



Neutral Citation: [2025] UKFTT 25 (TC)

Case Number: TC09397

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Taylor House, London

Appeal reference: TC/2022/13905

CUSTOMS – seizure of goods – refusal to restore – decision based primarily on alleged failure to prove ownership of goods – whether decision was unreasonable – proportionality – appeal dismissed

Heard on: 8 October 2024
Judgment date: 9 January 2025

Before

**TRIBUNAL JUDGE JENNIFER LEE
TRIBUNAL MEMBER GILL HUNTER**

Between

LAUTOKA VINTAGE LTD

Appellant

and

THE DIRECTOR FOR BORDER REVENUE

Respondent

Representation:

For the Appellant: Mr Joshua Carey of Counsel, instructed by DPP Law, for the Appellant.

For the Respondent: Mr William Dean of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondent.

DECISION

INTRODUCTION

1. On 16 August 2022, the Respondent seized 85 packages of clothing at Shoreham Road West, Heathrow Airport. The items were described as “used clothing” but were found by the officer to be new items of clothing from major brands such as Adidas, Reebok and Ralph Lauren.
2. The Respondent refused the Appellant’s request to restore the items seized on 22 September 2022. The Respondent confirmed that decision on review in a letter dated 10 November 2022 (“the review conclusion letter”). This is the Appellant’s appeal against that decision.

Preliminary issues

3. This case was originally listed for half a day. However, upon reading the papers and hearing from the parties at the outset of this appeal, it became apparent to the Tribunal that the original time estimate would be woefully deficient. Fortunately, the Tribunal were able to accommodate a longer time estimate on the day and were able to sit for the whole day.
4. In addition to considering a voluminous hearing bundle and an authorities bundle, the Tribunal heard oral evidence from the witnesses, and received detailed skeleton arguments and extensive oral submissions from counsel, Mr Carey and Mr Dean. We are grateful to them.
5. There were a number of preliminary issues, including an application by the Respondent to strike out the appeal dated 4 October 2023 and an objection by the Respondent to the Appellant relying on its skeleton argument, which had been filed out of time. We were informed at the outset of the hearing that the Respondent no longer sought to pursue its application to strike out, and furthermore, that it would not be taking issue with the late provision by the Appellant of its skeleton argument.
6. There were two other preliminary matters raised in the Appellant’s skeleton argument, at [34] – [45]. The first matter related to the extent to which the Appellant can challenge the factual position in light of its decision to abandon its challenge to the lawfulness of the seizure.
7. The second matter related to the Appellant’s contention as to the Respondent’s alleged failure to deal with a number of the grounds of challenge in its Statement of Case, and that it should now therefore be prevented from advancing any case in respect of those grounds. In respect of this, the Appellant contends that the only case advanced in the Respondent’s Statement of Case is that: (i) there were no exceptional circumstances justifying departure from the Respondent’s policy; (ii) the Respondent was correct to consider ownership of the goods and did so correctly; and (iii) the reliance on an agent does not amount to a reasonable excuse.
8. We note the submissions made and will deal with these two matters in our substantive decision.

BACKGROUND

9. The Appellant was incorporated on 15 December 2020. Its registered office is The Cow Shed, Salterton Farm, Salisbury, Wiltshire, United Kingdom SP4 6AL.
10. The Appellant sells used and vintage branded clothing. Its directors were Mr King and Mr Matthews (Mr King remains a director). We were informed that Mr King and Mr Matthews came up with their business venture in September 2019, inspired by their collective love of vintage clothing with a focus on environmental sustainability. Part of the aim of the business is to avoid goods ending up in a landfill site.
11. Mr King has provided a witness statement dated 19 October 2023. According to Mr King's written evidence (and these aspects were not controversial):
 - (a) Mr King and Mr Matthews met Ed Perkins ("Mr Perkins") at a market fair and formed a trading relationship with him.
 - (b) In 2021, the Appellant began to import some goods but left the customs considerations to the shipping agents. The Appellant did not experience any issues with importation. By way of example, Mr King appended to his statement an invoice and shipping invoice from Torgam Trading Co., a company based in California, USA.
 - (c) In 2022, Mr King and Mr Matthews became aware that Mr Perkins had begun wholesaling used clothes via his Dubai company, EdTex Stock ("EdTex"). The Appellant was interested in trading with EdTex as they could provide CSV. files for the stock as well as competitive prices. The CSV. files could also be uploaded straight to their website with a photograph of each item and brief details, which saved them time in respect of advertising.
 - (d) On 27 May 2022, the Appellant agreed with Mr Perkins via WhatsApp messages to purchase 3,860 items of clothing for the sum of £48,000 over four equal instalments (£12,000 for each instalment). A screenshot of this agreement was appended to his statement.
 - (e) On 1 June 2022, an agreed deposit of £2,000 was paid by the Appellant to EdTex to secure the stock. The remaining payment of £10,000 was made on 22 June 2022. Confirmation of the payment of £10,000 (it was in fact £10,027.50) was appended to his statement.
 - (f) The first shipment was received on 7 July 2022 and the Appellant was very happy with it. The Appellant had no dealings with the shipment, which was handled by EdTex's shipping agents Usman Industries ("Usman Industries").
 - (g) As the first shipment was well received, the Appellant was prepared to continue with the trade and awaited the remaining 2,860 items. As with the first shipment, the Appellant trusted Usman Industries to deal with the customs formalities when importing the items in the second shipment.

12. On 16 August 2022, the items in the second shipment arrived at Heathrow Airport. The import entry listed the value of the goods as 296.16 AED (£67.21). Officers of the Respondent conducted an examination of the contents of the shipment. The items were found not to have been described accurately and accordingly, they were liable to forfeiture by reason of section 167(1) of the Customs and Excise Management Act 1979 (“CEMA 1979”). The items were seized under section 139(1) and a notice of seizure (Notice 12A) was issued.
13. The notice is headed “Notice of Seizure for Under-Declared/ Misdeclared Goods”. The items seized were noted as “Goods: 85 pieces @1740 kilos, described as used clothes” and received from Usman Industries. The items were noted to be liable to forfeiture and to have been seized on the grounds that: “they were not described accurately by the sender on a written declaration accompanying the consignment”.
14. On 19 August 2022, the Appellant requested the release of the items, stating that the items of clothing were used and not new. It also apologised on behalf of the suppliers “that value was noted incorrect and should have been in USD and not AED, the items are still a low value due to them still being used clothes and therefore do naturally have a low value. Please see attached invoice below”. The attached invoice was from Usman Industries dated 29 July 2022 and with invoice no. LU00080-22. The items were described as “used clothing”, 85 PKGS, 1740 in weight, and with a value of AED 1,305.
15. On 23 August 2022, the Respondent replied, treating the Appellant’s letter both as a challenge to the seizure and a request for restoration of the items. The Respondent stated that as part of the restoration process, it required proof that the Appellant owned the goods. The letter explained that “this should include proof that you have made payment for the goods, e.g. bank/credit card statements. Alternatively, if payment has not been made, please provide a copy of the contract showing the terms and conditions of payment, to include the invoice value of the goods.”
16. On 25 August 2022, the Appellant replied by email, repeating that the items had been wrongfully seized, that they were used clothing and that the clothes “are naturally low value items due to them being second hand and we price our items accordingly...”. The Appellant attached website listings, a page from a selling website listing “old skool streetwear”, a photograph of a market stall and receipts from Portobello Market. The email refers to the Appellant being a small business and its concern that it would be irreversibly damaged by being prevented to trade. The email ends with this:

“Finally, I have also attached the Invoice, packing list and confirmation letter of payment upon arrival provide by the shipper, Usman Industries. Unfortunately, there was no contractual agreement due to us having already having a working relationship with the shipper and we usually pay upon arrival unless agreed otherwise...”
17. The attached invoice from Usman Industries is again dated 29 July 2022, with invoice no. LU00080-22. The items were again described as “used clothing”, 85 PKGS, 1740 in weight. However, the items were now valued at USD 1,305. A breakdown of the items was also provided (2,835 pieces). The invoice was stamped and signed by Usman Industries.

18. This invoice was accompanied by a letter (undated) from Usman Industries which stated as follows: “As discussed, your payment of 1,305 USD for shipment of 124 boxes of used clothing will be once you receive goods at your ware house (as agreed delivery location)”. The letter was stamped and signed by Usman Industries.
19. On 22 September 2022, the Respondent considered whether to restore the items under section 152(b) of CEMA 1979 and declined to do so.
20. On 30 September 2022, the Appellant replied by email, stating that the Respondent had not examined the items properly. Photographs of various items that were individually packaged and tagged were provided. The email states that in regards to the goods being incorrectly entered and undervalued, that “this was an error on the shipment paperwork made by our supplier” and that there is a “significant language barrier between us and our supplier, Usman Industries”. The email further states that “we now understand they provided an incorrect invoice to this shipment. We have now requested a completely new invoice which accounts for the full cost of the goods and the prices of the different clothing categories....the invoice will still be paid to our supplier upon arrival.”
21. The further revised invoice from Usman Industries is again dated 29 July 2022 and has the invoice no. LU00080-22. The items were not described as new or used, but were now listed as “sweatshirts, jackets, trousers” etc., said to be 2,911 PKGS with a weight this time of 4,409.28 KG. The total value of the items was now stated to be GBP 36,000. The invoice was stamped and signed by Usman Industries.
22. The revised invoice was accompanied by another letter (undated) from Usman Industries which stated as follows: “As discussed, your payment of 36,000 GBP for a shipment of 85 boxes of used clothing will be when you receive the goods (at delivery location)”. The letter was stamped and signed by Usman Industries.
23. On 3 October 2022, the Respondent acknowledged the Appellant’s letter and treated it as a request to review the original decision.
24. On 10 November 2022, the Respondent reviewed the original decision and upheld the decision not to restore the items. The review officer was Officer Mark Collins. A summary of the restoration policy for seized items was contained in the review conclusion letter. It reads as follows:

“The general policy is that seized goods should not normally be restored. However, each case is examined on its merits to determine whether or not restoration may be offered exceptionally.”
25. Officer Collins’s reasons for deciding not to restore the items seized can be found under the “Consideration” section of the letter. He stated that in considering restoration, he had looked at all of the circumstances surrounding the seizure, but had not considered the legality or correctness of the seizure itself, which was subject to a separate challenge in the Magistrates’ Court. He had proceeded on the assumption that the Court would find that the seizure was lawful and would duly condemn the items as forfeit.
26. The letter goes on to state (under the heading “Consideration”) that the “onus of making your case rests firmly with you: it is not for Border Force to make the contrary case. I refer you to the judgment in the case of *McGeown International...*”. The letter then sets

out a partial quote from *McGeown International Ltd v HMRC* [2011] UKFTT 407 (TC), as follows:

“1. ...it is the function of this Tribunal only to consider if HMRC have erred in law, or if they have taken a decision which is so unreasonable that no other Review Officer would have come to the same conclusion.

2. The burden of proof in relation to that question, very firmly rests with the Appellant. ... the Appellant appeared to suggest that the onus of proving alleged unlawful activity rested with HMRC. **That is simply not the case...**HMRC were within their powers to seize the Vehicle. HMRC then have a very clear statutory discretion as to the terms on which a vehicle once seized may be restored (or not) and this appeal is only concerned with the examination of whether, on the facts, that discretion was properly exercised.”

27. The letter states that although *McGeown International Ltd* referred to the decision not to restore a freight vehicle, “the principle would clearly also apply to other goods.”

28. Officer Collins goes on to deal with the issue of ownership, as follows:

“Before I can further address the policy, the first hurdle that must be crossed is to establish ownership of the goods. In this regard I have inspected the documents tendered and the comments made. There are a number of invoices but there is nothing that actually shows you have paid for the goods. To reinforce this viewpoint, you have stated that the invoice will be paid to the supplier upon arrival of the goods. As the goods were seized by Border Force on the 16th August 2022 and remain in the possession of Border Force, it would therefore not appear that your company has ever paid for the goods.

Having examined the documents tendered and the comments made, I am not satisfied that ownership has been satisfactorily proven for any of the seized goods.

In this I refer you to the decision in the case of *Worx Food and Beverage* (TC/2013/04645) Judge Anne Redston concluded:

56. The UKBF’s case is equally straightforward. Before restoration can be considered, the customer has to prove ownership. That means providing evidence that the precise goods seized belong to the claimant. This is a reasonable measure, because otherwise the UKBF might restore goods to someone other than the owner. WFB have not shown that they own the precise goods which have been seized, because there is no way of linking the seized goods to the documents. Only OTN’s “bon de livraison” has any lot numbers, and these do not correlate to any goods in the Queen’s Warehouse. As a result, WFB have not discharged the burden of showing that they own the goods, and therefore the decision not to restore has to be reasonable.

And later in the same hearing:

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.

And:

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."

29. Having stated that he was not satisfied that the Appellant had proved ownership for any of the seized goods, Officer Collins states that, "even if you were to satisfactorily evidence ownership, I would further examine the facts of this case." In that regard, the Officer refers to there being a number of invoices and documents for the same seized consignment. He notes that the entry lists the goods value as 296.16 AED (£67.21). There followed a series of invoices all numbered LU00080-22 and dated 29 July 2022 from Usman Industries, one describing the items as "used clothing" and another listing them as "shorts/trousers/jacket/puffer/t-shirt/sweatshirt/shirt". The values listed for the items differed between the invoices (one had a value of 1,305 AED and another had a value of GBP 36,000).
30. The Officer notes that it is unclear why there are numerous different totals and declarations for the same consignment, but that, and the mis-description of the goods being used and not new, underpinned the reasoning behind the seizure, which would be examined at the Magistrates' Court.
31. The Officer then stated that, "finally, I have read the reasoning behind your request for this review" but that "the issue that you have with the clothes not being new but in fact second hand is the reason behind the seizure...this is not something I can examine within my review but will form part of your appeal".
32. In respect of the incorrect valuation and the Appellant apportioning blame on the supplier, the Officer quotes from *Tkachenko v Director of Border Revenue* [2017] UKFTT 0701 (TC), as follows (from [50] of the decision): "*The Tribunal accepts that reliance on an agent, and ignorance of the law, are not a 'reasonable excuse' for failing to apply (sic) with the applicable UK customs requirements.*"
33. This is immediately followed by the Officer stating that:

"To sum up, it does not appear you have paid for the goods and therefore I do not accept you have ownership of the items, nor do I consider you have demonstrated any exceptional circumstances that would lead me to vary the policy not to restore in this case."
34. Under "Conclusion", the Officer states that:

"I am satisfied that there are no exceptional circumstances in this case and am of the opinion that the application of this policy treats you no more harshly or leniently than anyone else in similar circumstances, and I can find no reason to vary the policy not to restore in this case."

35. On 13 January 2023, the Appellant lodged a notice of appeal, together with detailed grounds of appeal. These grounds of appeal are summarised under these broad headings in the Appellant’s skeleton argument:
- (a) Ownership of the goods.
 - (b) Extreme financial hardship on the part of the Appellant.
 - (c) Exceptional circumstances.
 - (d) Failure to consider appropriate conditions.
 - (e) Failure to consider relevant circumstances.
 - (f) The decision was disproportionate.
36. As stated above, the Appellant had initially also indicated an intention to challenge the seizure in the Magistrates’ Court under paragraph 3, Schedule 3 of CEMA 1979. However, on 2 March 2023, the Appellant stated that it wished to withdraw from those proceedings, with the result that on 31 March 2023, the items were condemned as forfeit.

THE LEGAL FRAMEWORK

37. Section 16(4) of the Finance Act 1994 (“FA 1994”) provides that the Tribunal’s power, when dealing with an appeal against a restoration decision, is limited to considering whether that decision “could not reasonably have been arrived at” by the relevant officer.
38. By section 139(1) CEMA 1979: “[a]ny thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or constable...”
39. By section 167(1) CEMA 1979:
- “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.”
40. Section 152 CEMA 1979 provides that “the Commissioners may, as they see fit ... restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under [the customs and excise] Acts”.
41. On presentation of notice, the Commissioners are required by section 14(2) of FA 1994 to review “any decision under section 152(b) of the [1979] Act as to whether or not anything forfeited or seized ... is to be restored to any person or as to the conditions subject to which any such thing is so restored”.

42. On a review, the Commissioners may pursuant to section 15(1) of FA 1994 “confirm the decision” or “withdraw or vary the decision and take such further steps (if any) in consequence of the withdrawal or variation as they may consider appropriate”.
43. Where the Respondent refuses to restore goods, an appeal lies to the First-tier Tribunal by virtue of section 16(1) of FA 1994. The jurisdiction on appeal is limited to that in section 16(4) FA 1994, applicable to “ancillary matters”:

“(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say -

(a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;

(b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and

(c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.

44. With regard to the burden of proof, section 16(6) provides that: “it shall ... be for the appellant to show that the grounds on which any such appeal is brought have been established.” The position as to the burden of proof in respect of an appeal to the Tribunal in respect of the Respondent’s decision was summarised in *McGeown International Limited v. Commissioners for H.M.R.C.* [2011] UKFTT 407 (TC), at §45 and §46:

“Applying the principles, therefore, set out in [Associated Provincial Picture Houses Limited v. Wednesbury Corporation [1948] 1 K.B. 223], it is the function of this Tribunal only to consider if HMRC have erred in law, or if they have taken a decision which is so unreasonable that no other Review Officer would have come to the same conclusion.

“The burden of proof in relation to that question, very firmly rests with the Appellant. In the correspondence, the appeal notice (all of which are extensively quoted above) and in the Appeal, the Appellant appeared to suggest that the onus of proving alleged unlawful activity rested with HMRC. That is simply not the case.”

45. The burden is therefore on the Appellant to establish that the decision not to restore was unreasonable. A decision will be unreasonable if it is one which no reasonable decision maker could have arrived at it: *C & E Commissioners v JH Corbitt (Numismatists) Ltd* [1980] STC 23. A decision will also be unreasonable if the Respondent takes into account irrelevant matters, or fails to take into account all relevant matters: *Lindsay v C&E Commissioners* [2002] STC 588.

46. The Tribunal may consider evidence that was not before the decision maker and may reach factual conclusions based on that evidence: *Gora v Customs and Excise Commissioners* [2003] EWCA Civ 525 and *Behzad Fuels (UK) Ltd v Revenue and customs Commissioners* [2020] STC 760. In *Gora*, Pill LJ accepted at [38] and [39] that the provisions of section 16 FA 1994 do not oust the power of the Tribunal 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.
47. The Tribunal has no jurisdiction, however, to review whether the seized items were properly seized and/or condemned as forfeit. The procedure for challenging the same must take place in the Magistrates' Court. Where there is no successful challenge to the original seizure, there can be no argument that the items were incorrectly seized.
48. In *Commissioners for HMRC. v. Jones and Jones* [2011] EWCA Civ 824, the Court of Appeal held that once goods have been condemned as forfeit in the Magistrates' Court, the Tribunal has no power to overturn that decision, but has to deem the goods to have been legally seized. Mummery LJ, giving the judgment of the court, held at [71]:
- “(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.
49. At [71(7)], Mummery LJ further states that “deeming something to be the case carries with it any fact that forms part of the conclusion”.
50. Accordingly, in this case, the starting point is that the terms of section 167(1) (the basis for liability to forfeiture) are deemed to be true. It is not open to the Tribunal to go behind the deemed facts.
51. *Worx Food & Beverage BV v The Director for Border Revenue (TC/2013/04645)* is also pertinent. That was an appeal to the First-tier Tribunal (Judge Redston) against a decision

not to restore goods (alcohol) which had been seized. Parts of the decision have been quoted in the review conclusion letter. The salient passages are these:

“56. The UKBF’s case is equally straightforward. Before restoration can be considered, the customer has to prove ownership. That means providing evidence that the precise goods seized belong to the claimant. This is a reasonable measure, because otherwise the UKBF might restore goods to someone other than the owner.... As a result, WFB have not discharged the burden of showing that they own the goods, and therefore the decision not to restore has to be reasonable.

...

58. Our starting point is that the UKBF’s general policy of restoring goods only when satisfied that a person has proved ownership is self-evidently reasonable. The UKBF stores many thousands of items; it has to be a precondition of release that a person claiming a seized item must first show that it belongs to them.

...

70. Mr Hays gave short shrift to this submission, saying that since it was reasonable for Mr Collins to refuse to restore because ownership had not been proved, it was “irrelevant whether WFB was actually or constructively involved in the illegal importation of alcohol.” In other words, the UKBF did not need to go on to consider this question.

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.

72. This Tribunal, likewise, does not need to consider the facts as found, to see whether they support Ms Hadfield’s submission that WFB was an innocent third party.

73. Ms Hadfield also submitted that the decision was unreasonable because the hardship caused to WFB had not been considered. Mr Hays says, with commendable brevity, that “no issue of hardship arose.”

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”.

52. A restoration decision involves an interference with the Article 1 Protocol 1 ECHR rights of an appellant who has been deprived of its goods. Such an interference must be proportionate, and must consider on an individual case whether the result is disproportionate. Judge Redston sets out the relevant principles in a convenient form in *Smouha v The Director of Border Revenue* (TC/2014/02680) at [136] – [146]. At [145] – [146], Judge Redston states thus:

“145. Drawing this together, the Border Force must exercise their discretion proportionately as that term is understood both under EU law and under the Convention, and that a failure to do so will make the decision unreasonable. In considering our jurisdiction under FA94 s 16(4), we are therefore required to

consider not only the traditional Wednesbury test but whether Mr Brenton exercised the discretion given to the Border Force in a proportionate manner.

146. We respectfully agree with the summary given by Sir Stephen Oliver QC in *Yuan Shui v C&E Commrs* [2004] C00187, where he said at [35] that:

“The power to restore in section 152(b) of the Customs and Excise Management Act 1979 is of an essentially discretionary nature. As such, the power must be exercised reasonably in the Corbitt sense and, following Lindsay, in a manner that produces a proportionate result. A decision satisfying those conditions will meet the requirements in Regulation 338/98 for an enforcement regime in the domestic laws of the Member state that operates in a manner that is sufficient and appropriate to the nature and gravity of the infringement. Moreover, if a way can be found of dealing with the request for restoration that is less invasive than a complete denial of the applicant's property rights, that should be adopted.”

THE EVIDENCE

53. We have considered all the documentary evidence in the hearing bundle, including the witness statement of Mr King (on behalf of the Appellant), and the witness statements of Officer Zoe Boote and Officer Mark Collins (on behalf of the Respondent). Officer Boote, a Higher Officer of Border Force, currently employed as Review Officer, has adopted the witness statement and exhibits of Officer Collins, who is no longer with Border Force. Mr King and Officer Boote gave oral evidence. They were both cross-examined. We have reflected carefully upon their written and oral evidence.
54. As stated above, the Appellant bears the burden of establishing that the Respondent's decision not to restore was unreasonable.
55. We note at the outset that the Respondent does not pursue a case of dishonesty on the part of the Appellant. All findings of fact have been made on the civil standard of proof (on the balance of probabilities). That means that they were reached on the basis that they are more likely to be true than not. We do not intend to address every point of evidence or resolve every contention made by the parties. We have made the findings necessary to resolve the appeal before us. Where findings have not been made, or have been made in less detail than the evidence presented, that reflects the extent to which those areas were relevant to the issues and the conclusions reached.
56. Mr King gave sworn evidence. We found him to be an essentially truthful witness. However, certain parts of his evidence were contradictory or muddled. For example, his witness statement states on more than one occasion that Usman Industries was the shipper or the shipping agent. At paragraph 23, for instance, Mr King states that the shipment “was handled by EdTex Stock's shipping agents, Usman Industries”. In the Appellant's email to the Respondent dated 25 August 2022, which had been sent by Mr King, he also referred to Usman Industries as “the shipper”.
57. However, in Mr King's oral evidence, he stated for the first time that Usman Industries was in fact the supplier and that EdTex was more akin to being the shipping agent. When asked to elaborate, Mr King stated that Usman Industries was in fact supplying the items, and that EdTex was the “middle man” and was sorting out the deal. This was not apparent from Mr King's statement, which made no mention of this. To the contrary, the

impression given by the statement is that the Appellant was trading with EdTex who would be supplying the items, and that Usman Industries was the shipping agent.

58. We are also concerned to note that Mr King, on his own evidence, accepted that he did not bother checking the revised invoices supplied by Usman Industries. The fact that he did not do so is surprising, and reckless, particularly given that the revised invoices were being supplied to the Respondent as part of the Appellant's request for restoration, and in the context of the import entry having incorrectly listed the value of the items as being just 296.16 AED (£67.21), and the Appellant being aware that the purchase price was £48,000 for all the items (of which the items seized formed a substantial part).
59. Mr King stated in his statement that the Appellant agreed with EdTex to purchase 3,860 items of clothing for the sum of £48,000 over four equal instalments (see [20]). He confirmed that the first shipment was received on 7 July 2022 and that had been paid for. In his oral evidence, he confirmed that £12,000 had been paid, but that the balance of £36,000 had yet to be paid. He also confirmed that the agreement was that the Appellant would pay for the balance on receipt of the remaining items. This aligns with the letters (undated) from Usman Industries, which states that payment would only be made when the Appellant received the goods (one of the letters specifies that this would be "once you receive goods at your ware house (sic)").
60. When cross-examined about ownership, Mr King refuted the suggestion that the Appellant was not the owner of the items as it had not taken possession of the items, and had not paid for them. He stated that he did not feel comfortable asking EdTex or Usman Industries to request restoration of the items, due to the alleged language barrier with Usman Industries and also because the Appellant believed that it was the owner of the items. When it was put to Mr King that English is the business language in the UAE and that there should not have been a language difficulty, Mr King repeated that personnel at Usman Industries were just not proficient in English.
61. Mr King was asked whether the Appellant had taken legal action against Usman Industries given the errors in misdescribing the items. Mr King stated that the Appellant had not pursued such legal action. He then stated that the Appellant was liable for payment of the items seized and that this was because of the "deal made", that Usman Industries no longer had the items, and were expecting payment because of the deal.
62. Officer Boote also gave sworn evidence. We found her to be a truthful witness. She confirmed what she had stated in her witness statement that she had taken over the case from Officer Collins, who had left the department, and having reviewed the case, would have made the same decision as Officer Collins (to refuse restoration). When cross-examined, she accepted that when she took over the case, she was passed the file and Officer Collins had told her to read his decision. She stated that there were no notes/records of any of their conversations.
63. She stated that the legality of the seizure was not considered by Officer Collins (as is apparent from review letter), or by her, given that the issue of the lawfulness or otherwise of the seizure was not within their remit, it being subject to separate proceedings in the Magistrates' Court. She stated that the issue of ownership was considered by Officer Collins (as is apparent from review letter) and was also considered by her.
64. Officer Boote accepted that she cannot confirm definitively what Officer Collins did or did not consider because he had left the department, and if he had not considered

something, that would not necessarily be apparent from his review letter. She cannot confirm whether he considered or not the role of Usman Industries or Ed Tex.

65. The Respondent was criticised for not having produced its policy on restoration. Officer Boote stated that the Respondent had not done so, as it did not wish to the policy to be in the public domain due to concerns that smugglers would try to get around it. On the issue of ownership, Officer Boote stated that from the Respondent's point of view, it would wish to see evidence of payment having been made by the Appellant for the items seized in order for it to establish ownership. She pointed out that according to Mr King's own evidence, payment for the items seized had yet to be made. She also stated that Usman Industries could have requested restoration, with authority for the Appellant to act on its behalf if needed, and that would have been the obvious solution to take if the Appellant could not establish ownership (which she maintained it had not).
66. Officer Boote further stated that the Respondent had not requested an agent's letter for the Appellant to act because neither Usman nor EdTex had requested restoration. She pointed out that the letter from Usman Industries explaining the supply process (them washing, packing and tagging the clothes) was not the same thing as a restoration request, and if Usman Industries had indeed written to request restoration, the Respondent would have asked for a signed letter of authority for the Appellant to act. However, no such restoration request was received from Usman Industries, or EdTex, despite them having had the opportunity to do so.
67. Officer Boote also refuted the suggestion that the letters from Usman Industries confirmed that the Appellant was owner of items seized. She repeated that the Appellant had not paid for the items seized.
68. Officer Boote accepted that the Respondent's initial letter refusing restoration, dated 22 September 2022, did not refer to the issue of ownership at all. However, she pointed out that the Respondent had requested evidence of ownership of the items seized in their letter to the Appellant of 23 August 2022, in which the Respondent explains that as part of the restoration process, it required proof that the Appellant owned the goods. She also stated that the issue of ownership was mentioned in the review letter of Officer Collins.
69. Officer Boote was asked about the reference in the review letter to this quote from *Tkachenko v Director of Border Revenue* [2017] UKFTT 0701 (TC): "The Tribunal accepts that reliance on an agent, and ignorance of the law, are not a 'reasonable excuse' for failing to apply with the applicable UK customs requirements."
70. However, it was put to her that Officer Boote had failed to quote the rest of that passage, which states as follows (at [50]):

"Nevertheless, the fact that the Appellant was a trader resident in Germany who traded in several different countries, whose first language was not English, and who paid for and relied in good faith on the services of a professional customs agent to ensure that the relevant formalities were complied with in the UK, a country into which he was importing for the first time, are all circumstances that are relevant to the question whether or not the goods should be restored, and if so, on what conditions."
71. Officer Boote stated that she had not recently read this authority, but had read it in the past. When asked whether Officer Collins considered factors such as the lack of experience of Mr King and Mr Matthews, Officer Boote stated that she did not think that

factor was relevant given that the Appellant was an enterprise. She stated that she herself did not consider the issue of reliance on an agent as quoted from *Tkachenko* and cannot be sure whether Mr Collins had. However, she repeated that when there is a commercial enterprise such as this, the Respondent would expect the enterprise or business to take all appropriate measures to comply with import regulations.

72. In response to the suggestion that agents exist because of the extraordinary complexity of the regulations, Officer Boote stated that it was not her place to answer that question. She maintained the view that there had been a massive under-declaration in this case, however, which would have caused the seizure of the items alone, and even if that was a genuine error, it should still not have happened.
73. It was put to her that given this was the first time the Appellant had items seized, there was no deliberate attempt to evade tax, and this was a careless error, an exception should have been made and the items restored. Officer Boote disagreed, stating that those at Usman Industries apparently could not even speak good English and yet the Appellant went into business with them. In her view, that was not appropriate or acceptable. She stated that even if ownership had not been in issue, the items would still have been seized due to the under-declaration.
74. It was put to her that the notice of seizure referred to the item not being described accurately by the sender and that was in reference to the items being “used clothes” . Officer Boote pointed out that the heading stated “notice of seizure for under-declared/ mis-declared goods”. She stated that these are not notices that are issued generically and that sometimes, the notice would simply say “notice of seizure”. When it was put to her that the grounds for seizure do not refer to under-declaration, she stated that it was subjective.
75. It was also put to her that there was an absence of proportionality in the Respondent’s decision not to restore. Officer Boote stated that proportionality would have been considered and she remained of the view that the items were not fit for restoration.

DISCUSSION AND FINDINGS

76. Under section 16(4) FA 1994, the Tribunal can only disturb the Respondent’s decision if the Tribunal is satisfied that the person making the decision could not reasonably have arrived at it. This condition will be satisfied if a decision is so unreasonable that no reasonable decision maker could have arrived at it. However, this condition will also be satisfied in other circumstances, including where the decision maker failed to have regard to relevant considerations, or had regard to irrelevant considerations, or based the decision on an incorrect understanding of the applicable legal provisions.
77. In making a decision of this kind, the decision maker is entitled to have regard to any applicable policy of the Respondent dealing with the manner in which the restoration power is normally to be exercised. Indeed, it would be unreasonable for a decision maker to fail to have regard to any such policy.
78. Where the Respondent has such a policy, and where the decision maker takes it into account in making the decision, the decision may also be one that could not reasonably have been arrived at in circumstances where the decision is based on an incorrect understanding of the terms of the policy.

79. The decision maker has a range of possible responses to a request for restoration. The Respondent could refuse restoration at all, or could restore upon payment of an amount representing a part, or the whole value of the seized items. The Respondent has the ability to exercise the restoration power in a flexible way to treat more serious cases more severely, and less serious cases less severely, and rightly so, given that the Respondent must exercise its discretion in a proportionate manner.

Ownership of the items seized

80. The Respondent's case is that establishing ownership of the items sought to be restored is a prerequisite condition for restoration. It submits that one cannot "restore" something to someone who does not own it. Further, in order to ensure property is not transferred to a non-owner, which might constitute conversion or some other impermissible interference with the property rights of the owner, it is reasonable for the Respondent to seek evidence that the person seeking restoration of the items is their owner. The Appellant's own evidence is that payment would be made on receipt of the items. Whether property was to pass on delivery or payment of the seized items, neither occurred in this case.
81. The Respondent's conclusion on review was that the Appellant had not established a necessary prerequisite condition for restoration, and that decision was not one no reasonable decision-maker could have arrived at. The burden on this appeal (and establishing ownership) rested on the Appellant.
82. The Appellant raises a number of issues with the Respondent's contention that ownership should be a prerequisite condition, and that ownership had not been established on the facts of this case. They can be summarised as follows: (i) "ownership" is apparently an internal "policy" which the Respondent has deployed in this case; (ii) there is no consideration of whether on the facts of this case it was an appropriate starting point; and (iii) "ownership" being required when ownership is not a statutory requirement such that other forms of right to possession are sufficient.
83. In our view, the decision of Judge Redston in *Worx Food*, whilst not binding on us, is highly persuasive. We concur with Judge Redston that there is nothing unreasonable in a general policy of restoring seized goods to a person, only when satisfied that the person has proved ownership of the said goods. We find that this is a reasonable measure for the Respondent to have adopted, because it might otherwise restore goods to someone other than the owner, thereby inadvertently committing conversion (a tort) or some other impermissible interference with the property rights of the owner. It is proportionate and compliant with Article 1 Protocol 1 of the ECHR. In the absence of a policy of requiring proof of ownership, there would be a high risk that goods would be restored to persons other than their owners, so depriving those owners of their possessions.
84. The Appellant submits that "qualified ownership" or "qualified right to possession" of a seized item should suffice, and that at the very least the Appellant was a bailee. We do not agree. The question we have to decide is whether a general policy of restoring seized goods to a person, only when satisfied that the person has proved ownership of the said goods, is unreasonable. We have determined that there is nothing unreasonable in such a policy, particularly in a case such as this where it was open to either EdTex or Usman Industries (whoever the owner might be) to seek restoration, and if necessary, to grant authority to the Appellant to pursue restoration on its behalf.

85. The burden is on the Appellant to establish that it owns the seized items. We find that the Appellant has not established ownership. It was apparent from Mr King's evidence that the contractual terms between the Appellant and its supplier were less than clear. What is clear is that the Appellant had agreed to pay £48,000 in four equal instalments to EdTex, and that payment for the items which were eventually seized would only be paid upon delivery of those items to the Appellant. The seized items were not delivered to the Appellant. It is also clear that the Appellant has not paid for the seized items. In our view, the evidence points away from the Appellant establishing ownership of the said items.
86. Furthermore, even if the Respondent should have considered qualified ownership or qualified right to possession of the seized items, the Appellant has not established that the items were bailed to it. The burden is on the Appellant to establish that it was in the position of bailee. In our view, it has not discharged that burden. Its reference to *Bristol Airport PLC v Powdrill* [1990] Ch 744 does not assist. That case involved airport operators seeking leave of the court under the Insolvency Act 1986 to exercise their right to detain an insolvent airline's aircraft under the Civil Aviation Act 1982. It can be clearly distinguished from the present appeal.

The policy on restoration – exceptional circumstances

87. The discretion of the Respondent in relation to restoration decisions is given by section 152(b) CEMA 1979, which provided that the Respondent can “restore, subject to such conditions (if any) as they think proper, anything forfeited or seized...”. That is a broad discretion.
88. We have not been provided with a copy of the Respondent's policy on restoration. It does not appear in the Respondent's list of documents, provided pursuant to rule 27(1) of the Tribunal Procedure (FTT) (Tax Chamber) Rules 2009 (“the FTT Rules 2009”). Rule 27(1) states that in a standard or complex case, within 42 days after the date the respondent has sent its statement of case, each party must send to the Tribunal and to each part a list of documents –
 - (a) of which the party providing the list has possession, the right to possession or the right to take copies; and
 - (b) which the party providing the list intends to rely upon or produce in these proceedings.
89. The Respondent's list of documents is dated 4 August 2023. It would have been open to the Appellant to request a copy of the Respondent's policy on restoration upon receipt of the Respondent's list of documents, or if necessary, apply for specific disclosure of the policy pursuant to rules 5 and 6 of the FTT Rules 2009 prior to the commencement of this hearing. As far as we are aware, no such request was made by the Appellant between receipt of the Respondent's list and this hearing. There is also no application for specific disclosure. We have been invited to make adverse inferences against the Respondent. We decline to do so.
90. There was also no suggestion that the hearing should be adjourned in order for the policy to be produced. The Tribunal must therefore proceed on the basis of the information before it.
91. As stated above, the policy is summarised in the review conclusion letter as follows:

“The general policy is that seized goods should not normally be restored. However, each case is examined on its merits to determine whether or not restoration may be offered exceptionally.”

At the end of the letter, Officer Collins also states that he is satisfied “there are no exceptional circumstances” that would lead him to vary the policy not to restore.

92. The summary in the review conclusion letter differs slightly from the summary given in the first decision letter dated 22 September 2022, which reads as follows:

“The general policy is that seized goods because they did not correspond with the entry made and/or of an attempt to evade duty should not normally be restored, but each case is examined on its merits to determine whether or not restoration may be offered exceptionally.”

At the end of that letter, the same phraseology is used, with the officer stating that “there are no exceptional circumstances” justifying a departure from the policy.

93. Another summary, which differs from the two above, is set out in the notice of seizure itself, which reads as follows (the emphasis in bold is as per the notice):

“BF will consider all such requests on their individual merits and all relevant facts will be taken into account. **However, normally it is BF policy not to return (restore) seized excise goods such as alcohol or tobacco products and goods prohibited from importation (for example drugs, offensive weapons and endangered species).**”

94. The summary in the notice of seizure does not contain the word “exceptionally” or “exceptional”. The word “exceptionally” is also not in the wording of section 152(b) CEMA 1979, which confers on the Respondent a broad discretion in relation to restoration decisions.
95. Has the Respondent improperly fettered its broad discretion as set out in primary legislation by introducing the word “exceptionally” and “exceptional” into its policy, as contended by the Appellant?
96. The Respondent submits that the Appellant’s criticism in that regard is a misreading of the term “exceptionally” and “exceptional”. In his skeleton argument, counsel for the Respondent states that “exceptional” simply serves to indicate that there must be some justification that justifies a departure, and that the Appellant should be treated differently than an otherwise similarly-situated person. In other words, that an “exception” should be made.
97. The Oxford English Dictionary defines the word “exceptionally” as follows: (a) In an exceptional manner or degree; uncommonly, unusually, unusually well; and (b) By way of exception; as an exception to rule or custom. In our view, the Respondent’s contention would arguably fall within the second definition ((b)). Furthermore, given the wide discretion conferred on the Respondent in section 152, we are inclined to take the view that it would be open to the Respondent to set a policy whereby restoration should not normally be restored, but that each case would be examined on its merits to determine whether or not restoration may be offered exceptionally.

98. In any event, it is not necessary in our view to conclusively determine this issue given our findings (a) that the Respondent’s policy of requiring a person to prove ownership of an item seized as a pre-requisite condition is not unreasonable; and (b) that the Appellant has not established ownership of the seized items. We agree with Judge Redston in *Worx Foods* that if ownership of a seized item has not been established, then it would be reasonable for UK Border Force to stop there and it would not need to consider other matters (such as whether the person claiming ownership was an innocent party, or matters of hardship). If ownership of a seized item has not been established, the ribunal, likewise, would be entitled to stop there.
99. However, we do wish to record this. It is regrettable that there are discrepancies in the summary provided by the Respondent as to its policy on restoration. The summary in the notice of seizure does not mention the word “exceptionally”, but that word appears in the two decision letters. The notice of seizure also suggests that the general policy is not to restore seized excise goods such as alcohol or tobacco products and goods prohibited from importation (for example drugs, offensive weapons and endangered species), which implies that it would not encompass other seized goods. This does not in any way affect our decision on this appeal. Nevertheless, these discrepancies should be addressed by the Respondent going forward so that it is reasonably clear to the public from the outset what, in summary, its policy on restoration is.

Other grounds

100. The Appellant raises other grounds in its appeal. It contends that the Respondent has failed to consider the alleged extreme financial hardship on the part of the Appellant, that the Respondent has failed to consider all relevant circumstances (which would include the alleged financial hardship), and that it failed to consider whether any appropriate conditions could be imposed so as to enable restoration.
101. It is clear from the Respondent’s skeleton argument dated 12 September 2024 that these grounds are not accepted. However, we agree with the Appellant that the Respondent has not pleaded any case in respect of these matters in its Statement of Case. We also agree that the Respondent has not addressed these matters in its initial decision letter, or in its review conclusion letter. Its position on these matters were not articulated until the production of its skeleton argument. It was then further fleshed out during the hearing when Officer Boote gave her evidence.
102. This brings us to the issue raised by the Appellant in its skeleton argument dated 23 September 2024 as to whether the Respondent should be prevented from advancing any case in respect of these matters. Rule 25 of the FTT Rules 2009 requires the Respondent to set out its position in relation to the case. Without restriction on its wide powers under rule 5 (case management powers), pursuant to rule 15(1), the Tribunal has the power to make directions as to the issues on which it requires evidence or submissions, the nature of the evidence or submissions it requires, and the time at which any evidence or submissions are to be provided. Pursuant to rule 15(2) the Tribunal can exclude evidence that would otherwise be admissible where (i) the evidence was not provided within the time allowed by a direction or a practice direction; (ii) the evidence was otherwise provided in a manner that did not comply with a direction or practice direction; or (iii) it would otherwise be unfair to admit the evidence.

103. We have concluded that it would not be fair and just to prevent the Respondent from advancing its case in respect of these further grounds. Whilst the issue was raised in its skeleton argument, which had been served slightly later than directed/agreed, the Appellant did not make an application prior to the hearing that HMRC should be precluded from advancing its case on these matters.
104. Furthermore, all the grounds of challenge have been fully ventilated at this hearing. For example, no objection was taken by the Appellant when the Respondent examined the witnesses on these further grounds of appeal. The Appellant had every opportunity to fully cross-examine the Respondent's witness on these matters, and did so robustly. The Appellant has also had the Respondent's skeleton argument, which sets out the Respondent's case on these further grounds, for some weeks prior to the hearing. The Appellant has not been "ambushed". No prejudice has been caused to the Appellant.
105. The appeal fails by reason of our findings that the Respondent's policy of requiring a person to prove ownership of an item seized as a pre-requisite condition is not unreasonable, and that the Appellant has not established ownership of the seized items. It is not necessary for the Tribunal to consider the further grounds. However, if the Appellant had established ownership (it has not), we would have been minded to conclude that the Respondent has not shown that it had taken into account the fact that this was a "first offence" for the Appellant (this was not disputed), that there was no dishonesty (no dishonesty having been pleaded), or that it had considered whether or not restoration could be made with appropriate conditions. Officer Boote did give oral evidence about these matters, but they were not dealt with in her witness statement or the witness statement of Officer Collins, or indeed, in the review conclusion letter. Whilst Officer Boote stated that she would still have reached the same conclusion (not to restore) given the counter-vailing factors, such as the Appellant entering into an arrangement with Usman Industries despite the alleged significant language barrier and the Appellant's failure to check that the invoices were correct, those factors should have been specifically addressed in the review conclusion letter.

CONCLUSION

106. For the reasons set out above, we find that the Respondent's decision not to restore was not one which a decision maker could not reasonably have arrived at. The appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

107. 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.

**JENNIFER LEE
TRIBUNAL JUDGE**

Release date: 09th JANUARY 2025