



**Appeal number FTC/77/2010
[2011] UKUT 194 (TCC)**

***EXCISE DUTIES – was decision of First Tier Tribunal perverse - no –
appeal dismissed***

UPPER TRIBUNAL

TAX AND CHANCERY

HUNOVA-TRANS KFT

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: SIR STEPHEN OLIVER QC (Chairman)
NICHOLAS ALEKSANDER**

Sitting in public at 45 Bedford Square, London WC1 on 22 March 2011

Timothy Deal, instructed by Stockinger & Co for the Appellant

Charlotte Hadfield, instructed on behalf of the Director of Border Revenue

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DECISION

1. The Appellants, Hunova-Trans KFT ("Hunova") appeal against the decision of the First-Tier Tribunal (Tax Chamber) (Adrian Shipwright and Sandi O'Neill) released on 8 April 2010. The First-Tier Tribunal ("FTT") dismissed Hunova's appeal against the decision of HM Revenue & Customs made by a letter dated 21 March 2007 not to restore a DAF tractor unit and its associated curtain sided trailer (together "the Vehicle").
2. The functions of HM Revenue & Customs in relation to the matters which are the subject of this appeal were transferred to the Director of Border Revenue on 5 August 2009.
3. Hunova were represented by Timothy Deal of counsel, and the Director of Border Revenue by Charlotte Hadfield of counsel.

Law

4. The underlying jurisdiction of the FTT in this area is well known. Excise goods on which duty should have been paid (but was not) are liable to seizure. Any vehicle, container etc. used to carry such goods is liable to forfeiture. HMRC have a power to restore items that they seize, and may do so on such conditions as they think proper. Sections 14-16, Finance Act 1994 give the taxpayer the right to require HMRC to review a decision not to restore items seized. The taxpayer has a limited right of appeal to the FTT as regards such a review. On an appeal, the FTT has only the powers set out in section 16. These are to consider whether the decision reached by HMRC was one that they "could not reasonably have arrived at". In other words, was HMRC's decision outside the range of possible reasonable decisions – it does not matter if the FTT would have reached the same or a different decision.
5. An appeal lies to the Upper Tribunal from the FTT solely on points of law. Hunova in their application for permission to appeal express no issue as to the legal basis of the FTT's decision. The only grounds for Hunova's appeal in this case are, in essence, that the decision of the FTT was perverse – in other words the findings of the FTT are such that no tribunal acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. The phrase used by Hunova in the grounds for their appeal was that the decision of the FTT was *Wednesbury* unreasonable (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation*, [1948] 1 KB 223), although *Edwards v Bairstow* [1956] AC 14 (not cited to us) is possibly a more apposite reference.

Underlying factual issues

6. The factual issues are addressed in detail in the FTT's decision. A brief summary will suffice for the purposes of this appeal.
7. Hunova is a Hungarian road transport business, and is the lessee of the Vehicle. The Vehicle left Hungary on 22 August 2006 with a load of tyres for Tours in France.

Hunova had a consignment of white goods to transport from Newcastle-upon-Tyne to Hungary at the start of the following week. Hunova did not want to run the Vehicle empty from Tours to Newcastle, and therefore sought a job from France to the UK. It used a website called TimoCom for this purpose. Hunova were contacted by a man
5 called Michel. Michal did not make contact with Hunova via the TimoCom website, but by a mobile phone. The consignment was 33 pallets of plastic bowls from "Tiltman France SARL" of Compeigne to Norplast in Newcastle. The details of the number of pallets, price etc were agreed on the call as was the place where the customer would meet the Vehicle (a parking area by a motorway exit) and guide it to
10 the customer's premises. Hunova then received a fax from "Tiltman" confirming these details. Hunova checked the name and found a website for "Tiltmann" (two "n's") at the same address. Hunova's transport manager did not consider the differences in spelling, the contact via a mobile phone, or meeting in a parking area to be suspicious.

15 8. The driver took the Vehicle to the meeting place, a parking area at junction 9 of the A1 motorway. He was met by a man, and followed the man's car to the loading site. The Vehicle was loaded at a loading bay with a number of shrink wrapped pallets of boxes.

20 9. The driver then drove the Vehicle to the UK. It was stopped at Dover Eastern Docks, and 5,069,200 cigarettes were found concealed in the load. These cigarettes would attract £808,790.86 in excise duties. The cigarettes and the Vehicle were seized.

25 10. On 9 October 2006 Hunova wrote to HMRC requesting restoration of the Vehicle, on the grounds that they had no knowledge of the concealed cigarettes, and that the forfeiture of the Vehicle would cause undue harm to the Company. On 6 November, HMRC offered to restore the Vehicle on payment of £35,500 as insufficient steps had been taken by the Company to prevent smuggling. On 22 December, Hunova requested a review of this decision. By a letter dated 21 March
30 2007, the review officer gave the result of his review, which was to vary the original decision, and not to restore the Vehicle. The main reason was that the revenue involved was more than £50,000 and HMRC were not satisfied that Hunova were uninvolved in the smuggling. The review officer told the FTT that this decision was unusual.

Decision of First Tier Tribunal

35 11. A summary of the submissions of the parties and the reasons for the FTT's decision are set out in paragraphs 18 to 25 of its decision, as follows:

"The Submissions of the Parties

The Appellant's Submissions in outline

18. In essence, the Appellant submitted that:

(a) the decision was disproportionate having regard to the value of the vehicle, the hardship to the Company and the lack of intent;

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(b) HMRC's decision not to offer the vehicle for restoration was unreasonable. It was even more unreasonable not to do so on terms.

19. The following matters must be borne in mind:

(1) The Company behaved properly.

(2) It complied with industry standards.

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(3) The Driver was not met by a gang but only by one person. The Vehicle according to the Driver's evidence remained within his sight during its loading.

(4) The Driver thought that the description on the CMR matched what was loaded.

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(5) HMRC have taken insufficient account of the Driver's good conduct and have failed to consider the full circumstances.

20 [a]. Accordingly, it is unreasonable and disproportionate not to have allowed restoration of the Vehicle.

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HMRC's Submissions in outline

20 [b]. In essence, HMRC submitted that:

(1) the Vehicle was properly and lawfully seized and condemned as forfeited under paragraph 5 Schedule 3 CEMA.

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(2) The whole setup of the transaction was odd and suspicious. The reasons for this included the following:

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(a) It was strange that the setup was done through a mobile phone call rather than going through the security of the website. There was no attempt to check the phone number on the system. There was no attempt to check the mobile phone number used to call the Company.

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(b) Further one would not expect a responsible haulage company to meet someone in a motorway car park to collect a load if that load was legitimate. This seems foolish and dangerous behaviour.

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(c) The arrangements had all the hallmarks of "slaughter". The apparent load is one of low value that could be easily jettisoned when a diversionary phone call sends the lorry to its real destination where the cigarettes could be unloaded and the plastic bowls dumped.

(d) Taken all together it is unlikely that someone will behave in that way unless there was something in

it for them. It then becomes a perfectly rational explanation for the behaviour.

5 21. The onus is on the taxpayer to show that HMRC's decision does not fall within the range of decisions that meet *Wednesbury* reasonableness. It has failed to do this. The whole of the circumstances must be considered and on doing so it is not unreasonable to conclude that the Company at the very least 'turned a blind eye' and had not done sufficient to prevent the possibility of smuggling. Smuggling by someone was involved here – hence the refusal on review to restore the vehicle. This is not seem unreasonable looking at all the circumstances on HMRC's argument.

Discussion

15 22. The issue for determination here, as discussed above, is whether or not the decision set out in the Decision Letter is within the range of decisions that could reasonably be arrived at.

20 23. We do not consider that what HMRC decided was so disproportionate or gave rise to such hardship that it was a decision that was not within the range of reasonable decisions. Having heard Mr. Rayden [the HMRC officer] give evidence we are confident that he took all the relevant circumstances into account including the Company's point as to lack of intent and good conduct.

25 24. We do not consider it unreasonable to consider that the contact by a mobile and the arrangement to meet in a car park were suspicious. Further we do not consider it unreasonable for HMRC to take into account the possibility of a "slaughter" i.e. where the load appears to be legitimate when it goes through customs and excise but once it has left customs and excise the driver would be telephoned and told to go to a different destination. The contraband would then be extracted and the other goods either sold on or if of a low value destroyed.

30 25. In our view HMRC took all the circumstances into account and reached a decision that was within the range of decisions that could be reasonably arrived at."

35 12. Before considering Hunova's grounds for appeal, we note that there appears to be a misunderstanding in relation to paragraph 21 of the FTT's decision (we also note that there are two paragraphs numbered "20" – we refer to the first at 20a, and the second as 20b). Counsel for Hunova in his skeleton appears to consider that paragraph 21 represents a finding by the Tribunal. We read paragraph 21 (given its context) as merely summarising the concluding submissions made on behalf of HMRC (in much the same way as paragraph 20a summarises the concluding submissions made on behalf of Hunova), and does not represent a finding by the FTT. For this reason we have not considered further those Hunova's submissions which are grounded on paragraph 21 of the FTT's decision being a finding by it.

Hunova's grounds for appeal

45 13. Hunova's application for permission to appeal lists six grounds. Ground 1 is that the decision of the FTT was *Wednesbury* unreasonable. The other grounds (with the

exception of Ground 6) are examples of where the FTT's decision was unreasonable. Ground 6 is that the decision was not sufficiently clear. We deal with each of them in turn:

The FTT erred in not holding that Hunova properly adhered to international freight haulage customs and practice, and demonstrated insufficient experience of Continental standards relevant to this case

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14. In his submissions, counsel for Hunova said that whilst certain incidents (such as meeting in parking areas by motorway exits, or accepting orders by mobile phone) may appear strange to people operating outside the road haulage industry, within the industry they are normal and everyday practice. We note that there was no evidence before the FTT that it was normal and everyday practice in the international haulage industry generally for customers to make contact with hauliers by mobile phone, and to meet the haulage vehicle in a parking area near a motorway exit. In our view the FTT were entitled to reach the conclusion that it was reasonable for the HMRC officer to conclude that the contact by a mobile phone and the arrangement to meet in a parking area were suspicious.

While the FTT accepted the evidence that Hunova did not know of the contraband, the FTT erred in law by imputing to Hunova knowledge of the existence and the intended use of the cargo

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15. There is no finding in the FTT's decision that it "accepted" that Hunova had no knowledge of the existence of the contraband cigarettes. As mentioned above, we consider that the reference in paragraph 21 of the FTT's decision to Hunova having "turned a blind eye" is a reference to submissions made by HMRC, rather than a finding by the FTT. The FTT made no finding as to the knowledge of Hunova. Rather the FTT considered the evidence before the HMRC officer, and concluded that it was reasonable for the officer to find that the circumstances of the importation were suspicious. We consider that there was sufficient evidence before the FTT for it to be able to reach this conclusion.

The FTT erred by applying objectivity assessment criteria to HMRC's decision-making process such as to override objective assessment of Hunova's freight handing procedures. It is Hunova's conduct and intent which is of primary importance in assessing objectivity in restoration of the Vehicle.

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16. The precise meaning of this ground is not entirely clear. From submissions made before us, we consider that it relates to HMRC's attitude towards the procedures adopted by Hunova to prevent their vehicles being used for smuggling. In particular, Hunova submits that in its decision, the FTT did not make express reference to the explanations given by Hunova (and summarised in paragraph's 18 and 19 of the FTT's decision) and why the FTT had rejected this explanation. In particular the FTT had not taken account of the fact that the cigarettes were carefully concealed, and a visual inspection could not reveal them; the palettes were shrink wrapped, and the drivers were not authorised to break seals on packaging; the training given to drivers; and the reputation of Hunova and the absence of any previous involvement by either the

driver or Hunova in smuggling. The FTT had also placed too great weight upon the low value of the consignment.

17. We note that the basis of the decision of HMRC's officer not to offer restoration was not merely that Hunova had not taken adequate measures to avoid its vehicles being used for smuggling, but because he was satisfied, on the balance of probabilities, that Hunova was involved in the smuggling attempt. The FTT state in terms in its decision that it was satisfied that the HMRC officer had taken the conduct and intent of Hunova into account when reaching his decision. We consider that there was sufficient evidence before the FTT for it to be able to conclude that the decision of the HMRC officer was reasonable.

The FTT erred in law by not setting aside HMRC's decision in circumstances where the driver could have used the Vehicle to complete a "sting" operation against the supposed recipient of the contraband

18. The potential willingness of the driver to participate in a "sting" operation is irrelevant to the question of whether or not the Vehicle should be restored.

The FTT's decision is not sufficiently clear. Had a more fully reasoned decision been provided, Hunova would have been better able to analyse the sufficiency of the FTT's decision

19. We find the FTT's decision to be clearly structured and properly reasoned. It sets out the evidence that the FTT heard, and it is apparent that it took account of all of the evidence in reaching its decision, and did not take account of irrelevant factors. It considered whether, in the light of the evidence, the decision of HMRC not to restore was reasonable, and concluded that it was.

Proportionality

20. Although not set out as an express ground for appeal, Counsel for Hunova also made submissions as to the proportionality of HMRC's decision not to restore – the fact that the smugglers had used the vehicle without the knowledge of Hunova meant that the refusal to restore was disproportionate. In addition, Hunova were suffering significant hardship in that it had to continue to make payments for the Vehicle under its lease, but without being able to make use of the Vehicle.

21. The FTT found the decision of HMRC to be proportionate, and we agree. In the light of the quantity of cigarettes and HMRC's conclusion that Hunova were involved in the smuggling attempt, the decision not to restore the Vehicle was proportionate, notwithstanding the hardship arising.

Conclusion

22. We conclude, for the reasons given above, that the decision of the FTT was *Wednesbury* reasonable, and was supportable in the light of the evidence before it.

We find that the decision of the FTT was not perverse and that there was no error of law contained in it.

23. We therefore dismiss the appeal.

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SIR STEPHEN OLIVER

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NICHOLAS ALEKSANDER

**UPPER TRIBUNAL JUDGES
RELEASE DATE: 10 May 2011**

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