



TC05448

Appeal number: TC/2016/02142

EXCISE DUTY – seizure of raw tobacco and vehicle – appeal under restoration proceedings – whether decision not to restore vehicle without payment took into account all relevant information and no irrelevant information – held not – appeal allowed – UKBF required to carry out a further review

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MOTO TRANSPORT SP. Z O.O.

Appellant

- and -

THE DIRECTOR OF BORDER REVENUE

Respondents

**TRIBUNAL: JUDGE PHILIP GILLETT
TOBY SIMON**

Sitting in public at Fox Court, London on 19 October 2016

The Appellant did not appear and was not represented at the hearing

Tom Rainsbury, of counsel, instructed by the Director of Border Revenue, for the Respondents

DECISION

1. Neither the Appellant nor its representative, Adam Gosiewski, appeared at the hearing venue at the appointed time. The tribunal contacted Mr Gosiewski by telephone who said he was totally unaware of the hearing and that although he remembered a letter cancelling the previous hearing date, in September, he could not remember receiving the letter containing the revised hearing date.

2. Having heard representations from Mr Rainsbury that the hearing should proceed in the absence of the Appellant or its representative, and having been given a copy of the notebooks of the UK Border Force officers who had stopped and seized the vehicle, as well as the evidence statements contained in the hearing bundle, the tribunal decided that it had sufficient written evidence to hear the case properly and that it was in the interests of justice and fairness to proceed.

15 **Introduction**

3. This was an appeal against a review decision of the Respondent dated 15 March 2016 not to restore a DAF tractor unit and a Schmitz trailer which had been seized at the Inward Freight Controls in Eastern Docks, Dover on 29 October 2015, without the payment of a fee. The tractor unit and trailer belonged to or were leased to the Appellant, Moto Transport Sp. z o.o. (“Moto Transport”), a Polish haulier, and were driven by Stanislaw Urbanowicz, a Polish national.

Legal Framework

4. It is well established that the Tribunal’s jurisdiction in such cases is limited. In particular it was confirmed in the case of *HMRC v Jones and Jones* [2011] EWCA Civ 824 that the Tribunal has no ability to investigate whether or not the seizure of any goods was lawful. This can only be challenged in a Magistrates’ Court and once that avenue has been abandoned the goods are deemed to have been lawfully seized.

5. In addition the Tribunal’s jurisdiction is also limited by the legislative framework covering such appeals. S16(4) Finance Act 1994 provides in relation to such appeals:

“(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the power of an appeal tribunal on an appeal under this section 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, 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 that case ...”

6. A summary of the jurisdiction of this tribunal was laid out very clearly and very helpfully for us by the Respondents in their statement of case. Since it is not controversial, and since we agree with it, we see no reason not to reproduce it here.

- 5 (a) The jurisdiction of the Tribunal in this matter is supervisory;
- (b) The Tribunal cannot substitute its own decision for that of the Review Officer;
- 10 (c) The question for the Tribunal is whether the Review Officer’s decision was unreasonable in the sense that no reasonable adjudicator properly directing himself could reasonably reach that decision;
- (d) To enable the Tribunal to interfere with the Review Officer’s decision it would have to be shown that the Review Officer took into account some irrelevant matter or had disregarded something to which he should have given weight;
- 15 (e) In exercising its supervisory jurisdiction the Tribunal must limit itself to consider the facts and matters which existed at the time the challenged decision of the Review Officer was taken. Facts and matters which arise after that time cannot in law vitiate an exercise of discretion which was reasonable and lawful at the time it was effected;
- 20 (f) The burden of proof lies on the Appellant to satisfy the Tribunal that the decision of the Review Officer was unreasonable.

Facts

7. The facts are for the most part agreed between the parties as follows.

8. The vehicle was stopped at the Inward Freight Controls at Dover on 29 October 25 2015 and was found to be carrying a load of sofas and 3 pallets which contained 1,290kg of raw unprocessed tobacco. The CMR documentation for the pallets described their contents as “3 palety Tussilago Farfara 1,290kg”. Tussilago Farfara is we understand the Latin name for coltsfoot.

9. While there was no analytical evidence to show that the leaves were tobacco 30 rather than Coltsfoot, this would have been a relevant question only in condemnation proceedings rather than these proceedings; and we note that no such proceedings have been opened by the consignor.

10. On the CMR documentation the consignee was identified as Dooa Wholesalers 35 Ltd (“Dooa”) and the consignor as Manufakturakosmetyczna Poland. We understand that both companies are involved in the cosmetics industry.

11. The tobacco was seized on the ground that it was liable for forfeiture under s170B Customs and Excise Management Act 1979 (“CEMA”) in that its importation constituted the taking of steps with a view to the fraudulent evasion of excise duty.

The vehicle was seized on the ground that it was liable to forfeiture under s141(1)(a) CEMA in that it was being used for the carriage of goods liable to forfeiture.

12. We note that it was common ground between the parties that raw unprocessed tobacco is not per se subject to excise duty until it is processed into tobacco suitable for smoking, but this processing may only be undertaken by an appropriately licensed establishment. Dooa is not such a licensed establishment.

13. The driver was given a Seizure Information Notice (BOR156) and Warning Letter, which stated that it was possible to challenge the legality of the seizure in a Magistrates' Court by sending a notice of claim to UK Border Force ("UKBF") within one month from the date of seizure.

14. On 22 December, more than one month later, UKBF received a letter from Adam Gosiewski, on behalf of the Appellant, requesting restoration of the vehicle and asking for a magistrate to hear the case on the ground that the seizure was unlawful. The letter contained, inter alia, the following statements:

15 “(1) The Appellant received and processed two separate transport orders to deliver goods to the UK: one from a furniture company, and the other from a cosmetics company. (Mr Gosiewski attached what we believe were the transport orders referred to but these were not in English).

20 (2) Part of the processing procedure was to check the authenticity of the consignor. This was done by checking the company's registration and tax status. Both checks were trustworthy in Poland as there are stringent regulations and any company that is not operating properly quickly becomes deregistered. These checks were carried out by Mr Baranik, the owner of Moto Transport, in the Polish Tax Revenue database and the Polish Company Register, which is kept at the Commercial Court. The transport order itself was on a public transport exchange information website.

25 (3) The consignments were collected from the respective dispatchers along with appropriate documentation. The furniture company sent furniture, *the cosmetics company sent untreated tobacco leaves* (our emphasis added).

30 (4) The goods and paperwork were examined in detail by the French authorities during a customs check at Calais and nothing out of the ordinary was stated. This is mentioned in the driver's statement (which was also attached to the letter).

35 (5) The vehicle was checked again at Dover where the vehicle and the goods were seized by officer Wenn of UKBF. The driver was interviewed, informed that as the paperwork was allegedly incorrect, the paperwork, goods and vehicle would be seized until further notice. The driver was issued with a BOR156.

40 (6) All drivers are checked for any instances of non-compliance with the law. The interviews are held at the company's head office. Current customs rules and regulations are discussed. Literature is distributed to drivers, including from the UKBF Code of Practice and How to avoid a Penalty: 10 steps to an effective system for drivers to prevent clandestine entry.

(7) With regard to the seizure itself, Moto Transport always goes to great lengths to check the current state of regulations. *There was nothing in the transport order that seemed out of place* (our emphasis added).

5 (8) The Polish Ministry of Finance in a clarification letter states that “dried tobacco prepared in the way as described is not subject to excise and thus cannot be treated as a luxury product.”

(9) Moto Transport upholds the request of restoration of its vehicle registration P03H002/WPR1955A on the basis that *as far as could be reasonably ascertained the vehicle was carrying a legitimate load from a legitimate source to a clearly defined consignee* (our emphasis added)”

10 15. The statement from the driver made, inter alia, the following representations:

“(1) On 27 October 2015 I connected a DAF registration number P03H002 to trailer WPR1955A. There were three pallets of goods already loaded. They were wrapped in film and ready for transport. *I could not say what was in them* (our emphasis). I was given the transport documents CMR by the owner.

15 (2) I drove to my next stop, in Chemno, for furniture for England. After loading I was given the documents (CMR) and the delivery address. I started out the same day.

(3) I got to Dunkirk, France on 29 October at about 15:00. After collecting my boarding pass and entering the terminal, I was checked by Customs. During the French Customs search I was asked to open both sides of the vehicle. Both loads were examined and nothing was found to be wrong. I was told to secure my load, documents were returned and told to continue onto the ferry.

20 (4) After arriving to (sic) Dover Port, England, I was checked again. British Customs said something was wrong with first load. The pallets were offloaded at Dover Customs. Afterwards I was told to secure the load and lock the trailer. I was then interviewed with the help of a translator over the phone. I was told that the goods in the 3 pallets were subject to excise.

25 (5) I was informed that the vehicle and the rest of the load would be held until the matter has been clarified. The Customs officers allowed me to collect my personal items. I was left with these items at the terminal.”

30 16. We were also given copies of the notebooks of the UKBF officers involved in the seizure. These were generally routine in nature but contained notes of the following important exchange. When the officers asked the driver what was in the 3 pallets he replied that it was tobacco. When he was then asked who had told him it was tobacco he said it was the people in Dunkirk.

35 17. At this point we would note that we were unable to question either Mr Gosiewski, the driver or the UKBF officers involved, and must therefore treat their evidence with due caution. However, we would also note that in all material respects the accounts are not contradictory.

18. Piecing these various sources of evidence together we find as a matter of fact, on the balance of probabilities, that the driver did not know what was in the pallets until he was informed that it was tobacco by the French Customs officers at Dunkirk. Even then he was informed by those Customs officers that there was no problem.

5 19. In addition, we note that in his letter of 22 December 2015, Mr Gosiewski stated that the consignor had sent untreated tobacco leaves. What we cannot ascertain is whether or not this was known to the Appellant at the time of importation, or whether this was a matter of hindsight on the part of Mr Gosiewski. Either interpretation is possible.

10 20. On 22 December 2015 UKBF wrote to Mr Gosiewski to acknowledge his request for restoration and ask for further details, including proof of ownership of the vehicle. The letter confirmed that, unless informed otherwise, UKBF would commence condemnation proceedings in the Magistrates' Court.

15 21. On 7 January and 12 January Mr Gosiewski sent further emails to UKBF attaching various documents for the vehicle, which were in Polish but translated into English by Mr Gosiewski, and an authority to act for the Appellant.

22. On 26 January 2016 a decision was made to offer restoration of the vehicle in return for a fee of £22,375, being the trade value of the vehicle. The officer making this decision had reached this conclusion because "[the Appellant] failed to undertake reasonable checks before transporting the goods. The most basic of checks revealed that the consignee was a cosmetics company dealing in Afro cosmetics and beauty products, which was an unusual destination for unprocessed tobacco". The decision letter also stated that a call to the consignee would have confirmed that no such consignment was expected.

25 23. On 16 February 2016 Mr Gosiewski wrote to UKBF requesting a review of this decision and restoration of the vehicle without the payment of a fee. He made the following representations.

30 "(1) One cannot agree that there is any proof of Moto Transport being negligent in its duties or indeed there being an attempt to smuggle goods at all. The documentation was quite clear as to what the goods were, there was not even the slightest attempt to conceal what was taken by the haulier to be a legitimate load. [...] the French Customs authorities looked at the goods and paperwork and had no question as to the legitimacy of the load.

35 (2) With regard to the statement that the consignee had not been contacted, I would respectfully like to point out that under the CMR convention the contract to carry goods is between the consignor and the haulier and that the haulier is duty bound to deliver the goods as specified in the delivery note. The consignor is the de facto party entitled to dispose of the goods and is therefore the decision maker regarding the entrusted goods and in the event of a consignee being unobtainable at the delivery address the haulier is obliged to await instructions from the consignor. Clearly, if the haulier happens upon a situation that appears
40 unusual, he equally is bound to contact the relevant authorities. Nevertheless,

neither is there any practice or indeed statutory requirement for hauliers to make contact with the consignee before delivery.

5 (3) My client upholds his claim that he has acted responsibly. He always makes background checks on consignors, as described in the previous correspondence, which goes well beyond the normal parameters of the CMR convention. The CMR convention is very clear on carrier responsibility regarding accuracy of sender documents and information. This company has never had any trouble with the law, in spite of many years of delivering goods all over Europe and the UK, and in this case had reasonable cause to believe
10 that he was carrying legitimate goods.

(4) Therefore we respectfully request that the said vehicle is restored without a fine as the financial burden on this small company of having a vehicle immobilised since October 2015 is already having a very negative effect on this small family business.”

15 24. On 24 March 2016 the Appellant served notice on UKBF that it no longer wished to challenge the lawfulness of the seizure. The reason for withdrawing this challenge which was given in the subsequent appeal to this tribunal was that the Appellant had been warned that the challenge through the Magistrates’ Court could have serious financial consequences and, as a small family company, it could not take
20 this risk.

25 25. The review decision against which this appeal has been made is contained in a lengthy and very detailed letter from Ms Karen Norfolk of UKBF dated 15 March 2016 in which Ms Norfolk concluded that the original decision should be upheld. This review letter helpfully contains an extensive statement of UKBF’s policy on restoration in such cases. The relevant passage is set out below:

“A. If the operator provides evidence satisfying Border Force that neither the operator nor the driver were responsible for or complicit in the smuggling attempt then:

30 (1) If the operator also provides evidence satisfying Border Force that both the operator and the driver carried out basic reasonable checks (including conforming with the CMR Convention) to confirm the legitimacy of the load and to detect any illicit load, the vehicle will normally be restored free of charge.

(2) Otherwise,
35 (a) On the first occasion the vehicle will normally be restored for 20% of the revenue involved in the smuggling attempt (or for 100% of the trade value of the vehicle if lower)

On a second or subsequent occasion ...”

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Evidence

26. We received a written statement and heard evidence from Ms Norfolk, the Review Officer, who is a Higher Officer of UK Border Force. She very helpfully explained the rationale for her decision to confirm the original decision in some detail.

5 27. The key element of her conclusion was that neither the operator nor the driver had carried out the “basic reasonable checks” envisaged in paragraph A(1) of UKBF’s policy on restoration.

10 28. She acknowledged that she had conducted her review on the basis that, although the operator and driver were not in any way responsible for or complicit in the smuggling attempt, either or both knew that they were carrying tobacco. This then guided her decisions as to what checks might be considered reasonable for them to have carried out in such circumstances. She said she based this assumption on the fact that the driver had stated when he had been stopped at Dover that he was carrying tobacco and also the statement in the letter from Mr Gosiewski dated 22 December
15 2015 that “the cosmetics company sent untreated tobacco leaves”.

20 29. She explained that another key element in her review was that the consignee was not expecting any delivery from the consignor. She said that the consignee had been contacted by officers from UKBF and that the director of Dooa, the consignee, had stated that he was not expecting a delivery from the consignor and that they never dealt in raw unprocessed tobacco products. In her view therefore, a simple call to the consignee would have alerted the haulier to the fact that there was a problem with the goods being transported.

25 30. Ms Norfolk also said that the Appellant had not provided her with copies of the relevant transport orders. This was plainly not strictly correct in that Ms Norfolk’s papers, as supplied to the tribunal, contained a copy of the transport orders, but these were in Polish and had not been provided with an English translation.

30 31. She also stated that she had not given much weight to the checks which the Appellant said it had carried out on the consignor because they had not provided any evidence that they had carried out these checks. However, it was not clear to us precisely what sort of evidence could have been provided to evidence the checking of the Polish Tax Revenue database and the Polish Company Register. Ms Norfolk’s letters to Mr Gosiewski did not ask for further evidence or suggest that what had been provided was inadequate.

35 32. Her review letter stated that she had considered the question of hardship but again felt she had insufficient evidence to consider restoration on this basis. We noted again that further evidence of hardship had not been requested and the original decision letter had not contained any reference to the question of hardship and it was not therefore clear to us how Mr Gosiewski or the Appellant, could have known that detailed evidence on this subject might have assisted their case.

33. Ms Norfolk also confirmed that if the appellant did not reclaim the trailer, because of the fee required, the leasing company might also be able to ask for its return.

Discussion

5 34. As stated above, our jurisdiction in this case is limited to deciding whether or not the decision of the Review Officer was reasonable and in particular whether or not she took into account irrelevant facts or had disregarded something to which she should have given weight.

10 35. It was clear from Ms Norfolk's evidence that a key issue was her assumption that either the driver or the operator knew that they were carrying tobacco rather than Tussilago Farfara, as described on the CMR documentation. This then guided her judgement as to what might have constituted basic reasonable checks in the circumstances. However, we have found as a matter of fact that the driver did not know what he was carrying until he was told it was tobacco by French Customs officials at Dunkirk. Had he realised at that point that carrying tobacco was a problem it might have been reasonable to have expected him to have taken other action, such as notifying the UKBF officers when he arrived at Dover. However, the French Customs officers had said that there was no problem so he had no cause to be alarmed or to make further checks.

20 36. Ms Norfolk also put weight in reaching this conclusion on the statement in the letter of 22 December 2015 from Mr Gosiewski that "the cosmetics company sent untreated tobacco leaves". As we noted above this could easily have been a simple statement of the truth with the benefit of hindsight. There is nothing in Mr Gosiewski's words which either implies or suggests that the Appellant or the driver knew about this at the time. The position is therefore at best uncertain whereas the driver's statement on the subject is clear and unequivocal. He stated clearly that, when he set off, he did not know what he was carrying, as the pallets were wrapped in film. As such we think that Ms Norfolk gave considerable and unjustified weight to this factor in reaching her decision.

30 37. Ms Norfolk also put considerable weight on the fact that the director of Dooa, the consignee, when approached by UKBF officers had stated that he was not expecting a delivery from the consignor and that he never dealt in tobacco products. We were not supplied with notes of this conversation; so we do not know if the director was actually asked if he was expecting a delivery of Tussilago Farfara/Coltsfoot, which might have been ordered through a third party, rather than directly with the consignor.

38. However, we find it hard to imagine that anyone who might have been involved in the illegal importation of tobacco would admit to UKBF officers that he was expecting a delivery of tobacco. The possible interpretations of this denial by Dooa are that either it was involved in the smuggling attempt, and the director therefore, not surprisingly, denied all knowledge of the goods and the consignor, or that Dooa was not involved in the attempted smuggling and the director was therefore telling the

truth. In either case a negative answer would have been forthcoming and in our view very little weight should have been applied to it.

39. Paragraph A(1) of the UKBF policy on restoration refers to basic reasonable checks and states that they should include conforming with the CMR Convention. Ms Norfolk expected the driver or operator to have contacted the consignee as one of these basic reasonable checks. However, although Ms Norfolk stated that it was not unusual for hauliers to contact the consignee, she did not state that it was part of the CMR Convention, and indeed, Mr Gosiewski was quite clear that it was not part of the CMR convention. We note that the relevant paragraph of HMRC guidance, attached as Appendix A to Ms Norfolk's letter of 15 March 2016, states that a check that the consignee is expecting the goods is "particularly relevant for bonded warehouses in the context of diversion fraud", but that is not the case here. Again we believe that Ms Norfolk's conclusions on this point were heavily influenced by her belief that the driver knew what he was carrying.

40. If the Appellant or the driver had known that they were carrying tobacco to a cosmetics distributor then they might well have been expected to contact the consignee to question the situation, but we do not believe that the driver or operator knew what they were carrying until the load was searched by French Customs officers at Dunkirk. Even then the French Customs officers did not indicate that there was anything wrong and the driver therefore had no reason to suspect a problem or take additional actions.

41. On the question of hardship Ms Norfolk stated that she did not think she had sufficient evidence to consider this properly but since the letter acknowledging the request for a review, dated 19 February 2016, had asked the Appellant to provide any further evidence or information they wished to support the request for a review, she considered that the Appellant could have provided additional evidence of hardship at that time and had not taken advantage of the opportunity to do so. We find this a somewhat harsh approach since at that time neither the Appellant nor its representative had been informed of the full UKBF policy on restoration and would not therefore have been aware that proving exceptional hardship would be helpful to its case.

Decision

42. Having considered the above the Tribunal decided that the Review Officer's decision was unreasonable in that the Review Officer failed to direct herself correctly. She gave inappropriate and unjustified weight to her belief that the driver and operator were aware that they were carrying tobacco, and this formed the foundation of all her subsequent judgements. She also gave undue weight to the response from the director of Dooa that he was not expecting a consignment of tobacco and never dealt in the product.

43. Therefore, in accordance with the provisions of s16(4) FA 1994, we require UKBF to conduct a further review of the decision not to restore the vehicle without

payment of a fee, taking into account fully the conclusions we have reached as set out above.

44. We also direct that, for the purposes of this further review, the Appellant be given the opportunity to provide additional evidence to support its case, and in particular that they should be given the opportunity to provide, in the form of documents or further witness statements:

- (1) Evidence of the checks they carried out on the consignee,
- (2) Evidence of the knowledge of the driver and the operator at the time as to what was being transported,
- (3) English translations of the transport orders,
- (4) Evidence of the hardship suffered by the Appellant, including full financial information, and
- (5) Any other evidence which they consider appropriate.

45. The Appellant must provide any such evidence and information to UKBF within 60 days of the date of this judgement. If the Appellant does not comply with this direction within the 60 days allowed then UKBF shall be entitled to carry out their further review on the basis of the information and evidence currently in their possession, but taking into account the conclusions of this Tribunal as set out above.

46. 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.

**PHILIP GILLETT
TRIBUNAL JUDGE**

RELEASE DATE: 24 OCTOBER 2016