TC02536

Appeal number: TC/2012/00501

APPEALS – application for permission to bring appeal outside the time limit for doing so – permission refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

FAHMI HAKIM **Appellant**

- and -

UNITED KINGDOM BORDER AGENCY **Respondents**

TRIBUNAL: JUDGE CHRISTOPHER STAKER

Sitting in public in Colchester on 21 January 2013

The Appellant in person

Ms V Hale, Presenting Officer for the Respondents

DECISION

Introduction

1. The Appellant applies for permission to appeal to the Tribunal outside the applicable time limit for bringing an appeal. This application was heard in Colchester on 21 January 2013, and an oral decision was given at the end of the hearing. After the decision was given, the Appellant requested full written findings and reasons, which are now provided.

2. The Appellant seeks to appeal, pursuant to s.16 of the Finance Act 1994, against the 7 September 2011 decision of the Respondent not to restore to the Appellant a motor vehicle (the "vehicle"), which was seized on 26 June 2011 at the UK control zone in Coquelles, France. At the time of seizure, the vehicle was found to contain 14.5 kilos of hand rolling tobacco. A review decision of 6 October 2011 (but erroneously dated 6 September 2011) (the "review decision") determined that the 7 September 2011 decision should be upheld.

3. The time limit for bringing an appeal was 30 days from the date of the review decision. The time limit is thus 30 days from 6 October 2011 (despite the erroneous date on the decision), which would be 5 November 2011. The Appellant's notice of appeal was received by the Tribunal on 14 December 2011, such that it was over a month out of time.

The relevant legislation

4. Section 49(1) of CEMA provides that if goods chargeable on importation with customs or excise duty are imported without payment of such duty, they are liable to forfeiture.

5. 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".

6. 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—
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> (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; ...
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> shall also be liable to forfeiture.

7. Section 152 of CEMA relevantly provides that:

(1) The Commissioners may, as they see fit—

...

(b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under those Acts; ...

8. Section 14 of the Finance Act 1994 relevantly provides that:

(1) This section applies to the following decisions [by HMRC], ...—

(a) any decision under section 152(b) of the Management Act [CEMA] 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

(b) any relevant decision which is linked by its subject matter to such a decision under section 152(b) of the Management Act.

[The remaining sub-sections deal with a procedure for review by HMRC of decisions taken under s.152(b) of CEMA.]

9. Section 16 of the Finance Act 1994 deals with appeals to the Tribunal, and relevantly 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.

(5) In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal.

(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.

10. For purposes of s.16 of the Finance Act 1994, 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": Finance Act 1994, s.16(8) and Schedule 5, paragraph 2(1)(r).

The hearing, evidence and arguments

11. The following background facts, as stated in the review decision of 6 October 2011, have not been disputed by the Appellant.

12. On 26 June 2011 at the UK control zone at Coquelles, France, a Mr Kosik was driving the vehicle in which four other persons were passengers. The vehicle was intercepted by a UKBA officer. The officer seized the vehicle under s.139(1) CEMA as being liable to forfeiture under s.141(1)(a), on the basis that the officer considered that 14.5 kilos of hand rolling tobacco found in the car which did not appear to have borne UK duty were being held for a commercial purpose. The legality of the seizure of the car was not challenged in a magistrate's court, with the consequence that the vehicle was duly condemned as forfeit to the Crown by the passage of time under paragraph 5 of Schedule 3 of CEMA.

13. On 28 June 2011, UKBA received a letter from the Appellant, asking for the vehicle to be restored.

14. On 7 July 2011, UKBA sent the Appellant a questionnaire to complete. The completed questionnaire was returned by the Appellant on 13 July 2011.

15. On 19 August 2011, UKBA wrote to the Appellant requesting him to provide proof of ownership of the vehicle as he was not shown as the registered keeper.

16. On 26 August 2011, UKBA received from the Appellant a V5 document showing him as signing as the registered keeper on 20 June 2011, and a document purporting to be a receipt for the purchase of the vehicle from a Mr Ali Alan on 20 June 2011 for £2,000.

17. On 7 September 2011, UKBA issued the decision against which the Appellant now appeals. On 13 September 2011, the Appellant requested a review of this decision.

18. On 14 September 2011, UKBA wrote to the Appellant explaining the review process, and inviting him to provide any further information in support of his request for a review. The Appellant did not respond to this invitation.

19. The following additional facts, which are not accepted by the Appellant, are stated in the review decision. When Mr Kosik, the driver of the vehicle, was questioned by the officer who subsequently seized the vehicle, he initially said that the car was his, that he had owned it for nearly one month, that he had previously been abroad for two weeks, and that no one used the car except him. After the officer read Mr Kosik and the passengers a formal statement, Mr Kosik then said that he was the half-owner of the car with the Appellant.

20. The review decision proceeded from the following starting point. A request for restoration of forfeited items (or an appeal to the Tribunal against a decision of UKBA not to restore such items) is not a second opportunity to challenge the lawfulness of the seizure. Any challenge to the lawfulness of the seizure should have been brought before a magistrates court within one month of the seizure. As the Appellant had failed to bring any such challenge, the correctness of the seizure was not in question.

21. The review decision then upheld the decision not to restore the vehicle on the following grounds. The decision maker had regard to UKBA restoration policy, but was not bound or fettered by it. Under the policy, consideration could be given to restoring the vehicle on payment of a fee if the owner is a third party who is both innocent and blameless in respect of the smuggling attempt. Consideration could be given to restoring the vehicle free of charge if, additionally, the third party owner took all reasonable steps to prevent smuggling in the vehicle. However, a vehicle would not normally be restored to a third party in a situation where this would be tantamount to restoring it to the person responsible for the smuggling attempt.

22. The review decision considered that UKBA was not being presented with the full or accurate facts in respect of the ownership of the vehicle. It noted the inconsistent statements of Mr Kosik, referred to at paragraph 19 above. Inconsistently with this, the Appellant claimed to be the sole owner of the vehicle, and claimed to have purchased the vehicle on 20 June 2011. Inconsistently with this, Mr Kosik claimed on 26 June 2011 that the vehicle had been owned for one month, and records indicated that Mr Kosik had made a journey in the vehicle on 19 June 2011, which was one day before the Appellant claims to have purchased the vehicle.

23. The review decision also considered the degree of hardship caused by the loss of the car, but noted that hardship was the normal consequence of seizure, and considered that no exceptional hardship had been demonstrated in this case.

24. At the hearing, the Appellant said as follows. Mr Kosik was a friend of his. Mr Kosik lived with the Appellant for about 8 months from September or November 2010. Mr Kosik was living with him at the time that the vehicle was seized. Mr Kosik was always asking to use the car, and the Appellant always let him do so, as he was "a really good guy". Mr Kosik moved out subsequently as they had an argument over the seizure of the vehicle. The Appellant has not since stayed in touch with him.

25. The Appellant confirmed that the only documents that he had sent to UKBA were those listed in the HMRC notice of application dated 21 March 2012. He further stated as follows. He sent a letter of 12 September 2011 in response to the HMRC letter of 7 September 2011. He was then waiting to get a response from HMRC to his letter of 12 September 2011. He would have received the HMRC review letter a few days after it was sent on 6 October 2011. Within a day or two of receiving it, he went to the Citizen's Advice Bureau ("CAB"). They drafted a letter for him. He was then waiting for a document from UKBA. He was also waiting to get money for the car from Mr Kosik. He had contact with Mr Kosik through his girlfriend. The Appellant was the 100% owner of the car, and had merely lent the car to Mr Kosik.

26. On further questioning, the following emerged from the Appellant's evidence. He received the review letter within a few days of it being sent on 6 October 2011. Within a few days of receiving it, he went to the CAB, who arranged for Tribunal appeal form to be sent to the Appellant, and who advised the Appellant to return to the CAB once he had received it. However, the Appellant did not return to the CAB until 12 December 2011, when they assisted the Appellant to complete the Tribunal appeal form and the Appellant signed it.

27. In relation to the 14 September 2011 letter from UKBA, inviting him to provide any further information, the Appellant said that he had sent this to Mr Kosik via his girlfriend, as asked 3 or 4 times whether Mr Kosik had responded to it. The Appellant was informed by her that Mr Kosik had responded. The Appellant said that he was then waiting for UKBA to respond to the letter from Mr Kosik. The Appellant said that he never asked Mr Kosik what he wanted the car for.

28. In cross examination, Mr Kosik was asked why he did not appeal to the Tribunal within the time limit, when he received the review letter several days after it was sent on 6 October 2011, advising him that he had 30 days in which to appeal the Tribunal. The Appellant said that he was busy working. He added that he was waiting for his Mr Kosik to pay him for the car, and that if Mr Kosik had paid him, he would not have appealed. The Appellant was then asked why he did not demand of Mr Kosik that he pay for the car by a stated date, to give the Appellant time to appeal to the Tribunal in the event that Mr Kosik did not pay. The Appellant said that he was tired of everything, and was busy with work, and got fed up with it. He said that the car had cost him £2,000, but that he had told Mr Kosik that he would accept £1,000. The Appellant just hoped that Mr Kosik would pay, or send off a letter to UKBA. The Appellant accepted that he was aware of the 30 day time limit for appealing.

29. It was submitted on behalf of UKBA that the Appellant did not find the appeal process confusing. He had on previous occasions responded to UKBA, and had

admitted that he was aware of the deadline for appealing to the Tribunal. The fact that the review letter was erroneously dated September 2011 therefore did not confuse him. Reliance on Mr Kosik or his girlfriend was not compatible with the fact that it was the Appellant himself who was required to appeal. The Appellant was not confused, but merely fed up. This is not a sufficient reason for extending the time limit for appealing.

30. The Appellant submitted that the application should be granted.

Findings

31. In *Data Select v HMRC* [2012] UKUT 187 (TCC), it was said by the Upper Tribunal at [34]-[37] that:

> 34. ... Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions.
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> 35. The Court of Appeal has held that, when considering an application for an extension of time for an appeal to the Court of Appeal, it will usually be helpful to consider the overriding objective in CPR r 1.1 and the checklist of matters set out in CPR r 3.9: see *Sayers v Clarke Walker* [2002] 1 WLR 3095; *Smith v Brough* [2005] EWCA Civ 261. That approach has been adopted in relation to an application for an extension of the time to appeal from the VAT & Duties Tribunal to the High Court: see *Revenue and Customs Commissioners v Church of Scientology Religious Education College Inc* [2007] STC 1196.
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> 36. I was also shown a number of decisions of the FTT which have adopted the same approach of considering the overriding objective and the matters listed in CPR r 3.9. Some tribunals have also applied the helpful general guidance given by Lord Drummond Young in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 at [23]-[24] which is in line with what I have said above.
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> 37. In my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r 3.9, is the correct approach to adopt in relation to an application to extend time pursuant to section 83G(6) of VATA. The general comments in the above cases will also be found helpful in many other cases. Some of the above cases stress the importance of finality in litigation. Those remarks are of particular relevance where the application concerns an intended appeal against a judicial decision. The particular comments about finality in litigation are not directly

> applicable where the application concerns an intended appeal against a determination by HMRC, where there has been no judicial decision as to the position. Nonetheless, those comments stress the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled and that point applies to an appeal against a determination by HMRC as it does to appeals against a judicial decision.

32. The Tribunal takes into account all of the matters identified in this quote, including the public interest in the finality of forfeiture and restoration matters and in the finality of litigation, and that time limits for bringing appeals exist for a good reason. Indeed, that can be considered the starting point of any consideration of an application under s.49(2)(b). It is for the applicant to show reasons why an application to appeal out of time should be granted. The burden is not on HMRC to establish reasons why the extension should not be granted.

33. The Tribunal finds that each application to appeal out of time turns on its own particular facts and circumstances. Given that the Tribunal is not limited to a consideration of whether the Appellant has a "reasonable excuse" for the lateness, it will consider the circumstances as a whole, and not merely the soundness of the reasons for the lateness of the appeal.

34. While the burden is on the Appellant to show reasons why permission should be granted to appeal out of time, the strength of the considerations that must be established by the Appellant to justify permission being granted will depend on the strength of the countervailing considerations militating against the grant of permission.

35. In the present case, the Tribunal is not satisfied that permission to appeal out of time should be granted on the basis of the particular combination of all of the relevant facts and circumstances of the present case. Those facts and circumstances are set out above and need not be repeated.

36. Notwithstanding that the review decision was incorrectly dated, the deadline for appealing was 5 November 2011, being 30 days from the actual date of the review decision. The Appellant admits that he received the review decision within a few days of it being sent on 6 October 2011. The notice of appeal was lodged more than a month after the 30 day time limit. The Appellant admits that he was aware of the deadline. On the evidence, he could have gone any time to the CAB for assistance in filling out the appeal form, which eventually he did. He admits that the reason he did not do so earlier was that he was tired of the matter. He says that he was hoping that Mr Kosik would pay him something for the car, in which case he would not have appealed in any event, or that Mr Kosik would write a satisfactory letter to UKBA that would make an appeal unnecessary.

37. The Tribunal is satisfied that the Appellant was aware of the 30 day time limit for appealing, and that his failure to appeal to the Tribunal within that time limit was essentially due to him being tired and fed up. He would have been capable of appealing within the deadline.

38. The Tribunal does not find there to be any particular countervailing factors. If the Appellant had a strong case on the merits, that might be such a countervailing consideration. The Tribunal is not called upon to consider the substance of the appeal in determining the present application. However, the following is noted. UKBA have identified contradictions in the statements made by the Appellant and Mr Kosik, leading UKBA to consider that there are concerns that restoration of the vehicle might be tantamount to restoring the vehicle to the person responsible for the smuggling attempt. There is nothing before the Tribunal to suggest that the Appellant has an explanation for those contradictions. Based on the material presently before the Tribunal, the appeal would not seem to have strong prospects.

39. In the totality of the circumstances the balance is against granting permission to appeal out of time in this particular case.

Conclusion

40. For the reasons above, the Tribunal decided not to grant permission to the Appellant to make a late appeal.

41. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 7 February 2013