TC03019

Appeal numbers: TC/2012/08254

EXCISE DUTIES – Restoration – Reasonableness of decision to not to restore used vehicle and trailer seized in the course of smuggling tobacco into the UK – Previous decision of Tribunal holding decision not to restore unreasonable and direction to carry out further review taking into account Tribunal's findings of fact – Decision on review to restore vehicle on payment of fee of £32,825-Whether decision reasonable in all the circumstances-No-Appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

LOGISTIKA PEKLAJ AS **Appellant**

- and -

DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE TIMOTHY HERRINGTON
MICHAEL BELL, ACA CTA

Sitting in public in London on 10 October 2013

Mr Benjamin Douglas Jones, Counsel, instructed by Miller Rosenfalck, for the Appellant.

Mr William Hays, Counsel, 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 Director of Border Revenue ("the Respondents") to return the Appellant's seized tractor and trailer upon payment of a fee of £32,825. The Tractor is a DAF Unit, registration LTJPA509 and the trailer is a Curtainsider Trailer, registration LTPAS11J. This vehicle was seized on 10 May 2010 and is referred to in this decision as ("the Vehicle").

2. The decision under appeal was made following a direction made by the same Tribunal as heard this appeal in its decision released on 25 May 2012 that the Respondents conduct a further review of the review decision made by Mr Ian Sked ("Mr Sked") on 22 September 2010 that the Vehicle should not be restored.

3. Paragraphs 4 to 24 below contain findings of fact, broadly undisputed, from the documents that were before us.

Brief history of the matter

4. As found by the Tribunal in its decision released on 25 May 2012 ("the Tribunal Decision"), on 26 April 2010, a vehicle similar to the Vehicle and also owned by the Appellant was stopped by Border Force Officers and found to contain 504.7 kilogrammes of hand-rolled tobacco concealed within the trailer load of furniture. This vehicle was driven by an employee of the Appellant, a Mr Brainislav 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 for forfeiture under section 141(1)(a) of the Act it was also seized and was also liable to forfeiture.

5. Whilst the Appellant was carrying out investigations into the circumstances of this seizure on 10 May 2010, the Vehicle was stopped by Border Force officers and found to be carrying 336.5 kilogrammes of hand-rolled 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 Vehicle was seized under s.141(1)(a) of the Act.

6. As also found in the Tribunal Decision, the Appellant denied any involvement with the smuggling undertaken by the drivers concerned, a position which the Tribunal recorded in paragraph 12 of its decision was accepted by the Respondents in respect of both incidents.

7. On 22 September 2010 Mr Sked, after carrying out at the request of the Appellants a review of an earlier decision to restore the Vehicle on payment of a fee of £32,500, the trade value of the Vehicle at the time of seizure, concluded that the

Vehicle should not be restored. The basis of Mr Sked's decision was that this was a case categorised under the Respondents' restoration policy as one where the driver concerned was responsible for the smuggling (but not the haulier). He concluded that as this was a case of "same haulier different drivers" and as it was the second detection (the first being only 15 days earlier) restoration was not appropriate. It was also implicit in Mr Sked's decision that the Appellant, in his view, had not taken reasonable steps to prevent the smuggling and this was the basis on which before the Tribunal the Respondents sought to defend Mr Sked's decision as being one he could reasonably have arrived at.

8. Mr Sked's review letter setting out his decision contained the following findings on which he based his conclusion that the case should be dealt as one where the drivers but not the haulier were involved in the smuggling:

> "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."

9. On 21 October 2010 the Appellant lodged a notice of appeal seeking return of both of the seized vehicles. The Tribunal Decision observed that somewhat unusually a decision had been reached in respect of the Vehicle before that in respect of the vehicle seized some 15 days earlier. On 3 November 2010 the Respondents agreed to return this latter vehicle free of charge. No evidence was available to the Tribunal as to how this decision was arrived at and why it had been dealt with later. We were told at the hearing of the current appeal that there had been an "administrative error" and that there was a failure to link the two cases so that they were treated as totally separate unrelated incidents. We note, however, that Mr Sked in reaching his decision as described in the extract from his decision referred to in paragraph 8 above, was clearly aware of the fact that two vehicles had been seized within a short period of time and, quite properly, made his decision on that basis.

10. The Tribunal based its decision that Mr Sked's decision was one that no reasonable review officer could have arrived at on the following factors:

(1) The Respondents' policy called for a proportionate response where a second driver is involved in smuggling within a short period but the haulier was honest and had taken reasonable steps to prevent smuggling by its drivers (as the Tribunal found to be the case);

(2) That proportionate response would be to restore the Vehicle in such circumstances;

(3) Therefore Mr Sked misdirected himself as to the policy in carrying out the review.

These conclusions were set out in paragraph 85 of the Tribunal Decision.

11. Paragraph 86 and 87 of the Tribunal Decision set out the directions the Tribunal made in the light of that conclusion and the reasons for them. They can be summarised as follows:

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

(2) The Respondents should conduct a further review of the decision;

(3) The Respondents could not be directed to come to any particular conclusion on carrying out the review, but consistent with the reasoning of the VAT and Duties Tribunal in the case of *Travaca NV (E00985)* on similar facts, the Tribunal's findings of fact should be taken into account in conducting the review and in view of the fact that the Vehicle had by the date of the Tribunal Decision lost two years of its earning potential, it recommended that the Vehicle be restored.

12. In formulating its decision in this way the Tribunal was mindful of the imitations on its jurisdiction as contained in section 16(4) of the Finance Act 1994, which was set out in full in paragraph 43 of the Tribunal Decision. As the Tribunal observed, a decision whether or not to forfeit a vehicle is "an ancillary matter" in respect of which in the circumstances of this particular case, the power of the Tribunal, where it is satisfied that the decision could not reasonably be arrived at, are limited to directing as described in paragraph 11 above.

13. The Respondents did not act upon these directions until prompted to do so by a letter from the Appellant's representative dated 23 July 2012. In that letter, which we were told was sent out precisely 56 days after the Tribunal Decision to take account of the fact that the Respondents might seek to appeal within the statutory period allowed for an appeal, asked what arrangements were being made for the return of the Vehicle. The Respondent replied on the same day by email in a somewhat peremptory manner (described by the Appellant's representative in its response of 25 July 2012 as being "breathtaking in its arrogance"). This response stated (correctly) that the Tribunal ordered a re-review of the original review decision and did not order the restoration of the Vehicle, and that "you will be notified of the outcome of this re-review by the Review Officer in due course".

14. It is not clear whether the Respondents had at any time been contemplating an appeal; their email of 23 July did not indicate that that was the reason for no activity on the matter since the release of the Tribunal Decision. The Appellant suggests that the Respondents had taken the view that they had no obligation to carry out the re-review unless asked to do so by the Appellant. Indeed, the Review Officer's letter of 30 July 2012 setting out his decision on the review contains the following statement which suggests this might have been the case:

> "I have treated your letter as a valid request to conduct a review in accordance with the provisions of sections 14 and 15 of the Finance Act 1994. The law allows me to uphold, vary or cancel the original decision."

This statement may have been included in error; it is a standard paragraph which was also contained in Mr Sked's review decision of 22 September 2010 and was not adapted to take account that the obligation to carry out the review derived from the Tribunal's directions and not a request from the Appellant.

15. We think the evidence is inconclusive on this issue, but if the approach of the Respondents is only to carry out reviews directed by the Tribunal when prompted to do so then that is completely unacceptable. The Tribunal expects that its directions are complied with within a reasonable time, and a period of two months is in our view excessive where a decision has been made not to pursue an appeal, particularly in a case such as this where there has been a long period since the original seizure.

16. In any event, the Respondents decision on the re-review followed shortly thereafter, being set out in a letter dated 30 July 2012 addressed to the Appellant's representatives ("the Review Letter"). The decision was taken by Mr Raymond Brenton, a Review Officer who was the author of this letter ("Mr Brenton").

17. The Review Letter contained a brief summary of the background to the case. It is understandable that it did not recite the relevant facts in full because of course the Tribunal had made findings on these in its decision and the Respondents had been directed to take account of those findings in carrying out the further review. It is, however, surprising that the Review Letter did not seek to summarise the main findings of the Tribunal Decision.

18. Mr Brenton summarised the Respondents' restoration policy for commercial Vehicles in the Review Letter The relevant provisions for the purposes of this appeal are as follows:

> "B. If the operator provides *evidence* satisfying UKBA that the driver, but not the operator, is responsible for or complicit in the smuggling attempted then:
>
> (1) If the operator also provides evidence satisfying UKBA that the operator took reasonable steps to prevent drivers smuggling then the vehicle will normally be restored free of charge unless:
>
> (a) The same driver is involved (working for the same operator) on a second or subsequent occasion in which case the vehicle will normally be restored for 100% of the revenue involved in the smuggling attempt (or for the *trade* value of the vehicle if lower) except that
>
> (b) If the second or subsequent occasion occurs within 6 months of the first, the vehicle will not normally be restored.
>
> (2) Otherwise,
>
> (a) On the first occasion the vehicle will normally be restored for 100% of the revenue involved (or the *trade* value of the vehicle is lower),
>
> (b) On the second or subsequent occasion the vehicle will not normally be restored.
>
> C. If the operator fails to provide evidence satisfying UKBA that the operator was neither responsible for nor complicit in the smuggling attempt then:

(1) If the revenue involved is less than £50,000 and it is the first occasion, the vehicle will normally be restored for 100% of the revenue involved (or the *trade* value of the vehicle if less).

(2) If the revenue involved is £50,000 or more or it is seized on a second or subsequent occasion within 6 months, the vehicle will not normally be restored."

19. Mr Brenton referred on page 4 of the Review Letter to what he had considered in carrying out the review as follows:

"Turning now to the direction by the Tribunal to re-review the decision of non-restoration of your client's vehicle, I have read the documentation available and the decision of the Tribunal carefully to see how the evidence provided determines the application of the UKBA restoration policy."

20. In fact, the references in the Review Letter to the Tribunal's findings were limited. It referred to paragraph 86 of the Tribunal Decision, as referred to in paragraph 11 above, to emphasise that contrary to the Appellant's request in its letter of 23 July 2012, the Tribunal's powers did not extend to directing the return of the Vehicle. It also referred to the findings of the Tribunal in relation to the circumstances of the seizure of the first vehicle on 26 April 2010.

21. The essence of Mr Brenton's decision is contained in the following paragraphs from pages 5 and 6 of the Review Letter:

"Having examined the documentation available it appears your client has provided sufficient information, on paper, to consider they have taken reasonable steps to prevent their drivers from smuggling. However, having steps on paper does not necessarily mean that the company enforces them. Their actions following the seizures confirm the failure to implement their policy.

The seizure of 10th May 2012 was no casual concealment or one that could easily be made without the knowledge of both the operator and the driver. In each case, not only were the smuggled tobacco concealed, but they were placed so deep inside the load that it is possible that they were put there when the vehicle was loaded with the legitimate consignments. It is difficult to see how either the operator or the driver could not have known about the concealment. However, it is more probable that the tobacco would have been hidden later, during the journey from Italy to the UK but that would require most if not all of the legitimate consignments to be unloaded and re-loaded using a fork lift truck or other machinery so as to hide the tobacco. It is unlikely that that could be done without the knowledge or at least the deliberate ignorance of the driver. That would also take some time and the delay should have come to the attention of your client who we are advised monitored the movements of the vehicle. I conclude from the evidence available to me that that, on the balance of probabilities, the operator "was involved or at least complicit in" the smuggling attempt.

In addition, the two seizures are practically identical in that 2 pallets have been placed within the legitimate load and at roughly the same point in the trailer and both trips contained in excess of 300kg of HRT. As this involved 2 different drivers and the very large amount of tobacco it is unlikely to be the drivers who were instrumental in smuggling the tobacco.

As different consignors and consignees were involved in both seizures and the loads were legitimate it is unlikely to have been a 3rd party involved in the smuggling attempts, and on the balance of probabilities I am of the opinion that this further endorses the haulier's complicity in the smuggling attempt/s…

As previously stated this restoration request was dealt with prior to the offence of 26th April 2010. Therefore, having considered the evidence provided and concluded that the operator was responsible or complicit in the smuggling attempt, paragraph C of the policy applies. As the revenue is less than £50,000 and it is the first such occasion (within 6 months) [paragraph C (1)] the vehicle should be restored for 100% of the revenue involved (or the trade value of the vehicle if less). I should mention here that the *trade* value of a vehicle is lower than the *retail* value (the value that the vehicle should fetch on the open market) and therefore restoration for the *trade* value represents a considerable advantage compared with non-restoration.

In reference to the seizure of 26th April 2010, only 15 days prior to this present case, it appears that your client's vehicle, DAF unit, registration LTPAS11 & KRONE trailer 136NLJ was restored to your client free of charge. It appears that due to an administrative error to link the cases the vehicle was restored without a penalty. However, if the restoration process for vehicle seized on the 26th April 2010 had followed its natural course in assessing all the evidence available it is probable that the vehicle would not have been restored to your client:

Policy:

> *(2) If the revenue involved is £50,000 or more or it is seized on a second or subsequent occasion within 6 months, the vehicle will not normally be restored.*

The revenue involved in this case was more than £66,000. Having considered the evidence provided and concluded that the operator was responsible or complicit in the smuggling attempt and as the revenue is £50,000 or more, and the 2nd occasion within 6 months, 6 paragraph C (2) of the policy applies in that the vehicle should not be restored.

Your client should think themselves fortunate in all the circumstances of the event of 26th April 2010."

22. It was therefore quite clear that in Mr Brenton's view the Appellant was a willing participant in the smuggling although accepting that "on paper" they appeared to have taken reasonable steps to prevent smuggling. Page 7 of the Review Letter contained the following statement:

> "Your client chose to become involved in a smuggling attempt: if they find that the consequences of those actions puts them in in to [sic] difficult financial position, that is something they should have considered <u>before</u> choosing to become involved."

23. Mr Brenton's conclusion therefore was that applying the policy set out in paragraph C, quoted in paragraph 18 above, (treating the seizure as a first seizure because it was dealt with by the Respondents before the actual first seizure) because the revenue involved was more than £50,000, the vehicle should be restored for

£32,825, that figure, as was stated in the Review Letter, being based on the trade value of the vehicle on the date of the seizure.

24. On 24 August 2012, the Appellant's representative lodged a notice of appeal with the Tribunal against this decision, primarily on the grounds that the findings that the Appellants were complicit in the smuggling were inconsistent with the findings of fact made in the Tribunal Decision.

Other Findings of Fact

25. The Tribunal Decision made extensive findings of fact based on the documents that were before it as well as on the witness evidence of Sabina Koritnik, the General Manager of the Appellant, who was cross examined. The Tribunal found Ms Koritnik to be a credible witness and accepted her evidence in its entirety.

26. Sensibly, both parties agreed that it was not necessary to hear any further oral evidence from Ms Koritnik at the hearing of this appeal. The appeal therefore proceeded on the basis that our decision should be based on the findings of fact made in the Tribunal Decision and the further evidence we heard from Mr Brenton, who gave oral evidence and was cross-examined.

27. It is helpful for us to summarise the principal findings of fact in the Tribunal Decision, beyond those mentioned in paragraphs 4 to 24 above, which we do as follows:

(1) After the seizure of the first vehicle on 26 April 2010 the Appellant, having had a short conversation with the driver of the seized vehicle who notified them that the vehicle had been seized "because of some tobacco being found inside a load from Italy", tried unsuccessfully to obtain further information from the Respondents for a period of 4 days. The Respondents first communicated with the Appellants after solicitors acting for the Appellant intervened on 30 April 2010 (paragraphs 5 to 8 of the Tribunal Decision);

(2) On 3 May 2010 a written notice was given by the Appellant to all its drivers to warn them to be extra careful and vigilant regarding the carriage of illegal goods and that anyone found to be involved in smuggling would be instantly dismissed (paragraph 9);

(3) At this stage the Appellant began an internal investigation to check their GPRS system, which monitors the movement of all its vehicles, to establish the route the driver had taken in readiness for a disciplinary hearing they proposed to hold for him. They did the same when the Vehicle was seized on 10 May 2010 (paragraphs 10 and 17);

(4) Whilst this investigation was still going on the Vehicle was seized on 10 May 2010 (paragraph 11);

(5) On 11 May 2010 the Appellant requested the return of the vehicle. On 17 May 2010, whilst the Appellant was investigating the circumstances of the second seizure, it sent a further notice to all its divers warning them *inter alia* not to carry tobacco or other goods given to them by anyone, not to tamper with

the GPRS system, and not to deviate from the assigned route, with any deviation to be relayed immediately to the Appellant's office with reasons for it. It also circulated a further document setting out detailed rules for ensuring the integrity of loads (paragraphs 13 and 14);

(6) The reason for the instructions regarding the GPRS system and not to deviate was because during its investigation the Appellant suspected that the driver of the first vehicle had disconnected the GPRS system during a deviation from the prescribed route into Luxembourg and the Appellant was concerned that this was where the illegal tobacco was loaded. The investigations into the movements of the vehicle showed the driver stopping in Luxembourg for nearly 4 hours (paragraphs 15 and 18);

(7) Again on 17 May 2010 the Appellant sent a message to all its drivers who were on the road via the GPRS system prohibiting them travelling through Luxembourg (paragraph 16);

(8) The investigations involved a considerable amount of staff time in a very small administrative office checking in detail the route and stops of each driver and their phone calls, as well as the interview of their other drivers during which they were asked if they had ever been approached by criminals particularly in Luxembourg and been asked to smuggle tobacco into the UK (paragraph 20);

(9) Anecdotal stories where given during these interviews of drivers being offered substantial sums at various drivers parks in Luxembourg to smuggle goods into the UK (paragraph 21);

(10) The conclusions of the review by the Appellant of both drivers journeys 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 (paragraph 27);

(11) Both drivers failed to attend their disciplinary hearings and were summarily dismissed (paragraph 26);

(12) The steps taken by the Appellant to prevent smuggling and their reaction to the first seizure were reasonable in all the circumstances and Mr Sked gave insufficient weight 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 (paragraph 77); and

(13) The Appellant is honest (paragraph 85).

28. With regard to Mr Brenton's evidence, this centred around the extent to which he had taken into account all the relevant material before him, and in particular the findings of fact of the Tribunal, as detailed above.

29. We accept Mr Brenton's evidence as to the reasons why he concluded that the Appellant was complicit in the smuggling, which expanded on the very brief reasons given in the Review Letter. His view was that the two incidents had clearly been organised, involving two incidents within 15 days of each other through two separate drivers. The consigner and consignee were different, as were the loads. He therefore concluded that no third party had been involved. The drivers were of good character

both drivers had diverted off route which indicated pre-planning. He discounted the possibility that the drivers had been tempted to take the tobacco to the UK because Luxembourg was not on their planned route; they had been diverted to Luxembourg.

30. Based on his experience, Mr Brenton stated that drivers usually have little warning of what jobs they have and what they have to collect so, as in this case, there would be little time to organise large quantities of illicit goods because of the time they would take to load. This was a sophisticated smuggling attempt with the same *modus operandi*, and the only people who would know about it would be the Appellant. Mr Brenton said he was not suggesting Ms Koritnik herself was involved, but it would require more organisation than the two drivers acting on their own could provide. Mr Brenton accepted that the drivers would have taken various different routes from Slovenia to Luxembourg.

31. Mr Brenton said he had considered the finding in paragraph 85 of the Tribunal Decision that the Appellant was honest. His conclusion was that they had been honest regarding the steps that they had taken to prevent their drivers smuggling, but that did not prevent a finding that they had been dishonest in being complicit in the smuggling.

32. Mr Brenton accepted in cross-examination that his case theory was dependent on a finding to the effect that the elaborate steps that the Appellant took after the seizures, namely seeking information about what had happened to the first vehicle, instructing solicitors to help when no replies from the Respondents was forthcoming, sending warnings circulars to their drivers, carrying out a detailed investigation into the GPRS records of both drivers to ascertain what route they had taken and calling them for disciplinary hearings (which they did not attend), was all a smoke screen to hide their complicity in the smuggling. He placed no weight on the fact that the Appellant had sought a meeting shortly after the first seizure, although the Respondents' policy was that such a meeting should take place if requested, his view was that it could be discounted as it was usually impossible to arrange such a meeting.

33. With regard to the Tribunal's recommendation that the Vehicle be restored, Mr Brenton was of the view that he had had sufficient regard to that recommendation in that his recommendation was that the Vehicle be restored for a fee; there was nothing in the Tribunal Decision indicating that their recommendation was confined to a restoration free of charge. He confirmed that the fee had been calculated by reference to the trade value of the Vehicle at the time of seizure, consistent with the Respondents' policy and that he gave no consideration as to whether a lesser figure, or restoration free of charge would be appropriate in the light of the fact that it was now over three years since the Vehicle was seized, it had not been earning any revenue in the meantime, and its condition may have deteriorated significantly in the meantime.

34. Mr Brenton was clear that it was open to him as a different Review Officer to act entirely independently of Mr Sked's decision and it was open to him to reject Mr Sked's starting point, which was that the Appellant was not complicit and make his decision on a different basis.

35. Mr Brenton accepted that the Review Letter did not in many respects indicate how he had taken the Tribunal's findings of fact into account or the other information that was available to him, but he was clear that he had considered the Tribunal's key findings of fact, in particular its finding of honesty on the part of the Appellant. He confirmed that he did not take into account evidence that although before the Tribunal at the hearing was not referred to in its decision, such as the length of time the Appellant had been in business and the number of its drivers.

36. We have considered whether, despite the lack of indications that he had done so on the face of the Review Letter, Mr Brenton had in fact taken into account the Tribunal's findings of fact. Much of his evidence had the flavour of an ex post facto rationalisation of his decision. He admitted that he kept no notes of the process he went through to arrive at his decision, including the material he had reviewed and what weight he put on it. His evidence was that he would have looked at the relevant materials then went straight into typing the Review Letter. Notwithstanding this lack of corroborating material, we are prepared to accept, as Mr Brenton told us, that he did review the findings. We comment below on our views as to the quality of the Review Letter and our conclusions on the reasonableness of Mr Brenton's decision on the assumption that he did in fact consider those findings before making his decision.

Discussion

37. We now turn to consider whether Mr Brenton's decision was one that a reasonable review officer could have arrived at. We do so by applying the approach outlined in the various authorities that were identified in paragraphs 45 to 46 of the Tribunal Decision and the relevant policy of the Respondents regarding vehicle seizure and restoration, as outlined in that decision.

38. We start by making some observations on the quality of the Review Letter and the process by which Mr Brenton came to his decision. We find it deeply unsatisfactory.

39. Where a public body makes an administrative decision of a kind to be made under sections 14 and 15 of the Finance Act 1994 it is incumbent upon the decision-maker to make it clear in his decision the reasons he has made the decision he did and the matters he has taken into account in reaching that decision. This is good practice for all administrative decision-making and indeed it is a statutory requirement under section 15F (6) of the Finance Act 1994 for the conclusion of a review to confirm the officer's reasoning. The extensive powers that the Respondents have to seize property make it incumbent on the Respondents to give full reasons where it decides not to exercise its discretion to restore that property, particularly when the Tribunal, as it has done in this case, has recommended that it do so.

40. Although we have accepted that Mr Brenton did read the Tribunal's decision and took into account its findings there is, as we have found, little evidence on the face of the letter that he had done so. We would have expected, when a review officer has decided not to follow a recommendation, to give full reasons why that is the case. In that regard Mr Brenton's letter did not go into any detail on the following matters:

(1) Why he felt it was open to him to take a different starting position from Mr Sked, particularly in the light of the clear finding in paragraph 12 of the Tribunal Decision that the Respondents had accepted that the Appellant was not involved in the smuggling. Although it was based on an acceptance by both parties, the effect of paragraph 12 was that there was a finding of fact on the part of the Tribunal that the Appellant was not involved in the smuggling. It would have been open to the Tribunal not to have made that finding had the evidence before it suggested otherwise, but the fact that it did not do so was a clear indication that the Tribunal did not believe there was evidence to that effect.

(2) Why he believed that the more likely explanation was that the Appellant was involved in the smuggling. In particular, why he discounted the theory, implicit in the Tribunal Decision, that the drivers had been suborned to divert their journeys to the UK via Luxembourg where the tobacco was loaded.

(3) Why he believed that the steps that the Appellant took to find out about the fate of their vehicle after the first seizure, including the other steps to minimise the risks of further smuggling taking place, the extensive and time consuming investigation into the drivers' movements, the disconnection of the GPRS system in the first vehicle, the instructions not to travel via Luxembourg, and the institution of disciplinary proceedings against the drivers' involved were all part of an elaborate cover-up to hide the Appellant's complicity in the smuggling; and

(4) If there was a cover-up, why Mr Brenton believed that Ms Koritnik who the Tribunal found to be a credible witness and who Mr Brenton was prepared to accept was not personally involved in the smuggling, knew nothing about this cover-up when the cover-up would have to have been carried out by one or more of a small number of staff, including her own partner.

41. In short, the Review Letter reads as if it were made without any regard to these matters. Mr Brenton clearly took the approach, as he said in evidence that he was entitled to do, that his was an independent decision which he could make without regard to Mr Sked's findings. The structure and content of his decision may be appropriate in circumstances where he is merely carrying out a fresh review of a colleague's previous administrative decision, but in our view it is not acceptable where there is an additional requirement to take into account the findings of a judicial tribunal, made with the benefit of hearing live evidence and assessing the credibility of the principal witness. In those circumstances it was incumbent upon Mr Brenton to explain carefully why he could not accept Mr Sked's starting point, and the starting point of the Tribunal Decision, a starting point accepted by the Respondents with the result that it had become common ground between the parties that the Appellant was not complicit in the smuggling. Putting it at its most charitable, the failure to show that there had been due regard to the Tribunal's findings was discourteous. In that context, the comment of the Appellant's representatives in their letters of 25 July 2012 that the Respondents' approach to the re-review was "breathtaking in its arrogance" is understandable rather than as characterised by Mr Brenton "unprofessional".

42. In our view these deficiencies in the Review Letter are sufficient on their own to conclude that the decision contained in it was one that no reasonable officer could have arrived at. Had Mr Brenton imposed upon himself the discipline of explaining why, having considered the matters referred to in paragraph 40 above he still believed that the Appellant had been complicit in the smuggling, he may well have concluded that his theory was untenable in the circumstances.

43. Against that background, we turn to the question of the reasonableness of the decision itself. Mr Hays submitted that it was reasonable for Mr Brenton to have reached the decision that he did. It was reasonable for Mr Brenton to have concluded that these two incidents could only have happened the way they did if someone in the company realised the opportunity to smuggle was there and tipped the drivers off to take advantage of it. He submitted that it was reasonable, based on the only common denominator between the two incidents namely the common haulier. Mr Hays said that in looking at the way the theory of the case had changed, from the basis of Mr Sked's decision to the basis of Mr Brenton's decision the Tribunal had to perform "mental gymnastics" in that it needed to accept that its finding of honesty was confined to the circumstances considered in the Tribunal Decision, namely the reasonableness of the Appellant's procedures to prevent smuggling and that such a finding did not preclude a finding that there was complicity and therefore dishonesty on that account. These matters had never been put to Ms Koritnik. In effect, Mr Hayes was submitting that our finding of honesty had to be confined to its context and had no wider application, and it was open to Mr Brenton, acting independently, to depart from Mr Sked's and the Tribunal's starting point.

44. Mr Hayes submitted that it was reasonable not to have taken into account evidence that was not referred to in the Tribunal's decision; he was entitled to assume that the Tribunal would have referred to all matters of significance. Those matters which Mr Brenton said he did take into account but had not recorded as having done so, only went to the question of weight. Mr Hays accepted that it is less likely that a company complicit in smuggling would take steps after the event to prevent smuggling, but Mr Brenton had dealt with that in his evidence. It was reasonable for him to conclude that some parts of the company knew what was going on and others did not and that there was a form of subterfuge to hide the company's complicity.

45. Finally, Mr Hays submitted that the question of the value of the Vehicle now as a subsidiary matter. In any event, there was no evidence before the Tribunal as to the Vehicle's correct state and condition.

46. We have no hesitation in rejecting all of the above submissions.

47. First, to ask the Tribunal to accept that our findings of honesty can be qualified in the way Mr Hays suggests is not only to ask us to perform "mental gymnastics" but is completely artificial. It is implicit in the Tribunal Decision that the Appellant was found to be honest, this was based on a review of all the evidence, the same evidence on which Mr Brenton was obliged to base his decision. There is nothing in that evidence that points to any complicity on the Appellant's part, and the evidence that

the case should be treated as one focused on the procedures undertaken by the Appellant to prevent smuggling is overwhelming.

48. In our view, a finding that the evidence points to a cover-up of a deliberate smuggling plan on the part of the Appellants is not only completely lacking in plausibility, but, as submitted by Mr Douglas Jones, perverse. This is not simply a question of weight, as Mr Hays submitted, but a result of having considered a matter which, in the light of the Tribunal's findings on honesty and a lack of complicity, was irrelevant.

49. Whilst at first blush the occurrence of two incidents such as occurred here within a short time of each other certainly raises a suspicion of complicity, the other evidence clearly points in the opposite direction, namely:

> (1) the numerous attempts to contact the Respondents after the first seizure, instructing solicitors to follow up after a failure to respond. As Mr Douglas Jones pointed out, taking this course of action after your smuggling plot has been discovered is a case of throwing good money after bad; and
>
> (2) the urgent and detailed steps to prevent smuggling, the detailed investigation, requiring intensive resource from a thinly staffed company and the instructions not to travel via Luxembourg.

50. In coming to the conclusion that the Appellant must have arranged the stops in Luxembourg, Mr Brenton failed to consider that Luxembourg is a perfectly feasible route for a driver given notice to transport a load say from Italy or Slovenia to the UK. The stops in Luxembourg were therefore consistent with the possibility that the drivers had been suborned to stop there to pick up the loads. Taken together with all the other evidence mentioned above reinforces the correctness of the theory on which Mr Sked and the Tribunal proceeded.

51. Mr Brenton failed to give any consideration to Mr Sked's finding that although the two incidents close together were suspicious, there was insufficient evidence of the Appellant's involvement. Taken together with the Respondents acceptance of this position before the Tribunal on the first appeal, the consequent finding of fact that the Appellant was not complicit and the Tribunal's finding of honesty, there was no rational basis on which Mr Brenton could proceed to carry out the re-review on the basis of the complicit theory. In doing so Mr Brenton took irrelevant factors into account and failed to take relevant factors into account, notably the Tribunal's findings of fact and the acceptance by the Respondents before the Tribunal of Mr Sked's theory of the case.

52. Mr Brenton also fell into the same trap as Mr Sked in failing to have regard to the significance of the shortness of time between the two incidents. In paragraph 77 of the Tribunal Decision, it was found that an assumption that because a second incident occurred so quickly after the first that the Appellant's procedures were inadequate is unreasonable. Mr Brenton made his decision on the basis that there had been two incidents within six months without considering whether in all the circumstances they should have been treated as a single incident. In those circumstances, Mr Brenton's

comment in the Review Letter that the Appellant should think themselves fortunate that both vehicles were not restored is inappropriate.

53. Mr Brenton was bound to consider all the evidence available to him, not just the evidence referred to in the Tribunal Decision. Indeed Mr Brenton appears to have recognised this, because at the bottom of page 2 and the top of page 3 of the Review Letter he stated:

> "I have considered the decision afresh, including the circumstances of the events on the date of seizure and the related evidence …"

54. Finally, we do not accept that the value of the Vehicle is a subsidiary matter. It is clear that Mr Brenton accepted that the trade value at the date of seizure should be used as this is what the Policy said, without considering in the circumstances whether that was appropriate considering the length of time that had elapsed. This was a highly relevant matter that Mr Brenton failed to take into account. Commonsense dictates that the Vehicle would have deteriorated since seizure and considerable expense would be necessary in remedying that without the need for detailed evidence. It is also incorrect to assume that Mr Brenton was entitled to assume restoration for a fee was within the contemplation of the Tribunal and its decision. It is quite clear that the way the Tribunal interpreted how the restoration policy should apply in a case of same haulier, different drivers that the policy would lead to restoration *without* a fee and that was implicit in its decision.

55. For all these reasons we find that Mr Brenton's decision was one that no reasonable review officer could have arrived at and we allow the appeal. We therefore direct that:

(1) Mr Brenton's decision should cease to have effect from the date of release of this decision; and

(2) The Respondents conduct a further review of the decision not to restore the Vehicle without payment of a fee.

This matter has been ongoing for far too long. It is clear that in the circumstances, the Respondents should take the obvious course after the review and restore the Vehicle without charge, although ultimately that is a mater for their decision after carrying out the review. It is now over three years since the Vehicle was seized and has not been earning any revenue for the Appellant. It is hoped that the Respondents will decide that it is inappropriate for them to spend any more of their valuable resources in prolonging this matter any longer than is necessary and we therefore direct that the further review be carried out within 28 days of the date of this decision.

56. 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: 29 October 2013