[2015] UKFTT 0298 (TC)

TC04490

Appeal numbers: TC/2013/01420 and TC/2013/03832

EXCISE DUTY – seizure of two vehicles – whether decision to refuse restoration reasonable – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

ATWAL TRANSPORT LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS
PETER WHITEHEAD

Sitting in public at Priory Courts, Bull Street, Birmingham on 15 May 2015

Mr Christopher Pulman, Counsel, instructed by Rainer Hughes for the Appellant

Mr David Griffiths, Counsel, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents

DECISION

1. On 1 December 2011, officers of HMRC seized a Mercedes tractor and trailer unit (the "Mercedes") belonging to the appellant in exercise of their powers under s141 of the Customs and Excise Management Act 1979 ("CEMA"). On 8 March 2012, officers of HMRC seized a Volvo tractor and trailer unit (the "Volvo") belonging to the appellant also in exercise of their powers under s141 of CEMA.

2. The appellant appeals under s16 of the Finance Act 1994 ("FA 1994") against:

(1) the decision dated 26 June 2013 of Officer Angela Stewart, on a review under s15 of FA 1994 to restore the Mercedes to the appellant only on payment of a fee of £23,175; and

(2) the decision dated 23 January 2013 of Officer Louise Bines, on a review under s15 of FA 1994, to refuse to restore the Volvo to the appellant.

Evidence

3. We heard the following evidence:

(1) Rajwinder Singh Atwal, a director of the appellant, supplied a witness statement, gave oral evidence through an interpreter and was cross-examined. We have not been able to accept all of his evidence for reasons considered in more detail in the main body of this decision.

(2) Officer Louise Bines of HMRC provided a witness statement and was cross-examined. We found her to be a straightforward and reliable witness.

(3) Officer Angela Stewart of HMRC provided a witness statement and was cross-examined. We also found her to be a straightforward and reliable witness.

Background and undisputed facts

4. There was no dispute as to any of the facts set out at [5] to [24] below.

The seizure of the Mercedes and HMRC's decision on review

5. The appellant owns the Mercedes. On 1 December 2011 officers of HMRC seized the Mercedes and its load of 2,080 cases of Keller beer from premises in Ellistown, Leicestershire. The reason for the seizure was that the officers considered that excise duty had not been paid on the beer and that, accordingly, the beer was liable to forfeiture under s139 of CEMA and the Mercedes was liable to forfeiture under s141 of CEMA.

6. The driver of the Mercedes had no paperwork relating to the beer. However, shortly after the Mercedes was seized, Mr Atwal provided HMRC with a faxed copy of relevant paperwork, including an electronic administrative document. That paperwork showed that the beer was being transported by PJP Transport Limited ("PJP Transport") under a duty suspended movement between a warehouse in

Wimille (which is a few miles north of Boulogne in France) and a warehouse operated by Seabrook Limited in Barking, Essex.

7. The appellant initiated condemnation proceedings to challenge the legality of the seizure of the Mercedes, but subsequently decided to withdraw them. No-one came forward to claim ownership of the beer that had been seized.

8. The appellant requested HMRC to exercise their discretion to restore the Mercedes under their powers set out in s152 of CEMA. On 7 February 2012, HMRC wrote to the appellant's then representatives advising that the Mercedes would not be restored.

9. There were then a number of delays and procedural twists and turns, the details of which are not relevant. Ultimately, by letter dated 3 May 2013, HMRC offered to restore the Mercedes to the appellant on payment of a restoration fee of £23,175. The appellant requested a review of that decision under s15 of FA 1994 and, by letter dated 26 June 2013 addressed to the appellant's then advisers, Officer Stewart upheld that conclusion.

10. In her review decision, Officer Stewart noted that the Mercedes was found some 119 miles north of its stated destination in Barking. She said that the appellant had been asked to provide HMRC with details, including documentary evidence, of the circumstances in which it was in possession of the beer, how it fitted into the movement of the beer under a duty suspended arrangement and who had contracted it to carry the beer. She stated that, despite two requests, HMRC had not received any such information and concluded that:

> "In the absence of any explanation as to why Atwal was carrying the non duty paid goods, it appears, on the balance of probabilities, that Atwal did have knowledge and/or some involvement in the smuggling attempt. It is noted that, at the time of the seizure, no other seizure action was recorded against your client in the previous 12 month period. I am therefore of the view that the application of the Departmental policy of restoring the vehicle/trailer for the lesser amount of 100% of the revenue involved and the trade value of the vehicle is appropriate in this case".

11. She concluded that the trade value of the tractor and trailer unit comprising the Mercedes was £23,640 and that the unpaid duty on the seized Keller beer was £23,175. She therefore upheld the conclusion to restore the Mercedes to the appellant on payment of a fee of £23,175 being the lower of these two figures.

The seizure of the Volvo

12. The appellant owns the Volvo. On 8 March 2012, officers of HMRC challenged the driver of the Volvo at premises in Birmingham. 18,495.36 litres of mixed beer were found in the trailer unit of the Volvo with no accompanying paperwork. The officers suspected that UK excise duty had not been paid on the beer. They seized the

beer in exercise of their powers under s139 of CEMA and the Volvo in exercise of their powers under s141 of CEMA.

13. On 3 April 2012, the appellant's then advisers informed HMRC that the appellant would be challenging the legality of the seizure of the Volvo by way of condemnation proceedings. They also requested HMRC to restore the Volvo stating, inter alia, that the appellant had hired the Volvo to a company called SGA Logistics Ltd ("SGA Logistics") for a fee of £325 plus VAT per week. The appellant provided HMRC with a single-page document titled "Contract Hire Agreement" and invoices for the stated hiring fee but has not produced any detailed terms and conditions relating to that hire agreement.

14. On 12 November 2012, HMRC notified the appellant that the Volvo would not be restored and on 19 November 2012, the appellant requested a review of that decision under s15 of FA 1994.

Officer Bines's review relating to the Volvo

15. By letter dated 23 January 2013 addressed to the appellant's advisers, Officer Louise Bines upheld HMRC's decision on review. In a section of that letter headed "Background", she noted:

> "The vehicle and trailer were owned by Atwal Transport Ltd but hired under agreement to SGA Logistics Ltd".

She acknowledged that the driver of the vehicle at the time it was seized "spoke very poor English" but referred to her understanding that, at the time of seizure, he stated:

> "…that he worked for Atwal Transport and was told by his boss, Raj, to pick up the goods and await instruction".

She noted that:

> "This is the second seizure of a vehicle from Atwal Transport in 6 months. The first was on 1 December 2011".

16. Officer Bines summarised HMRC's policy in this area as follows:

> "**HMRC Vehicle Restoration Policy – HGV**
>
> **First detection – driver or haulier**
>
> Haulier has not taken reasonable steps – seizure of tractor unit and restoration for 100% of the total revenue evaded or the trade value of the tractor unit, whichever is the lower, together with the issue of warning letter.
>
> **Second or subsequent detection – same driver or same haulier**
>
> Second or subsequent detection within 6 months – tractor unit is to be seized and not restored".

17. In the section of her letter headed "Conclusion", she stated as follows:

> "I have reflected on the information contained in your letters to HMRC, and the documents you submitted, and taking all the information available to me into account, I am of the opinion your client has not taken reasonable steps to prevent the misuse of his vehicle and trailer.
>
> …
>
> Despite two requests, I have not received a copy of the terms and conditions attached to the hire agreement between your clients and SGA Logistics Ltd.
>
> I am of the opinion that the vehicle and trailer were involved in the movement of alcohol upon which no UK Excise [sic] duty had been paid, and would have been sold for profit had it not been intercepted by HMRC Officers. As such, the Commissioner's [sic] policy for the restoration of HGV's where the same haulier is involved in seizures within 6 months will apply".

18. Her ultimate conclusion, therefore, was that "the vehicle and trailer should not be restored".

19. Condemnation proceedings were determined against the appellant in Dudley Magistrates Court and the appellant's appeal to the Crown Court failed. No-one came forward to claim ownership, or contest forfeiture, of the beer that had been found on the Volvo.

HMRC's policy on "hire companies"

20. It will be seen from the summary of HMRC policy at [16] that different considerations apply depending on whether the "same haulier" has been involved in two or more seizures within a particular 6 month period. In cross-examination, Officer Bines was asked how HMRC identify the "haulier" in circumstances where a particular vehicle is owned by one company, but hired to another.

21. Officer Bines explained that a different, and more favourable, policy applies to what she described as "hire companies". If a vehicle owned by a hire company is seized while it is hired to a third party, HMRC policy permits the vehicle to be restored to the hire company, without payment of a fee, provided that the hire company agrees not to hire to the same third party again. If the hire company breaches such an agreement and one of its vehicles is subsequently seized while it is hired to the same third party, HMRC's policy would be to refuse to restore the vehicle.

22. However, Officer Bines confirmed that this automatic sanction applies only to subsequent seizures of vehicles hired to the same third party. So, if a hire company leased a vehicle to A, and the vehicle was seized while transporting alcohol on which duty had not been paid, the hire company would need to undertake not to hire again to A in order to secure restoration of the vehicle. If the hire company leased to B, and the vehicle was seized for similar reasons, there would be no automatic sanction of refusing to restore the vehicle. Rather, HMRC would consider the matter on its merits

and a possible outcome would be that the vehicle would be restored without a fee provided that the hire company agreed not to hire to B again.

23. Officer Bines stated that in her experience it is not uncommon for owners of vehicles that had been seized to claim that they had hired them to someone else. For that reason, the mere assertion that the vehicle was hired to another was not enough to enable a company to be regarded as a hire company. Rather, before accepting that a company is a hire company, HMRC would need to be satisfied that it was carrying on a legitimate business of hiring vehicles. HMRC would also need evidence that the company hired vehicles under appropriately detailed terms and conditions that dealt with matters such as insurance of the vehicle and the circumstances in which it could be taken outside the United Kingdom.

24. Officer Bines's decision on review contains no consideration of the policy on hire companies or analysis of whether the appellant could be regarded as a hire company. Her decision also contains no explicit suggestion that there had been no hiring of the Volvo to SGA Logistics, although it was clear from her evidence that she did have some doubts on this issue.

The appellant's criticisms of the review decisions

Criticisms of Officer Stewart's decision relating to the Mercedes

25. Mr Pulman criticised Officer Stewart's conclusion that the appellant "had some knowledge and/or involvement in the smuggling". He said that she had no positive evidence for this conclusion, but had reached it on the basis of "an absence of evidence". He invited us to accept that Mr Atwal's evidence considered at [42] to [47] below demonstrated that there was an innocent explanation for the 2,080 cases of Keller beer being found on the Mercedes.

26. Mr Pulman also submitted that HMRC's policy outlined at [16] was intended to offer leniency on a first seizure of a vehicle. However, he said that only a small measure of leniency had been shown to the appellant who was being offered the opportunity to pay £23,175 in order to secure the return of the Mercedes valued at £23,640. The appellant was therefore only £465 better off as compared with the position it would be in if it bought a second hand vehicle from a dealer that was identical to the Mercedes. He therefore submitted that the restoration fee of £23,175 was too high.

Criticisms of Officer Bines's decision relating to the Volvo

27. Mr Pulman submitted that Officer Bines had not given any consideration to whether the appellant could benefit from the policy on "hire companies" referred to at [20] to [24] above. He submitted that this omission made her decision unreasonable.

28. Having based her conclusion on an absence of "reasonable steps" to prevent misuse of the vehicle, he submitted that it was not permissible for Officer Bines to

seek to defend her conclusion at the hearing on the different ground that there was no hiring arrangement in place at all.

29. He submitted that, contrary to Officer Bines's conclusion, the appellant had taken "reasonable steps" to prevent misuse of its vehicle.

Criticisms common to both decisions

30. Mr Pulman submitted that both Officer Bines and Officer Stewart were applying the same HMRC policy which is set out in Officer Bines's decision and summarised at [16] above. That policy makes explicit reference to the seizure of "tractor units" only where lorries are used in the course of revenue evasions. The policy, he submits, does not refer to trailer units and therefore implicitly contemplates that trailer units should be returned. Accordingly, he submits that both Officer Bines and Officer Stewart should have agreed to restore the trailer units without payment of any fee and, in failing to do so, they have both unreasonably failed to follow HMRC's own policy.

31. Mr Pulman submitted that in both cases the appellant was two steps removed from the alcohol being neither the owner of it nor the haulier directly involved in its transportation. He relied upon *Customs and Excise Commissioners v Newbury* [2003] EWHC 702 as authority for the proposition that it was disproportionate (and, therefore in his submission, unreasonable) for the appellant to be deprived of its vehicles when it had no knowledge of the relevant wrongdoing.

The law

Statutory provisions relevant to this appeal

32. Section 152 of CEMA 1979 provides …

> "The Commissioners may as they see fit –
>
> (a) …
>
> (b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under [the Customs and Excise Acts] …"

33. Sections 14 and 15 of FA 1994 make provision for a person to require a review of a decision of HMRC under section 152(b) CEMA not to restore anything seized from that person.

34. Section 16(1) of the Finance Act 1994 provides that a person can appeal against a decision on a review s15. Section 16(4) provides:

> "(4) In relation to any decision as to an ancillary matter[1], 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,

[1] By virtue of s16(8) and Schedule 5 of FA 1994, a decision under s152(b) of CEMA 1979 is a "decision as to an ancillary matter".

> 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 that 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."

35. The Tribunal's jurisdiction on an appeal under s16 is thus limited. We must consider the threshold question of whether we are satisfied that HMRC could not reasonably have arrived at their decisions on the reviews under s15. If we are not satisfied that they could, we can only make directions of the kind set out in s15(4)(a) to s15(4)(c). In particular, even if we were to conclude that HMRC's decisions were unreasonable, we have no power to order HMRC to return the vehicles in question to the appellant[2].

Approach to ascertaining the "reasonableness" of a decision

36. The parties were agreed, rightly in our view, that following the decision in *Revenue and Customs Commissioners v Jones and another* [2011] EWCA 824, when we are considering the reasonableness or otherwise of HMRC's decisions, we must take as "deemed facts" that both the vehicles and the alcohol found on them were "duly" condemned as forfeit. Bearing in mind the statement of Mummery LJ in that decision that "deeming something to be the case carries with it any facts that form part of that conclusion", we have assumed that excise duty had not as a matter of fact been paid on the alcohol found on either the Volvo or the Mercedes.

37. Following the approach set out in *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1980] 2 WLR 753 at 663 we consider that we must address the following questions in order to assess the reasonableness or otherwise of the decisions that Officers Stewart and Bines have made:

(1) Did the officers reach decisions which no reasonable officer could have reached?

(2) Do the decisions betray an error of law material to the decision?

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[2] In his skeleton argument, Mr Pulman suggested that the Tribunal had a power that went beyond s16(4) of FA 1994 and entitled us to remake HMRC's decisions if we concluded that they were so disproportionate as to amount to a breach of the appellant's rights under the Human Rights Act 1998. However, sensibly in our view, he abandoned that contention during the course of the hearing.

(3) Did the officers take into account all relevant considerations?

(4) Did the officers leave out of account all irrelevant considerations?

38. In *Balbir Singh Gora v C&E Comms* [2003] EWCA Civ 525, Pill LJ accepted that, the Tribunal could decide for itself primary facts and then go on to decide whether, in the light of its findings of fact, the decision on restoration was reasonable. Thus, the Tribunal exercises a measure of hindsight and a decision which in the light of the information available to the officer making it could well have been quite reasonable may be found to be unreasonable in the light of the facts as found by the Tribunal.

39. Mr Pulman referred us to *Customs and Excise Commissioners v Newbury* [2003] EWHC 702 (Admin). In that case, the Divisional Court concluded that, in condemnation proceedings, a court did have the power to refuse to condemn a vehicle as forfeit if forfeiture would be disproportionate. It also found that the Crown Court was entitled to conclude that seizure would be disproportionate in circumstances where neither the owner nor the driver of a car was aware that another passenger was importing dutiable goods for members of her family with money supplied by them. Mr Pulman submitted that this decision demonstrated that, if we were satisfied that the appellant was not aware that its vehicles were being used to transport alcohol on which duty had not been paid, we should set aside both of HMRC's determinations on the basis that they were disproportionate and require HMRC to perform further reviews.

40. We do not consider that the *Newbury* case is authority for as broad a principle as this. Firstly, the case was concerned with condemnation proceedings rather than factors that HMRC should take into account when deciding whether to exercise their powers under s152 of CEMA 1979 to restore goods. Secondly, the Divisional Court did not state that, as a matter of principle, it would inevitably be disproportionate for a car to be condemned as forfeit in circumstances where the owner was unaware that it was being used to smuggle excise goods. Rather the Divisional Court merely stated that the Crown Court had been entitled to find that a particular forfeiture in these circumstances would be disproportionate.

41. However, we do agree that a "disproportionate" decision is capable of being "unreasonable" and we have accordingly at [65] and [66] considered whether the decisions of Officer Bines and Officer Stewart are proportionate.

Reasonableness – analysis of issues specific to the Mercedes

Relevant findings of fact

42. Mr Atwal gave evidence that, on or around 29 November 2011, PJP Transport who, as noted at [6] above, were hauliers tasked with transporting alcohol from France to Barking approached the appellant and asked the appellant to repair a vehicle that had a problem with its braking system. His evidence was that, once the vehicle was repaired, the appellant had been asked to get in touch with PJP Transport with a view to agreeing whether PJP Transport would continue to deliver the load itself or

whether, instead, the appellant would deliver it. However, he said that the Mercedes was seized before the appellant and PJP Transport had a chance to finalise this arrangement. He denied that there was, at any point, an agreement that the appellant would hire the Mercedes to PJP Transport.

43. The evidence summarised at [42] above represented a change from what Mr Atwal had said in his witness statement. At paragraph [13] of that witness statement, Mr Atwal had said that PJP Transport had approached the appellant to repair its vehicle. However, he then went on to say that the appellant had hired the Mercedes to PJP Transport. In cross-examination, he explained this change by saying that at no point had anyone read the witness statement to him in his own language. He accepted that he had signed the witness statement (which contained the usual declaration of truth) without checking the accuracy of its contents.

44. For the reasons set out at [45] to [47] below, we have not been able to accept Mr Atwal's explanation of how alcohol on which no duty had been paid, came to be found on the Mercedes.

45. Firstly, we found the explanation implausible. A lorry travelling from Wimille, just north of Boulogne, to Barking in Essex would naturally enter the United Kingdom in the south east of England, most likely in Dover. Mr Atwal did not suggest that PJP Transport had taken a more circuitous route in this instance. The appellant's premises are in Leicestershire. Mr Atwal did not explain why PJP Transport would have driven a faulty vehicle to the appellant's premises, some 120 miles from its intended destination, in order to be repaired.

46. Secondly, when cross-examined, Mr Atwal was unable to give a convincing reason why he had not given this revised explanation at any point in the 3 ½ year history of the dispute relating to the Mercedes. Mr Griffiths put to him an email sent by an HMRC officer on 20 December 2011 to the appellant's then advisers, Altion Law, that specifically invited an explanation of the circumstances in which the appellant came to be in possession of the alcohol and where it fitted into the movement of it. Mr Atwal accepted that his version of events had not been put forward in response to this email. He blamed this on his advisers with whom he expressed dissatisfaction. We found this explanation unconvincing. He has had different advisers for some time now and, in any event, we did not accept that his dissatisfaction with former advisers could explain why it took him so long to put forward this new version of events.

47. Finally, we considered that aspects of Mr Atwal's explanation were contradictory. He said that the Mercedes was seized before the appellant and PJP Transport could agree who would complete the delivery of the alcohol. Yet when the Mercedes was seized, the alcohol had clearly been loaded onto it. Mr Atwal did not explain why that had been permitted if no decision had been taken as to who was going to deliver the load.

Mr Pulman's first criticism - "absence of evidence"

48. The appellant is requesting HMRC to exercise their discretion to restore the Mercedes. We consider that it is entirely reasonable for HMRC to expect the appellant to put forward cogent reasons why this discretion should be exercised in its favour. Given that we have not been able to accept Mr Atwal's version of events, we consider that it was reasonable for Officer Stewart to reach the conclusion summarised at [10] above and to decline to exercise HMRC's discretion to restore the vehicle. We do not consider that it is right to characterise Officer Stewart's conclusion as being based on an "absence of evidence". On the contrary, the implausibility of Mr Atwal's explanation offered positive evidence that it was not true which in turn made it reasonable for Officer Stewart to conclude that the explanation was designed to deflect attention from the true state of affairs, namely that the appellant had some knowledge and/or involvement in the transport of alcohol on which duty had not been paid. We therefore reject Mr Pulman's criticism set out at [25].

Mr Pulman's second criticism - "insufficient leniency"

49. We do not accept Mr Pulman's submission, set out at [26] above, that in offering to restore a vehicle worth £23,640 on payment of a fee of £23,175, HMRC failed to show sufficient leniency to the appellant on the occasion of the first seizure of one of the its vehicles.

50. We accepted Mr Griffiths' submission that the policy summarised at [16] above is intended to strike a balance between the value of the vehicle and the amount of duty evaded. If an owner of a vehicle worth £20,000 is smuggling goods subject to unpaid excise duty of £500, it would be disproportionate to require the owner of the vehicle to pay £20,000 in order to secure its return. Similarly, if goods subject to unpaid excise duty of £20,000 are smuggled in a vehicle worth £500, there would be little practical chance of the vehicle owner paying £20,000 in order to secure the return of the vehicle. Therefore, the purpose of the policy is not to offer a "discount" to a person whose vehicle is seized for the first time, but rather to set the fee at a level that strikes a sensible balance between the amount of duty sought to be evaded and the value of the vehicle.

51. Once that is understood, Mr Pulman's criticism falls away. Officer Stewart concluded that the appellant was involved in, or had knowledge of, the attempted evasion of excise duty of £23,175 using a vehicle worth £23,640. She limited the fee payable for restoration of the vehicle to the amount of the excise duty at issue and we consider that to be a reasonable and proportionate decision.

Reasonableness – analysis of issues specific to the Volvo

Relevant findings of fact – Officer Bines's decision

52. We have concluded that Officer Bines did not mention the policy on hire companies in her review letter because she had decided that the appellant did not satisfy the criteria necessary to be a hire company. Her reasoning was not spelled out

in her letter, but we find that she reached that conclusion for a combination of the following reasons:

(1) She had not been shown any terms and conditions relating to the hiring of the Volvo. In those circumstances, she was not satisfied that the appellant was using appropriately detailed terms and conditions dealing with matters such as insurance and taking the vehicle abroad which, as noted at [23] above, she regarded as a hallmark of a hiring company's business.

(2) The "Contract Hire Agreement" that the appellant produced was extremely sketchy. Not only did it contain no detailed terms and conditions, it did not even include the cost of hire, giving rise to the question of whether it was a genuine document.

(3) The note of the conversation between HMRC officers and the driver of the Volvo suggested to her that the driver of the Volvo was working for the appellant and not for SGA Logistics. That added to her doubts as to whether the "Contract Hire Agreement" was genuine.

(4) She was aware from previous experience that it is not uncommon for people who have had vehicles seized to claim, untruthfully, that they have hired them to others.

53. The factors referred to at [52(2)] to [52(4)] above went beyond questions of whether the appellant's terms and conditions were sufficiently detailed for it to meet the definition of a "hire company". Rather, those factors suggested to Officer Bines that the "Contract Hire Agreement" with which she had been presented was a sham and that, in fact, there was no hire agreement in place at all. Those concerns were supported by evidence. However, we find that there was also evidence that suggested that there was a genuine hire agreement in place. In particular:

(1) The note of the conversation between the HMRC officer and the driver of the Volvo was not very strong evidence of the absence of a hiring agreement. It was clear that the driver spoke very poor English. The officer's notebook records the driver as answering "Yes" to the question "Boss pays you? Raj?". He had thus been asked two questions and given just one answer. That answer could be read as confirming simply that his boss paid him his wages and as saying nothing about who that boss was.

(2) The appellant had produced a cover note from Aviva Insurance which appeared to insure SGA Logistics as a driver of the Volvo with effect from 5 March 2012. That document was produced by a reputable third party insurer and appeared, at least on its face, to corroborate the statement that the Volvo was hired to SGA Logistics.

(3) Officer Bines would not necessarily been aware of this when performing her review but, during the hearing itself, Mr Atwal stated, in response to a question relating to the Volvo:

> "The trucks that were hired, I wasn't going to hire. My operating licence was revoked so I couldn't carry on working. So I decided to hire".

54. Mr Atwal's statement referred to at [54(3)] was not challenged in cross-examination[3]. We took Mr Atwal to be asserting that the appellant had lost its operating licence (rather than Mr Atwal himself). We considered that assertion also had the potential to be relevant to whether or not the appellant could meet HMRC's definition of a "hire company" as well as the question of whether the "Contract Hire Agreement" was genuine. If the appellant was not allowed to operate vehicles itself and had no choice but to hire them to others that would make it more likely to be carrying on a "legitimate business of hiring vehicles" which, as noted at [23], Officer Bines regarded as crucial.

55. We have concluded that, Officer Bines did not take into account relevant factors set out at [53] and [54] when making her decision. Her review decision acknowledged that the driver spoke "very poor English", but she nevertheless drew the definite conclusion that the driver had stated that he worked for Mr Atwal and she did not acknowledge the ambiguity of the driver's statement. We accept that she would not have been aware of Mr Atwal's assertion that the appellant had lost its operating licence, but as we have noted at [38], the question of "reasonableness" is assessed with a degree of hindsight.

Relevant findings of fact – "reasonable steps"

56. From the evidence before us we concluded that:

(1) There were no terms and conditions detailing the use to which SGA Logistics could put the vehicle while it was hired.

(2) Mr Atwal knew one of the directors of SGA Logistics as he had previously worked for Mr Atwal.

(3) There was no evidence before us to suggest that SGA Logistics had been in trouble with HMRC in relation to transports of dutiable goods in the past.

(4) Mr Atwal accepted in cross-examination that, beyond hiring the Volvo to someone he knew and trusted, he took no steps to check the use that would be made of the vehicle while it was hired.

57. Having expressed our scepticism as to the evidence that Mr Atwal gave of his dealings with PJP Transport, we are not satisfied that the mere fact that Mr Atwal knew and trusted SGA Logistics amounted to a positive endorsement of their probity.

58. We accept that, if Mr Atwal had obtained any assurances, whether contractual or otherwise, as to the use that SGA Logistics would make of the vehicle, they would have been difficult to verify. However, we found that Mr Atwal did not take any steps to check how SGA Logistics proposed to use his vehicle. We have, therefore,

[3] As noted at [60] below, we indicated during the hearing that Mr Atwal could not be cross-examined as to whether the Contract Hire Agreement was a genuine document as HMRC had not suggested prior to the hearing that it was not. However, there could have been no objection to Mr Atwal being cross-examined on evidence that he had himself given during the hearing.

concluded that the appellant did not take reasonable steps to ensure that the Volvo was not misused while it was hired to SGA Logistics.

Mr Pulman's first criticism – Officer Bines's failure to consider policy on "hiring companies"

59. As we note at [55] above that Officer Bines has not taken relevant factors into account when making her decision, it follows that her decision was unreasonable.

60. We could have made findings of fact in relation to some of those relevant factors. For example, we could have permitted Mr Atwal to be cross-examined as to whether the "Contract Hire Agreement" was genuine. We could have invited Officer Bines to give detailed evidence as to precisely what constitutes a "hire company" and made findings as to whether, in fact, the appellant met that definition. However, we concluded that it would not be fair for Mr Atwal to have to meet assertions that the "Contract Hire Agreement" was not genuine when no such assertion had been made in Officer Bines's decision or in HMRC's pleaded statement of case. In addition, given that HMRC do not publish their full policy on vehicle restoration, we concluded that it would not be fair to require the appellant to engage, without the opportunity to prepare, in an analysis of a policy of which no mention had been made in the review decision. We therefore concluded that the proper course would be to require HMRC to undertake a further review.

Mr Pulman's second criticism – HMRC seeking to support decision by reference to new claim that the hiring was not genuine

61. We have largely dealt with this point at [60] above. We do not consider that Officer Bines's concerns as to whether the "Contract Hire Agreement" was genuine represented additional reasons for refusing restoration. Rather, we consider that they represented part of her chain of reasoning that led her to conclude that the appellant was not a hire company and that, accordingly, the relevant question to be considered was whether the appellant had taken "reasonable steps" to prevent misuse of the Volvo. Therefore, the true criticism is that Officer Bines's chain of reasoning was not adequately set out in her decision letter and did not take into account all relevant considerations, points that we have addressed at [59] and [60] above.

Mr Pulman's third criticism – assertion that, in fact, appellant had taken "reasonable steps"

62. Given the findings of fact we make at [56] to [58] above, we have concluded that it was perfectly reasonable for Officer Bines to conclude, as she did, that the appellant had not taken "reasonable steps" to prevent misuse of the Volvo while it was hired to SGA Logistics.

Reasonableness – analysis of issues relevant to both the Volvo and the Mercedes

Mr Pulman's argument that HMRC policy required both trailer units to be returned

63. We have accepted Mr Pulman's submission that Officer Bines and Officer Stewart were seeking to apply the same policy when they made their respective decisions. However, while the extracts from the policy referred to in Officer Stewart's review decision refer only to the tractor unit (and do not refer in terms to the trailer unit), we do not accept that the policy is therefore to restore the trailer unit without payment of a fee in all cases. It is clear that the policy on restoration is intended to act as a deterrent against those who use, or permit their vehicles to be used, in smuggling. Since both tractor units and trailer units would be used in any attempt to smuggle goods in HGVs, there can be no rational reason why HMRC's policy should be to restore trailer units in all cases. We do not consider that, when making their decisions, Officer Bines and Officer Stewart were bound to construe HMRC policy strictly as if it were a statute. We find that it was perfectly reasonable for them to conclude that the policy dealt with both tractor units and trailer units, not least since it was set out in a section entitled "HMRC Vehicle Restoration Policy – HGV" (emphasis added).

Mr Pulman's argument relating to proportionality

64. We do not consider that either the decision of Officer Bines or that of Officer Stewart was disproportionate.

65. Firstly, as we have found at [48], it was reasonable for Officer Stewart to reach the conclusion that the appellant did have knowledge of, or some involvement in, the transport of alcohol on which duty had not been paid. In those circumstances, it was not disproportionate for her to conclude that the Mercedes should be restored only on payment of a fee.

66. As regards the Volvo, Officer Bines had formed the view that the policy on "hire companies" was inapplicable. She had also, correctly in our view, concluded that the appellant had failed to take "reasonable steps" to ensure that its vehicle was not used to transport illicit alcohol. It is clearly proportionate to apply sanctions to those who fail to take reasonable care, or who turn a blind eye to the use to which their vehicle is put. Therefore, we do not regard Officer Bines's overall conclusion as unreasonable or disproportionate although, as we have noted, we have concluded that she did not take all relevant factors into account.

Conclusion

67. The appeal against Officer Stewart's decision relating to the Mercedes is dismissed.

68. The appeal against Officer Bines's decision relating to the Volvo is upheld. In accordance with s16(4) of FA 1994, we direct that:

(1) Officer Bines's decision is to cease to have effect from the date of release of this decision.

(2) HMRC must perform a further review of the decision not to restore the Volvo.

(3) In performing that further review, HMRC must take into account the findings of fact set out in this decision. HMRC must also consider whether their policy on "hire companies" applies in this case and give reasons for any conclusion they reach in this regard.

69. 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.

JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 23 JUNE 2015