



TC02842

Appeal number: TC/2012/08819

EXCISE DUTY – RESTORATION OF MOTOR VEHICLE –
Appellant owner of a vehicle used for the commercial importation of large quantities of cigarettes – Appellant had a history of being involved in commercial importation – Appellant took no steps to prevent his vehicle from being used in smuggling – Was the non-restoration of the vehicle proportionate to the Appellants’ contravention? – Yes – Did the non-restoration create exceptional hardship? – No – Was the decision not to restore the vehicle reasonable? – Yes – Appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MAREK ORZECHOWSKI

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL TILDESLEY OBE
REBECCA NEWNS CTA**

Sitting in public at 45 Bedford Square, London WC1B 3DN on 15 July 2013

The Appellant did not appear

**Matthew Donmall, counsel instructed by the General Counsel and Solicitor to
HM Revenue and Customs, for HMRC**

DECISION

The Appeal

1. The Appellant appealed against HMRC's decision on review dated 23 August 2012 refusing restoration of a Renault Traffic Van, registration number EA53 KBN (hereinafter known as the vehicle).

2. On 16 May 2012 West Yorkshire Police stopped the vehicle being driven by a Mr Krzysztof Anusiewicz¹ which was found to be carrying 32,760 cigarettes on which no excise duty had been paid. Mr Anusiewicz gave an address in London. West Yorkshire Police seized the vehicle. The Appellant was identified as the owner of the vehicle. At the same time West Yorkshire Police stopped another motor car (a Toyota) which was also carrying 21,640 cigarettes.

3. On 21 May 2012 HMRC issued a notice of seizure of the vehicle to the Appellant. On 29 May 2012 the Appellant wrote to HMRC requesting restoration of the vehicle. On 5 July 2012 HMRC refused restoration. On 11 July 2012 the Appellant requested a review of the decision not to restore the vehicle. On 23 August 2012 Mr Paton upheld the decision refusing restoration. On 19 September 2012 the Appellant appealed to the Tribunal.

4. The Appellant accepted that the vehicle had been lawfully seized in view of the large amount of cigarettes transported by Mr Anusiewicz. The Appellant, however, denied that he had knowledge of what Mr Anusiewicz was doing. The Appellant accepted that in the past he had been involved in unlawful importations. The Appellant said he had given up such activities and had not imported excise goods for a long time. The Appellant acknowledged that Mr Anusiewicz had access to the vehicle because they were living in the same property. The Appellant stated that he now had a job as a builder. According to the Appellant, he required the vehicle to transport the tools for his work. The Appellant believed that he was innocent and desperate to get his van back so that he could go out to work.

5. HMRC pointed out that the vehicle had been lawfully seized, which the Appellant had not challenged before the Magistrates' Court. HMRC's records showed that the Appellant had been involved in eight seizures concerning the illegal importation of excise goods from 2008 to 2011. Five of those seizures occurred in 2011. HMRC maintained that the Appellant had taken no steps to prevent the unlawful use of the vehicle by Mr Anusiewicz. HMRC submitted that the Appellant had put forward no mitigating circumstances why the vehicle should be restored. HMRC argued that the decision not to restore was reasonable and proportionate, and requested the Appeal to be dismissed.

6. The issue for the Tribunal was whether Mr Paton's refusal of restoration of the vehicle was a decision which no reasonable body of Commissioners could have arrived at. In order for the decision to have been reasonable Mr Paton must have

¹ The Tribunal has adopted the spelling used by the Appellant.

considered all relevant matters and must not have taken into consideration irrelevant matters.

The Hearing

5 7. The Appellant did not attend the hearing. HMRC applied for the appeal to be heard in the absence of the Appellant in accordance with rule 33 of the Tribunal Procedure Rules 2009. The Tribunal granted the Application.

10 8. The Tribunal was satisfied that the Appellant had been duly notified of the hearing. On 13 May 2013 the Tribunal sent a notice of hearing by ordinary post to the address given by the Appellant which was 3 Salt Hill Drive, Slough, SL1 3TH. The notice advised the Appellant that the appeal would be heard on 15 July 2013 at 10.30am at Bedford Square London. HMRC also sent the Appellant a copy of the hearing bundle advising him of the hearing date. The Tribunal also tried to contact the Appellant by phone on the morning of the hearing but met with no response.

15 9. The Tribunal considered that it was in the interests of justice to proceed with the hearing because:

- (1) The Appellant had offered no explanation for his non-attendance.
- (2) HMRC was in a position to proceed with a witness in attendance.
- (3) The proceedings were nine months old.
- (4) The Appellant would not suffer serious prejudice because the Tribunal
20 was fully aware of his case for restoration

10. The Tribunal heard testimony from Mr Paton, the Review Officer. A bundle of documents was admitted in evidence.

The Jurisdiction of the Tribunal

25 11. HMRC's power regarding restoration of goods and vehicles which have been forfeited or seized is set out under section 152(b) of the Customs and Excise Management Act 1979. Once the power is exercised whether in the form of a positive decision to restore on terms or a refusal to restore, the person affected has a right of appeal to the Tribunal. The powers of the Tribunal are limited in the terms set out in section 16(4) of Finance Act 1994 which provides that:

30 "confined to a power, where the Tribunal are satisfied that the Commissioners or other person making the decision could not reasonably have arrived at it, to do one or more of the following, that is to say –

35 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 further review of the original decision;

5 c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a further review, to declare that decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of unreasonableness do not occur when comparable circumstances arise in future”.

12. The precondition to the Tribunal’s exercise of one or more of its three powers, namely, that the person making a decision could not reasonably have arrived at it, falls within the guidance given by Lord Lane in the decision in *Customs and Excise v JH Corbitt (Numismatists) Ltd* [1980] STC 231 at page 239:

“.....if it were shown the Commissioners had acted in a way in which no reasonable panel of commissioners could have acted; if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight”.

15 13. The Tribunal is entitled to make its own findings on the primary facts which are to be taken into account by HMRC when exercising their powers regarding restoration of goods. The findings of fact include blameworthiness and the proportionality of the penalty imposed to the policy aims pursued having full regard to the individual circumstances of the case. The Tribunal, however, has no fact finding jurisdiction for the purpose of challenging the legality of the seizure and forfeiture of the goods. The Tribunal will then apply its findings of fact to determine whether the Respondents acted reasonably in refusing restoration.

25 14. The Court of Appeal in *Revenue and Customs Commissioners v Jones and another* [2011] EWCA Civ 824 confirmed the scope of the Tribunal’s jurisdiction when a person does not contest the seizure before the Magistrates’ Court. Mummery LJ at paragraphs 71(4) & (5) stated:

30 “The stipulated statutory effect of the [importers'] withdrawal of their notice of claim under para 3 of Sch 3 was that the goods were deemed by the express language of para 5 to have been condemned and to have been 'duly' condemned as forfeited as illegally imported goods. The tribunal must give effect to the clear deeming provisions in the 1979 Act: it is impossible to read them in any other way than as requiring the goods to be taken as 'duly condemned' if the owner does not challenge the legality of the seizure in the allocated court by invoking and pursuing the appropriate procedure. The deeming process limited the scope of the issues that the [importers] were entitled to ventilate in the FTT on their restoration appeal. The FTT had to take it that the goods had been 'duly' condemned as illegal imports. It was not open to it to conclude that the goods were legal imports illegally seized by HMRC by finding as a fact that they were being imported for own use. The role of the tribunal, as defined in the 1979 Act, does not extend to deciding as a fact that the goods were, as the [importers] argued in the tribunal, being imported legally for personal use. That issue could only be decided by the court. The FTT's jurisdiction is limited to hearing an appeal against a discretionary decision by HMRC not to restore the seized goods to the respondents. In brief, the deemed effect of the [importers'] failure to contest condemnation of the goods by the court

was that the goods were being illegally imported by the [importers] for commercial use”.

Findings of Fact

15. The Tribunal makes the following findings of fact:

- 5 (1) On 16 May 2012 the West Yorkshire Police seized the Appellants’ vehicle which was found to be carrying 32,760 cigarettes on which no excise duty had been paid. Mr Anusiewicz was the driver of the vehicle. The Appellant was not present at the seizure. .
- 10 (2) The Appellant did not appeal to the Magistrates’ Courts against the legality of the seizure of the vehicle.
- (3) The Appellant accepted that the vehicle had been used for smuggling.
- (4) The excise duty due on the cigarettes was in the region of £7,500.
- (5) The value of the vehicle seized at today’s price was in the range of £1,800 to £2,000.
- 15 (6) Between 2008 and 2011 the Appellant had been involved in eight seizures of illegally imported excise goods.
- (7) The Appellant had given Mr Anusiewicz permission to use the vehicle.
- (8) There was no evidence that the Appellant had taken steps to ensure that Mr Anusiewicz did not use the vehicle for illegal purposes.

20 16. The Tribunal was satisfied that the Appellant had allowed his vehicle to be used for the smuggling of cigarettes. This was not the first time that the Appellant had been involved in the illegal importation of excise goods. Given those circumstances the Tribunal considers the non restoration of the vehicle was a proportionate response to the Appellant allowing the vehicle to be used for smuggling. Support for the
25 Tribunal’s view on proportionality is found in the Court of Appeal decision in *Lindsay v Customs and Excise Commissioners* [2002] EWCA Civ 267 where at paragraph 63 Lord Phillips said:

30 “Those who deliberately use their cars to further fraudulent commercial ventures in the knowledge that if they are caught their cars will be rendered liable to forfeiture cannot reasonably be heard to complain if they lose those vehicles. Nor does it seem to me that, in such circumstances, the value of the car used need be taken into consideration. Those circumstances will normally take the case beyond the threshold where that factor can carry significant weight in the
35 balance. Cases of exceptional hardship must always, of course, be given due consideration”.

17. The Tribunal holds that the Appellant put forward no grounds to support a finding of exceptional hardship. The Appellant asserted that he required the vehicle for his job. The Appellant adduced no evidence to substantiate his assertion. The fact
40 that the vehicle was seized on a Wednesday cast doubt on the truth of the Appellant’s claim.

18. The Tribunal is satisfied that Mr Paton carried out a thorough review of the Appellant's circumstances and the use of his vehicle for smuggling. The Tribunal found no evidence that Mr Paton relied upon irrelevant considerations. The Tribunal's own findings of fact supported Mr Paton's conclusions that there were no mitigating circumstances to justify restoration of the vehicle. The Tribunal considers that Mr Paton addressed the issue of whether the Appellant would suffer exceptional hardship from the non-restoration of the vehicle. The Tribunal agrees with Mr Paton's assessment that the Appellant had failed to substantiate his assertion that he required the vehicle for his work.

10 **Decision**

19. The Tribunal holds for the reasons set out above HMRC's decision on review dated 23 August 2012 refusing restoration of a Renault Traffic Van, registration number EA53 KBN was reasonably arrived at within the meaning of section 16(4) of the Finance Act 1994. The Tribunal, therefore, dismisses the Appeal.

15 20. 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
20 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

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**MICHAEL TILDESLEY
TRIBUNAL JUDGE**

RELEASE DATE: 14 August 2013

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