

Director and manager liability for customs duty on stolen cigarettes

It is well established law that if cigarettes are stolen from a licensed warehouse, the company that operates the warehouse will be liable for the duty on those cigarettes. However, in a decision that will worry many who work in licensed warehouses, Customs was successful in claiming the duty from a director and a manager of the company that held the license.

The case

In *Zaps Transport (Aust) Pty Ltd, Domenic Zappia & John Zappia* [2017] AATA 202 the Administrative Appeals Tribunal (**AAT**) had to consider who should be liable for duty on cigarettes stolen from a bonded warehouse. Claims had been made against the company that held the warehouse license, a director of the company, and the director's son, a manager who dealt with the day-to-day operations of the warehouse.

Section 35A(1) of the *Customs Act 1901* provides that

"(1) Where a person who has, or has been entrusted with, the possession, custody or control of dutiable goods which are subject to customs control:

(a) fails to keep those goods safely; or

(b) when so requested by a Collector, does not account for those goods to the satisfaction of a Collector in accordance with section 37;

that person shall, on demand in writing made by a Collector, pay to the Commonwealth an amount equal to the amount of the duty of Customs which would have been payable on those goods if they had been entered for home consumption on the day on which the demand was made."

This is a strict test and liability will be imposed regardless of the adequacy of the security measures taken. The key questions was, had the company, the director or manager been "*entrusted with, the possession, custody or control*" of the cigarettes.

The company (warehouse license holder) - The company was held to have been entrusted with the possession, custody or control of the cigarettes. This is the expected outcome.

The director – The director was held to be in overall command of the business and had overall direction over what happened to the goods. This was enough for the AAT to hold that he too should be liable for the duty.

The manager – The manager was also held to be liable. The AAT found that the manager was in possession, custody or control of the goods as he:

1. directed what happened to the goods on a day-to-day basis;
2. exercised delegated authority under which he could accept and release the goods; and
3. employees followed his orders in respect of the goods.

Very harsh decision

Normally directors and managers are protected by the corporate veil and will not be held personally liable for the companies they are associated with. There are justifiable exceptions where the director or manager has procured a breach or acted negligently or dishonestly.

However, in this case there was no suggestion the cigarettes were stolen due to acts of the company, the director or the manager. It is very much a strict liability offence.

Additionally, the legislation imposes liability on the person that has been "entrusted" which the possession, custody or control of the goods. It was the company that operated the warehouse, contracted for the storage of the goods and was entitled to be paid a fee for their storage. The company may have acted through its directors and employees, but that does not mean those directors and employees became the company.

Considerations

Companies need to ensure that their terms and conditions and insurance provide as much protection as possible for not only the company but also its officers and employees.

Directors and employees who have the authority to direct the day-to-day activities of the warehouse need to make sure that they have put in place asset protection measures. It sounds alarmist, but this case shows that your house is on the line if you are a manager in a licensed warehouse and that warehouse cannot account for goods it has received.

Hunt & Hunt has recently drafted warehouse terms and conditions that address these issues. Hunt & Hunt also has an asset protection team to assist businesses and individuals protect their assets from the risks associated with running a business.

Please contact one of our team if you would like assistance.

Customs and Global Trade Contacts

Russell Wiese
Principal

T +61 3 8602 9231
E RWiese@huntvic.com.au

Lynne Grant
Special Counsel

T +61 3 8602 9246
E lgrant@huntvic.com.au

Asset Protection Contacts

Bill Hazlett
Partner, Accredited Business & Commercial
Tenancy Law Specialist
Chartered Tax Adviser

T +61 3 8602 9259
E bhazlett@hunthunt.com.au

Andrew Sinclair
Associate - Estate Planning and Tax
Chartered Tax Adviser

T +61 3 8602 9358
E asinclair@hunthunt.com.au