



**Administrative  
Appeals Tribunal**

**DECISION AND  
REASONS FOR DECISION**

**Zaps Transport (Aust) Pty Ltd, Domenic Zappia & John Zappia  
(Taxation) [2017] AATA 202 (17 February 2017)**

Division: Taxation & Commercial Division

File Number(s): **2016/1275 2016/1276; 2015/5050**

Re: **Zaps Transport (Aust) Pty Ltd, Domenic Zappia & John Zappia**

APPLICANT

And **Comptroller General of Customs**

RESPONDENT

**DECISION**

Tribunal: **Deputy President Bernard J McCabe**

Date: **17 February 2017**

Place: **Sydney**

The decision under review is affirmed.

.....[sgd].....

Deputy President Bernard J McCabe

## **CATCHWORDS**

*CUSTOMS – warehouse licence – licence to store goods subject to customs control excluding petroleum and like products – applicant's licence varied so as to remove the approval to receive, store or move under bond dutiable tobacco and tobacco products – permission to move dutiable tobacco and tobacco products from warehouse not yet granted – dutiable goods stolen – whether the company, director and/or general manager were entrusted with the possession, custody or control of dutiable goods – whether it is appropriate to pierce the corporate veil – decision affirmed*

## **LEGISLATION**

*Customs Act 1901 (Cth) ss 35A, 35(1)(a) & 71E*

## **CASES**

*Collector of Customs for the State of New South Wales v Southern Shipping Company Limited (1962) 107 CLR 279*

*Maclaine Watson v Department of Trade (1989) 3 ALL ER 523*

*Salomon v Salomon & Co [1897] AC 22*

## **REASONS FOR DECISION**

**Deputy President Bernard J McCabe**

**17 February 2017**

1. This case raises questions about who is liable for any unpaid duty and GST on bonded goods that are stolen whilst in custody. The Comptroller-General of Customs says the company which owns the bonded warehouse is liable, but so are two of the officers of the company.
2. The respondent is right in relation to the applicants' liability for the unpaid duty. I explain my reasons below.

## WHAT HAPPENED?

3. Zaps Transport (Aust) Pty Ltd (Zaps) operated a bonded warehouse at Smithfield in the western suburbs of Sydney. Importers of goods that were dutiable could land the goods and store them in a bonded warehouse (like the Zaps' warehouse) before the import duty was paid. But the obligation to pay duty was only suspended. The amount of the duty had to be paid before those goods were released onto the market.
4. Some imported goods are subject to very high rates of duty. Taxes comprise a significant part of the retail price of alcohol and cigarettes. Cigarettes, in particular, present an attractive target for black marketeers who try to source stock for sale – from overseas, or by way of theft – that could be sold in Australia without paying duty. The provisions of the *Customs Act 1901 (Cth)* (the Act) have been shaped with that risk to the revenue in mind. Part V of the Act includes licensing provisions which regulate the handling of imported goods. The Act also includes sweeping liability provisions that are designed to protect the revenue if anything goes wrong while dutiable goods are in custody.
5. Zaps held a warehouse licence (No 6379) issued under Part V of the Act. The licence authorised Zaps to store 'Goods subject to Customs control excluding petroleum and like products' – a category that included alcohol, tobacco and tobacco products. Zaps had commercial arrangements with a number of companies that imported cigarettes, including Richland Express Pty Ltd. Under the arrangement with Richlands', Zaps held a stock of cigarettes in its warehouse on an ongoing basis. It stored tobacco and tobacco products for other companies as well.
6. A copy of the warehouse licence is reproduced in exhibit one, T2 at pp 58-63. The licence was issued on 14 November 2014 but commenced on 3 July 2010. It was set to expire on 30 June 2015. The licence names the company. It does not expressly identify any other person although the licence includes a condition that the company would inform the Australian Tax Office ('ATO') (which administers the Act) in writing of any other person 'participating in the management or control of the warehouse': exhibit one, T2 at p 59.
7. I understand there is no dispute that the details of Mr John Zappia ('John') were provided to the ATO. John was a director of Zaps at all material times. John's son, Mr Domenic Zappia ('Domenic'), was a manager employed by the company who dealt with the day-to-

day operations of the warehouse. I understand Domenic's name was also supplied to the ATO.

8. The scope of the licence was varied on 15 April 2015. Thereafter, the licensee was only authorised to store 'Goods subject to control being alcohol': exhibit one, T3 at pp 64-67. The authority to store tobacco and tobacco products had been withdrawn. The change occurred following thefts of cigarettes stored in the Zaps' warehouse. The most recent theft had occurred on 5 April 2015. But there was worse to come.
9. Zaps still held a quantity of cigarettes after the change in its authority. It asked for permission to move the cigarettes to appropriately licensed premises. The permission was required under s 71E of the Act. Permission was not forthcoming. The cigarettes remained where they were as Zaps and the respondent negotiated over what to do. (Zaps was also negotiating with Richlands over Richlands' obligation to reimburse Zaps for liabilities it had already incurred in respect of dutiable goods that had disappeared on earlier occasions. John acknowledged in cross-examination that Zaps was asserting a warehousemen's lien over the goods: transcript at p 22.) On 23 May 2015, there was a further break-in during which 400,000 sticks (i.e. individual cigarettes) were stolen from the warehouse (exhibit one, T1 at p 5).

#### **THE STATUTORY NOTICES OF DEMAND**

10. The respondent served notices of demand on Zaps, John and Domenic. The notices were issued under s 35A of the Act. In the notices, the respondent demanded payment of the whole amount of the duty payable on the cigarettes stolen during the break-in on 23 May 2015 together with the amount payable in respect of the Goods and Services Tax ('GST') on those goods. The notices are each dated 27 August 2015: exhibit one, T1 at pp 3-5; 6-10 & 11-13.
11. I should pause to dispose of the claim for unpaid GST. The GST component of the decision was barely discussed during the course of the hearing. In its statement of facts, issues and contentions the respondent said the Tribunal did not have jurisdiction to deal with the decision to impose GST. The applicants effectively conceded the point in their final written submissions when they indicated they would file amended business activity statements. I am satisfied the Tribunal does not have jurisdiction to deal with the GST claim because the reviewable decision in this case was the decision to make a statutory

demand under s 35A of the Customs Act. The GST liability does not arise under that Act. Objections to GST are dealt with under a different process. In these reasons, I will focus on the demand made under s 35A of the Act.

12. The power in s 35A is wide. Startlingly wide, in fact. Section 35A(1) says:

(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.*

13. There is no doubt the goods in question were dutiable, and they were not kept safely. While I was provided with evidence about security measures that were implemented at the Zaps warehouse, those measures failed. In any event, nobody was able to account for the dutiable goods when called upon to do so. (An explanation of how one might account for the dutiable goods to the Collector of Customs is set out in s 37 of the Act. Suffice to say nobody did the things referred to in s 37.)

14. Section 35A imposes strict liability. As the High Court explained in *Collector of Customs for the State of New South Wales v Southern Shipping Company Limited* (1962) 107 CLR 279, it makes no difference if the responsible person had taken reasonable steps to secure the goods. If something happened to the goods which results in a loss of duty, responsibility for that loss falls on the person or persons 'entrusted with...the possession, custody or control of excisable goods': per Dixon CJ at p 287.

15. The question, then, is whether any or each of Zaps, John or Domenic were *entrusted* with the goods at the time of the theft or when called upon to account for the goods. Different issues arise in relation to each applicant.

**Was Zaps entrusted with possession, custody or control of the dutiable goods?**

16. Zaps is a legal person. It was clearly *entrusted* with possession, custody *and* control of the goods when they were delivered into its warehouse in the ordinary course of business.

But was Zaps still in possession, custody or control of the goods after its licence had been varied to remove the authorisation to store tobacco and tobacco products? Recall that the change to the licence occurred on 15 April 2015 and the company thereafter requested approval under s 71E to move the goods, but that approval had not been given by the time of the theft on 23 May 2015. Zaps argued it was no longer lawfully entitled to hold the goods once the licence was changed, but it was prevented from moving the goods because it was not authorised to do so. Zaps argued it was no longer *entrusted* with the goods after the licence variation.

17. I disagree. Zaps was still exercising physical control over goods that were held in its warehouse under the direction of its employees after the licence was changed. It sought to assert that control against strangers: the goods were kept under lock and key and Zaps would presumably have resisted any attempt to carry off the goods without permission. Its relationship with Richland also continued after the licence was changed. Richland had *entrusted* the goods to Zaps when it delivered them and Richlands had every right to expect Zaps would continue to deal with the goods – subject to the law, of course – at Richland's direction.
18. The question of Zaps' possession, custody or control was probably resolved beyond doubt during the cross-examination of John. John confirmed there was a commercial dispute with Richlands over its liability to pay duty that was payable on other goods. Zaps was asserting a possessory lien over the goods at the time of the theft: transcript at p 22-23.
19. Zaps' written outline of its case said mere possession, custody or control was not enough: the way in which the company came into possession, custody or control was important too. If it were not *entrusted* with the goods, then the section did not apply. But Zaps was entrusted with the goods, at least initially. They were delivered by Richlands for storage in the ordinary course of business. It did not relinquish that possession when the licence changed, even if it should have done so. It still held the goods for Richlands, albeit subject to a lien that arose in the ordinary course of a warehouseman's business. The character of the company's possession, custody or control did not change. The change to the licence is, for present purposes, a red herring. There is simply no basis for exempting Zaps from liability.

**Were John or Domenic entrusted with possession, custody or control of the dutiable goods?**

20. John and Domenic also argued that if they had been entrusted with the goods by Richlands then they ceased to be entrusted once the licence was varied. That argument must fail for reasons I have already explained. But John and Domenic sought to rely on other grounds as well.
21. I should say a word about the position of John. John became a bankrupt during the course of the proceedings. His trustee wrote to the Tribunal on 20 October 2016 to say he did not wish to play any further role in the proceedings. By that point, the evidence was complete. The trustee's representative was asked to appear briefly by phone and it was agreed the Tribunal would proceed to make a decision in relation to John's claim without any further input on his behalf. Mr Hall, who had previously acted for both John and Domenic, agreed he would continue to act on Domenic's behalf.
22. John was a director of Zaps at all material times. It was clear from the oral evidence of John and Domenic that John was in overall command of the business. John approved the arrangement with Richlands, had overall direction of what happened with the goods and demanded that the lien be asserted: transcript at pp 21-22, 25-26, 48 & 51-53.
23. Domenic was employed as a manager albeit that Zaps was, in effect, a family business. His role must be understood in the context of the relationship he had with John. Domenic did not simply report to John in the course of a master-servant relationship. John was Domenic's father, which makes for a much richer, more textured relationship.
24. Domenic agreed in his oral evidence that he was employed to oversee operations at the warehouse: transcript at pp 44-45. In the course of cross-examination, Domenic said he made the operational decisions at the warehouse, albeit that he delegated some matters to staff: transcript at p 45. Domenic said he attended to the documentation required for customs' purposes. He agreed he oversaw what happened to the goods and that he was responsible for what happened – although he added he was subject to the direction of his father. He initially said he was not responsible for communicating with the ATO. His father took care of most of that. Domenic subsequently agreed he *did* handle some of the paperwork and communications with the ATO, but insisted he did so at his father's

direction: transcript at pp 46-47. He also said he did not have any input into the decision to claim a warehousemen's lien over the goods: transcript at p 53.

25. Domenic explained in his oral evidence that he was subordinate to his father in the business. Domenic said his father gave him operational control, but Domenic was required to refer anything 'big' – anything that might require legal advice or have tax implications – to his father for resolution: transcript at p 64.
26. I note Domenic met with officers from the ATO on 25 May 2015 to discuss the break-ins that occurred. He represented the company without his father being present in those dealings: exhibit one, T6 at pp 73-75.
27. Before I reach a conclusion about whether John and Domenic were entrusted with control of the goods, I should address a threshold argument. John and Domenic argue the company was the *person* in charge of the goods. It was the entity with responsibilities under the Act; it was named in the licence, and it was the entity that contracted with Richlands and other customers. John and Domenic point out they had no independent relationship or arrangement with Richlands, or any other customer of Zaps, precisely because those other businesses were Zaps' customers. They said they were entitled to remain behind the corporate veil.
28. That argument has significant appeal on its face. The separate legal entity doctrine is alive and well. The logic identified in *Salomon v Salomon & Co* [1897] AC 22 has been endorsed repeatedly, including by the House of Lords in *Maclaine Watson v Department of Trade* (1989) 3 ALL ER 523. Courts are reluctant to draw aside the corporate veil in the absence of a clear intention from parliament that they should do so. Their reticence is understandable: the separate legal entity doctrine enables businesses to manage risk and reduce transaction costs, which makes the economy work better. But the respondent says this is one of the exceptional cases where it is appropriate to look behind the veil and impose liability on those who shelter behind it.
29. The respondent's argument arises out of the language of s 35A. Mr Gollan, for the respondent, pointed out the section operates as a drag-net. It was clearly intended to cast a *very wide net*. I agree. The drafting of the section reflects an almost ruthless determination to protect the revenue. If the section had only referred to *possession* of the



goods, it would be easier to see how the individual applicants could argue their involvement with the goods was purely in their capacity as corporate officers, so that the corporation alone was in possession. But the section casts the net wider to include those who might have custody *or control*. Corporate officers might exercise *control* in the relevant sense in the course of discharging their responsibilities. Whether a particular officer or employee exercises control in relation to goods in a given case will be a question of fact.

30. I am satisfied John exercised control over the goods in the relevant sense, and he was entrusted with that control in his capacity as an officer of Zaps. All of the evidence points to him being in charge.

31. I am also satisfied Domenic exercised control over the goods, albeit that his control was subordinate to that of his father and – ultimately – that of the company. The evidence establishes that he was the one who directed what was to happen to the goods on a day-to-day basis. He exercised delegated authority under which he could accept and release the goods. If he gave orders with respect to the goods, the employees followed them. His operational role was underlined by the fact he met with the officers from the ATO on 25 May 2015 to discuss what had happened to the goods.

## CONCLUSION

32. I am satisfied the statutory demands for the recovery of unpaid duty were properly made. The decision to issue each of the demands is affirmed.

*I certify that the preceding  
32 (thirty-two) paragraphs are  
a true copy of the reasons for  
the decision herein of Deputy  
President Bernard J McCabe*

.....[sgd].....

Associate

Dated: 17 February 2017

Date(s) of hearing:

**28 October 2016 & 12 September 2016**

Counsel for the Applicant:

**Mr T Hall**

Counsel for the Respondent:

**Mr M Gollan**