[2017] UKFTT 212 (TC)

TC05703

Appeal number: TC/2014/1553

Customs & Excise – appellant's vehicle seized on suspicion of carrying derv (on which excise duty due) – appellant thought that the load was lubricating oil (on which excise duty not due) - seizure lawful - HMRC refused restoration based on appellant's awareness of nature of load – held: decision unreasonable as in fact appellant not so aware – not inevitable that HMRC would make same decision on facts found by tribunal – appeal allowed - HMRC directed to undertake fresh review

FIRST-TIER TRIBUNAL
TAX CHAMBER

TOMEX TRANS FHU TOMASZ BOMBA **Appellant**

- and -

THE COMMISSIONERS FOR HM REVENUE & CUSTOMS ("HMRC") **Respondents**

TRIBUNAL: JUDGE ZACHARY CITRON
MR DUNCAN MCBRIDE

Sitting in public at the Royal Courts of Justice, London on 22 November 2016

Mr WM Andrew Zalewski, Counsel, instructed by Ardens Solicitors, for the Appellant

Mr Michael Paulin, Counsel, instructed by the General Counsel and Solicitor to HMRC, for the Respondents

DECISION

1. The appellant's vehicle (registration K7 TOMEX) was seized at Dover on 11 November 2013 by officers of UK Border Force on suspicion of transporting derv (on which excise duty was due) rather than the substance indicated on the consignment note, lubricating oil (which did not attract excise duty). This was an appeal against HMRC's confirmation, on review, of their earlier decision to refuse restoration of the vehicle.

The appeal

2. On 21 January 2015, Ms L Bines, a higher officer of HMRC, wrote to the appellant's solicitors confirming, on review under s15 Finance Act 1994, HMRC's decision (by letter of 22 November 2013) to refuse restoration of the vehicle to the appellant. In a letter to the appellant's solicitors of 27 February 2015, Ms Bines stated that, after looking at certain documentation received from the appellant's solicitors subsequent to her 21 January 2015 letter, she was still of the opinion that the vehicle should not be restored. We shall refer to these letters from Ms Bines as the "decision letters" and to the decision made in them as "the decision in question".

3. By notice of appeal dated 29 March 2015, the appellant appealed against the decision in question under s16 Finance Act 1994.

4. By the time of the hearing, HMRC had agreed to release a trailer (registration KR231 RP) leased to the appellant and seized at the same time as the vehicle. The subject matter of the hearing was therefore HMRC's refusal to restore the vehicle (only).

Procedural matter

5. At the start of the hearing, counsel for both parties told the Tribunal that they had agreed that HMRC would present their case first. The hearing proceeded on this basis, with HMRC's witness (Ms Bines) giving evidence in the morning. Just before the lunch break - following cross examination of Ms Bines by Mr Zalewski and Mr Paulin's oral presentation of HMRC's case (and before the appellant's witness, Mr Bomba, had given evidence) - Mr Paulin asked the Tribunal to dismiss the appeal, on the grounds that it was entirely without merit. We declined, as it would not, in our view, have been fair and just to decide the appeal without having heard oral submissions on behalf of the appellant and the oral testimony of Mr Bomba.

Evidence

6. We heard oral evidence from Mr Tomasz Bomba (the owner and manager of the appellant) through an interpreter and from Ms Bines. We also had their witness

statements (Mr Bomba's was dated 15 November 2016 and Ms Bines' was dated 30 November 2015). We found them both to be reliable witnesses. In particular, it will be seen from our findings of fact (below) that we have accepted Mr Bomba's evidence as to the awareness of the appellant as to certain matters (as Mr Bomba was the guiding mind of the appellant).

7. The bundle contained correspondence between the parties as well as the following:

(1) An international consignment note (the "consignment note" – some of the evidence referred to this as the "CMR") (number 444000/290) of 6 November 2013, with the following information:

(i) The sender was shown as 'PETROSTAN' Sp.zo.o ("Petrostan") of Promna in Poland.

(ii) The consignee was shown as Pavol Koren TRENATEX ("Trenatex") of Lubochna in Slovakia.

(iii) The place of delivery of the goods was shown as the Irish Concete (sic) Society at an address in Drogheda in Ireland.

(iv) The place and date of taking over the goods were described as the same address as that for Petrostan, and 6 November 2013.

(v) The nature of the goods was shown as "Olej smarowy G-100". We understand that "olej smarowy" means lubricating oil in Polish.

(vi) The statistical number was shown as 27101999.

(vii) The gross weight was shown as 23,200 kg.

(viii) Under "Sender's instructions", the form showed: "UN 1202 ADR 3."

(ix) The appellant was shown as the carrier.

(x) On the top right of the consignment note it was stated: "This carriage is subject, notwithstanding any clause to the contrary, to the Convention on the Contract for the International Carriage of goods by road (CMR)"

(2) A document in Polish dated 6 November 2013 appearing to be a receipt, issued by Petrostan and addressed to Trenatex, relating to "olej smarowy G-100" and charging €22,341.60 (and nil VAT).

(3) Four copies or versions of a "Multimodal Dangerous Goods Form", showing:

(i) Petrostan as the "shipper" (on whose behalf the form was signed on 6 November 2013)

(ii) The Irish Concrete Society as the consignee

(iii) "PL" as the place of loading

(iv) "IR" as the destination

(v) The appellant as the haulier

(vi) The description of the goods was slightly different in the four versions; but each contained the words "olej smarowy", 23,200 kg, and the codes 27101999 and UN 1202 ADR 3

(4) An internet printout from an EU customs website, headed "TARIC Measure Information" and indicating that 2710 19 99 referred to "other lubricating oils and other oils."

(5) Six "Result of analysis" documents dated 12 December 2013 from the laboratory of the Government Chemist stating "sample is a mixture of derv and lubricating oil" (in five cases) and "sample is a mixture of derv, fames and some lubricating oil" (one case).

(6) Translation from Polish of a document dated 3 January 2014 from Lotos Lab in Gdansk (ordered by the appellant) testing various "pots". This stated that four samples did comply with, and two samples did not comply with, "the requirements of PN-EN 590+A1:2011 *Automotive fuels. Diesel. Requirements and test methods* and the Regulation of the Minister of Economy of 2nd February 2012 on Liquid Fuels Quality Requirements".

(7) Translation from Slovak of a certificate of registration and tax identification number issue dated 13 February 2003 for Pawol Koren, issued by the Slovakian tax authority.

(8) Translation from Polish of a certificate of VAT payer registration dated 24 June 2008 for Pawel Szymon Wojtarowicz signed by the Polish tax authority.

(9) Translation from Polish of a certificate of entry in the register of business activity dated 30 October 2008 for PAWEX Pawel Wojtarowicz signed by the municipal office in Jaslo, Poland. Activities included freight transport by road.

(10) Translation from Slovak of a VAT registration certificate issue protocol dated 31 January 2006 for Trenatex issued by the Ruzomberok tax authority.

(11) Translation from Polish of a "notification of committing a criminal offence" submitted by the appellant to the district prosecutor's office in Nowy Sacz Poland on 7 May 2015, in respect of its suspicion of a criminal offence committed by Trenatex.

(12) Translation from Polish of a decision of the governor of the customs office in Radom, Poland giving Petrostan an excise duty identity number as a duty-suspended warehouse entity.

(13) Email from Pavol Koren to the appellant's solicitors of 2 September 2015 in which he states that the stamp and signature of Trenatex on a one-page document (not translated into English) headed "Awizacja" and dated 1 October 2013 was not his.

(14) Other documents not translated into English.

8. Mr Zalewski produced a document printed from the internet called "About the ADR – European Agreement concerning the International Carriage of Dangerous Goods by Road – ADR applicable as from 1 January 2015"

Findings of fact

The delivery and the seizure

9. The appellant was a small Polish haulage company, making deliveries of goods around Europe. It was owned and managed by Mr Bomba, who had been involved in international shipment for about ten years.

10. On 6 November 2013 the appellant had a driver take the vehicle with a tanker trailer to pick up a load from Petrostan at premises in Promna in Poland. The delivery job had been referred to the appellant by another company, Pawex, with which the appellant had dealings for a number of years (35 orders between 2011 and 2015). The appellant understood the load to be lubricating oil for delivery to the Irish Concrete Society at an address in the Republic of Ireland.

11. The appellant had no previous substantial business dealings with either Petrostan or the Irish Concrete Society; it carried out no "checks" on these bodies or their bona fides. Neither did it perform any check that the liquid that was loaded up and sealed in the tanker was, in fact, lubricating oil. The consignment note described the liquid as such; it also showed two code numbers, one of which (the "statistical number") was consistent with the load being lubricating oil, the other of which was not (being a UN code number for "gas oil or diesel fuel or heating oil"). The appellant did not notice, and was not aware of, this inconsistency on the face of the consignment note.

12. The vehicle and tanker trailer were seized by Border Force officers at Dover on 11 November 2013 on suspicion of carrying derv, on which excise duty was due, rather than lubricating oil (on which it was not). Border Force issued a notice of seizure pursuant to s139(6) Customs & Excise Management Act 1979 ("CEMA") in respect of the oil, vehicle and tanker. The vehicle was seized pursuant to powers under s141(1)(a) CEMA. No valid notice of claim to challenge the legality of the seizure was given within a month; the vehicle and trailer were therefore duly condemned as forfeited by operation of paragraph 5 Schedule 3 CEMA.

13. We find that the liquid in the tanker was in fact a mixture of derv and lubricating oil (the result found by the Government Chemist on 12 December 2013 in respect of five of the six samples).

14. The vehicle cost about £50,000 (and at the time of the hearing was worth about half that).

15. There was insufficient evidence for us to make further findings of fact as regards Trenatex or the Irish Concrete Society. In particular, the evidence is insufficient for us to find, as suggested by the appellant's representatives, that the appellant was the victim of a fraud.

Correspondence culminating in the decision letters

16. A request for return of the vehicle was sent to Border Force by a representative of the appellant in Poland on 15 November 2013.

17. On 22 November 2013 HMRC wrote to the appellant's representative. The letter included the following:

> "I can confirm that the Government chemist has now analysed the liquid held within the tanker, which you have claimed to be lubricating oil. I can confirm that this liquid was in fact mostly diesel, mixed with a small amount of lubricating oil.
>
> This liquid and the vehicles used to support it, is now seized under [CEMA], as I suspect that an attempt to evade the payment of excise duty has been made. Since you have provided no evidence to suggest your lack of involvement, it is the policy of [HMRC] not to offer terms for the return of duty free or rebated oil intended for misuse as a road fuel, or any vehicles or equipment used to handle it.
>
> With this in mind, we are not therefore prepared to offer restoration of the above goods on this occasion."

18. Following an interlocutory hearing before the Tribunal and directions released by Judge Anne Scott on 10 December 2014, HMRC expressed willingness, by letter of 23 December 2014, to conduct a statutory review (under s15 Finance Act 1994) of their decision of 22 November 2013.

19. On 13 January 2015, HMRC wrote to the appellant's solicitors as follows:

> "The CMR for the load on when it was seized clearly stated the goods were Olej Smarowy G-100. This is lubricating oil free from Excise duty.
>
> The Tariff trade code quoted on the CMR was 27101999.
>
> The CMR also quotes a UN number of 1202 – this is Gas Oil, Diesel Fuel or heating Oil.
>
> Why was this not queried by your client?
>
> Who requested your client to transport the goods?
>
> Had your client done work for them before?
>
> Had the transportation been paid for? If so by whom?
>
> The Importer of the load is shown on the paperwork as The Irish Concrete Society with their address quoted as the delivery address. Have they ever come forward and asked what happened to the load?
>
> What due diligence checks were carried out by your client prior to transporting this load?
>
> Who paid for the ferry ticket for the vehicle?
>
> Is your client aware of excise duty on diesel in the UK?"

20. On 21 January 2015, Ms Bines wrote to the appellant's solicitors upholding, on review, HMRC's decision not to restore the vehicle. The letter included the following:

(1) Ms Bines said she was "guided by Commissioners' policy but not bound by it in that I consider every case on its individual merits. I have considered the decision afresh, including the circumstances of the events surrounding the seizure and the related evidence, so as to decide if any mitigating or exceptional circumstances exist that should be taken into account. I have examined all the representations and other material that was available to the Commissioners both before and after the time of the decision."

(2) Under the heading "HMRC policy on the restoration of seized vehicles", the letter stated:

> "Where a vehicle is detected smuggling road fuel that vehicle is to be seized and not restored. Seizure and non-restoration in these cases reflects not only the revenue loss but also the health and safety dangers which smuggling of road fuel poses to other road traffic, to the environment and to the travelling public".

(3) In the "Conclusion" section, the letter stated:

> "There are several reasons that lead me to believe your client was aware of the nature of the load that was in the vehicle at the time of the seizure.
>
> The CMR for the load stated the goods were Olej Smarowy G-100, a lubricating oil free from UK Excise Duty. However, the UN Code on the CMR quotes UN1202 which is the code for Diesel Fuel, Gas Oil or heating oil. This was not challenged by your client.
>
> Your client appears not to have completed any due diligence checks on either the client who requested they transport the load, nor the delivery address.
>
> I have asked several questions in relation to the transportation of the load, as in who requested the load to be transported, had your client worked for them before, who paid for the transportation, who paid for the ferry ticket. None of these questions has been answered.
>
> Taking all of the above into account I believe that on the balance of probabilities your client was fully aware what produce was being transported and had the load not been seized would have been used as road fuel."

21. In her witness statement, Ms Bines said the following:

> "I considered that the appellant should have challenged the fact that the CMR had stated the goods were lubricating oil, and the UN Code was for Diesel fuel. The appellant had appeared not to have completed any due diligence checks either on the client who had requested the load be transported nor the address where the fuel was to be delivered."

22. By letter of 5 February 2014, the appellant's solicitors requested more time to answer HMRC's questions; in their letter of 11 February 2015, they provided certain information, including the following:

(1) The consignment note was not prepared by the haulage company but by a "shipping company" – in this case, Petrostan

(2) The shipping company Pawex Pawel Wojtarowicz ("Pawex") requested the goods be transported by the appellant

(3) The appellant had been cooperating with Pawex since 2011: there were 35 instances of work performed by the appellant for Pawex between 2011 and 2015

(4) The usual arrangement is that transportation costs including ferry crossing are paid upon delivery of the load

(5) The appellant's solicitors said that Mr Bomba had confirmed that due diligence was always carried out with regard to new business partners (including in this case), such as checking company registration details and obtaining copies of relevant VAT and tax registration documents and any other appropriate licensing documents.

(6) The Irish Concrete Society had contacted the driver by phone to enquire about the transport, around the time of the expected delivery. The driver explained the incident to them. The appellant's solicitors stated that they believed a Polish advocate was acting for the Irish Concrete Society.

(7) The appellant was aware of UK excise duty on diesel; here, the consignment note stated "olej smarowy" (lubricating oil) with EU tariff code 27101999

23. Ms Bines contacted the Irish Concrete Society after having received the appellant's letter of 5 February 2015 and before writing her decision letter of 27 February 2015. They told her that had not been expecting a load of lubricating oil to be delivered from Poland.

24. On 27 February 2015, Ms Bines responded to the appellant's solicitors as follows:

> "I have looked at the documentation you provided and your clients responses to my questions, and I am still of the opinion that your client was aware of the goods being transported, and the vehicle should not be restored.
>
> The load was allegedly being transported to Southern Ireland to The Irish Concrete Society/Irish Cement, and your client has advised you that a Polish Advocate is acting for them in relation to the seized load. I can confirm that this company have made no enquiries into the seizure of the load, and have confirmed they were not the intended recipients.
>
> Your client provided details of a transportation booking for a ferry from Calais to Dover, and your letter states that a ferry ticket is always is always paid for in advance by the transport company so as discounts can be a benefit. However, there does not appear to be a booking for the onward journey to the ROI which was the destination of the goods.
>
> I am therefore still of the opinion that if this load had not been intercepted it would have been diverted into the UK without the payment of UK excise duty, and the produce used as road fuel."

25. Commenting on the emails later sent to her from the appellant's solicitors indicating that Pavol Koren had not signed a document bearing the signature of Trenatex, Ms Bines said in her witness statement:

> "I considered this statement, and reflected that the appellant had claimed due diligence checks had been carried out on new customers. I considered that had that been the case, the anomalies would have come to light before the transportation of the load, and therefore my decision of 27 February 2015 remained the same."

The law

26. We set out in the Appendix to this decision the relevant statutory provisions.

27. The Tribunal's powers are limited to considering whether the decision in question – the decision of HMRC to confirm, under s15(1) Finance Act 1994, their earlier refusal to restore the vehicle using their powers in s152(b) CEMA - could not reasonably have been arrived at. If we find it could not reasonably have been arrived at, our powers are limited to making directions of the type referred to at s16(4)(a) to (c) Finance Act 1994.

28. Following the Court of Appeal's judgement in *HMRC v Jones & Jones* [2011] EWCA Civ 824, when considering the question of reasonableness we must take as a "deemed fact" that the vehicle was "duly" and therefore lawfully condemned as forfeited under paragraph 5 Schedule 3 CEMA.

29. The Court of Appeal in *Customs & Excise Commissioners v JH Corbett (Numismatists) Ltd* [1980] STC 231 set out the correct approach for the Tribunal to follow where it has a supervisory (as opposed to a full merits) jurisdiction as it does in this case. In essence the Tribunal has the power to review the exercise of the discretion exercised by HMRC under s152(b) CEMA (and confirmed by them under s15 Finance Act 1994) and in doing so should answer the following questions:

(1) Did HMRC reach a decision which no reasonable commissioners of HMRC could have reached?

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

(3) Did HMRC take into account all relevant considerations?

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

30. However, *John Dee Ltd v Customs & Excise Commissioners* [1995] STC 941 is authority for the proposition that, if the decision in question failed to take into account relevant considerations, the Tribunal may nevertheless dismiss the appeal if we are satisfied that, even if it had taken into account those considerations, HMRC's decision would "inevitably" have been the same. We note Warren J's observation in *GB Housley Ltd v Revenue and Customs Commissioners* [2015] STC 1403 (at [22]) that this principle operates equally where there a decision-maker has failed to leave irrelevant considerations out of account:

> "The second observation relates to the 'inevitably the same' exception. That exception reflects the way in which the law works in relation to decision-making authorities generally. Remedies in this field are discretionary. They are, putting the matter very broadly, designed to protect the citizen against decisions by a public authority which

> have not been taken properly because such a decision may unfairly impact on the citizen's rights. But there is no such unfairness where the authority's decision would inevitably have been the same even if it had taken account of the incorrectly disregarded material. For my part, I see no difference in principle between that sort of case where material is wrongly ignored and a case where material is wrongly taken into account, provided that the decision would inevitably have been the same had the material been ignored."

31. In *Balbir Singh Gora v Customs & Excise Commissioners* [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 any decision which in the light of the information available to the HMRC 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.

32. In ascertaining the reasonableness and lawfulness of the decision in question, it is necessary to consider whether the decision in question was proportionate. In *Lindsay v Commissioners of Customs & Excise* [2002] STC 588, a case about a refusal to restore a vehicle used to smuggle excise goods (cigarettes and tobacco), the major issue was whether the policy of the Commissioners so fettered their discretion in reviewing restoration decisions as to prevent them from considering proportionality "and thus to render their decisions unlawful" (see at [45]). The Court of Appeal in that case explained the principle of proportionality thus (at [52]):

> "The action taken must, however, strike a fair balance between the rights of the individual and the public interest. There must be a reasonable relationship of proportionality between the means employed and the aim pursued …"

Appellant's arguments

33. The notice of appeal asserted that at all times the appellant thought that the liquid being transported was lubricating oil; and that HMRC had not conclusively proved that it was derv.

34. In response to HMRC's assertion that the appellant should have done more "due diligence", both Mr Bomba and Mr Zalewski submitted that it would be unreasonable to expect a small business like the appellant's to do extensive tests on their loads, especially where (as here) they were sealed; or to identify and investigate inconsistencies in the code numbers on a consignment note.

35. Mr Zalewski's submissions included the following further points:

(1) the appellant had in effect performed due diligence on Pawex, due to their longstanding business relationship;

(2) the decision in question had not sufficiently considered the materials sent to HMRC by the appellant's solicitors on 11 February 2015; and

(3) the decision letters showed no consideration of the fact that Mr Bomba may be an innocent party in all of this.

36. Mr Zalewski submitted that the judgement of the Supreme Court in *Kennedy v Charity Commission* [2014] UKSC 20 had relevance here, particularly at [51] where Lord Mance, discussing judicial review, cited Lord Bride's statement in *R v SoS Home Dept ex p Bugdaycay* [1987] AC 514, 531, to the effect that the graver the issue affected by an administrative decision, the more rigorous the examination the court must make. In this case, Mr Zalewski submitted, someone was being deprived of their livelihood due to the seizure of an expensive asset.

HMRC's arguments

37. HMRC's statement of case made the following points:

(1) HMRC did not just rely on sight and smell in identifying the transported liquid as derv – HMRC asserted that the local Government chemist confirmed that the oil was mostly derv with a small amount of lubricating oil.

(2) HMRC's general policy is that vehicles seized for smuggling dutiable fuel should not be restored. Only in exceptional circumstances will restoration be considered.

(3) The appellant appears not to have conducted any due diligence checks on the company that requested it transport the load or the place of delivery.

(4) HMRC asserted that the Irish Concrete Society confirmed they made no enquiries into the seizure and were not the intended recipients.

(5) HMRC asserted that the appellant appeared not to make a booking for the onward ferry journey to Ireland.

38. Mr Paulin submitted that the appellant's case was that HMRC ought to have undertaken further chemical analysis of the load, in addition to that undertaken by the Government Chemist. Mr Paulin submitted that HMRC was under no such duty – hence it cannot be said that HMRC's failure to do so, rendered their decision unreasonable.

39. Mr Paulin also noted that HMRC had re-reviewed their 21 January 2015 decision in the light of further information provided by the appellant in its 5 February 2015 letter. It cannot be said that HMRC's conduct met the required threshold of "unreasonableness". He submitted that HMRC's procedure had plainly been fair.

40. Mr Paulin submitted that the position here can be simply stated: whilst the consignment note indicated under "statistical number" that the contents were a lubricating oil, the UN code under "sender's instructions" was one for a diesel fuel. There was therefore a disconnect on the face of the consignment note itself. This is something which HMRC considered should have been challenged by the appellant, as a commercial operation. In Mr Paulin's submission, the appellant ought to have checked the consignment note; to have taken responsibility for the goods being shipped. If people transporting goods do not conduct due diligence as to the contents,

this could lead to results more dangerous than importation of diesel. It appears here that no test was done whatsoever on the consignment note.

41. Mr Paulin submitted that the statutory scheme in CEMA reflected the public policy and interest in ensuring that 'contraband' goods are not transported cross border. The shipping company has to carry responsibility for goods carried cross border. There is a public interest reason in not restoring seized items where they have been used to import contraband. The shipping company should have a process in place to discern what is being transported.

Discussion

42. The issue in this appeal is whether the decision in question is one which HMRC could not reasonably have arrived at. One indicator of such a decision – which, for shorthand, we shall refer to as an "unreasonable" decision – is a failure on the part of the decision-maker to leave out of account all irrelevant considerations. In making this determination, the Tribunal is bound to have regard to the facts as we find them; and so, where the information available to the decision-maker was different from, or less complete than, the facts as we have found them, it may be that we find a decision to be "unreasonable" where, on the information available to the decision-maker at the time, it was quite reasonable.

43. It is clear from the decision letters that the decision in question was made on the basis that the appellant was aware – "fully aware" as HMRC's letter of 21 January 2015 put it – that the liquid being transported was not lubricating oil but (mostly) derv. We have found as a fact (based principally on Mr Bomba's evidence) that the appellant was not so aware. It believed the load being transported was lubricating oil. For this reason, the decision in question falls into the "unreasonable with hindsight" position described immediately above: in retrospect, the decision in question took into account, to a material degree, an irrelevant consideration – the incorrect supposition that the appellant was aware that the load was mostly derv. This is sufficient to render the decision unreasonable.

44. We should therefore allow the appeal, and require HMRC to undertake a further review, unless we find that HMRC would, on the facts found at paragraphs 9 to 14 above, inevitably come to the same decision as before.

45. Inevitability is a high bar. We could see ourselves reaching if it we had, as a matter of evidence, a clear understanding of HMRC's policy in cases such as these, such that we could anticipate to a high degree of certainty, how HMRC would apply their policy to the facts as we have found them. Unfortunately, the evidence before us as to HMRC's policy is scant and not entirely consistent:

> (1) HMRC's 22 November 2013 letter stated that "since [the appellant had] provided no evidence to suggest [its] lack of involvement, it is the policy of [HMRC] not to offer terms for the return of duty free or rebated oil intended for misuse as a road fuel, or any vehicles or equipment used to handle it." This implies that if it was established that the appellant had no "involvement" in the

fact that the load was partly derv (as we have found to be the case here), then it would (or it least might) be HMRC policy to offer terms for return of the vehicle.

(2) HMRC's 21 January 2015 letter stated that a vehicle detected smuggling road fuel is to be seized "and not restored". Yet it also placed emphasis on the appellant's awareness of the type of substance being transported, which implies that when HMRC in their policy refer to "smuggling", they mean a conscious and intentional act. Here, we have found that the appellant was not conscious that the liquid being transported was other than lubricating oil.

(3) The absence of "due diligence" (of the load, of Petrostan as the sender, of Trenatex as the consignee, and of the Irish Concrete Society as the recipient) on the part of the appellant was mentioned in HMRC's 21 January 2015 letter and in Ms Bines' witness statement; and featured in Mr Paulin's submissions. However, no evidence was put before us in any detail as to HMRC's policy as regards the level of "due diligence" to be carried out by a haulier; whether and to what extent the size and resources of the haulier is taken into extent; and how the policy distinguishes between cases of hauliers who are aware that they are transporting goods subject to excise duty and cases of hauliers who are not so aware but carry out little or no "due diligence".

46. There is therefore insufficient evidence before us of HMRC's policy in cases such as these for us to conclude that, if given the facts as we have found them, HMRC would inevitably come to the same decision as they did in the decision letters and refuse restoration.

Conclusion and directions

47. For the reasons stated at paragraphs 43 and 46 above, we conclude that the decision in question was one which HMRC could not reasonably have arrived at.

48. We direct that the decision in question shall cease to have effect from the date of release of this decision.

49. We require HMRC to conduct a further review of their earlier decision to refuse restoration of the vehicle within 28 days of release of this decision. In doing so, we direct that HMRC:

(1) take account of the facts found by the Tribunal at paragraphs 9 to 14 above;

(2) state the policy being applied and explain how it underpins the conclusion reached.

50. The appellant should be aware that if it considers HMRC's further review decision to be unreasonable, it will have the ability to appeal to the Tribunal, which will have the same powers as the Tribunal has in respect of this appeal.

51. 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.

ZACHARY CITRON
TRIBUNAL JUDGE

RELEASE DATE: 2 MARCH 2017

APPENDIX

Relevant legislation

Customs and Excise Management Act 1979

Section 139 (Provisions as to detention, seizure and condemnation of goods etc)

(1) Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer…

(1A) A person mentioned in subsection (1) who reasonably suspects that any thing may be liable to forfeiture under the customs and excises Acts may detain that thing.

(1B) references in this section … to a thing detained as liable to forfeiture under the customs and excise Acts include a thing detained under subsection (1A)

…

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

Section 141 (Forfeiture of ships, etc used in connection with goods liable to forfeiture)

(1) …where any thing has become liable to forfeiture under the customs and excise Acts –

(a) any ship, aircraft, vehicle, animal, container (including any article of passengers' baggage) or other thing whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture, either at a time when it was so liable or for the purposes of the commission of the offence for which it later became so liable; and

(b) any other thing mixed, packed or found with the things so liable,

shall also be liable to forfeiture.

Section 152 (Power of Commissioners to mitigate penalties, etc)

The Commissioners may, as they see fit –

(a) …

(b) restore, subject to such conditions (if any) as they think proper, any thing forfeited or seized under [the customs and excise] Acts …

Schedule 3: Provisions relating to forfeiture

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.

4. (1) Any notice under paragraph 3 above shall specify the name and address of the claimant and, in the case of a claimant who is outside the United Kingdom and the Isle of Man, shall specify the name and address of a solicitor in the United Kingdom who is authorised to accept service of process and to act on behalf of the claimant.
(2) Service of process upon a solicitor so specified shall be deemed to be proper service upon the claimant.

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.

Finance Act 1994

Section 14 (Requirement for review of decision under s152(b) [CEMA])

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

(a) any decision under s152(b) [CEMA] as to whether or not any thing forfeited or seized under the custom 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 s152(b) [CEMA] .

(2) Any person who is –

(a) …

(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.

…

Section 15 (Review procedure)

(1) Where the Commissioners are required in accordance in accordance with section 14 to review any decision, it shall be their duty to do so and they may, on that review, either -

(a) confirm the decision; or

(b) withdraw or vary the decision and take further steps (if any) in consequence of the withdrawal or variation as they may consider appropriate.

…

Section 16 (Appeals to a tribunal)

(1) An appeal against a decision on a review under section 15 … may be made to an appeal tribunal within the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates.

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

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

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

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

…

(6) On an appeal under this section … it shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established.

By virtue of s16(8) and Schedule 5, a decision under s152(b) CEMA is a "decision as to an ancillary matter".