



Neutral Citation: [2023] UKFTT 00863 (TC)

Case Number: TC08940

FIRST-TIER TRIBUNAL

TAX CHAMBER

Location: Decided on the papers

Appeal reference: **TC/2021/01176**

EXCISE DUTY – seizure of company truck carrying goods liable to forfeiture – drugs- request for restoration of truck – restoration refused – discretion of UK Border Force – whether or not decision of reviewing officer reasonable – held yes – appeal dismissed.

Heard on: 12 October 2022

Judgment date: 13 July 2023

Before

TRIBUNAL JUDGE GANDHI

Between

DENISLAV GANCHEV TMD-TRANS LTD

Appellant

and

THE DIRECTOR OF BORDER REVENUE

Respondents

The Tribunal determined the appeal on 12 October 2022 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the undated Notice of Appeal and appellant’s Statement of Case dated 26 June 2021 and the respondent’s Statement of Case (with enclosures) dated 10 June 2021.

DECISION

1. This is an appeal against a decision made by UK Border Force (“UKBF”) on 11 March 2021 not to restore a Daf tractor unit registration PK2384BP (“the vehicle”) seized on 14 July 2019. The vehicle, together with an on-board trailer, registration PK0749EH, both of which it is claimed were owned by TMD-Trans Ltd (“the company”), were seized because the vehicle was used to transport 17 kg of cocaine with a street value of £850,000 (“the drugs”).

Tribunal’s powers

2. The powers of the Tribunal on an appeal against such a decision are set out in s 16(4) Finance Act 1994. In effect, the Tribunal only has a power to review the decision taken by the UKBF and does not have a power to substitute its own decision.
3. The threshold condition for interfering with a decision is that the Tribunal is satisfied that the "person making that decision could not reasonably have arrived at it". If the threshold condition is met, the Tribunal may direct that the decision should cease to have effect and may require (in this case) the UKBF to carry out a further review of the original decision.
4. The principles which the Tribunal should apply in exercising its powers can be summarised as follows:
 - (1) The burden of showing that the decision is one which the reviewing officer could not reasonably have arrived at lies with the appellant (s 16(6) Finance Act 1994 ; *McGeown International Limited v HMRC* [2011] UKFTT 407(TC) at [46]).
 - (2) A decision will be unreasonable in the relevant sense if there was an error of law (*John Dee Limited v Customs and Excise Commissioners* [1995] STC 941 at [952g-h]), if the decision maker took into account irrelevant factors or failed to take into account relevant factors or, even if the right factors were taken into account, the decision was one which no reasonable decision maker could have reached in the circumstances (*Customs and Excise Commissioners v J. H. Corbitt (Numismatists) Limited* [1981] AC 22 at [60]).
 - (3) Even if the decision is unreasonable in the relevant sense, the appeal may be dismissed if the Tribunal is satisfied that, notwithstanding the flaw in the decision-making process, the decision would inevitably have been the same (*John Dee* at [953a]).
 - (4) The Tribunal should carry out its own fact finding exercise and assess the decision in the light of the facts as found (*Gora v Customs and Excise Commissioners* [2003] EWCA Civ 525 at [38e-39]). A decision which may be reasonable based on the facts taken into account by the decision maker may therefore be unreasonable in the light of the facts as found by the Tribunal.
5. The approach the Tribunal should therefore take is as follows:
 - (1) Determine the relevant facts.
 - (2) Consider whether the decision maker has taken into account the right factors.
 - (3) If they have not, consider whether their decision would inevitably have been the same had they taken into account the correct factors.

- (4) Even if the decision maker had taken into account the right factors, consider whether the decision was one which no reasonable person could have reached in the circumstances.

The undisputed facts

6. On 14 July 2019 at Dover, the vehicle was intercepted by UKBF. It was driven by Yuriy Vasilev and operated by the company. The cab was searched and in a concealed area, officers found packages containing the drugs.
7. At the time of the seizure, the company was fulfilling a transport request from an Austrian company, LKW Walter and the on-board trailer was loaded with paper.
8. The drugs were seized and the driver was arrested. In his interview Mr Vasilev stated that the company was his and he ran it from his home address. He had purchased the vehicle 18 months previously and paid €40,000 for it.
9. The vehicle was seized as being liable to forfeiture as it was used for the carriage of goods liable to forfeiture i.e. the drugs.
10. On 24 February 2020 Mr Vasilev was sentenced to 12 years imprisonment.
11. On 13 September 2020 Milena Parvanova on behalf of her husband, Mr Vasilev, made an enquiry about the vehicle which was understood by UKBF to be a restoration request.
12. Her son, Denislav Ganchev, the appellant, who was head of transport at the company, then dealt with this matter.

The Parties' Cases

13. Mr Ganchev's case in summary is the following:
 - a. He has not been informed about the decision to restore the vehicle for a fee.
 - b. The ownership of the company is separate from the ownership of the property even if the owner of the property owns the company's capital. Mr Vasilev was acting as an individual i.e. the driver of the vehicle and a contractor under contract to the company. He was convicted as an individual who drove a truck transporting goods.
 - c. At the request of LKW Walter the on-board trailer owned by the company was restored to the driver who had completed delivery of the goods. The restoration was made by HM Customs, Coquelles. Although LKW Walter may have made the request for restoration, the trailer is owned by the company and was subsequently restored to the company.
 - d. The reasons as to why the trailer was restored should be established as it is essential to the decision with regards to the restoration of the vehicle otherwise there is a belief that there has been unequal treatment in relation to the restoration to the Bulgarian "family" company.
 - e. No evidence has been provided to show that the company were aware of or involved in the smuggling attempt. On the contrary, it is not disputed that

numerous transport services were provided by the company to and from the UK. Making such a claim would be tantamount to saying that LKW Walter is also an accomplice as the company has fulfilled their transport requests. There have been over a hundred successfully executed requests for transport by the company for LKW Walter from the beginning of 2019 until the date of confiscation.

- f. Restoration of the vehicle is vital for the company. The decision not to restore is disproportionate to the legitimate aim to prevent smuggling as there are no previous violations by the company or by Mr Ganchev. UKBF must not fetter their discretion by an undue adherence to a rigid policy. A fair balance must be struck between the public interest in preventing smuggling and the right of Mr Ganchev to the peaceful enjoyment of his possessions.
- g. The company has taken all necessary steps to prevent violations by their drivers including an explicit ban and severe sanctions for smuggling.
- h. There have been no previous violations by the company.

14. UKBF's case in summary is the following:

- a. As the legality of the seizure was not contested, the starting point is that the vehicle will have been condemned as lawfully seized and liable to forfeiture.
- b. The review decision to restore the vehicle for a fee was one that was reasonably arrived at for the following reasons:
 - i. UKBF's reasonable policy used for smuggling drugs was applied by the Review Officer although they were not fettered by it. The policy is intended to be robust to tackle cross-border smuggling and disrupt the supply of excise goods to illicit markets. The policy states that vehicles used to smuggle drugs should not be restored. Nevertheless, UKBF will consider whether the party that requested restoration was involved with, complicit in, or reckless in permitting or allowing the smuggling attempt; the amount of drugs involved; and evidence of humanitarian needs.
 - ii. The amount of drugs was not small and therefore restoration would only be considered very exceptionally.
 - iii. The Review Officer considered the level of complicity, if any, of the company, noting that a vehicle would not normally be restored to third party if that was tantamount to restoring it to the person responsible for the smuggling attempt.
 - iv. When interviewed, Mr Vasilev stated that the company firm was run from his home address. He had bought the vehicle and gave details of how much he had paid. Mr Ganchev appears to be Mr Vasilev's son. The company appears to be a family company and is therefore not a genuine third party.
 - v. If the company was owned and run by Mr Vasilev, then it was also complicit in the smuggling attempt.
 - vi. In relation to the restoration of the trailer to LKW Walter this may have been made by the National Crime Agency although the circumstances

and reasons for the restoration are not known. There is no inconsistency of decision-making on behalf of UKBF.

vii. Although hardship was considered, it is an expected and intended consequence of the seizure process. Any such hardship was not exceptional. The company has other vehicles that allow it to continue to trade.

c. The application of policy in this case treats Mr Ganchev no more harshly or leniently than anyone else in similar circumstances and the degree of failure in the duty to take reasonable steps to prevent smuggling was considered.

15. The review decision also states in summary the following:

a. A vehicle adapted for the purposes of concealing goods will not normally be restored. The vehicle had been adapted to conceal a significant amount of class A drugs. A vehicle adapted for smuggling would only be restored in very exceptional circumstances.

b. When the vehicle was intercepted Mr Vasilev told officers that the company was his firm. When he was later interviewed by the National Crime Agency, he reiterated that the company was his own company that he ran from his home address and that the company owned the cab.

c. The original restoration request was made by Ms Parvanova where she stated that she was the wife of Mr Vasilev. Mr Ganchev, his mother, Ms Parvanova, and her husband the driver, Mr Vasilev are inextricably linked to the company with Mr Vasilev on several occasions stating that he is the owner of the company and with Mr Ganchev and Ms Parvanova requesting restoration of the vehicle on behalf of the company. Therefore, neither the company nor Mr Ganchev are considered to be a genuine third-party owner.

d. In relation to the decision made to restore the trailer to LKW Walter, that has no bearing on the decision not to restore the vehicle. LKW Walter and their goods were an innocent third party to the smuggling attempt by Mr Vasilev.

e. When Mr Vasilev was interviewed, he states that he usually drives a different vehicle on behalf of the company and Mr Ganchev mentioned, in his request for a review, a different vehicle registration number that has not been seized. The inference from this is that the business has other vehicles that they have been able to use to continue to trade.

Discussion

16. Although the Statement of Case for the respondent refers to the vehicle being restored for a fee in fact it is quite clear from the review decision of 11 March 2021 that the decision made by the Review Officer was not to restore the vehicle. I take this as a typo error rather than an indication of UKBF's view as there is nothing else supporting the fact they have changed their view.

17. Mr Ganchev challenges the fact that the trailer, despite being owned by the company, upon request by LKW Walter, was restored to them and this is indicative of unequal treatment against a Bulgarian company.

18. Despite Mr Ganchev stating that the company owned the trailer and purporting to provide the registration certificate for the on-board trailer, I have not been able to identify any document which shows the company is the owner of the trailer. Given I have a registration document for the vehicle showing ownership, it is surprising that no such document showing ownership of the trailer has been provided. Although I have an email from LKW Walter dated 11 July 2019 referring to the registration number of vehicle and the trailer and asking the driver to follow the written instructions in the transport request, this does not, by itself, show that the trailer was owned by the company rather than being provided by LKW Walter.
19. I also have a variety of documents dated July 2019 which seems to be correspondence between the company and LKW Walter. Although these documents refer to both the vehicle and the trailer, as these documents are not translated, they do not show that the trailer was owned by the company and was restored to LKW Walter who then restored it to the company and that HM Customs Coquelles knew that it was the company who owned the trailer and that LKW Walter was going to restore the trailer to the company.
20. The company has also not explained to me why, if they owned the trailer, it was LKW Walter who asked for the trailer to be restored to them rather than the company. I do not accept that HM Customs Coquelles would restore the trailer to LKW Walter without being satisfied that they were restoring the trailer to its legitimate owners.
21. I also would have expected to be provided with documentary evidence from LKW Walter that the trailer was restored to them and then they subsequently restored it to the company and the reasons for this. This is particularly the case given the company's claimed long-standing links with LKW Walter.
22. The email from Gordon Crowe of Dunbar's' Solicitors simply states that LKW Walter is in the process of obtaining the trailer and goods from HM Customs. It does not give any more detail than that, so it is unclear to me, from this email, whether the trailer and goods were in fact restored to LKW Walter and whether they then returned the trailer to the company.
23. For the above reasons I therefore do not find the company has shown they owned the trailer. This means I agree with UKBF that any issues relating to the restoration of the trailer are not relevant to the restoration of the vehicle.
24. The next question I consider is who owns the vehicle. Was it a third party who was not present at the time of the seizure and were innocent of and blameless for the smuggling attempt (restoration for a fee) and additionally had taken reasonable steps to prevent smuggling (restoration for free).

25. Regarding whom owns the vehicle, the registration document shows the company owns the vehicle so who owns or is legally responsible for the actions of the company.
26. I have not been provided with any documents by the company to show who the directors/owners of the company are. If Mr Vasilev was not the owner of the company and the vehicle, then no explanation has been provided as to why he would say he was. In any case it has not been denied by Mr Ganchev that Mr Vasilev was an owner of the company and vehicle. Evidence from the Frakarita Bulgaria Association also shows that the manager of the company is Mr Vasilev.
27. I then consider the other documentary evidence before me to see what this shows. The contract for performance of personal work refers to Mr Vasilev as being a contractor for the company and I have evidence before me which shows that Mr Vasilev previously worked as a driver transporting goods internationally for RIS BG Ltd. The fact however that he was contracted to drive the truck is not mutually exclusive with him also being an owner/director of the company and the vehicle.
28. Further, the contract for performance of personal work states that the contract may be terminated by the company if the work is not performed and in the case of any property or reputational damage suffered by the company, as a result of the contract not being fulfilled, the contractor will give monetary compensation to the company. If Mr Ganchev is stating that he and the company are innocent third parties and that the company is not a “family” business, then I would have expected him to provide evidence of attempts to sue Mr Vasilev for breach of contract or alternatively give reasons as to why the company did not pursue such action.
29. The contract for the performance of personal work also contains a provision prohibiting the carriage of unregulated substances/goods/ people and states that in violation of this, the driver will owe monetary compensation to the company. Again, I have no evidence of any attempts to sue Mr Vasilev, nor have any reasons been provided as to why not.
30. I imply from this that no further action was taken by the company against Mr Vasilev as he is, as stated by him, the owner of the company and owner of the vehicle. Additionally, the others involved in running the company are closely related to him. This is because it is a small business as stated by Mr Ganchev. Mr Vasilev is the father of Mr Ganchev, and his mother and the wife of Mr Vasilev is Ms Parvanova. Further Mr Vasilev on two separate occasions told HMRC/the National Crime Agency that he was the owner of the business and it was run from his home address. From the evidence before me, it is therefore quite clear that the company is a small family run business. In any case, if this was not a family business, I would expect to see evidence of why Mr Vasilev was chosen as a driver for the company including for example details for any interviews and criminal checks carried out on him. No such evidence has been provided to me.

31. This then means the driver and owner of the company and vehicle, Mr Vasilev, was complicit in the smuggling as it is not in dispute he was convicted and sentenced to 12 years imprisonment. This in turns means that the company was complicit in the smuggling.
32. If I am wrong about this and the company is an innocent third party who was not present at the time of seizure and is innocent and blameless for the smuggling attempt, I consider if the company/Mr Ganchev has taken all necessary steps to prevent violations by their drivers.
33. Although the company states that they have successfully completed many other transports for LKW Walter, this does not, on its own, mean that the drivers/the company were not involved in smuggling as this could equally mean that the drivers/the company had simply not been caught.
34. In my view, the mere fact of including an explicit ban and severe sanctions for smuggling as a term in the contract, is not, by itself, sufficient evidence to show that the company made all reasonable attempts to ensure their drivers/trucks were not involved in smuggling. What I have not been provided with is what practical steps the company took to ensure their vehicles and/or drivers were not involved in smuggling. The company have not provided me with any details and/or evidence of what, if any, checks the company carried out/arranged to be carried out of the vehicle before Mr Vasilev set off, upon the goods being picked up by him, after the goods were delivered by him, and then upon return of the vehicle to the company's premises. Despite being asked for this evidence by UKBF in their letter of 23 October 2020, no details have been provided of how the contract to carry the goods was obtained, details of the checks made of LKW Walter, details of any checks that were made of whomever the goods were being delivered to, the arrangements made to deliver the goods, and details of any other measures taken to prevent the company's vehicles being used for smuggling. This lack of detail not only leads me to conclude that this was a family run business in which Mr Vasilev was intimately involved along with his son Mr Ganchev but that the company was involved in the smuggling or alternatively has not taken reasonable steps to prevent it.
35. UKBF state that a vehicle adapted for the purposes of concealing goods will not normally be restored except in very exceptional circumstances. The vehicle had been adapted to conceal a significant amount of class A drugs. The company has not given any exceptional circumstances as to why the vehicle, given it was adapted for smuggling (this has not been denied) should be restored.
36. Although the company refer to the financial impact on the company due to not restoring the vehicle, as UKBF states, hardship is an expected and intended consequence of the seizure process. The company has not provided me with any documentary evidence of any hardship and that such hardship is exceptional. This is particularly the case as it is quite clear from what they stated to HMRC that they had access to at least one other vehicle they could use to carry on trading.

37. I therefore make the following findings of fact:
- a. The trailer is not owned by the company and so is not relevant to whether or not the vehicle should be restored to the company.
 - b. There is no exceptional financial hardship caused to the company by not restoring the vehicle.
 - c. The company was complicit in the smuggling.
 - d. Alternatively, the company did not take reasonable care to ensure its vehicles were not being used for smuggling.
 - e. The vehicle seized was adapted to conceal drugs.

Conclusion

38. This means I find the company has not show that UKBF, when reaching their decision, did not consider all the relevant factors and did not properly consider their policy without being unduly fettered by it. Taking all of this into account I therefore do not find UKBF’s decision not to restore the vehicle to the company or Mr Ganchev as being an unreasonable decision.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

39. 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.

**PAULENE GANDHI
TRIBUNAL JUDGE**

Release Date: 13 July 2023