for the Appellant to travel and were the best available in the circumstances.)

9. The Appellant filed a witness statement dated 7 May 2021. The following points emerged from the Appellant's evidence. The Appellant had been in business since 2005. Neither the Appellant as operator nor its driver had any knowledge of the contents of the two pallets which were seized, merely the weight. That was normal for the Appellant. The CMR was not complied with. Instruction to drivers about smuggling was given orally and there was no written anti smuggling policy. Drivers' contracts in Poland did not state the drivers' responsibilities. The driver knew he had to make checks and he reported nothing untoward. Loading outside DHL premises for DHL orders as here could happen and it did not arouse suspicion. Transfers could also be done in parking areas. DHL could use handwritten orders.

10. Ms Zoe Boote, Review Officer, gave evidence in accordance with her witness statement dated 15 March 2021. The following points emerged from her evidence. Ms Boot had front line experience. In her opinion the Appellant should have checked with Skippy's as the consignee. DHL documents were invariably electronic. DHL consignments would invariably be transferred within DHL premises which typically were large enough to cover DHL's activities. It was basic procedure for the Appellant to know what its vehicles were carrying, quite apart from CMR requirements. Yet that did not happen here.

Submissions

11. Mr Fox for the Respondent relied on the Statement of Case, which has been summarised above. The Appellant had not shown that it had taken reasonable steps to prevent smuggling or that it had proper procedures in place. In particular the Appellant had accepted that the CMR had not been complied with. The review decision was a proper, informed decision based on the facts and was reasonable as well as proportionate. The Appellant had failed to show otherwise. The appeal should be dismissed.

12. Mr Wiencek for the Appellant relied on the Notice of Appeal and grounds, as well as a list of authorities submitted earlier. Irrelevant matters had been taken into account in the review decision by the Respondent which imposed unrealistic demands on hauliers such as the Appellant. There had been nothing in the load to arouse suspicion. Further enquiries should have been made and the Respondent had relied on weak evidence. In effect the Appellant's property was being confiscated without good cause. The appeal should be allowed and a further review ordered.

Discussion

13. International trade and transport has always carried a risk of smuggling and those engage in it are required to take precautionary measures. Heavy penalties apply for infringements and serve as a necessary deterrent. In this appeal the Tribunal finds that the Appellant failed to take any proper or adequate steps to prevent the use of its vehicles for smuggling. The most basic step of all, ensuring that the obvious and elementary requirements of the CMR were met, was not followed. Surprisingly it might be thought, the Appellant said that they routinely did not know what goods they were transporting. The safety implications alone of that admission give cause for concern.

14. As the Respondent's evidence showed, there was rather more about the two pallets supposedly destined for Skippy's which aroused suspicion. These include the following facts. The consignee's address was incorrectly stated and the consignee had no knowledge of the consignment. DHL, a leading company, were said to have been involved in the arrangements yet none of their standard procedures was followed. The Tribunal accepts Officer Boote's evidence that DHL documents are electronic, not handwritten and that the handwritten document supposedly from DHL should have prompted questions by the Appellant. The transfer outside DHL's premises, possibly at a truck stop, should have alerted any adequately trained driver that something was amiss and he should have sought guidance from his employer before proceeding further.

15. Officer Boote's evidence showed that the whole of the evidence available, including that put forward by the Appellant and the representations made on the Appellant's behalf, had been carefully considered and weighed before the decision was taken. No error as to the facts was shown. The Respondent's policy was applied as a guide, employing discretion to the review of the facts. Officer Boote's task was not to trace the perpetrator of the attempted smuggling, but having established that neither the operator nor its driver were culpable, to consider what the restoration penalty should be. There was no requirement to contact Victoria Service as part of the consideration

of the evidence. The ease with which Officer Boote was able to contact the consignee (Skippy's) and establish that they knew nothing of the shipment showed that the Appellant could have checked with similar ease. That was not to impose an onerous or unnecessary task upon the Appellant, in circumstances where heightened suspicion should already have been raised. The Tribunal finds that the review decision was reasonably open to the Respondent, having accepted that neither the Appellant nor its driver had any prior knowledge of the smuggling attempt.

16. There was no requirement for the Respondent to publish its restoration policy in advance. It should have been obvious to the Appellant that its business made it susceptible to the evasion of duty, i.e., smuggling, whether by its drivers obliging a friend with extra cigarettes or whether by more serious attempts, and that smuggling would have consequences.

17. Although Mr Wiencek supplied the Tribunal with a list of authorities, in the event we were not referred to any case said to be of particular relevance to the issue of the reasonableness of the Respondent's decision making. There is therefore no need for us to discuss those authorities as this is well trodden ground.

18. Thus the Tribunal finds the Appellant has not shown any proper basis for challenging the reasonableness or proportionality of the Respondent's decision.

19. The appeal is accordingly dismissed.

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.

TRIBUNAL JUDGE MANUELL

RELEASE DATE: 16 SEPTEMBER 2021