TC03066

Appeal number: TC/2012/02894

Seizure by border agency- application to appeal for review out of time- Finance Act 1994 s14A- ground to make application by third party – unreasonable delay- appeal dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

HEDLEY'S HUMPERS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE RACHEL SHORT
HELEN MYERSCOUGH

Sitting in public at 45 Bedford Sq London on 21October 2013

Mr Samuels for the Appellant

Mr Jones, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an application by Hedley's Humpers Limited (Hedley) for the Tribunal to require HMRC to carry out a review of a decision of the UK Border Agency under s14A Finance Act 1994 in respect of a seizure decision on 12 May 2011 and a decision to refuse restoration of twelve nineteenth century Japanese "inro" works to Christies in the UK.

Facts

2. An inro is an ivory ornament worn by Japanese women on their belts to hold small objects. We were told that the inro in question were of rare and particularly high quality. The Appellant was engaged to ship these valuable ivories from New York to Heathrow on behalf of Christies in London in May 2011. The nature of these goods required the completion of a CITES (Convention on International Trade in Endangered Species of Wild Fauna and Flora) document. This document was not completed correctly. We were shown the CITES document dated 23 February 2011 in which boxes 13 and 15 were left blank and unstamped. As a result the inro were seized by the UK Border Agency at Heathrow on 12 May 2011. There was no suggestion that there was any attempt to intentionally avoid import regulations.

3. Christies applied for restoration of the inro, but this was refused by the UK Border Agency on 19 June 2011 ("the 2011 Decision"). For reasons which were not provided to the Tribunal, Christies did not appeal against this decision. However, they did make a claim against Hedley for £146,000.25 in respect of the loss of the inro in October 2011.

4. In a letter of 15 April 2013 to the Tax Tribunal the Appellant's solicitors state that this payment was made to the original owner of the inro in New York and that "title to the inro now vested in Hedley". The payment is referred to in that letter as a payment of compensation. The Tribunal was not provided with any other evidence as to the nature of this payment.

5. No action was taken by Hedley after this payment was made for some time. It was not until 4 March 2013, as a result, we were told, of information seen in the trade press, that Hedley made an application for review of the 2011 Decision. The UK Border Agency responded to this request by giving Hedley 14 days to provide further information, including making clear the basis on which Hedley was requesting a review. Hedley did not respond within the fourteen day time period and their review request was refused on 26 March 2013. This application is made in respect of that decision. (The 2013 Decision).

The Law

6. The relevant legislation is set out at Customs and Excise Management Act 1979 ("CEMA 1979") and Finance Act 1994:

(1) S 152(b) of the CEMA 1979 allows the commissioners to restore, subject to such conditions (if any) which they think proper, anything forfeited or seized under the Customs and Excise Acts.

(2) S 14 Finance Act 1994 sets out the categories of people who can require the review of a decision under s 152, including at s 14(2)(c) "*a person on or to whom the conditions, limitations, restrictions, prohibitions or other requirements to which such a decision relates are or are to be imposed or required."*

(3) S 14A(4)(b) says that HMRC are required to carry out a review of a decision out of time if the appeal tribunal on application made by the person, orders HMRC to carry out a review.

Appellant's Arguments

7. The Appellants argue that as the owners of the inro, or at least an entity with an interest in the inro, as a result of the payment made in October 2011, they have the right to make a claim under s 14(2)(c) Finance Act 1994, being a person "*to whom the conditions, limitations, restrictions, prohibitions or other requirements to which such a decision relates, are, or are to be, imposed or applied"* The decision in question being the 2011 Decision and Hedley being impacted because, despite having a right to the inro, it cannot obtain them.

8. They argue that while there has been a significant delay in making this application, that delay is reasonable because until March 2013 Hedley was unaware of its ability to request a review of the 2011 Decision.

9. At the time when the 2013 Decision was made, Hedley's advisors were given only 14 days in which to provide evidence in relation to their late request for a review and to demonstrate who they acted for. They were not aware that a decision would be made immediately after the 14 day period if further evidence was not produced, although this is in fact what happened, leading to the 2013 Decision.

10. The Appellants also stress the significance of the inro as works of art which should not be allowed to remain in the custody of customs officials due to a minor administrative error. They stress that there is no suggestion that there was any intent to avoid customs duties and referred the Tribunal to a statement of the US customs officials that they have no interest in impeding delivery of the goods in these circumstances.

11. Overall Hedley's claim that this is an unusual set of circumstances surrounding some valuable assets and the Tribunal should therefore allow their application.

HMRC's Arguments.

12. HMRC started by clarifying that Hedley's application is for an extension of time to appeal against the 2011 Decision. In HMRC's view, there is a good reason why Hedley was not aware of the 2011 Decision; because it was nothing to do with

them, it related to Christies not Hedley. HMRC's position is that it is far from clear that Hedley owned the inro as a result of the payment made in 2011 and that even if they did, they could not appeal against a decision which had been made in respect of someone else.

13. HMRC did not consider that s 14(2)(c) FA 1994 should apply to Hedley; in the scheme of the legislation it was intended to apply to a third party who was affected by the conditions imposed as part of a restoration request, not someone to whom ownership of the goods had passed, if at all, after the restoration decision had been made.

14. Even if this is incorrect, and Hedley do have the right to make this application, Hedley should and could have taken action much sooner to apply for a review of the 2011 Decision. They must have known that the goods had been seized in May 2011 and could have spoken to Christies or the UK Border Agency at the time to provide information about the inro and to have learnt that Christies were not appealing the 2011 Decision themselves. Instead, they waited for 624 days before taking any action. This inordinate delay means that the Tribunal should not exercise its powers in Hedley's favour under s 14A(4)(b) to force HMRC to carry out a review. HMRC referred to the *Angliss* decision (*Ronald Angliss* v *Commissioners of Customs and Excise* [*2002*] EWHC 1311(Ch)), which suggested that a 45 time limit should be more than adequate for making an appeal under the Customs and Excise Management Act.

15. HMRC also pointed out that on seizure the inro would have become Crown property and it was not clear that there was any public interest argument for Hedley to have ownership rather than the Crown.

16. In considering the criteria which the Tribunal should apply in exercising its powers under s 14A(4)(b), its starting point should be that its powers were restricted and there was no general discretion to the Tribunal to review the 2011 Decision. The Tribunal should have regard to the principles which are generally applied to applications for an extension of time limits, including the Civil Procedure Rules, which would include taking account of the unreasonable delay on the part of Hedley.

Discussion

17. Firstly, we note in particular that although Counsel for Hedley suggested otherwise, there is no specific evidence that Hedley owned, or had any rights in the inro themselves. In fact, given that seizure and ensuing forfeiture of the goods led to them being held by the Crown, (in accordance with s 49 CEMA 1979) it is hard to see what rights Hedley could have obtained over the inro once the time limit for making a restoration claim had passed in July 2011. By the time that Hedley made its payment in October 2011 the inro belonged neither to Christies nor the original owner, but to the Crown. For these reasons we agree with HMRC that Hedley has not demonstrated that is has any legal rights to the inro, a conclusion which is supported by Hedley's failure to make clear to the UK Border Agency in respect of the 2013 Decision on what basis they were making their application.

18. Second, considering the over all scheme of the Finance Act 2004 provisions as they apply to restoration applications, the Tribunal considers that it is only on a very literal interpretation of s 14(2)(c) that Hedley could be treated as falling within the class of potential applicants under those provisions. If the effects of the 2011 Decision were "imposed or applied" on Hedley, they were applied indirectly and after the time limits for making an appeal against the Decision had passed. The Tribunal in this respect prefers the interpretation of those provisions suggested by HMRC, that they are intended to apply to third parties directly impacted by the seizure at the time of the seizure or conditions imposed as part of the restoration, rather than to a third party to whom some rights have allegedly been passed by the original applicant who no longer has any claim on the goods themselves.

19. Even if Hedley could bring itself within s 14(2) (c), we cannot see any basis on which the Tribunal should be persuaded to exercise their rights to force HMRC to make a further review in their favour. In considering this we have taken account of both the guidance in the CMR, at Rule 3.9 and our overall obligation under the Tribunal rules to act in the best interests of justice. We do not accept that there is a strong public interest argument here to release the inro to Heldeys, on the basis that they are currently safely in the hands of the Crown who are bound by the CITES treaty to consider where they will best be placed. Equally we consider that Hedley have failed to demonstrate that they have pursued their case with any diligence. If they did have any basis on which to make an application under s 14(2), we can see no reason why this was not exercised at the time of the 2011 Decision, save for the failure of Hedley to realise at the time that this was possible. This does not seem to us to be a strong enough reason for us to make what would be a very significant extension to the statutory time limit for making this application.

20. Added to their failure to act in 2011, we would add Hedley's failure to act in respect of the 2013 Decision prior to the closing of the 14 day period for giving further evidence. We have little sympathy for Hedley's excuse that they had failed to realise that the decision would be made immediately after the 14 day period, since it is difficult to see what else the UK Border Agency could do at that stage not having been provided with the additional information which had been requested within the stipulated deadline. 14 days might well be a relatively short time to gather evidence, but Hedley had all of the time from May 2011 until 2013 to gather that evidence.

21. We agree with Mr Samuels that this was an unusual case. It would be unusual for a Tribunal to extend a time limit by such a lengthy period unless there was very good reason to believe that it was in the interests of justice to do so and there was a claim to be made which had some real chance of success. Neither of those is true of Hedley's case and for these reasons this appeal is dismissed.

22. 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.

RACHEL SHORT
TRIBUNAL JUDGE

RELEASE DATE: 19 November 2013