



Neutral Citation: [2024] UKFTT 00055 (TC)

Case Number: TC09037

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2022/11595

RESTORATION OF SEIZED GOODS – Refusal to restore seized goods – whether Border Force failed to take into account relevant considerations – “Tameside” duty to carry out a sufficient enquiry – whether decision was one which no reasonable officer could have reached (irrational in a Wednesbury sense) – Article 1, Protocol 1 European Convention on Human Rights – whether decision was proportionate in striking a fair balance between the interests of the community and the protection of the right to peaceful enjoyment of the appellant’s possessions – appeal allowed.

Heard on: 15 December 2023
Judgment date: 16 January 2024

Before

**TRIBUNAL JUDGE ROBIN VOS
HELEN MYERSCOUGH**

Between

MARION TRADING LIMITED

Appellant

and

THE DIRECTOR OF BORDER REVENUE

Respondent

Representation:

For the Appellant: **JOSHUA HITCHENS** of counsel, instructed by ASR Advantage Law Solicitors

For the Respondent: **LOUISE THOMSON** of counsel, instructed by the Home Office UK Border Agency, Cash Forfeiture and Condemnation Legal Team

DECISION

INTRODUCTION

1. The hearing took place by video using the Tribunal's Video Hearing System. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.
2. This appeal concerns the respondent's refusal to restore to the appellant, Marion Trading Limited ("MTL") eighteen pallets of alcoholic drinks imported from Romania which were seized in December 2021.
3. There are two grounds for the appeal. The first is that Border Force did not take into account material considerations or conduct a sufficient enquiry and that the officer in question reached a decision which no reasonable officer could have made in the circumstances. The second ground of appeal is that the decision was, in any event, a disproportionate interference with MTL's right to the peaceful enjoyment of its possessions under Article 1, Protocol 1 of the European Convention on Human Rights ("ECHR").

THE EVIDENCE

4. The Tribunal had before it a bundle of documents and correspondence. Two further documents relating to the payment of excise duty were provided by MTL during the course of the hearing. The respondent did not object to this late evidence and we agreed to admit it given its relevance to the appeal.
5. We also heard oral evidence from the director of MTL, Mr Robert Roth and from a Border Force officer, Mr Ian Cox who had, following the retirement of the officer who made the decision which MTL now appeals against (Mr Raymond Brenton), taken over responsibility for the case.
6. We found Mr Roth a straightforward and helpful witness and we have no hesitation in accepting his evidence which, to the extent that it dealt with matters covered by the documentary evidence and his previous statements, was consistent with that evidence.
7. On the other hand, we found Mr Cox to be an unsatisfactory witness who did not appear to understand the requirement to answer the questions put to him in a straightforward way. On a number of occasions, he had to be reminded not to make submissions in support of the respondent's case as opposed to answering the questions. On other occasions, he was clearly unwilling to answer questions where he thought that the answer might be unhelpful to the respondent's case and had to be asked the question a number of times before an answer was forthcoming.
8. Having said that, we accept that, when Mr Cox did answer the questions put to him, the answers were honest. We therefore accept his evidence to the extent that it is relevant bearing in mind that he was not the person who made the relevant decision and that, to some extent, his evidence related more to the way in which the Border Force review process operates in general terms.

BACKGROUND FACTS

9. Based on the evidence available to us, we find the following facts. The key question, which we will come on to, is the conclusions which could reasonably be drawn from these facts.
10. MTL is a company which imports alcoholic drinks and other goods for sale in the UK.

11. On 3 December 2021, MTL placed an order for various alcoholic drinks and crisps from Global Cash and Carry SRL in Romania. The load consisted of eighteen pallets of alcoholic drinks and five pallets of crisps. The alcoholic drinks had been loaded first and the crisps were then loaded at the back of the trailer. In accordance with the transport contract, the goods were due to arrive with Marion Trading on 7 December 2021.

12. MTL uploaded the relevant documents to its customs agent, BFS Customs on 4 December 2021 to enable it to produce the relevant import declaration. However, by the time the refrigerated vehicle which was transporting the goods arrived in Dover early on 6 December 2021, the relevant paperwork had not been produced and the excise duty had not been paid.

13. Mr Roth was contacted by telephone when the vehicle was intercepted by Border Force. He noted that he was not expecting the goods until the following day. The driver was given a 3 hour grace period to produce the necessary import documents but these were not forthcoming. As the correct documents were not in place and no duty had been paid, the alcoholic drinks were seized by Border Force. MTL does not dispute the legality of the seizure given the circumstances.

14. However, later on the same day (6 December 2021), MTL created an entry for the goods on HMRC's Customs Handling of Import and Export Freight ("CHIEF") system and paid the amount of duty (£35,192.11) shown by that entry. There was some dispute as to whether this entry related to the goods in question given a discrepancy as to the amount of duty payable but it is clear to us from the reference number used (which corresponded with that on the print out from the BFS Customs platform mentioned below), the mention of 23 packages (i.e. pallets) and Mr Roth's evidence that MTL had no other consignments of excise goods at around the same time that the CHIEF entry does relate to this particular consignment.

15. MTL requested restoration of the alcohol on 8 December 2021. Following a request from Border Force for additional information in support of the restoration request, Mr Roth explained on 16 December 2021 that the problem had arisen as a result of BFS' failure to produce the import declaration on time together with the fact that the lorry had arrived in the UK on 6 December 2021 when it was expected on 7 December. In support of this, Mr Roth provided to Border Force a screen print showing that the necessary documents were uploaded to BFS' platform on 4 December 2021, a letter from BFS acknowledging its mistake and a copy of the transport contract confirming that delivery was scheduled for 7 December 2021.

16. Nonetheless, on 6 January 2022, Border Force wrote to MTL refusing the request for restoration on the basis that the circumstances of the seizure suggested that there was a deliberate attempt to evade the payment of excise duty and that there were no exceptional circumstances justifying a departure from the normal policy not to restore seized goods where there had been an attempt to evade excise duty.

17. On 17 February 2022, MTL requested a review of Border Force's decision not to restore the goods. In support of this, Mr Roth provided a sworn statement of the same date together with various additional supporting documents.

18. The review was carried out by a Border Force review officer, Mr Raymond Brenton. On 9 March 2022, Mr Brenton wrote to MTL setting out his conclusion that the goods should not be restored and the reasons for that conclusion. Amongst those reasons was a reference to the fact that MTL had, in the past, been involved in the illicit movement of excise goods.

19. In relation to this, the letter referred to one occasion where a load had been described as food but in fact contained mainly alcohol although noted that the alcohol was not seized as the correct paperwork was found to be in place. We infer from this that any excise duty had also been paid at the correct time. The letter also referred to six occasions on which cigarettes had

been found in goods destined for MTL and one occasion where alcohol and tobacco examined by HMRC in a UK store and on which duty had not been paid were said by the owners to have been purchased from MTL.

20. Based on the evidence of both Mr Roth and Mr Cox, we find as a fact that none of these instances of the possible illicit movement of excise goods has ever been raised by Border Force or any other UK authority with MTL or Mr Roth.

THE RIGHT OF APPEAL AND THE TRIBUNAL'S POWERS

21. There is no disagreement between the parties as to MTL's right of appeal and so we do not need to refer to all the relevant statutory provisions. It is sufficient to say that the appeal is against the review decision made by Mr Brenton which was made in accordance with s 15 Finance Act 1994 ("FA 94"). The right of appeal against such a decision is contained in s 16(1) FA 94.

22. It is accepted that a decision in relation to restoration is an "ancillary matter" within s 16(4) FA 94 which requires the appellant to show that the "person making that decision could not reasonably have arrived at it". In those circumstances, the Tribunal may direct that the decision should cease to have effect and may require Border Force to conduct a further review.

23. In accordance with s 16(6) FA 94, the burden is on MTL to establish its grounds of appeal.

LEGAL PRINCIPLES APPLYING TO THE BORDER FORCE DECISION

24. Again, the parties are agreed as to the applicable principles. It is the application of those principles to the facts of this case which is in dispute. We do not therefore need to go into the principles in too much detail.

25. Mr Hitchens, appearing for MTL, referred to three separate principles.

26. The first is that the decision-maker should take into account all relevant considerations which they were required by legislation or by internal policy to take into account (see *R (ClientEarth) v Secretary of State for Business, Energy, and Industrial Strategy* [2020] EWHC 1303 (Admin) at [99]). Mr Hitchens notes that the relevant Border Force policy (contained in paragraph 4.1 of notice 12A) requires Border Force to take "all relevant facts" into account.

27. The first principle therefore is that it was incumbent on Mr Brenton to take into account all relevant considerations. Ms Thomson, for the respondent, does not dispute this. Indeed, her case is that Mr Brenton did so.

28. The second principle relied on by Mr Hitchens is the duty to carry out a sufficient enquiry which is sometimes referred to as the "*Tameside*" duty. The principles were summarised by the High Court in *R (Plantagenet Alliance Limited) v Secretary of State for Justice* [2014] EWHC 1662 (Admin) at [99-100].

29. Looking at these principles, it is important to note that, whilst the decision-maker must take reasonable steps to acquaint themselves with the relevant information, it is up to Border Force to consider what enquiries should be undertaken and the Court should only intervene if no reasonable authority could have been satisfied on the basis of the enquiries made that it possessed the information necessary for its decision. The principle may however require the decision-maker to consult with outside bodies which have an involvement in the matter. The wider the discretion conferred on the relevant authority, the more important it is that the decision-maker has all the relevant material to enable them properly to exercise that discretion.

30. The question in this case therefore is whether Mr Brenton should have made any additional enquiries before making his decision.

31. The final principle relied on by Mr Hitchens is that the decision must be one which a reasonable officer could have reached in the circumstances. In the context of VAT this is referred to in the decision of the House of Lords in *Customs and Excise Commissioners v J H Corbitt (Numismatists) Limited* [1980] 2 WLR 653 at [663E-F] where Lord Lane explains the circumstances in which the Tribunal can review a decision of the relevant authority where it is given a supervisory jurisdiction of the nature conferred by s 16(4) FA 94.

32. It is perhaps worth noting that the comments of Lord Lane in *Corbitt* also encompass the first principle mentioned above as he observed that the Tribunal may review the exercise of the discretion not only where the decision-maker has acted in a way which no reasonable officer could have acted but also if they have taken into account some irrelevant matter or disregarded something to which they should have given weight.

33. It is clear that a breach of any one of these principles could lead to the conclusion that the requirement in s 16(4) FA 94 (that the person making the decision could not reasonably have arrived at it) is met. Even if that threshold condition is met, the Tribunal still has to decide whether to exercise any of the powers conferred on it.

34. It is however of course unlikely that the Tribunal would allow a decision to stand where one of the principles we have mentioned has been breached such that the threshold condition is met unless the decision would inevitably have been the same notwithstanding the defect in the decision-making process (see for example *John Dee Ltd v Customs and Excise Commissioners* [1995] STC 941 at [953], a case in which the principles set out in *Corbitt* were applied).

WAS THERE A BREACH OF THE RELEVANT PRINCIPLES?

35. Taking into account all of the evidence, our conclusion is that the decision made by Mr Brenton is not one that he could reasonably have arrived at in all the circumstances of this case. This is partly because he disregarded matters to which he should have given weight and also because he failed to make enquiries without which he could not be satisfied that he had all the information necessary to make his decision. In our view, it is therefore simpler for us to deal with all three principles together rather than looking at each one separately.

36. As a preliminary point, we need to address a significant issue which emerged from the submissions made by each of the parties. Mr Hitchens observed that it is clear from Mr Brenton's review conclusion letter that the decision not to restore the seized goods was based on his conclusion that there had been an attempt to evade the payment of excise duty (a point accepted by Ms Thomson). He therefore submits that the question to be determined by the Tribunal is whether, in the circumstances, a reasonable officer could have reached the conclusion that there was an attempt to evade excise duty and not whether a refusal to restore the goods could be justified on some other basis.

37. Whilst Ms Thomson argues that there was ample evidence on which Mr Brenton could reach a conclusion that there was an attempt to evade the payment of duty, she submits that it would in any event not have been unreasonable for Mr Brenton to refuse to restore the goods given his explanation of the Border Force policy that seized excise goods will only be restored exceptionally. The mistakes which Mr Roth says led to the failures justifying the seizure of the goods do not, she suggests, represent exceptional circumstances justifying a departure from the normal policy that such good will not be restored. It is implicit from this submission that, in her view, the focus should be on the reasonableness of the decision not to restore the goods and not the reasons given by Mr Brenton for reaching that decision.

38. In this respect, we prefer Mr Hitchens' submission. While the evasion of excise duty is not mentioned in the section of Mr Brenton's letter headed "conclusion", when read as a whole,

it is clear that Mr Brenton's refusal to restore the seized goods is based on a conclusion that there was an attempt to evade the payment of excise duty. As we have said, Ms Thomson did not dispute this.

39. There is no way of knowing what conclusion Mr Brenton might have reached had he concluded that, whilst mistakes had been made, there was no attempt to evade the payment of excise duty. Therefore, if his conclusion that this was a situation where the evasion of duty was involved was not one which he could reasonably have come to in the circumstances, it would not in our judgment be right to allow the decision to stand as it is not inevitable that the decision would still have been to refuse to restore the goods.

40. The focus must therefore in our view be on whether it was open to Mr Brenton to conclude that there was a deliberate attempt to evade the payment of excise duty and not on whether he could reasonably have concluded that restoration should be refused for some other reason.

41. We are mindful that the right of appeal conferred by s 16(1) FA 94 is an appeal against "a decision on a review" and that the threshold requirement in s 16(4) FA 94 is that "that decision" could not reasonably have been arrived at. This could be interpreted as meaning (in this case) simply the decision not to restore the seized goods irrespective of the reasons for the refusal so that, as Ms Thomson suggests, the refusal might be justified on other grounds not relied on by the decision-maker.

42. However, bearing in mind the agreed principles we should apply, such an interpretation would not make sense. For example, if a relevant matter has been ignored, the decision is defective and should not stand unless it can be said that the decision would inevitably have been the same had the matter been taken into account (see paragraph [34] above). If not, the authority should be directed to conduct a further review which takes into account the relevant matters. That is no doubt the reason for the existence in s 16(4) FA 94 of the power for the Tribunal to direct the authority to conduct a further review.

43. For the reasons we have just explained, we therefore consider that the reference to the "decision" in s 16 FA 94 must be taken to be not just to the decision itself but must extend to any finding which was fundamental to the decision in question.

44. Turning then to the evidence available to Mr Brenton, this included the two statements made by Mr Roth together with supporting documents, one made before the original decision to refuse restoration and the second made in support of the review request as well as information available to Mr Brenton from internal sources.

45. The key points emerging from this material which were mentioned by Mr Brenton in his review conclusion letter (although some of them just by way of a recital of what the original decision-maker had said) were as follows:

- (1) The import declaration was not available at the time the goods arrived in the UK and there was no evidence that excise duty had been paid at that time.
- (2) The alcohol was loaded behind the crisps so that the alcohol was not visible from a tailboard examination.
- (3) The goods were shown on the CMR as "food products" rather than alcohol.
- (4) The goods were transported in a refrigerated trailer which is normally used for perishable goods.
- (5) The quantities of alcohol discovered did not match the invoices provided by MTL.
- (6) Cigarettes had previously been found in loads destined for MTL.

(7) On one occasion duty had not been accounted for on tobacco and alcohol said to have been purchased by a third party from MTL.

46. Looking at the first point, Mr Roth had explained in both of his statements that the reason the correct documentation had not been in place and that the excise duty had not been paid in time was due to a clerical error by BFS Customs coupled with the fact that the goods had arrived in the UK one day early. This was backed up by a letter from BFS together with a transport contract which clearly showed that the goods were due to be delivered on 7 December 2021 and not 6 December 2021.

47. In his letter, Mr Brenton described this as “an implausible explanation” as to why the import declaration had not been made on time. In our view, there was nothing implausible about Mr Roth’s explanation (which he had given twice) and there was no reason for Mr Brenton to have any doubts about the documentary evidence provided in support of the explanation.

48. Mr Brenton also had available to him a document described in some places as a “payment summary” which was said by Mr Roth in his second statement to evidence the fact that excise duty had in fact been paid. However, in his first statement, he made the point that this document clearly showed that the relevant documents had been uploaded to the BFS Customs platform on 4 December 2021 (i.e. before the load arrived in the UK) in order to enable BFS to generate the necessary import declaration.

49. Mr Brenton gave “little evidential weight to this document” noting that it was almost illegible and that it did not in any event confirm that excise duty had been paid prior to the arrival of the goods in the UK. Whilst the second point is clearly correct, had Mr Brenton read Mr Roth’s first statement carefully it would have been clear to him that this document was also presented as evidence of MTL’s attempt to ensure that it complied with its obligations in relation to the import declaration and the payment of excise duty prior to the arrival of the goods in the UK.

50. In those circumstances, Mr Brenton could not in our view have been satisfied that he had all the information necessary to make a decision if he was not able to read the document. We accept Mr Hitchens’ submission that, in accordance with the *Tameside* duty, Mr Brenton should have asked MTL for a legible copy of the document which clearly could have been provided given that a legible copy is contained in the Tribunal bundle.

51. It is notable that Mr Brenton does not engage in his letter with Mr Roth’s explanation of the mistake made by BFS and the documents which provide supporting evidence of that mistake. Despite Mr Brenton’s statement in his letter that he has examined all the representations and other material available to Border Force both before and after the time of the decision, the inescapable conclusion is that he did not take this highly relevant evidence into account or, in the words of Lord Lane in *Corbitt* he “disregarded something to which [he] should have given weight”.

52. Mr Hitchens also submits that Mr Brenton should have checked whether the excise duty had in fact been paid. It emerged from the evidence given by Mr Cox that Border Force have access to HMRC’s CHIEF system and so could easily have checked whether the excise duty had been paid. His explanation as to why Mr Brenton would not have done this is that the payment of excise duty was only relevant to the question as to whether the seizure was legal in the first place (on the basis that excise duty had not been paid by the time the goods arrived in the UK). Whether or not excise duty had been paid subsequently would be irrelevant.

53. Mr Hitchens does not accept this and suggests that Mr Brenton was under a *Tameside* duty to check whether excise duty had been paid as this would corroborate Mr Roth's statements and would provide some support for there being no attempt to evade duty.

54. However, whilst we think that it might have been sensible or desirable for Mr Brenton to make these further enquiries, we do not believe that this point was so important that it can be said that no reasonable officer could consider that they had sufficient information to make the decision without knowing whether the excise duty had in fact subsequently been paid. It has no bearing on whether steps were taken before the goods arrived to complete the relevant customs formalities and a subsequent payment could just as well be consistent with a failed smuggling attempt. We do not therefore consider that the failure to seek this information was a breach by Mr Brenton of the *Tameside* duty to make sufficient enquiries.

55. As to the second point about the way in which the goods were loaded, Mr Brenton declares in his letter that he is satisfied that the alcohol was concealed within the load in the sense that a tailboard examination by Border Force would only have shown the crisps and not the alcohol. Whilst we accept that this could be consistent with an attempt to evade the payment of excise duty, it is also consistent with Mr Roth's explanation that the alcohol would be loaded first and that if there was any spare space, it would be filled up with other goods such as crisps which are much lighter. Even when weighed with the other evidence, we do not consider that a reasonable officer could have concluded on this basis that there was in fact an attempt to evade duty.

56. On the third point, although the CMR described the goods as "food products", Mr Roth's explanation in both of his statements was that this was a mistake by the supplier in Romania. Attached to his second statement were documents showing that the same mistake had been made in the past in circumstances where the correct duty had been paid in relation to the alcohol that was included in the consignments in question. In addition, Mr Brenton himself noted in his review conclusion letter a previous occasion where goods which included alcohol had been declared as food but which had not been seized as the correct paperwork was found to be in place. As we have already said, we infer from this that the correct excise duty was also paid at the correct time.

57. In the light of this evidence, we do not consider that any reasonable officer could conclude that the description of the goods on the CMR as "food products" provided any support for the suggestion that there was an attempt to evade excise duty. Indeed, Mr Brenton's rejection of this evidence in his review conclusion letter on the basis that "two wrongs don't make right" shows that he again disregarded something to which he should have given weight.

58. Ms Thomson submitted that it is reasonable for Mr Brenton to place less weight on documents provided by Mr Roth after the initial refusal to restore the seized goods. We infer that the suggestion is that this might be based on a suspicion that the documents had been fabricated simply to refute the points made in the refusal letter.

59. Whilst it is no doubt right that a review officer should be mindful of this possibility they cannot simply reject evidence for no reason. In any event, in relation to this particular aspect, it is clear that Mr Brenton was himself aware from his own records that alcohol had been mis-described as food and yet the correct duty had still been paid. He therefore had no reason not to accept the explanation which was given.

60. Mr Brenton does not appear to refer in the "consideration" section of his letter to the fact that the goods were transported in a refrigerated trailer (point (4) above) when, given the nature of the goods there was no need for the trailer to be refrigerated. It may be that Mr Brenton accepted Mr Roth's explanation that the transport company he used only had refrigerated trailers and that such practice was not uncommon.

61. This statement was backed up with a letter from the transport company as well as a letter from another transport company which MTL had used confirming that they also frequently transported goods from MTL in a refrigerated trailer (without the refrigeration turned on) where the goods did not need to be refrigerated. In the light of the evidence, we agree that Mr Brenton was right in not placing any weight on this.

62. In relation to point (5) above, the “consideration” section of Mr Brenton’s letter also does not appear to refer to the fact that the amount of alcohol seized did not tally with the invoice provided by MTL. He does refer in passing to the goods being “mis-manifested”. However, in the context in which the comment was made we consider that it refers to the mis-description of the goods as “food products” on what is referred to in the correspondence as the ship’s manifest. Nobody was able to explain to us what the ship’s manifest was (and we were not provided with a copy). However, assuming it is a document relating to the ship on which the lorry crossed the English Channel, we think it more likely than not that whatever was contained on the ship’s manifest would have been taken from the description on the CMR and so this adds nothing to this point or to what we have said in relation to point (3) above.

63. We infer from his failure to mention as part of his “consideration” any discrepancy in the quantity of alcohol in his consideration that Mr Brenton did not consider it to be a material point. If so, we would agree with this, particularly as there is no evidence as to what discrepancies existed. It is certainly difficult to see how a reasonable officer might consider that this lends any weight to the suggestion that there was an attempt to conceal the whole of the alcohol included in the load.

64. Mr Brenton also refers (his sixth point) to various occasions on which goods destined for MTL contained cigarettes. Mr Roth strenuously denies that MTL has ever been involved in the importation of cigarettes and, as we have said, there is no doubt based on his evidence and that of Mr Cox that neither Mr Roth nor MTL have ever been approached by any UK authorities in relation to involvement in the illegal importation of cigarettes. However, the question for the Tribunal is whether Mr Brenton was justified in taking this information into account in reaching his conclusion and, if so, whether it results in his conclusion being one which a reasonable officer could have come to in the circumstances.

65. In our view, Mr Brenton should not have taken into account the possible involvement of MTL in the illegal importation of cigarettes, at least not, as Mr Hitchens submits, without putting the point to MTL and asking for its comments.

66. In this context, it was clear from Mr Cox’s evidence that he was aware that MTL had never been approached about the presence of cigarettes in the loads destined for MTL and we infer from this that Mr Brenton must also have known that. On that basis, there can have been no reason for Mr Brenton to suppose that the presence of cigarettes in loads destined for MTL indicated any wrongdoing on the part of MTL and a reasonable officer would not in our view therefore have considered that this supported the suggestion that there was an attempt to evade duty without further investigation as to any involvement on the part of MTL. Given the weight which Mr Brenton appears to have placed on this point, it was in our view a breach of the *Tameside* duty for Mr Brenton not to have raised the issue with MTL prior to making his decision as he could not otherwise know what weight should be placed on this factor.

67. In any event, in our view Mr Brenton was wrong to place any significant weight on the possible involvement of MTL in the illegal importation of cigarettes given that the seizure in question related to alcohol and not cigarettes. The examples listed by Mr Brenton in his review conclusion letter do not include any instances where MTL had previously attempted to evade duty on the import of alcohol. Indeed, the only example given where alcohol was contained in

the load was the situation we have already referred to where the alcohol was not seized as the correct paperwork was found to be in place.

68. Mr Brenton also refers (point (7) in the list above) to a visit to a UK store by HMRC and other UK authorities where it was found that duty had not been accounted for on tobacco and alcohol which the owner of the store said had been purchased from MTL. We accept that this could be consistent with an attempt to evade excise duty on the alcohol contained in the particular load in question on 6 December 2021 but we do not consider that it would be reasonable for a Border Force officer to conclude, taking into account the evidence as a whole, that there was such an attempt in this particular case.

69. Based on the above, our conclusion is that Mr Brenton failed to take into account (or at least properly to take into account) key evidence provided by Mr Roth on behalf of MTL including in particular the clear evidence that MTL had put in place the process for generating the import declaration and the payment of excise duty on 4 December 2021 prior to the goods arriving in the UK. Mr Brenton also failed, in breach of the *Tameside* duty, to seek a further copy of the document evidencing this.

70. He also rejects as implausible Mr Roth's explanation that the goods were expected on 7 December 2021 rather than 6 December 2021 despite this being clearly evidenced by the transport contract provided by Mr Roth to Border Force prior to the original decision being made. In addition, he gives no rational explanation as to why he does not accept that the description of the goods on the CMR as "food products" was an error despite clear evidence that the same procedure had been followed in the past (including on one occasion referred to by Mr Brenton himself) where excise duty had clearly been paid at the correct time.

71. Despite there being some evidence which could be consistent with an attempt to evade customs duty (the way in which the trailer was loaded, the fact that a refrigerated trailer was used and an isolated occasion where duty had not been accounted for on alcohol said to be purchased from MTL), faced with the overwhelming evidence that MTL intended to declare the alcohol and pay the excise duty, no reasonable officer could in our judgment have concluded that there was a deliberate attempt to evade excise duty and that restoration of the seized goods should be denied on this basis.

DIRECTION

72. For the reasons set out above, we are satisfied that Mr Brenton could not reasonably have arrived at the decision to refuse restoration of the seized goods based on a conclusion that there was an attempt to evade the payment of excise duty. We therefore direct as follows:

- (1) the review decision is to cease to have effect immediately;
- (2) Border Force should conduct a further review of the original decision taking into account all of the evidence provided to this Tribunal and, in particular, taking into account the Tribunal's conclusion that, based on that evidence, there was no deliberate attempt to evade the payment of excise duty.

ARTICLE 1, PROTOCOL 1 EUROPEAN CONVENTION ON HUMAN RIGHTS

73. Although Mr Hitchens accepts that there is a legitimate public interest in promoting compliance with rules relating to the payment of excise duty, even where non-compliance is inadvertent as opposed to deliberate, he submits that in a case such as this where key mistakes have been made by third parties (BFS Customs and Global Cash and Carry) and where MTL has tried to comply, it does not strike a fair balance between the public interest and MTL's rights under Article 1, Protocol 1 of the ECHR to refuse restoration.

74. Whilst we see some force in this, we also note Ms Thomson’s submission that there has been non-compliance (for example the mis-description of the goods on the CMR) for which MTL is not wholly blameless given the previous instances of this happening and that a refusal to restore would not therefore be in breach of MTL’s A1, P1 rights given the margin of appreciation which should be allowed to the national authorities.

75. In any event, this is not a point we need to decide in relation to the review decision as we have directed that it should cease to have effect. However, no doubt Border Force will bear the point in mind when conducting its further review.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

76. 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.

**ROBIN VOS
TRIBUNAL JUDGE**

Release date: 16th JANUARY 2024