TC01297

Appeal reference: TC/2010/05824

EXCISE DUTY – non-restoration of goods – goods condemned as forfeit – certain factors unknown to reviewing officer at the time of review – was the decision reasonable? – no – appeal allowed

FIRST-TIER TRIBUNAL
TAX

DAVID KELSALL **Appellant**

- and -

THE DIRECTOR OF BORDER REVENUE **Respondents**

Tribunal: **Lady Mitting (Judge)**
Carole Roberts (Member)

Sitting in public in Manchester on 23 May 2011

The Appellant appeared in person

Miss Alison Graham-Wells of counsel, instructed by the General Counsel and Solicitor to Her Majesty's Revenue and Customs for the Respondents

DECISION

1. Mr Kelsall appealed against the decision on review dated 15 June 2010 refusing restoration of certain excise goods.

2. On 18 March 2010, Mr Kelsall was intercepted by officers of the UK Border Agency at Portsmouth Ferry Terminal while returning from Spain. He was found to be carrying three kilograms of hand-rolling tobacco and 3,125 Ronson cigarettes. Officers seized the excise goods, believing them to be held for a commercial purpose, UK Excise Duty not having been paid on them.

3. Mr Kelsall challenged the legality of the seizure and condemnation proceedings were instituted at Portsmouth Magistrates Court. Following a full hearing, an order for condemnation proceedings was made in respect of the goods on 26 November 2010. Mr Kelsall appealed the order to the Crown Court who, on 21 January 2011, also adjudged that the complaint was true and ordered the goods to be condemned as forfeit.

4. Simultaneously, Mr Kelsall had sought restoration of the goods, restoration being refused by letter dated 14 May 2010 and by letter dated 15 June 2010 the decision to refuse restoration was confirmed by the review officer, Mr Jonathan Aston. It was their view that the goods had been held for profitThis is the decision which is now under appeal.

The jurisdiction of the tribunal

5. We were referred by Miss Graham-Wells to the analysis of the jurisdiction of the tribunal set out in the decision of *Benahmed v The Director of Border Revenue* TC00509. We would with respect adopt that analysis contained in paragraphs 10 to 17 of the decision. Applying those principles, Mr Kelsall challenged the legality of the seizure. Both the Magistrates Court and the Crown Court ordered that the goods be condemned as forfeit and it is not now open to the tribunal to consider Mr Kelsall's argument that the goods were for his own use. The goods have been found to have been for a commercial purpose and this finding cannot be revisited by the tribunal.

6. The issue before the tribunal was whether Mr Aston's decision was reasonable, and the test for reasonableness which we apply is that set out by Lord Lane in *Customs and Excise v J H Corbitt (Numismatists) Ltd* 1980 STC 231 at page 239.

> "…if it were shown the Commissioners had acted in a way in which no reasonable panel of Commissioners could have acted; if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight."

The evidence

7. We heard oral evidence from the Appellant and on his behalf by Mr David Clewes and on behalf of the Respondents we heard from the review officer, Mr Jonathan Aston.

8. The reasons given by the seizing officer for the seizure of the goods were:

1. Unrealistic / not credible to be giving over €700 of goods away for free (Mr Kelsall had claimed that he was buying them for his family to whom they would be given free of charge)

2. Previous offender

3. Frequency of travel

4. Not credible that Mr Kelsall bought, as he had claimed, no goods back the previous month from a trip to Spain

These reasons were set out in a letter dated 14 May 2010 to which Mr Kelsall replied by letter dated 2 June, the contents of which Mr Aston took into account in his review. In his letter Mr Kelsall claimed first that he had looked after his family over the years and had given away to his family many thousands of pounds, both in monetary terms and in goods and presents. Secondly the mere fact that he might be known as a previous offender does not mean that he always offended, and "indeed I do not and the case in Maidstone was won by me". Thirdly Mr Kelsall maintained that it cannot be assumed that every time he travels abroad he purchases excise goods.

The review decision

9. Mr Aston in his review, quite correctly, predicated his decision on the assumption that the seizure would be found to be lawful and the goods would be condemned as forfeit. He went on to say that if however Mr Kelsall was successful in his claim then the goods would be returned to him in any event. He stated the restoration policy to be that where excise goods were held for profit, they would not normally be restored, although every case was examined on its merits. As we have stated previously, it was Mr Aston's view that Mr Kelsall's goods were held for profit and should not be restored. He set out in his letter five matters which he took into account in reaching his decision and we now examine each of these in turn.

10. Mr Kelsall was being picked up by a minibus at Portsmouth with a group of friends. There was what was quite rightly described by Mr Aston as a "bizarre incident" when the intercepting officer sought to confirm with the occupants of the minibus that they knew and were in fact waiting for Mr Kelsall. They denied that they did and Mr Aston treated this as an attempt to deceive the officer. The only information which Mr Aston had upon which he could base his view was that contained in the intercepting officer's note and he drew what would appear to be a perfectly proper interpretation of that note. However having heard the evidence of Mr Kelsall and Mr Clewes, we are not so certain that this was a correct interpretation. It appears to us that everybody was speaking at cross purposes, but without hearing the

evidence of the intercepting officer, who by now will have surely forgotten the incident, it is quite impossible to make a finding either way. We can only conclude that the view taken by Mr Aston on this incident was a reasonable view, given what he knew, but may or may not have been correct. We do not believe anything further can be said or drawn out of this.

11. Secondly, Mr Kelsall had told the officer that his sole income was £300 per week disability benefit. Mr Aston took the view that on this amount alone, it was unrealistic that Mr Kelsall should be giving away €700's worth of cigarettes and tobacco. He also took up the assertion made by Mr Kelsall in his letter that he looked after his family to the tune of many thousands of pounds over the years, and thought that this was not credible given his income. Mr Kelsall had produced no financial evidence to Mr Aston and all Mr Aston had in front of him was the interview note in which Mr Kelsall said he was giving the goods away to his family and the letter to which we have referred earlier. In his oral evidence Mr Kelsall told us that his wife had income of approximately £100 per week and it was her income that they lived off. He rarely drew on his income, most of which he was able to save. He was therefore quite easily able to afford €700. No financial evidence was produced to the tribunal and we have therefore no means of assessing the veracity of Mr Kelsall's assertions, but we can only say that in the light of the evidence which Mr Aston had, the view which he formed was not unreasonable.

12. The third factor taken into account by Mr Aston was rather more problematic. He had evidence before him that Mr Kelsall had been stopped by Customs on a number of occasions, namely 26 October 2007. 12 April 2008, 20 May 2008, 5 August 2008, 23 August 2008 and 22 April 2009. Mr Aston listed these dates and went on to say "on all these occasions you were carrying excise goods – a number of them resulting in seizure". In reality there had been a number of additional trips made by Mr Kelsall of which Mr Aston knew nothing and they were not therefore taken into account by him. On the other hand, the position was not entirely as Mr Aston had thought it was in relation to the trips which he had listed. It was accepted by Mr Kelsall that he had made the six previous listed trips. On all of them he was carrying goods approximately similar to those in question in this appeal. On the first three of the dates given, he was stopped but allowed to proceed. On the final one on 22 April 2009, he abandoned the goods by, he tells us, tipping them over the officer's head. Perhaps unsurprisingly the Respondents refused to entertain Mr Kelsall's request for restoration of those goods. The problem arises in respect of the trips on 5 August and 23 August 2008. On each occasion there had been condemnation proceedings in the Magistrates Court which had resulted in the goods being condemned as forfeit. Unknown to Mr Aston, although it certainly should have been known as it was a matter of record, the condemnation arising out of the 5 August seizure had been overturned on appeal at Portsmouth Crown Court on 14 August 2009. Secondly, Mr Kelsall was appealing against the decision of the Magistrates Court arising out of the 23 August trip. Mr Aston did not know of the appeal and it did not in any event take place until a couple of weeks after his review decision, but again the Magistrates condemnation was overturned. Even though the appeal post-dated the review it has to be a relevant factor. Quite clearly Mr Aston cannot be faulted but the fact of the

successful appeal fundamentally alters the circumstances of that seizure. It cannot be treated as a lawful seizure because it was later found not to have been. In relation therefore to Mr Aston's six listed interceptions, his belief that a number of them had resulted in lawful seizure was incorrect. In reality none of them had (unless arguably the abandoned goods are treated as such).

13. Fourthly, Mr Kelsall paid cash for the goods. Mr Aston viewed this as a common means of payment by smugglers because they themselves would have been paid in cash in advance and the payments could not be traced. Mr Kelsall told us that he never used a credit or debit card unless paying over the telephone because he had never been able to remember his PIN number. Again there was not documentary evidence before us to support this assertion, but it was not something known to Mr Aston and in the light of the evidence which he had, this view was not unreasonable.

14. The final factor taken into account by Mr Aston goes back to the condemnation proceedings which we mentioned previously. In his letter of 2 June 2010, Mr Kelsall had said "I am a known previous offender. This does not mean that you can assume that I always offend, indeed I do not, and the case in Maidstone was won by me". From his records, Mr Aston knew that the "Maidstone case" related to the 23 August 2008 seizure and he also knew that the appeal was not due to be heard until 25 June 2010. He therefore took the view that as the appeal had not been heard and yet Mr Kelsall was maintaining he had won it, Mr Kelsall was attempting to deceive him. In fact this was not the case at all. Mr Kelsall was not attempting to deceive Mr Aston but had inadvertently got the wrong venue. Mr Kelsall has been referring to the 5 August seizure, which as we have previously said was of course found to have been unlawful on appeal. His assertion was therefore a perfectly truthful one although containing that error.

Conclusions

15. Having outlined the factors taken into account by Mr Aston in reaching his decision, we have highlighted two matters where the facts were not as Mr Aston believed them to be. These two factors are of great importance and are critical to the review as a whole. Mr Aston clearly took the view that Mr Kelsall was a repeat offender, believing him, in fact incorrectly, to have had two importations seized and those seizures to have been upheld as lawful. He also quite wrongly believed and said so in terms that Mr Kelsall was attempting to deceive the Respondents by maintaining that he had won one of his cases. For these reasons, Mr Aston's review cannot be seen as reasonable. It fails the test of reasonableness which we set out earlier. For this reason, the appeal must succeed and Mr Aston's review cannot be allowed to stand. In line with our jurisdiction, and as we outlined to Mr Kelsall, we have to direct that a further review should be carried out. Mr Kelsall may wish to put in further evidence, specifically perhaps in respect of the assertions he made to us with regard to his financial situation, and if he does he should put in such evidence within 21 days of the date of release of this decision. We direct that the re-review should take place within 45 days of the date of release of this decision, any additional evidence being put in by Mr Kelsall to be taken into account and to be carried out by an officer with no previous involvement in the case.

16. In summary the appeal is allowed and a re-review ordered on the terms set out in the previous paragraph.

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.

LADY MITTING
JUDGE
Release Date: 5 July 2011