EXCISE - Restoration Refusal - Application by Customs for Direction under FA 1994 s.16(4)(b) opposed by Appellant - Appeal listed - Customs 'consented' to appeal being allowed - Primary facts in dispute - Determination by Tribunal on whether tobacco for own use - Gora v Commissioners of Customs and Excise [1992] V&DR 49 applied - Direction for new review on basis of facts found and Hoverspeed C.A.

LONDON TRIBUNAL CENTRE

WILLIAM JOSEPH CREAMER - Appellant
- and -
THE COMMISSIONERS OF CUSTOMS AND EXCISE - Respondents

Tribunal: THEODORE WALLACE (Chairman)

MRS R S JOHNSON

MR S K DAS LLB, LLM, ACIS

Sitting in public in London on 5 November 2002

James Dawson, counsel, instructed by Wortley Redmayne Kershaw, solicitors, for the Appellant

Matthew Barnes, counsel, instructed by the Solicitor for the Customs and Excise, for the Respondents

DECISION

1. This appeal was against the refusal by Customs to restore the Appellant's Volkswagen Golf and 15 kilogrammes of hand-rolling tobacco seized at Coquelles on 26 September 2001.

2. The appeal itself was against two review decisions in January 2002 the first concerning the car and the second concerning the goods which the first review had omitted.

3. The notice of appeal was served by the Appellant's solicitors on 19 February 2002. The Statement of Case and both parties' Lists of Document were served in April. The Tribunal directed witness statements by the officers interviewing and seizing the goods and by the Review Officer; these were served in July and September. On 18 September 2002 the appeal hearing was listed for 4 November.

4. On 21 October 2002 the Tribunal received an application by the Commissioners to vacate the hearing and for a direction under section 16(4)(b) of the Finance Act 1994 that "the Commissioners re-review the decision as soon as possible, but in any event not later than 6 weeks following the promulgation of the judgment of the Court of Appeal in the case of the *Commissioners of Customs and Excise v Hoverspeed and others* which is listed for hearing on 5 and 6 November." The application stated that the issues bear directly on the present appeal.

5. Section 16(4) of the Finance Act 1994 provides as follows:

> "(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 -
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> (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;
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> (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a further review of the original decision; and
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> (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."

6. A decision as to the restoration of goods seized or forfeited is a decision as to an ancillary matter. It has long been established that the precondition that the "person making that decision could not reasonably have arrived at it" is to be interpreted in line with *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1980] STC 231 per Lord Lane at page 239, see *Bowd v Commissioners of Customs and Excise* [1995] V&DR 212 and most recently *Gora v Commissioners of Customs and Excise* [2002] V&DR 49 at paragraph 50. Put shortly the precondition is that the decision was irrational or otherwise legally defective; the precondition is directed not merely at the end result but the way in which the decision was reached.

7. Section 16(4) gives the Tribunal a power to do one of three things when satisfied as to the precondition. The Tribunal has to decide whether to exercise the power and how to exercise it. If it contemplates making a direction under section 16(4)(b) it must decide what directions are appropriate.

8. In *Gora*, the President, Stephen Oliver QC, held that the jurisdiction of the Tribunal under section 16(4) includes finding the primary facts to be taken into account by the decision maker, see paragraph 57. This includes whether the goods have been properly seized. On that basis he decided that the Tribunal's

jurisdiction satisfied the requirements of Article 6 of the European Convention on Human Rights. Although the Commissioners have appealed against his reasons in a Respondent's Notice in *Gora*, Mr Oliver's conclusion was implicitly endorsed by the Divisional Court in *R (Hoverspeed Ltd) v Customs and Excise Commissioners* [2002] 3 WLR 1219 at paragraph 150.

9. The Application by the Commissioners in the present case did not specify why the review decision was defective. The Application could only be made however on the footing that the review was defective, since otherwise the Tribunal would have no power to direct a further review. The practice of the Tribunal on receipt of such applications, which are at present frequent, is to serve the application on the Appellant and, if the Appellant consents, to make a Direction provided that it is apparent that there was a material defect in the decision. It is a fact that most reviews coming before the Tribunal are defective in law.

10. This review contained three errors of law, which are common to most reviews. The first was the application of the presumption of commerciality in the Excise Duties (Personal Reliefs) Order 1992 which the Divisional Court has held in *Hoverspeed* to be incompatible with the EEC Excise Directive and with Article 28 of the Treaty. That part of the decision in *Hoverspeed* was not the subject of the appeal and the Order is currently being revoked from 1 December 2002.

11. The second error was that instead of considering the matter afresh, the review officer asked herself whether the earlier decision was unreasonable as follows:

> "It is for me to determine whether or not the contested decision is one that a reasonable body of Commissioners could not have reached."

This confuses the issue for the review officer with the test for the Tribunal.

12. The third defect here was that there was no evidence that, when stopping the Appellant, the Customs officer had reasonable grounds to suspect that he was carrying dutiable goods on which duty has not been paid; the decision of the Divisional Court as to this in *Hoverspeed* is under appeal. The review did not address this. All of the above defects occur regularly in review decisions.

13. In the present case the Appellant's solicitors did not consent to the appeal being vacated and to a direction being made. In those circumstances the Tribunal refused to vacate the hearing and the parties attended with their witnesses.

14. Mr Barnes did not renew the application for a direction under section 16(4)(b) at the hearing in its original form. Instead he stated that the Commissioners consented to the appeal being allowed on the footing that they would inevitably lose on the basis of the decision of the Divisional Court in *Hoverspeed* since they had no evidence as to the reason for stopping the Appellant; he submitted that in such circumstances the Tribunal should make a direction under section 16(4)(b) regardless of the Appellant's opposition.

15. Mr Dawson correctly said that this was in effect the earlier application put in another way. He said that his client was here with a witness and wished the Tribunal to determine the factual issue whether the tobacco was for his own use.

A new review would not decide this issue: if the review was adverse, this factual issue would still have to be decided by the Tribunal.

16. We decided that the Appellant was entitled to have the factual dispute resolved and that we should hear the evidence as to whether the tobacco was for the Appellant's own use or was for resale at a profit. If the tobacco was for the Appellant's own use, the review will be purely academic since there could be no justification for refusing restoration.

17. The relevant domestic legislation is contained in the Excise Duties (Personal Reliefs Order) 1992, articles 3, 3A and 5. The relevant provisions of Council Directive (EEC) No.92/12 ("the Excise Directive") are Articles 6 to 9.

18. Article 6 of the Directive provides that duty is chargeable at the time of release for consumption, here retail sale in Belgium. Article 7 provides that where products subject to duty are released for consumption in one state (here Belgium) but are held for commercial purposes in another (here the UK), duty is payable where they are held. Article 8 provides,

> "As regards products acquired by private individuals for their own use and transported by them, the principle governing the internal market lays down that excise duty shall be charged in the Member State in which they are acquired."

Article 9.1 of the Directive provides,

> "1. Without prejudice to Articles 6, 7 and 8, excise duty shall become chargeable where products for consumption in a Member State are held for commercial purposes in another Member State.
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> In this case, the duty shall be due in the Member State in whose territory the products are and shall become chargeable to the holder of the products."

Article 9.2 requires Member States to take account of certain matters "to establish that the products referred to in Article 8 are intended for commercial purposes". It thus only applies to private individuals acquiring and transporting goods in a Member State for their own use, transporting them and holding them for a commercial purpose. The specified matters include the commercial status of the holder and his reasons for holding the products, the mode of transport, any document relating to the products and the nature and quantity of the products. In relation to quantity, Member States are permitted to lay down guide levels "solely as a form of evidence."

19. Article 3 of the Personal Reliefs Order implements Article 8 of the Directive and Article 3A(2) and the first sentence of Article 5(1) of the Order implements Article 9.1 of the Directive.

20. The criteria listed in Article 5(2) of the Personal Reliefs Order broadly reflect Article 9.2 of the Directive.

21. The problem with the Personal Reliefs Order, which was identified by the Divisional Court in *Hoverspeed,* is that Article 5(3) and (3A) to (3C) are incompatible with Community law. The Declaration of the Divisional Court in *Hoverspeed* was as follows (see [2002] 3 WLR at page 1275),

> "Declaration that Excise Duties (Personal Reliefs) Order 1992 (as amended) is incompatible with Council Directive 92/12/EEC and EC Treaty, Article 28 in so far as
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> > (i) excise goods imported from another member state (where excise duty has been paid) are additionally chargeable to United Kingdom excise duty without it being established that goods are imported into the United Kingdom for commercial purposes and
> >
> > (ii) a persuasive burden of proof is placed on individual to prove that goods are not held for commercial purposes, where such goods are held in excess of minimum indicative levels laid down in the Directive and in Schedule to Order."

The Commissioners have not appealed against this Declaration and have laid Statutory Instruments before Parliament revoking the Personal Reliefs Order from 1 December 2002 and making new regulations designed to comply with EU law.

22. Although the new regulations have not yet taken effect, the Tribunal is obliged to disapply those provisions of the Order which are incompatible with the Directive and to give effect to the judgment and declaration in *Hoverspeed*. In our judgment article 5(2) itself is not incompatible : indeed the factors listed are all matters which would be potentially relevant regardless of the Order.

23. On the basis of *Hoverspeed* (paragraph 130), although it is the Appellant's appeal, the burden of proof is on the Commissioners to establish that the tobacco was held for a commercial purpose. The parties agreed that, although this was the only issue at this hearing, the Appellant would open rather than the Commissioners. This is in fact the Appellant's entitlement under Rule 27(1) of the VAT Tribunals Rules 1986. Arguably the Tribunal could vary the order of speeches under its powers in Rule 19 if the Appellant had applied for it to do so.

The facts

24. We now turn to the facts. The Appellant was stopped in his Volkswagen Golf at 1627 hrs (UK time) at Coquelles before boarding the shuttle. He had a passenger, Steven Charles Horlick. They told Katherine Hudson, who stopped them, that they had been to Adinkerke and had bought five boxes of tobacco. She opened the boot and found five 6kg boxes of Golden Virginia Tobacco, 30 kg in all or 600 pouches. The Appellant said that the tobacco was for themselves and they had paid for it.

25. The officer then interviewed the Appellant in a large garage, noting down the questions and answers. He produced a receipt from Eastenders in Adinkerke for £1,224 in sterling and said that he had paid half.

26. He said that his income was £84 a week, £10 as his mother's carer and £74 income support; he had been looking after his mother for 18 months and before that he was a warehouse supervisor. His weekly disposable income was about £64.

27. He told the officer that he got through three and a half to four pouches a week. He did not know how many roll ups he got from a pouch but the tobacco would last him six to eight months.

28. He said that this was his first time on the train, he had been two weeks earlier on a Car Park Shopper when passengers do not leave the boat. He had also crossed by Car Shopper six weeks or a little more earlier with Mr Horlick. He said that he had not bought back tobacco before - only wine, spirits and chocolate.

29. The Appellant told the officer that they had been talking about coming over for a while; a friend had told them tobacco was cheaper. He had drawn the money out of his savings which were starting to dwindle. The officer asked where he usually bought his tobacco. She recorded him as saying, "Where most people buy it, in the local pubs, you've only got to stand in the shops and you've got people trying to sell you tobacco." He said that he usually paid £4 for a 50 gr pouch.

30. Mr Horlick was interviewed separately. He said that he had been to Spain last year and had done a Park and Shop on the ferry on another occasion when he had bought beer for a party but no tobacco. He had paid for this trip with his credit card, it was organised a couple of weeks earlier. The tobacco had cost £2.04 a pouch, his share was £612. His income was £25,000 a year, his disposable income being £200 a week. He smoked 3 to 4 pouches a week and expected the tobacco to last a year.

31. After the interviews both the Appellant and Mr Horlick signed the officers' notes as true and accurate. Katherine Hudson recorded that they had failed to satisfy her that the goods were not for commercial purposes listing as her reasons:

> "1. Excess MILS" (minimum indicative limits)
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> 2. Tobacco will last 85 weeks each.
>
> 3. Previous opportunities to import tobacco when trips were made on the ferry.
>
> 4. Consumption rate re tobacco - will be out of date before it is consumed."

32. The Appellant told us in evidence that he had been smoking for 35 years and smoked hand-rolled tobacco only. He had drawn £1,000 for the trip to include petrol, food and half the fare. He had bought the Volkswagen Golf about 6 weeks earlier for £12,500, part exchanging a Corsair; his mother had paid the cash balance. It was a hatchback which took his mother's wheelchair; she had died this April, aged 76. He had also installed a CD player.

33. He said that he had been over on the ferry twice before, once three weeks earlier with Mr Wonnacotte to give him a day out; the other time was a month earlier with Mr Horlick. Both times he had taken the Car Park Shopper, had not left the boat and bought no tobacco. He understood that there were no limits to how much he could bring in : there were notices everywhere He said that the garage where he was interviewed was cold and there were no chairs or toilets; he said that he was continually being assured that the next train was in an hour.

34. Cross-examined, the Appellant said that his savings had gone down from £7,200 in 18 months. He paid the tax and insurance for the car from his savings. He realised that his savings were not going to last a whole lot longer and was keeping £3,500 for a motorised scooter for his mother. He did not consider £600 to be a considerable amount to spend on tobacco. He said "Now was the opportunity", his savings were going down. He had seen how cheap tobacco was on the ferry on an earlier trip and was told that it was even cheaper in Adinkerke.

35. He agreed that he had crossed to France on 28 March, 28 August and 6 September 2001; he said that he had not left the boat or bought tobacco on any of those trips, but had bought wine.

36. He denied telling the officer that he had bought tobacco in pubs. He said that he had not read the note properly before signing it because he was concerned to get back to his mother and he had a kidney problem. He said that he had not intended to sell the tobacco.

37. Mr Horlick told the Tribunal that he had gone on one Park and Shop trip with the Appellant, two weeks to a month before 26 September 2001. On 26 September they had left Dagenham early to go from Cheriton in mid-morning. He had £800 with him to buy tobacco. The tobacco was for themselves. He said there were no facilities where they were questioned.

38. He told Mr Barnes that he might have been to Amsterdam with Mr Creamer in March 2001. He had been on a Park and Shop trip with him. He had not bought tobacco on either trip apart from one kilo in March. He had not sought restoration of his own tobacco because of the legal costs.

39. Both officers denied that there was no seating in the garage and said that toilets were available. There was a bench which acted as a table. Katherine Hudson agreed that she did not ask the Appellant if he was going to sell the tobacco and that she had no evidence of actual sales. She said that he had had opportunities to buy before. She agreed that the tobacco was in the boot unconcealed. She said that her reasons for seizure were in her notes. Apart from her notes, she had no further recall.

Conclusion

40. We have to decide whether the Commissioners have satisfied us on the balance of probabilities that the Appellant was holding tobacco with the intention of selling it. No question of gifts or family use arises. He asserted it was all for himself.

41. We are satisfied that Katherine Hudson took an accurate note of the interview. We do not accept that the Appellant was the sort of person to have signed an incorrect note. We do not however attach any substantial significance to the reference to purchasing tobacco in pubs because Katherine Hudson did not do so herself. Even if the Appellant did buy off record tobacco for his own use, that does not mean that he was bootlegging on 26 September.

42. Looking at the factors set out in Article 5(2) of the Order, we note that the Appellant is not a revenue trader and that there was nothing special about the location of the goods, their mode of transport or packaging; the quantity was however substantial and it was personally financed from savings. Article 5(2) requires us to take account of any other circumstance which appears relevant. This includes the sharp difference between the cost of the goods in Adinkerke

(£2.04) and their cost and resale value in the UK, where the Appellant said that he pays £4 a pouch. There was no evidence as to the normal retail cost in the VAT. It also includes the Appellant's financial circumstances.

43. The amount paid for the tobacco was so great compared with the Appellant's resources that the expenditure clearly calls for an explanation. We found the Appellant's explanations to be wholly unconvincing. To spend over £600 on tobacco which would last 75 weeks at 4 pouches a week when he needed all but £2,000 of his diminishing savings to buy a motorised scooter for his mother did not make sense. The purchase did however make economic sense if he was intending to sell a substantial part at a profit, recouping the cost, albeit unlawfully. Nor does it make sense that being a heavy smoker, he bought no tobacco whatsoever on the previous ferry trips. We note that he only admitted to two previous trips until asked about the March trip. We were not impressed by the Appellant as a witness and were satisfied on the balance of probabilities that a considerable proportion of the tobacco was to be resold.

44. As we have already stated the Commissioners accept that the original review was defective on the basis of the decision of the Divisional Court in *Hoverspeed*, there being no evidence of the reason for stopping. In the light of our finding of fact, the application by the Review Officer of the wrong burden of proof as to commerciality is no longer material. When considering any further representations by the Tribunal, it is however necessary for the Review Officer to consider the matter afresh.

45. We direct the Commissioners to carry out a further review within 6 weeks of the decision of the Court of Appeal in *Hoverspeed*. Such review should be by an officer not previously involved, should be on the basis of our findings of fact and should take account of any further representations by the Appellant within 3 weeks of the decision in *Hoverspeed.* We specify 3 weeks, since this review which follows a hearing should receive priority.

THEODORE WALLACE

CHAIRMAN

RELEASED:

LON/02/8048