Neutral Citation No. [2014] NICh 13 | *Ref:* **STE9254**

Judgment: approved by the Court for handing down | *Delivered:* **28/04/2014**

*(subject to editorial corrections)**

UPPER TRIBUNAL TAX AND CHANCERY CHAMBER

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JAMES McKEOWN t/a JAMES McKEOWN HAULAGE

Appellant:

-and-

UK BORDER AGENCY

Respondent:

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STEPHENS J

Introduction

[1] This is an appeal by James McKeown, who trades as James McKeown Haulage ("the appellant") from a decision of the First Tier Tax Tribunal ("the Tribunal") dated 13 August 2012 whereby the Tribunal Judge dismissed the appellant's appeal against the decision of the UK Border Agency to refuse to restore a Scania highline tractor unit registration number 05 LH 6071 ("the tractor unit") which had been seized under Section 139 of the Customs and Excise Management Act 1979 ("the 1979 Act") following the discovery that 8,635,000 cigarettes upon which excise duty had not been paid, were being transported in a trailer attached to the tractor unit. The appellant contends that the Tribunal Judge unlawfully restricted his jurisdiction in finding that it was not open to the Tribunal to consider further materials which had not been placed before the decision-maker at the time of his original decision. The appellant submits that the Tribunal must satisfy itself that the facts upon which the Commissioners based their decision to refuse to restore the tractor unit are correct.

[2] Mr McNamee of McNamee McDonnell Duffy solicitors LLP appeared on behalf of the appellant and Ms Mullen, of counsel, appeared on behalf of the respondent.

Factual background

[3] The appellant was the owner of the tractor unit. The appellant's employee was the driver. On 14 December 2010 the tractor unit was attached to and was

hauling trailer registration number IEL 2502, the property of Norfolk Line. Upon arrival at Dover, having travelled by ferry from France, the driver was questioned by an officer of the respondent. The driver produced a CMR note number 24213361 dated 13 December 2010 which showed that he was purportedly transporting a consignment of starch from Netherlands to Kerry Foods in Belfast. The note showed that the consignment was uplifted in the Netherlands on 13 December 2010 and that it was due to be delivered in Belfast by 20 December 2010. That meant that the driver had seven days to travel from the Netherlands to Belfast in order to make this delivery. In fact one day later, and within 26 hours of having uplifted the consignment the tractor unit and trailer had arrived at Dover. False number plates were found to have been put on the vehicle. The consignment was not starch but rather cigarettes. The inference is that the driver off loaded the starch en route to the ferry and replaced that load with the load of cigarettes. False number plates were put on the vehicle so that there would be no record of the vehicle having entered the United Kingdom on 14 December 2010. The inference is that if the cigarettes had not been detected then they would have been off loaded within the United Kingdom and the vehicle still bearing false plates would then have returned to the continent. That the starch would then have been uplifted and the false plates removed from the vehicle. The vehicle would then have travelled back to the United Kingdom with the trip concluding in Belfast. Accordingly that the period of seven days, on the consignment note, to make the delivery was in order to facilitate the vehicle making two journeys as opposed to one.

[4] The tractor unit, the trailer and the cigarettes were seized by the UK Border Agency under Section 139 of the 1979 Act with the tractor unit being deemed liable for forfeiture under Section 141(1)(a) of that Act.

[5] Correspondence ensued between the appellant and the UK Border Agency in which the appellant sought the restoration of the tractor unit under Section 152(b) of the 1979 Act. The appellant contended that the tractor unit was engaged in a haulage contract for Norfolk Line, a highly reputable transport contractor, that the appellant was entirely blameless and that the loss of the vehicle was causing his business extreme difficulty.

[6] By letter dated 7 March 2011 G A Woods, an officer of the National Post Seizure Unit of the UK Border Agency refused to restore the tractor unit on the basis that the appellant was complicit in the attempt to smuggle the cigarettes. No reasons were given for that decision. The appellant was entitled to and did seek a review of that decision by an impartial review officer in the UK Border Agency. Faced with a lack of reasons the appellant resubmitted his earlier submissions as part of the review process.

[7] By letter dated 27 April 2011 Ian Sked, the review officer, informed the appellant that the tractor unit would not be restored. Mr Sked stated that the driver clearly had to be involved in the smuggling attempt. He also concluded that the

appellant would have had knowledge of the driver's activities for the following reasons:-

(i) James McKeown Transport must have made all travel arrangements for the vehicle – they would have known when the consignment was uplifted, when it was due to cross the Channel, and when it was due to arrive in Liverpool and when it was to ultimately arrive in Belfast. The haulier therefore would have been aware of any unauthorised delays or detours made by the vehicle.

(ii) The haulier would have access to tachograph records.

(iii) The legitimate goods were picked up in Belgium on 13 December 2010 and were not due for delivery in Belfast until 20 December 2010. The lorry was intercepted at Dover on 14 December 2010 at approximately 15.30 hours. This gave the haulier approximately six days to take the goods from Dover via Liverpool and Belfast. This Mr Sked considered was an excessively long time for one run in the economic climate and this suggested to him that extra time had been built in to enable the extra trip with a load of cigarettes to be carried out without causing suspicion.

Accordingly Mr Sked concluded that, on the balance of probabilities, the haulier was involved or at least complicit in the smuggling attempt.

[8] The appellant appealed against that decision to the Tribunal. He wished to introduce further evidence which had not been before Mr Sked to challenge the conclusion that the appellant must have made all the travel arrangements for the vehicle. The appellant stated that he had an arrangement with Norfolk Line which had existed since 2006 that he would hire the vehicle and driver to Norfolk Line and would charge an amount per mile. However that during those periods when the vehicle was hired to Norfolk Line he had no day to day control or indeed knowledge as to the travel movements of either his vehicle or the driver. That the vehicle was travelling under the direction and instruction of Norfolk Line. That all shipping and other transport arrangements were made by Norfolk Line. That the appellant had no input whatsoever to the travel arrangements other than to supply the lorry and driver to Norfolk Line. That accordingly Mr Sked was incorrect in concluding that the appellant would have known when the consignment was uplifted, when it was due to cross the Channel, and when it was due to arrive in Liverpool and when it was ultimately to arrive in Belfast. That Mr Sked was incorrect in concluding that the appellant would have been aware of any unauthorised delays or detours.

[9] At the hearing of the appeal the respondent's case included a submission that

> "the review decision by Mr Sked was in fact one which was reasonably arrived at on the facts known to Mr Sked at the time when it was made".

In effect that the powers of the Tribunal were limited so that it should exclude evidence which was not before Mr Sked but rather consider whether the decision arrived at by Mr Sked was reasonable on the facts as known to him at the time.

[10] The appellant gave evidence before the Tribunal and produced documents to support his factual assertion that he did not make any of the travel arrangements. He was not cross-examined or challenged in relation to his evidence that Mr Sked was incorrect in concluding that he would have been aware of any unauthorised delays or detours given that he did not make any of the travel arrangements. For instance it was not put to him how his evidence was inconsistent with his access to the tachograph records. This failure to challenge the appellant was entirely consistent with the view of the respondent put to the Tribunal that this evidence was immaterial as it had not been before Mr Sked.

[11] The appellant contends that the Tribunal Judge clearly adopted the respondent's submission. In contrast to the position before the Tribunal the respondent now concedes, in my view correctly, that it would be incorrect for the Tribunal to exclude evidence which was not before Mr Sked, see paragraphs 37-39 of *Gora and Others v Custom and Excise Commissioners, Dannett v Customs and Excise Commissione*rs [2003] All ER (D) 208. The respondent now accepts that it was inappropriate to submit to the Tribunal Judge that the Tribunal was restricted to considering whether the decision was one which was reasonably arrived at on the facts known to Mr Sked at the time when it was made. Section 152(b) of the 1979 Act provides that "the Commissioners may, as they see fit … (b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized …" The section provides a discretion based on the facts of each individual case. The person exercising that discretion in this case was Mr Sked. He exercised that discretion on the facts as known to him. The matter then went to the Tribunal. The Tribunal's power to review the respondent's decision is contained in Section 16 of the Finance Act 1994. Section 16(4) of the Finance Act 1994 provides that the power of the Tribunal "shall be confined to a power, where the Tribunal are satisfied that the Commissioners or other person making the decision could not reasonably have arrived at it …". In order to be reasonable a decision must be factually sound. Accordingly the Tribunal has a fact finding function. In *Revenue and Customs v Jones* [2012] Ch 414 HMRC specifically accepted that the Tribunal was empowered under its rules and procedures to carry out a "comprehensive fact finding exercise in all appeals". It was also accepted that the Tribunal has the power to "satisfy itself that the primary facts on which the HMRC base their decision not to restore the goods are correct". In short the obligation on the Tribunal is to find the facts. However the discretion is that of the Commissioners and the Tribunal if it is satisfied that the facts are correct is limited to a review on Wednesbury grounds of the Commissioners decision. The test at that stage being for the Tribunal to ask

a) Is this a decision which no reasonable panel of Commissioners could have come to?
b) Has some irrelevant matter been taken into account?
c) Has some matter which should have been taken into account been ignored?
d) Has there been some error of law?

(See *Customs and Excise Commissioners v JH Corbitt (Numismatists) Ltd* [1980] STC 231 and *Associated Provincial Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223).

[12] The respondent contends that despite the incorrect submission made to the Tribunal Judge he did not limit himself in the way which has been suggested by the appellant. In the alternative the respondent contends that there was no dispute but that the appellant had totally failed to carry out any checks on the driver and on that ground alone he was complicit in the smuggling operation. On this alternative argument the question as to whether it was the appellant or Norfolk Line who made the travel arrangements, were, it was contended, merely "smoke and mirrors." This alternative argument involved the suggestion that the core of the appellant's complicity was his complete failure to supervise or to check what his driver was doing. Ms Mullan accepted that this contention was not specifically recorded as having been made to the Tribunal, but contended that it would have been sufficient to dispose of the appeal.

[13] Leave to appeal was given on 18 March 2013 by Judge Jonathan Connor.

Discussion

[14] The first question is whether the Tribunal did limit its jurisdiction by finding that it was not open to the Tribunal to consider further materials which had not been placed before the decision-maker at the time of his original decision. At paragraphs 44-62 and under the heading "Decision" the Tribunal Judge set out his conclusion. In paragraph 45 at the start of that part of his judgment and also emphasising a part of that paragraph in bold letters, the Tribunal Judge stated:-

> "We must look at the decision-maker's approach to make sure he has taken into account all relevant factors and has not disregarded matters to which he properly ought to have had regard **at the time at which his decision is made**."

Ms Mullen termed that part of paragraph 45 which is in bold as a throw away comment which was unfortunate and which she did not wish to stand over. I consider that the true construction of that part of the judgment is that the Tribunal Judge did adopt the incorrect approach for which the respondent had contended that the Tribunal should not consider further materials which had not been placed before Mr Sked.

[15] The subsequent paragraphs of the judgment confirm that construction. For instance in paragraphs 60 and 61 the Tribunal Judge stated:-

> "60. Mr Sked took the decision, as he is empowered to do under the legislation, based on the information which was available to him. I do not find that he acted unreasonably in that decision, nor that he took into account something that he ought properly not to have taken into account – he simply took the decision based on the information which the appellant had placed before him.
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> 61. Mr Sked then applied the policy adopted by UKBA to the facts as he found them. I find no basis in law for disturbing that his conclusion and accordingly dismiss the appeal."

[16] I consider that in response to the submission made to him by the respondent that the Tribunal Judge unlawfully restricted his jurisdiction in finding that it was not open to the Tribunal to consider further materials which had not been placed before the decision-maker at the time of his original decision. In short the Tribunal failed to determine the facts.

[17] The alternative argument that it was open to the Tribunal to accept that all the travel arrangements had not been made by the appellant but still to find that the appellant was complicit on the basis of a failure to carry out any checks in relation to the driver had not been advanced before the Tribunal and this was not the explicit basis upon which the Tribunal arrived at its decision.

Conclusion

[18] I set aside the decision of the Tribunal and remit the case for its reconsideration. The Tribunal need not be differently constituted.