[2017] UKFTT 571 (TC)

TC06016

Appeal number: TC/2014/05753

Customs and Excise – hydrocarbon duty – seizure of a trailer – decision not to restore – whether the appellant knew or should have known it was carrying diesel subject to duty – no – appeal allowed – further review directed

FIRST-TIER TRIBUNAL
TAX CHAMBER

WTL S.P. Z.O.O. Appellant
(incorporating PSYK TRANSPORT POLAND)

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS Respondents

TRIBUNAL: JUDGE RICHARD CHAPMAN
MRS RAYNA DEAN

Sitting in public at Liverpool Civil and Family Court, 35 Vernon Street, Liverpool, L2 2BX on 18 May 2017

Mr Neil Addison, Counsel, for the Appellant

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

DECISION

Introduction

1. This is an appeal against a decision dated 12 June 2014 (upheld by a review decision dated 25 September 2014) refusing to restore a refrigerated trailer ("the Trailer") owned by the appellant, WTL S.P. Z.O.O. ("WTL"), which had been seized upon being found to hold approximately 26,000 litres of diesel fuel upon which excise duty had not been paid ("the Fuel").

2. The seizure took place on 11 April 2014 at an address in Fleetwood. The Trailer contained 26 Intermediate Bulk Containers ("IBCs"), each of which held approximately 1,000 litres of the Fuel. The seizure also included a vehicle, but this is no longer relevant to this appeal as it is owned by a third party. Similarly, the notice of appeal seeks restoration of the Fuel but on any view this was not owned by WTL. The parties agree that only the Trailer is now in issue.

3. The essence of the decision and the review was that HMRC reached the view that on the balance of probabilities WTL was or should have been fully aware that the Fuel was being transported and that had the load not been seized it would have been used as road fuel. Although HMRC maintained that such knowledge was not a necessary requirement of a refusal to restore, it was the determinative factor in the present decision. The essence of WTL's appeal is that it did not know and should not have known that it was carrying the Fuel (which has a United Nations hazardous substance number – "a UN number" of 1202), as distinct from what was simply described as an environmentally hazardous substance with the UN number 3082. It follows that this appeal turns upon what, in all the circumstances, WTL knew or should have known about what was being carried in the Trailer.

The Legal Framework

4. The relevant restrictions upon use, and liability to forfeiture, in respect of hydrocarbon oils are set out in the following sub-sections of section 10 of the Hydrocarbon Oil Duties Act 1979 ("HODA").

> "(1) Except with the consent of the Commissioners, no oil in whose case delivery without payment of duty has been permitted under section 9 above shall –
>
> (a) be put to a use not qualifying for relief under that section; or
>
> (b) be acquired or taken into any vehicle, appliance or storage tank in order to be put to such a use.
>
> …
>
> (8) For the purposes of this section, a person is liable for oil being taken into a vehicle, appliance or storage tank in contravention of subsection (1) above if he is at the time the person having the charge of the vehicle, appliance or tank, or is its owner, except that if a person

other than the owner is, or is for the time being entitled to possession of it, that person and not the owner is liable.

(9) Any oil acquired, or taken into a vehicle, appliance or storage tank as mentioned in subsection (1) above, or supplied as mentioned in subsection (4) or (5) above, shall be liable to forfeiture."

5. The following sections of the Customs and Excise Management Act 1979 ("CEMA") also deal with liability to seizure and forfeiture, as well as HMRC's power to grant restoration.

"49.

(1) Where –

(a) except as provided by or under the Customs and Excise Acts 1979, any imported goods, being goods chargeable on their importation with customs or excise duty, are, without payment of that duty –

(i) unshipped in any port,

(ii) unloaded from any aircraft in the United Kingdom.

(iii) unloaded from any vehicle in, or otherwise brought across the boundary into, Northern Ireland, or

(iv) removed from their place of importation or from any approved wharf examination station or transit shed; or

(b) any goods are imported, landed or unloaded contrary to any prohibition or restriction for the time being in force with respect thereto under or by virtue of any enactment; or

(c) any goods, being goods chargeable with any duty or goods the importation of which is for the time being prohibited or restricted by or under any enactment, are found, whether before or after the unloading thereof, to have been concealed in any manner on board any ship or aircraft or, while in Northern Ireland, in any vehicle; or

(d) any goods are imported concealed in a container holding goods of a different description; or

(e) any imported goods are found, whether before or after delivery, not to correspond with the entry mode thereof; or

(f) any imported goods are concealed or packed in any manner appearing to be intended to deceive an officer,

those goods shall, subject to subsection (2) below, be liable to forfeiture.

…

139.

(1) 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.

…

141.

(1) Without prejudice to any other provision of the Customs and Excise Acts 1979, where any thing has become liable to forfeiture under the customs and excise Acts –

(a) any ship, aircraft, vehicle, animal, container (including any article of passenger's 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

(b) any other thing mixed, packed or found with the thing so liable, shall also be liable to forfeiture.

(2) Where any ship, aircraft, vehicle or animal has become liable to forfeiture under the customs and excise Acts, whether by virtue of subsection (1) above or otherwise, all tackle, apparel or furniture thereof shall also be liable to forfeiture.

…

152. The Commissioners may, as they see fit –

…

(b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under those Acts,

…"

6. As the appeal relates to an ancillary matter, our powers are provided for in section 16(4) of the Finance Act 1994 as follows.

(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 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 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 which 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 the future."

7. The parties were agreed that we are entitled to decide primary facts, including the blameworthiness or otherwise of WTL. Once we have decided these primary facts, we should go on to decide whether in the light of those findings the decision not to restore was reasonable. It follows that we are not restricted to the evidence available to the decision making officer at the time of making the decision or the review decision. The authority for this proposition is *Balbir Singh Gora and others v Commissioners of Customs and Excise* [2003] EWCA Civ 525. Pill LJ said as follows at [38]:

> "… (e) Strictly speaking, it appears that under s16(4) of the 1994 Act, the Tribunal would be limited to considering whether there was sufficient evidence to support the Commissioners' finding of blameworthiness. However, in practice, given the power of the Tribunal to carry out a fact-finding exercise, the Tribunal could decide for itself this primary fact. The Tribunal should then go on to decide whether, in the light of its findings of fact, the decision on restoration was reasonable. The Commissioners would not challenge such an approach and would conduct a further review in accordance with the findings of the Tribunal."

8. The parties were also agreed that the burden of proof is upon WTL and that this is upon the balance of probabilities.

The Evidence

9. We heard oral evidence, through an interpreter, from Mr Tomasz Psyk, who is a director of WTL. We also read his witness statement, which had been translated to him previously. We found him to be an honest and helpful witness who was keen to set out his version of events. We also read a witness statement from Mr Leszek Bujak, who was the driver of the vehicle and Trailer. However, he did not attend the hearing to give oral evidence. Whilst we do take his evidence into account, we give it only limited weight given the absence of any opportunity for either party or the Tribunal to ask him any questions.

10. We also heard oral evidence from the officer who made the review decision, Ms Louise Bines. We had no doubts whatsoever about Ms Bines' credibility and Mr Addision did not suggest that there should be any. Ms Bines gave her evidence in a frank and constructive way.

Findings of Fact

11. We make the following findings of fact upon the basis of our assessment of the witness evidence and the documentary evidence, incorporating those elements of the background which were not in dispute in any event. However, we will leave our findings as to knowledge until after we have set out the parties' respective contentions in that regard.

12. WTL is a company based in Poland, carrying on business in the transportation of goods throughout Europe, including to the United Kingdom. This includes the

transport of hazardous substances. Mr Psyk is himself a qualified driver, albeit not the driver of the vehicle and the Trailer in question within this appeal. Mr Psyk is in charge of the day to day operations of WTL, including the sourcing and arrangement of transport work and the associated logistics.

13. In March or April 2014, Mr Psyk was contacted by Mr Slawomir Kruk of a company trading as SPAJ Crow Ltd ("Crow") with a view to Crow engaging WTL for its transport services. Crow was based in Limerick, Ireland. Also in March or April 2014, Mr Kruk travelled to Poland and met with Mr Psyk at WTL's premises. Mr Kruk enquired about WTL transporting hazardous substances for various of Crow's customers. Mr Kruk showed Mr Psyk an example of a consignment note in respect of a different haulier relating to similar goods.

14. On 4 April 2014, Mr Kruk telephoned Mr Psyk and asked him to quote for transporting hazardous substances from Antwerp, Belgium, to Limerick. Mr Psyk quoted him a fee of €700 and an agreement was subsequently reached. Mr Psyk understood from Mr Kruk that the goods to be transported were 26 IBCs of hazardous substances with the UN number 3082.

15. Mr Psyk arranged for a driver, Mr Bujak, and the Trailer. Mr Psyk's reason for choosing a refrigerated trailer was twofold; first, he was hoping that he would be able to take flowers from Liverpool to Holland for one of his regular customers (albeit that no firm arrangement was in place) and, secondly, although he had not been instructed to do so, the refrigerated trailer would allow the hazardous substances to be kept at a constant temperature even without the refrigeration unit switched on. Mr Psyk instructed Mr Bujak first to drive to a storage depot near Posnan to collect the IBCs and then on to Antwerp to collect the load from a company trading as VLS Group.

16. Mr Bujak arrived at Posnan on 7 April 2014, loaded the IBCs onto the Trailer and, although delayed, set off for Antwerp. However, upon arriving late on 8 April 2014, it became clear that Mr Bujak had missed his booking for loading. He telephoned Mr Psyk, who said that he should go to VLS Group's depot in Ghent the following morning. We presume that Mr Psyk had been told to arrange this by Mr Kruk because later emails on 9 April 2014 refer to instructions for loading the Trailer in Ghent and an "unloading place" of Crow's address in Limerick. The order referred to UN3082 environmental hazardous substances and what appears to translate as No 2 fuel oil diesel.

17. When Mr Bujak arrived at Ghent, 26 IBCs were filled and closed by employees at VLS Group from a tanker with what were said to be hazardous substances. These were exchanged for the empty IBCs on the Trailer. Mr Bujak and VLS Group's employees at Ghent then placed hazardous and dangerous goods stickers and seals on the full containers. The labels read, "UN3082 environmentally hazardous substance, liquid Nos (fuel, diesel, number 2) 9, 111 (E)". Mr Bujak then set off for Limerick. The VLS Group gave Mr Dujak a CMR note and a multimodal dangerous goods form. These again referred to destinations in Limerick and UN3082 environmentally hazardous substances. Mr Bujak then drove to Dunkirk and boarded the ferry.

18. It will be clear from the above that we have found that Mr Bujak's destination was at this point intended to be Limerick. We recognise that this is at odds with Mr Psyk's insistence that the original destination was Liverpool. We find that Mr Psyk is wrong about this. All the relevant documents refer to Limerick rather than Liverpool. It is also of note that Mr Psyk's own witness statement repeatedly refers to Limerick.

19. In any event, whilst Mr Dujak was en route from Dunkirk to Dover on 10 April 2014, Crow contacted Mr Psyk and asked him to divert Mr Dujak to a location north of Liverpool and that he would update him later as to the exact address. Mr Psyk contacted Mr Dujak and passed this on. Crow subsequently gave Mr Psyk an address in Fleetwood, which he duly passed on to Mr Bujak. However, Mr Bujak was having difficulty finding this address and so he rang Mr Psyk. Mr Psyk told Mr Bujak to pull over while he contacted Crow for assistance. Mr Psyk and Crow agreed that Crow would find Mr Bujak and guide him to their storage compound, which they then did.

20. When at the storage compound, the men who were there began extracting the substances using a manual pump. They asked after Mr Psyk. However, they appear to have made Mr Bujak concerned that they were, to use the wording in his witness statement, "gangsters". Mr Bujak telephoned Mr Mr Psyk, who said that he should unload quickly. However, owing to difficulties in unloading, it was agreed that Mr Bujak would wait until the following day when a forklift truck would be available to complete the unloading.

21. The following morning, 11 April 2014, the vehicle, the Trailer and the Fuel were seized. Mr Bujak was arrested for the offence of, "being knowingly involved in the evasion of excise duty, namely fuel contrary to section 170 Customs and Excise Management Act 1979." However, he was given a notification of no further action on 18 June 2014.

22. By a letter dated 30 April 2014, WTL requested restoration of the Trailer. This was refused by Ms Kate Roberts by a letter dated 12 June 2014. By a letter dated 6 August 2014, WTL requested a review of this decision. This resulted in Ms Bines upholding the decision on her letter dated 25 September 2014. After setting out the background facts as she understood them to be, Ms Bines weighed the various factors involved and reached the following conclusions.

> "Due to the fact that the load being transported was mainly derv it is subject to the restrictions of a Tied oil as stated in section 9 and 10 of the Hydrocarbon Oil Duties Act (HODA) 1979 and therefore sold and traded under that Act.
>
> Formal analysis undertaken by the Laboratory of the Government Chemist has shown the product is not lubrication oil as claimed by your client and is mainly derv and therefore able to be used as road fuel.
>
> The vehicles did not display the correct hazard markings for the load being carried.

> The consignor and driver should have been aware of the ADR regulations and the markings required.
>
> The address for the delivery of the load was changed on [sic] route which is unusual practice.
>
> The method used to pump the fuel into the containers by two Polish males with a pump that failed to work again is not what one would expect.
>
> IBCs of fuel are not usually transported in fridge box trailers.
>
> Taking all the above into account I believe that on the balance of probabilities your client was fully aware what product was being transported and had the load not been seized would have been used as road fuel.
>
> I believe that your client has not been treated any more harshly or leniently than anyone else in similar circumstances.
>
> Therefore I have decided to uphold the original decision whereby the vehicle and trailer will not be restored to your client."

23. WTL appealed against the review decision by a notice of appeal dated 21 October 2014. The grounds of appeal are long and it must be said are really nothing more than a chronology of events.

Submissions

WTL

24. Mr Addison's main submission was that Ms Bines was wrong to reach the conclusion that WTL knew or should have known that duty unpaid Fuel was being carried. Having reached this erroneous conclusion, he submitted, she therefore took into account an irrelevant consideration, making the decision unreasonable in the *Wednesbury* sense.

25. Mr Addison drew our attention to the fact that Mr Psyk had carried out due diligence on Mr Kruk by meeting him and that there was no need to be suspicious of him or Mr Crow. He also said that there was no substance to the criticisms that a change of destination address was uncommon; Mr Psyk's uncontradicted evidence was that in his experience it happened about 20% of the time. He said that the use of the refrigeration trailer was satisfactorily explained by Mr Psyk. Although the method of unloading at Fleetwood was unusual, this was not in itself sufficient to impugn the transaction.

26. Mr Addison said that even if we were of the view that Ms Bines' decision was reasonable upon the basis of the information available to her at the time that she made it, the facts as they emerged during the hearing mean that the decision was "unreasonable with hindsight". He relied upon *Tomex Fhu Thomaz Bomba v HMRC* [2017] UKFTT 212 (TC) (Judge Zachary Citron and Mr Duncan McBride) at [43].

27. Mr Addison also submitted that the question of proportionality had simply not been addressed. He drew our attention to *Nefaria Trans Edyta Sowa v HMRC* [2017] 0844 (TC) (Judge Sarah Falk and Mr John Robinson) at [66] as follows:

> "… (2) The review decision did not appear to take account of the fact that [the] appellant was a carrier, presumably rewarded at most by a modest fee – in the words of the House of Lords a "modest contributor" – rather than a smuggler making a profit directly from duty evasion. There was no suggestion that the appellant was paid anything other than a normal carrier rate to carry the product in question (if indeed she was paid at all on this occasion). The maximum amount paid by Vybigon on previous journeys was 2,400 euros, and that appears to have covered a journey to Liverpool rather than (as in this case) London. There was no indication that the appellant would have benefited from a share of any profit made from smuggling the goods. So even if the appellant should have been prompted to make further checks (as to which see below) it would not follow that non-restoration was proportionate. As the cases discussed above illustrate there is a distinction in principle between someone who profits from duty evasion and a carrier who, although conducting a commercial business, is unaware that an illicit load is being carried and makes only the modest returns that a haulier might be expected to make."

HMRC

28. Mr Charles submitted that it was clear on the face of the various documents and the labels on the containers that it contained diesel fuel as it was mentioned on it, albeit in the context of UN number 3082. Further, various features should have made WTL concerned. In particular, the change of address, the inevitable smell of diesel and the process of unloading. He also highlighted the inconsistency between references in oral evidence to Liverpool as the initial destination and in written evidence and documents to Limerick. There is also the oddity of agreeing to €700 as a fixed price without amendment notwithstanding the change of address.

29. Ms Bines also noted in her witness statement that her internet search of Crow's address revealed that it was a domestic address and so unsuitable for such a delivery. Indeed, Ms Bines pointed in her witness statement to a general lack of due diligence checks on Crow.

30. Mr Charles said that as WTL knew or should have known that they were carrying the Fuel, the case is to be distinguished from *Tomex* and *Nefaria.* In any event, these are First-tier Tribunal decisions, not binding and turn on their own facts.

31. As regards proportionality, Mr Charles accepted that it had not been dealt with "head on" as he put it. However, the overall circumstances of the case reveal that WTC is not a small enterprise, it had eight vehicles at the time of the seizure and has grown substantially since then.

Discussion

32. We find that the decision to refuse restoration was, in the light of the facts as we have found them, one which HMRC could not reasonably have arrived at, was one which took into account irrelevant considerations (namely, the erroneous conclusion that WTL knew or should have known what they were really carrying) and did not take into account a consideration which ought to have been taken into account (namely, Mr Psyk's meeting with Mr Kruk). This is for the following reasons, individually and cumulatively.

33. First, we find as a fact that WTL did not know that they were carrying Fuel. The fact that documents referred to diesel fuel must be seen in the context that they were under a UN number which related to substances which would not attract excise duty. WTL submitted, and HMRC did not dispute, that the Fuel would have been UN number 1202. Further, the descriptions make no mention of the substances being road fuel Importantly, we believe Mr Psyk's evidence when he insisted that he did not know the load was anything other than an environmentally hazardous substance with UN number 3082.

34. We have considered whether or not Mr Psyk's credibility is damaged by his insistence that he was told that Liverpool was the initial destination for the load in circumstances in which we have found that it was in fact Limerick. However, we have reached the view that he has misled himself in this regard rather than trying to mislead the Tribunal. This is because the rest of his evidence was given in a credible and measured way and it is difficult to see what benefit he would gain from fabricating this as the relevant feature is the fact of a change of destination address, which is still present.

35. Secondly, it cannot be said that WTL should have known of the Fuel as a result of any absence of due diligence upon Crow. Ms Bines said very openly and frankly that, "It was not until today that we knew that the customer travelled and met Mr Psyk. That's quite good due diligence and it was only brought up today." Ms Bines said that if she had known that they had met, this would have made, "a difference," as she put it. On being asked if she would have made a different decision if she had known this she said, "It may have done," although she went on to say, "I don't go so far as saying that I would not have made the decision I made." Given the prominence which Ms Bines gives to due diligence in her witness statement, it follows that the due diligence in having the face to face meeting is a consideration which she ought to have taken into account but which she did not take into account. Of course, we do not criticise Ms Bines for this; as she rightly points out, the fact of this meeting only emerged in the hearing. However, we find that this does fall into the "unreasonable with hindsight" category referred to in *Tomex*.

36. Thirdly, the review decision refers to the hazard markings required and those displayed. However, this presupposes knowledge that the markings were wrong. As set out above, the containers were marked with what WTL though the load was.

37. Fourthly, the review decision refers to it being unusual to change the destination address. However, on Mr Psyk's evidence, a change of destination address is not unusual. This was not contradicted by any competing evidence. We agree that it is surprising that there was no renegotiation of the €700 but this is not sufficient to create a suspicion that WTL knew or should have known of the Fuel.

38. Fifthly, HMRC correctly refer to the method of unloading at Fleetwood to be unusual and suspicious (although we note that the decision refers to the loading of the containers, we assume from its context that it was the unloading which was intended). However, this is at the very end of the process and in our view is not enough in its own right to justify the position as it is outweighed by the other features set out above. We also note that this took place after the arrival of the Fuel in the United Kingdom. Neither party made any submissions about the effect of this and so we do no more than make the point that HMRC's should consider as part of their further review whether or not events during the unloading are relevant given that they took place after the arrival of the Fuel in the United Kingdom.

39. Sixthly, we accept Mr Psyk's explanation as to the use of the refrigerator unit. There was no contract in place to transport flowers from Liverpool to Holland. However, it appeared to be from the evidence a hope rather than an entitlement and Mr Psyk did not suggest that it was anything more than that. We note that the reference to Liverpool is not contingent upon any finding as to whether the original destination was Liverpool or Limerick and so is of no consequence.

40. Seventhly, we do not accept that there has been any or sufficient consideration of proportionality. In particular, there has been no consideration of the value of the transport contract, the Trailer or the impact of non-restoration upon WTL's business.

41. For completeness, we note that Ms Bines considered that Mr Bujak would have known the Fuel was diesel at the time of loading because he would have smelt diesel. This is not necessarily the case, as the containers were (on Mr Bujak's written evidence) closed before he applied the labels and seals. Ms Bines accepted that there had been an assumption about the smell of diesel. As Mr Bujak did not attend to give oral evidence, we do not make any findings of fact in this regard.

Decision

42. It follows that we allow the appeal.

43. In accordance with subsection 16(4) of the Finance Act 1994:

(1) We direct that the review decision and decision in respect of the Trailer are to cease to have effect from the date of the release of this decision.

(2) We require HMRC to conduct a further review of their decision to refuse restoration of the Trailer. In doing so, HMRC shall take into account the facts found in this decision as part of their considerations.

44. 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.

RICHARD CHAPMAN
TRIBUNAL JUDGE

RELEASE DATE: 21 JULY 2017