Neutral Citation: [2024] UKFTT 001115 (TC)

Case Number: TC09381

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House

Appeal reference: TC/2023/15955
TC/2023/15959

RESTORATION – Goods chargeable to duty not declared and therefore seized – Vehicle used to carry Goods also seized as liable to forfeiture – no condemnation proceedings and no challenge to legality of seizure therefore Vehicle and Goods deemed as forfeit – deeming provisions in Schedule 3 of the Customs and Excise Management Act 1979 - Jones and Race considered and applied – Tameside duty – whether the Respondent is required to publish the Policy relating to restoration – no – the legitimate aim – whether decisions not to restore were reasonable – yes – whether hardship considered – yes - Appeals dismissed

Heard on: 19 November 2024
Judgment date: 9 December 2024

Before

JUDGE NATSAI MANYARARA
MOHAMMED FAROOQ

Between

(1) SHENZHENSHI WANGYI DIANSHANG YOUXIAN GONGSI
(2) EMPIRE TRADING LIMITED

Appellant

and

DIRECTOR OF BORDER REVENUE

Respondents

Representation:

For the Appellant: Mr Joshua Hitchens of Counsel, instructed by Rogers & Norton

For the Respondents: Mr Kwame Sekyere of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The first Appellant, Shenzhenshi Wangyi Dianshang Youxian Gongsi ("**Gongsi**") appeals against the Respondent's review decision, dated 16 September 2023, to refuse to restore electronic cigarettes and mini-mopeds ("**the Goods**"), as follows:

Description	**Quantity**
Mini-mopeds	37
Electronic cigarettes	186,830 sticks

2. The Goods were examined and seized on 14 March 2023, pursuant to the Customs & Excise Management Act 1979 ("**CEM**A"), as being liable to forfeiture under s 167 CEMA (in that they were mis-declared) and under s 78 CEMA (being Goods chargeable to duty which were not declared).

3. The second Appellant, Empire Trading Limited ("**Empire**") appeals against the review decision, also dated 16 September 2023, to refuse to restore a Schmitz Cargobull registration number QAN480 trailer ("**the Vehicle**"). The Vehicle was intercepted and seized under s 139(1) CEMA as being liable to forfeiture under s 141(1)(a) because it was used for the carriage of the Goods liable to forfeiture.

4. The tractor unit, Volvo 2CSE512, which had also been seized at the same time, was restored free of charge and does not form part of this Decision.

5. We shall refer to the Appellants as either "Gongsi" and "Empire" (where the issue concerns each individual Appellant separately) or "the Appellants" (where the issue concerns both Appellants jointly).

6. The Appellants challenged the seizure out of time. Consequently, the Goods and the Vehicle were duly condemned as being forfeit to the Crown by the passage of time, under para. 5 of Schedule 3 of CEMA. Furthermore, the Goods were confirmed as "held" in the United Kingdom for a "commercial purpose", having been improperly imported.

7. The Appellants appeal pursuant to s 16 of the Finance Act 1994 ("**FA 1994**"). Empire acts on behalf of Gongsi.

ISSUE(S)

8. The issue in these appeals is whether the decisions not to restore the Goods and the Vehicle were reasonable.

9. The burden of proof is on the Appellants to show that the review decisions were unreasonable. This means that the Appellants must prove that the Respondent could not reasonably have arrived at the review decisions: s 16(4) FA 1994.

10. The standard of proof is the civil standard; that of a balance of probabilities.

AUTHORITIES AND DOCUMENTS

11. The authorities to which we were referred by the parties were (amongst others):

(1) *HMRC v Jones & Jones* [2011] EWCA Civ 824 ("*Jones*");

(2) *Customs & Excise v JH Corbitt (Numismatists) Ltd* 2 WLR 653; [1980] STC 231 ("*JH Corbitt (Numismatists*");

(3) *Gora v C & E Comrs* [2003] EWCA Civ 525, [2004] QB 93 ("*Gora*"); and

(4) *Jacek Szymanski v Director of Border Revenue* [2019] UKUT 343 (TCC) ("*Jacek Szymanski*").

12. Mr Hitchens referred us to a number of other authorities, on the issue of the exercise of the Respondent's discretion and the policy applied, in his Skeleton Argument (as set out in his submissions referred to below). We will refer to these in in our consideration of his submissions.

13. The documents to which we were referred to were: (i) the Hearing Bundle consisting of 322 pages (within which were the Notices of Appeal relating to Gongsi and Empire, and the Statements of Case relating to both); (ii) the Authorities Bundle consisting of 84 pages; (iii) the Respondent's Skeleton Argument dated 30 October 2024; and (iv) Appellant's Skeleton Argument dated 13 November 2024.

BACKGROUND FACTS

14. On 14 March 2023, at the freight area in Coquelles, the Vehicle was intercepted. The driver (Mr Fosette) produced a CMR, which set out the following:

(1) Consignor – ECT Delta Terminal, Maasulate, Rotterdam, Netherlands;

(2) Consignee – NG Terminal Limited, Feltham, UK;

(3) Haulier – Empire Trading;

(4) Description – "1 contenaire MAGU 5395103".

15. A "**T1**" (a transit document which allows goods which originated outside of the European Union ('EU') to move freely within the EU) was also presented, detailing an import of 340 mini-mopeds with the same container number. An x-ray revealed an anomaly, which was inconsistent with the paperwork. An examination revealed only 37 boxes at the rear of the container containing mopeds, with the majority of the container being a large quantity of various e-cigarettes labelled "from China". There was no Goods Movement Reference ("**GMR**") or Customs Declaration Service declaration ("**CDS declaration**") for the e-cigarettes. The driver held no documentation for the load. Therefore, the Goods and the Vehicle were seized.

16. On 21 March 2023, Empire sent an email to the Respondent requesting restoration of the Vehicle and the Goods.

17. On 22 March 2023, the Respondent acknowledged receipt of the request.

18. On 9 May 2023, an email was received by the Respondent from Gongsi, with an authorisation letter detailing that they were the legal owner of the Goods and that they authorised Empire to act on their behalf.

19. On 24 May 2023, the Respondent wrote to Empire formally acknowledging the restoration request, requesting proof of ownership of the Goods and further information in support of the request for restoration.

20. On 9 June 2023, Empire sent an email to the Respondent enclosing various documents in support of the request for restoration.

21. On 21 June 2023 a further email was received from Empire by the Respondent.

22. On 22 June 2023, the Respondent confirmed the restoration request had been allocated to an officer.

23. On 10 July 2023, Empire sent a further letter chasing an update.

24. On 11 July 2023, the Respondent wrote to Empire refusing restoration of the Goods.

25. On 2 August 2023, the Respondent received an email from the Appellants' representative, attaching a letter of authority to act on behalf of the Appellants and confirming that the authority should be taken as confirmation of the parties' ongoing challenge to the legality of seizure, and the request for restoration.

26. On 23 August 2023, the Respondent wrote to the Appellants' representative advising that the appeal against the legality of seizure was out of time and, therefore, proceedings would not be commenced in the Magistrates' Court.

27. On 23 August 2023, the Appellants' representative sent a further letter of authority to act on behalf of the Appellants.

28. On 23 August 2023, the Respondent acknowledged the request for a review of the decision not to restore the Goods and a requested further supporting documentation.

29. On 16 September 2023, the Review Officer decided not to restore the Goods and the Vehicle.

30. The Appellants then submitted appeals to the First-tier Tribunal ('**FtT**').

RELEVANT LAW

31. The Convention on the Contract for the International Carriage of Goods by Road ("Convention relative au Contrat de Transport International de Marchandise par Route") ("**the CMR Convention**") was agreed in Geneva, Switzerland, on 19 May 1956 by the United Nations Economic Commission for Europe ("**ECE**"). It subsequently came into force on 2 July 1961. The United Kingdom is a signatory to the CMR Convention. The CMR Convention was transposed into UK law by the Carriage of Goods by Road act 1965, as amended by the Carriage by Air and Road Act 1979.

32. The CMR Convention regulates the commercial relationships between the operator, the seller/sender and the buyer/recipient of goods. It provides for a "**CMR Note**" and a receipt to be sent when goods are moved. The CMR Note is mandatory for all imports into the United Kingdom, except those from the Republic of Ireland or Northern Ireland, postal imports, funeral consignments and furniture removal.

33. The Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ("**the Excise Duty Regulations**") materially provide that:

> "**Goods already released for consumption in another Member State-excise duty point and persons liable to pay**
>
> **13.**-(1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.
>
> …
>
> (3) For the purposes of paragraph (1) excise goods are held for a commercial purpose if they are held-
>
> (a) by any person other than a private individual; or

(b) by a private individual ("P") except in a case where the excise goods are for P's own use and were acquired in, and transported to, the United Kingdom from, another Member State by P.

…

Forfeiture of excise goods on which the duty has not been paid

88.-(1) If in relation to any excise goods that are liable to duty that has not been paid there is-

(a) a contravention of any provisions of these Regulations, or

(b) a contravention of any condition or restriction imposed by or under these Regulations, those goods shall be liable to forfeiture."

34. CEMA sets out the powers of the Respondent in relation to seizure and forfeiture. Section 49 provides that:

"**49 Forfeiture of goods improperly imported.**

(1) Where—

(a) except as provided by or under the Customs and Excise Acts 1979 or by or under the Taxation (Cross-border Trade) Act 2018, any imported goods, being goods chargeable by reference to their importation with customs or excise duty, are, without payment of that duty—

(i) unshipped in any port,

…

(d) any goods are imported concealed in a container holding goods of a different description; or

…

(f) any imported goods are concealed or packed in any manner appearing to be intended to deceive an officer,

those goods shall, subject to subsection (2) below, be liable to forfeiture."

35. Section 78 provides that:

"**78 Customs and excise control of persons entering or leaving the United Kingdom.**

(1) Any person entering the United Kingdom shall, at such place and in such manner as the Commissioners may direct, declare any thing contained in his baggage or carried with him which—

(a) he has obtained outside the United Kingdom; or

(b) being dutiable goods or goods, he has obtained in the United Kingdom without payment of duty or tax, and in respect of which he is not entitled to exemption from duty and tax by virtue of provision made by regulations under section 19 of the Taxation (Cross-border Trade) Act 2018 relating to any relief conferred on persons entering the United Kingdom or any order under section 13 of the Customs and Excise Duties (General Reliefs) Act 1979 (personal reliefs).

…

(4) Any thing chargeable with any duty or tax which is found concealed, or is not declared, and any thing which is being taken into or out of the United Kingdom contrary to any prohibition or restriction for the time being in force with respect thereto under or by virtue of any enactment, shall be liable to forfeiture."

36. Section 167 provides that:

"**167 Untrue declarations, etc.**
(1) If any person either knowingly or recklessly—

(a) makes or signs, or causes to be made or signed, or delivers or causes to be delivered to the Commissioners or an officer, any declaration, notice, certificate or other document whatsoever; or
(b) makes any statement in answer to any question put to him by an officer which he is required by or under any enactment to answer,

being a document or statement produced or made for any purpose of any assigned matter, which is untrue in any material particular, he shall be guilty of an offence under this subsection and may be detained; and any goods in relation to which the document or statement was made shall be liable to forfeiture."

37. Section 139 provides that:

"139. Provisions as to detention, seizure and condemnation of goods, etc.

(1) Anything liable to forfeiture under the customs and excise Acts may be seized, or detained, by any officer or constable or any member of HM Armed Forces, or coastguard.

...

(5) Subject to subsections (3) and (4) above and to Schedules 2A and 3 to this Act, any thing seized or detained under the customs and excise Acts shall, pending the determination as to its forfeiture or disposal, be dealt with, and, if condemned or deemed to have been condemned or forfeited, shall be disposed of in such manner as the Commissioners may direct.

(6) Schedule 3 to this Act shall have effect for the purpose of forfeitures, and of proceedings for the condemnation of any thing as being forfeited, under the customs and excise Acts."

38. Section 141 provides that:

"Any ...vehicle, container or article of passengers' baggage which has been used for the carriage, handling, deposit or concealment or anything liable to forfeiture ... and anything else mixed, packed or found with it is also liable to forfeiture".

39. Paragraph 5 of Schedule 5 CEMA provides that:

"**5.** If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of any thing no such notice has been given to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with, the thing in question shall be deemed to have been duly condemned as forfeited."

40. In relation to restoration, s 152(b) CEMA provides that:

"**152. Powers of Commissioners to mitigate penalties, etc.**

The Commissioners may, as they see fit—

…

(b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under those Acts; …"

41. Where, as in this case, the Respondent refuses an initial request to exercise its power under s 152 CEMA to restore an item that has been seized, s 14 FA 1994 permits a person affected by that decision to require the Respondent to review it. Any review that is required must be performed in accordance with the provisions of s 15 FA 1994. If the person is still dissatisfied with the Respondent's decision following the review, s 16 of FA 1994 confers a right of appeal to the FtT in the following terms

> "**16 Appeals to a tribunal**
>
> (1) An appeal against a decision on a review under section 15 (not including a deemed confirmation under section 15(2)) may be made to an appeal tribunal within the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates….
>
> (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 that 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.
>
> (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."

42. The FtT's powers on an appeal are limited by s 16(4) FA 1994. The FtT has power to review decisions of HMRC in a number of administrative areas which are specified in Schedule 5, FA 1994. These decisions are referred to, collectively, as "ancillary matters". Section 16(4) FA 1994 confers a limited jurisdiction on the FtT to examine the reasonableness of ancillary decisions, but with very limited powers to give effect to such findings. It would not allow the FtT, or the Upper Tribunal ("**UT**"), to quash the decision appealed against: *CC&C Ltd. v R & C Comrs* [2015] 1 WLR 4043 ("*CC&C Ltd*"), at [16] (per Underhill LJ). The appeal against the decision not to restore is an ancillary matter, under Schedule 5, and falls for review by virtue of s 14(1) FA 1994 (see s 16(8) and para. 2(1)(r) of Schedule 5 FA 1994), the FtT's powers on the appeal were limited to those set out in s16(4) of FA 1994. Accordingly, the FtT can only interfere with the Respondent's decision if satisfied that the Respondent could not reasonably have arrived at that decision. Even if that threshold requirement is satisfied, the FtT can only take the steps set out in s 16(4)(a) to (c).

43. In deciding whether the Respondent's decision is unreasonable, the FtT is not bound by the factual determinations that the Respondent made. Nor is the FtT limited to a consideration of the evidence that was before the Respondent's decision-maker.

APPEAL HEARING

Preliminary matters

44. At the commencement of the appeal hearing, both representatives agreed that the sole issue for consideration in these proceedings is whether the review decision was "reasonable". Mr Hitchens however submitted that there were different facets to the issue of reasonableness, thus explaining the authorities that he sought to rely on (which largely refer to judicial review principles).

45. We gave both representatives time to consider the decision of the Upper Tribunal ('UT') in *Grzegorz Sczepaniak (T/A PHU Greg-Car) v Director of Border Revenue* [2019] UKUT 0259 (TCC) ("*PHU Greg Car*") (Judges Herrington and Richards), as the Respondent had relied on the permission to appeal decision.

46. We then proceeded to hear the appeals.

The evidence

47. We heard oral evidence from the Director of Empire, Mr Sofiene Abdelkader Lekehal de Percin-Northumberland ("**the Director**") (on behalf of the Appellants). In his oral evidence, he adopted the contents of his witness statement, dated 7 May 2024, as being true and accurate. He was not asked any further questions in examination-in-chief by Mr Hitchens. In his witness statement, the Director says this:

(1) His background is in logistics and transportation. He completed his diploma to operate Heavy Goods Vehicles ("**HGVs**") in France, in 2017.

(2) He started his business in 2019. He then outsourced to partners and took on a warehouse in 2020. Trucks were introduced into service in 2021.

(3) He does not have a criminal record.

(4) If the Goods and the Vehicle are not restored, the consequences for Empire will be catastrophic. A balance of EUR 20,926.25 is owed to Volvo for the chassis. Ongoing payments of EUR 5,000.40 need to be made to Evergreen Shipping Line ("Evergreen") for demurrage and detention costs of the Vehicle. Empire has received a final bill of EUR 2,462.70 from Evergreen, to purchase the container in order to stop the charges. Empire's client, SWOYG, who purchased the e-cigarettes and mini-mopeds, are seeking full compensation totalling EUR 535,041.00 for the Goods. Empire's reputation in China, the logistics community and in the EU is severely damaged.

(5) The Appellants are not the cause of the irregularities discovered. The driver simply picked up the wrong chassis. It is usual practice to load items that have the larger quantity first. Empire now has a "Smuggling Prevention and Customs Compliance" policy in place.

48. Under cross-examination by Mr Sekyere, the Director accepted that:

(1) There had been previous seizures involving Empire. As Empire did not know what was in the loads being carried on those occasions, no appeal was lodged.

(2) He may have confused matters within his witness statement when he stated that Empire has never had any issues in the United Kingdom, in the past (he explained that

what he meant was that Empire had never had to launch Tribunal proceedings in the past).

(3) No evidence has been provided to show that Empire had lost 40% of its business as a result of the seizure.

(4) The European market is competitive (although his position was that Empire used to receive a significant number of jobs prior to the seizure).

(5) The Training Manual (dated October 2023) is a new document which had not been in existence prior to the seizure.

(6) He relied on drivers' experience when he was hiring (albeit that he also stated that he contacts the company where the driver previously worked).

(7) The container could have been loaded a different way, despite the method of loading heavier/larger loads first (his evidence was that the vapes were heavier).

(8) Customs rules permit the opening of loads.

(9) Checks should be made before transporting goods (albeit that his position was that some clients, for example Amazon, do not permit the opening of loads to conduct checks).

49. In re-examination, the Director stated that the warehouse where the chassis and trailer were situated has two separate doors. He added that the chassis was behind "Door 1" and the trailer was behind "Door 2"; both of which are next to one another. He further added that Empire had carried out over 200 trips to the United Kingdom in the past year. He concluded by saying that Empire's turnover had been significantly impacted (albeit that it was accepted that no documentary evidence had been provided to substantiate this).

50. In response to questions for the purposes of clarification from the panel, the Director stated that there was no-one else at the warehouse when the driver collected the wrong chassis, as this happened at 5am. He added that instructions would have been sent to the driver the day before he was due to make the collection. In relation to the absence of a seal on the container, the Director explained that this was due to the container not being ready to be collected. He re-iterated that the driver had made a mistake. He concluded by saying that he had not obtained any witness evidence from the driver.

51. We also heard oral evidence from Officer Zoe Boote ("**the Review Officer**"). In her oral evidence, she adopted the contents of her witness statements, dated 29 November 2023 and 17 April 2024, as being true and accurate. In her witness statement, Officer Boote sets out the documentation that she considered in reaching her review decision. She further highlights that in reviewing the decision not to restore the Goods and the Vehicle, she was guided by the policy on restoration ("**the Policy**"), but was not constrained by it. She adds that she examined the circumstances of the case to determine how to the apply the Policy.

52. In her evidence, Officer Boote explained that Empire was required to know what was in the load that was being transported to the United Kingdom, as there may be unscrupulous people seeking to evade duty. She added that it was the haulier's duty to carry out checks. In relation to the decision by the Respondent's officers to open the load, she stated that the Respondent needs to be satisfied that illegal, or contraband, goods are not being carried. Therefore, the person who receives goods would understand if the goods had been opened.

53. She added that the onus was on the Appellants to provide information to the Respondent to substantiate any claims being made. She further added that she would have expected to see some evidence to show that the Goods were, indeed, faulty goods. In relation

to the location of the seller and the buyer, she stated that it was only when the skeleton argument on behalf of the Appellants was served that she became aware that there was an EU customer. The information previously suggested that the seller and buyer were in China, while the Goods were said to be intended for transportation to Hong Kong.

54. She considered that Empire had displayed a level of naivety and had a recent history of goods being seized.

55. In relation to the issue of hardship, she stated that one would expect to see bank statements and evidence of expenditure to substantiate a claim to hardship. She added that, in any event, Trading Standards had declared the e-cigarettes to be unfit for human consumption, and so they were destroyed.

56. She concluded by saying that she had been satisfied that she could reach a decision on the basis of the information that had been provided by the Appellants.

57. Under cross examination, Officer Boote stated that:

(1) she was not fettered by the Policy on restoration.

(2) the expectation is that a haulier will check the load, but she does not know if there is a legal duty to do so under legislation. The obligation comes from Border Force practice, in order to avoid the evasion of duty.

(3) she accepts that delivery may not be accepted if the seal is removed and goods are opened.

(4) the claimed route of the Goods was China to Hong Kong, via Rotterdam.

(5) she accepts that companies incorporated in one country often sell and distribute goods in another country.

(6) this was Empire's third seizure within a period of just over six months, and the Appellant only prepared a training manual in October 2023.

(7) the Appellant could have avoided the situation if practices had been put in place much earlier, and if goods had been checked against documentation.

(8) a second seizure in 12 months results in a decision not to restore.

(9) the Policy changes after repeated seizures.

(10) she would speak to a senior officer if she needed to consider restoration after a third seizure within six months.

(11) the Policy sets out the kind of evidence that the Respondent would expect to see.

(12) she did not know why the trailer was restored.

(13) It may be possible to depart from the Policy on humanitarian grounds, such as the COVID-19 pandemic.

(14) she did not ask for further clarity from the Appellants because she had enough information before her to reach a decision.

(15) she considered that the request for review had been detailed and had been prepared by a solicitor.

58. In re-examination, Officer Boote stated that third seizures are rare. She re-iterated that in such circumstances, she would need to take advice from a senior officer on the issue of restoration. She concluded by saying that if restoration is given on the day of seizure, the case

does not go to a review officer, but a person can appeal against a high fee and this would be considered by a review officer.

The submissions

59. The Appellants' case is, in essence, that the Goods were faulty and were being sent back to the manufacturer in Hong Kong. The Appellants' case is also that the driver who collected the load in Rotterdam had taken the wrong chassis.

60. Mr Hitchens' submissions (on behalf of the Appellants) can be summarised as follows:

(1) Section 16 FA 1994 empowers the FtT to quash a review decision where it is satisfied that it could not reasonably have arrived at it.

(2) The Review Officer proceeded on the fallacious basis that the law did not require her to share the Policy against which the Respondent's decision was to be judged.

(3) Despite the Review Officer being confused by the information provided to her by the Appellants, the officer made no further inquiries with the appellants.

(4) Empire lost c.40% of its trade, was only five years into its existence, was facing a very sizable liability should the Goods not be restored and was a small company with only six vehicles. In light of that information, it was not reasonably open to the Respondent to conclude that non-restoration would not cause hardship that was exceptional, when compared to the hardship that would ordinarily be caused by the seizure of a vehicle.

(5) A decision-maker must take into account all relevant considerations required by legislation, or any internal policy. In this regard, it is relevant that the Respondent's Policy requires Border Force to take into account "all relevant facts". There was a failure to take account of the explanations provided by the Appellant. Faulty goods were being returned to the manufacturer.

(6) There is a duty on public bodies to carry out sufficient inquiry before taking a decision. This obligation is referred to as the "**Tameside Duty**" as the principle derives from the case of *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014. Lord Diplock summarised the duty by saying that the question for the court is, "did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly".

(7) The Tameside Duty is a facet of reasonableness. The Review Officer should have made further enquiries before reaching a decision, if the explanations provided by the Appellant were found to be difficult to understand. A decision cannot be taken unless the decision-maker is able to conclude that they have all of the reasonable information.

(8) The modern legal framework governing the Tameside Duty is summarised at [100] of the decision in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice & Ors* [2014] EWHC 1662 (Admin) ("*Plantagenet Alliance Ltd*").

(9) The obligation upon the decision-maker is only to take such steps to inform himself as are reasonable.

(10) Subject to a Wednesbury challenge, it is for the public body, and not the court, to decide upon the manner and intensity of the inquiry to be undertaken: *R(Khatun) v Newham LBC* [2005] QB 37 ("*Khatun*"), at [35] (per Laws LJ).

(11) The court should not intervene merely because it considers that further inquiries would have been sensible, or desirable. It should intervene only if no reasonable authority could have been satisfied, on the basis of the inquiries made, that it possessed

the information necessary for its decision (per Neill LJ in *R (Bayani) v Kensington & Chelsea Royal LBC* (1990) 22 HLR 406 ("*Bayani*").

(12) The court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the enquiries they had made were sufficient: Schiemann J in *R (Costello) v Nottingham City Council* (1989) 21 HLR 301 ("*Costello*"); cited with approval by Laws LJ in *Katun*.

(13) The principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant, but from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion: Laws LJ in *R (London Borough of Southwark) v Secretary of State for Education*, at p 323D.

(14) The wider the discretion conferred, the more important it must be that he has all relevant material to enable him properly to exercise it: *R (Venables) v Secretary of State for the Home Department* [1998] AC 407 at 466G ("*Venables*").

(15) There is consistent case law from the senior courts that where a policy governs the exercise of a public body's discretion, and that discretion affects the rights of individuals, the policy must be published.

(16) In *B v Secretary of State for Work & Pensions* [2005] EWCA Civ 929 ("*B*"), Sedley LJ said it is axiomatic in modern government that a lawful policy is necessary if an executive discretion of the significance of the one now under consideration is to be exercised, as public law requires it to be exercised, consistently from case to case but adaptably to the facts of individual cases. If – as seems to be the situation here – such a policy has been formulated and is regularly used by officials, it is the antithesis of good government to keep it in a departmental drawer.

(17) In *Lumba v Secretary of State for the Home Department* [2011] UKSC 12 ("*Lumba*"), Lord Dyson held that: "the rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised.". His Lordship went on to explain that "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..." There is a correlative right to know what that currently existing policy is, so that the individual can make relevant representations in relation to it.

(18) In *R (ZLL) v Secretary of State for Housing, Communities and Local Government* [2022] EWHC 85 (Admin) ("*ZLL*"), Fordham J held that: "a further recognised feature of public law is that prescriptive policy guidance, which has been issued, may in law need to be published".

(19) In *R (on the application of) Richard McMorn v Natural England* [2015] EWHC 3297 ("*McMorn*"), Ouseley J quashed a decision relating to buzzard shooting licenses on the basis that the policy upon which the decision was based was unpublished and undisclosed.

(20) In *Mccord, Re Application for Judicial Review* [2020] NICA 23 ("*Mccord*"), the Court of Appeal of Northern Ireland held: "as a matter of domestic administrative law, where a public authority has formulated and applies a policy, it should be published".

61. Mr Sekyere's submissions (on behalf of the Respondents) can be summarised as follows:

(1) The Goods were liable to duty and were not declared.

(2) The mopeds were a cover load for e-cigarettes and the Goods were packed in a manner meant to deceive.

(3) Gongsi did not challenge the legality of the seizure and the Goods are deemed condemned as forfeit. There is no jurisdiction for the legality of seizure to be raised before the FtT.

(4) The seizure of the Goods was legal as a large quantity of e-cigarettes were improperly imported. The Respondent asserts that the first hurdle to be crossed is to establish proof of ownership and in this case the Respondent is not satisfied that Gongsi has provided satisfactory evidence that they hold legal title to the Goods.

(5) The Review Officer cannot restore the Goods unless ownership is proved beyond doubt.

(6) The decision is reasonable. The Respondent was guided by the Policy and the forfeiture provisions in CEMA. The Policy is that seized goods should not normally be restored, especially if there are aggravating factors such as goods being mis-declared. The Review Officer considered the decision afresh, including the circumstances of the date of the seizure and the related evidence, so as to decide if any mitigating or exceptional circumstances exist that should have been taken into account. The Review Officer has also examined all the representations and other material that was available both before, and after, the time of the decision.

(7) It remained the Appellants' responsibility to ensure that the Goods were declared correctly.

62. In relation to the Vehicle, Mr Sekyere submitted that:

(1) The Vehicle was used to transport the Goods and is liable to seizure.

(2) Empire did not challenge the legality of the seizure and the Vehicle is deemed condemned as forfeit. There is no jurisdiction for the legality of seizure to be raised before the FtT.

(3) An operator involved in transporting goods across international frontiers should conduct reasonable checks to prevent smuggling, be aware of all the correct documentation necessary and be very aware of potential risks. In addition, the information provided in respect of events leading up to the seizure are convoluted, elaborate and difficult to understand.

(4) The Respondent does not disclose the full guidance or frameworks of the Policy into the public domain as this would help smugglers to adapt their smuggling attempts.

(5) Hardship is a natural consequence of having vehicles seized and exceptional hardship would need to be established for such vehicles to be restored in this case

63. We are grateful to both counsel for their succinct submissions in these proceedings. At the conclusion of the appeal hearing, we reserved our decision, which we now give with reasons.

FINDINGS OF FACT

64. The following facts were either accepted, admitted or proved:

(1) The Vehicle was found to contain Goods that had not been declared.

(2) The Vehicle and the Goods were seized as liable to forfeiture.

(3) There was no, or no timely, challenge to the legality of the seizure.

(4) The Vehicle and the Goods were duly condemned as forfeit.

(5) The only proof of ownership of the Goods was in the form of three receipts.

(6) This was the third seizure involving Empire.

(7) Empire now has a Training Manual in place for drivers, and this was only published in October 2023.

(8) The driver has not provided any written explanation for the situation that has occurred.

(9) Both containers had the same reference number.

(10) The Appellants have not provided evidence of hardship, such as bank statements or other financial statements.

(11) There was no evidence provided to support a conclusion that the Goods were faulty.

(12) Trading Standards deemed the Goods unfit for human consumption and, consequently, the Goods cannot be restored.

65. We, therefore, make these material findings of fact.

DISCUSSION

66. This is the Appellants' appeal against the Respondent's decisions to refuse to restore the Goods (said to be owned by Gongsi who in turn are said to have purchased them from Xitai Trading Limited, in three separate orders) and the Vehicle (leased by Empire from Volvo), which were seized by the Respondent exercising powers under s 139 CEMA. The Goods and the Vehicle were seized on 14 March 2023 after the Vehicle, which was being pulled by a Volvo tractor unit reg. number 2CSE512, was intercepted at Coquelles. The Vehicle was found to hold a container which contained the Goods. The seizure of the Goods and the Vehicle were challenged out of time and the Goods and Vehicle were, therefore, condemned as forfeit by the passage of time. Furthermore, the Goods were confirmed as "held" in the United Kingdom for commercial purposes, having been improperly imported.

67. Empire's position (on behalf of the Appellants) is that the freight-forwarder in China had pre-booked the container (which they used for importing goods to Belgium) to be exported with another shipment for their customer. The Appellants' case is that the Goods were not intended for the UK market, and that the driver had picked the wrong chassis to pull the container reference "MAGU5395103" (which held the Goods) when he was collecting the load in Rotterdam.

68. The burden of proof is on the Appellants in these appeals. The documents provided by the Appellants in support of the appeals included, *inter alia*:

(1) Trailer (i.e., the Vehicle) registration document;

(2) Lease agreements in English;

(3) Volvo Contract; and

(4) Employment reference of Driver.

69. The documents provided by the Respondent included:

(1) Notice of Seizure;

(2) Officer notebook entries;

(3) Warning letter regarding tractor unit 2CSE512;

(4) Trailer registration document;

(5) Lease agreements in English;

(6) Smuggling prevention and Customs compliance training manual;

(7) Truck driver experiences, training and qualifications;

(8) Email from Trading Standards dated 5 May 2023.

70. We have, further, had the benefit of considering the evidence and submissions.

71. Firstly, if a challenge to the legality of a seizure is not pursued, the FtT must proceed on the basis that the Goods and the Vehicle were legally seized. In consequence, any facts relating to the legality of the seizure must be taken to have been proved and there can be no attempt to re-adjudicate these facts: *Jones*. The FtT, therefore, does not have jurisdiction to consider the legality of the seizure itself. We are required to proceed on the basis that the Goods and Vehicle were liable to forfeiture.

72. Secondly, the reasonableness of the decision is to be judged against the background of the information which was available to the Review Officer. The FtT's fact-finding power in this regard was conceded by the Commissioners in *Gora*. This can be found in the judgment of Pill LJ, at [38], as considered in *Harris v Director of Border Revenue* [2013] UKFTT 134 (TC) ("*Harris*"), at [11]. In *Harris*, at [8], Judge Helier said this:

> "It is important to remember that a conclusion that a decision is not unreasonable is not the same as a conclusion that it is correct. There can be circumstances where different people could reasonably reach different conclusions. The mere fact that we might have reached a different conclusion is not enough for us to declare that a conclusion reached by UKBA should be set aside."

73. In *Gora*, Pill LJ approved an approach under which the FtT should decide the primary facts and then decide, whether in light of those findings, the decision on restoration was reasonable. In short, the question for us is whether the review decision was reasonable. Pursuant to *JH Corbitt (Numismatists)*, a decision is not reasonable if (a) the decision maker acted in a way which no reasonable decision maker could have acted; (b) if they had taken into account some irrelevant matter; or (c) had disregarded something to which he or she should have given weight.

Schedule 3 CEMA: The deeming provisions

74. The time at which the requirement to pay duty arises is addressed in the Excise Duty Regulations. Goods that are not declared on importation are liable to seizure and forfeiture. If anything is seized as liable to forfeiture, any vehicle used for its carriage is also liable to forfeiture. This is the situation that has arisen in this appeal. The Vehicle was clearly seized because it was carrying the Goods in question. The Goods had not been declared on arrival in the United Kingdom.

75. In relation to anything seized as liable to forfeiture, s 139(6) CEMA provides that Schedule 3 CEMA shall have effect. Under para. 3 of Schedule 3, any person claiming that anything seized as liable to forfeiture is not so liable has one month from the date of the notice of seizure in which to give notice of his claim in writing. The Appellants in the appeal before us did not give notice of claim within the specified time-limit. The Goods and Vehicle

are, therefore, deemed to have been duly condemned as forfeited, under para. 5 of Schedule 3 CEMA. This is the legislative scheme in Schedule 3 CEMA.

76. The effect of para. 5, Schedule 3 CEMA was considered by the Court of Appeal in *Jones*. There, the Court of Appeal concluded that the lack of challenge to the seizure means that it is not open to the FtT to entertain any argument by the Appellant which would be inconsistent with the legality of the seizure. In *Jones*, the appellants had maintained (in an appeal against the non-restoration of goods and their vehicle) that the goods had been for their personal use, and gifts for members of their family. The Court of Appeal held that the FtT had no power to re-open and redetermine the question of whether or not the seized goods had been legally imported for personal use.

77. Mummery LJ (with whom Moore-Bick and Jackson LJJ agreed) held, at [73], that the question was:

> "already the subject of a valid and binding deemed determination under [CEMA]"

78. And that:

> "the FTT only had jurisdiction to hear an appeal against a review decision on the deemed basis of the unchallenged process of forfeiture and condemnation".

79. Mummery LJ provided guidance on the provisions of CEMA, the relevant authorities and the articles of the CMR Convention. He said this, at [71]:

> "71... For the future guidance of tribunals and their users I will summarise the conclusions that I have reached in this case in the light of the provisions of the 1979 Act, the relevant authorities, the articles of the Convention and the detailed points made by HMRC.
>
> (1) The respondents' goods seized by the customs officers could only be condemned as forfeit pursuant to an order of a court. The FTT and the UT are statutory appellate bodies that have not been given any such original jurisdiction.
>
> (2) The respondents had the right to invoke the notice of claim procedure to oppose condemnation by the court on the ground that they were importing the goods for their personal use, not for commercial use.
>
> (3) The respondents in fact exercised that right by giving to HMRC a notice of claim to the goods, but, on legal advice, they later decided to withdraw the notice and not to contest condemnation in the court proceedings that would otherwise have been brought by HMRC.
>
> (4) The stipulated statutory effect of the respondents' withdrawal of their notice of claim under paragraph 3 of Schedule 3 was that the goods were deemed by the express language of paragraph 5 to have been condemned *and* to have been "duly" condemned as forfeited as illegally imported goods. The tribunal must give effect to the clear deeming provisions in the 1979 Act: it is impossible to read them in any other way than as requiring the goods to be taken as "duly condemned" if the owner does not challenge the legality of the seizure in the allocated court by invoking and pursuing the appropriate procedure.
>
> (5) The deeming process limited the scope of the issues that the respondents were entitled to ventilate in the FTT on their restoration appeal. The FTT had to take it that the goods had been "duly" condemned as illegal imports. It was not open to it to conclude that the goods were legal imports illegally seized by HMRC by finding as a fact that they were being imported for own use. The role of the tribunal, as defined in the 1979 Act, does not extend to deciding as a fact that the goods were, as the respondents argued in the tribunal, being imported legally for personal use. That issue could only be decided by the court. The FTT's jurisdiction is limited to hearing an appeal against a discretionary decision by HMRC not to restore the seized goods to the respondents. In brief, the deemed effect of the respondents' failure to contest condemnation of the goods by the court was that the goods were being illegally imported by the respondents for commercial use.

(6) The deeming provisions in paragraph 5 and the restoration procedure are compatible with Article 1 of the First Protocol to the Convention and with Article 6, because the respondents were entitled under the 1979 Act to challenge in court, in accordance with Convention compliant legal procedures, the legality of the seizure of their goods... Their Convention rights were not infringed by the limited nature of the issues that they could raise on a subsequent appeal in the different jurisdiction of the tribunal against a refusal to restore the goods.

(7) I completely agree with the analysis of the domestic law jurisdiction position by Pill LJ in *Gora* and as approved by the Court of Appeal in *Gascoyne*. The key to the understanding of the scheme of deeming is that in the legal world created by legislation the deeming of a fact or of a state of affairs is not contrary to "reality"; it is a commonly used and legitimate legislative device for spelling out a legal state of affairs consequent on the occurrence of a specified act or omission. Deeming something to be the case carries with it any fact that forms part of the conclusion.

…

(9) …that there is no question of an owner of goods being deprived of them without having the legal right to have the lawfulness of seizure judicially determined one way or other by an impartial and independent court or tribunal: either through the courts on the issue of the legality of the seizure and/or through the FTT on the application of the principles of judicial review, such as reasonableness and proportionality, to the review decision of HMRC not to restore the goods to the owner.

(10) …the 1979 Act itself stipulates a deemed state of affairs which the FTT had no power to contradict and the respondents were not entitled to contest. The deeming does not offend against the Convention, because it will only arise if the owner has not taken the available option of challenging the legality of the seizure in the allocated forum.

[Emphasis added]

80. The case of *Jones* is, therefore, clear authority for the proposition that the FtT has no jurisdiction to go behind the deeming provisions in para. 5 of Schedule 3 CEMA. *Jones* was applied by the UT in *HMRC v Race* [2014] UKUT 03331 (TCC) ("*Race*"), in the context of an appeal against an assessment to excise duty. There, Warren J said:

"26…If goods are condemned to be forfeited, whether in fact or as the result of the statutory deeming, it follows that, having been bought in a Member State and then imported by Mr and Mrs Jones, they were not held by the taxpayers for their own personal use in a way which exempted the goods from duty. The reasoning and analysis in *Jones* did not turn on the fact that the case concerned restoration of the goods and not assessment to duty."

…

33…It is clearly not open to the tribunal to go behind the deeming effect of paragraph 5 Schedule 3 for the reasons explained in *Jones* and applied in *EBT* [i.e., *HMRC v European Brand Trading Ltd* [2014] UKUT 226 (TCC), a decision of Morgan J]. The fact that the appeal is against an assessment to excise duty rather than an appeal against non-restoration makes no difference because the substantive issue raised by Mr Race is no different from that raised by Mr and Mrs Jones."

81. Similarly, in *HMRC v European Brand Trading Ltd* [2014] UKUT 0226 (TCC) ("*EBT*"), Morgan J sitting in the UT said this, at [57] and [63], in relation to seized goods:

"57. The effect of the order of the magistrates' court on 13 May 2010 is that in law, as between HMRC and EBT, duty was not paid on the goods seized on 20 August 2009. The effect of paragraph 5 of schedule 3 to the 1979 Act is that in law, as between HMRC and EBT, duty was not paid on the goods seized on 16 February 2010.

…

> 63. For the above reasons, I am unable to accept the submission made by counsel for EBT on the appeal to the Upper Tribunal, which I have set out above, to the effect that the review officer is required to consider "that material relevant to the duty paid status of the seized goods which was available to and considered by the relevant officer at the relevant time". As at the time of the further review decision, the duty paid status of the seized goods is established to be that duty was not paid. It is irrelevant to inquire as to what might have been argued to have been the apparent position at an earlier time."

82. Morgan J's decision in *EBT* was subsequently upheld by the Court of Appeal: [2016] EWCA Civ 90, where Lewison LJ quoted, and endorsed, Warren J's decision in *Race*, at [38] and [39] of his judgment.

83. In *DV3 RS LP v HMRC* [2013] EWCA Civ 907, in the context of SDLT legislation, Lewison LJ said this, at [13], in respect of deeming provisions under a different statute:

> "Sections 44 and 45 [Finance Act 2003] are what are sometimes called "deeming provisions". The Upper Tribunal referred to the discussion of such provisions by Peter Gibson J sitting in this court in *Marshall v Kerr* [1993] STC 360 after citation of well-known authorities, including the speech of Lord Asquith in *East End Dwellings Co Ltd v Finsbury BC* [1952] AC 109, 132, Peter Gibson J said:
>
> > "For my part I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so.""

84. At [15], Lewison LJ made further comments on the interpretation of these provisions:

> "Although sections 44 and 45 are "deeming provisions" the fact that we are concerned with such provisions does not displace the ordinary principles of statutory interpretation: *HMRC v DCC Holdings (UK) Ltd* [2010] UKSC 58. In my recent judgment in *The Pollen Estate Trustee Company Ltd v HM Revenue and Customs* [2013] EWCA Civ 753 I set out what I believe to be those principles... I repeat it here for convenience:
>
> > "The modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose. This approach applies as much to a taxing statute as any other: *Inland Revenue Commissioners v McGuckian* [1997] 1 WLR 991; *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51. In seeking the purpose of a statutory provision, the interpreter is not confined to a literal interpretation of the words, but must have regard to the context and scheme of the relevant Act as a whole: *WT Ramsay Ltd v Commissioners of Inland Revenue* [1982] AC 300; *Barclays Mercantile Business Finance Ltd v Mawson* at [29] ... But however one approaches the matter, the question is always whether the relevant provision of statute, upon its true construction, applies to the facts as found: *Barclays Mercantile Business Finance Ltd v Mawson* at [32]."

85. What can be gathered from these authorities is that the legislation does not provide for a right of appeal to the FtT against forfeiture and condemnation. The FtT has no express jurisdiction to determine such an issue on appeal. The differences in fact and law in these authorities and in the appeals before us do not negate the need to give effect to the clear deeming provisions in Schedule 3 CEMA. Despite the Appellants' submissions about the

Goods not being intended for the United Kingdom, an incontrovertible fact in this appeal is the fact that the Appellants did not challenge the legality of the decision to seize the Goods, or the Vehicle, within the 30-day time-limit to do so. This brings the deeming provisions into play. Similarly, the result of the statutory deeming is that having been bought into the United Kingdom, the Goods held cannot be considered to have been held for personal use in a way which exempted the Goods from duty

86. The nature and scope of the right of appeal to the FtT, as accepted by both parties, is against the discretionary review decision on the issue of restoration. If a challenge to the legality of the seizure is not pursued, the FtT must proceed on the basis that the Goods and the Vehicle were legally seized. In consequence, any facts relating to the legality of the seizure must be taken to have been proved and there can be no attempt to re-adjudicate these facts. The issue relating to legality of seizure was for decision by the courts in condemnation proceedings. If the Appellants had wanted to take such a point, they should have started proceedings in the Magistrates' Court, within 30 days of the decision refusing to restore. Notice 12A is clear that unless seizure is challenged, it is not possible to argue that the Goods or the Vehicle were not liable to forfeiture. The FtT has no power to order restoration.

Q. Was the decision not to restore the Goods and the Vehicle reasonable?

87. There is, in truth, only one live issue before us; that is whether the decisions to refuse to restore the Goods and the Vehicle were reasonable. There is a single test of reasonableness. In *Lindsay v C & E Comrs* [2002] EWCA Civ 267; [2002] STC 588 ("*Lindsay*"), the court held (per Lord Phillips MR) that in a restoration case, the Commissioners' decision will be unreasonable if:

> "they take into account irrelevant matters, or fail to take into account all relevant matters."

88. The court so held applying the principles adumbrated in *JH Corbitt (Numismatics)*, at [239], where Lord Lane, similarly, said this concerning whether a decision was reasonable:

> "...if it were shown [that] the Commissioners had acted in a way which no reasonable panel of Commissioners could have acted; if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight."

89. In *Gora*, Pill LJ held that the provisions of s16 FA 1994 do not prevent the FtT from conducting a fact-finding exercise. Consequently, and as considered earlier, it is open to the FtT to decide the primary facts and then determine whether, in the light of those facts, the decision was one which could not reasonably have been reached: (Pill LJ at [38] to [39]). This was confirmed in *Jones* and *R & C Comrs v Behzad Fuels (UK) Ltd* [2019] EWCA Civ 319 ("*Behzad Fuels*"). As confirmed in *Gora* and *Harris*, the reasonableness of the decision-maker's decision is to be judged against the information available to us at the date of the hearing, even though in some cases this may include information which was not available to the decision-maker when the decision was taken.

90. The Court of Appeal's decision in *John Dee Ltd v CCE* [1995] STC 941(*"John Dee Ltd"*) concerned an appeal in which the then VAT Tribunal had concluded that the Commissioners had failed to have regard to additional material relating to the appellant's financial circumstances. Neil LJ (with whom the other Lords Justices agreed) held that the appellant had been right to concede that:

> "where it is shown that, had the additional material been taken into account, the decision would inevitably have been the same, a tribunal can dismiss an appeal."

91. No distinction is made, as a matter of principle, between that situation (taking account of relevant material that was not originally taken into account) and a case where irrelevant

material ought not to have been taken into account. In reaching a conclusion that the relevant decision would inevitably be the same, the FtT may well consider the evidence from the decision-maker and whether it would have decided the matter in the same way. In the context of restoration decisions, consistent with the FtT's fact-finding role as explained in *Gora*, there is no reason why the FtT should not, in considering inevitability, also take account of any facts it has found.

The Policy on Restoration

92. Section 152 CEMA gives the Respondent a discretion to restore goods which have been seized. When exercising this discretion, the Respondent will have regard to the Policy. In relation to the Goods, the general Policy is that goods seized because they did not correspond with the entry made and/or there is evidence of an attempt to evade duty should not normally be restored. Goods will not be restored where there have been aggravating circumstances such as being mis-declared, or the intercepting officer has cause to doubt the veracity of information supplied to them, where goods have been concealed, or there has been a deliberate attempt to evade duty.

93. In relation to the Vehicle, the Policy for the restoration of commercial vehicles that have been used for smuggling excise goods is intended to tackle cross-border smuggling, and to disrupt the supply of excise goods to the illicit market. "Commercial vehicles" include not only "HGVs", but any vehicle considered to be moving primarily for a commercial and business purpose. When considering the restoration of commercial vehicles, the Respondent will consider the involvement of the owner/haulier and the steps taken by the haulier to prevent their vehicles from being used to carry smuggled goods. The Respondent will also consider whether satisfactory evidence has been provided to show that basic reasonable checks, including conforming with the CMR Convention, were carried out to confirm the legitimacy of the load and to detect any illicit load.

The Ownership Issue

94. Gongsi provided three invoices, in respect of the Goods. The first two invoices were each in the sum of EUR 190,126.00 and related to "disposable e-cigarettes". The third invoice was in the sum of EUR 154,760.00 and relates to "e-cigarettes and 50 mini-mopeds". The invoice numbers were "2023A03-0203", "2023A02-2806" and "2023A03-0501", respectively. There were also payment instructions to Hang Seng Bank dated 1 February 2023, 22 February 2023 and 8 February 2023. The Restoration Officer concluded, on 11 July 2023, that:

> "*In considering restoration I have looked at all of the circumstances surrounding the seizure, but I do not consider the legality or the correctness of the seizure itself. Your client has not established that they are the owner of the goods. As evidence of payment they have submitted three copies of payment instructions issued by Hang Seng Bank. However, these are not proof of payment as the documents do not include details of the payor and they are all payment instructions, not payment confirmations. Your client has offered no explanation as to why the goods were being loaded in Rotterdam. The goods were purchased by a company in mainland China from another company based in mainland China, and the final destination was Hong Kong. I cannot see the logic of sending those goods to Rotterdam unless they were destined for a customer in Europe. UK Trading Standards have confirmed that the e cigarettes are not suitable for the UK market. They do not conform to the Tobacco and Associated Products Regulations 2016, and as such cannot be released into free circulation in the UK. The e cigarettes formed the majority of the load but they were packed in such a fashion that only the mopeds were visible should any authority undertake a visual inspection. The mopeds were two boxes deep at the rear of the container with smaller boxes of e cigarettes in front. This may suggest the mopeds were merely a cover load for the e cigarettes. I conclude that there*

are no exceptional circumstances that would justify a departure from the Commissioners' policy and I can confirm on this occasion the goods will not be restored."

95. The Respondent's case is that the Gongsi has not shown that it owns the Goods because there was no way of linking the Goods to the documents that had been provided to prove ownership. As a result, Gongsi was considered to have failed to discharge the burden of showing that it owned the Goods.

96. In *Worx Food & Beverage BV v Director of Border Revenue* [2015] UKFTT 0253 (TC) (Judge Redston and Member Akhtar), which we find to be persuasive though not binding on us, Judge Redston said this:

> "71. We agree with Mr Hays. If ownership has not been established, then it is reasonable for the UKBF to stop there. They do not need to go on to consider whether the person claiming ownership was an innocent party in a fraudulent transaction.
>
> …
>
> 74. Again, we agree with Mr Hays. If a person has not proved that they own the goods in question, it is reasonable for the UKBF to stop there. Indeed, it would be unreasonable for them to go on to consider hardship, because that carries with it the inference that the goods were owned by the person asking for restoration.
>
> …
>
> 82. We therefore find that the UKBF's general policy of requiring proof of ownership is proportionate within the meaning of the Convention. We further find that it is proportionate in this case. The evidence provided by WFB in support of its claim to own the goods was inadequate, and Mr Collins' decision to refuse to restore was proportionate."

97. We are satisfied that before restoration can be considered, ownership of the Goods must be established. That means providing evidence that the Goods seized belonged to Gongsi. We accept that this is a reasonable measure as, otherwise, the Respondent might restore goods to someone other than the true owner. We are further satisfied that Gongsi has failed to establish ownership and the Respondent was, therefore, entitled to stop there. Despite ownership not being established, Review Officer Boote went on to consider whether any mitigating, or exceptional, circumstances existed, together with the issue of hardship. We now turn to her analysis of all of the information.

The Review Decisions

98. Officer Boote was the Review Officer in these proceedings. We derived considerable benefit from hearing her giving oral evidence, which we found to be truthful and reliable. Officer Boote is a Higher Officer of Border Force, currently employed as a review officer. Her duties include undertaking reviews of decisions regarding the restoration of items seized as a result of their improper importation. She conducted a review of the contested decisions not to restore the Goods and the Vehicle.

99. Officer Boote concluded that, in relation to the Goods:

(1) The seizure was legal as a large quantity of e-cigarettes were improperly imported.

(2) She was not persuaded that Gongsi had satisfactorily evidenced that it held legal title to the Goods on the date of the seizure.

(3) The Grounds of Appeal were a direct challenge to the legality of the seizure.

(4) Such an error could not have occurred had there been stringent checks and procedures in place to prevent such occurrences.

(5) The invoices showed that both the buyer and the seller were companies based in mainland China, and that no explanation was provided for why goods purchased in China, with a final destination in Hong Kong, were being loaded in Rotterdam. This gave concerns about the legitimacy of the consignment.

(6) The restoration of the e-cigarettes would be unlawful following the involvement of UK Trading Standards, stating that the e-cigarettes present a health risk to the consumer, and are not suitable for the UK market as they do not conform to the Tobacco and Associated Products Regulations 2016. They cannot, therefore, be released into free circulation.

100. In relation to the Vehicle:

(1) The seizure of the Vehicle was legal.

(2) The duty to take reasonable steps to prevent smuggling applies not just to movements to and from the United Kingdom, but to all countries. Operators are expected to take reasonable steps to prevent smuggling.

101. The overall conclusion reached by Officer Boote was that:

(1) No physical checks were made to certify the Goods, and no reservations were entered into the consignment note in accordance with the Carriage of Goods by Road Act 1965.

(2) It is to be expected that reasonable checks would have been carried out.

(3) A seal was not applied to the Vehicle.

(4) The information provided by the Appellants was "*convoluted, elaborate and difficult to understand"*.

(5) To expect the Respondent to believe that the Goods were not intended for the UK market and that they had been loaded into the wrong trailer "*stretches the bounds of credulity beyond acceptable limits"*

(6) The CMR provided in respect of the Goods was handwritten and, therefore, a question arises as to whether the CMR was "*bogus*" and intended to "*hide the fact that the goods had in fact arrived from China"*.

(7) No explanation had been provided for why Goods originating in China would be loaded in Holland before being returned to China, and that "*it is not reasonable or credible for goods intended for Hong Kong to pass through Rotterdam, especially at the commercial viability in shipping faulty goods to another country as stated…"*.

102. Officer Boote found that no exceptional hardship had been established on the facts of these appeals.

103. These are the decisions whose reasonableness we are required to consider.

Q. Was irrelevant material taken into account and was any relevant information ignored?

104. Firstly, Officer Boote considered the Policy on restoration (but was not fettered by it) and whether a case for departing from the Policy had been made out by the Appellants.

105. Secondly, in conducting her review, Officer Boote considered the following documents:

1.	Review Decision from Border Force dated 16/09/23
2.	Notice of Seizure

3.	Officer notebook entries
4.	Email from Appellant to Border Force requesting restoration dated 21/03/23
5.	Email from Trading Standards dated 05/05/23
6.	Email from Appellant to Border Force containing an Agent's Authority dated 09/05/23
7.	Email from Border Force to Appellant acknowledging restoration request dated 24/05/23
8.	Email from Appellant to Border Force including commercial documents dated 09/06/23
9.	Commercial Invoice, Packing List, Purchase contract, Bank transfers 1
10.	Commercial Invoice, Packing List, Purchase contract, Bank transfers 2
11.	Commercial Invoice, Packing List, Purchase contract, Bank transfers 3
12.	Non-restoration decision dated 11/07/23
13.	Review request dated 02/08/23
14.	Agent's Authority Shenzhen Wangyi Dianshang Youxian Gongsi 23/08/23
15.	Authority Authority Rogers and Norton
16.	Review acknowledgement dated 23/08/23
17.	Email from Border Force to Appellant concerning the challenge to the legality of the seizure dated 23/08/23

106. Thirdly, Officer Boote considered the fact that the Respondent had given the Appellants opportunities to provide further information and documentation. We accept that Officer Boote was satisfied that she had sufficient information on which to reach a decision.

107. In their email, dated 21 March 2023, Empire said this:

> "*Last week on Tuesday 14 March 2023 our trailer numbered QANN480 together with our customer's goods was seized by Borderforce in Coquelles Freight in Calais. The officer who seized the trailer and goods is identified by numbers "10993". The officer claimed the goods did not match the manifest. We have an explanation for this, the goods loaded in this container was not for the UK. We received these goods from our customer in the EU. These goods should have been loaded in another container planned for export to Hong Kong, our warehouse loaded these goods in this container which was seized by mistake. Our customers are initiating a claim from us for these goods, we urgently need to know how we can bring these goods back from your possession? Furthermore, we need our chassis returned us.*" [sic]

108. In their email dated 9 June 2023, Empire provided further documents and said this:

> "*Please find attached documents provided by owner of the goods. The VAT and EORI number for the client is mentioned on the commercial invoices. In total there are 1174 boxes of vapes in the container, 50 boxes of Mini Mopeds and 2 boxes of posters*."

109. Empire provided a commercial invoice, a packing list, a purchase contract, and a Hang Seng bank transfer for 154,764.00 Euros for 49920 disposable electronic cigarettes and 50 mini mopeds, and the same for an amount of 190,124.00 Euros for 65560 disposable electronic cigarettes.

110. In the email dated 2 August 2023, the Appellants' representative said this:

> "*…The driver assumed this chassis carrying container MAGU5395103 indeed contained the Mini Mopeds which were going to the UK. He did not know that the container*

MAGU5395103 was offloaded overnight with the Mini Mopeds and was planned to be taken to the UK with a taut-liner on 15-03. The empty container with number MAGU5395103 was loaded with the vapes and some Mini Mopeds (for repair) and was going to be booked with the shipping line to be returned to Hong Kong. ***These vapes are faulty with issues around the battery quality and shelf life.*** *There is no CDS or GMR reference for the vapes because they were not destined for the UK. The Mini Mopeds from container MAGU5395103 were destined for the UK. If you check the records you will find Mini Mopeds did come to the UK some days after this incident under the same reference of MAGU5395103 with our truck 2CGY827 and trailer EC129MF, these goods were Customs cleared in the UK on 21.03.2023. The driver simply picked the wrong chassis to pull, where he saw the reference MAGU5395103 on the container he automatically assumed this container needed to come to the UK. He did not realize the Mino Mopeds were transferred over to a taut-liner from container MAGU5395103 and this container was planned to be used for the export to Hong Kong. It is usual practice to load the items that have the larger quantity first and the items with less quantity at the end of containers. If the invoices are closely checked you will find the importer is a German based seller with German VAT and French EORI numbers. This is an offshore based company with German VAT and EORI which allows them to sell goods in the EU. They are a regular importer into the European Union. It is against Custom's rules to permit the opening and checking of what is inside boxes for goods moving under Transit Documents (T1 or T2). If our client tampers with the boxes when the goods arrive in bonded warehouse, it would have to explain why boxes are opened. Bonded warehouses will refuse to clear the goods. If the goods are refused to be cleared, the VAT and Duty liability on the T1 will be issued to our client. It is clear that the seizure has caused financial hardship and will have a devastating effect unless the Goods are restored urgently. Refusal to restore will be disproportionate and unreasonable*."

111. The Appellants' case was straightforward in the sense that all that was being argued was that a mistake had occurred in relation to the Goods being in the United Kingdom. We find that it is unclear what further information could have been obtained by Officer Boote on the issue of restoration. Furthermore, Officer Boote considered that the Appellants' request for restoration had been prepared with the assistance of a solicitor. We will return to consider the issue of further information, in relation to the issue of hardship, later.

112. Fourthly, Officer Boote considered the mitigation put forward by the Appellants and, in order to alter the review decisions, had to be satisfied that exceptional circumstances had been demonstrated over and above importations and seizures of a similar modus operandi.

113. Fifthly, Officer Boote concluded that it remained the Appellants' responsibility to ensure that the Goods were declared correctly.

114. We are satisfied that Officer Boote's decisions cannot be impugned on the grounds of unreasonableness, and were not beyond the bounds of reasonableness. We make the following observations in further amplification of this conclusion:

115. We have considered Mr Hitchens' submissions on the failure to make the Policy public. We have also considered the authorities to which Mr Hitchens took us. We find that whilst it is clear that there may be circumstances in which a policy needs to be clearly stated, for instance when it concerns applications for, *inter alia*, leave to remain in the United Kingdom (in order for applicants to know which documents they would need to submit to support a claim), the Policy on restoration serves a legitimate aim (which we will return to consider later). In *PHU Greg-Car*, the UT said this concerning the Respondent's policy:

> "40. Whether or not the Respondent could, or should, publish its policy on restoration is of no relevance to this appeal. That is because, in this appeal the Respondent makes the serious allegation that the Appellant was responsible for, or complicit in, an attempt to smuggle 2.6m cigarettes into the UK. If that allegation is true (which the differently constituted FTT will

have to decide), the Appellant can scarcely complain that it could not have realised that there would be significant repercussions. If the allegation is untrue then, as we have observed, the Respondent's refusal to restore the vehicle is unlikely to be reasonable whether or not the policy was published."

116. We have found that Goods which were not fit for consumption and which were not declared were found in the Vehicle. That is an incontrovertible fact in these appeals. We further find that in light of the "straightforward" case presented on behalf of the Appellants, publication of the Policy would not have advanced the Appellants' case any further (thus causing the decisions to be unreasonable). The fact that the Appellants' case may have been straightforward is not determinative of any probative value in the Appellants' appeals.

117. We have found that by the Appellants' own evidence, no checks were carried out prior to the load being transported to the United Kingdom. We find that there is considerable force in the Respondent's submission that it is incumbent on a haulier to be aware of goods that are being transported. The importance of this goes without saying. This is because an unintended consequence of failing to carry out reasonable checks can result in illegal items being brought to the United Kingdom. We further find that Officer Boote's reference to "unscrupulous" people seeking to evade duty is one of the concerns that hauliers must have, especially if their position is that there was no involvement in the smuggling. Furthermore, whilst there is no suggestion that there were any adaptations made to the Vehicle, it is the case that there was no seal on the container.

118. In *Jacek Szymanski* (Judges Raghavan and Andrew Scott) held that:

"**Sufficiency of CMR Convention checks**

…

54. …The preamble to the CMR Convention recognises "the desirability of standardizing the conditions governing the contract for the international carriage of goods by road, particularly with respect to the documents used for such carriage". It is readily apparent that, in the different policy context of seeking to prevent smuggling, Border Force would not be unreasonable if they expected checks to be made beyond those set out in a Convention whose purpose was wholly different (the international standardisation of contractual conditions).

…

Lack of detail of expected checks and publicity of expected checks

…

59. The question of what will constitute adequate checks for the purpose of establishing whether an operator acted reasonably will depend on the particular facts relating to the operator and the circumstances surrounding the seized load…The checks which might reasonably have been carried out in the particular factual circumstances of this case were, in our view, ones a haulier might reasonably have been expected to carry out without specific advance notice"

119. The Respondent clearly states that:

"The duty to take reasonable steps to prevent smuggling applies not just for movements to and from the UK: all countries now expect operators to take reasonable steps to prevent smuggling…"

120. We have further found that no evidence was submitted from the driver, by the Appellants, in relation to the "mistake" that is said to have occurred. Furthermore, the evidence from the Director is that the driver would have been alone when the chassis was being collected from the warehouse. The other incontrovertible fact in these appeals is that Empire only prepared a Training Manual in October 2023, and there is no suggestion that any

training manuals existed prior to that date. We are satisfied that the fact that Empire only began trading relatively recently does not absolve the Appellant from exercising due diligence. Lastly, this was not the first and only seizure for Empire by the UK authorities. Indeed, the Director did not seek to gainsay this.

121. We are satisfied that Officer Boote considered all of the relevant information that was placed before her, and that it was incumbent on the Appellants to provide any further information that they sought to rely on. Returning to the issue of further information and the alleged failure of Officer Boote to request further information, we find that it was open to the Appellants to produce evidence that was not before the Respondent when the review decisions were made, in order to invite us to reach factual conclusions different from those that the Respondent reached in the review (with a view to arguing that the Respondent's decisions were unreasonable). The Court of Appeal has relatively recently endorsed that proposition in *Behzad Fuels*, in the following terms:

> "It is common ground that a decision made by HMRC under section 152(b) of CEMA 1979 is an "ancillary matter" for the purposes of section 16, from which it follows that the powers conferred on the FTT on an appeal from the relevant review decision are confined to those set out in subsection (4), and are also dependent upon the FTT being satisfied that the decision is one which HMRC "could not reasonably have arrived at". The apparent strictness of this approach has, however, been significantly alleviated by the decision of this court in Gora v Customs and Excise Commissioners [2003] EWCA Civ 525, [2004] QB 93, where Pill LJ accepted the submission of counsel for HMRC (Mr Kenneth Parker QC, as he then was) that the provisions of section 16 do not oust the power of the FTT to conduct a fact-finding exercise, with the consequence that it is open to the FTT on an appeal from a review decision to decide the primary facts and then determine whether, in the light of the facts it has found, the decision was one which could not reasonably have been reached: see the judgment of Pill LJ at [38] to [39]. The correctness of this approach has not been challenged before us, and in [Revenue & Customs Commissioners v Jones and another [2011] EWCA Civ 824] Mummery LJ said at [71](6) that he "completely agree[d] with the analysis of the domestic law jurisdiction position by Pill LJ in Gora's case".

122. In *PHU Greg-Car*, the UT said this:

> "42. Under s16 of FA 1994, the appeal is against the Respondent's decision on review. Therefore, the fact that the review decision may refer to matters that the Respondent did not mention in its original refusal under s152 of CEMA does not, of itself, make the review decision unreasonable. However, if the reference to fresh material is arbitrary, or the Appellant had no adequate opportunity to comment on that material, the FTT may well wish to take those factors into account when determining the reasonableness or otherwise of the review decision."

123. We find that there is considerable force in the Respondent's submission that everyone involved in the transportation of goods into the United Kingdom must make themselves aware of the Customs procedures. This information is freely available at ports and airports in the United Kingdom. Furthermore, we have already concluded that the Appellants' position is that the Goods were not intended for the United Kingdom is not a matter that is open for us to determine. The incontrovertible fact in this appeal is that the Goods had not been declared and they were in the United Kingdom.

Hardship and Proportionality

124. We have considered various decisions of the FtT, which we find to be persuasive, though not binding on us.

125. On the issue of hardship, in *UAB Barela & UAB Reisrida v HMRC* [2014] UKFTT 547 (TC) ("*UAB*"), the FtT considered the policy in relation to vehicles adapted for smuggling as follows:

> "54. It is clear from the decision of the Court of Appeal in the *Lindsay* case (see the judgment of Lord Phillips MR at [63]) that a policy of refusing restoration of a vehicle used in "commercial" smuggling (provided that policy allows for due consideration to be given to cases of exceptional hardship) is compatible with the requirements of law. The *Lindsay* case does not deal with vehicles which are adapted for the purposes of concealing goods which are intended to be smuggled into the United Kingdom, but that is clearly a situation which, even more strongly, justifies a policy of refusing restoration: adapting a vehicle indicates a carefully planned smuggling operation with a likely intent to use the vehicle for that purpose on a recurrent basis, and the legitimate aim of protecting the revenue is fairly achieved by ensuring that the vehicle is never restored to its owner."

126. We find that despite the submission that Empire has lost 40% of its trade as a result of the seizure, no documentary evidence, in the form of financial statements, has been provided. We have already considered that it was open to the Appellants to provide further supporting evidence in this appeal, even if the Appellants' case is that further information was not requested. We are satisfied that it would have been a relatively simple and straightforward matter for the Appellants to provide bank statements and other financial documents. That simply has not been done in these appeals.

127. The Director further refers to the loss of reputation for Empire within the markets. We are satisfied that neither the inconvenience, nor the expense, in this case was tantamount to exceptional hardship over and above that which one should expect. Hardship is, indeed, a natural consequence of a decision to seize a vehicle. The review decision shows that Officer Boote considered the issue of hardship, against the background of this being Empire's third seizure. We are satisfied that a policy of refusing restoration of a vehicle used in "commercial" smuggling (provided that policy allows for due consideration to be given to cases of exceptional hardship) is compatible with the requirements of law. Returning to the legitimate aim, the legitimate aim is the protection of the revenue. This is fairly achieved by ensuring that a vehicle is never restored to its owner in situations such as that which has arisen in these appeals.

128. In relation to proportionality, in *OK Trans Ltd v UKBA* [2010] UKFTT 223 (TC) ("*OK Trans Ltd*"), the FtT referred to the decision of the European Court of Human Rights in *AGOSI v United Kingdom (1986) 9 EHRR 1* ("*AGOSI*"), which held, at [54]:

> "The striking of a fair balance depends on many factors and the behaviour of the owner of the property, including the degree of fault or care which he has displayed, is one element of the entirety of circumstances which should be taken into account". It has to be correct that a policy on restoration should draw the type of distinctions addressed in the Commissioners' policy. (…) Furthermore, it seems to us that part of its legitimate aims in the public interest, the State is able to impose by mean of a restoration policy obligations of vigilance on drivers and hauliers, providing that the burdens imposed as a result are not excessive so as to enable the relationship of proportionality to remain between the means employed and the aim sought to be realised. The Commissioners' policy in the instant case seems to us to satisfy these requirements."_

129. All current formulations of the proportionality test involve four elements taken from Lord Sumption's speech in *Bank Mellat v Her Majesty's Treasury (No.2)* [2014] AC 700 ("*Bank Mellat*"), at [20]:

> "... the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine: (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective;

> (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them."

130. The third element is now usually qualified in the manner explained by Lord Neuberger in *R (Bibi) v Secretary of State for the Home Department* [2015] 1 WLR 5055 ("*Bibi*"), at [85], for which Lord Reed's speech in *Bank Mellat* was cited:

> "...it has been authoritatively said that the question it involves may be better framed as was 'the limitation of the protected right ... one that it was reasonable for the legislature to impose' to achieve the legitimate aim, bearing in mind any alternative methods of achieving that aim..."

131. Both the condemnation and restoration procedures are available to the owner of items when they are seized. We have considered that if the owner wishes to challenge the condemnation of the items as forfeit, the notice of claim court hearing procedure is available. If he simply wishes to challenge the refusal to restore the items, the appeal tribunal hearing procedure is available. There is simply no question of an owner being deprived of his property without an opportunity to challenge, in a court, the legality of the decision to seize and to challenge, in a judicial tribunal, the legality of the decision refusing to restore them.

132. The State is permitted to secure property in order to control the use of it in accordance with the general interest or securing the payment of taxes and other contributions or penalties, pursuant to art. 1 of Protocol 1 of the ECHR. This is compliant with art. 6 ECHR: *Air Canada v United Kingdom* (1995) 20 EHRR 150 ("*Air Canada*"), at [61] to [63]. This is the legitimate aim. Schedule 3 is Convention compliant. The remedy for any arguments that there was any unfairness in relation to the application of those statutory provisions is judicial review and not an appeal before the FtT. The FtT has no inherent power to review decisions of the Respondent, or to provide a remedy in respect of any alleged procedural unfairness. In any event, we are satisfied that the Appellants were provided with Notice 12A, which set out what the Appellants needed to do. The issue of import for commercial use has been determined by the statutory deeming.

133. We have considered all of the information, including the matters urged upon us by Mr Hitchens. Having considered the evidence, cumulatively, we are satisfied that the decisions were reasonable.

CONCLUSIONS

134. Having considered all of the evidence, cumulatively, and having regard to our findings of fact and the relevant law, we are satisfied that the appeals must fail. We hold that:

(1) The FtT has no power to re-open and re-determine the question of the legality of the seizures. That question was already the subject of a valid and binding deeming determination under CEMA.

(2) The deeming was in consequence of the Appellants' own decision not to initiate a claim contesting the condemnation and forfeiture.

(3) The FtT's jurisdiction only extends to hearing an appeal against the review decision made by the Respondent on the deemed basis of the unchallenged process of forfeiture and condemnation. In this regard, the FtT has fact-finding powers on the basis of all of the information submitted with the appeal.

(4) It is reasonable for the Respondent to require that a person asserting ownership of goods provides evidence that s/he owns the goods which have been seized, and that this evidence should comprise of a clear chain or evidence linking back to the individual.

(5) The Review Officer correctly applied the Policy on restoration and was not fettered by it.

(6) The decisions were considered afresh, including the circumstances of the events of the date of seizure, to decide if any mitigating or exceptional circumstances existed.

(7) All representations and materials made available were considered.

(8) The conclusions reached were ones which were open to the review officer to reach.

(9) In this regard, the review decisions clearly cannot be said to have been disproportionate.

135. Accordingly, therefore, the appeals are DISMISSED.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

136. 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.

Release date: 09th DECEMBER 2024