

Excise Duty - Refusal to restore car - Excise goods being carried partly for own use and partly for sale, otherwise than for profit, to friends etc - Whether refusal to restore reasonable - No

LONDON TRIBUNAL CENTRE

RONALD HENDRY Appellant

- and -

THE COMMISSIONERS OF CUSTOMS AND EXCISE Respondents

Tribunal: STEPHEN OLIVER QC (Chairman)

E M MacLEOD FIPM

SUNIL DAS ACIS

Sitting in public in London on 16 April 2002

The Appellant in person

Mr Hugh McKay, counsel, instructed by the Solicitor for the Customs and Excise, for the Respondents

© CROWN COPYRIGHT 2002

DECISION

1. Mr Ronald Hendry appeals against a deemed decision not to restore his car to him. The deemed decision confirms an original decision which had been notified to Mr Hendry by letter of 29 April 2001. The original decision relates to Mr Hendry's request to the Commissioners for the restoration of the car. That request had been made by letter dated 23 April 2001.

The Facts

2. Mr Hendry lives in East Ham, London. At the relevant time he was the registered owner of a Skoda car with a "P" registration number. The car was on hire purchase.

3. On 10 April 2001 the car which was being driven by Mr Hendry was stopped by the Commissioners at the Coquelles Channel Tunnel Control point in France at 2000 hours (British time). Mr Hendry was questioned by an officer of the Customs (Helen Russell). He explained that he had purchased 800 cigarettes. He produced receipts for wine, mainly boxed in cases of six 75ml bottles. The receipts showed that he had purchased 126.75litres of wine, 800 cigarettes and a litre of rum.

4. In the course of the interview Mr Hendry was asked about his smoking habits. He told the officer that his consumption was about ten to twenty cigarettes a day. He said that his consumption of alcohol was about six bottles of wine a week but it could be higher if he had visitors. The note of interview records that he said he tended to take two or three bottles of win to Belgium each time he went there.

5. Mr Hendry was asked about his employment. He told the officer that he worked as a road sweeper and had done so for about five years. His take home pay, according to the note, amounted before overtime to about £220 a week and, with overtime, to about £300. He provided details of his monthly expenses.

6. The note of the interview records Mr Hendry as admitting that he had been stopped by Customs before. The previous Christmas he had been stopped with thirty pouches of tobacco and two cases of beer. He had been shown a copy of Customs Notice number 1 and he accepted, in the course of the interview, that he knew the guide levels for excise goods. He stated that his last journey to France had been the previous weekend. At that time he had bought 800 cigarettes and a bottle of wine. He said that he travelled almost every week via Calais to Ostende to visit a friend.

7. When asked to explain what he would be doing with the cigarettes that he had bought, he claimed only to smoke 120 a week. His explanation was that he had given some away while out at work or in a pub.

8. At the conclusion of the interview Mr Hendry refused to sign the interview note. We became aware, from various occasions when Mr Hendry attempted to read material to us in the course of evidence, that Mr Hendry's reading ability was slow and inaccurate. We accept his evidence that the interview was conducted at a time when Mr Hendry was tired, hungry and cold.

9. The Customs officer (Helen Russell) was not satisfied that the goods were not being imported for commercial purposes. She then seized the excise goods and Mr Hendry's car. The reason given for her exercising the power of seizure, set out at the end of the Note of Interview, were that Mr Hendry had admitted "knowledge of law", that he had goods in excess of the guide levels, that he was a regular traveller, that his replies to questions had been "vague" and that "consumption of goods (was) inconsistent with quantity".

10. Mr Hendry's request to have the car restored to him was refused by letter of 29 April 2001. He asked for a review at the end of April. No review took place within the statutory 45 day period.

11. In due course, on 5 June, Skoda Finance (with whom Mr Hendry had a hire purchase agreement in relation to the car) wrote to the Commissioners advising them that the car was on hire purchase. They pointed out that by virtue of one of the provisions in the hire purchase agreement the agreement was terminated if, among other things, "the vehicle is seized or distrained upon or made subject to any court order". Skoda Finance asked for the seized vehicle to be conditionally restored to them and the "Post Seizure Unit" agreed to such restoration on payment of a release fee of £75. The car was returned to Skoda Finance because it appeared to the Commissioners that they were the owners of the vehicle in terms of the hire purchase agreement. It was collected by Skoda Finance on 1 August 2001.

#### The law

12. Article 5(1) of the Excise Goods (Personal Reliefs) Order 1992 provides that relief from payment of excise duty in respect of excise goods obtained by a community traveller for his own use is subject to the condition that the excise goods are not imported for a commercial purpose and that if that condition is not complied with those goods shall be liable to forfeiture. Article 5(3) of the Order provides that a person shall be regarded as having imported, held or used excise goods for a commercial purpose if he has in his possession or control any excise goods in excess of the quantity specified in the Schedule to the Order. The Schedule specifies the quantities of tobacco products for the purposes of Article 5(3) as, among other things, 800 cigarettes. The same schedule specifies the

quantities of alcoholic beverages for the purposes of Article 5(3) as, among other things, 90 litres of wine.

13. The issue for us is whether the evidence satisfies us that the Commissioners could not reasonably have arrived at the decision (i.e. the original decision in the letter dated 29 April 2001) not to restore the seized car to Mr Hendry.

14. The original decision reads as follows:

"You request in your letter the restoration of the seized vehicle, which was being driven by yourself at the time of seizure.

In March 2000, Dawn Primarolo MP, the Minister responsible for Customs and Excise, announced the toughening of Customs' vehicle seizure policy. This received widespread national media publicity at the time, and to advertize this approach to every motorist in the UK, a leaflet from Customs is issued with their road tax renewal. This leaflet specifies the guidance levels, and warns that the possibility of having your goods and vehicle confiscated if you exceed them.

The Commissioners' normal policy for vehicle seized in relation to excise offences is that they will not be restored, even for first time offences.

There are no exceptional circumstances in this case which would justify departure from this policy, and I have therefore decided that on this occasion the vehicle should not be restored to you."

15. As indicated above, the Commissioners failed to conduct a review of the original decision within the 45 day period referred to in Finance Act 1994 section 15(2). This, we were told, was the result of severe understaffing (which, we are assured, has now been remedied). Consequently they are assumed to have confirmed that original decision. Many months later Mr I F McEntee wrote (on 17 December 2001) to say that he had conducted an out-of-time review. The letter contains this passage:

"It is for me to determine whether or not the decision you are contesting is one which a reasonable body of Commissioners could not have reached."

That is not a review officer's function. His function is to look at all the relevant circumstances and take a decision whether or not to uphold the original decision. He is entitled to substitute his own decision for that of the officer who took the original decision. Mr McEntee's letter indicates that he did not accept that Mr Hendry regularly visited a lady in Ostende. He did not accept Mr Hendry's explanation that he intended to take 2-3 bottles of the wine to Belgium. Nor did he accept Mr Hendry's explanation that he would have given some of the cigarettes to friends in a pub.

16. On 20 May 2001 Mr Hendry appealed to this Tribunal.

17. On 30 August 2001 this Tribunal directed that the Commissioners should within 14 days lodge a statement of case and witness statements. The Direction noted that there was nothing to indicate what considerations had been taken into account by the Commissioners in reaching the disputed decision about the particular circumstances of Mr Hendry.

18. In the event the Commissioners did not serve any witness statement for the officer (N J Tigwell) who took the original decision not to restore the vehicle. Mr Tigwell attended to give evidence at this hearing. We decided not to hear his evidence having regard to the fact that the Commissioners were in breach of their earlier order.

19. At the present hearing Mr Hendry gave evidence. He said that he had gone shopping on 10 April on impulse. There was nothing on television that night. He wanted to buy some wine for a party to be held in Ostende the following Sunday. He had been mistaken as to the amount of wine that he had bought. The receipt showed that he had bought a wide range of different wines in relatively small quantities. He intended to buy those things because he thought they were going cheap. He said that he would be taking two to three cases of the wine on his next visit to Belgium (i.e. the following Sunday). There was to be a party at a pub in Belgium. The wine was needed for that. (Usually, he had told Helen Russell at the interview, he took her 2-3 bottles each visit.)

20. Mr Hendry produced a note stating that there had been a party at a pub in Belgium. This, so far as we could ascertain, related to a date in May. We therefore disregarded it as evidence in support of his assertion that there was to be a party on the weekend following 10 April.

21. Mr Hendry's statement that he had gone to France on impulse was contradicted by his Channel Tunnel ticket which showed that it had been bought on 9 April, i.e. the day before.

22. Mr Hendry said that his means were quite sufficient to cover the cost of the goods. The goods had cost some £200. His average weekly salary at the time had been £300. He showed us statements tending to demonstrate that, in the month of April at least, he had paid very little out in respect of rent, hire purchase charges and other living expenses.

23. The response for the Commissioners was that Mr Hendry have been carrying at least a third more (i.e. 36 litres) than the permitted limit for wine of 90 litres. He must have known that he was carrying too much. £200, it was observed, represented a very large part of a month's salary. All in all it was unlikely that Mr Hendry had been buying the excise goods for his own use. Moreover, it was observed, he had actually lied about his journey to France being on impulse. And, when interviewed, he had said nothing about the party. In any event his defence that the wine had been purchased for a party in Ostende was unlikely; a party in a public house would not normally involve guests bringing their own drink. The Commissioners also referred us to the fact that their records showed that he had been stopped on previous occasions. On six occasions between 28 February 1996 and 11 July 1999, excise goods had been seized from Mr Hendry. This was not denied by Mr Hendry. In the course of the interview he had told the Customs officer that he had been stopped by Customs before Christmas at which time he had 30 pouches of hand-rolling tobacco with him. He had also been stopped on 20 January 2001 with 1.5 ks of tobacco.

24. We have found this a very difficult case. We accept Mr Hendry's evidence that he has a good reason for going to Ostende most weeks. He has a friend there whom he habitually visits. The Commissioners were, we think, wrong not to have taken this into account. He is a person on a steady weekly income without heavy expenditure commitments. He did not strike us as a person who buys and sells excise goods for a commercial purpose, i.e. as a business of buying and selling with a view to profit. At the same time the answers that he gave in the course of

interview were evasive and, in many cases, misleading. We do not accept the explanation that he gave to us that he was buying wine for a party the following Sunday. At the same time we accept that he drinks a reasonable amount of wine and could well be consuming six bottles a week. We accept that he does from time to time give wine away and we have no doubt that he takes some to his friend in Ostende.

25. All in all we were not satisfied that all the excise goods were purchased for Mr Hendry's own consumption or to be given to friends. On balance it seems to us that the wine was being brought in partly for his own use and partly because he might be able to sell some to his work mates. Our conclusion that a large part of the wine was purchased for his own consumption is based on the fact that Mr Hendry had been very selective in his choice of wine. He had purchased relatively small quantities of eleven different types of wine. The largest single amount had cost £1 per bottle at Eastenders. For those reasons we are not satisfied that all the wine and the cigarettes were purchased for Mr Hendry's own use. Some were purchased with the possibility of their being sold to his friends and work mates. We do not think that Mr Hendry bought the wine with a view to reselling it at a profit. Some were purchased to be given to his friend in Ostende. Those were factors which the Commissioners should have taken into account when exercising their decision not to restore the car to Mr Hendry. We refer in this connection to the recent decision of the Court of Appeal in *Customs and Excise Commissioners v Lindsay*. The evidence shows that the Commissioners stuck to the hard and fast policy statement and, in so doing, they ignored relevant considerations, i.e. that he was carrying the goods for friends (including his friend in Ostende) and work mates and he was not in it for profit.

26. We therefore decide that the decision reached by the Commissioners was not one which they could reasonably have arrived at.

27. The decision was one which has already been acted on. The car has been returned to Skoda finance. In this connection a letter of 5 June 2001 from Skoda finance to the Commissioners states that the vehicle has been restored to Skoda finance for a charge of £75 to cover administrative and storage costs; a further condition is that the car is not returned to Mr Hendry. As the decision has been acted on it cannot be remedied by a further review of the decision not to restore it to Mr Hendry. On this basis, and having regard to the words of section 16(4)(c) of Finance Act 1994, we declare the decision to have been unreasonable. We adjourn the hearing until a date after 20 June 2002. This will give the Commissioners and Mr Hendry the opportunity to see whether the matter can be resolved without calling for any further direction on our part. If they have not resolved the matter by 6 June 2002, the appeal will be re-listed for a further hearing before us. In the meantime both parties are at liberty to apply for further directions.

STEPHEN OLIVER QC  
CHAIRMAN

RELEASED:

LON/2001/8083-HEN.OLI