TC03986

Appeal number: TC/2013/03454

EXCISE DUTY: ***seizure of vehicles used for smuggling cigarettes; restoration offered on payment of trade value of vehicles; application of policy; whether decision making flawed – yes; further review directed.***

FIRST-TIER TRIBUNAL
TAX CHAMBER

J D P PARTNERS **Appellant**

- and -

THE DIRECTOR OF BORDER REVENUE **Respondent**

TRIBUNAL: JUDGE CHRISTOPHER HACKING
MR RICHARD THOMAS

Sitting in public at Bedford Square, London on 6 May 2014

Mr Michael Wiencek, a Polish lawyer from Euro Lex Partners LLP for the Appellant

Mr Rupert Jones, counsel, instructed by and on behalf of the Director of Border Revenue, the Respondent.

DECISION

Concerning the appealed decision

1. This was an appeal against a decision made by the Border Force dated 19 February 2013 and confirmed on review by letter dated 17 April 2013 that the vehicles referred to below should be restored to the Appellant for a fee of £20,725.

2. The vehicles concerned were a Renault Premium Route tractor unit, Polish registration number PSZ 33165 and a curtain side trailer bearing the Polish registration number PSZ PC87. These vehicles had been seized by the Border Force on 31 October 2012 at Dover Eastern Docks because excise goods which had not been declared and on which duty had not been paid had been discovered in amongst the declared load comprising furniture apparently intended for delivery to IKEA.

3. The excise goods concerned consisted of 2,624,860 cigarettes, the unpaid duty on which amounted to £628,399.34.

The seizure

4. The seizure of the goods was made under section 139 Customs and Excise Management Act 1979 ("CEMA") as being liable to forfeiture under regulation 88 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 and section 49(1)(a)(i) CEMA. In this instance the Border Force seized the vehicles under section 139(1) CEMA as they were liable to forfeiture under section 141(1)(a) CEMA because they were being used for the carriage of goods liable to forfeiture.

5. The Appellant had not challenged the legality of the seizure of the vehicles nor did it question the right of the Respondent to confiscate the cigarettes.

The matters at issue between the parties

6. What was in dispute was the application of the policy of the Border Force concerning its powers of restoration of the vehicles only on payment of the assessed value of the vehicles. Although the value of the vehicles had been questioned there was no argument on this aspect before the tribunal. Valuation was not an issue before the tribunal.

7. The appeal before the Tribunal is governed by section 16 of the Finance Act 1994 ("FA 1994"). Subsection (4) provides:

> "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."

In the Appellant's Statement of Case it is argued that the Border Force's decision did not concern an ancillary matter. But this point was, rightly, not pressed by Mr. Wiencek as the decision clearly falls within paragraph 2(1)(r) of Schedule 5 to FA 1994, and is not a decision excluded by s 16(8) or (9) FA 1994.

8 As a result of s 16(4) the jurisdiction of the Tribunal is, in this case, limited in effect to requiring the Border Force to conduct a further review in accordance with the Tribunal's direction, and it can only do that if it is satisfied that the decision maker could not reasonably have arrived at the decision they did.

9. The issue which was before the tribunal was the application of the Border Force policy concerning restoration of vehicles having regard to the facts of this particular matter. In accordance with s 16(4) FA 1994, a necessary component of this issue was the legitimacy of the decision making process by Border Force in public law terms.

10. The Border Force policy concerning vehicle restoration is set out in some detail in the Respondent's review letter of 17 April 2013.

11. The policy seeks to distinguish between circumstances in which

(a) neither the driver nor the operator of the vehicle(s) is responsible for the smuggling, and

(b) the driver but not the operator is responsible; and, finally,

(c) the operator is responsible.

12. In scenario (a) above the vehicle will normally be restored without payment being required if evidence satisfying Border Force that neither the operator nor the driver were complicit in the smuggling is provided; and the operator can provide evidence to the effect that basic reasonable checks were made by the operator and the driver such as to confirm that the load did not include illicit goods (by which is meant dutiable goods that had not been declared and on which duty had not been paid).

13. If evidence of basic reasonable checks having been carried out cannot be provided then on a first occasion of seizure the vehicles will normally be restored for 20% of the value of the revenue involved in the smuggling or 100% of the trade value of the vehicle(s) if less. On a second or subsequent occasion within 6 months the vehicle(s) will not normally be restored.

14. Different consequences flow depending on whether, and, if so which, of scenarios (b) and (c) above might apply. In scenario (b), f the operator provides satisfactory evidence that the driver was responsible for or complicit in the smuggling, and that the operator took reasonable steps to prevent drivers smuggling, the vehicle(s) will normally be restored free of charge, except that where the same driver is involved on more than one occasion restoration may be refused or subject to payment of 100% of the revenue involved or the trade value of the vehicle(s) if less. Restoration for a payment of these amounts will also be required if it is the driver who was complicit in the smuggling, and the operator did not take reasonable steps to prevent drivers smuggling.

15. In scenario (c), if the operator cannot satisfy Border Force that it was neither responsible for nor complicit in the smuggling and the revenue concerned is less that £50,000 then, on a first occasion, the vehicle(s) will be restored for 100% of the revenue involved or the trade value of the vehicle(s) if less. If the revenue at risk was more than £50,000 or the seizure is a second or subsequent one within 6 months the vehicle(s) will not normally be restored

16. It was the contention of the Border Force in this appeal that whilst neither the operator (the Appellant) nor the driver were responsible for or complicit in the smuggling, so that scenario (a) applied, the driver had failed to make the necessary basic reasonable checks (including conforming to the CMR Convention) required to confirm the legitimacy of the load and to detect any illicit load.

17. The Appellant by its lawyer contended that the driver had taken all reasonable steps to satisfy himself that the load was legitimate. There was nothing to alert him to the possibility of smuggling.

The hearing

18. Neither the driver nor any member from the Appellant partnership attended the hearing. Both the driver and the Appellant were represented by Mr Wiencek, a Polish lawyer, who made submissions based on substantially agreed facts.

The case for the Respondent

19. For the Respondent evidence concerning the decision under appeal was given by Mrs Deborah Hodge, the Review Officer who had written the review letter of 17 April 2013. Mrs Hodge was cross examined by Mr Wiencek on a number of points arising from the review letter. In particular Mrs Hodge was asked what "elements in this case" had led her to suspect that the operator may have been complicit in the smuggling of the cigarettes (page 7 of the review letter). Mrs Hodge repeated in substance the matters referred to in the review letter.

20. In the review letter these "elements" are stated to include the fact that for some reason the plates of the tractor unit and trailer had been swapped around. The driver had had no explanation for this, it was said.

21. The driver had, it was said, told the interviewing officers that he had been contacted by telephone no less than 3 times by the client (not the operator) during the journey to ensure that all was well. Again according to the interviewing officer's reports the driver had acknowledged that this was unusual as normally the client did not contact him at all.

22. A further peculiarity was said to be the fact that the driver was given a sum of 6000 zlotys for fuel by one of the men loading the goods at the factory from which he picked up the load. This was said to be unusual as the driver had apparently said to the interview officer that his boss generally handed to him fuel money.

23. Other elements of the collection process it is said in the review letter, should have caused the driver to question whether the load was legitimate. These included the fact that he had loaded "in the middle of the night", that the furniture was of low quality and that the loader installed a 'sonic rat deterrent' in the trailer for no apparent reason. The paperwork (meaning, it is understood, the necessary documents to accompany the vehicle/trailer) was also said to be "tatty"

24. It is said of the Appellant (operator) that it failed to undertake credible checks relating to the load and did not check the destination of the delivery (IKEA). Subsequent enquiries of IKEA had revealed that they were not expecting the delivery from Poland.

25. Mr Kluczkowski, the client who had commissioned the Appellant to undertake the delivery, had instructed the driver to call him one hour before making the delivery, a fact which ought, says the Respondent, to have alerted the driver as being suspicious.

26. The Respondent also relies on the list of "Reasonable checks to be undertaken by operators/drivers to prevent smuggling in the load" set out at Appendix E to the review letter. Some of these include the matters to which reference is made above. Others are not relevant to the particular circumstances of this appeal but relate to other types of dutiable goods (e.g. spirits)

27. Significant reliance is placed by the Respondent on the suspicions which it is said the driver harboured and admitted to at interview. These matters included the telephone calls from the client and in particular the instruction concerning the need to call him one hour before arrival at the delivery address.

The Appellant's case

28. As indicated above neither a representative of the Appellant nor the driver was present to give evidence to the tribunal. The case for the Appellant was limited therefore to the submissions made on its behalf by their lawyer, Mr Wiencek. A Statement of Case had however been prepared by Mr Wiencek which had been signed

by Mr Pavel Nowicki, a principal of the Appellant, and by Mr Wiencek. This was included in the appeal bundle.

29. In the Appellant's Statement of Case it is admitted that the Respondent had grounds for stopping and inspecting the vehicle (the tractor unit and the trailer) as there had been an attempt to smuggle goods. The Appellant could not, says Mr Nowicki, have opposed the condemnation proceedings.

30. It is of the essence of the Appellant's case that neither the Appellant nor the driver had any knowledge of the excise goods hidden in the vehicle. They were unaware of the attempt to smuggle the goods and were not complicit in this enterprise.

31. The driver had only recently been engaged to drive for the Appellant. He was engaged under a contract for services dated 1 October 2012 and was not an employee of the Appellant nor, it is understood, did he have any prior knowledge of the client whose goods were to be moved.

32. The Appellant is said to have acted 'reasonably and diligently' in advising drivers of their obligations under relevant international and domestic law, examples of which are listed in the Statement of Case.

33. More particularly, and in accordance with the CMR Convention 1956 the driver had checked the conformity of the load with the accompanying documents. The goods (furniture) were wrapped in what is described as "stretch foil" and placed on pallets. There had been an external physical check of the pallets by the driver who then secured the load ready for departure.

34. The present incident was, it is said, the first experience by the Appellant of an attempt to smuggle goods in its vehicles since it commenced trading in 2010. The goods themselves were said to have been 'deceitfully hidden' in the load.

35. Mr Wiencek challenged the lawfulness of the decision made by the Respondent concerning restoration on terms and also the application of the Respondent's own policy. In coming to its decision the Respondent took account of irrelevant matters such as the "tatty paperwork" and the poor quality of the furniture. The result has been, said Mr Wiencek, to penalise an innocent party with a penalty which, having regard to its equivalent value in Polish zloty is wholly disproportionate. Mr Wiencek relied on statistical evidence in support of this contention the purpose of which was to illustrate just how seriously affected has been the Appellant by the seizure of its vehicle and the requirement to pay £20,725 for its return.

36. In support of his contention that the requirement to pay the value of the vehicle/trailer as a condition of their restoration was disproportionate, Mr Wiencek referred the tribunal to the case *Alexander James Anderson v HMRC* [2003] E 00442. In that case the tribunal was said to have found it to be disproportionate that the actual smuggler escaped by having his goods forfeited whereas the Appellant was 'burdened' (presumably by restoration costs) and that the UK Border Authority should have in mind the appropriateness and proportionality of penalising an innocent party while failing to prosecute the actual offender.

37. Mrs Hodge, when asked by Mr Wiencek, had been unable to say what, if any, steps may have been taken to pursue the client who had commissioned the movement of his goods and who, it seems reasonable to conclude, was involved in the smuggling attempt.

38. Also cited was *Logistika Peklaj AS v UK Border Agency* [2012] UKFTT 355 (TC) in which the Vehicle Seizure and Restoration Policy was considered. It was, said Mr Wiencek, emphasised in that case that it was not the aim of the policy to penalise the honest haulier and that the "principles of proportionality [as elaborated by the] ECHR should accordingly be applied"

The tribunal's consideration of the appeal.

39. This was an appeal which concerned an attempt to smuggle no less that 2,624,860 cigarettes thus avoiding excise duty of £628,399.34. To say that this was a serious matter is to understate the situation. Smuggling on this scale was and is a menace and it is to the great credit of the Respondent that it was able to detect and apprehend the vehicles concerned.

40. It seems clear to the tribunal that this particular attempt to smuggle was one which had been carefully planned and executed. The goods had been packed in large boxes which had been covered in protective transparent film. On the inside of the film (and outside of the boxes) was a diagram purporting to indicate the contents of the boxes. This was shown clearly in the photographs in evidence before the tribunal. The diagrams were of good quality and headed "MEBLE SYSTEMOWE" (which the Tribunal understands is Polish for "System furniture"). There were pictures of furniture items, mainly chests of drawers, tallboys and the like beneath the heading.

41. Mr Kasendra, the driver, on the instructions of the Appellant, arrived at the client's factory in Poland in the early hours of the morning of 30 October 2012. Although an experienced driver he had only been engaged by the Appellant on a short term contract for services commencing 1 October 2012 until 31 October 2012. For this period he was to be paid 3,400 zlotys (about £667). He was given money for fuel at the factory by one of the workers there. This sum was 6,000 zlotys (£1,176).

42. The Appellant is a partnership. It had been inexistence since 2010. It is not a large enterprise running only 2 vehicles and taking work where it can find it. Neither the Appellant nor the driver is said to have had any previous involvement with the UK authorities in relation to cross border matters in the past. This has not been disputed by the Respondent.

43. Mr Kasendra was said to have satisfied himself that the goods being loaded were items of furniture. He had apparently seen examples of sofas in the doorway of the premises. He had a long journey ahead of him and it is said by the Respondent that he slept in his cab whilst the loading took place. The e-mailed report from the Respondent's, Mr Dean Wilson, (Criminal Investigation), dated 7 November 2012 states simply that the driver "waited in the HGV cab while the loading took place". There is no mention of his sleeping although the tribunal would not be surprised if he

had taken the opportunity of closing his eyes and resting whilst the loading of the trailer was going on. At some stage a rodent deterrent device was placed in the trailer. It also appears that the plates on the vehicle and trailer were swapped around. Mr Wiencek could not say why this had happened.

44. Beyond this there is very little further detail as to the loading and departure of the vehicle and trailer.

45. What is known is that during the journey Mr Kasendra received three telephone calls from the client asking about his progress. At some stage (precisely when is not known) the client asked Mr Kasendra to call him when he was within 1 hour of the delivery point. During the journey Mr Kasendra took breaks from driving and rested. He is said to have checked that his load had not been tampered with after each such occasion.

46. Before Mr Kasendra was able to make the call to Mr Kluczkowski, the vehicle and trailer were seized at Dover and Mr Kasendra was interviewed.

47. Very little is known about that interview, how long it took, what was asked and what responses were given save that it is said by the Respondent that Mr Kasendra had commented that he was surprised about the contacts from the client, Mr Kluczklowski, which he found to be unusual.

48. Whether a Polish interpreter was present during the interview process is unclear. Mr Kasendra was said by Mr Wiencek to have very little English.

49. Surprisingly, indeed almost exceptionally, in this tribunal's experience, there was neither a hand written note nor even a typescript record of the interview available to the tribunal. Who said what to whom and the context in which Mr Kasendra is said to have expressed some concerns about aspects of the delivery are matters as to which the tribunal has been unable to form any real view. Quite why no such evidence was forthcoming is wholly unclear. Whether Mr Kasendra had a full and proper understanding of questions being put to him is equally unclear. All of this is, in our finding, most unsatisfactory.

50. As to the other alleged indications that Mr Kasendra failed to make the basic reasonable checks the tribunal would observe as follows:

51. That Mr Kasendra arrived to take delivery of the goods to be transported to the UK at 4.00 a.m. (described in the Respondent's Statement of Case as 'in the middle of the night') is said to be suspicious. We reject that suggestion as showing a complete lack of understanding of the road transport business. Hauliers will very often prefer to arrange for goods to be loaded and sent on their way as early as possible to avoid domestic traffic. In our view this is quite normal and no adverse inference can properly be drawn from this fact.

52. That the furniture was "of low quality" as alleged in the Respondent's Statement of Case is quite extraordinary. How it might be expected that a driver is to

assess the quality of packed furniture is beyond this tribunal's understanding. By what quality standards the Respondent seeks to make such a judgment is not stated.

53. The installation of a sonic rat detector 'for no apparent reason' can only be understood as meaning 'no apparent reason to the Respondent'. It is known that rats will destroy wooden and cardboard packing materials often in the hope, if not expectation, of finding something more to their taste inside. We find that the installation of such a device cannot reasonably be seen as an indication of likely criminal intent.

54. That the paperwork was 'tatty' is hardly unusual and again cannot reasonably be said to be indicative of suspicious activity.

55. That the client's loader gave the driver the petrol money is said to have been unusual. However on this occasion the factory was quite some way from the Appellant's place of business (some hours drive the tribunal was told) and it may well have been agreed between the Appellant and the client that the client would advance these monies to the driver. This is no more than speculation but so too is the adverse speculation that this was so unusual a matter as to alert the driver to the fact that all was not well. Without evidence as to the context in which this money was paid no adverse inference can properly be drawn from this fact.

56. The switching of the number plates is at first sight something of a puzzle. The incident report relating to the seizure reads:

> "On 31/12/2012 at 00:30 hours officers at Dover IB Freight Controls intercepted Polish registered vehicle PSZPC87 pulling trailer PSZ33165. The unit and trailer plates were found to have been switched and tractor unit is actually PSZ33165."

57. Apart from the fact that this was considered to be a curiosity it is not clear what, if any, inference is to be drawn from this fact. It appears that when this matter was drawn to Mr Kasendra's attention he was "unable to explain the discrepancies."

58. The tribunal notes however that the Appellant is in fact the owner of both the tractor and trailer units bearing respectively the numbers PSZ33165 and PSZPC87. The implicit suggestion that the plates may in some way have been changed over so as to avoid detection was in fact addressed by Officer Dean Wilson in his e-mail referred to above. Of this matter he states:

> "Consideration was given to the possibility that the number plates had been deliberately switched by the driver to avoid detection, but it was thought that such actions, if anything, would draw particular attention to the vehicle should it be stopped en route by the Police and so this was deemed unlikely"

Unlikely or not, it remained as a feature of the Respondent's contentions concerning 'reasonable checks'. That the tractor unit's registration may have been transferred to the trailer to conform to UK law does seem to the tribunal to be a more reasonable explanation. The UK unlike Poland and several other countries, the tribunal

understands, does not operate a separate trailer registration system although this is now believed to be under consideration.

59. Whatever the true explanation may be, the significance of this matter to the tribunal is the clearly demonstrated underlying assumption made by Border Force as to the bad faith of the driver and the Appellant. It is this approach which concerns the tribunal as it suggests something far less than an objective appraisal of the circumstances.

60. The only other suggestions of failures on the part of the driver and the Appellant concern (a) their not having checked with IKEA as to the expected delivery and (b) that the requested telephone call to the client should have alerted the driver to the fact that the load might not have been legitimate. With the benefit of hindsight it may be that there is some strength to these suggestions but at the time it was said by Mr Wiencek that neither the driver nor Mr Nowicki of the Appellant partnership had any reason to question what appeared to be a straight forward delivery from a Polish furniture factory to a well known retail furniture outlet in the UK. This was a first delivery by Mr Kasendra for a new client of the Appellant and the client's concern, reflected in the telephone calls, may well have been understandable.

61. Mr Wiencek criticised as unfair the Respondent's restoration policy which, having regard to the value of the goods attempted to be smuggled, meant that, absent evidence satisfactory to the Border Force as to reasonable checks having been made, 100% of the value of the vehicle would be required as a condition of restoration whether under any of the three options (A, B or C).

62. That criticism is not based on a strictly correct analysis of the policy which does quite clearly differentiate between quite separate circumstances. However it is accepted by the tribunal that the absence of evidence as to reasonable checks is dealt with substantially in the same way as would other failures by the driver or by the operator of an arguably more serious nature on a first occasion of detection given the high value of the goods seized.

63. Attached to the Appellant's submission prepared by Mr Wiencek was some statistical evidence comparing GDP per capita and price level indices in different European countries. The purpose of this was to demonstrate that Poland was a relatively less prosperous country than many of its neighbours. This information included details of average wages paid to employees in Poland. It appeared from this that the average monthly wage paid in 2013 to all employees was 3650.06 zlotys or £716. In this light said Mr Wiencek a requirement to pay a restoration fee of £20,725 was unreasonable and disproportionate. It was a price which would cripple the Appellant's business.

64. As valuation was not challenged however the tribunal can only conclude that the figure proposed represented a fair value for the tractor and trailer unit concerned. That is not dispositive of the argument concerning proportionality but in this case the tribunal is very conscious of the seriousness of the smuggling attempt and is reluctant

to conclude that a requirement to pay for the value of the vehicles is necessarily disproportionate.

Decision

65. The tribunal is not satisfied that the Respondent has shown that its consideration of this matter and in particular its decision making process was fair and one that could reasonably have been arrived at (s 16(4) FA 1994).

66. In her review decision the Review Officer noted as indicators that the **operator** was complicit in the smuggling, the swapping of the number plates, the three contacts between client and driver and the giving of fuel money to the driver by the client. She then however concluded that on balance neither the operator nor the driver were responsible for or complicit in the smuggling, and correctly said that scenario (a) of the policy applied.

67. She then added that it remained for her to determine for the purposes of that scenario whether she had been provided with satisfactory evidence that both the operator and the driver carried out basic reasonable checks, and she referred to Appendix E. This is a list of indicators of whether reasonable checks have been carried out but it is stated that each case depends on its circumstances. We note that this list does not appear to have been given to the appellant's lawyers in the Border Force's letter of 11 December 2012, and is not apparently available to the public.

68. She then mentioned factors which she said went to show that the **driver** had not taken reasonable checks: the loading in the middle of the night, the low quality of the furniture, the rat deterrent, the tatty paperwork and the fuel money. She then added that she had no evidence that the operator undertook any credibility checks relating to the load. And she saw as suspicious that "the haulier" did not check the destination of the goods and that the driver was instructed to call Mr Kluczkowski (of the consignor), a matter which she said should have alerted the operator's suspicions. She further added that she had taken into account "the degree of failure in the operator's duty to take reasonable steps to prevent smuggling".

69. It is clear to the Tribunal that the review officer has taken account of matters in relation to the driver's actions which the tribunal finds to be irrelevant as indicated above. As to the operator's reasonable checks, the only matters she refers to in this connection are the failure to check the destination of the goods and that the driver was instructed to call the consignor. As stated above we can see that these might be indicators of failure to carry out a reasonable check, but we consider the officer has failed to take account of, or at least to give appropriate weight to, facts which are relevant such as the fact that the driver was a new driver to the Appellant such that some checks by the client consignor may well have been justified as cautionary. Adverse inferences have been drawn against the Appellant and its driver where none could properly have been drawn. Further, we are very disturbed by the reliance on evidence of what the driver is supposed to have said at interview. It is not known whether there was an interpreter present and no record of the interview was before the tribunal.

70. The smuggling attempt was quite a sophisticated one so that there was little of significance which might have alerted the driver or the Appellant to what was going on. The driver did check that what was being loaded was from all external appearances furniture. He was careful to check his load at stops. There is very little evidence on which the Respondent can in the tribunal's view properly rely as indicating a failure to undertake reasonable checks.

71. The evidence strongly suggests that there were procedural irregularities in the handling of this matter by the Respondent. The complete absence of evidence concerning the interview of the driver, the absence of information as to the presence or otherwise of an interpreter; the apparent unwillingness of the Respondent to consider possible reasonable explanations for such matters as the placing of the vermin trap in the trailer and the exchanging of the registration plates coupled with the less than convincing suggestions that adverse inferences could properly be drawn from such matters as the state of the documentation or the quality of the furniture all combine to militate against an objective assessment of the situation as the basis of decision making.

72. We are also concerned by the fact that in its letter of 19th February 2013 (the original decision) the Respondent referred to the basic reasonable checks which would have identified the illicit load in a summary of the Respondent's restoration policy, and it concluded that the haulier did not take all the reasonable steps and make all the reasonable checks it could have taken or made as the reason for denying restoration. It had previously requested the appellant to provide answers to questions, one of which was "the checks your client makes of the consignee" and another "the arrangements made to deliver the goods to the consignee". Mr Wiencek's reply not only indicated that his client had checked out IKEA, the consignee, but he also gave (for the first time) information about the phone call the driver was expected to make to the consignor one hour before delivery. In the context of these being the only relevant questions being asked about the consignee, we cannot understand how the original decision to deny restoration, made solely on the basis of failure to make reasonable checks about the "customer and delivery arrangements", was a reasonable one, especially when the Appellant had not been provided at any time with Appendix E listing some indicators of reasonable checks. We consider that decision flawed, and we also consider that the reviewing officer's failure to take into account that the original decision was flawed was another reason why her own decision was flawed.

73. In short the tribunal believes that the decision was flawed in public law terms and that the review did no more than to rubber stamp an unfair decision.

74. **Accordingly it is directed that**:

(a) in accordance with s 16(4)(b) FA 1994 the Respondent shall carry out a further review which should include a critical assessment of the true probative value of the matters asserted in the review letter of 17 April 2013.

(b) the review shall be concluded within six weeks of the release of this decision, and its outcome shall forthwith be notified to Mr Wiencek on his client's behalf and to the tribunal.

Mr Wiencek may wish to note that if he is dissatisfied with the outcome of the further review I have directed, he may, subject to his clients' instructions, appeal again to the tribunal.

75. This document contains full findings of fact and reasons for the decision set out above. Any party dissatisfied with the decision has a right to apply for permission to appeal against it/them 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.

CHRISTOPHER HACKING
TRIBUNAL JUDGE

RELEASE DATE: 3 September 2014