[2016] UKFTT 175 (TC)

TC04961

Appeal number: **TC/2012/10548**
TC/2013/03301
TC/2013/09682
TC/2013/03688
TC/2014/00816

EXCISE DUTY – five seizures of goods – whether Respondent's refusal to restore unreasonable – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

BEVEREX HUNGARY KFT **Appellant**

- and -

THE DIRECTOR OF BORDER REVENUE **Respondent**

TRIBUNAL: JUDGE JONATHAN RICHARDS
JOHN ROBINSON

Sitting in public at The Royal Courts of Justice on 10 and 11 February 2016

The Appellant did not appear and was not represented

Michael Newbold, instructed by the Home Office, for the Respondent

DECISION

1. The appellant ("Beverex") is a company incorporated in Hungary which carries on a business of selling alcohol wholesale. It appeals against the refusal of the Respondent to restore various loads of seized alcohol to Beverex.

2. The appeals arise in connection with the seizure of five loads of alcohol on separate occasions. The Respondent (who we will refer to in this decision as the "Border Force") seized most, if not all, of those loads because they were concerned that they were involved in "double runs" of alcohol under the same documentation. Interested readers are referred to the Tribunal's decision in *Worx Food & Beverage BV v The Director of Border Revenue* [2014] UKFTT 774 for a clear summary of the administrative procedures that need to be followed in the case of cross-border movements of alcohol under duty suspense arrangements and the nature of the fraud that is involved in "double runs" of alcohol.

Procedural matters

Application for postponement

3. This appeal was previously listed to be heard in September 2015. However, that hearing was postponed because Beverex's only witness, Mr Daniel Volckaerts, had suffered a heart attack prior to that hearing. The hearing was, therefore, re-listed for three days from 10 to 12 February 2016.

4. On 1 February 2016, Beverex's advisers, Altion Law Limited ("Altion"), wrote to the Tribunal to request a postponement of the hearing on the grounds that Mr Volckaerts was too unwell to attend. With their application, Altion included a doctor's note (and translation) that stated that Mr Volckaerts would not be fit for work until 1 April 2016. The date of the medical note was hard to read but it appeared to have been signed on 11 January 2016 by an orthopaedic surgeon.

5. The Border Force opposed this application on the grounds that it would incur significant expense and inconvenience if a three day hearing were postponed for a second time. Having reviewed Altion's application and a copy of Mr Volckaerts's first witness statement that was on the Tribunal's file relating to the appeal, the Tribunal decided not to grant the postponement on the papers and requested oral submissions on the issue at commencement of the hearing on 10 February 2016. The Tribunal sent a letter to the parties to this effect which also asked Beverex to consider whether Mr Volckaerts's evidence (which consisted largely of producing copies of documentation that Beverex had) could be given by someone else and asked the Border Force to consider the extent to which it disputed Mr Volckaerts's evidence so that the Tribunal could consider whether to admit that evidence in his absence if necessary.

6. Some further correspondence ensued. In the course of that correspondence, Altion stated that there was no other director or employee of Beverex who could give the

evidence set out in Mr Volckaerts's witness statement. They confirmed that Mr Volckaerts's partner had contacted them a few weeks previously to explain that Mr Volckaerts would not be well enough to attend the hearing and had enclosed the doctor's note. However, they appeared to state that it was only on 1 February 2016 that they had been instructed to apply for a postponement of the hearing. In any event, they stated that they had no instructions to attend the hearing to argue for the postponement, nor any instructions to attend the hearing or instruct Counsel if no postponement was granted. Moreover, Altion stated that if a postponement were granted, in all likelihood they would have no instructions to attend, or instruct Counsel at a reconvened hearing. The Tribunal noted this and stated that any further written representations that Beverex wished to make would be taken into consideration and we have considered further written submissions that Altion made.

7. In deciding whether to grant the postponement, we weighed up the prejudice that the Border Force would suffer if we granted a postponement against the prejudice that Beverex would suffer if we did not and considered the competing prejudices in the light of the overriding objective set out in Rule 2 of the Tribunal Rules. We decided not to grant a postponement for the following reasons:

(1) Charlotte Hadfield of Counsel had submitted a full skeleton argument on behalf of Beverex in preparation for the hearing in September that had been postponed. Although Ms Hadfield was not instructed to appear at this hearing, that skeleton argument would enable us to consider the case that Beverex were putting forward. It was unlikely that postponing the hearing would result in Beverex having a greater level of representation than this given that Altion had stated that neither they, nor Counsel, were likely to be instructed to attend a reconvened hearing. Moreover, Mr Newbold very fairly accepted that, if no postponement was granted, he would draw the Tribunal's attention to aspects of the evidence that supported Beverex's case and would ensure that Ms Hadfield's arguments were addressed appropriately. We considered that those factors afforded Beverex appropriate representation. Indeed many taxpayers who attend the Tribunal in person have a lower level of representation than this.

(2) Undoubtedly Beverex would suffer prejudice as a result of their only witness not attending the hearing. However, while Mr Volckaerts's illness was clearly not Beverex's (or Mr Volckaerts's) fault, we considered that Beverex should have done more to deal with the situation. In particular, they should have notified both the Border Force and the Tribunal as soon as it became clear that Mr Volckaerts would not be able to attend, which might have enabled the Border Force to mitigate the costs they would suffer if the hearing were postponed.

(3) By the time of the hearing, we had read all of Mr Volckaerts's witness statements. It was clear from those witness statements that Mr Volckaerts only became a director of Beverex on 23 January 2013 which was after three of the seizures and just one day before the fourth seizure. Therefore, Mr Volckaerts was not, to any significant extent, giving evidence of his own recollection of events relating to the seizures. He was largely giving

evidence that consisted of exhibiting documents, many of which had already been supplied to the Border Force in the course of reviews of the various decisions to seize goods. Beverex's business of selling excise goods wholesale must generate lots of paperwork and we considered it unlikely that Mr Volckaerts was the only director or employee of Beverex who could give evidence as to the meaning of paperwork that related to the seized goods, particularly if Beverex had sought to identify a suitable replacement for Mr Volckaerts as soon as it was clear that he could not attend the hearing.

(4) While Mr Volckaerts's evidence is clearly relevant to the appeal, we do not consider that it would be determinative of it since the central question is not whether Mr Volckaerts's evidence was true or not, but rather whether the Border Force's refusal to restore the seized goods was reasonable. Therefore, given that much of that evidence was duplicative, and that Mr Volckaerts was not, to any significant extent, giving evidence of his personal recollections, we considered that the prejudice in not having Mr Volckaerts present at the hearing to give evidence was relatively low.

(5) If we postponed the hearing, the Border Force would suffer costs. Conceptually, prejudice of that kind could be dealt with by making an award of costs against Beverex. However, enforcing an award of costs against a Hungarian company would be difficult.

(6) For the reasons set out at (1) to (5) above, we concluded that the prejudice to the Border Force in postponing the hearing both outweighed the prejudice to Beverex in proceeding with it and was more difficult to mitigate. By contrast, the prejudice to Beverex could be mitigated by admitting Mr Volckaerts's witness statement and by ensuring that the points set out in Ms Hadfield's skeleton argument were taken into account. Overall, we were satisfied that Beverex had been notified of the hearing and we considered that it was in the interests of justice to proceed in Beverex's absence.

Evidence

8. We decided to admit Mr Volckaerts's witness statements even though he was not present in person at the hearing. We have taken into account, when assessing the weight of that evidence, that Mr Volckaerts was not cross-examined on it. At a number of points in his submissions, Mr Newbold suggested that Mr Volckaerts's evidence was implausible and that there were inconsistencies in that evidence and in the documentary evidence to which Mr Volckaerts referred. When considering those submissions, we have taken into account the fact that Mr Volckaerts did not have the opportunity to deal with those criticisms by giving evidence in person.

9. For the Border Force, we had evidence from the following four officers of the Border Force:

(1) Officer David Harris – who performed a review of one of the decisions and set out his conclusions in a letter dated 23 October 2012;

(2) Officer Helen Perkins – who performed a review of one of the decisions and set out her conclusions in a letter dated 9 January 2014;

(3) Officer Raymond Brenton – who performed a review of one of the decisions and set out his conclusions in a letter dated 1 November 2013 (which he amended on 27 November 2013); and

(4) Officer Karen Norfolk – she had not herself performed any review of any of the relevant decisions whose conclusions were communicated to Beverex. However, she had performed a "re-review" of two review decisions that Officer Graham Crouch had performed (on 26 March 2013 and 10 April 2013) by reference to the same materials that Officer Crouch had available to him. The reason for this was that Officer Crouch has since retired and so was not available to give evidence on his own thought processes when performing his review. However, Officer Norfolk was able to give evidence of her reasons for coming to the same conclusion as Officer Crouch having considered exactly the same material as he had available to him and we admitted her evidence as we considered that it was relevant to the question of the reasonableness or otherwise of Officer Crouch's decisions.

10. None of the officers mentioned above were cross-examined. However, the Tribunal did ask all of them questions and, from the answers to those questions, we were satisfied that all of the officers were reliable and honest witnesses.

11. We also had available to us a hearing bundle, which Altion had prepared, that consisted of a number of documents which Mr Newbold carefully took us through.

Structure of this decision

12. The five seizures that are in issue in this appeal raise a number of common issues. However, after setting out the relevant principles of law, we will deal with each seizure separately in a separate section of this decision, cross-referring where necessary to issues that have been considered in the context of another seizure.

Applicable principles of law

13. The Border Force's power to seize goods and vehicles is set out in s139 and s141 of the Customs and Excise Management Act 1979 ("CEMA").

14. Schedule 3 of CEMA sets out a number of provisions connected with the seizure of goods which, so far as material, are as follows:

> **Notice of claim**
>
> 3. Any person claiming that any thing seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of

the date of the seizure, give notice of his claim in writing to the Commissioners at any office of customs and excise…

Condemnation

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

6. Where notice of claim in respect of any thing is duly given in accordance with paragraphs 3 and 4 above, the Commissioners shall take proceedings for the condemnation of that thing by the court, and if the court finds that the thing was at the time of seizure liable to forfeiture the court shall condemn it as forfeited.

Border Force's discretionary power to restore goods

15. Section 152 of CEMA gives the Border Force a discretionary power to restore goods and vehicles that have been lawfully seized in the following terms:

152 Power of Commissioners to mitigate penalties, etc.

The Commissioners may, as they see fit--

(a) ... compound an offence (whether or not proceedings have been instituted in respect of it) and compound proceedings or for the condemnation of any thing as being forfeited under the customs and excise Acts; or

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

Reviews of discretionary powers

16. Section 14 of the Finance Act 1994 ("FA 1994") provides so far as material as follows:

14 Requirement for review of a decision under section 152(b) of the Management Act etc.

(1) This section applies to the following decisions by HMRC, not being decisions under this section or section 15 below, that is to say--

(a) any decision under section 152(b) of the Management Act as to whether or not anything forfeited or seized under the customs and excise acts is to be restored to any person or as to the conditions subject to which any such thing is so restored;

(b) any relevant decision which is linked by its subject matter to such a decision under section 152(b) of the Management Act.

(2) Any person who is--

(a) a person whose liability to pay any relevant duty or penalty is determined by, results from or is or will be affected by any decision to which this section applies,

(b) a person in relation to whom, or on whose application, such a decision has been made, or

(c) a person on or to whom the conditions, limitations, restrictions, prohibitions or other requirements to which such a decision relates are or are to be imposed or applied,

may by notice in writing to the Commissioners require them to review that decision.

…

(5) A person shall be entitled to give a notice under this section requiring a decision to be reviewed for a second or subsequent time only if—

(a) the grounds on which he requires the further review are that the Commissioners did not, on any previous review, have the opportunity to consider certain facts or other matters; and

(b) he does not, on the further review, require the Commissioners to consider any facts or matters which were considered on a previous review except in so far as they are relevant to any issue to which the facts or matters not previously considered relate.

17. Section 15 of FA 1994 sets out the procedure to be followed on a review under s14 of FA 1994.

18. Section 16 of FA 1994 sets out rights of appeal to the Tribunal in relation to matters connected with a refusal to restore goods and provides, relevantly, as follows:

16 Appeals to a tribunal

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

…

(4) In relation to any decision as to an ancillary matter[1], 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--

[1] The combined effect of s16(9) of FA 1994 and paragraph 2(1)(r) of Sch 5 of FA 1994 is that the decisions to refuse to restore goods that are the subject of this appeal are decisions as to "ancillary matters".

> (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.

The decision in Jones

19. In *HMRC v Jones and Jones* [2011] EWCA Civ 824, the Court of Appeal considered the potential overlap between condemnation proceedings and an appeal to the Tribunal under s16 of FA 1994 against HMRC's refusal to restore seized goods. In that case Mummery LJ said:

> The deeming process [contained in paragraph 5 of Schedule 3 of CEMA] 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.

20. For completeness, we note that, although the provisions of CEMA 1979 and FA 1994 mentioned above refer to "the Commissioners" (being the Commissioners for HM Revenue & Customs), in the context of this appeal, by virtue of s7 of the Borders, Citizenship and Immigration Act 2009, that expression includes the Border Force.

Approach to assessing the "reasonableness" or otherwise of a review decision

21. Following the approach set out in *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1980] 2 WLR 753 at 663 we consider that we must address the following questions in order to assess the reasonableness or otherwise of the decisions that the various reviewing officers have made:

> (1) Did the officers reach decisions which no reasonable officer could have reached?

(2) Do the decisions betray an error of law material to the decision?

(3) Did the officers take into account all relevant considerations?

(4) Did the officers leave out of account all irrelevant considerations?

22. In *Balbir Singh Gora v C&E Comms* [2003] EWCA Civ 525, Pill LJ accepted that, the Tribunal could decide for itself primary facts and then go on to decide whether, in the light of its findings of fact, the decision on restoration was reasonable. Thus, the Tribunal exercises a measure of hindsight and a decision which in the light of the information available to the officer making it could well have been quite reasonable may be found to be unreasonable in the light of the facts as found by the Tribunal.

Approach to be taken if a decision is "unreasonable"

23. Section 16(4) of FA 1994 confers a power on the Tribunal to give certain directions if HMRC make an unreasonable decision. However, it does not require the Tribunal to order a further review if HMRC reach a decision that is unreasonable in the sense outlined at [21] above. That corresponds with administrative law principles. For example, in *R v Broadcasting Complaints Commission ex p Owen* [1985] QB 1153 May LJ said:

> …the grant of what may be the appropriate remedies in an application for judicial review is a matter for the discretion of this court. Where one is satisfied that although a reason relied on by a statutory body may not properly be described as insubstantial, nevertheless even without it the statutory body would have been bound to come to precisely the same conclusion on valid grounds, then it would be wrong for this court to exercise its discretion to strike down, in one way or another, that body's conclusion.

24. In the Tribunal, a similar approach has been taken in circumstances in which the Tribunal exercises a supervisory rather than an appellate jurisdiction by reference to the Court of Appeal decision in *John Dee Ltd v CCE* [1995] STC 941. In that case which concerned an appeal originating in the VAT Tribunal, the Tribunal had concluded that the Commissioners had failed to have regard to additional material relating to the appellant's financial information. Neil LJ (with whom the other Lords Justices agreed) held that counsel of the company contesting the security requirement in that case had been right to concede that:

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

PART I – THE SEIZURE ON 17 MAY 2012; OFFICER HARRIS'S REVIEW OF 23 OCTOBER 2012 (TC/2012/10548)

Background to the review

25. On 17 May 2012, the Border Force's officers seized a quantity of mixed beers at the Port of Dover as they were satisfied that the goods were excise goods held for a commercial purpose and the proper methods of removing excise goods to the UK had not been used.

26. On 7 June 2012, Altion wrote to the Border Force requesting that the goods seized be restored to them. That letter contained the following paragraphs:

> We have been advised by our client that they wish the goods to be restored to them. Please accept this as a formal request for restoration.
>
> We have further been advised by our client that they were informed that the load was seized on suspicion of the documents being used before, however our client has not been provided with any evidence of this whatsoever. Our client has requested that any information in support of this accusation is provided by return for their information.

27. The Border Force replied to Altion's letter of 7 June 2012 on 19 June 2012. That letter included the following paragraph:

> Before consideration can be given to your client's restoration request, I require proof of ownership of the goods. This should not only include proof that your client has made payment for the goods, but that the goods held by our Queen's Warehouse can be physically shown to be those that your client is claiming.
>
> To this end please supply me with details of the system used to identify your client's goods and the numbers on this particular consignment, i.e. lot numbers, rotation numbers or pallet numbers. These can then be checked against the goods we hold to help confirm ownership.
>
> If your client has any other paperwork relating to the above goods which support the claim for restoration, please forward a copy of these as soon as possible…

28. There was some question over Altion's authority to act for Beverex. On 27 June 2012, Altion sent the Border Force a document dated 29 May 2012 on the letterhead of "Beverex Hungary" confirming Altion's authority to act. The contact telephone number shown on the letterhead was "+45 1234 3567890" (an unusual number which consists of long strings of consecutive digits). The international dialling code for Hungary is +36 whereas +45 is the international dialling code for Denmark.

29. Following a reminder from the Border Force on 19 July 2012, on 1 August 2012, Altion sent a letter to the Border Force attaching "proof of ownership documents now received from our client".

30. On 9 August 2012, the Border Force sent Altion a letter refusing to restore the goods. On 18 September 2012, Altion requested a review of that decision.

Officer Harris's review of 23 October 2012 and follow up correspondence

31. In his letter of 23 October 2012, Officer Harris noted that, since Beverex had not challenged the legality of the seizure in condemnation proceedings, the goods in question were to be taken as duly condemned by virtue of paragraph 5 of Schedule 3 of CEMA. In Officer Harris's words:

> Having had an opportunity of raising the lawfulness of the seizure in the magistrates' court, one does not have a second chance of doing so at tribunal or statutory review as the tribunal does not have jurisdiction to consider it and the Review Officer should not normally do so…

32. He quoted the Border Force's policy on seized excise goods as follows:

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

Officer Harris's letter explained that he considered he was "*guided* by the restoration policy but not *fettered* by it".

33. Officer Harris concluded that the goods should not be restored to Beverex. He gave two reasons for that decision. The first reason was that he had not been provided with details of any exceptional circumstances that would result in the goods being restored. However, he also said that there were "positive additional reasons" for refusing to restore as follows:

> In considering restoration the first step is to establish who has title to the goods at the time of the seizure. If ownership is established then the process of restoration can continue to examine any other relevant circumstances. To that end, I have examined the letter of authority as supplied by you [i.e. Altion] from your client. The telephone number stated is +45 1234 3567890. I tried to ring the number but was not surprised when no such number existed. In addition, I noticed that the dialling code quoted is for Denmark, which is surprising for a company purportedly in Hungary where the code is +36. Even if I try the number with the 36 prefix then the number still does not exist. Such inconsistencies do not persuade me that this is a bona fide company.

34. Altion replied to Officer Harris's letter on 20 November 2012. They stated that they had contacted Beverex who had explained that Beverex had used an "old template" when providing their letter of authority dated 29 May 2012. Altion also stated that Beverex had advised them that they do have contact numbers for Hungarian and Danish branches and enclosed further documents on Beverex letterhead that quoted a contact number with a +36 prefix. Altion's letter concluded with a request that the Border Force reconsider their review decision in the light of that information. We accepted Officer Harris's evidence to the effect that he did not

see a copy of this letter and it follows that we accepted Mr Volckaerts's evidence, set out in his witness statement to the effect that the Border Force did not reply to this letter.

Beverex's criticisms of Officer Harris's decision of 23 October 2012

35. Ms Hadfield's skeleton argument criticised Officer Harris's decision as unreasonable for the following reasons:

> (1) The evidence that Beverex produced clearly showed that it owned the goods that had been seized.
>
> (2) Beverex had provided a reasonable explanation for the unusual telephone number with the Danish dialling code of +45.
>
> (3) The evidence produced clearly showed that Beverex was innocent of any wrongdoing.
>
> (4) All in all, Beverex had demonstrated exceptional circumstances justifying restoration of the goods.

Discussion of Officer Harris's decision

36. This Tribunal does not have jurisdiction to determine the lawfulness or otherwise of the Border Force's policy of restoring seized excise goods only if "exceptional circumstances" can be demonstrated. We can only comment on the reasonableness or otherwise of particular decisions made pursuant to that policy. That said, as a general matter, we see nothing unreasonable in principle in Border Force making individual decisions that require "exceptional circumstances" to be demonstrated before lawfully seized excise goods are restored. There is a clear public interest in enforcing the collection of excise duties. Once excise goods have lawfully been seized, we consider it entirely reasonable for Border Force to require that exceptional circumstances are present before they are restored as a more lenient policy would run the risk of diluting the deterrent effect of the Border Force's powers of seizure. Therefore, provided that Border Force give genuine consideration to whether "exceptional circumstances" are indeed present, we do not consider that decisions made in pursuance of this policy are unreasonable simply because they set a high threshold that needs to be met before the goods are restored. Although we set out our conclusion on this issue in the context of Officer Harris's decision specifically, we consider that it applies equally to all of the seizures that we consider in this decision.

37. A striking feature of the correspondence between Altion and Officer Harris is that, at no point in that correspondence, did Altion advance any good reason, supported by evidence, as to why the seized goods should be restored to Beverex. Altion's letter of 7 June 2012 simply requested restoration. It did not even contain any positive assertion either that the documents for the seized load had not been used before or that Beverex was innocent of any involvement in any multiple use of the documents that had taken place. Altion's letter simply made the point that no evidence of a duplicate load had been produced. That was itself a strange point to make in circumstances

where Beverex were asking the Border Force to give them an entirely discretionary relief and where no question of the Border Force having to prove a particular point arose.

38. It was reasonable for Officer Harris to refuse to grant restoration in response to what was nothing more than a bare request, unsupported by any good reasons. However, as noted at [22], the Tribunal is not limited to a consideration of the facts that were before Officer Harris. If, in the light of the facts that are before us, there is a good reason why restoration should be granted, Officer Harris's decision could, after the event, be unreasonable if it failed to consider that reason. We have, therefore, considered the evidence before us and in particular, Mr Volckaerts's witness statements, to consider whether they establish a good reason as to why the goods seized should be restored.

39. Mr Volckaerts's first witness statement sets out evidence relating to the seizure that Officer Harris considered. It contains passages that explain anomalies in some of the evidence of ownership that Beverex put forward. It also refers to the letter of 20 November 2012 that Altion sent purporting to explain the unusual telephone number on Beverex's letterhead. However, it does not specifically confirm the accuracy of the explanation that Altion put forward. Indeed, in a later section of Mr Volckaerts's first witness statement dealing with the unusual telephone number, he makes no mention of the Danish branch to which Altion refers but blames the inclusion of that telephone number on the designer of the Beverex's stationery. However, these passages cannot establish a good reason as to why the seized goods should be restored. At most they are relevant to the question of whether Beverex is the genuine owner of the goods so that, if a good reason to restore the goods were demonstrated, those goods should be restored to Beverex rather than anyone else.

40. The only aspects of Mr Volckaerts's witness statement that could serve as a foundation for an argument that there is a good reason why the goods should be restored to Beverex are those passages in which Mr Volckaerts states that Beverex performed due diligence on all relevant parties with whom it trades and has no control over when transport companies it uses make other trips to the UK. Those points are of potential relevance because they might suggest that, if as the Border Force suspected, a duplicate load of alcohol had previously come into the UK supported by the same paperwork, Beverex was both unaware of that fact and had taken steps to prevent it.

41. Mr Newbold showed us the due diligence material that Beverex had provided. We considered that it was extremely sketchy, consisting of little more than a collection of certificates of incorporation, utility bills and copies of driving licences and passports of individuals whose connection with Beverex's counterparties was not clear. Very little financial information on counterparties was included. At most that documentation established that particular individuals and companies existed. It did not establish that Beverex took any particular steps to check that transport companies and counterparties with whom it dealt were reputable and did not demonstrate that Beverex was innocent of any involvement in "double runs" of alcohol.

42. Nor do we consider that Mr Volckaerts's mere assertion that Beverex was unaware of any duplicate load is such a good reason for the goods to be restored that Officer Harris's decision was unreasonable in failing to take into account that assertion. There may well be circumstances in which seized alcohol should be restored to innocent parties. However, it is reasonable to require much more evidence of innocence than a mere assertion.

43. We therefore consider that, even looking beyond the information that was in front of Officer Harris, Beverex has not shown any good reason why the Border Force should exercise its discretionary power to restore goods. That on its own makes Officer Harris's decision reasonable. Later in this decision we will analyse in detail the quality of evidence of ownership of goods that Beverex put forward in relation to other seizures. In relation to this seizure, we will say only that the evidence of ownership that Beverex adduced was not sufficient to demonstrate that Beverex owned the actual load of alcohol that HMRC had seized for reasons similar to those set out at [59] and [60]. That, therefore, is a further reason why it was entirely reasonable for HMRC to refuse to restore that alcohol to Beverex.

44. Officer Harris's decision, therefore, did not contain any error of law, did not fail to take into account relevant considerations, did not take into account irrelevant considerations and was, overall, a reasonable decision. It is not, therefore, "unreasonable" in the sense set out at [21].

PART II – THE SEIZURE ON 18 OCTOBER 2012; OFFICER CROUCH'S REVIEW OF 26 MARCH 2013 (TC/2013/03688)

Background to the review

45. On 18 October 2012, the Border Force intercepted a vehicle containing 14,962.5 litres of mixed wine. The electronic accompanying document ("EAD") in respect of the Administrative Consignment Code ("ARC") associated with the movement of alcohol was in respect of 17,456 litres of wine. On 7 November 2012, the Border Force issued a Notice of Seizure stating that

> Border Force has identified that [the vehicle transporting the load seized on 18 October 2012] travelled to the UK at 20:35 hours on 16/10/12 manifested as alcoholic beverages.
>
> This earlier movement is within the lifetime of the ARC/e-AD. We believe, therefore, that the unique ARC number presented to Border Force officers has been used previously prior to the interception of this load. An ARC/e-AD is unique and therefore valid only for one movement of excise goods. The seized load has therefore not moved under cover of an e-AD.

46. On 15 November 2012, Altion wrote to the Border Force to request restoration of the goods seized. That request included the following paragraphs:

> **Restoration request**

> We confirm that our client wishes for the Goods to be restored to them. We attached various documents showing owner ship of the Goods.
>
> In making their request to restoration our client relies on the matters set out herein. It is clear that UKBF have not offered any legally satisfactory reasons whatsoever for the seizure. UKBF is causing damage and loss to our client's business without any justification

47. At some point Beverex evidently requested the Border Force to take condemnation proceedings. We were not provided with a copy of the Notice of Claim or evidence as to the outcome of those proceedings, although we can infer that Beverex did not succeed in establishing that the goods were unlawfully seized (since, if it had succeeded, it would not be persisting with a claim for restoration as it would be entitled as a matter of law, to have the goods returned to it).

48. On 28 November 2012, the Border Force responded to Altion's letter and requested further evidence of ownership in the following terms:

> Before consideration can be given to your client's restoration request I require proof of ownership of the goods. This should not only include proof that your client has made payment for the goods, or a copy of the contract showing the payment terms, but that the goods held by our Queen's Warehouse can be physically shown to be those that your client is claiming.

49. On 13 December 2012, Altion sent a letter enclosing further evidence of ownership. They also requested that the Border Force provide them with evidence of the alleged previous use of the ARC.

50. Taking into account the further evidence that Altion provided, the evidence of ownership with which the Border Force were provided included:

> (1) a Purchase Order quoting reference BHU-84 submitted by Beverex to ISA Shopping, one of its suppliers, for a quantity of alcohol including 112 boxes each containing six 75cl bottles of "Lindemans Bin 40";
>
> (2) a Sales Order submitted by Nirkar Ltd to Beverex requesting, inter alia, 112 boxes each containing six 75cl bottles of "Lindemans Bin 40";
>
> (3) a "bon de livraison" issued by Opale Total Negoce ("OTN"), a bonded warehouse in France, recording a consignment of alcohol including 112 boxes of six 75cl bottles of "Lindemans Bin 85" (but no "Lindemans Bin 40") leaving that bonded warehouse. Each category of alcohol identified in that document was accompanied by a "lot number".
>
> (4) Two documents entitled "Payment Receipt" on the letterhead of Beverex apparently evidencing cash payments of £25,000 and £45,000 respectively by Beverex to ISA Shopping.
>
> (5) A document apparently produced by ISA Shopping allocating the cash payments made among various invoices including that relating to "BHU-84" referred to at [50(1)] above.

51. There was thus a discrepancy in the paperwork which showed Nirkar Ltd ordering a quantity of Lindemans Bin 40 from Beverex, and Beverex ordering the same quantity of Lindemans Bin 40 from its own supplier, but Nirkar Ltd actually being delivered Lindemans Bin 85.

52. On 7 February 2013, the Border Force wrote to Altion to state that the seized goods would not be restored broadly because Beverex had not established "exceptional circumstances" so as to justify restoration and also because the Border Force were not satisfied that Beverex was the owner of the seized goods.

53. On 18 February 2013, Altion wrote expressing surprise at the Border Force's conclusion that Beverex's ownership of the goods had not been established given that the Border Force had been provided with a copy of an invoice from Beverex's supplier. Altion did, however acknowledge that there was a deficiency in the copy invoice that had been provided as follows:

> We do note, however, that on further consideration of the invoice from the supplier, there appears to be no address for the supplier company. We have therefore requested that our client contact the supplier of the goods and provide us with further documentation in support of ownership. Please now find attached a further copy invoice for the goods showing the full address of the supplier.

In the same letter, Altion requested a review of the Border Force's decision.

Officer Crouch's review decision of 26 March 2013

54. Officer Crouch's review decision began by recording his understanding that the paperwork produced to support the movement of the goods had been released at 20.00 on 16 October 2012 and that records showed that during the lifetime of that paperwork, the relevant vehicle had also travelled on 16 October 2012 at 20.35. He also noted that, while the ARC and the consignment note (referred to as a "CMR") produced for the load recorded that the consignment totalled 17,456 litres of wine, the quantity of wine actually seized was 14,962.5 litres, a difference of 2,493.5 litres from that recorded on the documentation. Finally, in the "Background" section of his letter, Officer Crouch noted that Beverex had challenged the lawfulness of the seizure and that, in those circumstances, he had approached his review on the assumption that the goods were lawfully seized.

55. Officer Crouch's letter summarised the Border Force's policy on seized excise goods 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.

56. In the section of his letter headed "Consideration", Officer Crouch made the following points:

(1) He stated that he was "guided" by the Border Force's policy but not "constrained" by it.

(2) He concluded that he had been provided with no details of any exceptional circumstances that would justify the goods being restored and referred to a decision of this Tribunal in *Clear Plc* which he considered demonstrated that it was reasonable for the Border Force to have a policy of restoring only in exceptional circumstances. He also concluded, by reference to the Tribunal's decision in *McGeown International* that the burden of proof was firmly on Beverex to make a positive case for restoration of the goods.

(3) He concluded that there were positive additional reasons for refusing to restore the goods namely that Beverex were "at least complicit in the attempt to smuggle goods into the UK", had been involved in a similar seizure of alcohol previously and had not, in any event, established ownership of the alcohol in question.

(4) Officer Crouch expanded on his allegation that Beverex were "at least complicit" in the smuggling of alcohol towards the end of his letter suggesting that there had been an earlier of movement of alcohol under the same ARC and that, since that load was not intercepted, Beverex "exploited the opportunity for a further consignment under the same ARC".

Beverex's criticisms of Officer Crouch's decision of 26 March 2013

57. Ms Hadfield's skeleton argument submitted that Officer Crouch's decision of 26 March 2013 was unreasonable in the following respects:

(1) The evidence produced by Beverex clearly showed that it owned the seized goods. While there was a small discrepancy in the load (namely one pallet of Lindemans 85), Mr Volckaerts's witness statement explained how that had come about.

(2) Beverex was not involved in running duplicate consignments. Officer Crouch was wrong to attach any significance to what she described as the "paperwork being released 35 minutes before the supposed first delivery" since there would not be time for that delivery to leave the bond, arrive at the docks, get booked in and board in those 35 minutes. However, even if there was a duplicate load, the evidence demonstrated that Beverex was innocent of any wrongdoing and was indeed a victim of it.

(3) Given that the previous seizure was the subject of an appeal, it was wrong for Officer Crouch to attach significance to it.

(4) All in all, Beverex had demonstrated exceptional circumstances justifying restoration.

Discussion of Officer Crouch's review decision of 26 March 2013

58. It was clearly reasonable of Officer Crouch to want to be satisfied that Beverex owned the goods in question since he was being asked to release goods that had been seized and give them to Beverex. If Beverex could not demonstrate that it owned the goods, that reason alone would justify a decision not to restore the goods to Beverex.

59. Mr Newbold submitted that the evidence of ownership that Beverex produced, which consisted of invoices, purchase orders and delivery notes was inadequate as it specified only generic quantities of goods and did not contain other information, such as expiry dates of the wines concerned, or pallet numbers that could be linked with the specific goods seized. He submitted that it was particularly important to have evidence of ownership of this nature where it is suspected that fraud is being committed involving two similar loads of alcohol coming into the UK in reliance on the same ARC as, if the Border Force were minded to restore alcohol, they would need to be satisfied that they were restoring the right load to the right person. He also submitted that, where ownership is to be established by reference to invoices, it is reasonable for the Border Force to wish to be satisfied that the invoices have been paid. If those invoices have not been paid, there may be competing claims to ownership of the goods as between the buyer and the unpaid seller and it is reasonable for the Border to wish to understand whether there are such potential competing claims before restoring the goods to a particular person.

60. In principle, we agree with these submissions, although we would not wish to go so far as to specify precisely what evidence needs to be supplied in any given case. While the "bon de livraison" referred to at [50(3)] referred to "lot numbers", we took these to be references to holdings within the bonded warehouse and Mr Volckaerts's witness statement did not explain to our satisfaction how, if at all, the alcohol shown on the "bon de livraison" could be identified with the alcohol that the Border Force seized. It follows that we consider that, even ignoring the anomalies involving the Lindemans Bin 40 and Bin 85, it was reasonable for Officer Crouch to conclude that the paperwork that Beverex submitted did not establish Beverex's ownership of the seized goods to his satisfaction and, for that reason alone, it was reasonable for him not to restore the goods to Beverex.

61. We also do not consider that Mr Volckaerts's witness statement did explain the anomaly involving the Lindemans Bin 85 and Bin 40. Mr Volckaerts's explanation was that ISA Shopping made a typographical error in the document offering Beverex the load. That might be an explanation if the purchase order from Nirkar Limited recorded an order of Lindemans Bin 85. However, as noted at [50(2)], Nirkar's purchase order was for Lindemans Bin 40 and, accordingly, the paperwork showed Nirkar as ordering Lindemans Bin 40 from Beverex, Beverex ordering Lindemans Bin 40 from ISA Shopping but, having done so, unaccountably delivering Lindemans Bin 85 to Nirkar Limited. Therefore, not only did the evidence of ownership that Beverex provided fail to establish a link with the actual goods seized, there were also internal inconsistencies in it that called into question whether Beverex had made an order that corresponded to the load that was seized.

62. Finally, the evidence of payment that had been provided was sketchy. Mr Volckaerts's witness statement explained that Beverex had a practice of sending couriers to its suppliers' premises with cash that would be handed over and allocated against specific invoices. Mr Newbold invited us to conclude that this evidence was implausible not least since it apparently involved a Hungarian company sending large amounts of cash (in sterling) to discharge liabilities owed to a French supplier. Given the points we make at [8], we will not make a finding that Mr Volckaerts's evidence in this respect was untrue. However, it was certainly reasonable for Officer Crouch to be sceptical about the evidence of payment that was put forward.

63. There were some flaws in Officer Crouch's review letter. He does not take into account the fact that the paperwork relating to the load was released only 35 minutes before the relevant vehicle was said to have first arrived in the UK containing a duplicate load of alcohol. It clearly would not have been possible for a vehicle to leave OTN's bonded warehouse in France with paperwork newly issued at 20.00 on 16 October and arrive in the UK with that paperwork at 20.35. There may have been reasons why, even taking into account the short 35 minute interval between the paperwork being released and the vehicle arriving in the UK, there were still reasonable grounds for suspicion that a duplicate load was involved, but Officer Crouch's letter does not engage with these issues. We also consider that he did not fully explain the reasons for his view that Beverex was "at least complicit" in the smuggling of alcohol.

64. However, we do not consider that these flaws are sufficient for us to direct that a further review be performed applying the principles set out at [23] and [24] above. Even if Officer Crouch had taken into account the short 35 minute time interval referred to above, and even if he had no suspicions that Beverex was "at least complicit" in alcohol smuggling, he could only have come to one conclusion namely that, since Beverex had not proved that it owned the seized goods, those goods should not be restored to Beverex.

PART III – THE SEIZURE ON 19 JULY 2012; OFFICER CROUCH'S REVIEW OF 10 APRIL 2013 (TC/2013/03301)

Background to the review

65. On 19 July 2012, Border Force officers intercepted a lorry at Dover that was carrying a load of mixed beer. The load was seized and a Notice of Seizure was issued that recorded the Border Force's view that there had been an earlier movement of the vehicle within the lifetime of the ARC/EAD and that it was therefore suspected that the ARC in question had already been used on a previous occasion.

66. On 5 September 2012, Altion wrote to the Border Force to request restoration of the goods seized. Altion stated that, since they had not yet seen the Notice of Seizure they were not aware of the reasons for the seizure and required the Border Force to give reasons.

67. On 17 September 2012, the Border Force wrote to request proof of ownership in terms similar to those set out at [27].

68. On 18 December 2012, following a reminder from the Border Force, Altion provided a set of documentation as evidence of Beverex's ownership of the goods in question. Altion's letter included the following paragraph:

> We understand that the driver of the vehicle… provided the enclosed CMR, as documentary evidence of the load that he brought in previously. As can be seen, this load was for a completely different client of Les Vins Du Tunnel and the movement was carried out by a different haulier. This clearly has nothing to do with our client. Indeed it appears that the haulier in that case was another client of ours, although we are surprised that the haulier appears to have given our address…[This] does not change the fact that the previous movement was clearly nothing to do with this movement, and therefore nothing to do with Beverex.

69. The evidence of ownership included:

(1) A document apparently sent by MKG Convenience Limited ("MKG") to Beverex ordering a quantity of alcoholic drinks including one pallet of Red Stripe beer and one pallet of "Tennents Supper" (which we assumed was a reference to Tennents Super beer).

(2) A purchase order numbered BHU-37 sent by Beverex to ISA Shopping ordering a quantity of alcohol. That purchase order was for a range of drinks similar to that set out at (1) above. However, instead of ordering Red Stripe and Tennents Super beer, Beverex ordered a quantity of Budweiser and Dubowe beer.

(3) A Delivery/Release Note apparently instructing Les Vins du Tunnel, a bonded warehouse in France, to release a quantity of alcohol to MKG including Tennents Super and Red Stripe.

(4) Two "Bons de livraison" documents issued by Les Vins du Tunnel quoting different ARC numbers. The first document listed 26 pallets of beer, including Tennents Super and Red Stripe but no Budweiser or Dubowe, and referred to an ARC ending in 770. The second document listed 28 pallets of beer and included both Budweiser and Dubowe and Tennents Super and Red Stripe and quoted an ARC number ending in 347. Both documents identified "lot numbers" for the various categories of alcohol to which they referred.

(5) An email apparently from Beverex to Les Vins du Tunnel dated 17 July 2012 stating:

> As the Delivery was amended, [is] this transfer note accurate? Does the transfer note need amending? Please confirm that we have no stock left over.

(6) A document apparently evidencing a transfer of one pallet of Red Stripe and one pallet of Tennents Super from Beverex's account with Les Vins du Tunnel to ISA's account with Les Vins du Tunnel.

(7) A CMR referring to a load of alcohol (including a pallet of Budweiser and a pallet of Dubowe beer and referencing the ARC number ending 770) being transported by Fingal International Logistics Limited ("Fingal"), a haulier based in Dublin.

(8) A CMR referring to a different load of alcohol being transported by a haulier named Visima Limited (that gave the same address as that of Altion) and quoting a completely different ARC number.

(9) Two documents entitled "Payment Receipt" on the letterhead of Beverex (quoting the unusual telephone number +45 1234 3567890 which we have discussed previously) apparently evidencing cash payments of £20,000 and £40,000 respectively by Beverex to ISA Shopping.

(10) A document apparently produced by ISA Shopping allocating the cash payments made among various invoices including that relating to "BHU-37" referred to at [69(2)] above.

70. On 5 February 2013, the Border Force refused to restore the goods seized stating that they were not satisfied that Beverex was the owner of them.

71. On 12 March 2013, Altion requested a review stating that the reasons given were "woefully inadequate" and ignored the comprehensive evidence of ownership that had been provided.

Officer Crouch's review of 10 April 2013

72. Unsurprisingly, Officer Crouch's review letter of 10 April 2013 followed the same format as his earlier review letter of 26 March 2013. We will not, therefore, set out extracts from his letter of 10 April 2013 in the same detail as we set out extracts from the earlier letter.

73. Officer Crouch's overall conclusion was that the goods should not be restored to Beverex firstly since Beverex had not set out any "exceptional circumstances" that would justify the goods being restored. He also concluded that Beverex had not demonstrated that it owned those goods since:

> …all the paperwork provided by you relates to an entirely different ARC number to that produced at the time of seizure of the goods. Furthermore, the goods tallied differ from those released against the ARC produced at the time of interception.

74. Officer Crouch did not repeat the assertion, contained in his earlier letter of 26 March 2013, that Beverex was "at least complicit" in the smuggling of alcohol.

Beverex's criticisms of Officer Crouch's decision of 10 April 2013

75. Ms Hadfield's skeleton argument set out the following criticisms of Officer Crouch's decision:

> (1) The paperwork that Beverex produced clearly established that Beverex was the owner of the seized goods.
>
> (2) Beverex had provided satisfactory explanations of the discrepancies in the paperwork.
>
> (3) The issue relating to the ARC on interception had been satisfactorily explained.
>
> (4) The evidence showed that Beverex was innocent of all wrongdoing.
>
> (5) All in all, Beverex has demonstrated exceptional circumstances justifying restoration of the goods.

Analysis of Officer Crouch's decision

76. None of the evidence of ownership that Beverex provided could be linked specifically with the alcohol that was seized. Therefore, at most that evidence could establish that Beverex had previously ordered alcohol of a type and quantity that corresponded with that seized. For reasons set out at [58] to [59] above, we consider that it was reasonable for Officer Crouch to conclude that this did not demonstrate that Beverex was the owner of the specific alcohol that had been seized.

77. At the time Officer Crouch made his decision, he did not have in front of him a detailed explanation of the anomalies in the paperwork provided. Mr Volckaerts included an explanation in his first witness statement and, in view of the point we make at [22], we have considered that explanation to assess whether, in the light of that explanation, Officer Crouch's decision could now be characterised as unreasonable.

78. Mr Volckaerts's explanation was broadly that an error had been made in the paperwork. When Les Vins du Tunnel discovered the error:

> [they] did add the correct drinks onto the order list, being one pallet of Dubowe Moore 24x500 7% and one pallet of Budweiser 4.8% 24x330, which were not included in the original order, however they failed to remove the incorrect pallets of drinks from the list in error. The amended Bon de Livraison and the Transfer Note show 28 pallets which is clearly wrong as 28 pallets will not fit in a lorry. The email trail with the supplier is attached …. The next morning the bond warehouse corrected the position by returning the two pallets of Tennents and Red Stripe to the account of ISA Shopping and issued the Company with a further transfer note for these two loads.

79. This does not explain the anomaly. Firstly, Mr Volckaerts evidence is not backed up by witness statement on behalf of Les Vins du Tunnel. It also leaves some

questions unanswered. The documentation at [69] indicates that MKG ordered Tennents and Red Stripe beers. Mr Volckaerts's evidence suggests that they were to be provided with Budweiser and Dubowe instead. That suggests that the error was made by MKG when they submitted an order for Red Stripe and Tennents to Beverex when they should have ordered Budweiser and Dubowe. However, no evidence is given from MKG to substantiate that this was indeed the error. Nor is it explained how Les Vins du Tunnel discovered the error. The bonded warehouse was presumably initially given instructions to deliver Red Stripe and Tennents to MKG. It is not clear how the bonded warehouse could itself have realised that these instructions did not reflect what MKG had actually ordered. In view of the importance of establishing that Beverex truly did own the seized goods, the explanation that Mr Volckaerts put forward cannot be regarded as satisfactory.

80. We do not consider it is even arguable that Beverex had established that it was innocent of all wrongdoing. Firstly, at no point in its correspondence with the Border Force did Beverex advance any cogent or coherent reason why the Border Force should exercise their discretionary power to restore the goods to Beverex. Their production of the CMR referred to at [69(8)] could perhaps be seen as an attempt to explain that there had not been any previous movement of goods under the same ARC number. However, that CMR proved nothing: it did not demonstrate that Fingal had not made an earlier movement using the same ARC as it evidenced a movement transported by Visima Limited rather than Fingal.

81. The points made at [76], [79] and [80] each individually meant that Officer Crouch's decision not to restore the goods was reasonable. We do not consider that his decision has any defect of the kind set out at [21] and his decision was, accordingly, reasonable.

PART IV – THE SEIZURE ON 24 JANUARY 2013; OFFICER BRENTON'S REVIEW OF 1 NOVEMBER 2013 (TC/2013/09682)

Background to the review

82. On 24 January 2013, Border Force officers intercepted a lorry containing a load of alcohol. On 1 February 2013, Altion acting on behalf of Beverex wrote to request restoration and also to require the Border Force to take condemnation procedures in order to establish the legality of the seizure. The grounds on which Altion requested restoration were as follows:

> Our client has not been provided with a reason for the seizure and UKA are causing damage and loss to our client's business seemingly without any justification.

83. Beverex requested a firm called Debello Law to act in connection with the condemnation proceedings. Owing to what Mr Volckaerts described in his witness statement as a "mix up", the Border Force were ultimately not required to take condemnation proceedings within applicable time limits.

84. On 20 March 2013, Altion sent evidence of Beverex's ownership of the seized goods to the Border Force. That evidence included:

> (1) An invoice from ISA Shopping to Beverex relating to an order BHU-127 including a quantity of Strongbow cider;
>
> (2) A sales order and delivery note apparently recording an intended sale to MKG, also including a quantity of Strongbow cider; and
>
> (3) A "bon de livraison" from the bonded warehouse, Les Vins du Tunnel.

As well as listing types and quantities of alcoholic drinks, the "bon de livraison" included a reference to "lot numbers" which we took to be a reference to holdings of alcohol in Les Vins du Tunnel's warehouse. However, we were not satisfied that this information enabled the subject matter of those orders be matched specifically with the goods that the Border Force had seized.

85. On 12 June 2013, the Border Force wrote to Altion to request proof of ownership of the goods in the following terms:

> I note however we require proof of ownership of goods. This should not only include proof that your client ordered the goods i.e. an invoice already received but also that your client has made payment for the goods i.e. a bank statement or a copy of the contract showing payment terms and that the goods held by our Queens Warehouse can be physically shown to be those.

86. Throughout the correspondence between Altion and the Border Force, the seized load was described as "25,252.34 litres of mixed beer".

87. On 16 August 2013, the Border Force wrote to Altion to inform them that the request for restoration had been refused for the following reasons. The Border Force described the load that had been seized as 25,752 litres of mixed beers. This figure is incorrect and appears to be taken from the "bon de livraison" referred to at [84(3)] which gives a figure for the weight of the alcohol (rather than its volume). The Border Force gave the following reason for refusing to restore the seized alcohol:

> I conclude that there were no exceptional circumstances that would justify a departure from the Commissioners' policy as your client has provided no proof of payment despite our request of 12 June 2013. They have not evidenced that they hold legal title to the goods and as a consequence I can confirm that on this occasion **the goods will not be restored**.

88. On 25 September 2013, Altion wrote to request a review of this decision. Altion enclosed evidence of payment for the goods in the form of statements, similar to those described at [69(9)] and [69(10)] that purported to show that Beverex had paid a cash amount of £20,000 to ISA Shopping and that ISA Shopping had allocated some of that amount towards invoice BHU-127. They also enclosed some print out from the companies registry in France containing information on both ISA Shopping and on Les Vins du Tunnel.

Officer Brenton's review of 1 November 2013

89. Officer Brenton set out the conclusions of his review in a letter dated 1 November 2013. His decision was that the seized goods should not be restored. The original front page of Officer Brenton's letter described the goods seized as 25,752 litres of "mixed beer and cider". However, on 12 November 2013, Altion wrote to Officer Brenton to explain this description did not correspond with the load actually seized (and that Officer Brenton had used incorrect references in the "Your reference" and "Our reference" details in his letter). On 27 November 2013, Officer Brenton wrote to Altion apologising for what he described as typographical errors and enclosing an amended front page to his review letter altering the description of the seized load to 25,252 litres of "mixed beer". In his letter explaining this change, Officer Brenton wrote as follows:

> Having checked the BF database I can confirm that all the alcoholic goods seized were mixed beers. In this I question why you on behalf of your client produced as ownership documentation invoices which included cider.

90. We concluded that Officer Brenton had, in the first version of his letter, copied the figure of 27,752 litres from the Border Force's letter of 16 August 2013 referred to at [87] and had referred to the load as "mixed beer and cider" because some of the invoices that he had considered during his review (referred to at [84(1)]) included quantities of Strongbow cider. We also concluded that, since he had used another review letter that he had prepared in the past as a base for his review letter, he had failed to update the "Your reference" and "Our reference" details properly. We were, however, satisfied that Altion had not mistakenly been sent a review letter relating to another seizure not least since the sections of the letter referred to at [92] were clearly specific to Beverex.

91. Officer Brenton's letter summarised the Border Force's policy to the effect that seized excise goods should not normally be restored but that each case is considered on its merits to determine whether or not restoration may be offered exceptionally. Having stated that he was guided by that policy, but not fettered by it, he concluded that the goods should not be restored.

92. Officer Brenton's first reason was that no exceptional circumstances had been shown to justify restoration of the goods. He concluded that there were also positive additional reasons not to restore goods in the following paragraph of his letter:

> In considering restoration the first step is to establish who has title to the goods at the time of seizure… To that end I have examined the letter of authority as supplied by you [i.e. Altion] from your client. The telephone number as stated on the headed paper is [Officer Brenton quotes a telephone number with a +36 prefix]. I tried to ring the number but this was a voice mail quoting the number dialled. Also the contact email address is at 'gmail' – these are not the contact details one would expect for a bona fide trading company. Furthermore 'Google Maps' shows Beverex's address to be a residential area of retail shops with flats above. Also MKG Convenience Ltd is suburban

> residential area [sic]. I also note that in a previous seizure of similar goods from your client the telephone number as stated on the headed paper was **+45 1234 3567890**. The Officer dealing with that case was not surprised when no such number existed… It appears that since this anomaly was brought to your attention your client has enlisted the aid of a voicemail phone number in Hungary. All these inconsistencies do not persuade me that this is a bona fide company.

93. In oral evidence, Officer Brenton said (and we accepted) that he had tried Beverex's number (with a +36 prefix) five or six times during normal business hours (allowing for the time difference between the UK and Hungary) but the phone had not been answered on any occasion.

Beverex's criticisms of Officer Brenton's review of 1 November 2013

94. Beverex makes the following criticisms of Officer Brenton's review decision:

(1) The original letter of 1 November 2013 was full of errors.

(2) There was confusion over the goods seized.

(3) The evidence showed that Beverex was a legitimate company; it was not reasonable to take any other view simply on the basis of the quality of Beverex's answering service and the email provider that it used.

(4) The evidence clearly demonstrated that Beverex owned the goods.

(5) To the extent it was suggested that Beverex was involved in wrongdoing, the evidence clearly shows that it was not and, accordingly, it was not proportionate to refuse to restore the goods.

(6) All in all, the Appellant has demonstrated exceptional circumstances justifying restoration of the goods.

Discussion of Officer Brenton's review of 1 November 2013

95. In its original request for restoration, Beverex provided scarcely any reasons as to why the goods should be restored. When one focuses on the essence of that correspondence, it is little more than a bare request for restoration. Mr Volckaerts's second witness statement does not take matters any further forward. That witness statement is lengthy, running to some 30 numbered paragraphs, and includes detailed sections criticising the errors in HMRC's review letters and what are said to be unwarranted assumptions about Beverex. However, that witness statement contains little if any evidence (for example evidence as to innocence in any wrongdoing) which could justify HMRC exercising their discretionary power to restore goods.

96. The evidence of ownership referred to at [84] and [88] suffers from the now familiar defect that it cannot be linked to the load of alcohol that Border Force actually seized. Moreover, Officer Brenton was entitled to be sceptical as to the

probative value of the receipts apparently recording the payment of round cash sums in sterling.

97. There were typographical slips in Officer Brenton's letter. In addition, there was some confusion as to the amount of alcohol that had been seized which appears to have arisen as a result of Border Force officers confusing the weight of the load of alcohol with its volume. However, it is overstating matters to say that Officer Brenton's letter was "full of errors". Moreover, such errors as there were did not detract from the conclusions that he expressed as to why the goods should not be restored.

98. We consider that Officer Brenton did leap somewhat to conclusions in the passage of his letter referred to at [92]. We would not ourselves conclude that the use of a "gmail" address necessarily means that a company is not engaged in a bona fide business. There were other possible explanations for the fact that Beverex did not answer the phone: it might have poor administration or crucial staff members might be ill or on holiday. We would not ourselves be confident that it would be possible to tell from a picture on Google Maps whether a district is a residential area or not. However, we are not satisfied that no reasonable officer could have had the same suspicions as to whether Beverex was a "bona fide company". There was evidence for those suspicions. Moreover, even in the light of the evidence that Beverex put forward at the hearing (which was limited given that Beverex did not attend that hearing) we were not satisfied that Officer Brenton was unreasonable to have suspicions as to Beverex's bona fides.

99. However, even if Officer Brenton's suspicions as summarised at [92] above were unreasonable or unjustified, we note that Officer Brenton described these suspicions only as additional reasons for not restoring the goods. We consider that the factors set out at [95] and [96] above coupled with the fact that this was the fourth seizure of goods involving Beverex in some eight months meant that Officer Brenton would inevitably have concluded that the goods should not be restored to Beverex. Therefore, applying the approach summarised at [23] and [24], even if we thought that these suspicions were unreasonable or unjustified (which we do not), we would not order a further review.

PART V – THE SEIZURE ON 12 APRIL 2013; OFFICER PERKINS'S REVIEW OF 9 JANUARY 2014 (TC/2014/00816)

Background to the reviews

100. On 12 April 2013, the Border Force seized a quantity of alcohol.

101. On 8 May 2013, Altion wrote to dispute the legality of the seizure (and to require the Border Force to take condemnation proceedings) and to request restoration of the goods to Beverex. With that letter, Altion enclosed evidence of ownership similar in nature to that produced in connection with the other seizures including:

(1) An invoice numbered BEV-148 issued by Beverex to Nirkar Ltd relating to a quantity of alcohol including "Blossom Hill", "Hardys" and "Echo Falls" wines.

(2) A delivery/release note issued by Beverex to Nirkar relating to invoice BEV-148 and showing the alcohol being transported by Hillfer Ltd to the account of Nirkar Ltd at Abbey Storage, a bonded warehouse near London.

(3) A purchase order sent by Beverex to ISA Shopping for a load of alcohol corresponding to that set out at (1).

(4) A "bon de livraison" issued by OTN, a bonded warehouse in France, that corresponded with the load of alcohol described at (1) and setting out "Lot numbers" for each constituent of the load.

(5) A CMR document dated 8 April 2013 that related to a movement of alcohol (that did not correspond with the alcohol shown on the invoices referred to above) being transported by Hillfer Ltd to a bonded warehouse in Bristol. Apart from the fact that it referred to the same haulier, this CMR document bore no evident relation to the other documents that Altion had provided.

102. On 20 June 2013, the Border Force wrote to Altion to request proof of ownership in terms similar to those used in connection with the other seizures demonstrating that:

> …the goods held by our Queens Warehouse can be physically shown to be those that your client is claiming.

103. On 18 October 2013, the Border Force wrote to Altion refusing to restore the load of alcohol to Beverex. That letter described the seized alcohol as 17,745 litres of wine and concluded that the goods would not be restored to Beverex as Beverex had not provided adequate proof of ownership.

104. On 27 November 2013, Altion wrote to the Border Force to request a review of the decision of 18 October 2013. As well as requesting a review, Altion's letter made the following points:

(1) The Border Force had described the alcohol as 17,745 litres of wine, but the summons issued in connection with the condemnation proceedings described the load as 15,210 litres of wine.

(2) The condemnation proceedings referred to the Border Force's suspicion that there was a "double run" involving the same paperwork. Altion expressed surprise at this assertion given that the Border Force "have already been provided with the CMR for the previous load taken by that transporter". They enclosed a further copy of this document which was the same CMR as is referred to at [101(5)].

(3) Altion enclosed further evidence of ownership in form of a CMR for the load and a largely hand-written payment receipt (apparently signed by

ISA Shopping) confirming receipt of £25,000 in cash which had been allocated to invoice BEV-148 referred to at [101(1)] above.

(4) Altion also enclosed a print out from the French Companies House website of certain information on ISA Shopping and copy due diligence that Beverex carried out on Hillfer Ltd including a copy of a driving licence and utilities bill relating to an individual said to be a contact of Beverex at Hillfer Ltd.

Officer Perkins's review of 9 January 2014

105. On 9 January 2014, Officer Perkins completed her review and concluded that the goods would not be restored to Beverex. We will not quote her letter in detail since it follows a pattern very similar to the review letters for other seizures. Therefore, we will note only that Officer Perkins recited the background to the seizure, summarised the Border Force's policy in terms similar to those set out at [32] and stated that, in performing her review, she was "guided" but not "constrained" by that policy.

106. Officer Perkins's reasons for refusing to restore the goods to Beverex can be summarised as follows:

(1) Beverex had not provided details of any "exceptional circumstances".

(2) The hand-written receipt for the cash payment was insufficient to establish that the actual goods seized had been paid for.

(3) The Excise Management Control System ("EMCS") record relating to the seized load described that load as being 3380 cases each containing 6 bottles of "Echo Falls Merlot @ 13.5%". However, the documents that Beverex had produced consisted primarily of wines other than Echo Falls Merlot.

(4) There appeared to have been a previous movement of the trailer used to transport the seized load within the lifetime of the relevant ARC number.

(5) This was the fifth seizure of goods involving Beverex since 17 May 2012.

(6) Overall Officer Perkins was not satisfied that Beverex was the owner of the seized goods. In addition, on a balance of probabilities it was reasonable to assume that Beverex was involved in the importation of excise goods into the UK without payment of excise duty.

Beverex's criticisms of Officer Perkins's decision

107. Beverex argues that Officer Perkins's decision was unreasonable for the following reasons:

(1) The evidence clearly demonstrated that Beverex owned the seized goods.

(2) If one adds up the quantity of litres of wine listed in the various documents, it is clear that the figures on Beverex's paperwork tally with the seized wine.

(3) Beverex had no control over other journeys that its haulier undertook.

(4) Beverex had produced the CMR for the previous load that the haulier had transported that demonstrated that the goods transported previously were completely different from those that Beverex was transporting.

(5) It was unreasonable to take account of other seizures that were the subject of appeals to this Tribunal.

(6) The evidence clearly shows that the appellant was innocent of any wrongdoing.

(7) All in all Beverex has demonstrated "exceptional circumstances" justifying restoration of the goods.

Analysis of Officer Perkins's decision

108. Beverex's criticisms of the decision raise a number of points that have been dealt with in the context of other review decisions and we can deal with them quite shortly.

109. Firstly, for reasons similar to those set out at [59] and [60], we do not consider that the evidence of ownership that had been put forward demonstrated that Beverex was the owner of the very goods that had been seized. Mr Volckaerts's witness statement contained no evidence that addressed Officer Perkins's concerns about the discrepancies between the description of the alcohol seized in the eAD relating to the load and the description set out on the paperwork Beverex provided. It was entirely reasonable for her to conclude that ownership had not been established and this reason alone justifies her decision not to restore the goods to Beverex.

110. As we have noted at [42], a mere assertion that a person has no control over previous journeys that its haulier makes is not of itself enough to amount to a good reason why seized excise goods should be restored. If Beverex had put forward positive proof of its innocence and/or positive proof that it had taken reasonable steps to ensure that its hauliers were not involved in transporting duplicate consignments that could have taken matters forward. However, the evidence that Beverex produced did not amount to positive proof and the "due diligence" material that Beverex advanced was sketchy and inconclusive showing little more than particular companies existed and particular individuals, whose significance or role were not explained, had received utility bills and held driving licences.

111. It was entirely reasonable of Officer Perkins to take into account previous seizures even though Beverex was appealing against the Border Force's decision to refuse to exercise its discretion to restore the goods. If the Border Force had previously agreed to restore seized goods the fact that discretion had been exercised previously would be relevant to whether it should be exercised again. Therefore, even if the Tribunal were to decide that an earlier refusal to restore was unreasonable, the

fact that previous seizures had been made was still relevant to the discretion Officer Perkins was being requested to exercise.

112. Therefore, Beverex had not established that it was the owner of the seized goods, had not shown any good reasons (still less any "exceptional circumstances") why the goods should be restored and had not established that it was innocent of any wrongdoing. Officer Perkins's decision had no defect of the kind set out at [21] and was reasonable.

Conclusion

113. All of the appeals are dismissed.

114. 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.

JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 9 MARCH 2016