[2011] UKFTT 833 (TC)

TC01669

Appeal number: TC/2010/6660

EXCISE DUTY – whether decision of UKBA to refuse to restore truck and trailer seized at Dover having been used in attempt to smuggle drugs into UK was reasonable – yes in circumstances – appeal dismissed

FIRST-TIER TRIBUNAL

TAX

UAB ANETUS **Appellant**

- and -

DIRECTOR OF BORDER REVENUE

Respondents

TRIBUNAL: Mrs B Mosedale (Tribunal Judge)

Sitting in public at 45 Bedford Square, London WC1 on 1 December 2011

The Appellant was not represented

Mr Lill, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant company appeals against a decision on review of the UKBA not to restore to it an Iveco trailer truck registration number GPH 722 and trailer BJ 460. The original decision to refuse restoration was 15 February 2010. The review decision was taken by Officer Mark Collins on 15 April 2010.

Non attendance of appellant

2. The Appellant did not attend and was not represented at the hearing. On 26 October 2011 the sole director of the appellant company, Mr Arunas Tomkevicius, wrote to the Tribunal Service and asked for the matter to be decided in the absence of representation for the appellant as he could not attend due to financial problems.

3. In view of the Appellant's request that the Tribunal hear the appeal in its absence, I determined that it was in the interests of justice to do so.

Appeal out of time

4. The appeal was lodged out of time. S 16 Finance Act 1994 (as amended) provides for a 30 day time limit to appeal:

> "**16 Appeals to a tribunal**
>
> (1) An appeal against a decision on a review under section 15(not including a deemed confirmation under section 15(2) may be made to an appeal tribunal within the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates.

5. The Appellant was notified of this with the review letter. The letter also contained the address to which to send an appeal and directed the Appellant to the website for the Tribunal Service.

6. Despite this guidance, the Appellant dated a letter of appeal on 13 May 2010 and sent it to "London Tribunal Centre". Mr Tomkevicius's case is that he sent the letter to the wrong address, and I find that he did. We do not have the envelope but it must have been sent to 45 Bedford Square (the address of the VAT & duties Tribunal and still a current address for the FTT Tribunal although no longer its processing centre): I find this because ultimately the letter was forwarded to the Tribunal's central processing centre in Birmingham (to which all appeals should be sent) and forwarded without any covering memo: it is unlikely that anyone other than someone in 45 Bedford Square would realise that the letter should have been forwarded to Birmingham CPC.

7. The appellant was not present to explain why he sent the letter to the old address for the VAT Tribunal rather than the current address for the FTT Tax chamber. I find that it seems more likely than not due to confusion in that some versions of the legislation applicable to his appeal still refer to the VAT & Duties Tribunal and a later

letter from the Appellant actually refers to the VAT & Duties Tribunal. I consider that it may well not have been obvious to many persons outside the tax profession, and certainly not to someone based in Lithuania that the FTT Tax Chamber is the successor to the VAT & Duties Tribunal which no longer exists.

8. I considered the possibility that the letter was not sent on the date with which it was dated because it was not received by Birmingham until 20 July 2010. Sadly however inefficiencies in Bedford Square are very well known to the judiciary and it is only too likely that there would be a delay in forwarding post. It would not have been in Mr Tomkevicius's interests to delay making an appeal he clearly wishes to make so my finding is that the letter was sent when dated.

9. Even making allowance for the mistake in the address, bearing in mind it had to come from Lithuania and was only sent on 13 May, the letter of appeal was unlikely to have been received even if correctly addressed, within the time allowed for the appeal. Nevertheless, on the basis that Mr Tomkevicius clearly wished to lodge an appeal, and HMRC would not have been prejudiced by what should only have been a delay of a few days, and that Mr Tomkevicius is having to work in an language that is not his own, and that it would not have been obvious to someone unfamiliar with the law that the 30 days ended when the Notice of Appeal is received rather than sent, I decided in the interests of justice to extent the time limit and permit the Appellant to lodge this appeal out of time.

10. I turn to deal with the appeal itself.

Law

11. Section 3(1) of the Misuse of Drugs Act 1971 provides:

> "(1) Subject to subsection (2) below—
> (a) the importation of a controlled drug; and
> (b) the exportation of a controlled drug,
> are hereby prohibited."

12. Sub-section (2) is not relevant. Section 49(1) of the Customs and Excise Management Act 1979 ("CEMA") provides that

> "(1) Where—
> ...
> (b) any goods are imported, landed or unloaded contrary to any prohibition or restriction for the time being in force with respect thereto under or by virtue of any enactment; ...
>
> those goods shall…. be liable to forfeiture."

4. Section 139(1) of CEMA provides that

> "Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard".

5. Section 141(1) of CEMA relevantly provides that:

> "(1) Without prejudice to any other provision of the Customs and Excise Acts 1979, where any thing has become liable to forfeiture under the customs and excise Acts—
>
> (a) any ship, aircraft, vehicle, animal, container (including any article of passengers' baggage) or other thing whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture, either at a time when it was so liable or for the purposes of the commission of the offence for which it later became so liable;
> ...
> shall also be liable to forfeiture."

13. The effect of these provisions is that if a controlled drug is imported it is liable to forfeiture and then seizure by UKBA officers: anything which transported the goods at the time of the importation is also liable to forfeiture and seizure.

14. The Appellant does not challenge the legality of the seizure and indeed he cannot do so: that has already been determined by default by his failure to challenge the seizure in the magistrates' court. Nor do there appear to be any grounds on which the forfeiture could have been challenged.

15. HMRC have power under s 152 of CEMA to restore anything forfeited or seized subject to such conditions as they see fit:

> "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 and Excise Acts."

16. HMRC refused to excise that power in favour of the Appellant in this case. The Appellant asked for that decision to be reviewed, which under s 16 Finance Act 1994 it must do in order to appeal it. Mr M Collins, an officer of UKBA, carried out the review on behalf of UKBA and the Appellant has the right to appeal that decision.

17. Section 16 of the Finance Act 1994 also provides that:

> "(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;

> (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 the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.
> ….
> (6) On an appeal under this section the burden of proof as to—
> (a) the matters mentioned in subsection (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 a penalty to arise under section 22(1) or 23(1) of the Hydrocarbon Oil Duties Act 1979 (use of fuel substitute or road fuel gas on which duty not paid),
> shall lie upon the Commissioners; but it shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established."

9. Section 16(8) Finance Act 1994 and Schedule 5 paragraph 2(1)(r) provides that an "ancillary matter" includes:

> "any decision under section 152(b) as to whether or not anything forfeited or seized under the customs and excise Acts is to be restored to any person or as to the conditions subject to which any such thing is so restored"

18. The effect of this provision is that this Tribunal is limited to considering the reasonableness of HMRC's decision on review to uphold the original officer's decision not to restore the trailer and truck to the Appellant.

Facts

19. The Appellant is a company registered in Lithuania and its business is haulage. The only director of the company is Mr Arunas Tomkevicius.

20. The Lithuanian registered truck and trailer, owned by the Appellant, were intercepted at Dover on 29 November 2009. It was driven by Mr Saulius Katleris.

21. It carried two loads. One was a load of Ikea furniture, with its own CMR, and no question was raised in respect of this load which was ultimately allowed to continue to its destination. The other load, according to the separate CMR which accompanied it, was described as children's paint sets destined for Splosh Paints in Bury. However, on examination there was found to be distributed inside the various boxes marked Splosh, small boxes marked "Testoviron". These was tested and found to

contain anabolic steroids (testosterone) which is a Class C drug (Schedule 2 Part III Misuse of Drugs Act 1971). In total the vehicle was carrying 222.5kgs of anabolic steroids.

22. The drugs, trailer and truck were seized. As mentioned above, the Appellant did not challenge the seizure in the Magistrates Court and therefore under paragraph 5 of Schedule 3 to CEMA they were deemed as to be duly condemned as forfeited.

23. The Appellant's case is that prior to the shipment a Mr Rytis Strioga came to the Appellant's office and offered it the job of transporting the paints to Bury. Mr Tomkevicius's original statement to UKBA was that Mr Rytis Strioga was a representative of a Lithuanian company UAB Sidabrinis Medis (a stationary seller). Mr Tomkevicius said before accepting the work he had checked UAB Sidabrini Medis was a legitimate company on the internet. At his interview with UKBA he produced a document which post dated the seizure which he said showed the kind of information he would have obtained on the company before he accepted the work. HMRC do not challenge UAB Sidabrinis Medis' status as a legitimate company.

24. The Appellant having agreed to transport the goods, the driver Mr Katleris went to collect them. In Mr Katleris' statement to UKBA he explained that the Splosh load comprised some 25 boxes which had to be taken off their pallet and handed up to the lorry. Mr Tomkevicius says, however, that the drivers are never allowed to handle the load as they would be liable if the packaging was damaged. There was no CMR for the goods so Mr Katleris handwrote the CMR on the basis of information provided to him.

25. In his interview with UKBA, Mr Tomkevicius stated that after the seizure he had contacted the Director of UAB Sidabrinis Medis (whose name he could not recall) who had confirmed Mr Rytis Strioga was an employee. Later, in a letter dated 2 March 2010 Mr Tomkevicius said that he had now discovered that in fact Mr Strioga did not work for UAB Sidabrinis Medis but had merely used their logo. There is a possible explanation for this inconsistency in a letter from Mr Tomkevicius which hints that the director of UAB Sidabrinis Medis may originally have given Mr Tomkevicius mistaken information as Mr Tomkevicius says there is an employee at Medis with a similar name to Mr Rytis Strioga. I find Mr Tomkevicius made no checks into the bona fides of Mr Strioga before the transportation and at best was not very careful in the initial check he made after the event.

26. I am satisfied that UAB Sidabrinis Medis did not make any consignment because, firstly, of the improbability that a legitimate business would compromise its position by supplying drugs as a sideline using its own name and, secondly, because Mr Tomkevicius now says Mr Strioga was not a legitimate employee of Medis, and thirdly, because Mr Katleris's statements in interview were vague on precisely from where he collected the goods and the way the driver loaded the goods and completed the CMR were irregular. In any event, this point does not appear to be in dispute: Mr Tomkevicius no longer maintains the case that Mr Strioga was genuinely acting on behalf of UAB Sidabrinis Medis.

27. Mr Tomkevicius also said in interview that he never checked the consignee: he only checked the people who were paying the company. However, in a letter after the interview and dated 2 March 2010 to HMRC he said "we check offloading address and company" and it is clear from the context of the letter he meant the consignee (the company taking delivery). Nevertheless, I find that in this case he did not check with Splosh that they had ordered the goods, because if he had he would have discovered that they had not (see below).

28. Mr Tomkevicius now accepts that the Appellant's procedures were not adequate to protect it from a smuggling attempt as he said in his letter to the Tribunal of 26 October that "great changes" had been made to prevent repeat incidents in the future.

29. Although we had no direct evidence, hearsay evidence from Mr Collins, who had spoken to the officers concerned, was that the criminal investigation team were quite satisfied that although Splosh was a genuine company based in Bury, it had not ordered the paints in the trailer and was not expecting a delivery. They were satisfied Splosh was not the intended recipient of the drugs either. Mr Collins' evidence was not challenged: the Appellant had not suggested in his letters to the Tribunal that Splosh was involved in the smuggling. Nevertheless we have considered whether the evidence is reliable: I found Mr Collins to be a credible witness and I accept that he did speak to the criminal investigation team and was told they are satisfied Splosh were not involved.

30. I consider whether the view of the criminal investigation team is likely to be well-founded. I take into account that on the basis of the evidence I have that more likely than not that the real smuggler chose to disguise his identity by using that of an unconnected third party UAB Sidabrinis Medis as the consignor: it is therefore more likely than not that Splosh was also a genuine business picked to hide the true identity of the smuggler. For these reasons I find as a fact that Splosh was not involved in the smuggling attempt and had not ordered a consignment from Lithuania.

31. In his interview Mr Tomkevicius also stated (through the interpreter) that "we didn't suspect anything, well because it's the money" and also "the job is money". In a later letter he says that this was badly translated and he did not mean that the Appellant would take on any work as long as it was paid because, he said, his company would not risk its reputation by involvement in illegal activities. Nevertheless, I find Mr Tomkevicius was clearly aware of the risk of his vehicles being used for smuggling because it had happened once before (see below) and because he gave his drivers a printed instruction sheet telling them how to avoid being inadvertent smugglers. And I find that despite this knowledge, Mr Tomkevicius was prepared to accept loads without checking that they were genuinely from and to the companies they were purported to be from and to.

32. In a letter dated14 January 2010 to HMRC Mr Tomkevicius said:

> "our company is always trustable and nothing like it happened before."

33. I find this is not true. On 28 March 2009 the same truck and trailer, driven by the same Mr Katleris, and owned by the Appellant was stopped at Dover. Some 44,000

cigarettes were found hidden in a secret compartment adapted from the vehicle's fuel tank. The truck and trailer, although seized, were restored to the Appellant on payment of a fee.

34. In summary I find some of the statements made by Mr Tomkevicius in his interview and in letters in respect of this appeal to be unreliable: at least one is demonstrably not correct and others are inconsistent, leaving some doubt as to which statement is correct (if any).

35. I find it instructive to look not at what Mr Tomkevicius says but what he did. I find he continued to employ the driver who had been driving one of the Appellant's vehicles with a fuel tank converted to smuggle cigarettes, despite that driver being in his probationary period with the Company. Mr Tomkevicius' explanation for keeping on Mr Katleris (even at the date of his letter in late 2010 after the second discovered attempt at smuggling) was that Mr Katleris was contrite, would pay any fines and ensure it didn't happen again. However, I find Mr Tomkevicius was either in collusion with Mr Katleris over the smuggling of the cigarettes or indifferent to the risk that Mr Katleris might again adapt his lorry and continue to smuggle in the future because otherwise he would simply have terminated Mr Katleris' employment in the probationary period.

36. In addition to this I find Mr Tomkevicius agreed to transport goods in November 2009 without checking that the stated consignor was actually making the consignment or that the consignee wanted the consignment. He did not check that Mr Strioga was an employee of the "consignor". This suggests either complicity or a disregard of the risk of his vehicle being used for smuggling.

37. As Mr Tomkevicius was well aware of the risk of smuggling, failed to check out that the named consignor was supplying the goods to the UK, or that the named consignee, was expecting delivery of the load, and used a driver only 8 months previously found to have adapted to Mr Tomkevicius' company's vehicle for smuggling and kept him on even after two failed smuggling attempts, I find that the only possible conclusion is that Mr Tomkevicius was culpably involved in the smuggling of the drugs: either he was a knowing party to the smuggling attempt or he was indifferent to the risk that it might happen and failed to take basic safety precautions.

Was UKBA's decision reasonable?

38. As non-restoration involves depriving the Appellant of its vehicle, the HMRC officer is bound to consider whether such a sanction is proportionate in all the circumstances.

39. It is the Appellant's case the loss of the company's truck and trailer has meant a substantially reduced income for the Appellant and that the loss of the truck and trailer is unfair and disproportionate as the Appellant is an innocent dupe of smugglers.

40. I find that Mr Collins did take into account the hardship caused to the Appellant by the loss of its truck and failure but nevertheless concluded that in the particular circumstance of the case, the forfeiture was proportionate. Of particular relevance was his conclusion that "I am forced to conclude your leniency shown towards Mr Katleris points towards your complicity in the smuggling attempt" and that "I am forced to conclude that you as the owner of the haulage firm are culpable in this attempted smuggle."

41. I am satisfied that Mr Collins' decision was reasonable and proportionate. I find he considered the matters he should have considered and I have not formed the view that he considered anything which he should not have. His decision not to restore the truck and trailer was in accordance with the law and, based on the findings of fact which I have made, plainly right.

42. I dismiss the appeal.

43. 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.

Barbara Mosedale

TRIBUNAL JUDGE
RELEASE DATE: 15 December 2011