[2019] UKFTT 77 (TC)

TC06961

Appeal number: TC/2018/01220

EXCISE – restoration of Mercedes Van – Mercedes Van sold by Border Force before restoration decision made – Border Force decision that normal policy not applicable because of alleged deceit by Appellant – no deceit – appeal allowed and Border Force directed to make a new decision

FIRST-TIER TRIBUNAL
TAX CHAMBER

UAB ANGLERAS **Appellant**

- and -

Respondents

THE DIRECTOR OF BORDER REVENUE

TRIBUNAL: JUDGE ANNE REDSTON
MRS HELEN MYERSCOUGH

Sitting in public at the Tribunal Centre, Taylor House, Rosebery Avenue, London on 8 January 2019

Mr Alamantas Andrasiunas, director of the Appellant, and Mr Tadas Andrasiunas, former director of the Appellant, for the Appellant

Mr Michael Newbold of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Summary

1. UAB Angleras ("the Company") is a Lithuanian company owned by Mr Alamantas Andrasiunas and his wife Mrs Dale Andrasiuniene. Their son, Mr Tadas Andrasiunas, was at the time the Company's commercial director. The Company was a small family business with no employees, so the only people working in the company were Mr and Mrs Andrasiunas and Mr Tadas Andrasiunas.

2. On 16 September 2017, the Border Force seized a Mercedes Sprinter van ("the Mercedes Van") owned by the Company. The Mercedes Van was carrying various goods, including packaged glass doors. When the doors were X-rayed, the Border Force found 58,300 cigarettes hidden behind them, concealed by the packaging.

3. On 20 September 2017, the Company applied for the Mercedes Van to be restored. On 1 December 2017, the Border Force refused the restoration request, but had already sold the Mercedes Van to a third party. At the end of our decision, we make some observations on this premature sale.

4. On 10 January 2018, Officer Summers carried out a review of the restoration decision, and confirmed the refusal to restore, but for different reasons. In particular, he found that the Company was complicit in the smuggling.

5. The normal policy of the Border Force on a first offence is to restore the vehicle in exchange for a payment equal to 100% of the duty evaded. However, Officer Summers decided not to apply that policy because, in his view, the Company had "attempted to deceive" the Border Force when it provided evidence in support of the restoration request. Officer Summers also decided that there was no exceptional hardship.

6. The Tribunal found that the Company was not complicit in the smuggling; that no member of the Andrasiunas family was aware that the Mercedes Van was carrying cigarettes; that Mr Alamantas and Mr Tadas Andrasiunas had carried out reasonable checks, and that the Border Force's decision not to restore the Mercedes Van caused exceptional hardship. In consequence, the Tribunal allowed the Company's appeal and directed the Border Force to make a new decision.

7. For the benefit of Mr Alamantas and Mr Tadas Andrasiunas, who are unfamiliar with the powers of the Tribunal or the relevant laws, we summarise the outcome of their appeal here:

(1) the Tribunal believed your evidence;

(2) however, we are not allowed by law to order the Border Force to pay you the value of your Mercedes Van;

(3) we have instead ordered the Border Force to make a new decision on the basis that you did not know about the smuggling and that you took reasonable steps to check the goods you were carrying;

(4) if, as the result of their new decision, the Border Force offer to pay you a sum of money to compensate you for the premature sale of your Mercedes Van, we also cannot tell them how much to pay you, or how to calculate it;

(5) however, if you are dissatisfied with the Border Force's new decision, you have a right to appeal that decision to this Tribunal.

The law

8. The Customs & Excise Management Act 1979 ("CEMA") sets out the powers of the Border Force in relation to seizure and forfeiture. In that Act, and in other related statutes, the Border Force are called "the Commissioners".

9. CEMA s 141(1) provides that a vehicle is liable to forfeiture if it "has been used for the carriage…or concealment" of smuggled goods.

10. CEMA s 139(1) provides that "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". The Mercedes Van at issue in this case was seized in reliance on this provision.

11. That seizure can be challenged by making a claim in the Magistrate's Court within one month of the date of the seizure, see CEMA s 139(5) and (6), together with Sch 3 para 3. If there is no challenge, "the thing in question shall be deemed to have been duly condemned as forfeited", see CEMA Sch 3, para 5.

12. Although the Company, through its previous representative London Legal Advice Ltd ("LAA"), initially sought to argue that the seizure of the Mercedes Van had been challenged, by the time LAA filed the Company's grounds of appeal that contention had been abandoned. Having considered the relevant documents, we agree, and find as a fact that the Company did not challenge the seizure.

13. A vehicle which has been legally seized can be restored by Border Force under the powers given by CEMA s 152, headed "Power of Commissioners to mitigate penalties, etc". It reads:

> "The Commissioners may, as they see fit–
>
> (a) compound an offence (whether or not proceedings have been instituted in respect of it) and compound proceedings or for the condemnation of any thing as being forfeited under the customs and excise Acts; or
>
> (b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under those Acts."

14. If the Border Force refuse to restore a vehicle, the owner has been deprived of his possession, and Article 1 to the First Protocol of the European Convention on Human Rights is therefore engaged. In *Lindsay v C&E Commrs* [2002] EWCA Civ 267 ("*Lindsay*"), the Master of the Rolls, giving the leading judgment with which Judge LJ and Carnwarth J both agreed, said at [55]:

> "Broadly speaking, the aim of the commissioners' policy is the prevention of the evasion of excise duty that is imposed in accordance with European Community law. That is a legitimate aim under art 1 of the First Protocol to the convention. The issue is whether the policy is liable to result in the imposition of a penalty in the individual case that is disproportionate having regard to that legitimate aim."

15. He continued at [64]:

> "I consider that the principle of proportionality requires that each case should be considered on its particular facts, which will include the scale of importation, whether it is a 'first offence', whether there was an attempt at concealment or dissimulation, the value of the vehicle and the degree of hardship that will be caused by forfeiture."

16. If the Border Force refuse to restore the vehicle, Finance Act 1994, s 14 allows person to request a review of that decision. If he is dissatisfied with the outcome of that review, he can appeal to the Tribunal under FA 1994, s 16.

17. However, as noted above, the Border Force's restoration decision is made under CEMA s 152. Decisions made under that section are decisions about an "ancillary matter", see FA 1994, s 16(8), read with Sch 5. The Tribunal's powers on ancillary matters are set out in FA 1994, s 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 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 that 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 future."

18. The meaning and effect of that section was summarised by Master of the Rolls in *Lindsay* at [68], when he said that if the Tribunal finds that the restoration decision to have been unreasonable, the Tribunal has:

> "the power to direct that the decision appealed against ceased to have effect and to require the [Border Force] to conduct a further review of the original decision in accordance with the directions of the tribunal."

19. In C&E *Commrs v Corbitt* [1980] 2 WLR 753, Lord Lane said that a decision would not be "reasonable"

> "if it were shown [the decision maker] had acted in a way which no reasonable [decision maker] could have acted; if [he] had taken into account some irrelevant matter or had disregarded something to which [he] should have given weight."

20. In *Gora v C&E Comms* [2003] EWCA Civ 525, Pill LJ accepted that the Tribunal could decide the facts and then go on to decide whether, in the light of those findings, the restoration decision made by the Officer was reasonable.

The evidence

21. The Tribunal was provided with a Bundle prepared by the Border Force which included:

(1) correspondence between the Border Force and Mr Tadas Andrasiunas;

(2) correspondence between the Border Force and LLA;

(3) various invoices and other documents in Lithuanian and English translations;

(4) a copy of a contract dated 15 September 2017 between the Company and Mr Alamantas Andrasiunas;

(5) a document headed "Explanation" signed by Mr Alamantas Andrasiunas and dated 21 September 2017.

22. Officer Summers provided a witness statement in advance of the hearing. He also gave oral evidence led by Mr Newbold, was cross-examined by Mr Tadas and Mr Alamantas Andrasiunas, and answered questions from the Tribunal. We found him to be an honest witness, although he was reluctant to explain the basis on which he had departed from the Border Force's normal procedure in this case, see §59.

23. Mr Alamantas Andrasiunas spoke no English. The start of the hearing was delayed while the Tribunal obtained a professional interpreter fluent in the Lithuanian language. After the interpreter arrived, Mr Alamantas Andrasiunas gave oral evidence, was cross-examined by Mr Newbold and answered questions from the Tribunal.

24. Mr Tadas Andrasiunas spoke good English. He came to the witness box with a document setting out his view of what had happened. He had not understood that this was a "witness statement" and so should have been provided to the Border Force before the hearing. However, as Mr Newbold did not object to its admission it was copied and provided to the Border Force, the Tribunal and to Mr Alamantas Andrasiunas (the interpreter translated it into Lithuanian). Mr Tadas Andrasiunas subsequently provided further information as evidence in chief; he was then cross-examined by Mr Newbold and answered questions from the Tribunal.

25. We found both Mr Alamantas and Mr Tadas Andrasiunas to be honest and credible witnesses. They straightforwardly explained the basis on which the Company

had operated and what had happened with this delivery. Their evidence was consistent with the documentation provided and with their own previous written statements.

26. On the basis of that evidence, we make the findings of fact set out below. We also make further findings of fact later in this decision.

The facts

27. The Company has been operating since 2002. It is jointly owned by Mr and Mrs Andrasiunas, with each holding half the shares. Mr Tadas Andrasiunas worked for the Company; he was given the title of commercial director. The Company had no employees: Mr and Mrs Andrasiunas, and Mr Tadas Andrasiunas, did all the work between them.

28. Until 2015 the Company transported goods within the EU using refrigerated vehicles. In 2015 it purchased the Mercedes Van for €19,000 plus taxes. From then onwards, its only vehicle was the Mercedes Van, which it used to transport goods between Lithuania and the UK, and between the UK and Lithuania. The Company derived its income from that activity, plus a small sum from renting out a seaside cottage.

29. The Mercedes Van usually transported the personal goods of Lithuanians who were moving to the UK. A typical load contained items of furniture, boxes of personal items, and vehicles such as motor bikes**.** Sometimes they also transported goods back to Lithuania for those returning there from the UK, but this was less common. As a result, the Mercedes Van was usually less full on return journeys. Mr Tadas and Mr Alamantas Andrasiunas therefore purchased second-hand goods, such as lawn mowers from car boot sales, and purchased UK goods on E-bay. They used the space in the Mercedes Van to bring these goods to Lithuania, where they sold them online.

30. The Mercedes Van normally made one run to and from the UK each week. The journey took 23 hours one way non-stop, with Mr Tadas and Mr Alamantas Andrasiunas taking turns at driving.

31. Less commonly, commercial businesses asked the Company to transport goods to or from the UK. Occasional deliveries were also made to and from other EU countries, such as Germany.

The CMRs and the hire agreement

32. When the goods to be transported belonged to a commercial business, the Company knew that it had to produce a CMR – an internationally recognised consignment document – when the Mercedes Van passed through customs. However, when the goods to be transported were the personal possessions of an individual, it was the joint understanding of Mr Alamantas and Mr Tadas Andrasiunas that EU law allowed these goods to be transported without a CMR, as long as the person transporting the goods was an individual and not a company.

33. When transporting private goods, a hire agreement was therefore completed between Mr Alamantas or Mr Tadas Andrasiunas on the one hand, and the Company on the other. These agreements were for short periods of 7-10 days. In a twelve month period, there were around 20 such agreements in place between Mr Tadas Andrasiunas and the Company, and about the same number between Mr Alamantas Andrasiunas and the Company. The hire fee in each case was equal to the amount of money paid by the customers for the delivery of their goods, so all the revenue for the journey was passed through to the Company. Although the agreements stated that the costs of use (such as petrol) were to be paid by Mr Alamantas or Mr Tadas Andrasiunas, in fact these costs were recharged to the Company. As Mr Tadas Andrasiunas said in cross-examination, all the profit ended up in the Company. Mr Tadas and Mr Alamantas Andrasiunas's evidence was that, when they passed through customs and showed the officers one of these hire agreements, they accepted that the EU rule on the transportation of personal possessions applied, and so did not require the formalities of a CMR, and did not charge them any customs or excise duties.

34. The hire agreement between Mr Alamantas Andrasiunas and the Company at issue in this case is dated 15 September 2017, the day before the Mercedes Van was seized, and it states that the agreement was valid until 24 September 2017. We return to this agreement at §58 and §60ff.

The delivery in question and the seizure

35. Goods for transportation by van were often collected and loaded in the carpark of a large supermarket, appropriately called "Mega". This was true not only of the Company but also for other transport businesses. Mr Tadas Andrasiunas described it as "a normal safe place around with video cameras and lots of cars, people around…in a really good location. It's near the Via Baltic road, around 200 meters [from it]".

36. Some days before 15 September 2017, Mr Alamantas Andrasiunas received a phone call from an individual who asked him to carry some glass doors to the UK; he said that the friend was installing them in a house. They agreed to meet at the Mega carpark.

37. At around 2pm on 15 September 2017 two individuals met Mr Alamantas and Mr Tadas Andrasiunas as arranged. They handed over a VAT invoice from Eukera UAB which named that company as the supplier, set out the cost of the doors, and stated that the customer was Mr Gazevičius, with an address in Grays, Essex. They also told Mr Alamantas Andrasiunas that Mr Gazevičius required the doors to be delivered to a different address, but also in Grays. Mr Alamantas Andrasiunas did not record the names of the individuals, but relied on the invoice.

38. The individuals handed over 8 packages which they said contained very expensive fragile sliding doors, packed in moisture-resistant material to protect them from damage. The normal practice of Mr Alamantas and Mr Tadas Andrasiunas was to open each package to check its contents: for example they would unzip bags and open boxes. However, they did not open these sliding door packages because of the warnings they had been given about damage and fragility. They lifted the packages

and thought they seemed around the correct weight for glass doors. Later, when the packages were opened by the Customs Officers, they saw that the glass was extremely thin, so that it was the cigarettes which had made up the rest of the expected weight. Mr Alamantas Andrasiunas also checked the number of packages to the invoice, and wrote the number of units on a document called "The Verification Document of the Safety of Vehicle and Cargo". At the bottom, he added a handwritten note, which translates as "it is impossible to inspect the consignment of the doors due to the packaging and film, the film is moisture resistant". Mr Alamantas and Mr Tadas Andrasiunas loaded the doors, and also loaded other personal goods for a different customer.

39. Mr Alamantas and Mr Tadas Andrasiunas drove the Mercedes Van to Dover and were stopped by Officer Roberts. He opened the back door of the van and said he wanted to X-ray the packages. Mr Alamantas and Mr Tadas Andrasiunas carried one of the doors to the X-ray machine, and Officer Roberts saw the hidden cigarettes. He undid some of the packaging, and then used an allen key to undo the bottom runner of the sliding door so he could see the cigarettes.

40. There were 58,300 cigarettes hidden in the doors, with a duty value of £13,996.81. Mr Tadas Andrasiunas was able to communicate with the Officers. He showed them the hire agreement and told them the vehicle was owned by the Company and that Mr Alamantas Andrasiunas was leasing it. He provided the delivery address for the glass doors, and offered to go with the Officers to that address to find the smugglers, but the Officers declined. They seized the cigarettes and the Mercedes Van, gave Mr Tadas Andrasiunas Notice 12A, Form BOR162 and a Notice headed "Seizure of Vehicle". That Notice includes this paragraph (capital letters, emboldening and underlining in original):

> **"AT THE END OF <u>ONE MONTH</u> FROM THE DATE OF SEIZURE THE VEHICLE WILL BE DISPOSED OF OR DESTROYED UNLESS COMMUNICATION IS RECEIVED FROM THE OWNER."**

41. Included in Notice 12A is this paragraph:

> "4.6 When seized things are disposed of HMRC and Border Force will dispose of perishable goods (including tobacco, beer and all food products) as quickly as possible. They usually begin disposing of non-perishable things (such as vehicles and spirits) 45 days after the date of seizure unless the legality of the seizure is challenged or they receive a restoration request. In those cases they usually keep the goods until the challenge or restoration is decided.
>
> We will normally dispose of vehicles if storage costs are likely to exceed the value of the vehicle and where a restoration request has been considered and refused, whether or not you have asked for a review (see paragraph 4.8).
>
> If the seized thing has been destroyed, HMRC or Border Force can't restore it to you but they will usually offer you an appropriate payment instead. This may be an amount equal to the sum paid by you for the goods in question or an amount equal to the proceeds of sale

> (where HMRC or Border Force have sold the goods in question) or an amount equal to the market value of the goods at the time of seizure and not including any additional compensation (for costs, travel expenses, interest)."

42. On 20 September 2017, HMRC received an email from the Company, asking for further information about restoration of the vehicle, and attaching an "Explanation" from Mr Alamantas Andrasiunas. This had been written in English by Mr Tadas Andrasiunas in accordance with his father's instructions.

43. In the Explanation Mr Alamantas Andrasiunas described receiving and loading the doors. He also provided the Border Force with the telephone number of the person who had given the doors to him and the phone number of the consignee, as well as the delivery address. He then said:

> "when doors were loaded into van I have no ideas that there could be packed illegal things. I thought that I was delivering normal doors, because I have got normal invoice with all company details, quantity of doors, price of it, dimensions. It was looking really normal, packed in high quality package. I couldn't believe that there was so much cigarettes. If I would have known about these illegal things inside I absolutely were not taken these doors anywhere & would inform local place about this illegal loading.
>
> I really don't know anything about this loading, these goods and cigarettes inside the doors. I am sorry for this situation. I really don't have nothing mutual with these persons and these cigarettes."

44. In their Statement of Case, the Border Force said that by having "nothing mutual with these persons" in the final sentence, Mr Alamantas Andrasiunas meant that he had nothing to do with the Company. The Tribunal asked Mr Alamantas Andrasiunas who he meant by the words "these persons" and he said "the two men who delivered the doors". We find that the natural reading of the final sentence in the context of the rest of the passage is that by "these persons" Mr Alamantas Andrasiunas was referring to the men who delivered the doors to the carpark.

Sale of the Mercedes Van, refusal of restoration and review decision

45. On 21 November 2017, the Border Force wrote to the Company and said it would begin processing the restoration request.

46. Around the same time, the Company received calls from UK car dealers, saying that the Mercedes Van was being sold, and asking the Company if it wanted to repurchase it, using one of the dealers as an intermediary. On 24 November 2017, the Company was called by the purchaser of the Mercedes Van, offering to sell it back to them.

47. The Border Force accepted at the hearing that the Mercedes Van had been sold before they had made a decision on restoration. Officer Summers said that seized vehicles are held by the Queen's Warehouse, which decides which vehicles to sell, and the Border Force had no control over those decisions.

48. On 1 December 2017, the Border Force refused the restoration request because, according to the evidence received, the vehicle had been hired to Mr Alamantas Andrasiunas and that hiring period had expired, so the Border Force could not restore the vehicle to him. The decision does not consider whether the Mercedes Van should be restored to the Company, despite the fact that it was the Company that made the restoration request on 20 September 2017, and the Border Force had been communicating with the Company since that date.

49. At the end of the refusal letter the Border Force say:

> "We will dispose of seized perishable goods…as quickly as possible. We will normally begin to dispose of non-perishable things (such as vehicles and spirits) 45 days after the date of seizure unless we received a request for their restoration in the meantime, in which case they will normally be retained by us until the restoration matter is fully concluded. However, old cars will be disposed of once a restoration request has been considered and refused (ie before any restoration appeal process is concluded. If we decide to restore the seized thing, but have in the meantime disposed of it, we will normally offer you an appropriate payment instead."

50. The Border Force also informed the Company that a request for statutory review must be received within 45 days, ie by 15 January 2016. The Company instructed LLA to act for them, and on 21 December 2017 LLA asked for the a review of the restoration decision. On the same date, the Border Force replied, saying that the Company should provide any further relevant evidence, and that the review decision had to be carried out by 4 February 2018.

51. Officer Summers issued his review on 12 January 2018; this crossed in the post with a letter from LLA with attachments containing further evidence. On 23 January 2018, Officer Summers wrote again, saying he had considered the further evidence but had not changed his decision. On 2 February 2018, LLA appealed to the Tribunal on behalf of the Company.

52. As the result of the refusal to restore the Mercedes Van, the Company has effectively stopped trading, although it is still trying to sell a few items purchased on e-Bay during earlier visits to the UK, and it is renting out the small holiday property. Mr Tadas Andrasiunas can no longer earn his living by working for the family business, and has taken another job. He said:

> "Today, I have found a new job in other company. But my family business, mother and father have stopped the UAB Angleras companies activities till these days. They don't earn any money, lost the last vehicle of the company and that's why we are here without any lawyer."

The Border Force policy and the review decision

53. In this section of the decision, we set out the Border Force policy on restoration of goods and Officer Summer's review decision.

The Border Force policy

54. Officer Summers' review letter includes the Border Force policy on the restoration of goods which have not been adapted for the purposes of smuggling. The policy sets out three possibilities, which so far as relevant to this case are as follows:

A: Neither the operator or the driver are responsible for, or complicit in, the smuggling attempt, and:

(1) the operator provides evidence satisfying the Border Force that both the operator and the driver carried out basic reasonable checks, including conforming with the CMR convention, to confirm the legitimacy of the load, the vehicle will normally be restored free of charge;

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

B: The driver, but not the operator, was responsible for, or complicit in, the smuggling attempt, then:

(1) if the operator took reasonable steps to prevent drivers smuggling, the vehicle will normally be restored free of charge unless the same driver is involved on a second or subsequent occasion;

(2) otherwise, on the first occasion the vehicle will normally be restored for 100% of the revenue involved in the smuggling attempt, or the trade value of the vehicle, if lower.

C: The operator was responsible or complicit in the smuggling attempt, and the revenue involved was less than £50,000, the vehicle would normally be restored for 100% of the revenue involved in the smuggling attempt, or the trade value of the vehicle, if less.

55. Appendix E to the review letter is headed "reasonable checks to be undertaken by operators/drivers to prevent smuggling in the load". The first paragraph reads:

> "Indications of negligence in failing to establish the illicit nature of the load will clearly be specific and varied depending on each individual case. Below are some of the common indicators that suggest that the operator/driver has not conducted those checks that could reasonably have been expected to reveal the illicit nature of the load."

56. The list includes the following:

(1) "simple examination of the load" such as the lifting of "a flimsy cover", but that "drivers cannot be expected to detect sophisticated concealments within the load which take…scanning technology to detect (for example, cigarettes concealed within the drums of pre-packed washing machines)";

(2) a driver amending the delivery details in circumstances that should reasonably have alerted suspicion;

(3) the excuse given for failing to identify the presence of illegal goods would itself indicate breaches of other regulations, codes of conduct, transport contract terms, Health and Safety breaches have taken place. For example, the Code of Conduct or the CMR; and

(4) an operator failing to take steps "to establish…the details of the owner of the goods".

The review decision: involvement in smuggling and alleged fabrication of agreement

57. Officer Summers decided that the Company was "involved or at least complicit in the smuggling attempt". As the duty value of the cigarettes was £13,996.81, well below £50,000, the applicable policy was that the vehicle would "normally be restored for 100% of the revenue involved in the smuggling attempt, or the trade value of the vehicle, if less", see Policy C above.

58. However, Officer Summers decided not to apply Policy C. He said that the hire agreement was fabricated, and by providing that agreement, the Company had "continued to mislead the Border Force, attempting to deceive us into believing that they were an innocent owner merely renting a vehicle to a private individual when in fact the driver is a family member". He also said that Mrs Dale Andrasiuniene (who had instructed LAA to act for the Company) was "inextricably linked" to Mr Alamantas and Mr Tadas Andrasiunas, this "was yet another attempt to deceive the Border Force as to the true ownership of the vehicle".

59. The Tribunal asked Officer Summers if there was any Border Force guidance on when an Officer can depart from Policy C. He was reluctant to answer – the question had to be repeated four times – but he finally said that there was no guidance, but as the Review Officer he was "above the policy" which only applied "normally", and this situation fell outside the normal ambit of Policy C.

Whether the hire agreement was fabricated

60. As set out above, Officer Summers had decided that the purpose of the hire agreement was to make it appear as if the smuggling had been carried out by a driver/hiree who was unconnected to the owner (the Company), with the objective of making restoration more likely. In the witness box, he expressed incredulity at Mr Alamantas and Mr Tadas Andrasiunas's stated understanding of the legal position. He said that EU law only allows goods to be imported without a CMR in very limited situations, such as the transportation by an individual of his own personal possessions when moving house, and where an exception did apply, there was no requirement that the goods be transported in a vehicle owned or leased by an individual. In his view the hire agreement was a "complete fabrication".

61. We considered whether this was the case. However, if the hire agreement had been fabricated to make it look as if an independent driver had been smuggling without the knowledge or consent of the Company, that ruse would have had no chance of succeeding, given that:

(1) the person requesting restoration was Mrs Dale Andrasiuniene, a director and 50% shareholder of the Company, and the wife of Mr Alamantas Andrasiunas;

(2) the driver was Mr Alamantas Andrasiunas, also a director and the other 50% shareholder of the Company; and

(3) he was accompanied by Mr Tadas Andrasiunas, who signed the BOR162 when the Mercedes Van was seized.

62. The three individuals were therefore evidently connected to each other and to the Company. Mr Alamantas and Mr Tadas Andrasiunas are both intelligent men. They would have expected the Border Force (a) to check who owned the Company, and (b) to realise from the identity or near-identity of the surnames that Mr Alamantas Andrasiunas, Mr Tadas Andrasiunas and Mrs Dale Andrasiuniene were members of the same family because they could easily have established that the "–iene" ending indicates "Mrs", so that Andrasiuniene means "Mrs Andrasiunas".

63. Moreover, Mr Alamantas Andrasiunas's consistent position, as evidenced in his written note of "Explanation" dated 21 September 2017, just after the seizure, was that "I have no ideas that there could be packed illegal things. I thought I was delivering normal doors…" In other words, there was never any suggestion from the Appellant that the driver was culpable, but the Company innocent. Rather, the Company's position throughout has been that none of the Andrasiunas family knew anything about the smuggled goods.

64. It is not necessary for the purposes of this decision for us to make findings on the law which applies to cross-border movements of goods. We accept the evidence given by Mr Alamantas and Mr Tadas Andrasiunas, and find as a facts that:

(1) the Andrasiunas family do not have the same knowledge and experience of EU law as Officer Summers;

(2) they genuinely believed that it was possible to transport an individual's personal goods around the EU without needing a CMR, providing that the person transporting those goods was acting as an individual and not on behalf of a company; and

(3) the hire agreement signed on 15 September 2017 was not a fabrication for the purposes of deceiving the Border Force.

Other factors

65. In coming to his review decision, Officer Summers also found that the operator and driver had not complied with the following procedures:

(1) the requirements of the "duty suspension" law and other legal obligations which apply to cigarettes, alcohol and similar goods; and

(2) the CMR requirement that the accuracy of the statements in the consignment note should be checked to the number of packages and their marks and numbers, and to the apparent condition of the goods and their packaging.

66. In relation to "reasonable checks", Officer Summers decided that the operator and the driver did not comply with the Border Force's policy "in that at no point did the driver inspect the contents of the load".

67. Officer Summers also considered whether a refusal to restore would cause hardship to the Company. He said that Mrs Dale Andrasiuniene had "chosen to become involved in a smuggling attempt" and should have considered the adverse consequences before doing so. He said he would restore the Mercedes Van only if there would otherwise be "exceptional hardship", and that was not the case here.

68. Mr Newbold submitted that a relevant factor to emerge in the hearing, but not included in the review decision, was that Mr Tadas and Mr Alamantas Andrasiunas agreed to change the delivery location of the glass doors from that shown on the invoice, to the address given to them by the individuals who brought the glass doors to the Mega carpark, and this should have alerted them to the possibility of smuggling.

69. Mr Alamantas Andrasiunas responded by saying that individuals commonly required goods to be delivered to different addresses – for instance, they may ask for the goods to be delivered at the place they are working rather than where they are living. This was particularly the case when the goods were to be delivered at the weekend, which was the position here. Mr Tadas Andrasiunas added they had been told that the doors were to be installed in a house, and so it was not a surprise that the place where the work was being carried out was not where Mr Gazevičius, the purchaser, was living.

Discussion and decision

70. As is clear from our findings of fact, we do not agree with Officer Summers that the rental agreement was a fabrication, or that the Company was attempting to deceive the Border Force into thinking that the operator was an "innocent owner".

71. In relation to the policy on reasonable checks, Mr Alamantas and Mr Tadas Andrasiunas accepted that they had not removed the packaging on the doors. However, given the fragile nature of the doors and the information provided about the risk of damage, removing the packaging would have gone beyond "simple examination" of the goods. Officer Roberts only identified that the doors contained the cigarettes by using the X-ray machine, and he could only see the actual packages after using an allen key to open the runners on the bottom of the doors. These were "sophisticated concealments within the load which take…scanning technology to detect". The Border Force rightly accepts that drivers cannot be expected to detect such consignments, see Appendix E referred to at §55.

72. Officer Summers' review decision also stated that the absence of the CMR documents meant that driver and the operator were unable to check "the accuracy of the statements in the consignment note as to the number of packages and their marks and numbers, and the apparent condition of the goods and their packaging". Mr Alamantas Andrasiunas checked from the invoice to the number of doors. The CMR does not require that the goods be unpacked by the carrier. In other words,

completing the CMR paperwork for the glass doors would not have alerted Mr Alamantas and Mr Tadas Andrasiunas to the presence of the hidden cigarettes. As the first paragraph of Appendix E states, this was not a check which "could reasonably have been expected to reveal the illicit nature of the load", and the failure to complete the CMR was thus an irrelevant consideration.

73. A further point relied on by Officer Summers was the failure to apply the requirements of the "duty suspension" law and other legal obligations relevant to excise goods, but that is to put the cart before the horse. Although those requirements apply to cigarettes, neither the driver nor the operator knew they were carrying cigarettes. The failure to follow these legal requirements cannot be a relevant factor when considering restoration.

74. We do not agree with Mr Newbold that the change of delivery address was a factor which ought to have alerted the driver and the operator to the risk that the glass doors might have contained contraband goods. Instead, we agree with Mr Alamantas and Mr Tadas Andrasiunas, for the reasons they give at §69. The situation here is very different, for example, from that where a driver is transporting alcohol to a bonded warehouse, but is then instructed to deliver it instead to a residential address.

75. Another of the Border Force's "reasonable checks" is whether the operator has "taken no steps to establish…the details of the owner of the goods". Mr Alamantas and Mr Tadas Andrasiunas did not take the names of the individuals who handed over the doors. However, they were provided with an invoice giving the name of the supplier and the name of the customer, so they had evidence as to the owner of the goods.

Decision

76. We find that Officer Summers took into account the following matters which should not have been taken into account:

(1) his view that the Andrasiunas family, and thus the Company, was involved with, and complicit in, the smuggling attempt. We have found as a fact that this was not the case;

(2) his view that the hire agreement was fabricated, and that the Andrasiunas family had submitted documents with the purpose of deceiving the Border Force; we have found as facts that the hire agreement was genuine and that there was no attempt to deceive;

(3) the failure to open the packaging around the glass doors: this was a sophisticated concealment, and would not have been detected by the basic checks set out in the Border Force policy;

(4) the failure to have CMR documents for the doors: these would have made no difference; and

(5) the failure to comply with the regulations about excise goods such as cigarettes: neither Mr Alamantas or Mr Tadas Andrasiunas were aware that excise goods were concealed within the doors.

77. It therefore follows that Officer Summers also failed to take into account the facts that (a) the Andrasiunas family was not involved in, or complicit with, the smuggling; and (b) Mr Alamantas and Mr Tadas Andrasiunas made reasonable checks on the doors.

78. He also failed to take into account the hardship which would be caused as the result of the decision to refuse restoration. The Company has in effect now gone out of business, and Mr and Mrs Andrasiunas have lost their livelihood.

79. The Company's appeal against the restoration decision is allowed.

Directions

80. The Border Force are directed in accordance with FA 1994, s 16, as follows:

(1) Officer Summers' review decision dated 10 January 2018 is to cease to have effect;

(2) the Border Force shall conduct a further review of the decision not to restore the Mercedes Van;

(3) in carrying out that review, they shall not take into account the irrelevant matters set out at §76;

(4) instead, they shall take into account the following findings of fact made by this Tribunal:

(a) neither the driver nor the operator were involved in, or complicit with, the smuggling attempt; and

(b) they made reasonable checks on the glass doors which were being transported in the Mercedes Van.

Appeal rights

81. This document contains full findings of fact and reasons for the decision. If the Border Force is dissatisfied with this decision, they have 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 the Border Force. 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.

Postscript

82. The Company had been informed via Notice 12A that the Border Force would "usually keep the goods until the challenge or restoration is decided" and would "normally dispose of vehicles if storage costs are likely to exceed the value of the vehicle and where a restoration request has been considered and refused, whether or not you have asked for a review". In other words, the normal policy of the Border Force is that vehicles will not be disposed of until *after* they have decided not to restore a vehicle, and then only if the storage costs exceed the value of the vehicle.

83. However, that normal policy was not followed here. The Mercedes Van was sold before the restoration decision had been made. Officer Summer's only explanation for this failure was that the Border Force had no control over the Queen's Warehouse. In our view, that does not come close to a good reason for the Border Force failing to adhere to its policy. There is a big difference between a person having their own, familiar, personal vehicle returned to them, and receiving the sum of money estimated by the Border Force to be appropriate compensation.

84. This Tribunal has decided that the Border Force must make a new decision. If, as a result, the Company is offered compensation, the Border Force may wish to consider whether its failure to follow its own restoration policy may be a relevant factor in calculating the amount to be paid. That is, however, not a matter for us.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 05 FEBRUARY 2019