



## DECISION

1. The Appellant seeks to appeal the decision taken by the Respondent on review and notified by letter dated 11<sup>th</sup> December 2013 not to restore a Scania tractor unit registration number LU6374R (“the unit”), seized at Dover Eastern Dock on 23<sup>rd</sup> June 2013

2. The Appellant did not attend the hearing and no oral evidence was called on his behalf. For the Respondents we heard oral evidence from the review officer Helen Perkins

### 10 **The background**

3. There was no dispute about the law or about the policy, nor indeed about the facts, the dispute being about the application of the facts.

### **The facts**

4. On 23 June 2013 at Dover, the above Tractor Unit, towing trailer WPIUK10, was stopped by Border Force (“BF”) Officers. It was driven by Mr Piotr Matysiak (“the Driver”). He presented paperwork for the load and an ID card. The paperwork consisted of CMR JG250626 dated 25<sup>th</sup> June 2013 and a packing list numbered 30279185.

5. The trailer was carrying a load consisting of Electrolux ovens. The Driver stated that the ovens were loaded in Poland, that he was delivering to the address on the CMR and that he had not loaded the trailer himself. The trailer was sealed and the Driver pointed to the CMR to confirm the seal number. The Driver was asked if there were any cigarettes in the trailer and he answered “no”.

6. On examination of the trailer 499,780 non duty-paid cigarettes (liable to excise duty of £115,581.00) (“the Excise Goods”) were found. These were hidden in a “coffin type” concealment within the load. This consisted of a gap being left, in which the cigarettes were stored, surrounded by the ovens.

7. The officer was satisfied that the Excise Goods were held for a commercial purpose, but none of the proper methods of removing excise goods to the UK were used and therefore he seized the Goods under section 139 of the Customs and Excise Management Act 1979 (“CEMA”) as being liable to forfeiture pursuant to both Regulation 88 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 and section 49 (1) (a) of CEMA. The Tractor Unit and the trailer were also seized under section 139(1) as being liable to forfeiture under section 141(1)(a) because they were used for the carriage of goods liable to forfeiture.

8. A form 156 “Seizure Information Notice” and “Notice 12A” was issued, notifying the Appellant of the right to challenge the seizure in the magistrates’ Court.

9. The Appellant has not challenged the legality of the seizure in the Magistrates' Court and therefore, due to the passage of time, the Goods are deemed to have been duly condemned under paragraph 5 of schedule 3 of CEMA.

5 10. The Appellant requested restoration of the Tractor Unit and the trailer. Both were refused. Restoration of the trailer could not be considered, as the Appellant did not own it.

10 11. The Appellant requested a review of that decision. The BF reviewed that decision and decided not to restore the Tractor Unit on the basis that it was considered that the Appellant operator was likely to have been complicit in the smuggling attempt.

### **The law**

15 12. The decision not to restore falls to be reviewed by the Tribunal pursuant to s. 16(4) of the Finance Act 1994 as it is an "ancillary matter" as defined in s. 16(8) and of a description specified in Schedule 5 s.2(l)(r) of that Act. Under that section the Tribunal must decide whether the decision was reasonably arrived at. If it decides that it was not, it can:

- a. direct that the decision ceases to have effect;
- b. require the Respondents to review the decision in accordance with directions;
- 20 c. in the case of a decision already acted upon, declare the decision unreasonable and give directions for steps to be taken to ensure that there is no repetition of the unreasonable decision

25 13. It was submitted by Mr Davies, and we accepted as correct, that the appropriate test to be applied when determining the reasonableness of the decision is whether the Commissioners acted in a way in which no reasonable panel of commissioners could have acted; if they have taken account of an irrelevant matter or if they disregarded something to which they should have given weight (as per Lord Lane in *Customs and Excise v JH Corbitt (Numismatists) Ltd [1980] STC 231*, quoted in the matter of *Elliot v Commissioners of Customs and Excise EE00843*

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### **Border Force Policy**

14. The basis of UKBA's ultimate decision not to restore the tractor unit was their stated policy on such matters.

35 15. The review letter sets out Border Force Policy for the restoration of commercial vehicles that have been used for smuggling excise goods as follows:

A vehicle adapted for the purposes of smuggling will not normally be restored.

Otherwise the policy depends on who is responsible for the smuggling attempt:

A: Neither the operator nor the driver are responsible; or

B: The driver, but not the operator is responsible; or

C: The operator is responsible.

A. If the operator provides evidence satisfying Border Force that neither the operator nor the driver were responsible for or complicit in the smuggling attempt then:

5 (1) If the operator also provides evidence satisfying Border Force that both the operator and the driver carried out basic reasonable checks (including conforming with the CMR Convention) to confirm the legitimacy of the load and to detect any illicit load, the vehicle will normally be restored free of charge.

10 (2) Otherwise,

(a) On the first occasion the vehicle will normally be restored for 20% of the revenue involved in the smuggling attempt (or for 100% of the trade value of the vehicle if lower).

15 (b) On a second or subsequent occasion (within 6 months) the vehicle will not normally be restored.

B. If the operator provides evidence satisfying Border Force that the driver, but not the operator, is responsible for or complicit in the smuggling attempt then:

20 (1) If the operator also provides evidence satisfying Border Force 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,

30 (a) On the first occasion the vehicle will normally be restored for 100% of the revenue involved (or the trade value of the vehicle if lower).

(b) On a second or subsequent occasion the vehicle will not normally be restored.

35 C: If the operator fails to provide evidence satisfying Border Force 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).

40 (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 Respondent's case

16. The Respondent contended that the decision not to restore the Tractor Unit was reasonably reached.

5 17. They set out the correspondence which had taken place prior to the review decision

18. In a letter dated 3<sup>rd</sup> July 2013 Victor Mirski wrote to the Respondent on behalf of the Appellant asking for restoration of the Tractor Unit and the trailer. The letter stated:

- 10 a. The Tractor Unit and the trailer were leased;
- b. The Driver was to blame for the importation although he refuses to admit guilt;
- c. The GPS shows deviations from the route as well as stops;
- d. There is no real sanction against drivers in Poland as the authorities are reluctant to prosecute;
- 15 e. The Driver was on a 3-month probation, was dismissed and will not be reemployed. The Appellant gives drivers comprehensive training with emphasis on avoiding smuggling.

19. The letter from the Appellant company itself enclosed with the letter of 3<sup>rd</sup> July 2013 was dated 25<sup>th</sup> June 2013. This letter states:

- 20 a. The trailer was loaded on the 21<sup>st</sup> June 2013 and was correctly fitted with a seal before departure.
- b. The deviations shown on the GPS looked suspicious; The Appellant makes every effort to train drivers, had 19 units and has had no problems with authorities in any country;
- 25 c. The Appellant had no previous problems with the Driver;
- d. The Tractor Unit and the trailer are both leased.

20. In a letter dated 16<sup>th</sup> July 2013 written to the Appellant, the Respondent advised that Deutsche Leasing had notified it that the finance agreement with the Appellant for the trailer had been terminated. Accordingly the Respondent could not consider  
30 restoring the trailer to the Appellant.

21. In a letter dated 18<sup>th</sup> October 2013 the Respondent wrote to the Appellant stating that the Tractor Unit would not be restored as it was considered that the Appellant company was complicit in the smuggling attempt because the seal on the trailer was applied at the time of loading and was intact, indicating that the Goods had  
35 been loaded onto the trailer before the Driver commenced his journey.

22. On the 7<sup>th</sup> November 2013 the Appellant's representative wrote to the Respondent stating that the Driver could have inserted the Goods without breaking the seal if the Driver had intentionally failed to thread the tilt cord though the eye of the

lever that controls the tilt cover. The GPS showed deviations from the route that the Driver had no legitimate reason to make. Further the Driver had been dismissed from the company and reported to the authorities. The Driver was not contesting the dismissal, nor had he provided any explanation for the deviations.

5 23. On the 13<sup>th</sup> November 2013 the Respondent wrote to the Appellant explaining the review process and inviting the Appellant to provide any further information in support of a review.

24. On the 11<sup>th</sup> December 2013 the Respondent wrote to the Appellant with the decision that the Tractor Unit would not be restored (the disputed decision).

10 25. The essence of the review decision was that the trailer was loaded on 21<sup>st</sup> June 2013 and correctly fitted with a seal. When the officer approached the vehicle at Dover it was necessary to break the plastic seal. Indeed, the Respondent themselves had confirmed that the seal was applied correctly immediately before departure.

15 26. The review officer had gone on to deal with the issues raised in the correspondence from the Respondent, namely the deviations from the authorised route and the dismissal of the driver. She raised the fact that she had examined the signature of the driver on his contract, and stated that it did not appear to be the same as the signature on his ID card or the signature on the seizure documents. She said that this was sufficient for her to doubt the credibility and legitimacy of the contract.

20 27. The review officer gave evidence to the Tribunal. She confirmed that she felt that regular travel was a consideration to be taken into account, as it presented an opportunity to an operator. She had not considered whether the consignor was involved, as no evidence had been presented to suggest their involvement. The Appellant had implicated the driver, and made no suggestion that the consignor was  
25 involved. She said that she would not have come to a different conclusion if the signatures had matched up, and that consideration of regularity of travel was only one of many, and would have made no difference to her conclusion.

28. Counsel submitted that if the officer came to a conclusion that one thing was inherently likely, there was no need to go through every other possibility and to  
30 discount it. He also submitted that it was not unreasonable to fail to take account of something which had not been raised by the Appellant

### **The Appellant's case**

29. Counsel for the Appellant argued that the review officer, when looking at the evidence of the seal, only considered one possibility. She had failed to consider  
35 whether the consignor, Electrolux, had placed the goods inside the vehicle. In consequence, she had failed to take account of Part A of the Border Force Policy.

30. He also pointed out that the review officer had said in her review letter that the Appellant's vehicles were regularly travelling to and from the UK and this provided the company with ample opportunity for illicit goods to be imported and distributed  
40 commercially without payment of the relevant UK excise duty due. Thus, she was

conflating opportunity with propensity. He submitted that this consideration was material to the decision taken, and was an irrelevant consideration.

5 31. He also pointed out that the assertion that the signature of the driver did not appear to be the same as on his ID, without taking steps to obtain expert evidence, was an assertion given the force of evidence, and was an irrelevant consideration material to the decision. It had affected credibility, and so it was a relevant consideration

10 32. The review officer had suggested that a reasonably careful operator with a GPS system in the vehicle, would have been aware of the deviations to the approved route that amounted to almost 6 hours, and questioned them immediately unless they were complicit. Counsel suggested that this was another irrelevant consideration, which was material to the decision, as subsequent evidence showed that this was impossible for an operator to do on a day to day basis.

15 33. Counsel asked the Tribunal to consider the question of hardship. There had been no evidence before the decision maker at the time of review, but evidence was put before the Tribunal that the loss of the tractor unit could lead to insolvency.

### **The jurisdiction of the Tribunal**

20 34. Our jurisdiction is limited to judging the reasonableness of Ms Perkin's decision. The test which we apply is to determine whether or not the Commissioners have acted in a way in which no reasonable panel of Commissioners could have acted; if they have taken account of any irrelevant matter or have disregarded something to which they should have given weight.

### **Conclusions**

25 35. There was no evidence before Ms Perkins that neither the operator nor the driver were responsible for or complicit in the smuggling attempt. In our view, therefore, it was not unreasonable for her to move straight to a consideration as to whether the driver, but not the operator, was responsible under Paragraph B of the policy, or whether the operator was responsible under Paragraph C of the policy. There was no evidence that the consignor was complicit in the smuggling attempt, and 30 it is not, in our finding, unreasonable for the review officer to fail to take account of something which was not raised as a possibility by the Appellant.

35 36. The evidence before Ms Perkins was that the trailer was sealed at the time of its arrival in Dover. The Appellant had confirmed that it had been loaded on 21<sup>st</sup> June 2013 and that immediately before departure had been fitted with a seal. The Appellant had asserted that the driver had substantially deviated from his route, and that it would have been possible for the driver to load illicit cigarettes during that deviation if he had intentionally failed to thread the tilt cord through the eye of the lever on the trailer at the time of the initial loading. There was no evidence of this, other than the assertion of it being a possibility.

37. We are able to look at the additional evidence provided after the review was concluded. In our view, it is not so compelling as to provide us with a reason why the decision of the reviewing officer should be overturned. Indeed, it confirmed that a different driver was present at the time of loading of the trailer, and that this driver  
5 witnessed the application of the seal.

38. We were asked by Mr Brigden to find that the irrelevant issues were part of the decision making process. We found that the evidence of the Appellant's complicity in the attempted smuggling was overwhelming. There was no evidence of the involvement of the driver, Mr Matysiak, in the smuggling attempt other than the  
10 assertion by the Appellant that it was a possibility.

39. In our finding, the assertion by Ms Perkins that the Appellant had the opportunity to import and distribute illicit goods is not an unreasonable consideration. The opportunity is something which can properly be taken into account when making a decision on complicity, as long as this is not the sole consideration. It is, in our  
15 finding, not an irrelevant consideration.

40. We found that the credibility issue regarding handwriting was an irrelevant consideration, but we accepted the evidence of Ms Perkins that it would not have affected her decision.

41. In summary, we concluded that it was entirely reasonable for the reviewing officer to come to the decision to which she came, and that she did not act in a way that no reasonable panel of Commissioners could have acted.  
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42. We looked at the question of hardship. Loss of a vehicle is, of course, likely to cause hardship. However, we concluded that on the facts that the Appellant, having a fleet of 19 vehicles, would not suffer exceptional hardship from the loss of one tractor  
25 unit. The seizure of the vehicle was, in our finding, proportionate.

43. We therefore disallow the appeal

44. 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.  
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**JOHN N. DENT  
TRIBUNAL JUDGE**

**RELEASE DATE: 16 September 2014**

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