

EXCISE DUTY - restoration of company car - company did not know employee was taking caking car abroad - appeal dismissed

LONDON TRIBUNAL CENTRE

HOULTON MEATS LIMITED Appellant

- and -

THE COMMISSIONERS OF CUSTOMS AND EXCISE Respondents

Tribunal: DR JOHN F AVERY JONES CBE (Chairman)

LEON WILKINSON FCIB

PRAFUL DAVDA FCA

Sitting in public in London on 7 May 2002

R Newitt, director, for the Appellant

Jeremy Hyam, counsel, instructed by the Solicitor for the Customs and Excise for the Respondents

© CROWN COPYRIGHT 2002

DECISION

1. This is an appeal by Houlton Meats Limited against a decision on review made on 4 May 2001 and reconsidered in the light of a letter of 11 May from the Appellant, refusing to restore its car which had been seized on 12 February 2001 at Coquelles. The Appellant was represented by one of its directors, Mr R Newitt and the Respondents were represented by Mr Jeremy Hyam.
2. The car, a Honda CR-V registration number R620 HJV, was driven by Mr Neil Troth and another passenger, Mr B D Page. Mr Troth is the son of a director of the Appellant. The car is normally used by his mother who also works for the Appellant. Mr Troth is authorised to drive any company vehicle. There is a restriction on the use of company cars which is known to employees although it is not written down, this being a small company where instructions are often given by word of mouth, which is imposed by one of the financing companies (although it is not known whether it was imposed by the company financing this particular vehicle) that the cars should not be taken abroad without permission. Mr Troth was not travelling on the Appellant's business and had not received permission to take it abroad. On being stopped at Coquelles Mr Troth initially told the officer that they had been to Calais and had purchased some wine but had no tobacco. In fact they had purchased 17 cases of wine, 24 kilos of hand-rolling tobacco (purchased in Belgium) and 2 bottles of spirits. The tobacco was hidden under the cases of wine so that it could not be seen. The indicative amounts are 90 litres of wine and 1 kilo of tobacco.
3. The Commissioners, not being satisfied that the goods were for the passengers' own use and were not being held or used for a commercial purpose within article 5 of the Excise Duties (Personal Reliefs) Order 1992, seized the excise goods and the car as liable to forfeiture under sections 49(1)(f) "any imported goods concealed or packed in a manner appearing to be intended to deceive any officer", and 141(1) of the Customs and Excise Management Act 1979. The Appellant does not dispute that the goods and the car were properly seized.
4. Section 152 of the Customs and Excise Management Act 1979 provides that: "The Commissioners may, as they see fit...(b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized..." By section 14(2) of

the Finance Act 1994 a person affected by a decision of the Commissioners, which includes a decision under section 152(b), may require it to be reviewed.

5. The Tribunal's jurisdiction is contained in section 16 of the Finance Act 1994 which applies to matters contained in Schedule 5 including decisions on restoration. Section 16(4) provides that

"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 the 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;...."

6. We heard evidence from the reviewing officer, Mr A W Hack. He considered that in allowing employees to use its vehicles the Appellant took a risk, which included loss through misuse of the car. He considered that the Appellant's redress was against Mr Troth. Non-restoration of the car was in accordance with the Commissioners' policy and there were no circumstances in this case that suggested that he should depart from the policy. He was not aware before the evidence at the hearing of the Appellant's policy that employees needed permission to take cars abroad and so did not take it into account, but it was unlikely to have affected his decision if he had known.

7. Mr Newitt said that the loss of the car was a serious matter for the Appellant which was a small company. The Appellant had an unwritten policy that would have been known to Mr Troth that company cars should not be taken abroad without permission and Mr Troth did not have such permission. He was not on company business and it was disproportionate that the Appellant should lose the car, which had cost £17,288 on 9 November 1999, some two years earlier, when the duty involved was about £2,500. No disciplinary action had been taken against Mr Troth but this was still under discussion.

8. Mr Hyam contended that the Commissioners' policy made no distinction between cases where the vehicle is owned by the driver or a third party. The policy was justified by the legitimate aim of preventing smuggling.

9. The question for us is whether the Commissioners' decision not to restore the vehicle is one that they could not reasonably have arrived at.

10. In relation to the issue of reasonableness we follow the guidance given by Lord Lane in *Commissioners of Customs and Excise v J H Corbitt (Numismatists) Limited* [1980] STC 231, 239 that the tribunal can only properly review the Commissioners' discretion: "...if it were shown the commissioners had acted in a way in which no reasonable panel of commissioners could have acted; if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight." It is a strict test and as Lord Lowry said in *R v Secretary of State for the Home Department Ex parte Brind* [1991] 1 AC 696, 765: "...it is not enough if a judge feels able to say, like a juror or like a dissenting member of Cabinet or fellow-councillor, 'I think that is unreasonable; that is not what I would have done'....A less emotive but, subject to one qualification, reliable test is to ask, 'could a decision-maker acting reasonably have reached this decision?'. The qualification is that the supervising court must bear in mind that it is not sitting on appeal, but satisfying itself as to whether the decision-maker has acted within the bounds of his discretion".

11. Applying these tests we cannot say that the review decision was unreasonable. The Commissioners have a policy applying to all third party owners of cars, which they depart from only where the car is stolen, or is owned by a hire company, unless there are other exceptional circumstances. The policy requires that those who smuggle lose their cars whoever they belong to. The policy is hard on companies that own cars made available to employees but it is necessary that

it should be a tough policy without any exceptions for owners who are not involved in smuggling themselves, unless there are exceptional circumstances. Here the Appellant as employer made the car available to Mrs Troth who made it available to her son who was driving with the Appellant's approval, although he should have obtained their approval before taking the car abroad. The Appellant has to take the consequences.

12. Article 1 of Protocol 1 of the Human Rights Convention provides:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided by law...

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The test to be applied when considering this provision is summarised in the decision of the European Court of Human rights in *Sporring and Lonroth v Sweden* (1982) 5 EHRR at para.69:

"...the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1."

The Court decided in that case that the appellants bore "an individual and excessive burden" through not being able to contest the threatened expropriation of their land.

13. Mr Hyam contended that here the burden was not individual, as the policy affected all third party owners of cars. Nor was it excessive because at common law an employer is vicariously liable (i) if goods bailed to the employer are negligently damaged by the employee, (ii) goods are stolen or lost as a result of dishonest acts where the loss or theft is caused by the employee improperly performing what he was employed to do, or (iii) the goods are lost as a result of fraudulent conduct of the employee falling within the scope of the employee's authority, actual or ostensible. Here Mr Troth was authorised to drive the car and the Appellant had to bear the consequences. It was no different from an employer bearing the loss if the insurance had been voided because the employee had been driving while drunk.

14. The Court of Appeal in *Lindsay v Customs and Excise Comrs.* [2002] EWCA Civ 267 considered this aspect at para.63:

"...I would not have been prepared to condemn the Commissioners' policy had it been one that was applied to those who were using their cars for commercial smuggling, giving that phrase the meaning that it naturally bears of smuggling goods in order to sell them at a profit. Those who deliberately use their cars to further fraudulent commercial ventures in the knowledge that if they are caught their cars will be rendered liable to forfeiture cannot reasonably be heard to complain if they lose those vehicles. Nor does it seem to me that, in such circumstances, the value of the car used need be taken into consideration. Those circumstances will normally take the case beyond the threshold where that factor can carry significant weight in the balance. Cases of exceptional hardship must always, of course, be given due consideration."

Since the Commissioners have treated this as a case of commercial smuggling in the sense explained, and indeed one of concealing the tobacco in a manner appearing to be intended to deceive the officers, and we have decided that they were not unreasonable in doing so, the value of the car in relation to the duty can be ignored. Like the Court of Appeal we decide that Mr Troth cannot reasonably be heard to complain if he loses the vehicle, whether it belongs to him or someone else, in this case his employer. The Appellant has to take the consequences of its employee's actions when driving with their permission, even

though we accept that there is little that it can do to prevent it happening. We do not think that the non-restoration of the car is disproportionate in failing to achieve the fair balance between the demands of the general interest of the community in preventing smuggling, and the requirements of the protection of the Appellant's fundamental rights as owner of the car.

15. Accordingly we dismiss the appeal.

J F AVERY JONES

CHAIRMAN

LON/01/8068