



Neutral Citation: [2024] UKFTT 00642 (TC)

Case Number: TC09247

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

Location; Taylor House, London

Appeal reference: TC/2022/09477

*Excise Duty – Seizure of vehicle used to carry goods – Appeal by finance company against decision to restore vehicle for a fee – Whether decision reasonable and proportionate on the facts – Yes – Appeal dismissed*

**Heard on:** 1 December 2023  
**Judgment date:** 18 July 2024

**Before**

**JUDGE VIMAL TILAKAPALA  
TRIBUNAL MEMBER DUNCAN MCBRIDE**

**Between**

**PACCAR FINANCIAL POLSKA SP. Z O.O**

**and**

**DIRECTOR OF BORDER REVENUE**

**Appellant**

**Respondents**

**Representation:**

For the Appellant: Simon Clarke of counsel instructed by Aaron & Partners LLP

For the Respondents: Edward Gordon-Saker of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

## DECISION

### INTRODUCTION

1. This is an appeal by the Appellant, PACCAR Financial Polska SP. Z O.O (“Paccar”) against a decision made by the Respondent on 27 January 2022 to offer restoration of a vehicle owned by Paccar (“**Vehicle 1**”) subject to payment of a £2,500 fee. Paccar seeks restoration of Vehicle 1 without payment of that fee.

### BACKGROUND AND FACTS

2. We were provided with a hearing bundle of 425 pages together with skeleton arguments from each party. No witnesses were called. The parties submitted further written representations on the issue of “unreasonableness” on 31 January 2024.

3. By way of background, Paccar provides financial services to Polish registered businesses with respect to commercial vehicles manufactured by DAF Trucks. It leases approximately 6,300 vehicles to over 500 Polish commercial vehicle operators. The vehicles leased include large to medium sized tractor units and large articulated vehicles. The large articulated vehicles are used primarily for international trade.

4. Although some lessees are “end users” of the vehicles leased by Paccar, other lessees operate sub-leasing or hiring business under which they sub-lease or hire to third parties the vehicles that they lease from Paccar.

5. Vehicle 1 is a DAF XF 480 FT goods vehicle, registration WGM56563. On 18 July 2021 it was stopped and searched at the Coquelles Eurotunnel Depot by a UK Border Force officer and was found to be carrying a consignment of 7,880 cigarettes on which duty had not been paid.

6. The goods were seized under section 139(1) of the Customs and Excise Management Act 1979 (“CEMA”) as being liable to forfeiture under s 5(1) of the Taxation (Cross-Border Trade) Act 2018 (“TCBTA”) and section 49(1)(a)(i) CEMA. The vehicle was seized under s 139(1) CEMA as being liable to forfeiture under s 141(1)(a) CEMA as it was the means of transporting the goods liable to forfeiture.

7. No challenge was made to the legality of the seizure or the facts of the seizure.

8. Vehicle 1 is legally owned by Paccar and at the time of the seizure was leased by Paccar to Truck Care Sp. Z o.o (formerly HAMA Polska Sp. z o.o.) (“Truck Care”) under a finance lease entered into on 18 December 2018 (the “Lease”).

9. Truck Care carries on a sub-leasing or hiring business and had in turn sub-leased Vehicle 1 to Hurtownia Owocow I Qarzyw “Limonka” Marek Chodkowski (“Limonka”) under an operating lease entered into on 24 February 2020 (the “Sub Lease”). Limonka was the operator of the Vehicle at the time of its seizure.

10. As legal owner of Vehicle 1 Paccar applied on 27 August 2021 for its restoration.

11. Information supporting the restoration claim was provided by Mr Michal Matuesuz Dobrowski, a director and board member of Paccar (“Mr Dobrowski”). This information was also provided by Paccar in the form of a Witness Statement dated 18 October 2021 from Mr Dobrowski for the hearing. Mr Dobrowski was not, however, called as a witness. The content of the witness statement has not been challenged.

12. Mr Dobrowski’s evidence included the following information:

- (1) That the business relationship between Paccar and Truck Care (formerly HAMA Polska) had existed from 2014.

(2) In response to HMRC's query asking for details of the measures taken by Paccar to ensure that it was "leasing/hiring to legitimate haulage companies" the following answers were given;

"When TCSZ [Truck Care] first applied to the Company for vehicle financing, one of the Company's Regional Business Managers carried out all the usual background checks. These included: -

- 15.3.1 Verifying the proper constitution and registration of TCSZ as a limited liability company in Poland by reference to the National Court Register in Poland. From this it was established that TCSZ had been incorporated in Poland in March 8 2008 and the identity of its directors and owners.
- 15.3.2 The Regional Business Manager met with directors of TCSZ and obtained from them details of their background, experience, the nature of their business activities and the identity of their suppliers and customers.
- 15.3.3 Under Polish law, when an application is made to register a company the authorities will check the criminal record of the directors. While those with a criminal record for certain offences can be shareholders in a Polish company, they are not permitted to be directors, In these circumstances I was able to ascertain that neither director of TCSZ have any relevant criminal convictions, which would not enable them to be registered as Directors.
- 15.3.4 Using an external credit referencing agency, Sun & Bradstreet/Bisnode we established the credit rating for TCSZ
- 15.3.5 We carried out background checks on their customers which showed these relationships to be good, stable and long-standing. Of particular relevance was the fact that the contracts contained clauses that allowed them to vary the price when fuel prices increased and they had not changed customers for some time. Frequent changes of customers will often indicate a weakness.
- 15.3.6. We made checks against TCSZ in the national debt register.
- 15.3.7 We established the general nature of the business carried out by TCSZ. TCSZ are a vehicle rental company, previously owned by a PACCAR dealership and sold in May to Europejski Fundusz Leasingowy S.A. which in turn is owned by Credit Agricole.

(3) He confirmed that on 24 February 2020, TCSZ sub-let the vehicle to Limonka and that Paccar had agreed to the sub-lease on 5 May 2021 and subsequently to an extension of that sub-lease to an expiry date of 31 January 2022.

(4) He also confirmed that Paccar had reviewed and been satisfied as to the specific terms of the sub-lease with Limonka and had concluded that no further due diligence was considered necessary.

#### *The Lease*

13. Key provisions of the Lease (headed "Lease Agreement No. 7048" and dated 18 December 2018) are:

- (1) Clause 1(1) which provides that it is subject to "PACCAR Financial's general terms", a copy of which is appended to the Lease.
- (2) Clause 7 headed "Detailed terms and conditions" which provides at 7.1:

“The Parties agree that the ban on sublease or other disposal of the Object or any parts thereof or rights thereto under the Agreement stipulated in the General Terms and Conditions shall persist unless the Lessee obtains the Lessor’s express written waiver thereof.”

*Paccar’s General Terms (the “General Terms”)*

14. Mr Clarke drew our attention to the following obligations in the General Terms, which corresponded to those listed by Mr Dobrowski in his response to HMRC’s question “Does [the Company] have a term in the lease/hire agreement that states if Border Force seize the tractor unit or trailer, it would put the lessee/hirer in breach of their contract with you”:

**“4.2 The Customer’s Obligations regarding PACCAR Financial’s Ownership’s Interests**

The Customer undertakes:

...

d) not to hold itself out as the Owner of the Object or do anything that might jeopardise PACCAR Financial’s interest in the Object and (except to comply with its maintenance obligations) to keep the Object in the Customer’s possession and at all times;

e) not to sell, assign, charge, pledge, sub-let, sub-lease or otherwise dispose of the Object or any of its parts or its interest in the Agreement;

f) to inform PACCAR Financial immediately if the Object is lost, stolen or damaged or if anyone attempts to claim any interest in the Object – in particular by way of pledge, retention, seizure or attachment - and to take any such action as PACCAR Financial may require in order to protect PACCAR Financial’s interest. In case the Object is lost or stolen, the Customer shall immediately inform any relevant insurers of this and report any theft to the police;

g) to keep the Object free from all liens, charges and distraints and pay all taxes, assessments, levies, duties and other charges by the authorities (including any penalties) outgoings and impositions in respect of the Object excepting only any taxes on or assessed by reference to PACCAR Financials’s profits or any value added tax which PACCAR Financial is able to reclaim from the relevant tax authorities.

**5. Use of the Object**

**5.1 Agreed Use**

PACCAR Financial and the Customer agree that the Agreement is based upon the representations of the Customer set out in the Agreement with respect to use that the Customer will make of the Object. The Customer warrants to PACCAR Financial that the Object will not, without the prior approval of PACCAR Financial, be used differently and shall inform PACCAR Financial immediately when the Object has or will not be used in accordance with the agreed use. Any damage to or loss in value of the Object, caused by a difference use than represented by the Customer, shall be fully compensated by the Customer.

**5.2 Customer’s Obligations re Use of the Object**

Without prejudice to Customer’s other obligations set forth in the Agreement, the Customer shall:

(i) ...

(ii) ...

(iii) Use the Object in accordance with all applicable laws and regulations and with the manufacturer's operating, maintenance and repair instructions and recommendations (including but not limited to the use of parts, oil, fuel, grease, coolants and factory rate gross weight or loading capacity limitations);

(iv) ...

(v) Not use the Object for any purpose which is illegal, or which might invalidate or otherwise adversely affect any warranties in respect of the Object or which might tend to prejudice PACCAR Financial's interest in the Object or might lead to any claim or cause any loss to PACCAT Financial (whether directly or indirectly); ...”

#### *The Sub-lease*

15. The sub-lease between Truck Care and Limonka (the document headed “COPY OF THE ANNEX DATED 30/04/2021 TO THE TRUCK “LEASE” AGREEMENT No. 09/09/KOR/2020 between HAMA Polska and Hurtownia Owocow I Warzyw “LIMONKA” Marek Chadkowski, Warzaska) included the following terms:

Clause 2, Part 5

“2. CHARGES AND TAXES RELATING TO THE GOODS MOVEMENT  
The Lessee shall be solely responsible for keeping the accounts and paying fees and taxes relating to the movement of goods (customs, indirect taxes, etc). The Lessor expressly reserves that if it is held liable in this regard, it shall have the right to demand full compensation from the Lessee for the damage suffered.”

Clause 7, Part 6

“7. The Lessee undertakes:

.....

To drive the vehicle in line with applicable laws and regulations”

16. In response to Border Force's point that there had been previous seizures of vehicles belonging to Paccar, Paccar stated the following in its “Notice of Claim for Restoration” dated 18 October 2021:

“17. The Claimant is an independent self-governing business incorporated and operating from the Republic of Poland. There are a number of other independent, self-governing, and free-standing businesses in other jurisdictions, incorporated under the laws of those jurisdictions, The Claimant has no control nor any financial or other interest in those other businesses, notwithstanding that they may be members of the PACCAR Group. Accordingly on this topic the Claimant is only able to speak for PACCAR Financial Polska Sp. Z.o.o.”

17. Paccar's initial request for restoration was refused by Border Force on 19 November 2021. The reason given by Border Force was that:

“With the lease agreements still in place I can only infer that Paccar would return the vehicle to the operator, Limonka. It is likely that the vehicle would have been restored to the operator on payment of a fee had they pursued their restoration request. However I cannot transfer that penalty to Paccar as they are not the party responsible for the offence.”

Ultimately restoration decisions are guided by HM Revenue and Customs mandatory policy. That policy is designed to encourage legitimate trade and, at the same time, discourage excise offenders by operating a proportionate system of penalties for wrongdoers. Restoring the tractor unit to your client while the lease agreements are still in place would directly conflict with policy as the offence would not have been taken into consideration.”

18. On 19 December 2021 Paccar applied for a review of the initial Border Force decision. That review was provided on 27 January 2022 by Border Force Officer Collins.

19. Officer Collins’ review varied the initial Border Force decision and concluded that the Vehicle should be restored for a fee of £2,500.

20. In his letter setting out his decision, Officer Collins stated the following:

“... moving on to the wider issues of the leasing of your client’s vehicle I have the following concerns. There have been a number of seizures concerning vehicles leased out by the company Paccar Financial Polska within the last 12 months. I note in particular with this case that the vehicle was initially leased to Truck Care Sp Zoo who in turn subleased to Limonka Marek Chadkowski. The company Limonka subsequently has the vehicle seized from them by Border Force. I note in your claim for restoration on behalf of your client that you outlined a number of steps taken to ensure the legitimacy of haulage operators as clients. My observation from examining these points is that whilst your client allows the subleasing of its vehicles, the checks conducted on the *initial* haulier carry little weight.

Ultimately your client has had a succession of vehicles seized by Border Force that your client had claimed legal title to. The initial vehicles were restored free of charge but there has to come a point when the recognition of a failing in the system is addressed. Policy would indicate that the least action appropriate would be a fee of £5,000. I am exceptionally willing to restore the vehicle for a 50% reduction of that fee. I feel that this is a balanced, proportionate and graduated response to the seizure by Border Force of your client’s vehicle.”

21. It is this decision that Paccar is appealing.

#### *Vehicle 2*

22. Around the same time as seizure of Vehicle 1, another vehicle owned by Paccar was also seized. This vehicle (“Vehicle 2”) was seized on 9 July 2021 following its interception by Border Force at the Coquelles Eurotunnel Depot where 8 kg of hand rolling tobacco was found on which duty had not been paid.

23. As with Vehicle 1, the goods were seized under s.139(1) CEMA as being liable to forfeiture under s.5(1) TCBTA and s.49(1)(a)(i) CEMA and the vehicle was seized as being liable to forfeiture under s.141(1)(a) CEMA as it was the means of transporting the goods liable to forfeiture.

24. Again, no challenge was made to the legality of the seizure or the facts of the seizure.

25. In this case, Vehicle 2 was leased by the Appellant to Dem-Pol Vestoil Sp.j, (“**Dem Pol**”) a Polish company which, unlike Truck Care, was the end user of the leased vehicle. The tobacco products were unlawfully imported by the driver of the vehicle who was an employee of the lessee.

26. As legal owner of Vehicle 2 Paccar applied on 30 July 2021 for its restoration.

27. In its restoration application Paccar submitted information, including statements from Mr Dabrowski, that were very similar to the information submitted for Vehicle 1. In particular; (a) the checks stated to have been carried out on Dem-Pol were in all respects the same as those stated to have been carried out on Truck Care, (b) the relevant provisions of the lease quoted to Border Force in response to the question “Does [the Company] have a term in the lease/hire agreement that states if Border Force seize the tractor unit or trailer, it would put the lessee/hirer in breach of their contract with you” were in all material respects references to the same provisions of Paccar’s General Terms as those given to Border Force for Vehicle 1, and (c) Paccar’s response to Border Force’s point that there had been previous seizures of vehicles owned by Paccar was identical to the response given in relation to Vehicle 1.

28. The reason given by Border Force for the initial refusal to restore Vehicle 2 was that the lease agreement with Dem Pol had not been terminated and so its rights to the vehicle remained and had to be observed by Border Force.

29. Paccar requested a review of this decision and a review was carried out by Border Force Officer Sanders. Officer Sanders notified Paccar of his review decision on 27 January 2022. The review decision varied the initial Border Force decision and concluded that restoration should be granted for a fee of £2,500.

30. The reasons given for his conclusion were similar, although not quite identical to the reasons given for the decision on restoration of Vehicle 1. The relevant parts were as follows:

“I consider the measures PACCAR Finance Polska has in place within their leasing contract and the steps taken to prevent their vehicles being used to carry smuggled goods were adequate, however I also have to consider that whilst your client allows the subleasing of its vehicles, any checks conducted on the *initial* lessee do not ensure legitimate end use by any party who takes over the sub-lease.

I can see from our records that previously vehicles were restored free of charge to your client, but there has to come a point when the recognition of a failing in the system is addressed, and because of this, and although the lease between your client and Dem-Pol Vestoil So. Remains extant, I can now confirm that I vary my original decision not to restore the vehicle, and I now conclude that exceptionally; the Tractor unit should be restored for a fee of £2,500.”

31. Paccar notified Border Force on 31 January 2022 of its intention to appeal to the Tribunal Officer Sanders decision on grounds very similar to those of the current Appeal.

32. The appeal was eventually submitted to the Tribunal on 17 December 2022. Paccar also pointed in further representations that Officer Sanders had incorrectly referred to the sub-leasing of vehicles and to “end use by a party that takes over the sub-lease”. Paccar pointed out that this showed a misunderstanding of Paccars’s business as Dem Pol was not a sub-lessee.

33. Officer Sanders went on long term sick leave and was therefore unable to attend a hearing. It was agreed that a new Border Force Officer would be asked to review his decision. The further review was carried out by Border Force Officer Cox who concluded that the vehicle should be restored to Paccar without any fee. The reason given, in his review conclusion letter of 7 March 2023 was that:

“I consider the measures Paccar Finance Polska has in place within their leasing contract and the steps taken to prevent their vehicles being used to

carry smuggled goods were adequate and therefore reduced the restoration fee accordingly.”

34. Officer Collins did not explain Officer Sanders’ earlier reference to sub-leasing nor did he make any further reference to previous seizures of vehicles belonging to Paccar. The reasons for those references are therefore unknown.

35. As a result of the new review decision the appeal in relation to Vehicle 2, which was due to be heard by the Tribunal together with the current Appeal was dropped. The issue remains relevant though as Paccar contrasts the decision made in relation to Vehicle 2 with the decision made in relation to Vehicle 1, arguing that there is unjustifiable inconsistency.

#### **THE STATUTORY FRAMEWORK**

36. The statutory provisions relevant to this appeal are as follows.

37. S.49(1) CEMA which provides that where any goods are imported contrary to any prohibition by virtue of any enactment, those goods shall be liable to forfeiture.

38. S.141(1) CEMA which provides that where anything has become liable to forfeiture, any vehicle which has been used to carry that thing shall also be liable to forfeiture.

39. S.139(1) CEMA which provides that anything liable to forfeiture may be seized or detained by any officer of the UK Border Force.

40. S.152 CEMA which provides for restoration of anything seized as follows:

152 The Commissioners may as they see fit –

...

(b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under [the Customs and Excise Acts]

...

41. The review and appeals procedure in relation to decisions concerning restoration of things forfeited or seized under CEMA is contained in Finance Act 1994 (“FA 94”). S.14 FA 94 makes provision for a person to require a review of a decision under s.152(b) CEMA in relation to restoration of anything seized from that person.

42. S.16 FA 94 sets out the jurisdiction of the Tribunal on an appeal against such a review. A decision on review to refuse restoration or to impose conditions on restoration is an ancillary matter. As such the jurisdiction of the Tribunal is limited to considering whether the decision of the review officer was reasonable.

43. The Tribunal has limited powers where it is satisfied that a decision is unreasonable. S.16(4) FA 94 provides as follows:

16(4) 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 review or further review as appropriate 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 review or further review as appropriate, 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. There is no dispute as to the legislation in this appeal nor is there any challenge to the legality of the seizure.

#### **THE GROUNDS OF APPEAL**

45. Paccar's stated grounds of appeal in respect of the Border Force Decision are as follows:

- (1) That it imposes duties and obligations on Paccar which are remote, unreasonable and unduly burdensome;
- (2) That it has no foundation in law and is accordingly outside the lawful authority of the Respondent;
- (3) That it seeks to impose restrictions on the activities of Paccar in circumstances outside the Respondent's jurisdiction; and
- (4) That it amounts to an interference with Paccar's peaceful enjoyment of its possessions in breach of the guarantee provided to it in Article 1 of Protocol 1 of the European Convention on Human Rights.

46. In his skeleton argument and in his submissions Mr Clarke's argument for Paccar focused on the unreasonableness of the Officer Collins' decision, that purported unreasonableness being the central underlying ground of appeal. The parties also agreed that the reasonableness of the decision was the key issue in this Appeal.

47. We focus therefore on the unreasonableness issue but then go on to consider other specific points which arise from the stated grounds of appeal together with certain related points made by Paccar in its skeleton argument and during the course of Mr Clarke's submissions.

#### **Unreasonableness**

48. The threshold condition for interfering with a decision is that the Tribunal is satisfied that the "*person making that decision could not reasonably have arrived at it*".

49. If the threshold condition is met, the Tribunal may direct that the decision should cease to have effect and may require (in this case) Border Force to carry out a further review of the original decision.

50. The principles which the Tribunal should apply in exercising its powers can be summarised as follows:

- (1) The burden of showing that the decision is one which the reviewing officer could not reasonably have arrived at lies with the appellant (s. 16(6) FA 94); *McGeown International Limited v HMRC* [2011] UKFTT 407(TC) at [46]).
- (2) A decision will be unreasonable in the relevant sense if there was an error of law (*John Dee Limited v Customs and Excise Commissioners* [1995] STC 941 at [952g-h]),

if the decision maker took into account irrelevant factors or failed to take into account relevant factors or, even if the right factors were taken into account, the decision was one which no reasonable decision maker could have reached in the circumstances (*Customs and Excise Commissioners v J. H. Corbitt (Numismatists) Limited* [1981]AC 22 at [60]).

(3) Even if the decision is unreasonable in the relevant sense, the appeal may be dismissed if the Tribunal is satisfied that, notwithstanding the flaw in the decision-making process, the decision would inevitably have been the same (*John Dee* at [953a]).

(4) The Tribunal should carry out its own fact finding exercise and assess the decision in the light of the facts as found (*Gora v Customs and Excise Commissioners* [2003] EWCA Civ 525 at [38e-39]). A decision which may be reasonable based on the facts taken into account by the decision maker may, therefore, be unreasonable in the light of the facts as found by the Tribunal.

51. The approach the Tribunal should, therefore, take is as follows:

(1) Determine the relevant facts.

(2) Consider whether the decision maker has taken into account the correct factors.

(3) If the decision maker has not, consider whether their decision would inevitably have been the same had they taken into account the correct factors.

(4) Even if the decision maker had taken into account the right factors, consider whether the decision was one which no reasonable person could have reached in the circumstances.

(5) If the Tribunal find that the decision was unreasonable, then we have jurisdiction to direct the respondent to conduct a further review, and the basis on which that further review should take place.

52. Importantly, it is not the role of the Tribunal to substitute its own view of reasonableness for that of the decision maker's. Our role is, instead, to consider the reasonableness of the original decision in accordance with the principles set out above.

#### **DISCUSSION**

53. The central issue in this appeal is whether Officer Collins' decision to impose the restoration fee was reasonable.

54. Paccar's argument is, in essence, that Officer Collins' conclusion that it had not taken sufficient steps to ensure the appropriateness of its sub-lessees was unreasonable as Paccar had in its view done enough and as a practical matter, could not, in the context of its business, be expected to do more.

55. Paccar also highlights (i) what it sees as the divergence from Border Force's restoration policy and (ii) the inconsistency of Officer Collins' decision with the decision in respect of Vehicle 2 as further indications of unreasonableness.

56. HMRC's submission is that (i) Paccar has not shown that the Officer Collins considered anything which he ought not to have considered or that he failed to consider anything that he should have considered, (ii) the 50% reduction in the restoration fee reflects adequately the due diligence that was conducted by Paccar, and (iii) the decision is one which could reasonably have been made in the circumstances.

57. We now turn to application of the five step process outlined above.

***Step 1 – Determining the facts***

58. We have determined the material facts as set out above.
59. There is no dispute between the parties as to the facts of the seizure. Further, the terms of the documentation in place between Paccar and Truck Care and between Truck Care and Limonka are clear.
60. There has also been no challenge from HMRC as to the explanation provided by Mr Dobrowski of the steps taken by Paccar to check on Truck Care and Limonka.
61. Although it is clear that previous seizures involving vehicles owned by Paccar was a key factor in the Officer Collins’ decision, Paccar has not provided substantive details of any previous seizures other than in relation to Vehicle 2.
62. In its restoration application Paccar’s only response was that Paccar could not speak for any other members of the Paccar Group.
63. During the course of his submissions Mr Clarke acknowledged that Paccar had experienced previous seizures but said that none of those seizures had been in relation to Truck Care. This was the first time that such information appears to have been given. No further mention of the previous seizures was made nor was any evidence provided. Mr Clarke made the point by way of attempting to put it into context for us, and went on to tell us that the nature of the haulage industry meant that there were hundreds of smuggling attempts per day and that Paccar leased thousands of vehicles.
64. The only facts in respect of the previous seizures that we have found from the material available are, therefore, that: (i) there were previous seizures, (ii) those seizures may have affected both Paccar clients that were direct users of the leased vehicles and those whose business consists of sub-leasing or hiring the leased vehicles – we have specific details of one. We noted Mr Clarke’s comments – but they were given during the course of his submissions and so are of course not evidence.
65. Other key facts that we established were as follows:
- (1) Paccar’s General Terms prohibited the sub-leasing of leased vehicles
  - (2) The Lease was expressly subject to the General Terms.
  - (3) The Lease provided for the prohibition on sub-leasing to apply to Truck Care unless it obtained Paccar’s express written waiver.
  - (4) Paccar expressly consented to Truck Care sub-leasing to Limonka and it also consented to an extension of that sub-lease.
  - (5) Paccar carried out due diligence on Truck Care and Truck Care’s customers at the beginning of its relationship with Truck Care (then HAMA Polska). Paccar did not provide any evidence as to any renewal or updating of that due diligence.
  - (6) Paccar did not provide any evidence to Border Force or to the Tribunal as to any due diligence being carried out in relation to Limonka other than a review of the Sub-Lease.

***Step 2 - Consider whether the decision maker has taken into account the correct factors.***

66. There is no suggestion that the Officer Collins failed to take into account the representations made by Paccar in its restoration application.

67. Officer Collins' decision itself acknowledges Paccar's previous correspondence and notes that no new representations were made in response to Border Force's invitation for further information in advance of the review.

68. Mr Clarke submitted that Officer Collins failed to follow Border Force's restoration policy and he repeated this point at some length in his further written submissions. We deal with that point later in our judgment but for now we find that the restoration policy was clearly a factor that needed to be taken into account and that it was in fact taken into account by Officer Collins in reaching his decision.

69. There is otherwise no suggestion that Officer Collins failed to consider something that he should have considered or considered something that he should not have considered.

70. We find accordingly that Officer Collins took into account the correct factors when making his decision and did not take into account any factors that he should not have.

71. We note in this regard that Mr Clarke also raised as issues (a) the inconsistency between Officer Collins' decision and the decision relating to Vehicle 2 and (b) the fact that Officer Collins decision failed to appreciate the practical, commercial reality of Paccar's position with regard to sub-lessees. We deal with these points in our discussion on the reasonableness of the decision rather than in the "factors" part of our approach.

72. We also note that in the hearing an issue arose as to what Officer Collins meant in the following paragraph of his decision (our italics):

"Ultimately, your client has had a succession of vehicles seized by Border Force that your client had claimed legal title to. The initial vehicles were restored free of charge *but there has to come a point when the recognition of a failing in the system has to be addressed.* Policy would indicate that the least action appropriate would be a fee of £5,000. I am exceptionally willing to restore the vehicle for a 50% reduction of that fee. I feel this is a balanced, proportionate and graduated response to the seizure by Border Force of your client's vehicle."

73. Mr Gordon-Saker contends that the obvious reading of this paragraph is that "the failing in the system" is that if finance companies can always have vehicles restored free of charge, then there is no disincentive to attempting to smuggle goods into the country in financed vehicles. Paccar contends that it refers to a specific purported failure by Paccar.

74. It is in our view unclear whether Officer Collins is stating a general position as regards the application of the penalty regime to finance companies or making a specific criticism of Paccar.

75. On balance we think it more likely to be referring to Paccar's particular position given the earlier reference to previous seizures and the subsequent reference to the restoration fee being a proportionate response specifically in respect of Paccar's vehicle.

76. However, given that Paccar has had vehicles seized previously, we consider that the position would be the same on either reading. In short, the clear meaning of the decision letter is that the imposition of the penalty is a result of there being insufficient procedures in place to prevent smuggling in leased vehicles.

77. Given our findings on step 2, we move straight to step 4.

**Step 4 - Was the decision one which no reasonable person could have reached in the circumstances?**

78. Paccar's primary contention is in essence that it should not be expected to carry out due diligence on its customer's customers.

79. Mr Clarke has explained that the sheer scale of Paccar's operation makes this close to impossible as a practical matter and accordingly (as per Ground 1.1.1 of Paccar's grounds of appeal) such obligations would if imposed be "remote, unreasonable, and unduly burdensome".

80. In his oral submissions Mr Clarke said that to expect Paccar to carry out checks on its customer's customers would be akin to expecting the Ford Motor Company to carry out checks on each customer of Hertz Rentals who intended to rent a vehicle leased by Ford to Hertz.

81. We do not agree with Mr Clarke. Notwithstanding his assertions, Paccar's situation is not the type of situation postulated by Mr Clarke which appears to contemplate a lessor leasing vehicles to a lessee who is then free to sub-let or hire them at its discretion.

82. The Paccar contractual terms provided to us show that Paccar as lessor intended to and did in fact retain a significant amount of control over who Truck Care's sub-lessees were.

83. Specifically, we found that (a) the Lease terms, together with Paccar's General Terms, prohibited Truck Care from sub-leasing without Paccar's express consent, (b) Paccar had in fact specifically reviewed the terms of the proposed sub-lease between Truck Care and Limonka and consented to the sub-lease and (c) Paccar had expressly determined that no further due diligence was necessary.

84. No evidence has been provided in respect of Paccar's contractual terms with other lessees generally. The only other set of documentation that we have seen were those between Paccar and Dem Pol, the lessee of Vehicle 2. We noted that these were very similar to those for Vehicle 1 and Truck Care albeit that the general prohibition on sub-leasing contained in the General Terms was not, as in the Truck Care lease, overridden by a provision allowing sub-leasing with Paccar's consent. This may have been because Dem Pol was an "end user".

85. Mr Gordon-Saker for HMRC also postulated in his written submissions various ways in which a lessor in Paccar's situation could conceivably conduct due diligence on its lessee's sub-lessees. These included; inserting a provision in its lease terms requiring its lessees to carry out due diligence on their customers (indirect due diligence), carrying out the due diligence itself and passing the cost on to its lessees (direct due diligence), or including penalties in its lease terms requiring lessees to indemnify it for penalties resulting from unlawful use by sub-lessees (penalty shifting).

86. We do not express a view on the implications or practicalities of the options suggested by Mr Gordon-Saker we note merely that there is a range of possibilities.

87. When taking into account: (a) Paccar's choice to involve itself in Truck Care's sub-leasing (as evidenced by the contractual provisions), (b) Paccar's actual involvement in expressly consenting to Limonka as sub-lessee, (c) the lack of any apparent due diligence by Paccar on Limonka, (d) the fact that vehicles owned by Paccar had been the subject of previous seizures and (v) the existence of potential solutions to the due diligence issue, we have no hesitation in finding that Officer Collins' decision was not so unreasonable that no reasonable decisionmaker could have arrived at it.

88. In other word it was not unreasonable for Officer Collins to consider, in line with the theme of the restoration policy, that Paccar had not done everything it could reasonably have been expected to.

89. We note also in this regard that Officer Collins had substantially reduced the restoration fee to reflect the steps that Paccar had actually taken. He was not saying that Paccar had done nothing.

90. Given our finding at Step 4 we do not go on to consider Step 5. We do however consider, for the sake of completeness, the other grounds of appeal raised by Paccar to the extent they are not addressed by our conclusion at Step 4.

### ***Inconsistency***

91. Paccar contends that Officer Collins' decision is inconsistent with the decision in respect of Vehicle 2. The specific question raised is how Border Force could on one hand accept as sufficient the measures taken by Paccar to prevent its vehicles from being used for smuggling by lessees but not accept it as sufficient in the case of sub-lessees. In his submissions Mr Clarke sought to equate the employees of a lessee with a sub-lessee, arguing that if there was no requirement to conduct checks on the former there should be no requirement to conduct checks on the latter. We do not agree with Mr Clarke's logic. We see no general basis, or any implicit requirement in either Officer Collins' decision or the decision in relation to Vehicle 2, for a lessor to conduct checks on the employees of a lessee. The relationship of an employee to an employer is fundamentally different to that of a lessee and sub-lessee.

92. We also do not regard the two decisions as being inconsistent. One is in relation to a lessor who was end user, the other is in relation to a lessor who sub-leased. They are distinct fact patterns.

### **Failure to follow the stated border force restoration policy**

93. Officer Collins' decision contains a summary of the then prevailing restoration policy for hired or leased commercial vehicles, which was as follows:

The general policy for the restoration of commercial vehicles is designed to tackle cross border smuggling rigorously and to disrupt the supply of excise goods to the illicit market significantly.

Restoration for a fee - On a first offence the tractor unit/ trailer may be restored to the finance company on the following conditions.

a) The finance company has demonstrated clear title to the tractor unit/ trailer

b) Ordinarily a restoration fee of £5,000 is paid or a sum equal to the trade value of the tractor unit/ trailer whichever is the lower. If the finance company however can demonstrate that they have done all that can be reasonably expected to ensure that they are leasing vehicles to legitimate companies for use for a legitimate purpose, then the fee can be reduced proportionately.

Any vehicle adapted for the purposes of smuggling may not normally be restored.

A subsequent detection of the same tractor unit/ trailer being used by the same haulage company, or anybody directed by them, may result in non-restoration. In respect of any other vehicle leased to the company; the previous seizure would be a relevant factor in deciding not to restore or requiring a higher sum to restore.

94. Mr Clarke contended that Officer Collins diverged from the Border Force stated policy and that consequently there had been a “misapplication” of that policy by the decision maker. This is, he says, because the policy requires consideration of the relationship between lessor and lessee only - it does not require a lessor to carry out any enquiry as to third parties.

95. In his supplemental written submissions he cited several cases which were concerned with the application of policies by public authorities.

96. The first was *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59 which concerned a policy relating to the approach to be taken by caseworkers processing UK visa applications. Here Mr Clarke cited the following extracts from Lord Wilson’s judgment:

“[29] ... So the applicant’s right to the determination of his application in accordance with policy is now generally taken to flow from a principle, no doubt related to the doctrine of legitimate expectation but free-standing, which was best articulated by Laws J in *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 as follows:

“... Where a public authority has issued a promise or adopted a practice which represents how it proposed to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public. [68]”

[30] Thus in *R (Lumba) v Secretary of State for the Home Department (JUSTICE intervening)* [2011] UKSC 12 [2012] 1 AC 24 ... Lord Dyson said simply:

“The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute. [35]”

97. The second was *Lee-Hirons v Secretary of State for Justice* [2016] UKSC 46 and Lord Wilson’s statement that:

“[17] Where a public authority issues a statement of policy in relation to the exercise of one of its functions, a member of the public to whom it ostensible applies ... has a right at common law to require the authority to apply the policy. So long as it is lawful, to himself unless there are good reasons for the authority not to do so ...”

98. Mr Clarke’s written submissions stray into areas of public law, such as the issue of legitimate expectation, that the Tribunal does not have the jurisdiction to consider.

99. As we state at the start of this judgment, our role is limited to considering the reasonableness of Officer Collin’s decision.

100. In this regard a key concern is that the restoration policy does not prevent a Border Force Officer from considering each case on its own facts and exercising his or her discretion. We note here that Officer Collins specifically confirms his decision that he was guided by the restoration policy but not fettered by it.

101. This is consistent with Lord Wilson’s recognition of Lord Dyson’s two qualifications on the public law right of an individual to have a public policy applied. These are that a policy should not be so rigid as to amount to a fetter on the discretion of decision makers and

that a decision maker should follow policy “unless there are good reasons for not doing do” (see para [31] of Lord Wilson’s judgment in *Mandalia*).

102. Other than recognising that there is no legal requirement to follow policy in all circumstances we do not consider any potential public law argument raised by Paccar. Instead we recognise that the restoration policy was one of the factors required to be considered by Officer Collins and we find that it was clearly considered. We then go on to consider the policy as a factor when assessing the reasonableness of his decision.

### ***The policy***

103. The policy purpose is stated as being “to tackle cross border smuggling rigorously and to disrupt the supply of excise goods to the illicit market significantly”.

104. The section introducing the conditions in which a vehicle can be restored for a fee states that it is intended to apply “*On a first offence ...*”. It provides that the vehicle “*may*” be restored to a finance company on those conditions. Of the conditions, the second condition states the fee can be reduced “*If the finance company however can demonstrate that they have done all that can reasonably be expected to ensure that they are leasing vehicles to legitimate companies for use for a legitimate purpose.*”

105. There are several points to note here. First, the policy aim is clear. Second, it states a possible approach in the event of a first offence. Third, it does not specifically address businesses that involve sub-leasing (although sub-leasing can of course be a legitimate purpose of a lease).

106. Having considered the policy and the circumstances, we find that Officer Collins’ departure from the policy, if it was in fact a departure, was not so unreasonable that no reasonable decision maker could have arrived at it.

107. Specifically, although the policy does not address sub-leasing expressly, in a situation where a lessor is required to give express consent to a proposed sub-lessee, we do not consider it unreasonable to expect that lessor to take some steps to ensure suitability of the sub-lessee. We also consider it not unreasonable to expect the lessor to have done more than just review the sub-lease in circumstances where there had been previous seizures of vehicles owned by it within the past 13 months.

108. We consider the approach taken by Officer Collins to be consistent with the stated aim of the policy.

109. Further, as the Respondent has pointed out in its statement of case, we note that if the policy is construed narrowly it could be circumvented easily through the use of tiered leasing and sub-leasing arrangements.

110. In reaching this conclusion we note also that Paccar chose not to give Border Force (or this Tribunal) any information in respect of the prior seizures.

111. We also note that Officer Collins reduced the restoration fee significantly (by 50%) to reflect the fact that some checks had been made.

### ***The Border Force Decision has no foundation in law and is accordingly outside of the lawful authority of the Respondent***

112. The legislative provisions under which Vehicle 1 was seized and under which it can, at the Respondent’s discretion, be restored are set out at the start of this judgment.



113. We have determined that the decision was a reasonable one in accordance with the applicable tests. Paccar have not satisfied us that the decision was outside the lawful authority of the Respondent.

***That it seeks to impose restrictions on Paccar's activities in circumstances outside the Respondent's jurisdiction***

114. We do not understand Paccar's contention that the decision to restore Vehicle 1 for a fee imposes restrictions on it outside the UK. This ground was not developed at the hearing, and Paccar has not therefore made its case. We do not consider this ground further.

***The requirement of restoration for a fee is a violation of Article 1 of the First Protocol of the European Convention on Human Rights ("Article 1").***

115. The First Protocol is incorporated into law by the Human Rights Act 1998. Article 1 provides as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

116. The issue of restoration, and restoration fees, in the context of the First Protocol, has been considered judicially several times. In *John Lindsay v Customs and Excise Commissioners* [2002] EWCA Civ 267, which was cited by the Respondent, Lord Phillips, MR when considering Mr Lindsay's challenge to HM Customs' rights to forfeit his car, summarised the position as follows:

“[55] Broadly speaking, the aim of the Commissioners' policy is the prevention of the evasion of excise duty that is imposed in accordance with European Community law. That is a legitimate aim under Article 1 of the First Protocol to the Convention, the issue is whether the policy is liable to result in the imposition of a penalty in the individual case that is disproportionate having regard to that legitimate aim. More specifically, did it have that effect in the case of Mr Lindsay?”

117. Leaving aside the reference to European Community law, if the actual decision that has been taken by Border Force is reasonable and proportionate in the circumstances then it should not infringe Article I.

118. We have concluded that Officer Collins' decision is not unreasonable and we consider the comparatively low fee for restoration relative to the value of Vehicle 1, together with the 50% reduction applied, to be proportionate in the circumstances.

119. We do not therefore consider that Paccar has demonstrated that there has been an infringement of Article 1.

***Imposing requirements to carry out checks on a Lessee's customers would require exchanges of information that would result in breach of the General Data Protection Regulation ((EU) 2016/679) and the UK Data Protection Act 2018.***

120. Paccar did not provide any specific details of its concerns under this ground and it was not therefore considered further.

**DECISION**

121. For the reasons given above we dismiss Paccar's appeal.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

122. 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.

**VIMAL TILAKAPALA  
TRIBUNAL JUDGE**

**Release date: 18<sup>th</sup> JULY 2024**