[2020] UKFTT 0133 (TC)

# TC07624

**Appeal number: TC/2017/08458**

***CITES REGULATIONS – no import certificate – goods seized – whether refusal to restore was reasonable – yes – appeal allowed***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**SELECTRON-UK LIMITED** **Appellant**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS** **Respondents**

**TRIBUNAL: JUDGE ANNE FAIRPO**

**Sitting in public at London on 9 April 2019**

**Ms J Smith for the Appellant**

**Mr B Zurawel, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

DECISION

1. This is an appeal against a decision by the Respondents (HMRC) to refuse to restore to the Appellant (Selectron) 96 electric guitars which were seized on 25 May 2017.

**Background**

2. The background, the law, and general facts were not in dispute and can be summarised as follows:

(1) Selectron is a distributor of guitars in the UK and has imported and distributed guitars for many years.

(2) The guitars which are the subject to this appeal were partly manufactured using Dalbergia Latifolia, a wood also known as Indian Rosewood.

(3) Dalbergia Latifolia is (amongst other materials) listed in Appendix II of the Convention on International Trade in Endangered Speciies of wild fauna and flora ("CITES") and in Annex B of Commission Regulation (EC) 338/97 (as amended).

(4) The import of items on Annex B into the UK requires an import permit at the date of import, as set out in Article 4 of Commission Regulation (EC) 338/97 (as amended) and the rules relating to implementation of this Regulation in Commission Regulation (EC) 865/2006.

(5) s49(1) Customs and Excise Management Act (CEMA) 1970 provides that goods which are imported contrary to any prohibition or restriction shall be liable to forfeiture.

(6) s139(1) CEMA 1970 provides that goods which are liable to forfeiture may be seized by Border Force.

(7) The legality of such seizure may only be contested at the magistrates court. No proceedings were brought to challenge the legality of the seizure and so the goods have been condemned as forfeit and this Tribunal has no jurisdiction to consider the legality of the seizure.

(8) s14 Finance Act 1994 provides that a person whose goods have been seized may require that HMRC review that decision. On review, s15 Finance Act 1994 provides that HMRC may confirm, withdraw or vary the decision.

(9) s16 Finance Act 1994 provides that the powers of this Tribunal on appeal in respect of the review decision are limited to a supervisory jurisdiction.

3. The relevant timeline is as follows:

(1) With effect from 4 February 2017, all imports of goods manufactured using rosewood into the UK require a CITES import permit issued by the UK before the goods are shipped, as well as an export permit issued by the country of origin.

(2) On 17 March 2017, a CITES export permit issued by the Republic of Korea in respect of the guitars was lodged with Border Force.

(3) On 28 March 2017, Selectron were advised by email that the guitars were ready for shipping and authorised their agents to arrange the shipping.

(4) On 1 April 2017, a Notice of Seizure in respect of a consignment of musical instruments imported by Selectron was issued by Border Force for failure to comply with the CITES requirements (the "first seizure")[1]. These goods had arrived in the UK on 17 March 2017.

(5) On 11 May 2017, Selectron applied to the Animal and Plant Health Agency (APHA) for a retrospective import permit in respect of the guitars.

(6) On 17 May 2017, the guitars arrived from the Republic of Korea at the Port of Felixstowe. No CITES import permit was presented prior to, or at the time of, the arrival of the guitars. The guitars were valued at $40,085.28.

(7) On 25 May 2017, the guitars were inspected and seized by a Border Force officer as no import permit had been provided in respect of the guitars. The seizure reference number was E4840183-17527.

(8) On 30 May 2017, APHA refused the application for a restrospective import permit. The letter of refusal stated that retrospective permits will only be issued in very exceptional circumstances and that, as Selectron had explained that the reason for the late request was that Selectron were unaware of the controls and the requirement to obtain import permits before the goods were shipped, the criteria for issuing a retrospective permit were not met.

(9) On 6 June 2017, Selectron applied to HMRC to request restoration of the guitars. The request was acknowledged on 9 July 2017.

(10) On 23 July 2017, HMRC agreed to restore the goods in the first seizure for a fee.

(11) On 24 July 2017, HMRC refused restoration.

(12) On 31 August, Selectron requested a review of the decision to refuse restoration.

(13) On 16 October 2017, the reviewer upheld the decision to refuse restoration.

(14) On 1 November 2017, Selectron appealed to this Tribunal.

[1] These instruments were also guitars but, to avoid confusion with the goods which are the subject the seizure which is being appealed, the goods in this first seizure will be referred to as "musical instruments" in this decision.

**Appellant's evidence and submissions**

4. Selectron's grounds of appeal were that HMRC's refusal to restore the goods was unreasonable, disproportionate and a breach of Article 1, Protocol 1 of the EUHR for the reasons set out below. Ms Smith provided a witness statement and gave evidence at the hearing.

*Impact on the company*

5. Selectron is a very small distribution company, employing 6 part time employees and 2 full time employees, with a self-employed sales representative. As a result of the refusal to restore, staff hours have been cut due to a lack of stock and Selectron had expected in 2018 that it would have to cease trading, although it was acknowledged in the hearing that the company was still trading. Ms Smith estimated that Selectron had saved approximately £45,000 by reducing working hours.

6. Two employees are of an age and in circumstances where Selectron considers that it will be difficult for them to find alternative employment. Selectron considered that the impact on the individuals and Selectron is a disproportionate effect of the decision not to restore.

7. Selectron can only distribute guitars in the UK and Ireland but, in common with other UK distributors, is facing increasing competition from online distributors outside the UK.

8. The guitars were intended for the 2017 Christmas market and, if not restored, Selectron would suffer a financial loss for the year as they have had to pay for the guitars and cannot use the expected approximate income of £60,000 from those guitars to pay for further goods.

9. This seizure, and a subsequent seizure of 519 guitars in October 2017, will cause exceptional hardship to Selectron. That subsequent seizure arose because the goods were shipped without Selectron's authorisation and without Selectron being aware that the goods had been shipped.

10. Selectron cannot afford to pursue legal action against the shipping agent for any failure by that agent.

11. In the hearing, Ms Smith explained that Selectron was no longer the UK supplier for the guitars in question as it had been unable to meet sales targets required by the manufacturer because of the loss of the goods. She disagreed that this was due to market conditions but, instead, due to the lack of stock arising from HMRC's actions.

*Nature of the material*

12. The rosewood included in the guitars was acquired by the manufacturers before the CITES convention came into force and came from wood felled several years earlier. The seizure of the goods will not prevent any damage to the relevant sources.

13. The amount of rosewood in the guitars is less than 5% of the overall weight of the guitars, being limited to the fretboards.

*Awareness of the relevant law*

14. Selectron has been importing similar goods into the UK for many years. It was not aware of the changes to the legislation. It was aware that a CITES certificate was required but had not realised that additional permits were needed. Selectron is not a member of a trade union or association and believed at the relevant time that the export permit was sufficient for the goods to be imported into the UK.

15. Selectron had successfully imported three shipments with only an export permit and so had not realised that its belief was incorrect.

16. Selectron was aware that Border Force had met with the Musical Instrument Trade Union and had agreement that there were inconsistencies in the way in which Border Force treated musical instruments.

17. Selectron applied for a permit once it became aware of those changes.

18. APHA had provided an "amnesty" for retrospective permits until 1 May 2017, but Selectron were not aware of this amnesty until they became aware of the problem with the seizure under appeal. As Selectron is a small company, it uses an agent to deal with imports and had provided them with all the documentation they thought was required. Selectron had had a meeting with the agents on 5 April 2017 and had been advised that only the CITES export permit was required for imports.

*Other seizures referred to by HMRC*

19. The first seizure arose because of a mistaken belief by HMRC that a different material, Ramin, had been used in the instruments. These guitars were subsequently restored for a fee as HMRC accepted on 24 July 2017 that Ramin had not been used in the guitars. It was not until May 2017 that Selectron were advised that the rosewood in the guitars was also a reason for the seizure and so, until that time, did not realise that an import permit was required.

20. This seizure took time to resolve as the material in question had to be analysed by Kew and, in the meantime, three further shipments were released and shipped to the UK. These shipments (including the shipment relating to this appeal) arrived within ten days of each other. Retrospective import permits for these three shipments were requested but refused by APHA.

21. A subsequent seizure in October 2017 arose because firstly of an error in relation to an export permit which Selectron believes was a clerical error made by the person who issued the export permit. In addition, the goods were shipped without Selectron's authorisation or knowledge, against their standing orders to their agent that no goods were to be released for shipping until Selectron confirmed that an import permit had been received. The permit had been applied for before the goods were shipped but was

declined because a foreign government had not responded to APHA in respect of the material involved. This shipment was eventually restored by HMRC on payment of a fee.

22. A further seizure in early 2018 arose because the goods arrived late due to shipping delays and the relevant permits had expired before landing.

23. Selectron also explained that it had made an offer to HMRC to pay a restoration fee to settle the matter but that this had been rejected. Selectron submitted that this rejection was unreasonable.

## HMRC's evidence and submissions

24. Officer Brenton, the officer who reviewed the decision not to restore, provided a witness statement and gave evidence at the hearing.

25. HMRC submitted as follows:

*Awareness of the requirements*

26. HMRC submitted that Selectron should have been aware of the CITES requirements because:

(1) The first seizure would have put them on notice of the requirements;

(2) They had met with their agents in early April to discuss the procedure;

(3) The changes were generally known about in the industry at this time

*Reliance on agent*

27. HMRC submitted that the legislation imposes requirements on the importer, and that the importer is liable for the actions of its agent. The use of an agent did not remove the responsibility of the importer to know what the goods are made of and the requirements involved in importing such goods. If the agent had made a mistake, the importer may have a remedy against the agent but that does not make a refusal to restore unreasonable.

28. In addition, HMRC submitted that the agents appeared to have made a number of mistakes in relation to imports and so Selectron should have taken greater care to monitor their agents and check the information provided.

*Financial hardship*

29. HMRC submitted that any financial hardship was proportionate to the number of items imported and the graduated response to previous non-compliance (having had goods restored before on payment of a fee).

30. HMRC further submitted that any hardship suffered by Selectron was not directly caused by the seizure but, instead, by the loss of a distribution contract with a manufacturer. In addition, although Selectron had indicated that they would have to lay off employee only one had been made redundant and the business had continued to operate.

*Nature of the material*

31. HMRC submitted that it was not relevant that the material had been obtained before the CITES convention came into force as the convention does not include any discretion in respect of material obtained before that date.

*Other seizures*

32. HMRC submitted that this was not a first offence, as Border Force had seized 72 guitars on 17 March 2017 for non-compliance with CITES regulations. Once it was aware of the 17 March 2017 seizure, at the latest, Selectron must have been aware of the relevant legislation and its obligations.

33. Selectron had also been given the "benefit of the doubt" on that first seizure as those had been restored on payment of a fee although the required import permit had not been obtained.

34. HMRC was aware that the shipments involved in the seizure under appeal and the two subsequent seizures arrived within a very short period of time but took the view that the goods seized should not be restored because they considered that the previous seizure should have put Selectron on notice that they had not complied with the CITES requirements.

35. HMRC noted that although the first seizure had been made because it was suspected that Ramin was used in the body of the instruments, a fee was charged to Selectron for restoration of those instruments because rosewood was involved in the neck.

36. HMRC submitted that it was reasonable to take into account the subsequent seizures because they had been made whilst the non-restoration decision and review decision were being made, as they reflected the extent to which Selectron attempted to comply.

37. HMRC acknowledged that the October 2017 seizure had been restored following a review of the initial decision not to restore, on the basis that the circumstances in that case had been outside Selectron's control.

38. HMRC submitted that it was irrelevant to this decision that other shipments had been imported on the basis of an export permit only, and that Border Force had had discussions with the Musical Instrument Trade Union, as each case is different.

*Reasonableness*

39. HMRC submitted, in conclusion, that it was Border Force policy to refuse to restore, in the absence of exceptional circumstances, materials which had been imported into the UK illegally and were lawfully seized.

40. HMRC submitted that the decision that there were no such exceptional circumstances to justify a departure from the policy in this case was reasonable and proportionate for the circumstances set out above.

**Discussion**

41. There was no dispute that the jurisdiction of the Tribunal in this case is supervisory and can only cancel the decision and remit the matter for the restoration decision to be remade if it is satisfied that the review decision was one which could not reasonably have been arrived at.

42. The test as to whether a decision is unreasonable in this was set out in *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223 (p223-24), where Lord Greene stated that a decision would be unreasonable if the decision makers have:

> "taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account."

43. In *Lindsay v C&E Commrs* [2002] STC 588 ("*Lindsay*"), a case about the restoration of a vehicle, the Court confirmed that a decision by HMRC will be unreasonable if "they take into account irrelevant matters or fail to take into account all relevant matters."

*Review decision*

44. The decision letter issued by Officer Brenton in this case stated that he can looked at all of the circumstances surrounding the seizure and had concluded that there were no exceptional circumstances which warranted a departure from Border Force policy because:

(1) The responsibility for compliance with the CITES requirements was with the importer and that any dispute as to the actions of an agent were a matter for Selectron to take up with the agent;

(2) Selectron had had goods seized on 17 March 2017. Those goods had been leniently restored on that first occasion for a fee. This should have put Selectron on notice that the importation of goods falling under the CITES legislation needs to comply with the regulations in force. Nevertheless, Selectron had imported these guitars without the required import permit.

45. Officer Brenton's evidence was that he was satisfied that he had considered everything that was relevant and had disregarded anything that was irrelevant in reaching this conclusion.

*Was the decision reasonable?*

46. The decision letter takes two factors into account: the reliance on an agent and the existence of a previous seizure.

47. Selectron's evidence was that they relied on their agent's advice and did not realise that their agent's advice that an export permit was sufficient was incorrect. Selectron were not aware of the changes in requirements because they were not members of a trade union or association. However, Selectron have been importing goods for many years; this was not a one-off import. Selectron did not provide any evidence that they monitored or check for themselves what import requirements were from time to time – their evidence was only that they had not been advised by others that the requirements had changed. Whilst reliance on a third party may be reasonable in certain circumstances, I do not consider it is reasonable for a business which regularly imports goods to not monitor for themselves the requirements for import of those goods.

48. As Selectron have not provided any evidence that they undertook any checks of their own as to import requirements, I do not consider that this aspect of the decision is unreasonable in the *Wednesbury* sense.

49. With regard to the previous seizure, HMRC's submission (as stated in the review decision) was that they considered that Selectron had been "put on notice" as to the requirements by the first seizure and that the restoration on the first seizure was sufficient "leniency" in respect of relatively new import requirements.

50. Considering the timeline in question, as set out above, HMRC's submission was that Selectron were put on notice by the seizure of goods on 17 March 2017. However, the documentation in the bundle provided to the Tribunal showed that the Notice of Seizure in respect of this shipment was dated 1 April 2017. No evidence was provided to support an earlier date at which Selectron should have been aware that those goods had been seized.

51. Selectron authorised the shipment of the guitars to which this appeal relates on 28 March 2017, before the issue of the Notice of Seizure in respect of the first seizure.

52. The Notice of Seizure in respect of the first seizure states that the goods have been seized under s49(1) CEMA 1970 but does not provide any detail as to what prohibition or restriction has been contravened. An email from Border Force to Selectron on 2 April 2017 with a copy of the Notice of Seizure refers to the need to dismantle one of the instruments in that first seizure for analysis of the material in the body of the instrument.

53. Selectron's evidence was that they were advised that the goods had been seized because it was suspected that they contained Ramin, the import of which has required an import permit for a number of years. It was not until analysis showed that the goods did not contain Ramin that they became aware that Border Force were also challenging the import on the basis of the rosewood content. This evidence was not disputed by HMRC. The guitars which were the subject of this appeal did not contain any Ramin.

54. Selectron's evidence was also that, in April 2017, they believed that the problem with the first seizure was that the original exemption letter, issued by the Indonesian government, had not been provided on import although it had been provided to the shipping agent.

55. The CITES regulations require that import permits shall be applied for in sufficient time to allow their issue before the import takes place (Article 13(1), Commission Regulation (EC) 865/2006) and Article 8(3) of the same Regulation provides that the relevant authority decide on the issue of a permit within one month of the date of submission of a complete application.

56. Considering the evidence put to me, I do not consider that it is reasonable to conclude that Selectron were "put on notice" by the first seizure that the import of rosewood now required a CITES import permit in time for such a permit to be successfully applied for because:

(1) The first seizure was, at the relevant time, believed by Selectron to be in respect of a different material (Ramin);

(2) The failure was believed by Selectron to be in respect of the CITES export permit rather than a lack of a CITES import permit;

(3) The documentation provided in respect of that first seizure does not show that Selectron had any reason to believe otherwise as a result of that seizure.

57. I consider that the evidence before this tribunal shows that, at the point at which Selectron could have successfully applied for an import permit in respect of the guitars, it was in the same position as regards to knowledge of the CITES requirements that it had been in respect of the rosewood involved in the first seizure. Border Force allowed restoration on the basis of leniency for a "first offence" in respect of the rosewood in that first seizure.

58. On balance, therefore, I consider that in concluding that Selectron had been "put on notice" as to the CITES requirements by the first seizure, the decision maker was not taking into account matters which he should have taken into account: notably, the actual timeline of events in respect of that first seizure and the implications for the state of knowledge of Selectron at that time. This aspect of the decision was, therefore, unreasonable in the *Wednesbury* context.

*Proportionality*

59. Article 16 of Commission Regulation (EC) 338/97 requires that "Member States shall take appropriate measures to ensure the imposition of sanctions" and paragraph 2 provides that the sanctions:

> "shall be appropriate to the nature and gravity of the infringement and shall include provisions relating to the seizure and, where appropriate, confiscation of specimens."

60. The review decision concludes that the refusal to restore the guitars was a proportionate response to the failure to provide an import permit in the particular circumstances because this was the second breach of CITES legislation by Selectron and that they were "put on notice" on notice as to those requirements by the first seizure.

61. The decision as to proportionality in this case therefore follows from a conclusion which I have found to be unreasonable.

62. I therefore make no findings as to whether a refusal to restore in respect of a second seizure made in full knowledge of the circumstances of a first seizure would be disproportionate as that would depend on the facts in such a case, which is not the case before me.

**Decision**

63. I find that the decision not to restore the guitars was unreasonable because Officer Brenton failed to consider relevant matters.

64. The Border Force must carry out, within six weeks of the release of this Decision, a further review of the original decision in accordance with the following Directions.

65. Border Force are directed to look at the facts of this case, including:

(1) Selectron's actual state of knowledge of the facts of the first seizure at the time that it could have applied for an import permit in respect of the guitars which are the subject of this appeal; and

(2) The fact that the third and fourth seizures in 2017 occurred shortly after the seizure which is the subject of this appeal.

66. 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.

**ANNE FAIRPO**
**TRIBUNAL JUDGE**

**RELEASE DATE: 06 MARCH 2020**