TC01856

Appeal number: TC/2011/4694

EXCISE DUTY – home-made wine and spirits smuggled into UK – vehicle seized - UKBA refusal to restore vehicle- whether decision reasonable - yes

FIRST-TIER TRIBUNAL
TAX CHAMBER

SC VRG ROBY TRANS SRL **Appellant**

- and -

DIRECTOR OF BORDER REVENUE **Respondent**

TRIBUNAL: JUDGE BARBARA MOSEDALE
JO NEILL

Sitting in public at Bedford Square, London on 27 and 31 January 2012

Mr V Adeniyi of A&A Solicitors LLP for the Appellant

Mr O Powell, Counsel, instructed by the United Kingdom Border Agency, for the Respondent

DECISION

1. The Appellant company appeals against a decision on review of the UKBA not to restore to it a Volvo tractor unit with registration number BC72 VRG. This vehicle was seized by the UKBA on 5 February 2011. The review decision was taken by Officer Ian Sked on 27 April 2010.

Facts

2. The appellant company is a Romanian company owned by its two directors, Mr Dumitru-Florin Vrabie and Mrs Mihaela Vrabie.

Previous incident

3. The Appellant did not dispute and we find that on 4 September 2010 Mr Vrabie and Mr Bucur (Mr Vrabie's co driver and an employee of the appellant) arrived at Dover in the tractor unit BC72 VRG which is the subject of this appeal towing the trailer BC10 VRG. The vehicle was discovered to contain some 566.50 litres of homemade wine and 26 litres of homemade spirits in the pallet storage area of the trailer and on which excise duty had not been declared. The goods and vehicles were seized but the tractor and trailer were restored to the appellant on payment of a penalty equivalent to the excise duty evaded of £1,520.

4. The excise goods were among large bags containing personal possessions. It was the evidence of Mr Vrabie and Mr Bucur that these bags belonged to acquaintances in Romania and they were delivering them to UK-resident relatives of these acquaintances.

Incident leading to refusal to restore

5. We find and it was not disputed that Mr Vrabie with his co-driver Mr Bucur and a Mr Ovidiu Simion who was a passenger arrived at Dover late on 4 February 2011. Again they were driving the same tractor unit BC72 VRG towing the same trailer BC10 VRG. In the trailer was furniture destined for Ikea; in the trailer and in the pallet storage area some 235.5 litres of homemade wine and 32 litres of homemade spirits were discovered. The wine and spirits and the tractor and trailer were seized. The excise duty evaded was £834.

6. At the hearing we had the evidence of Mr Vrabie and Mr Bucur but no oral evidence from the HMRC officer who had made the seizure. We had the hearsay evidence from her notebook. The appellant did not contend that the officer's record of what had been said by anyone was inaccurately recorded, but claimed that neither Mr Vrabie nor Mr Bucur had understood what was said and that therefore their replies to the questions should be given no weight.

7. We take into account that the appellant did not actually challenge the accuracy of the officer's account. We also take into account that the appellant (who was represented) had not indicated in advance to HMRC that it considered the record to be wrong thus giving HMRC the chance to call the officer in person. We therefore

accept the hearsay evidence of Officer J Hilmi's record of the conversation at Dover on 4 & 5 February 2011 between Mr Vrabie and Mr Bucur and herself as accurate.

8. We went on to consider whether Mr Vrabie and Mr Bucur had understood the conversation and whether any weight should be placed on their answers. An independent interpreter was provided for all three witnesses at the hearing before us and we are satisfied that without the assistance of the interpreter none of those three persons would have properly understood what was said at the hearing or been able to give evidence.

9. Nevertheless, that does not necessarily mean that Mr Vrabie and Mr Bucur would have needed an interpreter to understand the simple questions asked by Officer J Hilmi on 4 and 5 February 2011.

10. We find, on the contrary, that it is clear that Mr Vrabie did understand the simple questions asked as he gave correct answers. For instance, he correctly told the officer in answers to questions that he was carrying Ikea furniture, that Mr Bucur was his colleague and that he carried 2 cartons of cigarettes. We find that when asked whether he was carrying alcohol, wine or beer he understood the question. His answer was that they did not carry any.

11. Mr Bucur's position was that he had not understood what the Officer said and that the Officer could not have seen him in his position in the cab. We do not accept this. The officer took a detailed note of his name, date of birth and identification number and Mr Bucur did not suggest that these were incorrect. The officer records not only Mr Bucur shaking his head in answer to questions, but also records Mr Vrabie pointing to him. It records a fairly detailed conversation with Mr Bucur when Mr Vrabie identified him as owning the alcohol. We take into account that the appellant had not sought to challenge the accuracy of this before and that we have found the earlier conversation with Mr Vrabie was correctly recorded. We also take into account that Mr Vrabie did not actually challenge the accuracy of this section either. In conclusion, we do not accept that the officer did not see Mr Bucur or that Mr Bucur did not understand the simple questions asked. We therefore find as a fact that Mr Bucur did indicate to the officer that the spirits belonged to him but that the wine belonged to the three of them.

Reliability of the witnesses

12. Mr Vrabie: Mr Vrabie's evidence was that he had known in *September 2010* that he was transporting bags containing alcohol on behalf of friends and acquaintances who wished to send personal things to their relatives living in the UK. His evidence was that in *February 2011* he only knew Mr Bucur had allowed friends & acquaintances to put large bags into the pallet area and he knew they would be carrying them to the UK. Mr Vrabie's evidence about whether he knew that these bags contained alcohol was inconsistent even at the hearing: sometimes he said he did not know and on other occasions he said Mr Bucur had told him some wine was included but that he (Mr Vrabie) had not realised it was so large a quantity. And we find that earlier he had told the HMRC officer at Dover that there was no alcohol on the lorry.

13. Apart from the inconsistency in his evidence, we find his evidence incredible. His evidence amounted to saying that he was happy in February 2011 to transport goods as a favour for friends and acquaintances of Mr Bucur's and without checking their contents despite incurring a large penalty five months earlier for doing the same thing, which due to financial problems he had had to borrow money in order to pay. We find it makes no sense that he would have risked another substantial penalty just to do unpaid favours for friends and acquaintances of his co-driver. We do not think Mr Vrabie would have acted so irrationally. Therefore we conclude that Mr Vrabie's evidence on this was not reliable.

14. We also note that despite being asked about hardship, he did not mention that the appellant had recently acquired a new tractor unit. We conclude that he was not a reliable witness and we treat his evidence with caution.

15. Mr Bucur: Mr Bucur's evidence was that they carried the bags to the UK for friends and acquaintances and in return they might be given a meal or a place to shower. Yet at the time of the seizure he told the UKBA officer that the goods belonged to all three of them.

16. He was adamant at the hearing that after the first seizure he and Mr Vrabie did not discuss it afterwards although late in the hearing he agreed that they had discussed it afterwards in order to agree not to tell Mrs Vrabie.

17. Apart from these inconsistencies in his evidence, we find his evidence, if true, implies irrational behaviour in that he was claiming he was prepared to transport for free large bags of personal belongings for friends and acquaintances without checking their contents despite the large fine on his employer the previous September. We do not find Mr Bucur's evidence reliable.

18. Mrs Vrabie: We consider Mrs Vrabie was a more straightforward witness. When asked how they had managed financially since the seizure, her reply was that they had managed with some difficulty to get by with Mr Vrabie working for some of the time as a driver for a relative and much more recently through the purchase of a replacement tractor unit although at the cost of incurring yet more debt. She said they had travelled to the hearing in this vehicle. Her evidence was in contrast to Mr Vrabie's who did not mention the new vehicle and implied he had not worked very much. We considered her evidence more likely to be true as it would not be in her interest to claim the company was in a better position than it actually was.

19. Nevertheless, we note that Mrs Vrabie had written a letter to UKBA saying that the wine was being imported on behalf of Mr & Mrs Ursu for a family wedding. Telephone numbers for the Ursus were given. We do not find that this was the destination of the wine: Mr & Mrs Ursu were not called to give evidence, Mrs Vrabie said Mr Bucur was the source of her information and at the hearing Mr Bucur gave a different explanation of the source and destination of the wine.

20. Even if we accept Mrs Vrabie's account that Mr Bucur was the source of this story given in writing to UKBA but no longer advanced by the appellant as the true

version of events, it is clear that Mrs Vrabie had not utilised the telephone numbers she provided to UKBA to verify Mr Bucur's information, which we consider was careless in the circumstances. So although we prefer her evidence to Mr Vrabie's and Mr Bucur's we still treat it with some caution.

Events after the seizure

21. The appellant did not challenge the legality of the seizure in the Magistrates' court. We were told that it filed the papers too late for this. It did apply in time to UKBA for the tractor and trailer to be restored.

22. HMRC refused to restore the tractor and trailer to the Appellant. The Appellant appealed. We were informed by the Appellant's representative that the refusal to restore the trailer is no longer under appeal: we understand that this is because the Appellant's possessed the vehicle under a hire purchase contract and HMRC restored the vehicle to its owner. We are therefore concerned with HMRC's refusal to restore the tractor unit BC72 VRG.

Law

23. The Alcoholic Liquor Duties Act 1979 provides:

> "5. There shall be charged on spirits –
>
> (a) imported into the United Kingdom; or
>
> ….a duty of excise ….."
>
> "54. There shall be charged on wine –
>
> (a) imported into the United Kingdom; or
>
> ….a duty of excise…"
>
> "55. There shall be charged on made-wine –
>
> (a) imported into the United Kingdom; or
>
> ….a duty of excise…."

The definition of made-wine is in s 1 of the same Act and is "any liquor which is of a strength exceeding 1.2% and which is obtained from the alcoholic fermentation of any substance….but does not include wine, beer, black beer, spirits or cider." It was not suggested that the confiscated bottles contained anything other than an alcoholic drink. So whether the imported home-made alcoholic drinks were actually wine or made-wine is immaterial. Both are subject to excise duty. So in other words, the home-made wine and spirits brought into the country on the Appellant's trailer were subject to excise duty. That duty was not paid.

24. The time at which liability to the duty arises is determined under regulations. Article 13 of Excise Goods (Holding, movement and Duty Point) Regulations 2010 provided that where excise goods "are held for a commercial purpose" that excise duty point is that time when they are first so held in the United Kingdom. In other words, the duty point was when the goods first arrived in the UK *if* they were held for a commercial purpose.

25. Commercial purpose is defined in article 13(3):

> (3) For the purposes of paragraph (1) excise goods are held for a commercial purpose if they are held—
>
> (a)by a person other than a private individual; or
>
> (b)by a private individual ("P"), except in a case where the excise goods are for P's own use and were acquired in, and transported to the United Kingdom from, another Member State by P.
>
> (4) For the purposes of determining whether excise goods referred to in the exception in paragraph (3)(b) are for P's own use regard must be taken of—
>
> (a)P's reasons for having possession or control of those goods;
>
> (b)whether or not P is a revenue trader;
>
> (c)P's conduct, including P's intended use of those goods or any refusal to disclose the intended use of those goods;
>
> (d)the location of those goods;
>
> (e)the mode of transport used to convey those goods;
>
> (f)any document or other information relating to those goods;
>
> (g)the nature of those goods including the nature or condition of any package or container;
>
> (h)the quantity of those goods and, in particular, whether the quantity exceeds any of the following quantities—
>
> 10 litres of spirits,
>
> 20 litres of intermediate products (as defined in article 17(1) of Council Directive 92/83/EEC(1)),
>
> 90 litres of wine (including a maximum of 60 litres of sparkling wine)
>
> 110 litres of beer,
>
> 3200 cigarettes,
>
> 400 cigarillos (cigars weighing no more than 3 grammes each),
>
> 200 cigars,
>
> 3 kilogrammes of any other tobacco products;
>
> (i)whether P personally financed the purchase of those goods;
>
> (j)any other circumstance that appears to be relevant.
>
> (5) For the purposes of the exception in paragraph (3)(b)—
>
> (a)"excise goods" does not include any goods chargeable with excise duty by virtue of any provision of the Hydrocarbon Oil Duties Act 1979 or of any order made under section 10 of the Finance Act 1993(2);
>
> (b)"own use" includes use as a personal gift but does not include the transfer of the goods to another person for money or money's worth

(including any reimbursement of expenses incurred in connection with obtaining them).

26. In other words, unless the alcoholic drinks were imported for personal use, as defined above, they were liable to excise duty at the point of importation. No duty was paid in this case.

27. Section 49(1) of the Customs and Excise Management Act 1979 ("CEMA") provides that

> "(1) Where—
> (a) except as provided by or under the Customs and Excise Acts 1979, any imported goods, being goods chargeable on their importation with customs or excise duty, are, without payment of that duty-
> (i) unshipped in any port,….
>
> those goods shall…. be liable to forfeiture."

In other words, if the home-made wine and spirits were liable to excise duty and were brought into the UK without payment of such duty, the wine and spirits were liable to forfeiture.

28. 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".

29. The effect of this provision is that where the home-made wine and spirits were liable to forfeiture, the UKBA officer had the right to seize them, as indeed he did.

5.Further, section 141(1) of CEMA 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."

30. The effect of this provision is that any vehicle which at the time of importation transported any goods liable to seizure is itself also liable to forfeiture and seizure.

31. 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."

32. As mentioned earlier, 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 Sked, an officer of UKBA, carried out the review on behalf of UKBA and the Appellant has appealed that decision. We did not hear any evidence from Mr Sked because he is now on long-term sick leave and unavailable to give evidence.

33. 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"

34. 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 tractor unit to the Appellant.

35. UKBA publishes its policy on restoration. This provides (in so far as relevant) as follows:

> (ii) **<u>the driver but not the haulier is responsible</u> –** If the haulier provides evidence satisfying the UKBA that the driver, but not the haulier, is responsible for, or complicit, in the smuggling attempt then:
>
> (a) if the hauler also provides evidence satisfying UKBA that the haulier took reasonable steps to prevent drivers smuggling then the vehicle will normally be restored free of charge unless:
>
> (i) the same driver is involved (working for the same haulier) on 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:
>
> (ii) if the second or subsequent occasion occurs within 6 months of the first, the vehicle will not normally be restored.
>
> (b) Otherwise
>
> (i) on the first occasion the vehicle will normally be restored for 100% of the revenue involved (or the trade value of the vehicle if lower).
>
> (ii) on a second or subsequent occasion the vehicle will not normally be restored.
>
> (iii) **<u>the haulier is responsible:</u>**
>
> (a) If the revenue involved is less than £50,000 and it is the first occasion, the vehicle will normally be restored for 100% of the revenue involved (or the trade value of the vehicle if less).
>
> (b) If the revenue involved is £50,000 or more or it is restored on a second or subsequent occasion within 6 months, the vehicle will not normally be restored.

Decision

36. It is for the Appellant to demonstrate that UKBA's decision not to restore the vehicle was unreasonable. We deal with the Appellant's grounds of appeal.

The goods were for personal use

37. This was not a ground of appeal in its Notice of Appeal nor even specifically advanced by the Appellant's representative at the hearing. Nevertheless, mention was made of the fact that the total of the wine and spirits imported was less than what

might be regarded as three persons' 'allowance' under the regulations cited above which say regard should be had to whether the import was less than 10 litres of spirits and 90 litres of wine per person.

38. The Appellant does not challenge the legality of the seizure and indeed it cannot do so: that has already been determined by default by its failure to challenge the seizure in the magistrates' court. We are bound by the Court of Appeal authority in *HMRC v Jones & Jones* [2011] EWCA Civ 824 which is that the effect of Schedule 3 paragraph 5 to the Customs and Excise Management Act 1979 is that where the owner has not challenged the legality of the seizure within one month of the seizure then the thing seized is "deemed to have been duly condemned as forfeited." The conclusions of the Court of Appeal were:

> "the stipulated effect of the respondents' withdrawal of their notice of claim under paragraph 3 of Schedule 3 was tht the goods were deemed by the express language of paragraph 5 to have been condemned *and* to have been "duly" condemned as forfeited as illegally imported goods…..
>
> …In brief, the deemed effect of the respondents' failure to contest condemnation of the goods by the court was that the goods were being illegally imported by the respondents for commercial use."

39. We consider that this means that in this case the appellant's failure to challenge the legality of the seizure in the Magistrates' court means we are bound to find that the goods were imported illegally by the appellant for commercial use. UKBA's decision not to consider that the goods were for personal use was therefore in compliance with the law and cannot be faulted.

40. We note that in any event, even were we able to consider personal use, we would not have been persuaded that the goods were for personal use. UKBA and the Tribunal have been given at least 3 different stories about the intended use of the goods. At Dover, the UKBA officer was told the goods belonged to the 3 men in the cab. As mentioned, in a letter written by Mrs Vrabie, the UKBA review officer was told that the wine belonged to a Mr and Mrs Ursu and was intended for a family wedding. Yet at the hearing Mr Vrabie and Mr Bucur's story was that it belonged to between 10-15 friends and acquaintances (unnamed) who were sending supplies over to relatives in the UK and Mr Vrabie and Mr Bucur would deliver them in return for favours such as a meal or shower.

41. We do not consider that any of these explanations are correct: they are inconsistent and none of them have been reliably verified. In any event only the original claim (that the goods belonged to all three of the men in the cab) was consistent with personal use. They not only now deny that they owned the spirits and wine but in any event regulation 13(4)(h) only requires regards to be had to the quantity imported when considering personal use: it does not create an irrebutable presumption that importing a lesser quantity must be for personal use. And in this case, even if they were the owners, where the three persons travelling in the cab were on their evidence only to be in the UK a very short time it is most unlikely that they would be bringing in around 90 litres of wine each for their own personal use.

42. So (were it relevant, which it is not) for all these reasons we are satisfied that the spirits and wine were not for personal use.

The appellant did not know of the previous seizure of the vehicle

43. We consider it would be relevant whether the appellant knew of the previous seizure as it would affect how HMRC applied its policy with regards the question of whether it was a second or subsequent smuggling attempt. However, as a matter of law, we consider that the appellant company must be taken to know whatever an individual director knows with respect to the business of the company.

44. We accept Mrs Vrabie's evidence that Mr Vrabie and Mr Bucur had not told her about the earlier seizure in September 2010 until after the second seizure in February 2011. The evidence of all three witnesses for the appellant was consistent on this but as explained above we would treat the evidence particularly of Mr Vrabie and Mr Bucur with caution. Nevertheless, we note that Mr Vrabie dealt with the fine on the spot in September 2010 and we accept their evidence the letters from UKBA were handed to Mr Vrabie rather than posted to the company in Romania. We also note that the evidence (that Mr Vrabie and Mr Bucur agreed to keep it a secret from Mrs Vrabie) was credible on the basis neither of these witnesses were entirely straightforward with the Tribunal either.

45. However, this finding of fact is irrelevant. The company is deemed as a matter of law to know what either of its directors knows. Mr Vrabie was one of the appellant's directors. He was well aware of the earlier seizure, even if Mrs Vrabie was not. The company must therefore be taken to have known of the seizure of the vehicle in September 2010. There is therefore nothing in this ground of appeal.

The two directors were married

46. It was Mr Adeniyi's case that the UKBA's officers decision ignored the fact that the vehicle was owned by a company and not Mr Vrabie personally or alternatively was influenced by the fact that the two directors of the company were married. We agree with Mr Adeniyi that the two directors' personal relationship is irrelevant: we disagree with him that it influenced UKBA's decision. It is not mentioned as a reason for the decision and we do not find any reason to suppose that it did influence the decision. In particular, as we have explained above, Mr Vrabie's knowledge is imputed to the company, not because he was married to a director but because he was himself a director. This is not lifting the veil of incorporation but merely recognising that the company as an incorporeal entity must act by its directors.

The Appellant did not know it risked seizure of its vehicle

47. The appellant accepted that Mr Vrabie was well aware of the first seizure and that this had led to Mr Vrabie paying a penalty of £1,520. We therefore find that the appellant company (through its director Mr Vrabie) knew that it was against the law of this country to bring into this country home-made wine and spirits without paying excise duty.

48. It was the appellant's case that it did not understand from the previous seizure that a second seizure would lead to confiscation of their trailer, and that the UKBA was wrong not to take this into account in its decision.

49. We had little evidence about this as UKBA had not produced the officers' notebooks from the earlier seizure. The appellant produced a letter written to them in English and an attached document written in Romanian. Although the English version warned that a second smuggling attempt would lead to non-restoration of the vehicle, we were not satisfied that the Romanian version did as it was clearly not a translation of the English document.

50. We take into account that on Mr Vrabie's own evidence the penalty imposed on him back in September 2010 was part paid by a Romanian friend living in England with good English and that Mrs Vrabie's evidence that this was Mr Ionuț. Mr Vrabie's evidence was that Mr Ionuț's English was good enough for him to act as translator when he was speaking to the solicitor who represented the appellant at this hearing, and he was the person Mr Vrabie had asked the officer to speak to on the phone at the second smuggling attempt to explain what was happening with regards the confiscation of the vehicle.

51. We therefore find that at the time of the first incident Mr Vrabie had a document in English which explained the point and an English-speaking friend who helped at the time with paying the fine. We take into account that Mr Vrabie's evidence on other matters was not reliable. We are therefore not satisfied that he did not know that he risked forfeiture of the vehicle if he attempted to smuggle again.

52. In any event, as a matter of law we do not think it matters whether or not Mr Vrabie (and therefore the appellant company) understood that they risked forfeiture of the vehicle. We think it is relevant to the application of HMRC's policy that the appellant understood that what it was doing was against the law of this country and it is clear that Mr Vrabie was well aware that smuggling home-made wine and spirits was unlawful as he had had to pay a penalty for doing just this five months before. In conclusion, there is nothing in this ground of appeal.

No interpreter

53. Mr Vrabie says he asked for an interpreter at Dover and one was not provided. Even if true, we do not consider as a matter of law that this by itself is a ground for restoration. It would be potentially relevant if Mr Vrabie was disadvantaged by the lack of the interpreter. The only reason it was suggested that Mr Vrabie was disadvantaged by the lack of an interpreter was because, it was said, he misunderstood the questions and gave answers which UKBA considered to be misleading the officers which was taken into account in the restoration decision.

54. We have already found as a fact that he did not misunderstand the questions and in particular in telling the UKBA officer that there was no wine on board he was misleading the officer as evidence he gave at the hearing was that he knew that there was some alcohol in the bags.

55. Nor do we accept that Mr Vrabie asked for an interpreter: there is no record of this in the officer's notebook which instead records at the end of the conversation that Mr Vrabie asked the officer to speak to his friend on the phone (identified at the haring as Mr Ionuț) to explain the position and that Mr Vrabie then signed the report to say he understood the reasons for the seizure. Mr Vrabie did not suggest this was not accurate and we bear in mind that we have not found his evidence reliable.

56. So in conclusion we do not think that Mr Sked should have considered the absence of an interpreter at Dover or that if he had he might have reached a different conclusion to the one that he did.

Value of the wine

57. Although this point was not specifically raised at the hearing we have considered whether UKBA should have taken the value of the wine into account in reaching their decision. We accept the evidence of Mr Bucur as it is consistent with common-sense that the value of the homemade wine in Romania was virtually nothing. Although we think the wine would have had some value in the UK, as a matter of common-sense its value would have been low. However, excise duty is charged on the quantity and not quality or value of spirits and wine. The *value* of the spirits and wine might have been relevant to a decision on restoration following a first offence in that it might not be obvious to someone that importing home-made wine is as much subject to excise duty as commercially produced wine (if not for personal use). However, the appellant (via Mr Vrabie) was well aware home-made wine was subject to excise duty as he had had to pay a fine for importing it five months before. Therefore, Mr Sked's failure to consider the value of the goods in this case is right.

Forfeiture of the tractor is disproportionate to the offence

58. Very little documentary evidence of hardship was produced to UKBA or the Tribunal. Nevertheless, we accept Mrs Vrabie's evidence at the hearing and in her letters that the loss of the tractor unit has caused her family financial hardship. In particular we find that this was the only tractor unit which the company owned and the appellant had to pay finance on it yet was earning no income from it since it had been seized. Nevertheless, in the absence of more evidence we are unable to be certain of the degree of hardship.

59. We find that Mr Sked took hardship into account in reaching his decision as his letter says so. He considered that it was not *exceptional* hardship over and above what could be expected from having a vehicle seized. We agree that the appellant has not demonstrated exceptional hardship over what could be expected from losing a vehicle.

60. Mr Adeniyi's point is that he considers that the hardship is out of proportion to the offence which he saw as Mr Vrabie merely failing to check that the bags did not contain alcohol. However, we are unable to agree. As we have already stated, we do not accept Mr Vrabie's evidence on this. We consider that Mr Sked was right to treat this as a case of the haulier (by the agency of its director Mr Vrabie) being complicit in the smuggling attempt.

61. We find (as the parties agreed) that the tractor unit was worth £7,875, which is about 10 times the value of the duty evaded. Mr Sked did not consider the value of the vehicle to be relevant. It was clear that he thought it irrelevant because he considered that the goods were being imported for a commercial purpose. When considering proportionality, we agree with and are bound by Phillips in *Lindsey* who said that the value of the vehicle would be relevant if the importation was not for profit. However, as is clear from above, like Mr Sked, this tribunal is not satisfied with the explanations provided by the appellant as to why the goods were brought into the country. We are *not* satisfied that Mr Vrabie's motive was not profit. Indeed, based on the evidence we heard, we consider that there would have been a profit motive even though we were not told what it was. Therefore, we think Mr Sked was right to exclude the relative value of the vehicle from his consideration of whether the seizure was proportional.

Conclusion

62. We consider that Mr Sked considered all the factors which he should have considered and none that he should not have considered. He concluded that the haulier was responsible for the smuggling attempt because he considered Mr Vrabie was well aware of the presence of the alcohol. We agree with Mr Sked. His conclusions, based on our findings of fact, are in line with UKBA's published policy.

63. We agree that he was right to conclude that the seizure of the vehicle was not out of proportion to the offence because it was the second offence within six months by the same persons with the same vehicle and the same type of goods smuggled and it was not without a profit motive.

64. We dismiss the appeal.

65. 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: 24 February 2012