TC02642

Appeal number: TC/2011/03997

EXCISE DUTY RESTORATION OF VEHICLE – vehicle restored for fee representing excise duty on goods seized (hand rolled tobacco) – level of fee – non-apportionment of fee to goods attributable to appellant – appellant offered to pay fee – appellant incurred other costs relating to seizure and restoration – whether decision to restore for fee should have been made sooner – whether decision one that could not reasonably have been arrived at? –no - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

AMANDA BROOME **Appellant**

- and -

DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE SWAMI RAGHAVAN
ELIZABETH BRIDGE

Sitting in public at Bedford Square, London on 4 April 2012 and 14 September 2012

Mrs Amanda Broome in person

Mr Edward Culver, Counsel for the Respondents

DECISION

Introduction

1. Mrs Broome appeals against a decision of the UK Border Agency ("UKBA") of 21 June 2011 restoring her car for a fee of £1940.00. The decision amended an earlier decision of 5 May 2011 which refused restoration of the car.

2. The car, a Ford Kuga, registration number EN10 CDK, was seized on 12 March 2011 following the seizure of 15kg of hand rolling tobacco upon which excise duty of £1,943.85 had been evaded. The appellant was travelling with her husband, Ian Broome and another couple.

3. The appellant argues the fee required by UKBA was unreasonable. In particular the fee did not take into account that only a proportion of the goods were for the appellant and it was unfair in view of other costs including legal costs the appellant had incurred in the car having been seized and in getting her car back. She also argues the decision to restore for a fee should have been reached sooner than it had been.

4. UKBA argue the decision to restore for the fee was in accordance with its policy, that it was reasonable, and that the timescale over which the decision was taken was also reasonable.

5. The hearing had been adjourned from 4 April 2012 as UKBA's witness was unavailable for cross-examination due to medical reasons.

Evidence

We had before us a bundle of documents produced by UKBA. This included UKBA's notes of the initial interception and interview of the appellant and other occupants of the vehicle and correspondence between the appellant and UKBA. It also included copies of documents produced by the appellant covering details of fees incurred in relation to representation and in relation to the eventual retrieval of the car. We heard evidence from David Harris the UKBA officer who made the decision which is the subject of the appeal, and Mrs Broome had the opportunity to ask Mr Harris questions. Mrs Broome represented herself and in the course of her submissions gave evidence upon which UKBA were able to ask questions.

Facts

6. On 12 March 2011 the appellant's vehicle was stopped by UKBA officers at the UK Control Zone at Coquelles. The appellant had been away for the day to Brugge along with her husband Ian Broome and two friends of the family Andrew Lang and Trudie Alger and they had between them bought 300 pouches of hand rolling tobacco with a weight of 15kg. The goods were paid for on the appellant's Tesco credit card which enabled her to collect Tesco clubcard points on the purchase.

7. The four occupants were interviewed. The officer came to the view the tobacco was not for own use and was held for a commercial purpose. The tobacco was seized under s139(1) of the Customs and Excise Management Act 1979 (CEMA) as being liable to forfeiture and the car was seized as being liable to forfeiture because it was used for the carriage of goods liable to forfeiture.

8. The appellant took initial steps to challenge to the legality of the seizure in the magistrate's court.

9. On 14 March 2011 the appellant wrote to UKBA to make representations in relation to the return of the vehicle.

10. On 25 March 2011 UKBA Officer Harvey wrote to the appellant refusing to restore the vehicle.

11. On 1 April the appellant's solicitor requested a review of the decision. The officer wrote on 5 April 2011 inviting submissions of further information. Further correspondence ensued between that date and 4 May 2011.

12. On 8 April 2011 the appellant sent a letter by fax and post to the Acting Chief Executive of UKBA. The letter included the following:

> "On the 28th March I received a letter stating that the amount of excise duty on the whole seizure would be £1943.85. I spoke to the other members of my party and it was agreed I would telephone to pay this duty in order to get the goods and the car back. The letter also stated that the car would not be restored! I immediately telephoned to pay the duty and was informed that I could not to this."

13. On 5 May 2011 Mr Harris wrote to the appellant refusing to restore the vehicle.

14. On 17 May 2011 the appellant wrote to UKBA making further representations as to why the vehicle should be restored. The letter included the following:

> "I hope that you will re-consider your decision and the matter can be resolved upon repayment of the Excise Duty payable…I request again that HMRC accept payment if the Excise Duty by way of "fee" and restore my vehicle…".

15. The letter also mentioned the car was purchased less than 6 months ago for £19,000.

16. On 18 May 2011 the appellant was informed by UKBA that Officer Harris was on leave and would not be back until early June.

17. On 27 May 2011 the appellant's representative informed UKBA the appellant was withdrawing from proceedings in the magistrates court referring to reasons of costs and because of the implications of the other members of her party not contesting those proceedings. On the same day the appellant lodged her Notice of Appeal with the Tribunal.

18. On 21 June 2011 Mr Harris wrote to the appellant and having reviewed the decision further made an offer for restoration of the vehicle for a fee of £1940.

19. In the letter Mr Harris stated he was:

> "…exceptionally going to deviate from the general policy in such cases and extend to you the benefit of the doubt and offer restoration of the vehicle for a fee based on the excise duty evaded. The decision is made on humanitarian grounds."

20. In an e-mail dated 29 June 2011 the appellant's representative enclosed a copy of the revised decision and confirmed to the Tribunal that the appellant wished to pursue her appeal against the revised decision.

21. On 7 July 2011 the Tribunal informed the parties that the appeal would continue under the same reference number but with substitution of the appealed decision with UKBA's decision of 21 June 2011.

22. Shortly afterward the same month the appellant paid the fee and vehicle was restored to her.

Law

23. Under Section 141(1) CEMA a vehicle is liable to forfeiture if it used for the carriage of the seized goods.

24. Section 152 CEMA provides:

> "The Commissioners may, as they see fit,
>
> …b) restore, subject to any conditions (if any) as they think proper, anything forfeited or seized …."

25. The provisions of the Borders, Citizenship and Immigration Act 2009 enable UKBA to exercise customs functions at the UK border and provide for legislative references to the Commissioners to be read accordingly.

26. The powers of the Tribunal in relation to UKBA's decision are set out in s16(4) of the Finance Act 1994. This provides:

> "…the powers of an appeal tribunal on an appeal…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 steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in the future."

Appellant's arguments

27. The appellant argues it was unfair of UKBA to seek a fee of £1940 in view of the following.

(1) The amount corresponded to the whole amount of duty on the tobacco rather than the proportion attributable to her.

(2) She had already incurred significant costs as a result of the seizure of the car and in retrieving the car.

(3) The context in which the appellant had made an offer to pay an amount representing the duty on the goods was from sheer desperation to get the car back.

(4) The decision to restore for a fee ought to have been made at the outset.

28. The appellant disputed that the tobacco was held for a commercial purpose. The appellant had begun to contest this in condemnation proceedings in the magistrates court but these had to withdrawn because of the costs.

Respondents' arguments

29. The Respondent argues that the decision to restore the vehicle for a fee the appellant had offered and which represented the unpaid excise duty was a reasonable decision. The seized goods were for profit and in those circumstances the return of the vehicle for a fee was a concession from the normal application of UKBA's policy which would have resulted in the car not being restored.

30. The calculation of the fee by reference to the duty evaded was reasonable and it was reasonable to calculate this on the whole amount rather than on the amount of tobacco attributable to the appellant.

31. The length of time to make the decision given the train of correspondence was reasonable. Even if the Tribunal did not think the decision was reasonable the threshold was that of showing that the decision could not reasonably have been arrived at and that threshold was not met on the facts of this case.

Discussion

Tribunal's powers given vehicle had already been returned and fee paid

32. The appellant had the car restored to her upon payment of £1940 in June 2011. The issue was raised at the hearing on 4 April 2012 and in correspondence preceding

this hearing as to whether the Tribunal could in these circumstances nevertheless deal with issues as to the level of the fee charged.

33. The Tribunal's powers under s16(4) Finance Act 1994 are set out above at [26]. Given, for example, the power in subparagraph c), which refers to the tribunal being able to declare a decision to have been unreasonable and to give directions to the Commissioners so as to secure that future repetitions of unreasonableness do not occur, we think it is clear that the Tribunal is not deprived of jurisdiction to hear an appeal where the reasonableness of the fee is in issue even if the vehicle has been restored and the fee paid. At the hearing Mr Culver, correctly in our view, did not seek to argue otherwise.

34. Before the Tribunal can exercise any of the powers set out in s16(4) Finance Act 1994 it must however be satisfied in relation to the decision that "the Commissioners or other person making [the] decision could not reasonably have arrived at it...".

35. It is not for the Tribunal to re-make the decision afresh but to consider whether in reaching its decision UKBA took account of all relevant matters, did not take into account irrelevant matters and did not make an error of law.

36. In examining UKBA's decision there are some issues the Tribunal may not consider. To the extent the appellant argues that the tobacco was not held for a commercial purpose this is not something the Tribunal is able to consider following the Court of Appeal decision in *Jones v Jones* [2011] EWCA Civ 824. That issue and any issue as to the legality of the seizure had to be addressed in condemnation proceedings. The fact that the appellant states she withdrew from such proceedings due to reasons of cost does not alter the position that the tribunal cannot consider the issue of whether the goods were held for a commercial purpose.

Mr Harris's decision to restore for a fee

37. Mr Harris's decision of 21 June 2011 was in response to the appellant's letter of 17 May 2011 which in turn responded to Mr Harris's original decision letter of 5 May 2011. That letter contained a summary of UKBA's policy for the restoration of private vehicles.

38. The general policy is stated to be that private vehicles used for the improper importation or transportation of excise goods should not normally be restored. The policy draws a distinction between "not for profit" cases which are described as cases where the goods are not for own use but are to be passed on to others on a not for profit reimbursement basis and "for profit" cases. In "for profit" cases the vehicle is not normally restored but the circumstances of the quantity of excise goods being small and the importation being a first occurrence are cited as an example where UKBA might decide to restore subject to conditions e.g. a fee.

39. In relation to "not for profit" cases for a first "aggravated detection" the policy states the vehicle will normally be seized and restored for 100% of the revenue

involved. Aggravating circumstances are defined as including where large quantities for example more than 6kg of handrolling tobacco. In his letter of 17 May 2011 Mr Harris explained that as no claim had been made that the goods were to be passed on to others on "not for profit" reimbursement basis Mr Harris had concluded the goods were held for profit the policy was not to restore the vehicle. He also considered the issue of whether there was exceptional hardship arising from the difficulties the appellant faced in transporting her disabled father-in-law but concluded that this was not a reason to restore noting that records indicated to him that the appellant was shown as a keeper of another vehicle.

40. While UKBA's policy is not something which binds this Tribunal it is relevant to our consideration of the decision to look at whether Mr Harris acted in accordance with the stated policy on the basis that if he did not this would on the face of it indicate the decision was not one which could reasonably have been arrived at. We note that although Mr Harris's decision of 21 June 2011 to restore the vehicle for a fee was a departure from the summarised policy (in that vehicles would not normally be restored in "for profit" cases where the quantities were not small) it was one which was favourable to the appellant. From the correspondence and evidence before us there was nothing to suggest Mr Harris was wrong in concluding that the goods were not to be supplied to others on a reimbursement basis. The appellant had not claimed this and the evidence supplied did not support such a conclusion. Although the conclusion was that this was not a "not for profit" case, the calculation of the fee was made by reference to the amount that would have been calculated had there been a restoration for a fee for a first time detection of a "not for profit" case i.e. 100% of the excise duty on the goods.

41. Mr Harris also explained to us that when he saw the appellant's offer to pay the excise duty outstanding he thought restoration for a fee of that amount would be reasonable.

42. He explained that the price of the car is not taken into account except in so far as it acts as a cap so that if the duty evaded was greater than the value of the car the fee would not exceed the value of the car. The appellant's letter of 17 May 2011 refers to the car being bought for £19,000 six months earlier so the cap was not engaged.

43. There are a number of aspects relating to the fee which the appellant say made it unfair. We must consider these from the point of view of whether the amount of the fee was one the decision maker could not reasonably have arrived at.

44. The appellant argues that if a fee was to be charged it should have been apportioned to the duty on her share of the goods. We note that the circumstances of the trip were that the two couples who knew each other well and had been on a shopping trip together. It was a joint expedition, the appellant was aware of the quantities of goods having paid for them on her credit card and allowed her car to be used to bring the tobacco in. That Mr Harris did not apportion the duty payable in calculating the fee in such circumstances does not strike us as unreasonable.

45. The fact that the fee was linked to the amount of duty on the goods seized did not appear to us to be unreasonable given the legislative basis upon which the vehicle was seized was because it was used for the carriage of goods liable to forfeiture.

46. Mr Harris's decision was also influenced by the appellant offering to pay a fee for an amount representing the duty on the goods. The appellant says she made the offer in desperation and that she would, in her words, have done anything to get the car back. We accept that was her genuine sentiment and that that was the context in which she made the offer. But, we do not think that means it is unreasonable for Mr Harris to have taken account of her offer in setting the fee especially as it was an offer which was not out of step with the fee that would have been charged if UKBA had accepted the goods were "not for profit" under their policy.

47. The appellant also referred us to the fees she had incurred which came to £4,274.11. As well as including the fee of £1940 it covered the loss of the seized goods and the taxi fare home after seizure divided by 4, legal fees incurred, road tax lost, insurance lost due to cancellation, bus fares, and petrol costs in retrieving the car. The appellant felt it was unfair that she had to suffer these costs. We cannot deal with a generalised complaint of unfairness, but we can consider whether the lack of account being taken of the costs when determining the fee was something that meant the decision was not reasonably arrived at.

48. We note however that all of these items arise in some way from the seizure of the goods and vehicle and the vehicle's restoration following its seizure. As mentioned above the legality of the seizure cannot be an issue in these proceedings. In our view there is no merit in any argument that Mr Harris did not reach his decision reasonably because he did not take account of costs arising from the legal seizure of the goods and the vehicle and the costs incurred in retrieving the vehicle.

49. The decision to restore for a fee of £1940 was in our view not unreasonable or disproportionate taking account the circumstances of the case.

50. As to the appellant's complaint the decision to restore could have been reached sooner, the Tribunal's focus as outlined above must be to look at the reasonableness of the decision of 21 June 2011, whether relevant factors were taken into account, irrelevant factors were disregarded and whether there was any error of law.

51. The chronology of what was disclosed to whom and when may of course be relevant considerations when assessing what factors were and were not taken into account and it is possible to envisage situations where the delay in considering evidence or representations is so significant that the tribunal comes to the view the decision maker could in those circumstances not be said to have reasonably arrived at the decision. That is not the case here. The appellant made an offer to pay amount representing the duty on 8 April 2011. Mr Harris did not see this letter, it was addressed to the Acting Chief Executive of UKBA but even if the letter is to be treated as received by him we cannot assume Mr Harris's decision to restore for a fee would have been made then given the offer was in relation to both the goods and the car and as accepting it would have been a departure from the stated policy. Reviewing

the train of correspondence, to the extent there were any delays, they were not unreasonable and they certainly were not so significant as to provide a reason for why the decision of 21 June 2011 was a decision that could not reasonably have been arrived at.

Conclusion

52. In the circumstances of this case it was not unreasonable to calculate the fee by reference to the duty evaded, to take account of the offer the appellant made and to not apportion the duty to the amount of tobacco attributable to the appellant. The decision to restore the vehicle for a fee of £1940 was one which was within the range of reasonable decisions open to UKBA in exercising its discretion to restore vehicles subject to such conditions as they think proper. The considerations Mr Harris took account of were relevant and he did not take into account irrelevant considerations. We can discern no error of law in the decision. It has not been demonstrated to us the decision was one that could not reasonably have been arrived at and accordingly the appellant's appeal is dismissed.

53. 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.

SWAMI RAGHAVAN
TRIBUNAL JUDGE

RELEASE DATE: 12 April 2013