TC02041

Appeal number: TC/2010/08224

Excise duties – Restoration - Reasonableness of decision to not to restore used vehicle and trailer seized in the course of smuggling tobacco into the UK – Second seizure within a short period after a similar incident — In both cases driver responsible and haulier not complicit - UKBA's decision based on conclusion that haulier's standard of care was inadequate – Whether decision reasonable in all the circumstances – No – Appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

LOGISTIKA PEKLAJ AS **Appellant**

- and -

UK BORDER AGENCY **Respondents**

TRIBUNAL: JUDGE TIMOTHY HERRINGTON
MICHAEL BELL, ACA CTA

Sitting in public in London on 3 March 2012

Mr Benjamin Douglas Jones, for the Appellant

Mr Stuart Lill, instructed by the General Counsel and Solicitor to UK Border Agency, for the Respondents

DECISION

Introduction

1. Logistika Peklaj AS d.o.o, ("the Appellant") a company carrying on business in Slovenia, appeals against a decision of the UK Border Agency ("the Respondents") to refuse to return the Appellant's seized tractor and trailer. The tractor is a DAF Unit, registration LTJPAS09 and the trailer is a Curtainsider Trailer, registration LTPASIIJ. This vehicle was seized on 10 May 2010 and is referred to in this decision as ("the May Vehicle").

Findings of Fact

2. The facts were largely undisputed, in part derived from correspondence and in part derived from a witness statement from Sabina Koritnik, the General Manager of the Appellant, who also gave oral evidence. Ms Koritnik was cross-examined by Mr Lill for the Respondents but the focus of his cross-examination was to challenge the effectiveness of the Appellant's procedures against smuggling rather than the factual evidence provided by the witness. We found Ms Koritnik, who gave her evidence through an interpreter, to be a credible witness and accept her evidence and consequently find as a fact the matters she described as set out below.

3. There was also a witness statement from Mr Ian Sked, the officer who reviewed the decision not to restore the May Vehicle. Due to illness Mr Sked was not able to attend the hearing of the appeal. Mr David Harris, who is another officer of the Respondents responsible for conducting similar reviews, gave evidence to the effect that he had reviewed the case papers and confirmed that had he conducted the statutory review he would have come to the same conclusion as Mr Sked. Mr Harris also gave evidence to assist the Tribunal in clarifying the Respondents' policy on the restoration of seized commercial vehicles.

4. On 26 April 2010, a vehicle similar to the May Vehicle and also owned by the Appellant was stopped by Border Force Officers and found to contain 504.7 kilogrammes of hand-rolling tobacco concealed within the trailer load of furniture. This vehicle was driven by an employee of the Appellant, a Mr Branislav Cilibrk ("Mr Cilibrk"). As there was no evidence that duty had been paid on the tobacco it was seized under section 139 of the Customs and Excise Management Act 1979 ("the Act") and as the vehicle had been used to carry goods that were liable to forfeiture under section 141(1)(a) of the Act it was also seized and was also liable to forfeiture. This vehicle is referred to in this decision as the "April Vehicle".

5. According to Ms Koritnik's evidence, on 26 April 2010 a short telephone call from Mr Cilibrk was received by the Appellant. That call was made from a telephone booth as the driver's mobile had been taken by UK Customs. Mr Cilibrk stated that his lorry had been seized due to "some tobacco being found inside a load from Italy". The call could not be returned for further clarification as the Appellant was not given

any telephone number that they could call. The Appellant was not able to ascertain the amount of tobacco involved. At this point it was hoped that the tobacco would be for the personal use of the driver and not prove to be more serious than this.

6. Several calls were made to the Respondents by the Appellants between 26 April 2010 and 29 April 2010 to obtain information about what had happened to the April Vehicle and when it would be released. The Appellant was given various telephone numbers and names. The Appellant also sought advice from the Slovenian Chamber of Commerce but they were unable to help.

7. Because the Appellant was unable to ascertain what was happening it instructed solicitors based in Kent, who contacted the Respondents on its behalf and subsequent to which a fax was then received on 30 April 2010 from the Respondents.

8. In its fax of 30 April 2010, the Respondents stated that they were considering the Appellant's request for the restoration of the April Vehicle. The fax stated that they would consider among other factors, the involvement or otherwise of the Appellant and the steps that the Appellant has taken to prevent their vehicles being used to carry smuggled goods. In order that the request could be given further consideration the Respondents requested the Appellant to provide copies of employment references from Mr Cilibrk's previous employer, details of the checks the Appellant made to ensure the legitimacy of the consignor and the consignee and details of any physical checks made of the load.

9. Following receipt of this on 3 May 2010 a written notice was given by the Appellant to all the drivers and staff advising them that in view of the fact that the April Vehicle had been seized because it was apparent that tobacco had been found on board, they must be extra careful and vigilant when abroad that the Appellant's procedures regarding illegal goods were followed to the letter. The notice went on to say:

> "Any member of office staff or drivers that is found to be involved in any kind of illegal smuggling of drugs, tobacco, or any other illegal substances or materials will be instantly dismissed from the job and the Company will use full legal power to prosecute that persons."

10. The Appellant at this stage believed that Mr Cilibrk was being held in custody and began an internal investigation to check their GPRS system, which monitors the movements of all its vehicles, to establish the route Mr Cilibrk had taken in readiness for a disciplinary hearing they proposed to hold for him.

11. Whilst these investigations were ongoing, on 10 May 2010, the May Vehicle was stopped by Border Force officers and found to be carrying 336.5 kilogrammes of hand-rolling tobacco concealed in a "coffin concealment" within a load of pasta that was being transported. This vehicle was being driven by an employee of the Appellant, a Mr Igor Markovic. Again, as there was no evidence that duty had been paid on the tobacco, it was seized under s 139 of the Act and the May Vehicle was seized under s 141(1)(a) of the Act.

12. On 11 May 2010 the Appellant requested the return of the May Vehicle. As was the case with the April Vehicle, the Appellant denied any involvement with the smuggling undertaken by the drivers concerned. This position has been accepted by the Respondents in respect of both incidents. On 19 May 2010 the Respondents wrote to the Appellant seeking the same information as it sought it relate to the April vehicle, as set out in paragraph 8 above.

13. Whilst the Appellant was investigating the circumstances of this second seizure, a further notice was sent to all its drivers as follows:

> "Under no circumstances do not take abroad in Company's vehicle any tobacco, cigarettes, alcohol, drugs or any other packages or goods from anyone.
>
> If anybody approaches you and offers you any of the above goods, immediately contact the office.
>
> Do not tamper with the vehicles' GPRS system or Tacco system, if you have any problem with any of this contact office immediately and await for instructions.
>
> Do not deviate from assigned route unless instructed specifically by the Traffic Manager. Any route deviation over 5 kilometres to be relayed immediately to the office with the reason for deviation which will be recorded."

14. At the same time the Appellant circulated a further document setting out detailed rules for drivers covering, among other things, ensuring the integrity of loads that are being transported, and in particular this document reiterated that no unauthorised loads could be carried and that only small quantities of tobacco for personal use was to be carried in the cab of the vehicles.

15. Ms Koritnik stated that the reason why the drivers were told in the circular referred to in paragraph 13 above not to tamper with the GPRS system or deviate for more than 5 kilometres from the route that they were supposed to travel was that during the investigation carried out in respect of the seizure of the April Vehicle it had become suspected that the driver had disconnected his GPRS system during a deviation from the prescribed route into Luxembourg and that the Appellant was concerned that this was where the illegal tobacco was loaded on to the April Vehicle.

16. Again on 17 May 2010, the Appellant also sent a message to all the 23 drivers who were on the road. The message was sent via the GPRS system which would be immediately visible on each driver's screen. It stated:

> "Compulsory route for transit from Germany for all export goods is AB-A5-A61-Aachen or A8-A7-A6-A61 Aachen. Absolute prohibition for any transit via Luxembourg."

17. As indicated above, the Appellant had carried out an investigation into the GPRS records of the April Vehicle, in respect of the journey which resulted in its seizure and after the seizure of the May Vehicle it did the same in relation to that vehicle.

18. The results of the investigation into the route of the May Vehicle showed Mr Markovic stopping near the Luxembourg border for a period of three hours 55 minutes. The driver had turned off the motorway, the E25, and took a local A Road. It appeared from these records that the driver moved the vehicle three times for approximately 20 minutes during the near four hour period that he was stopped.

19. As a result of the Appellant's suspicions being aroused by its initial analysis of the GPRS records they wrote to all the drivers on 17 May 2010 in the terms set out at paragraph 13 above. On the same day, 17 May 2010, the Appellant also sent the message to all the 23 drivers who were on the road referred to in paragraph 16 above. That message was sent via the GPRS system which Miss Koritnik stated would be immediately visible on each driver's screen. The message stated unequivocally that the drivers were prohibited from stopping in Luxembourg.

20. Ms Koritinik's evidence was that these investigations involved a considerable amount of staff time in what is a very small administrative office backtracking the route of each driver checking each stop and correlating the written and map displays with verifiable data and phone calls. She also stated that the Appellant interviewed their other drivers and asked them if they had ever been approached by criminals particularly in Luxembourg who had asked them to smuggle tobacco in to the United Kingdom.

21. None of the other drivers said that this has been the case but they had anecdotal stories of drivers being offered to be paid in excess of £2,000 at various driver parks in Luxembourg by men who they described as "seagulls" if the driver would agree to smuggle tobacco and alcohol into the United Kingdom.

22. In the light of this information the drivers were advised in the terms of the notice dated 17 May 2010 to notify the Appellant if any such approach was made to them and also not to tamper with the vehicle's GPRS system or depart from their assigned route.

23. The analysis of the GPRS system carried out by the Appellant in respect of Mr Igor Markovic revealed that he did stop in Belgium and stopped the night with a relative. Ms Koritnik stated that this is not unusual for drivers to do and drivers will often turn off the motorway where there is nowhere to park and find somewhere safe to leave the vehicle. Miss Koritnik stated that this "deviation" from his route was no more than 5 kilometres and added nothing whatsoever to the fuel costs that were incurred. The GPRS record showed Mr Markovic's stay with his relative was from 19.41 to 11.06 the next day for a period of 14 hours 40 minutes.

24. Ms Koritnik was asked what steps were taken to monitor drivers and the routes they were taking using the GPRS system. She explained that the system was not designed to monitor movements on a continuous basis, but the records may be checked every few hours to see if other drivers were deviating from the prescribed route in any material respect. The journeys that led to the seizures took place over weekends so inevitably the monitoring would be less at those times. Neither the stop in Belgium by Mr Markovic to stay with his relative or the stops in Luxembourg by

the two drivers would have generated much interest as they were not far off the prescribed routes and drivers were expected to stop for rest breaking from time to time. The prime purpose of the GPRS system was to monitor the position of drivers to manage vehicle movements efficiently, making it easier to give instructions regarding deliveries and re-route vehicles or change drivers for particular deliveries where it would assist in managing the business efficiently.

27. Nevertheless, according to Miss Koritinik the conclusions of the review of both drivers journeys (which was completed in the case of Mr Markovic by 21 May 2010) was that the tobacco must have been loaded during the respective drivers' stops in Luxembourg, a conclusion that was clearly arrived at with the benefit of hindsight.

25. On 27 May 2010 the Appellant gave written notice to Mr Cilibrk that he was required to attend a disciplinary meeting on 1 June 2010. On the same day the Appellant gave notice to Mr Markovic that he was required to attend a disciplinary meeting on 7 June 2010. Ms Koritnik stated that the reason why Mr Markovic was required to attend a week later was that more time was needed to analyse his GPRS records.

26. On 1 June 2010 Mr Cilibrk failed to attend his disciplinary meeting and was summarily dismissed by the Appellant and on 7 June 2010 Igor Markovic failed to attend his disciplinary meeting and was also summarily dismissed by the Appellant .

28. Ms Koritnik described the processes for employing drivers. All non-Slovenian drivers (which included Mr Cilibrk and Mr Markovic who were both Serbian nationals) had to be approved and verified by the Slovenian Ministry of Traffic and the Chamber of Commerce of Slovenia who would if satisfied issue a certificate to that effect. The drivers were employed pursuant to standard form contracts prescribed by Slovenian law which cannot be deviated from. These contracts would be sent to the Slovenian Employment Ministry in support of an Application submitted by the Appellant asking for permission to employ the driver. The Employment Ministry then approve the Contract and either give or refuse permission to employ the driver. Normally permission is only given for the driver to work for one year when this has to be reviewed. Before a driver is employed verbal references are usually taken (as was the case with Mr Cilibrk and Mr Markovic) but reliance is placed on the verification procedures carried out by both the Slovenian Employment Ministry and the Chamber of Commerce of Slovenia before any driver is issued with a certificate. Any driver who had a criminal record would not be issued with a certificate or the necessary work Visa. Although the contracts were written in Slovenian, which was not the native language of Mr Cilibrk and Mr Markovic, Ms Koritnik's evidence was that the two languages are very similar and the drivers would have been able to read and understand the contracts.

29. Ms Koritnik admitted that although the contracts of employment do not specifically provide that should a driver use his employer's lorry for smuggling he would be liable to dismissal the terms of the contract do make it clear that if the employee is suspected of committing a criminal offence that they can be summarily dismissed. She also mentioned that at the commencement of their employment both

drivers were given a separate document setting out a non exhaustive list of the circumstances in which their employment can be terminated without the need for notice to be given in accordance with their contracts of employment. This statement included as an example actions that damage the employer, performed at work or in connection with work. In addition the drivers were required to sign an instruction letter stating that no unauthorised persons or prohibited goods or goods of suspicious character are to be taken to the United Kingdom. The same document also requires the drivers to check the vehicle for unauthorised goods or persons. Ms Koritnik admitted that this latter document had been prepared specifically as a response to the known risk of illegal immigrants seeking to board lorries without the knowledge of the drivers to obtain entry to the United Kingdom (which had in fact happened to the Appellant) and although the notice did make a mention of prohibited goods it was not explicit in relation to smuggling. Ms Koritnik admitted that smuggling of goods such as tobacco into Slovenia is not a common activity, and so would not be an issue they would have thought to focus on specifically.

30. Ms Koritnik confirmed that both Mr Cilibrk and Mr Markovic signed a letter of instruction in the form described above. As is set out in their contracts of employment the drivers are primarily responsible to ensure that a consignment is collected at its point of departure, in respect of both incidents, Italy, and delivered to its ultimate destination in the United Kingdom without due delay.

31. Ms Koritnik explained that the Appellant ensures that all drivers are familiar with Customs' procedures and in both these specific cases there should have been no reason at all for either consignment the drivers were legitimately transporting to have been opened after the goods were collected. Both consignments consisted of one delivery for a specific UK customer so all the driver had to do was to ensure that it was properly loaded and remained intact until such times as he was in a position to delivery the consignment to the UK customer.

32. When cross-examined Ms Koritnik stated that no specific training was given regarding the terms of the employment contracts or the letter of instruction and the first specific notice regarding the prohibition on smuggling and the consequences of it was given on 3 May 2010, followed up by the second message on 17 May 2010, consequent upon the seizure of the vehicles. Mr Lill questioned why the response to the incidents was to send out letters other than speak individually to the drivers. Ms Koritnik explained that initially it was felt important to establish all the facts and in any event all the drivers would be deployed across Europe so it would have been impossible to set up meetings with them at short notice.

33. Against that background, we turn to the decisions made by the Respondents with regard to the Appellant's request for the return of both vehicles.

34. Somewhat unusually, a decision appears to have been made in respect of the May Vehicle first. This was set out in a letter dated 2 July 2010 from the Respondents to the Appellant's representative. The officer making the decision concluded that the Appellant had been complicit and/or reckless in this case, and applying the Respondents policy in restoration, on the basis that this was the first

detection of smuggling against the Appellant, restoration of the May Vehicle was offered upon payment of £32,500, the trade value of the vehicle.

35. The Appellant exercised its right to have the decision reviewed by an impartial Review Officer. This review was carried out by Mr Sked and his decision was set out in his letter of 22 September 2010 addressed to the Appellant's representative ("the Review Letter"). Mr Sked's conclusion was that the May Vehicle should not be restored.

36. The Review Letter set out the underlying principles of the Respondents' restoration policy as follows:

- Vehicles used to transport smuggled goods should be seized, as this has a significant deterrent effect.
- Vehicle restoration policies should provide a graduated response, depending on
    - the degree of blame which can be attributed to the individual, and,
    - the potential harm caused by the attempted smuggle.
- Vehicle restoration policies must also recognise that there will be occasions when overriding humanitarian principles warrant a departure from the normal restoration criteria.
- Vehicles specifically adapted to facilitate smuggling should not normally be restored.
- The general policy is that vehicles used for smuggling or for transporting diverted excise goods within the UK will be seized and not restored.
- This policy is aimed at those who are profiting from smuggling (either through regular trips, by smuggling larger amounts less frequently or as a one-off attempt).
- However, restoration can be offered in exceptional cases/circumstances."

37. The letter then set out the matters that Mr Sked had taken into account in coming to his decision and the relevant policy applicable as follows:

> "In considering whether restoration would be appropriate in this case, it first had to be established who was involved in the smuggling attempt:
>
> 1. Smuggling by driver
> 2. Smuggling by haulier
> 3. Smuggling by third party (e.g. consignee/consignor)
>
> 1. I am satisfied that the driver was involved in this smuggling attempt. I do not believe it possible that the tobacco could have been loaded or unloaded without the driver's knowledge or co-operation.
>
> 2. Peklaj state that they had no involvement in this matter and are an innocent party. In considering their involvement, I have taken account of the following:
>
> - I note that the contracts with the drivers requires the drivers to "perform their duties conscientiously, professionally,

timely, with quality, carry out instructions and authorisations according to the law, general documents of the company and conclusions and reach the expected results." The contracts do not warn of the consequences of drivers being involved in smuggling offences.

- Their drivers carry a copy of Peklaj's written instructions/procedures in relation to checking their vehicles/loads for unauthorised persons and things prior to entering the UK, but again there is no specific mention made in relation to the consequences of drivers being involved in smuggling offences.
- On 25 April 2010, only 15 days previous, another of their vehicles was found attempting to smuggle 505.7kg of tobacco into the UK from Belgium. The duty due on that importation amounted to £66,764.77.
- Knowing at that time that an employee was involved in smuggling, still no written warning was issued to any other employee/driver of the consequences of being involved in smuggling.
- The company have tracking devices on all their vehicles, so know where their vehicles are at any time – and would know if their vehicles go off-route. In this case the vehicle was travelling with a load from Italy to the UK via Calais/Dover. They state that the driver took a break in Belgium to visit friends. This stop was clearly not on the planned route, and would have added considerable time to the journey, and such a detour which would have increased the fuel costs of the trip. Although this unplanned stop in Belgium happened within 2 weeks of one of their other vehicles being seized for smuggling tobacco into the UK, they took no action to prevent their driver in acting in this unusual way.
- I find it suspicious that 2 of their vehicles have been used in almost identical smuggling attempts in a 15 day period. There were different drivers involved in the smuggling attempts, different consignors/consignees – the only constant being Peklaj.

Taking all information into account, I believe that there is insufficient evidence that Peklaj were directly involved in the smuggling attempts. However, it is clear that they have no deterrent in place to prevent their employees using their vehicles for this purpose. I must therefore conclude that Peklaj are negligent as they did not take reasonable steps to prevent their staff from smuggling in their vehicles.

3. There is no evidence of a third party involvement.

Taking all the above into account I am satisfied that this case should be treated as a "smuggling by driver". Restoration can be considered in the following situations.

Smuggling by Driver

These situations envisage a smuggling attempt in which it is the driver (and not the haulier) who is either responsible for, or complicit in the smuggle.

Driver – first detection

- Haulier has taken reasonable steps to prevent drivers smuggling – seizure of tractor unit and restoration free of charge. Where possible, the letter advising of the restoration decision should include a warning that future offences may result in the vehicle not being returned.
- Haulier has not taken reasonable steps – seizure of tractor unit and restoration for 100% of the total revenue evaded or the trade value of the tractor unit, whichever is the lower, together with the issue of warning letter.

Same driver, same haulier – second or subsequent detection

- second or subsequent detection within 6 months – trader unit is to be seized and not restored,
- first detection more than 6 months ago – seizure of the tractor unit and restoration for 100% of the total revenue evaded or the trade value of the tractor unit, whichever is the lower, together with issue of warning letter.

Same driver, different haulier – first detection

- Haulier has taken reasonable steps to prevent drivers smuggling – seizure of tractor unit and restoration free of charge, with issue of a warning letter.
- Haulier has not taken reasonable steps – seizure of tractor unit and restoration for 100% of the total revenue evaded or the trade value of the tractor unit, whichever is the lower, together with issue of warning letter.

Same haulier, different drivers – first detection

- Haulier has taken reasonable steps to prevent drivers smuggling – seizure of tractor unit and restoration free of charge, with issue of a warning letter.
- Haulier has not taken reasonable steps – seizure of tractor unit and restoration for 100% of the total revenue evaded or the trade value of the tractor unit, whichever is the lower, together with issue of warning letter.

However, as this case would fall into the last category above ("Same haulier, different drivers") and as this is the second detection (the first being only 15 days earlier), restoration is **not** appropriate in this case."

38. The Review Letter concluded by stating that there were no circumstances amounting to exceptional hardship which would lead to a conclusion that the May Vehicle should be restored. In essence, the decision appears to have reversed the original decision on the basis that the original review had not taken account of the fact that since this was the second detection against the Appellant, correct application of the policy should result in the vehicle not being restored.

39. On 21 October 2010 the Appellant lodged a notice of appeal seeking the return of both the April and May Vehicles.

40. On 3 November 2010 the Respondents agreed to return the April Vehicle free of charge. It is not clear to us on what basis this decision was made as the relevant decision notice has not been submitted in evidence. If the Respondents applied the policy set out in the Review Letter it would appear that it would have done so on the basis that they were satisfied that the Appellant had taken reasonable steps to prevent the drivers smuggling.

41. In a witness statement dated 22 November 2010 which was admitted as evidence, Mr Sked set out what he regarded as the reasonable steps a haulier should take to present drivers smuggling and thereby minimise the risks of having any vehicle used for smuggling being forfeited, as follows:

> "I would expect a haulier involved in transporting goods across international frontiers not just to and from the UK) to make reasonable checks of the drivers to prevent smuggling and to be very well aware of the risks involved in illicit loads carried by drivers including the smuggling of firearms, explosives and excise goods. As a matter of routine I would expect such a haulier to "vet" the drivers extremely carefully and to include extremely strict rules and penalties in their contracts, ensuring that all drivers are covered by these arrangements. Having had 2 of their vehicles seized, I would expect, at the very least, a haulier to carry out reasonable checks as follows:
>
> - A copy of the terms and conditions of the driver's contract is made available and these show that smuggling by drivers is considered to be an act of gross misconduct and will lead automatically to dismissal or other strong sanction;
> - The haulier can supply a copy of a letter from them to the driver, signed by the driver, and clearly stating that smuggling is considered to be an act of gross misconduct and will lead automatically to dismissal or other strong sanction;
> - The haulier has sought and obtained a copy of employment references from driver's previous employers;
> - The haulier has made enquiries of the driver's previous employers to establish driver has had no previous dealings with Customs;

- If the haulier has used an agency driver, the haulier can supply a letter from the agency giving details of any previous dealings the driver has had with Customs;
- If the driver is employed by an agency, the haulier should be able to demonstrate the measures he has in place to notify an agency of drivers detected smuggling;
- The haulier can produce a record of an interview with the driver confirming that he has had no previous offence dealings with Customs;
- This is not an exhaustive or definitive list and each case will be considered on its merits."

The Law

42. Section 152(b) of the Act provides that the Respondents may as they see fit, restore subject to such conditions, if any, as they think proper, any thing forfeited or seized.

43. The Tribunal's power to review decisions made under s 152(b) derives from ss 14 to 16 of the Finance Act 1994, read together under Schedule 5 to that Act. Under Schedule 5 to that Act, a decision whether or not to forfeit a vehicle is deemed to be a decision "as to an ancillary matter". s 16(4) of the Finance Act 1994 goes on to provide:

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

44. For the Tribunal therefore to be able to exercise in connection with the current appeal its powers outlined in paragraph 43 above it must first be satisfied that Mr Sked could not reasonably have arrived at the decision he did on review not to restore the May Vehicle.

45. The question as to what is the correct approach to reasonableness in this context was considered in the Tribunal's decision in *Eugene Crilly* (E00452). The Tribunal agreed with the conclusion in the Tribunal's decision in *Boyd v Customs and Excise Commissioners* (1995) V&DR 212 which held that the word 'reasonably' is to be construed in the wider sense viewed by Lord Greene MR in *Associated Provincial*

Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 when he stated at page 229:

> "a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matter which he is bound to consider. He must exclude from the consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it may within the powers of the authority. Wattington LJ in *Short v Poole Corporation* (1926) Ch 66 gave the example of the red-haired teacher dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith, and, in fact, all those things run into one another"."

Similarly, Lord Lane in *Customs and Excise Commissioners v J H Corbitt (Numismatists) Limited*[1980] 2 WLR 653 at 663 described the method to be adopted by a tribunal in its approach to the review of the exercise of a discretion in the following terms:

> "It could only properly [review the discretion] if it were shown that the Commissioners had acted in a way in which no reasonable panel of Commissioners could have acted, if they had taken into account some irrelevant or had disregarded something to which they should have given weight."

46. In *Ware v Commissioners for Customs and Excise* (E00735) in approving the approach set out in the cases referred to in paragraph 45 above, the Tribunal stated in paragraph 18 that the test of reasonableness requires the Tribunal to ask:

- Is this a decision that no reasonable panel of Commissioners could have come to?
- Has some irrelevant matter been taken into account?
- Has some matter which should have been taken into account been ignored?
- Has there been some error of law?

47. We therefore follow the approach outlined in the cases cited above in assessing the question of reasonableness.

The Respondents' policy regarding vehicle seizure and restoration.

48. The closing submissions from both the Appellant and the Respondents were submitted in writing after the conclusion of the hearing. The reason for this was that, rather surprisingly, a definitive and complete copy of the Respondents' Vehicle and Restoration Policy was not available at the hearing and the cross-examination of Mr Harris on the elements of that policy without all the parties having access to it was pointless. It was therefore agreed between the parties that closing submissions would be submitted within specified periods after the policy had been disclosed, rather than the hearing being adjourned for further oral submissions.

49. The Appellant and the Tribunal were provided after the hearing with extracts from the Respondents' Vehicle Seizure and Restoration Policy in relation to alcohol and tobacco excise offences, being those sections dealing with the policy as it relates to heavy goods vehicles("the Policy").

50. The Introduction to the Policy states:

> "In pursuing policies set out here officers should not forget their obligation to act in a proportionate way, consistent with ECHR Principles."

In a section setting out the underlying principles of the policy it is stated:

> "Restoration Policy should provide a graduated response depending on the
>
> - Degree of blame which can be attributed to the individual; and
> - Potential harm caused by the attempted smuggle."

and later in the same section:

> "The Policy is aimed at those profiting from smuggling (either through regular trips, by smuggling larger amounts less frequently or as a one-off attempt). It is not intended to penalise third- parties.
>
> The guidance includes examples of the steps we would normally expect a third-party owner to have taken in order to minimise the risk of their vehicle being used for smuggling. Where such steps have been taken, the vehicle will be seized but usually restored free of charge on the first occasion. However, if the owner has not acted responsibly by taking reasonable steps, the policies include guidance on when the vehicle may be restored subject to conditions, such as payment of a fee."

51. When dealing with the terms on which restoration may be offered it is stated:

> "Nothing in this guidance is intended to prevent conditions for restoration to be varied (up or down) in individual cases where circumstances merit diversion from usual policy."

52. In Appendix F to the Policy, which sets out the specific procedures to be followed when dealing with heavy goods vehicles that have been found to be smuggling alcohol or tobacco, it is stated:

> "In applying these guidelines it is important to remember that we do not wish to penalise the honest haulier and that the principles of proportionality and ECHR apply equally to freight vehicles and containers as to private vehicles."

53. In relation to heavy goods vehicles, it is clear that the emphasis of the Policy is on the haulier taking reasonable steps to avoid its vehicles being used for smuggling. In that regard the Policy states:

> "The seizure and restoration policy is aimed not only at those who are clearly involved in the smuggling operation, but of equal importance, at those who turn a blind eye despite the fact that the circumstances warrant care. It is not aimed at those hauliers who have taken reasonable steps to prevent their drivers smuggling or where reasonable checks have been made to ensure the legitimacy of loads. It is accepted that hauliers cannot guarantee their drivers will never smuggle, however we are looking to ensure that reasonable steps are taken to prevent smuggling and to this end, the measures suggested in this guidance are normal, good commercial practice."

Further on in that section it is stated:

> "Some circumstances may lead you to conclude that the haulier has failed to take reasonable steps. For example, if three or more different drivers are detected smuggling in a period of less than 12 months, it could be argued that the steps taken by the haulier to prevent smuggling have not been effective."

54. The Policy then goes on to set out some smuggling scenarios, the relevant ones of which were quoted in the Review Letter, as set out in paragraph 36 above. These are quoted verbatim from the Policy disclosed to us, save that the last scenario, headed "Same haulier, different drivers – first detection" in the Review Letter is headed just "Same haulier, different drivers" in the Policy. Mr Sked appears in the Review Letter to have interpreted the "Same haulier, different drivers" scenario, which is of course the scenario applicable to this case, on the basis that as it is a second detection within a short period involving the same haulier, that the Policy should give the same result as that described under the "same driver, same haulier – second or subsequent detection", that is the vehicle should be seized and not restored. However, the fact that the scenario in the Policy is not headed "Same haulier, different drivers – first detection" and there is no separate scenario headed "same haulier", different drivers – second detection" could lead to the conclusion that the scenario proceeds on the basis that where a different driver is involved in the smuggling it is inevitably a "first detection". On that basis, it is only where the same driver is involved a second time that the Policy calls for no restoration even where reasonable steps have been taken. We therefore need to consider whether Mr Sked has correctly applied the Policy in this respect.

55. Our conclusions from those sections of the Policy that we have seen as far as relevant to this case, and in particular those that relate to cases where the driver alone is complicit in the smuggling, are as follows:-

(1) Those who make decisions as to whether to restore vehicles used in smuggling are obliged to comply with the Policy;

(2) The Policy is to be applied flexibly, so as to take account of the facts and circumstances of any particular case;

(3) The Policy should be applied in a proportionate way;

(4) The Policy should be applied less harshly in the case of honest hauliers who can satisfy the decision-maker that they have taken reasonable steps to prevent their drivers engaging in smuggling;

(5) In cases where the decision-maker is satisfied that the haulier is not complicit in the smuggling by the driver, a graduated response is required taking account of previous incidents involving that particular haulier and the particular driver concerned, repeated incidents involving the same drivers to be treated less sympathetically than "first offences".

56. We start from the position that there is nothing in the Policy that is so inherently unreasonable that decisions based upon it would inevitably be flawed. We therefore follow the approach of assessing the question of the reasonableness of the decision in this particular case by reference to the extent to which it can be said that the policy has been applied reasonably, construing the word reasonably in the manner indicated by the cases cited in paragraphs 45 and 46 above.

Appellant's submissions

57. Mr Douglas-Jones for the Appellant submitted that Mr Sked in carrying out the review took into account matters which should not have been taken into account and some of those maters were the product of inferences that should not have been drawn. He submitted that Mr Sked placed undue reliance on other matters so that he failed in his decision to take into account material factors which should have been considered.

58. As a consequence, Mr Douglas-Jones submitted Mr Sked forced himself to conclude that the Appellant fell into the second limb of the "same haulier, different driver" scenario bracket without giving any or any proper consideration to the overarching principles within the Policy which govern how the discretion should be applied, namely, that:

(1) the policy is aimed at those profiting from smuggling;

(2) the policy is aimed at those turning a blind eye to smuggling;

(3) the policy is not aimed at innocent third parties;

(4) the honest haulier should not be penalised;

(5) the policy is not aimed at those hauliers who have taken reasonable steps to prevent their drivers smuggling;

(6) any reputable haulier should be able to comply without difficulty with the obligation to take reasonable steps to prevent smuggling; and

(7) principles of "proportionality and ECHR" apply.

59. It was submitted that Mr Sked placed reliance on the fact that "The contracts do not warn of the consequences of drivers being involved in smuggling offences", as stated in the first bullet point under paragraph 2 of the Review Letter quoted in paragraph 36 above but failed to consider that the contracts had been drafted in the context of Slovenian domestic law, with prescribed contents drafted by the Ministry of Employment.

60. Furthermore, Mr Douglas-Jones explained that the contracts did deal with loading and the obligation to perform one's duties lawfully a breach of which would lead to notice or early notice in accordance with the "law of contractual employment relations (ZDR)" in Slovenia.

61. The suggestion by Mr Sked in his witness statement as referred to in paragraph 41 above that the contract of employment should have set out that smuggling was a dismissible offence was, Mr Douglas-Jones submitted, flawed for a number of reasons:

(1) It was discredited as a proposition advanced as an indicator of insufficient due diligence in the decision of *Traveca NV* E00985 (2006); indeed it was described at paragraph 22 of the decision as "… an unnecessary, if not offensive course to install a provision of the sort suggested …" in that case;

(2) It might render the contract or term unenforceable in law (European or domestic);

(3) It took no account of Mr Markovic's acknowledgement that he knew that smuggling was an offence;

(4) If the contract had included such a clause it might have indicated that the company endorsed other criminal conduct about which the contract was silent;

(5) In any event, the instructions letter referred to in paragraph 29 above that was sufficiently wide to provide them with a checklist for preventing smuggling and was not as submitted by the Respondents, confined to immigration offences.

62. Furthermore, Mr Douglas-Jones submitted that Mr Sked failed to consider the separate document setting out the non-exhaustive list of the circumstances in which a driver's employment could be terminated referred to in paragraph 14 above.

63. Mr Douglas-Jones submitted that Mr Sked placed undue weight on the fact that the only previous smuggling event by a driver employed by the Appellant occurred merely 15 days before (on 25 April 2010) and did not consider the fact that 15 days had not afforded the Appellant enough time to complete its investigation. He did not take into account the following facts:

(1) The Appellant had contacted the Respondents;

(2) The Respondents had failed to provide the Appellant with any information (in breach of the Director's duty to provide material as described in the Policy) ;

(3) The Appellant had taken the proactive step of instructing UK solicitors within four days of the first seizure;

(4) These solicitors had contacted the Respondents' Enforcement Department;

(5) No-one at the department had contacted their solicitors in response;

(6) The Appellant could get no information at all from the Respondents concerning the first seizure, even with the assistance of the solicitors;

(7) There had been no meeting with the Appellant (again in breach of the procedure set out in the Policy).

64. Mr Douglas-Jones submitted that Mr Sked placed undue weight on the break in Belgium and indeed his conclusions on this point were factually wrong. It was not, he submitted a factor that should have been taken into account at all was on the planned route. It would have added no material time or expense to the journey as confirmed by Ms Koritnik. It appears according to Ms Koritnik's evidence to have comprised a detour of about five or seven kilometres which would have cost a minimal amount in fuel costs, saved the expense of a hotel and reduced the risk of the vehicle being intercepted for use in smuggling by its being away from the main freight route.

65. Furthermore, he submitted the inference by Mr Sked that the driver's action in staying with a relative was unusual was wrong. This was common practice.

66. Furthermore, he submitted it would appear from the Appellant's investigations that it was likely that the illegal goods had been loaded during the one hour stop in Luxembourg and the Appellant reacted responsibly by prohibiting drivers from travelling through Luxembourg once this conclusion had been reached.

67. As a consequence, Mr Douglas-Jones submitted that Mr Sked's decision was one that could not reasonably have been arrived at and he invited the Tribunal to direct in accordance with section 16(4)(b) of the Finance Act 1994 that the Respondents should review the case and conclude that the vehicle should be restored free of charge to the Appellant.

The Respondents' Submissions

68. The Respondents submitted that Mr Sked had an unfettered discretion when reviewing the decision not to restore. He had assessed the documentation provided by the Appellant and had used the Policy as guidance. The Appellant had not shown that his decision was one that could not reasonably have been arrived at in all the circumstances.

69. The Respondents submitted that the Policy had been correctly applied in not restoring the May Vehicle as it was a second seizure from the same company and the total revenue evaded amounted to £110,312.84. Mr Lill submitted that it was apparent that sufficiently rigorous steps were not in place at the Appellant in order to prevent such large scale importations by their drivers.

70. Mr Lill was critical of the fact that the Appellant did not give any direct face to face training or instruction to their drivers in respect of their obligations to the company or indeed what the company expected of them. He distinguished the decision in *Traveca* relied on by the Appellant on the basis as stated at paragraph 23 of the decision, "This was quite a small business (having some 20 vehicles) and it seems to us that upfront oral communication is a better means of communicating important house rules than written notices".

71. Mr Lill submitted that the practice of relying only on verbal references when employing new drivers and on the Slovenian Chamber of Commerce to carry out checks before issuing a heavy goods vehicle driving does not amount to sufficiently stringent checks on drivers, particularly given the lack of specific company training.

Conclusions

72. Our starting point is to examine the extent to which the essential elements of the Policy as we state them in paragraph 55 above have been applied reasonably.

73. In that regard, the most significant factor is the extent to which the haulier has taken reasonable steps to prevent its drivers from smuggling; as we read the Policy if the decision-maker finds that reasonable steps have not been taken then unless there are exceptional circumstances the haulier cannot expect to have the vehicle restored.

74. The principal reasons why the Respondents say that reasonable steps have not been taken in this case are as follows:

(1) The drivers' employment contracts and separate instructions for checking their vehicles for unauthorised loads or persons did not

specifically warn of the consequences of drivers being involved in smuggling offences;

(2) The Appellant's procedures for telling new drivers are inadequate in that they rely primarily on the checks carried out by the Slovenian Chamber of Commerce and Slovenian Employment Ministry rather than carrying out their own enquiries, for example by obtaining references from previous employers;

(3) The fact that there was a second incident so soon after the first showed that the procedures were inadequate;

(4) The Appellant failed to carry out face to face training of the drivers in respect of their obligations; and

(5) The Appellant failed to carry out adequate enquiries as to the reason for Mr Markovic's stop in Belgium happening as it did within a short period after the first incident.

75. In our view Mr Sked gave undue weight to these factors and failed to give adequate weight to the countervailing factors.

76. As submitted by the Appellant, the suggestion of including a specific provision in the driver's employment contract indicating that smuggling was a dismissible offence was discredited in *Traveca*. We do not accept that the nature of the Appellant's operations would lend themselves to more use of face to face communications with staff, as suggested by Mr Lill in reliance on the passage in *Traveca* referred to in paragraph 70 above. It seems to us that the Appellant's approach of providing the employees with separate notices warning its drivers of the need to be vigilant regarding unauthorised goods or persons and the separate notice setting out the circumstances in which their employment may be terminated, as referred to in paragraph 28 above is a reasonable alternative and that Mr Sked did not give sufficient weight to it. Although we accept that the latter document was prepared specifically in the light of concerns about the risks of unauthorised persons being carried it does refer specifically to the need to avoid the carriage of unauthorised loads, and the drivers could have been left in no doubt that the carriage of such a large amount of tobacco in addition to the authorised load was unauthorised and could lead to disciplinary action under their employment contracts.

77. Moreover, we find that Mr Sked gave insufficient weight to the steps that were taken by the Appellant; following the first incident and to the fact that there was a limited period of time between the two incidents for the Appellant to have carried out a comprehensive review of their procedures. We find that the steps that they did take were reasonable in all the circumstances, namely:

(1) Sending the written warning on 3 May 2010 to all drivers of the consequences of smuggling; and

(2) Investigating the precise circumstances of the first incident and in particular examining the GPRS records which ultimately led to the likely conclusion that the tobacco was loaded in Luxembourg, resulting in drivers being prohibited from deviating from the approved route into that country.

We therefore find that the assumption that because a second incident occurred so quickly after the first one of itself indicates that the Appellant's procedures were inadequate is unreasonable.

78. We also find that Mr Sked placed undue weight on Mr Markovic's stop in Belgium, and we accept the Appellant's evidence that the fact of such a stop would not indicate anything unusual, being as it was not a significant deviation from the prescribed route. We accept that it would have been unrealistic for the Appellant to have had its suspicions aroused by such a stop between the two incidents.

79. We also find that Mr Sked placed insufficient weight on the due diligence that the Appellant did carry out before employing the drivers. Mr Sked failed to give due consideration as to the different practices in other EU Member States and consider whether the approach of relying on reputable third parties such as the Slovenian Chamber of Commerce and the Slovenian Employment Ministry involved access perhaps to a wider range of material that would be available to the Appellant was a satisfactory alternative to pursuing references from previous employers.

80. Applying the tests set out in *Ware* set out in paragraph 46 above, we therefore find that Mr Sked has taken irrelevant matters into account (the absence of the penalty clause in the employment contract and the stop in Belgium) and has failed to take into account other matters (the due diligence actually carried out before employing the drivers, the various notices issued to them and the steps taken between the two incidents) such that his decision that reasonable steps were not taken by the Appellant to prevent Mr Markovic smuggling is one that no reasonable decision-maker could have come to.

81. Whether this conclusion is sufficient in itself to require the decision to be reconsidered, depends upon whether the fact that reasonable precautions have been taken is, under the Policy sufficient to lead to the conclusion that the May Vehicle should be restored.

82. We do have serious concerns as to whether in this case the Respondents have in fact applied the Policy correctly. First, as mentioned above, it is not clear on what basis the April Vehicle was restored; according to the section of the Policy applicable to a smuggling by driver case where it is a first detection the vehicle should only be restored without charge if reasonable steps to prevent smuggling have been taken, suggesting that it was concluded in that case that reasonable steps were taken which is inconsistent with Mr Sked's findings on the second incident.

83. Secondly, and more fundamentally, we question whether the correct application of the Policy to the "same haulier different drivers" scenario should in fact have led to

a decision to restore the May Vehicle. We question this because of the additional wording added to the heading on this scenario in the Review Letter which appears to have led him to conclude that as this was a second detection involving the Appellant the May Vehicle should not be restored.

84. However, application of the principles set out in sub-paragraphs (2) to (4) of paragraph 55 above would tend to suggest that where it is a scenario with a different driver with the same haulier that the policy should be applied less harshly than where the same driver has been involved, yet the result of Mr Sked's decision is to lead to the same result as the Policy leads to in the case of a second detection involving the same driver within six months of the first detection. The Policy indicates that it is only where three or more drivers are detected smuggling in a period of less than twelve months that it could be argued that the steps taken by the haulier to prevent smuggling have not been effective.

85. These are matters that we might have been able to clarify with Mr Harris had the Policy been available at the hearing. However, as we interpret the Policy we find that a proportionate response as called for under the Policy where a second driver is involved in smuggling within a short period, but the haulier is honest and has taken reasonable steps to prevent smuggling by its drivers (as we find in this case) would be to restore the vehicle. We therefore find that Mr Sked misdirected himself as to the Policy in carrying out the review and his decision is therefore one that no reasonable review officer could have arrived at.

86. The Appellant submits that the correct course for us to take is to direct in accordance with s 16(4):

(1) That Mr Sked's decision should cease to have effect from the date of the decision of the Tribunal;

(2) To require the Respondents to conduct a further review of the Decision; and

(3) To direct that the Respondents should review the case and conclude that the May Vehicle should be restored free of charge to the Appellant.

87. In our view s 16(4) enables us to make the directions set out in sub-paragraphs (1) and (2) of paragraph 86 above and we so direct. Our jurisdiction does not extend to directing the Respondents to come to any particular conclusion upon carrying out the review. However, consistent with the reasoning in *Traveca* our findings of fact should be taken into account in conducting the review, and in view of the fact that the May Vehicle has now lost two years of its earning potential for the Appellant, we recommend that the May Vehicle be restored. Consequently, the appeal is allowed.

88. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

TIMOTHY HERRINGTON
TRIBUNAL JUDGE

RELEASE DATE: 25 May 2012