[2015] UKFTT 0677 (TC)

TC04794

Appeal number: TC/2014/05026

Excise duty. Restoration of forfeited goods. Can the Reviewing Officer give reasons different from the original decision maker for upholding the original decision – no.

FIRST-TIER TRIBUNAL
TAX CHAMBER

S G EQUIPMENT LEASING POLSKA SP **Appellant**

- and -

THE DIRECTOR OF BORDER FORCE **Respondent**

TRIBUNAL: JUDGE GERAINT JONES Q. C.
MR. LESLIE HOWARD.

Sitting in public at Fox Court, London on 08 December 2015.

Mr. Paul Corben – counsel for the Appellant

Mr. Paul Sharkey - counsel instructed by the Respondent

DECISION

The Factual Background.

1. This is an appeal which took an unusual course in the sense that neither party called any evidence. The Tribunal was asked to determine the appeal on the basis of the documents adduced, facts which were not in dispute and the arguments advanced by each side.

2. The appeal proceeded on the basis that the following facts were either agreed or, at the very least, not in dispute :

(1) That the appellant is the owner of a MAN motor coach registered in Poland with the registration WOT TC 38 ("the motor coach").

(2) The motor coach was, from new, in the possession of Pan Piotr Tor a Polish company or firm which had possession of the motor coach pursuant to an Equipment Leasing Agreement dated 23 October 2013 made between it and the appellant.

(3) The appellant is a Polish subsidiary of Societe Generale S. A.

(4) At some unknown time the company or firm which had possession of the motor coach under the leasing agreement caused or permitted modifications to be made to it which, say the respondents, created concealed spaces where goods could be secreted and smuggled into the United Kingdom (or elsewhere).

(5) On 07 July 2013 the respondent seized the motor coach at Coquelles, France. The company or firm from whom the motor coach was seized and which was in possession of it at the time of seizure, did not require the respondent to initiate Condemnation Proceedings and so, at the expiration of one month from the date of any lawful seizure, the goods were deemed condemned as forfeit by reason of paragraph 1(5) of Schedule 3 of the Customs and Excise Management Act 1979[1].

(6) When the appellant became aware of the fact that the motor coach had been seized it exercised its contractual right to terminate the leasing agreement by a written notice dated 09April 2014.

(7) The seizure of the motor coach was pursuant to section 88 of the Customs and Excise Management Act 1979 ("the 1979 Act").

(8) The appellant made a written application for restoration of the motor coach on 14 May 2014 and with that request enclosed a copy of its Notice of Termination of the leasing contract between it and Transport Piotr Tor. That request was made pursuant to section 152 of the 1979 Act.

[1] Neither party was able to provide information as to whether the respondents complied with the requirement set out in paragraph 1(1) of Schedule 3 of the 1979 Act. This is of significance because if the appellant was not given the notice which the statute requires it to have been given, the one-month period within which it could require Condemnation Proceedings to be pursued would not have started to run.

(9) By letter dated 17 June 2014 the respondent refused restoration on the discrete basis that the appellant had "failed to provide substantive evidence of" its rightful legal ownership of the motor coach concerned.

(10) The appellant sought a Statutory Review of the decision to refuse restoration and provided documentary evidence of its ownership of the motor coach.

(11) The Statutory Review was concluded by a Decision Letter dated 14 August 2014 which upheld the decision to refuse restoration on grounds different to those given in the original decision. The Reviewing Officer took no issue with the appellant's ownership of the motor coach but, instead, stated that "Our policy is normally to refuse to restore vehicles that have been seized under section 88 of the 1979 Act unless we are satisfied the owner had no knowledge of the adaptation, in which case the vehicle may be restored upon conditions, one of which would be the removal of the adaptation. This condition is unable to be fulfilled."

(12) The appellant has appealed that decision to this Tribunal.

3. It is necessary that we should explain that this appeal has been outstanding since September 2014. Initially its progress was delayed by an administrative error at the Tribunal. Subsequently, when it was listed for hearing in September 2014, the respondent sought an adjournment which was granted, and a new hearing date was fixed for 08 December 2015. Prior to that hearing date the respondent made a further application for the appeal to be adjourned or postponed on the basis that their witness, Mr Brenton, who has provided a witness statement dated 21 October 2014, could not attend as he needed to care for his wife, who was indisposed. The Duty Judge refused that application. The application was not renewed before us in circumstances where the appellant, although it produced an Appellant's Bundle, went on to say that it did not intend to rely upon it. The appellant was keen that this matter should not be adjourned and was prepared to forego the opportunity to cross examine Mr Brenton.

<u>The Law.</u>

4. The motor coach was seized on the basis that it was a vehicle adapted for the purpose of concealing goods within the meaning of section 88 of the 1979 Act.

5. This appeal is solely against a refusal to restore the motor coach to its owner (as opposed to restoring it to the person in possession of it under the lease at the time of seizure). No issue has been taken concerning the lawfulness of the seizure.

6. This appeal is pursued pursuant to section 16, subsections (4) & (6) Finance Act 1994, the relevant parts whereof are as follows:

Appeals to a tribunal.

16(1) Subject to the following provisions of this section, an appeal shall lie to an appeal tribunal with respect to any of the following decisions, that is to say—

(a) any decision by the Commissioners on a review under section 15 above (including a deemed confirmation under subsection (2) of that section); and

(b) any decision by the Commissioners on such review of a decision to which section 14 above applies as the Commissioners have agreed to undertake in consequence of a request made after the end of the period mentioned in section 14(3) above.

(2) An appeal under this section shall not be entertained unless the appellant is the person who required the review in question.

(3) ……

(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 further review 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 further review, 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 future.

(5) In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal.

7. Thus we are restricted to considering whether the respondent could not reasonably have arrived at the decision that was notified to the appellant in the Review Decision. It was common ground in this appeal that if we conclude that the decision reached was not one that the respondent could reasonably have arrived at, we should require the respondent to conduct, in accordance with our directions, a further review of the original decision.

8. In our judgement the wording of section 16(4)(b) Finance Act 1994 (above) is important in this appeal. That is because it gives the clearest possible indication that the decision being appealed is "the original decision" notwithstanding that there has been a statutory review in respect thereof. This is not surprising given that a Review is just that; it is a review of the initial decision, not an appeal from it. In our judgment it would be open to a Reviewing Officer to uphold an original decision whilst adding to or supplementing the reasons given for arriving at a particular conclusion said to justify a decision not to restore, but not to uphold an original decision on wholly different grounds to those given by the decision making officer.

9. We illustrate the foregoing, as follows. In a case where, for example, the original decision not to restore is put on the basis that goods have been smuggled into the United Kingdom, the original decision maker may have given only one or two reasons for arriving at that conclusion. In our judgement the Reviewing Officer is permitted to give further or supplemental reasons justifying the conclusion that the goods had been smuggled, especially as, by that stage, further factual matters may have been adduced in evidence or further reliable factual information may have come to light. In that situation the underlying reason for the refusal to restore remains the same; only the material or evidence supporting that reason is different or supplemented. In our judgment that situation is to be contrasted with one where the original decision is put on a discrete basis, as in the instant case. In this case the original decision was made on the sole basis that the appellant had not established that it was the owner of the motor coach.

10. When the Reviewing Officer made his decision to uphold the original decision against restoration of the motor coach, he made no reference whatsoever to the ownership of the motor coach. That is not surprising given that the appellant had, in our judgement, produced documents which demonstrated that it was the lawful owner of the motor coach. It had produced a copy of the of the sales invoice issued to it by MAN Truck and Bus Polska Sp which showed the price paid for the new motor coach in April 2011. The appellant also produced a copy of the lease agreement between it and the lessee. It could not have (or should not have) entered into that leasing agreement unless it had title to the motor coach. The respondent has not put forward any positive case to the effect that the motor coach was owned by anybody other than the appellant.

11. So far as the ownership of the motor coach is concerned, we find that it was owned by the appellant from April 2011, when it purchased it from the manufacturer.

12. We are satisfied that the only reasonable conclusion to which the Reviewing Officer could have come was that the motor coach was owned as set out in paragraph 11 above. It is plain from the decision of the Reviewing Officer that he did not consider that issue notwithstanding that it was the very issue that had led to the original decision, not to restore, being made by an un-named officer of the respondent, as set out in the letter dated 17 June 2014. On the basis that that was the sole reason given by the original officer for refusing restoration, it was not open to the Reviewing Officer to decide to deny restoration for different reasons. We are satisfied that that is a correct statement of the law because section 16(1) of the 1994 Act makes provision for the Tribunal to hear appeals from "any decision by the Commissioners/Director on a review ……". However, that does not provide any indication of the basis upon which any such Review has to be undertaken. Further, no assistance is provided by the opening words of section (16)4 of the 1994 Act because they do no more than define the extent of the appeal Tribunal's jurisdiction. It is only when we arrive at section 16(4)(b) of the 1994 Act that Parliament's intention becomes clear because it provides that if the Tribunal decides that the person making the decision could not reasonably have arrived at it, the Tribunal can "require the Commissioners to conduct, in accordance with the directions of the Tribunal, a further review of the original decision". The words "original decision" must refer not to the

decision taken by the Reviewing Officer but to the decision which was under review. Further, a review is just that; it is not a totally fresh adjudication of the restoration application which, ex hypothesi, has already been determined.

13. The foregoing conclusion is supported by section 15 of the Finance Act 1994 because that section provides that where a statutory review takes place then, upon review, the Commissioners may either :

(1) confirm the decision, or

(2) withdraw or vary the decision and take such further steps (if any) in consequence of the withdrawal or variation as they may consider appropriate.

14. Thus the power upon review is to confirm or withdraw the decision. That did not happen in the instant case. The power also extends to varying the decision. The "decision", on the facts of the instant case, refers to the decision either to agree to restore the motor coach or to refuse to restore it. In this case the Reviewing Officer has not varied the decision, nor did he purport to do so. On the face of his decision he upheld the original decision, that is, a decision to refuse restoration.

15. In our judgement the provisions in section 15 of the 1994 Act lend no support to the proposition that a Reviewing Officer may arrive at a totally fresh decision on a basis, or bases, wholly different to those relied upon by the original decision maker, as has happened in the instant case.

16. If we are wrong about the inability of the Reviewing Officer to rely upon a basis or bases wholly different to those relied upon by the original decision maker to refuse restoration, we would still allow this appeal, for the following reasons.

17. The Review Decision dated 14 August 2014 begins by setting out that it is the general policy of the respondent not to restore vehicles used or adapted for the improper importation or transportation of goods, but that if the vehicle is owned by a third party who was not present at the time of the seizure and that person can show that they were both innocent of and blameless for the smuggling attempt (if any), then consideration may be given to restoring the vehicle for a fee. The Reviewing Officer went on to say that in such a case consideration will be given to whether the person applying for restoration has taken reasonable steps to prevent smuggling in or by the use of the vehicle.

18. It is thus reasonably to be expected that the Reviewing Officer would have given active consideration to those policy considerations, which he had seen fit to set out in full.

19. The only paragraph in the Review Decision that addresses those identified policy considerations is on page 3 of 6. It is worth setting out in full :

"Our policy is normally to refuse to restore vehicles that have been seized under section 88 of CEMA unless we are satisfied the owner had no knowledge of the adaptation, in which case the vehicle may be restored on conditions, one of which would be the removal of the adaptation. This condition is unable to be fulfilled. The

previous coach with the identical adaptation has been inspected by one of our contracted engineers. The engineer has advised that due to the extent of the adaptation it would require the coach manufacturer to rectify the damage. The roof support has been compromised to such a degree that the coach is considered to be unsafe for public use in its current state. This applies equally to your client's vehicle and clearly identifies that this option is not practicable."

20. The Reviewing Officer did not expressly (or even impliedly) consider whether he was satisfied that the owner of the motor coach had no knowledge of the identified adaptation. In our judgement, if active consideration had been given to that issue, it is inevitable that it would have been answered in favour of the appellant. This is a simple matter of commercial reality because it will be extremely rare for a financier to take physical possession or control of a motor vehicle, which is usually delivered directly to the lessee where the purchaser from the manufacturer is the same party as the lessor to the lessee. In such a commonplace tripartite arrangement the seller sells to the lessor who finances the purchase and then leases the product to the lessee; but rarely would take physical possession or control of the goods so leased.

21. The documentary evidence in this case leads us to conclude that it is more probable than not that this case was an ordinary tripartite agreement where ownership of the motor coach passed from the manufacturer to the appellant lessor, but physical possession of the motor coach was delivered up by the manufacturer to the lessee upon the instructions of, and with the consent of, the lessor once it had acquired title.

22. The Reviewing Officer did not specifically consider whether he was satisfied that the appellant had no knowledge of the identified adaptation to the motor coach. That is a glaring omission, especially in a case where the Reviewing Officer has identified that as an important factor in the exercise of the decision making process. In our judgement, if he had done so, it is inevitable that he would have concluded that the lessor had no such knowledge, whether actual or constructive. The commercial reality of the situation is that once the motor coach passes into the possession and control of the lessee, the lessor is highly unlikely to have the motor coach in its possession or to have occasion to inspect it, unless it re-possesses the vehicle or, unusually, avails itself of any clause in the leasing agreement permitting it to inspect the vehicle periodically. In the instant case, we find that even a periodic visual inspection, if undertaken, would not have disclosed the adaptation, which was discovered by the respondent.

23. The Reviewing Officer then went on to say that the motor coach would not be restored because it had been adapted and the adaptation could not be removed. In our judgement, there was no proper evidential or other basis for that conclusion. We say that because the Reviewing Officer sought to rely upon what he said was known about a "previous coach with the identical adaptation" which he said had been inspected by "one of our contracted engineers". The only inspection report relied upon by the respondent is contained within a document dated 24 June 2014 where a Mr Brooks of Coombe Valley Commercials has said that he examined a different motor coach on an unspecified date, and that as parts of it had been cut away to give access to a concealment area, it required repair by the manufacturers to ensure that it could be

safely used on the roads. The Reviewing Officer seems to have relied upon that brief opinion from a person of unknown, if any, qualifications and in respect of whom he was quite unable to judge whether he had any, and if so what, expertise permitting him to make the assessment that he set out in the document. More than that, it is common ground that Mr Brooks did not inspect the subject motor coach and, in our judgement, there is no proper basis upon which the Reviewing Officer could justifiably assume that any adaptations to the motor coach which the appellant wanted restored, were identical to the unspecified and particularised adaptations referred to in the document generated by Mr Brooks.

24. The Reviewing Officer, even if he had been justified in concluding that the instant motor coach had been adapted in the same manner as the motor coach which Mr Brooks said he had inspected (which he found to have been adapted, but in respect of which adaptations he did not see fit to set out any significant detail concerning same), he had no basis for asserting that any condition concerning restoration of the coach to a roadworthy condition could not be fulfilled. That was pure speculation. It was certainly not taken from anything said by Mr Brooks because he had specifically referred to the other motor coach requiring repair by the manufacturer. In other words, Mr. Brooks was postulating that appropriate repairs were feasible.

25. The Reviewing Officer then went on to say that "with the evidence before me restoration is not a viable option" at the end of a paragraph where he was dealing with the issue of hardship. In that paragraph he commented that he could only take into account "exceptional hardship" as a reason not to apply the policy not to restore the vehicle. There is a risk that that comment indicates a departure from the correct approach which the Reviewing Officer had earlier identified in his Decision Letter, that is to say, that a policy may be taken into account, but is not determinative as each case must be considered on its own merits. The Reviewing Officer did not say why restoration "is not a viable option" except inferentially where he seems to have proceeded on the basis that repairs were not viable and so there was no purpose to be served in restoring it to its owner. Restoration was plainly viable. The issue that the Reviewing Officer probably meant to address was whether restoration would be of any commercial or financial value to the appellant. That is primarily a matter of judgement for the appellant. In any event, there was no proper evidence upon which the Reviewing Officer could conclude that restoration was not viable. If, by that, he meant that restoration would have no commercial or financial value to the appellant.

26. Furthermore, quite regardless of whether the motor coach could be restored to a condition where it could be used lawfully and safely on a public road (whether in Poland or this country) it would nonetheless have an economic value, even if only as a vehicle to be cannibalised for spare parts.

27. It follows that in our judgement the Reviewing Officer could not reasonably have arrived at the decision that he made for the two separate reasons that we have set out above, namely:

(1) It was not open to the Reviewing Officer to refuse restoration for a wholly different reason (or reasons) to that given by the officer who made the original decision.

(2) Even if the foregoing conclusion is wrong, the Reviewing Officer could not reasonably arrive at the decision he made without a proper consideration of the factors that he had identified as being relevant to his decision. That meant that he had to consider the issue of the ownership of the motor coach; whether the owner was innocent of and blameless in respect of any smuggling or attempt to smuggle; whether the owner knew about the adaptation of the motor coach for any illicit purpose; and, possibly, whether any such adaptation could be removed. In our judgement the Reviewing Officer totally failed to consider ownership, the issue of innocence or blameworthiness and the appellant's state of knowledge, if any, concerning the adaptation. In our judgement the Reviewing Officer could not justifiably arrive at a conclusion that the adaptation could not be removed and that any condition requiring it to be removed would be incapable of fulfilment. He was not in possession of evidence sufficient to justify such a conclusion. That conclusion was no more than speculation.

28. In the foregoing circumstances we exercise our powers under section 16(4)(b) of the 1994 Act by requiring the respondent to conduct a further review of the original decision in accordance with the following directions :

(1) Each of the facts that we have set out herein as either being agreed, common ground or found as facts by us must be the factual basis upon which the further review is conducted.

(2) The further review must be a review of the original refusal of restoration which was based solely upon the contention that the appellant had failed to prove its ownership of the motor coach which it sought to have restored.

(3) In circumstances where (i) nothing is known of the qualifications, if any, of Mr Brooks of Coombe Valley Commercials, (ii) he did not inspect the appellant's motor coach, and (iii) there is no proper basis for saying that any adaptation to the appellant's motor coach is the same as or substantially the same as that made to the motor coach inspected by Mr Brooks, his report must not be taken into account upon any further review.

29. 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.

Decision.

The appeal is allowed and it is determined that the decision taken upon the review of the appellant's request for restoration of the motor coach is not one that could reasonably be arrived at.

We direct that a further review is undertaken (by a different Reviewing Officer) on the basis of the facts set out herein and in accordance with the Directions set out in paragraph 27 above.

GERAINT JONES Q. C.
TRIBUNAL JUDGE

RELEASE DATE: 29 DECEMBER 2015