



TC04993

[2016] UKFTT 217 (TC)

Appeal number: TC/2015/03738

EXCISE DUTY – Restoration – Seizure of leased vehicle on entry into the UK – Owners appeal against decision to restore vehicle for a fee – Whether the decision reasonable and proportionate on the facts – Yes – Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

LEASING POLSKI LLC GDANSK

Appellant

- and -

THE DIRECTOR OF BORDER REVENUE

Respondents

TRIBUNAL: JUDGE JOHN BROOKS

As both parties consented and the Tribunal considered that it was able to determine the matter without a hearing this appeal was determined on 23 March 2016 on the papers without a hearing pursuant to Rule 29 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009

DECISION

1. On 16 September 2014 a DAF XF 105 unit (the “Vehicle”) carrying raw tobacco was stopped by Border Force Officers at the port of Dover. It had been leased by Ambar Tedeusz Popielarz from Leasing Polski LLC Gdansk (“Leasing Polski”). Satisfied that the import of the raw tobacco constituted “being concerned in the taking of steps with a view to the fraudulent evasion of excise duty”, contrary to s 170B of the Customs and Excise Management Act 1979 (“CEMA”), the tobacco and vehicle were therefore liable to forfeiture (under ss 170B and 141 CEMA respectively) and were seized by the Officers under s 139(1) CEMA. There was no challenge to that seizure.

2. Leasing Polski wrote to Border Force on 18 December 2014 requesting restoration of the Vehicle. Correspondence between Leasing Polski and Border Force clarified that as the lease with Ambar Tedeusz Popielarz remained in force it and not Polski Leasing was entitled to the Vehicle. Accordingly by a letter, dated 25 February 2015, Border Force refused its restoration to Leasing Polski. However, having terminated the lease with Ambar Tedeusz Popielarz on 27 March 2015 Leasing Polski wrote to Border Force on 31 March 2015 requesting a review of the decision not to restore the Vehicle. That review was undertaken by Officer Brenton who had not had any previous involvement with either the seizure or the original decision refusing restoration.

3. Officer Brenton completed his review and wrote to Leasing Polski on 20 May 2015 setting out his conclusion that the decision not to restore the Vehicle should be varied and that the Vehicle should be restored for a fee of £5,000. The letter, after setting out the background, summarised the restoration policy of Border Force in relation to hired/leased commercial vehicles (with emphasis as stated in the letter) as follows:

The general policy for the restoration of commercial vehicles is designed to tackle cross border smuggling rigorously and to disrupt the supply of prohibited or restricted goods to the market significantly.

Restoration free of charge – Where a restoration claim is received from an innocent third party (eg hire company or where the vehicle has been stolen), restoration free of charge will be considered unless the vehicle has been adapted for smuggling or it is decided that the innocent party was reckless.

Restoration for a fee – On a first offence the tractor unit and trailer may be restored to the finance company on the following conditions.

a) The finance company has demonstrated clear title for the tractor unit and trailer.

b) Ordinarily a **restoration fee of £5,000** is paid or a sum equal to the trade value of the tractor unit and trailer whichever is the lower. If the finance company can however demonstrate that they have done all that can be reasonably expected to ensure that they are leasing vehicles to

legitimate companies for a legitimate purpose, then the fee can be reduced proportionately

5 Any vehicle adapted for the purposes of smuggling may not normally be restored. A subsequent detection of the same tractor unit and trailer being used by the same haulage company, or anybody directed by them, may result in non-restoration. In respect of any other vehicle leased to the company, the previous seizure would be a relevant factor in deciding not to restore, or requiring a higher sum to restore.

10 These terms apply afresh where a leasing company's vehicle is seized from an unconnected company.

4. After stating that he (Officer Brenton) was “*guided* by the restoration policy but not *constrained* by it” in that he considered “every case on its individual merits” and had considered the decision not to restore the Vehicle afresh the letter continued:

15 I have read you letters carefully to see whether a case for disapplying the Border Force policies on restoration have been presented. ...

Conclusion

20 Border Force Records available to me show that there have been two previous seizures of vehicles leased by your company in 2014 and two other seizures prior to 2014. No evidence has been supplied to demonstrate that your company has done all that can be reasonably expected to ensure that you are leasing vehicles to legitimate companies for a legitimate purpose. Furthermore, whatever controls your company has in place appear not to be stringent enough to dissuade your lessees from using your vehicles for illicit purposes.

25 Therefore I am of the opinion that the application of Border Force policy in this case treats you no more harshly or but somewhat more leniently than anyone else in similar circumstances and therefore in this instance I am prepared to:

➤ **Restore the [Vehicle] for a fee of £5,000.**

30 If you have *fresh* information that you would like me to consider then please write to me: however, I will not enter into further correspondence about evidence that has *already* been provided.

35 The letter concluded by explaining that if decision to restore the Vehicle for a fee of £5,000 was contested an appeal could be made to the Tribunal within 30 days of the date of the letter.

5. On 11 June 2015 Leasing Polski appealed to the Tribunal against the decision of Officer Brenton on the grounds that:

40 Contested decision is misplaced. Leasing Polski LLC in Gdansk implemented solutions aimed to avoid situations such as this. General Conditions of the Leasing agreement under §23 (c) stated, that leasing company is authorised to immediately terminate the contract if subject of leasing is seized by the border force of foreign country under the suspicions of being used to commit a crime. Also after receiving any information that lessee is using leased vehicle to criminal activity, all

its contracts with lessor are terminated and future contracts cannot be signed with that particular lessee. In this case leasing agreement has been terminated.

6. A translation, from Polish to English, of §23 of the general terms and conditions of Leasing Polski's lease agreement (which does not appear to have been seen by Officer Brenton) provides:

Lessor may terminate the Agreement with immediate effect if Lessee:

- a) ...
- b) ...
- 10 c) the Leasing Object has been seized due to the initiation of any enforcement, penal or penal-fiscal proceedings, including the seizure by authorities outside the territory of the Republic or Poland;

Law

7. Under s 2 of the Tobacco Products Duty Act 1979:

15 There shall be charged on tobacco products imported into or manufactured in the United Kingdom a duty of excise at the rates shown in the Table in Schedule 1 to this Act.

8. Section 139(1) of CEMA provides that:

20 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.

9. Under s 141(1) CEMA:

Where any thing has become liable to forfeiture under the Customs and Excise Acts—

25 (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; and

30 (b) any other thing mixed, packed or found with the fittings so liable,

shall also be liable to forfeiture.

10. Section 170B CEMA provides:

35 (1) If any person is knowingly concerned in the taking of any steps with a view to the fraudulent evasion, whether by himself or another, of any duty of excise on any goods, he shall be liable—

(a) on summary conviction, to a penalty ...

(b) on conviction on indictment to a penalty ...

(2) Where any person is guilty of an offence under this section, the goods in respect of which the offence was committed shall be liable to forfeiture.

11. Section 152 CEMA establishes that:

5 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.

12. Section 14(2) of the Finance Act 1994 provides:

10 Any person who is –

(a) a person whose liability to pay any relevant duty or penalty is determined by, results from or is or will be affected by any decision to which this section applies,

15 (b) a person in relation to whom, or on whose application, such a decision has been made, or

(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 applied,

20 may by notice in writing to the Commissioners require them to review that decision.

13. Section 15(1) of the Finance Act 1994 states:

Where the Commissioners are required in accordance with this Chapter to review any decision, it shall be their duty to do so and they may, on that review, either –

25 (a) confirm the decision; or

(b) withdraw or vary the decision and take such further steps (if any) in consequence of the withdrawal or variation as they may consider appropriate.

30 14. Section 16(4) to (6) of the Finance Act 1994 sets out the powers of the Tribunal on an appeal against a decision as follows:

35 (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 sections 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;

40 (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a further review of the original decision; and

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 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.

10 (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;

Discussion and Conclusion

15 15. In written submissions on behalf of Leasing Polski, Alicja Felska-Pela (a Polish attorney at law) contends that by terminating the lease under §23(c) Leasing Polski has done everything that can be reasonably expected to ensure that it leases vehicles to legitimate companies for a legitimate purpose and therefore the Vehicle should be restored either with no fee or alternatively for a reduced fee.

20 16. However, as is clear from s 16(4) of the Finance Act 1994 the issue before me is not whether the Vehicle should be restored to Leasing Polski without a fee or with a reduced fee but whether, having regard to the facts, the decision taken by Border Force to restore the Vehicle for a £5,000 fee is proportionate and one that could reasonably have been reached. It is not sufficient that I might have reached a different
25 conclusion.

17. As Lord Phillips of Worth Matravers MR (as he then was) said in *Lindsay v Commissioners of Customs and Excise* [2002] STC 508 at [40]:

30 “... the Commissioners will not arrive reasonably at a decision if they take into account irrelevant matters, or fail to take into account all relevant matters.”

18. Although, having regard to the circumstances I consider the decision to restore the Vehicle for a fee to be proportionate, Officer Brenton does not appear to have had a copy of the general terms and conditions of Leasing Polski’s lease agreement when he made the decision and therefore, although clearly relevant, could not have taken
35 these into account. In *John Dee Ltd v Commissioners of Customs and Excise* [1995] STC 941 the Court of Appeal held that in cases, such as the present, where because of a failure to take some relevant material into account, a decision could not have reasonably reached the Tribunal could, nevertheless, dismiss the appeal if the decision would *inevitably* have been the same had account been taken of the additional
40 material.

19. Having regard to all the circumstances of this case I am satisfied that had Officer Brenton been aware of the general terms and conditions of Leasing Polski’s

5 lease agreement (in particular §23 (c)) when he made the decision to restore the Vehicle for a fee, as these terms and conditions were not sufficient to prevent two previous seizures of vehicles owned by Leasing Polski in 2014 (or two seizures before then), his decision to restore the Vehicle for a fee would inevitably have been the same.

20. As such the appeal cannot succeed and is therefore dismissed.

Right to apply for permission to appeal

10 21. 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.

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**JOHN BROOKS
TRIBUNAL JUDGE**

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RELEASE DATE: 29 MARCH 2016