TC02141

Appeal number: TC/2011/07311

EXCISE DUTY – *red diesel – refusal to restore motor vehicle – whether decision reasonable – yes – appeal dismissed*

FIRST-TIER TRIBUNAL
TAX CHAMBER

PAUL CHATHAM **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN
ANN CHRISTIAN

Sitting in public at Leeds on 12 July 2012

Mr Paul Chatham appeared in person

Mr Andrew Scott of Counsel appeared for the Respondents

DECISION

Introduction

1. Mr Chatham appeals against a decision of HMRC on review not to restore a vehicle belonging to him which was found to have rebated fuel oil ("red diesel") in its running tank. We should say at the outset that there was no dispute that the vehicle, a Land Rover registration OEH 967W, was tested on 16 June 2011 and was found to have red diesel in its tank. The Land Rover was seized on that date. Mr Chatham has offered a number of explanations for the presence of red diesel in the tank – in the interview following seizure, during the course of the review process and in his grounds of appeal to the tribunal.

2. At the outset of the appeal Mr Scott, on behalf of HMRC, quite properly informed us that Mr Chatham suffers from dyslexia. We indicated to Mr Chatham that we would ensure that he fully understood the importance of any documents that were referred to during the course of the hearing. We also took this condition into account in so far as it affected the presentation of his case and his evidence to the tribunal.

3. Mr Scott also informed us that Mr Chatham wished to apply for an adjournment. The grounds of the application were that Mr Chatham did not realise that this was to be a formal hearing and that he wished to call Mr Rob Barclay as a witness. He told us that about 2 weeks after the seizure Mr Barclay had admitted putting red diesel in the tank of the vehicle when he had borrowed it a few days prior to the seizure. Mr Chatham wanted to call Mr Barclay as a witness to substantiate this.

4. We refused the application for an adjournment. In doing so we took into account:

(1) This was the first time since the date of seizure that this explanation had been offered.

(2) Directions of the Tribunal dated 16 February 2012 asked the parties to give listing details to the Tribunal including details of the witnesses to be called. Mr Chatham replied in a typed letter dated 29 February 2012 that he did not intend to call any witnesses.

(3) Mr Chatham had had a reasonable opportunity to ensure that any relevant witnesses were available at the hearing.

5. Having refused the application for an adjournment we heard the appeal. It is significant that during the course of the hearing Mr Chatham said "*I spoke to Rob last week about coming [to the hearing]*". Mr Chatham did not mention this for the purposes of his adjournment application. We infer that he did not tell us this during the course of the adjournment application because he realised that it would be unlikely we would grant it in those circumstances.

6. Mr Scott opened the appeal on behalf of HMRC at the invitation of the tribunal and Mr Chatham. We are grateful for the even-handed way in which he presented

HMRC's case and for his efforts in helping to ensure that Mr Chatham had a fair hearing. We heard evidence from the review officer Ms Louise Bines and from Mr Chatham. At the conclusion of the appeal hearing we announced our decision that we would dismiss the appeal. This decision notice sets out our findings of fact and our reasons for reaching that decision.

Background

7. The background was not in dispute and from the evidence before us we find the following facts.

8. In July 2006 a VW Golf was seized from Mr Chatham after it was found to contain red diesel in its running tank. It was restored upon payment of a sum of about £600. Mr Chatham accepted that he had deliberately put red diesel in the tank.

9. In July 2010 the Land Rover in the present appeal was seized for the first time after it was found to contain red diesel in its running tank. It was restored to Mr Chatham upon payment of a sum of about £900. Mr Chatham accepted that he had deliberately put red diesel in the tank.

10. The Land Rover was then tested again on 16 June 2011 and was found to contain red diesel in its running tank. It was seized and HMRC have refused to restore it to Mr Chatham.

11. Mr Chatham was not present when the fuel in the Land Rover was tested. The circumstances of Mr Chatham's absence at the time of testing are not relevant for present purposes. He also pointed out that he had not been offered a sample of the fuel, although it was not in dispute for the purposes of the appeal that there was red diesel in the running tank.

12. Mr Chatham was interviewed by officers of HMRC on 27 June 2011. Mr Chatham denied fuelling the vehicle with red diesel. He stated that on 15 June 2011 he had drawn about 50 litres of fuel from a Peugeot 306 estate vehicle that he owned and transferred it to the Land Rover. He had bought the Peugeot as scrap in February 2011 with the fuel still in it. The inference he invited was that this was the source of red diesel in the tank of the Land Rover.

13. Mr Chatham told the officer that he did not know how red diesel had got into the Land Rover's tank other than from the Peugeot. In response to questions at interview Mr Chatham stated that two friends had borrowed the Land Rover in the previous 6 months but to his knowledge they did not fuel it.

14. On 21 July 2011 HMRC wrote to Mr Chatham refusing to restore the Land Rover. Mr Chatham was informed of his right to ask for a review of that decision, in which case he was invited to send to HMRC any information and evidence of exceptional circumstances. The reference to exceptional circumstances was, we understand, a reference to the restoration policy of HMRC. Namely, in the absence of mitigating or exceptional circumstances the terms on which restoration will be offered are as follows:

(1) On a first offence, restoration will be offered upon payment of civil penalties, together with 100% of the revenue evaded on that occasion and any storage or removal costs incurred by HMRC or, the value of the vehicle whichever is lower.

(2) On a second offence, restoration will be offered upon payment of civil penalties, together with 200% of the revenue evaded on that occasion and any storage or removal costs incurred by HMRC or, the value of the vehicle whichever is lower.

(3) On a third offence, restoration will not be offered.

15. Mr Chatham wrote requesting a review on 2 August 2011. We understand that this letter was written by his mother. The grounds upon which he sought restoration were that he had used only white diesel (duty paid diesel) since he had last been caught in July 2010. He suggested that the red diesel in the tank must have been the residue of the red diesel when he was last caught and that in July 2010 he had not been advised by HMRC to clean the tank thoroughly. He provided copies of fuel receipts in support of his case that he fuelled the vehicle with white diesel.

16. The review officer, Ms Bines, upheld the decision not to restore by her letter dated 2 September 2011. She set out the restoration policy, the matters stated by Mr Chatham in interview and the contents of his request for a review. She considered in particular whether she felt there was a "reasonable excuse" for the presence of red diesel in the Land Rover (see *s10 Finance Act 1994* set out below). Ms Bines noted that the test report on the fuel in the Land Rover recorded 13% red diesel in the tank.

17. Ms Bines did not accept Mr Chatham's explanation that the presence of red diesel could be remnants from the red diesel put into the tank in July 2010 when he was last caught. In the circumstances she upheld the original decision. At the same time she invited Mr Chatham to provide any fresh information he might have. She also notified Mr Chatham of his rights of appeal.

18. Mr Chatham appealed to the tribunal in a notice of appeal dated 12 September 2011. The grounds of appeal were hand written, we understand either by Mr Chatham's mother or his sister. Mr Chatham repeated his claim that since he had been caught in July 2010 he had used only white diesel in the Land Rover. Again he suggested that any contamination by red diesel must have been the residue from when he had previously been caught.

19. Mr Chatham's position remained the same until the morning of the hearing when, as we have noted, he claimed for the first time that Mr Barclay had admitted putting red diesel in the Land Rover. We deal with the evidence at the hearing in relation to this admission in more detail below.

Legal Framework

20. In this section we set out the statutory provisions relevant to the issues we have to determine on the appeal:

Customs & Excise Management Act 1979 ("*CEMA*") provides as follows:

> "*139(1) Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer…*
>
> …
>
> *141(1) …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 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*
>
> *(b) any other thing mixed, packed or found with the things so liable,*
>
> *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, anything forfeited or seized under the Customs and Excise Acts…*"

Paragraph 5 Schedule 3 CEMA provides:

> "*If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of anything no such notice has been given to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with the thing in question shall be deemed to have been duly condemned as forfeited.*"

Hydrocarbon Oil Duties Act 1979 ("*HODA*") provides as follows:

> "*12(2) No heavy oil on whose delivery for home use rebate has been allowed … shall –*
>
> *(a) be used as fuel for a road vehicle; or*
>
> *(b) be taken into a road vehicle as fuel,*

unless an amount equal to the amount for the time being allowable in respect of rebate on like oil has been paid to the Commissioners in accordance with regulations made under section 24(1) below for the purposes of this section.

13(1) Where any person –

(a) uses heavy oil in contravention of section 12(2) above, or

(b) is liable for heavy oil being taken into a road vehicle in contravention of that subsection, his use of the oil or his becoming so liable (or, where his conduct includes both, each of them) shall attract a penalty under section 9 of the Finance Act 1994 (civil penalties).

…

(6) Any heavy oil –

(a) taken into a road vehicle as mentioned in section 12(2) above or supplied as mentioned in subsection (2) or (3) above; or

(b) taken as fuel into a vehicle at a time when it is not a road vehicle and remaining in the vehicle as part of its fuel supply at a later time when it becomes a road vehicle;

shall be liable to forfeiture."

Finance Act 1994 provides as follows:

"*9(1) This section applies, subject to section 10 below, to any conduct in relation to which any enactment (including an enactment contained in this Act or in any Act passed after this Act) provides for the conduct to attract a penalty under this section.*

(2) Any person to whose conduct this section applies shall be liable –

(a) in the case of conduct in relation to which provision is made by subsection (4) below, or by or under any other enactment, for the penalty attracted to be calculated by reference to an amount of, or an amount payable on account of any duty of excise, to a penalty of whichever is the greater of 5 per cent, of that amount and £250; and

(b) in any other case, to a penalty of £250.

…

10(1) Subject to subsection 2 below and to any express provision to the contrary made in relation to any conduct to which section 9 above applies, such conduct shall not give rise to any liability to a penalty under that section if the person whose conduct it is satisfies the Commissioners or, on appeal, an appeal tribunal that there is a reasonable excuse for the conduct."

21. *Section 14 Finance Act 1994* makes provision for a person to require a review of a decision of HMRC under *section 152(b) CEMA* not to restore anything seized from that person.

22. *Section 16 Finance Act 1994* sets out the jurisdiction of the tribunal on an appeal against a review carried out by HMRC pursuant to *section 14*. In particular:

> "*16(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 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 further review of the original decision; …*"

23. The decision not to restore the Land Rover is an ancillary matter and as such our jurisdiction is limited to considering whether the decision of the review officer was unreasonable in which case our powers are limited to those set out in *section 16(4)*. The burden of establishing that the decision was unreasonable lies with the appellant.

24. The test of reasonableness involves consideration of whether HMRC have taken into account some irrelevant matter, have disregarded something to which they should have given weight or have reached a decision which no reasonable decision maker could have reached. The tribunal does have a fact-finding jurisdiction so as to satisfy itself that the primary facts on which the review officer based the decision not to restore are correct (see generally *HMRC v Jones & Jones [2011] EWCA Civ 824*). For example, if there are facts which were not taken into account by the review officer we can consider whether the review officer ought to have taken those facts into account.

25. It is not the case that a review officer must always conduct a critical examination of the facts presented with a view to seeking out other facts which have not been presented. However if the review officer has not taken into account material facts which he or she should have taken into account then the decision will not be reasonable for these purposes.

26. A question then arises as to the position if there are material facts available to the tribunal which the review officer cannot be criticised for failing to take into account because they were not available to him at the time. This was considered by

the Court of Appeal in *Gora v HMRC at [38] and [39]* where Pill LJ set out the approach taken by HMRC in those circumstances and the jurisdiction of the Tribunal:

> *"38(3)…The Commissioners accept …(e) Strictly speaking, it appears that under s 16(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.*
>
> *39 I would accept that view of the jurisdiction of the Tribunal subject to doubting whether, its fact-finding jurisdiction having been accepted, it should be limited even on the "strictly speaking" basis mentioned at the beginning of paragraph 3(e). That difference is not, however, of practical importance because of the concession and statement of practice made by the respondents later in the sub-paragraph. As a "tribunal" to which recourse is possible to challenge a refusal to restore goods under section 152(b) of the 1979 Act, the Tribunal in my judgment meets the requirements of the Convention.*"

27. The answer to the question appears to be therefore that the tribunal should consider whether, in the light of all material facts available at the date of the hearing, the decision not to restore was reasonable.

28. In the present appeal the legality of the seizure of the fuel and the Land Rover was not challenged within one month of the seizure. The Land Rover was deemed condemned as liable to forfeiture by the passage of time under *paragraph 5 schedule 3 CEMA*. In those circumstances we are bound by the deemed condemnation and forfeiture of the Land Rover

29. We considered, and Mr Scott agreed, that the circumstances in which the red diesel came to be in the running tank could be relevant to the reasonableness of the decision not to restore and we have approached our fact-finding task on that basis. We are only entitled to take into account such circumstances to the extent that they are consistent with the deemed condemnation and forfeiture. That limitation does not restrict us in our approach to the issues in the present case because it is not disputed that the vehicle had been fuelled using red diesel and was properly seized and forfeited.

Findings of Fact

30. Mr Chatham's case before us may be summarised as follows:

(1) The red diesel was put in the Land Rover tank by Rob Barclay and this was done without Mr Chatham's knowledge or consent. It was only later that Mr Barclay admitted what he had done.

(2) The vehicle was worth between £1,000 and £1,500.

(3) Mr Chatham and his son had built the Land Rover together and it had considerable sentimental value.

(4) Mr Chatham was unemployed at the time of the seizure, but now has employment earnings of £250-280 per week. He has savings of £500-600 which he thinks ought to be the amount chargeable as a condition of restoration.

31. We accept the evidence of Mr Chatham as to the value of the Land Rover and the circumstances in which it came to be built. We also accept that it has considerable sentimental value to Mr Chatham and his family. The Land Rover is used by Mr Chatham as a hobby vehicle for leisure purposes. He takes it to a quarry and enjoys the thrill of taking it off road. We accept Mr Chatham's brief description of his financial circumstances.

32. The real issue of fact between the parties is the circumstances in which the red diesel came to be in the Land Rover tank.

33. Mr Chatham's evidence before us was that a friend of his, Rob Barclay, had borrowed the Land Rover shortly before the seizure. It was only about 2 weeks after the seizure, some time in July 2011, that Mr Barclay admitted having taken the vehicle to Scotland and used red diesel to fuel it. Later in his evidence Mr Chatham said that Mr Barclay had made this admission 3 or 4 days after the interview. Again, that would place the admission in early July 2011. Mr Chatham said that before the interview he had asked Mr Barclay whether he had put red diesel in the vehicle but Mr Barclay had denied doing so. Mr Barclay had suggested that it must have come from the Peugeot. After the interview Mr Chatham had checked the colour of the diesel remaining in the Peugeot and found that it was white. He questioned Mr Barclay further and it was then that Mr Barclay admitted taking the Land Rover to Scotland and using red diesel.

34. In cross examination Mr Chatham suggested that he had had a "*massive argument*" with Mr Barclay and that he had spoken to him a week before the appeal hearing about coming along.

35. We do not accept Mr Chatham's evidence as to how he discovered that there was red diesel in the vehicle. It is inconsistent with the letter requesting a review of the decision and with the hand written grounds of appeal. Both those documents were dated after Mr Barclay's alleged admission. We do not accept that Mr Chatham's dyslexia, or that other family difficulties are an explanation for that inconsistency. It may well be that Mr Barclay borrowed the Land Rover to go to Scotland. However we are not satisfied on the evidence that at the time Mr Barclay borrowed the vehicle Mr Chatham was unaware that red diesel would be used in the Land Rover.

36. We should also note that when requesting a review of the decision Mr Chatham provided copies of supermarket invoices said to relate to the fuelling of the Land Rover. A perusal of those invoices indicates that some relate to a period after the date of seizure and one shows purchases of petrol rather than diesel. However we accept that Mr Chatham did not intend to suggest that these related to the Land Rover. Rather they related to other vehicles which he owned, including a Renault Laguna which only he used and which ran on diesel and his girlfriend's Peugeot which ran on petrol.

Decision

37. The burden is on Mr Chatham to establish that the decision under review is unreasonable.

38. On the basis of the material before Ms Bines we are satisfied that her decision refusing restoration was eminently reasonable. She took into account all the circumstances as they were known to her. Her decision, in the light of those circumstances was clearly a reasonable one.

39. Mr Chatham has provided further evidence and material in the course of the appeal hearing. We consider, in particular, that:

(1) The Land Rover was a hobby vehicle and it is a matter of personal choice that Mr Chatham wants restoration so that he can continue to use it as such by going off-road.

(2) It cannot really be said that Mr Chatham was struggling financially when he was prepared to spend his savings to obtain restoration of the vehicle purely for leisure purposes.

(3) This is the third occasion on which one of Mr Chatham's road vehicles has been found to be fuelled with red diesel.

(4) There is a sentimental value attaching to the Land Rover arising from the fact that Mr Chatham built it with his younger son.

40. Taking into account these matters, and our findings of fact generally, even if we were to accept Mr Chatham's evidence as to the circumstances in which red diesel came to be in the tank of the Land Rover we do not consider that a decision refusing restoration of the vehicle would be unreasonable. We do not consider on the facts that the decision is in any way disproportionate.

41. Evidence in relation to these matters and the evidence we have heard as to the circumstances in which red diesel came to be in the running tank was not available to Ms Bines when she took her decision. We do not consider that she or HMRC can be criticised for failing in any way to elicit this information from Mr Chatham before making their decision. Even if this material had been taken into account in making the decision we consider that the decision of HMRC would inevitably be the same (see *John Dee Ltd v Customs and Excise Commissioners [1995] STC 941*).

42. For the reasons given above we are not satisfied that Mr Chatham was unaware that the Land Rover would be fuelled using red diesel. In those circumstances his argument that the refusal to restore is unreasonable cannot be sustained.

43. In all the circumstances we dismiss the appeal.

44. At the conclusion of the hearing Mr Scott intimated that HMRC would consider in the light of our written decision whether to make an application for costs. Without deciding the point, our provisional view is that taking into account Mr Chatham's conduct of the appeal and his financial means as disclosed to us during the hearing the circumstances are not such as would warrant a costs order under the Tribunal Rules. If HMRC do intend to pursue an application for costs then it should be served on the appellant and the tribunal within 28 days from the release of this decision.

45. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 20 July 2012