TC02453

Appeal number: TC/2012/3261

EXCISE DUTY – beer & wine seized - legality of seizure not challenged- whether decision not to restore reasonable – on facts yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MALT BEVERAGES BVBA **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE BARBARA MOSEDALE
SONIA GABLE

Sitting in public at Bedford Square, London on 9 October 2012

Mr Stebbings, Counsel, instructed by Altion Ltd, for the Appellant

Mrs Mannion, HMRC Officer, for the Respondents

DECISION

1. On 8 September 2011 a trailer containing a load of excise goods was seized. The appellant was the owner of the excise goods. It did not challenge the legality of the seizure in the Magistrates Court. It applied for restoration of the goods which HMRC refused by letter dated 12 October 2011. This decision was upheld on review by Miss Bines in a letter dated 19 January 2012.

2. The appellant appealed her review decision. The appeal was on six grounds. Mr Stebbings notified us at the start of the hearing that the appellant would not proceed with three of these grounds. In particular:

- the appellant no longer relied on HMRC's decision to offer to restore the trailer unit to its owner (a leasing company) for payment of a fee as evidence that their refuse to make a similar offer in relation to the goods seized was unreasonable;

- The appellant no longer relied on claims that the movement of the goods was in accordance with the law and that the duty was not due. They accept that this is a challenge to the legality of the seizure, which is something over which only the Magistrates' Court has jurisdiction.

3. It proceeded with its other three grounds which were in brief:

- HMRC seized the goods in the mistaken belief that they were not booked in with a bonded warehouse (Seabrook Warehousing, hereafter referred to as "Seabrook") simply because HMRC had quoted the wrong reference number to Seabrook;

- Although their error was drawn to their attention HMRC chose to ignore it and continue to refuse to restore the goods;

- There is no evidence of wrongdoing by the appellant: at best there may be indications of wrongdoing by the haulier but the appellant cannot be responsible for this.

Facts

Reliability of witness evidence

4. The only witness from whom we had oral evidence was the HMRC officer, Miss Bines, whose review decision was under challenge. We found her to be a reliable witness.

5. We also relied on the hearsay evidence of the notebooks of the officers involved in the seizure. By the time of the hearing the appellant no longer maintained its contention that the notebooks incorrectly recorded the reference numbers quoted to Seabrook. We found the notebooks were prepared contemporaneously. As the

appellant did not challenge their accuracy and there was no obvious inconsistency with the other evidence, we had no reason to doubt their accuracy and we accepted them as accurate evidence of events on that day.

Findings of fact

6. The appellant owned goods (wine and beer) held in a bonded warehouse in France at Coquelles near Calais. It sold the goods to Castle. We find that the CMR and an email from an employee of the appellant stated that on 5 September 2012 the goods were collected from the bonded warehouse for transport to the UK.

7. On 8 September, the lorry transporting the goods was intercepted by HMRC at Thurrock Service station. We note that therefore we do not accept that the goods actually left the bonded warehouse near Calais on 5 September as it does not normally take 3 days for goods to cross the channel.

8. The driver of the lorry was interviewed and amongst other things said that:

- the vehicle was owned by McVeigh Transport for whom he had worked for two weeks;
- he had just arrived from Calais;
- he was going to the Titan truck stop where he would drop the load;
- he could not take the load to Seabrook as it was not booked in until the following day;
- he had dropped another load at the Titan truck stop on 6 September and left the paperwork for that load with the trailer.

9. The HMRC officer (Mr G Davies) who intercepted the vehicle spoke to the CITEX officer (Mr K Lochan) who spoke to Seabrook in a number of phone calls at around 1.45pm. The reply of the employee of Seabrook to whom he spoke was that there was no load booked in tomorrow under that reference number (and we find the correct reference number was used). He also said there was no load for Castle booked in under any reference number at all for the following day.

10. The goods were seized.

11. The position was checked by Mr Lochan with Seabrook again around at around 3pm. We find that on this occasion, based on the evidence of the officer's notebook, that the reference quoted to Seabrook was one digit wrong. Again he was told the load was not booked in.

The law

12. The appellant did not challenge the legality of seizure which means they accepted that duty was owed on the seized goods. Because no challenge was made to

the legality of the seizure, we cannot and do not go behind the legality of the seizure. The goods were imported without payment of the due excise duty. The duty was chargeable because the bond conditions were broken and/or the goods had left bond.

13. The appellant did ask HMRC to restore the goods. HMRC refused to do this and the decision was upheld by Miss Bines on review.

14. Section 16 of the Finance Act 1994 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"

15. The effect of these provisions is that HMRC's decision not to offer the goods for restoration is a decision that can be appealed but the grounds of such an appeal are limited to showing that the decision of the HMRC officer (in this case Miss Bines) was one she could not reasonably have arrived at.

16. As we have said, the appellant's case was that the decision was one Miss Bines could not reasonably have arrived at for three reasons:

- HMRC seized the goods in the mistaken belief that they were not booked in with a bonded warehouse (Seabrook Warehousing, hereafter referred to as "Seabrook");
- Although their error was drawn to their attention HMRC chose to ignore it and continue to refuse to restore the goods;
- There is no evidence of wrongdoing by the appellant: at best there may be indications of wrongdoing by the haulier but the appellant cannot be responsible for this.

17. We consider each contention in turn.

HMRC seized the goods in the mistaken belief that they were not booked in with a bonded warehouse.

18. From the evidence of the notebook of the officers, we find that the correct reference number for the goods was given in the various contacts with Seabrooks at around 1:45 and before the goods were seized at about 2:20. This was no longer disputed by the appellant. However, the wrong reference was given in calls with Seabrook which took place at around 3pm.

19. The appellant's case, in a nutshell, is that although HMRC gave the right reference to Seabrook at around 1:45, there was a problem with Seabrook's computer and/or booking system which caused Seabrook at 1:45 to mistakenly deny that that the load was expected. And then when HMRC spoke to them again an hour or so later, the computer and/or booking system was working, but HMRC gave the wrong reference number causing Seabrook again to deny that the load was expected.

20. The appellant supports it case by referring to the officers' notebooks on the day which disclose, it says, in respect of an unrelated load shipped by a third party for a customer called Blumar, seized at approximately the same time, that there was a problem with Seabrook's booking system at around 1:45 on 8 September. This caused Seabrook to deny that the Blumar load was expected. But by 3:10 Seabrook stated to HMRC that the Blumar load was due.

21. Therefore, the appellant considers Miss Bines' decision unreasonable because she had the notebooks but did not make any investigations to establish if there was a problem at 1:45 which might have caused Seabrook to say the appellant's load for Castle was not expected when it was.

22. We consider that Miss Bines is under no duty to carry out her own investigations. Her duty is no more than to invite representations from the appellant and consider all the documents and other evidence made available to her.

23. In the event, the appellant presented no evidence to HMRC or Miss Bines at the time and called no evidence at the hearing.

24. On the evidence which Miss Bines had (and which was available to us) we consider it was a reasonable conclusion to reach that the appellant's load was not destined for Seabrook.

25. Firstly, the evidence that problems with Seabrook's computer or booking system had caused the initial denial was very thin: the only comments were made in respect of an unrelated load. The officer's notes record in respect of the appellant's load that there were several clear denials that any such load, irrespective of its reference number, was expected. There was no mention of any systems problems in these calls. Further, the emails between the appellant and Seabrooks some four days after the seizure, in which Seabrooks explained why it had denied the load was expected, only gave as a reason for the problem HMRC's use of the wrong reference number. These emails made no mention of systems failures.

26. Secondly, Miss Bines' decision that the load was not destined for Seabrook was not, as she explained to us, primarily based on the absence of a booking for it at Seabrooks. As it said in her decision letter, on the basis of what the driver said, her conclusion was that the load was destined for a truck stop and not a bonded warehouse. As she explained, even if there had been a booking at Seabrooks for the following day, nevertheless it was clear the goods were destined for a truck stop where the driver intended to leave them.

27. So we reject the appellant's case on this. Miss Bine's decision was not unreasonable for failing to carry out an investigation into whether Seabrook made a mistake when they denied the load was booked in. Nor was it unreasonable in failing to conclude that the load was destined for Seabrooks. On the balance of the evidence it was reasonable to conclude (as we would conclude) that the load was not destined for Seabrooks.

Although their error was drawn to their attention HMRC chose to ignore it and continue to refuse to restore the goods

28. We find that the error in the reference number was specifically addressed by Miss Bines in her decision. She accurately records that a later enquiry on the same day by an HMRC officer used the wrong reference number.

29. And despite this second set of calls to Seabrook, which did use the wrong reference number, for all the reasons given above, we do not find her decision to refuse restoration unreasonable.

No evidence that the appellant was involved in wrong-doing

30. Miss Bines does not need to be satisfied that the appellant was involved in wrong-doing in order to refuse to restore. The policy is not to restore goods which were imported without payment of duty due, save in exceptional circumstances. This is a reasonable policy to discourage evasion of excise duty.

31. Therefore it seems to us that Miss Bines would have to be have been satisfied that the appellant was *not* involved in wrong-doing for there to be exceptional circumstances.

32. It is clear that Miss Bines was not so satisfied. And we consider there was nothing unreasonable in that decision:

- The appellant does not deny that it did not carry out due diligence on its customer or transporter. Mr Stebbings' case was that it was unreasonable to expect them to do so but we do not agree;

- The appellant offers no explanation why the documents show the goods were picked up in Coquelles 3 days before the goods arrived at Thurrock;

- The appellant offers no explanation of why the goods arrived in the UK one day before (on the appellant's case) they were booked in with the bonded warehouse;

- The appellant offers no explanation of why the truck was not sealed;

- The appellant offers no explanation of why the driver said he was employed by McVeigh Transport when the appellant's case is that their freight forwarder was Duncormick Freight.

- The appellant offers no explanation why the driver said that his instructions were to drop the goods at a truck stop and that the bonded warehouse was not expecting them until the following day, other than to make a submission that what the driver said was unreliable. No evidence was given. We note that although the appellant and Seabrooks were later to claim that there was a booking for the goods, nowhere was it claimed that the booking was for the goods to arrive at Seabrooks on the day the goods were seized.

- The appellant offers no explanation of why the driver said he had dropped a similar load a few days before at a truck stop and left the paperwork with the vehicle, other than to say that there is no evidence that this earlier load was owned (or anything to do with) the appellant.

33. No evidence was given on behalf of the appellant; and there was no evidence to counter what was said contemporaneously by the driver. We conclude it was reasonable for Miss Bines to accept what the driver said as accurate as it was not challenged by the appellant at the time of the review decision. We also find that, in the absence of any other evidence, it should be accepted, firstly because there is no

reason apparent to us why the driver would say the goods were destined for a truck stop if they were actually destined for a bonded warehouse; secondly, because the appellant has never challenged this despite the opportunity to do so, and thirdly, because the goods had to go somewhere and on the appellant's case they were not expected at the bonded warehouse, only a short distance away, until the next day.

34. Miss Bines concluded that the goods would be dropped at the truck stop and excise duty unpaid. We consider that on the evidence she had this was a reasonable conclusion to reach and one that we would also have reached.

35. In all these circumstances, we found Miss Bines' decision was reasonable. Indeed, we think it was right. We dismissed the appeal.

36. 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: 14 November 2012