



TC05090

Appeal number: TC/2015/04333

EXCISE DUTY – seizure of commercial vehicle – whether decision to refuse restoration was reasonable

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

IBRAHIM BASER

Appellant

- and -

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

**TRIBUNAL: JUDGE VICTORIA NICHOLL
SUSAN LOUSADA**

Sitting in public at Fox Court on 25 February 2016

Ms K. Joshi, Solicitor from Kinas Solicitors, for the Appellant

**Mr Michael Paulin, Counsel, instructed by the General Counsel and Solicitor to
HM Revenue and Customs, for the Respondents**

DECISION

1. This is an appeal by the Appellant (“Mr Baser”) under section 16 of the Finance Act 1994 against a decision to refuse to restore a refrigerated trailer unit with registration DUIB91 (“the Vehicle”) that was seized by the Respondents (“HMRC”) on 5 August 2014.

2. The decision was given to the parties following the hearing. This decision notice sets out the reasons for the decision in full.

10 **Background and facts found**

3. We heard no oral evidence and we found the following facts from the tribunal bundle and the witness statements of Mr Baser, Mr Ismail Kaya and Ms Louise Bines of HMRC.

4. Mr Ibrahim Baser operates a vehicle rental business in Germany that hires out cars, vans and lorries. Mr Baser owns twenty tractor units and thirty five trailers units, of which ten are refrigerated trailers. The units are leased by Mr Baser and then sub-leased on hire agreements. Teowest S.R.O. (“Teowest”) is a transport company based in Slovakia and it is one of the client companies that hire tractor and trailer units from Mr Baser. Mr Baser deals with Mr Ismail Kaya of Teowest in relation to this client’s business.

5. Mr Kaya arranges the use of the units hired by Teowest, including the contracts with drivers. Mr Kaya explains the rules and regulations about cross border transport, including the dangers of illegal smuggling, to his drivers but he is not able to check every load as the lorries are loaded and unloaded in different places around Europe.

6. On 25 February 2013 a vehicle and trailer hired by Teowest from Mr Baser was seized by HMRC. The units were restored to Mr Kaya on payment of a fee equal to the duty evaded on that occasion. No specific conditions were imposed on Mr Baser by HMRC in relation to his hire business as a result of this seizure. In particular he was not required to undertake not to hire vehicles to Teowest.

7. Mr Kaya employed Mr Sunay Syuleymanov Mehmedov (“Mr Mehmedov”) as one of his drivers in May 2014. Mr Mehmedov carried out a number of journeys in the Vehicle for Mr Kaya without incident, but on 5 August 2014 HMRC was called to a logistics centre in Milton Keynes as the Vehicle had been found to be too warm on unloading. On inspection it was found that the fans had been switched off and that the space had been blocked by a concealment of tobacco. Mr Mehmedov was arrested, interviewed and, in due course, convicted for smuggling 54.9 kilos of hand rolling tobacco. Mr Mehmedov admitted in interview that he had adapted the Vehicle in order to conceal the tobacco by putting two boards down to support the tobacco in a concealed area before the Vehicle was loaded. Photographs of the adaptation of the Vehicle were not provided by HMRC to Mr Baser’s representative until the day before the hearing. These show tobacco concealed between the fan and a metal plate.

Mr Mehmedov confirmed in interview that Mr Kaya was not aware that he had adapted the Vehicle on this journey.

5 8. On 20 August 2014 HMRC's seizing officer sent notices of the seizure of the tractor unit and the Vehicle to Mr Baser c/o Kinias Solicitors. Mr Baser did not challenge the seizure of the tractor and trailer in condemnation proceedings and so they were duly condemned as forfeited one month after the date of seizure.

10 9. HMRC offered to restore the tractor unit and Vehicle for a fee of £9970, this being the value of the duty evaded. After a period of email correspondence between HMRC and Mr Baser it was agreed that only the tractor unit would be restored for a fee of £5,000 as Mr Baser could not raise the full amount for the restoration of both units. The tractor unit was restored, but HMRC then notified Mr Baser on 19 January 2015 that the Vehicle would not be restored as it had been adapted to facilitate the smuggling of tobacco. Mr Baser asked for a review of this decision. The decision was reviewed by Higher Officer Bines of HMRC ("Officer Bines") under section 15(1) Finance Act 1994 and she informed Mr Baser by letter dated 20 April 2015 of her decision to uphold the original decision dated 19 January 2015.

10. Mr Baser submitted a Notice of Appeal on 9 July 2015.

20 11. HMRC sought a 3 month stay of the proceedings on 1 February 2016 on the basis that they required copies and translations of leasing documents in order to determine which restoration policy should be applied in these circumstances. This application was refused and the hearing proceeded on 25 February 2016.

The law

12. Regulation 88 of the Excise Goods (Holding, Movement, and Duty Point) Regulations 2010 provides that:

25 "If in relation to any excise goods that are liable to duty that has not been paid there is -
a contravention of any provision of these Regulations, or
a contravention of any condition or restriction imposed by or under these Regulations,
30 those goods shall be liable to forfeiture"

13. Section 139 (1) of the Customs and Excise Management Act 1970 ("CEMA 1979") provides as follows:

35 "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."

14. Section 141(1) of CEMA provides that where any thing has become liable to forfeiture:

“(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,
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...shall also be liable to forfeiture”

15. Paragraph 1 Schedule 3 CEMA 1979 provides for notice of the seizure to be given in certain circumstances. Paragraph 3 Schedule 3 CEMA 1979 then states:

10 “Any person claiming that anything seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of the date of the seizure, give notice of his claim in writing to the Commissioners...”

16. If a notice of claim is given under Paragraph 1 Schedule 3 CEMA 1979 condemnation proceedings are heard in the Magistrates’ Court.

17. Section 152 CEMA 1979 provides:

“The Commissioners may as they see fit –

(a)...

(b) restore, subject to such conditions (if any) as they think proper, anything
20 forfeited or seized under [the Customs and Excise Acts]...”

18. Section 14(2) Finance Act 1994 makes provision for a person to require a review of a decision made under section 152(b) CEMA 1979 not to restore anything seized from that person. If such a review is required it is to be carried out in accordance in accordance with the provisions of section 15(1) Finance Act 1994.

25 19. Section 16 Finance Act 1994 makes provision for a person to appeal against any decision on the review of such a decision. It specifies that the power of an appeal tribunal shall be confined to a power, where the tribunal are satisfied that the review decision is one that the reviewing officer making that decision could not reasonably have arrived at on the basis of the information provided, to do one or more of the
30 following:

(a) Direct that the decision, so far as it remains in force, is to cease to have effect;

(b) Require a further review of the original decision in
35 accordance with such directions as the tribunal considers appropriate;

(c) Where the decision has already been acted on or taken effect, declare the decision to have been unreasonable and to give directions as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when
40 comparable circumstances arise in the future.

Submissions

20. Mr Baser submits that Mr Mehmedov has admitted full responsibility for his actions and that neither Mr Baser nor Mr Kaya was aware of the attempt to smuggle tobacco. On this basis HMRC offered to restore both the tractor unit and the Vehicle for £9970 and this offer was accepted by Mr Baser. HMRC then withdrew this offer on the basis that the Vehicle had been adapted for smuggling without providing evidence of the adaptation.

21. Mr Baser acknowledges that another of his vehicles was seized on 25 February 2013 but, as this was more than 12 months prior to this seizure and he was not aware of the driver's actions, he submits that the Vehicle should be restored in accordance with HMRC's policy. Mr Baser is still paying for the lease of the Vehicle and is therefore suffering ongoing financial loss because of its seizure.

22. HMRC submit that its policy in relation to the restoration of seized commercial vehicles is that if a vehicle has been adapted to facilitate smuggling it should not normally be restored. This policy is intended to be robust to protect legitimate UK trade and revenue and prevent illicit trade in excise goods. The policy has been applied correctly in this case as the tractor unit was restored for a fee but the trailer was adapted and so should not be restored. The evidence contradicts Mr Baser's supposition that the decision maker could not have reasonably arrived at her decision.

23. HMRC submit that Mr Baser should have taken reasonable steps to prevent misuse of the Vehicle and, taking into consideration that a vehicle leased to Mr Kaya had been seized in 2013, Mr Baser should have refrained from allowing the Vehicle to be hired by Mr Kaya on another occasion.

Discussion

24. We considered that it would be compatible with the overriding objective to give permission for Mr Baser's appeal to be made some weeks late. Mr Baser's representatives were in correspondence with HMRC about the terms for the restoration of the tractor and trailer unit until the decision of 19 January 2015 was made. There was then further correspondence about the change in HMRC's position before it became clear to Mr Baser that the decision should be appealed. We weighed up the reason for, and the length of, the delay against the purpose of the time limit to provide finality and the consequences for HMRC, and concluded that in these circumstances it would be fair and just to give Mr Baser the opportunity to put forward his submissions on appeal.

25. The jurisdiction of this Tribunal under section 16 Finance Act 1994 is supervisory and limited to determining whether the decision by HMRC was reasonable. In *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1980] STC 231 Lord Salmon commented that the tribunal cannot substitute "its own discretion merely because it prefers its own discretion to that exercised". As Lord Lane explained, a review of the exercise of discretion should consider whether "the commissioners had acted in a way 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.”

26. Officer Bines’ review letter explains that HMRC are guided by the Commissioners’ policy on restoration but that each case is considered on its individual merits. She went on to note that in considering restoration she had looked at all of the circumstances surrounding the seizure, but not the legality of the seizure as it had not been challenged in the Magistrates’ Court. The policy that Officer Bines applied is summarised as follows in the document provided to us at the hearing (although we note that the policy cited in Officer Bines’ review letter is slightly different in relation to multiple seizures within 12 months) :

27. “A vehicle adapted for the purposes of smuggling will not normally be restored.

Otherwise the policy depends on who is responsible for the smuggling attempt:

A: Neither the operator nor the driver are responsible; or

B: The driver, but not the operator is responsible; or

15 C: The operator is responsible.”

28. In this case it is accepted that the driver, but not the operator, is responsible for or complicit in the smuggling attempt. In these circumstances the policy provides:

“(1) If the operator [also] provides evidence satisfying Border Force that the operator took reasonable steps to prevent drivers smuggling then the vehicle will normally be restored free of charge unless:

(a) The same driver is involved (working for the same operator) on a second or subsequent occasion in which case the vehicle will normally be restored for 100% of the revenue involved in the smuggling attempt (or for the trade value of the vehicle if lower) except that

25 (b) If the second or subsequent occasion occurs within 12 months of the first, the vehicle will not normally be restored.

(2) Otherwise,

(a) On the first occasion the vehicle will normally be restored for 100% of the revenue involved (or the trade value of the vehicle if lower).

30 (b) On a second or subsequent occasion the vehicle will not normally be restored.”

29. We noted from the decision in *Atwal Transport Ltd v The Commissioners for Her Majesty’s Revenue & Customs* [2015] UKFTT 0298 (TC) that HMRC have another policy in relation to “hire companies”. This provides that where a vehicle is owned by a hire company and seized while it is hired to a third party, the vehicle may 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.

5 30. It appears from HMRC's application to stay the proceedings that it considered at that stage that the "hire companies" may be the appropriate policy to apply in this case and that the lessor owner may be given the opportunity to request restoration. This point was not pursued at the hearing by either party, but Officer Bines confirmed that the "hire companies" policy also includes a provision that a vehicle adapted for
10 the purposes of smuggling will not normally be restored as this is HMRC's general policy.

31. We find it unsatisfactory that HMRC initially offered to restore the Vehicle and then withdrew the offer notwithstanding that it had all of the relevant information when the offer was made. HMRC also failed to explain why the photographic
15 evidence of the adaptation was not disclosed until the day before the hearing. Both of these failures were frustrating and costly for Mr Baser. It is also unsatisfactory that HMRC's policies refer to operators or owners taking "reasonable steps" to avoid smuggling, but HMRC failed to provide clarity on what was considered to be "reasonable steps" following the first seizure. Mr Baser was not required to agree not
20 to hire to Teowest or Mr Kaya following the seizure in 2013, but Officer Bines' witness statement notes that Mr Baser had not taken "reasonable steps" as she "considered that the Appellant should have refrained from allowing the trailer to be hired by Mr Kaya on another occasion."

32. Notwithstanding our concerns outlined in paragraph 31, the Tribunal's
25 jurisdiction under section 16 is limited to considering whether Officer Bines' decision is one which no reasonable panel of commissioners could have reached as noted in paragraph 25 above. In this context, we considered whether Officer Bines took into account some irrelevant matter or had disregarded something to which she should have given weight. We noted that Officer Bines refers to her opinion that Mr Baser
30 had not taken "reasonable steps" to prevent the misuse of the Vehicle by allowing it to be hired to Mr Kaya, but she then concluded that there was "no reason to steer away from HMRC policy" that a vehicle that has been adapted should not be restored. We found from this that Officer Bines had taken account of the previous seizure of a vehicle hired to Mr Kaya and her opinion that Mr Baser had not taken "reasonable
35 steps" as part of the circumstances surrounding the second seizure, but that her decision was appropriately based on the weight that she attributed to the fact that the Vehicle had been specifically adapted to facilitate smuggling.

33. On the basis of the application of the general policy in Officer Bines' letter and our finding that the Vehicle was adapted for smuggling as admitted by Mr
40 Mehmedov, we find that HMRC's policy was correctly applied in this case and that the decision is reasonable. The decision is not one that no reasonable panel of commissioners could have reached.

34. There is no exceptional hardship in this case as the risks and penalties are the same for all hauliers. Mr Baser has not been treated any more harshly or leniently than anyone else in similar circumstances.

Decision

5 35. The appeal is refused.

36. 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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**VICTORIA NICHOLL
TRIBUNAL JUDGE**

RELEASE DATE: 17 MAY 2016

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