



Neutral Citation: [2023] UKFTT 00121 (TC)

Case Number: TC08728

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal references: TC/2019/04716
TC/2022/01087

Restoration of seized goods – two seizures of alcohol in September 2018 and March 2019 – on grounds that small brewery relief claimed inappropriately on imported beer and that the Appellant was carrying out wholesale sale of alcohol without requisite approval – whether review decision not to restore the goods could reasonably have been arrived at – held no (in relation to September seizure) and yes (in relation to March 2019 seizure) –whilst Tribunal would have reached the same conclusion as HMRC in relation to the September 2018 seizure, not inevitable that HMRC would do so – HMRC therefore required to carry out new review

Heard on: 27-28 September 2022
Judgment date: 10 February 2023

Before

**TRIBUNAL JUDGE KEVIN POOLE
NORAH CLARKE**

Between

OMOLADE NETUFO

Appellant

and

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS
Respondents**

Representation:

For the Appellant: Michael Avient of counsel, instructed by Chris Solicitors.

For the Respondents: Charlotte Brown of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was V (video), using the Tribunal's Video Hearing System. Both the advocates, the Appellant and the two HMRC officers attended by remote video link, though Mr Avient experienced some connection problems, as a result of which he attended by telephone link for part of the time, confirming that this was satisfactory from his point of view. A face to face hearing was not held because at the time the appeal was listed for hearing it was not possible to conduct an "in person" hearing safely due to the public health emergency and it was not possible to re-arrange the hearing as "face to face" without a potentially lengthy postponement.

2. The documents to which we were referred were in electronic form and comprised a main hearing bundle of 1,199 pages and an authorities bundle of 234 pages. In addition, a further eight pages comprising copies of bills of lading, were admitted late as further evidence.

3. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

THE SUBJECT MATTER OF THE APPEALS

4. These appeals are against a refusal by HMRC, confirmed upon review, to restore to the Appellant large quantities of beer seized from her in two separate seizures, one in September 2018 and one in March 2019.

The September 2018 seizure

5. The September seizure involved over 8,000 litres of beer and 261 litres of Alomo Bitters (40% ABV). There has been no claim for restoration of the bitters, which we do not therefore consider any further.

6. In relation to the beer seized, there is some discrepancy between the "Seizure Information Notice" issued by HMRC on 20 September 2018, the tally sheets recording the goods uplifted on 21 September and HMRC's letter dated 25 August 2021 refusing restoration, as follows:

	Guinness 600 ml 7.5% ABV		Guinness 325 ml 7.5% ABV		Star Beer 5.1% AbV		Orijin Beer 6% ABV	
	Cases	Litres	Cases	Litres	Cases	Litres	Cases	Litres
Seizure Information	No count	4911	No count	1411.8	No count	1864.8	No count	118.8
Tally Sheets	629	4528.8	218	1700.4	259	1864.8	15	118.8
HMRC letter	629	4528.8	218	1700.4	240	1728	15	118.8

7. It would appear that the discrepancy between the tally sheets and HMRC's letter is attributable to the simple accidental omission from the letter of one line in the tally sheets (19 cases of Star beer, totalling 136.8 litres). What is less clear however is the explanation for the discrepancy between the seizure information notice and the tally sheets in relation to the Guinness. Even if one simply adds the volumes of Guinness together in both cases, the volume of Guinness shown on the seizure information sheet is still 93.6 litres more than is reflected in the tally sheets. There is mention on the visit report that 3 cases of Guinness 600 ml (12 per case) were broken whilst loading, but that would only account for 21.6 litres of the difference.

The remaining 72 litres (which would be equivalent to 10 cases of the Guinness 600 ml bottles) remains unexplained. In any event, around 1,100 cases of beer were seized.

8. The grounds for the seizure of the beer were that the duty due on its import had been underpaid because it had been declared as having been produced in a micro brewery, whereas in fact it had been produced by large scale commercial breweries. This fact is not disputed by the Appellant, however she claims to have had no knowledge of the error in the import declaration, which (like numerous previous declarations containing similar errors) was made on her behalf by her freight forwarder, Canmi Limited, trading as Canmi Freight (“Canmi”).

9. By letter dated 1 April 2019, the Appellant’s solicitors requested payment of an amount equal to the value of the goods seized (said to be £25,793) in lieu of their restoration (having been informed that the goods themselves had been destroyed).

The March 2019 seizure

10. The March 2019 seizure involved 4,375.625 litres of beer/lager and 16.05 litres of bitters (a mixture of Orijin, Agbara and Alomo with alcohol content ranging from 30% to 40% ABV). There has been no claim for restoration of the bitters, which we do not therefore consider any further. The beer/lager was made up as follows:

	Cases	Loose Bottles	Total Litres
Guinness 600 ml 7.5% ABV	340	-	2448
Guinness 325 ml 7.5% ABV	124	-	967.2
Guinness FES 325 ml 7.5% ABV	2	11	17.225
Trophy lager 600 ml 6% ABV	116	-	835.2
Orijin 600 ml 6% ABV	10	-	72
33 Export 600 ml 5% ABV	5	-	36
TOTALS	597	11	4,375.625

11. The grounds for the seizure of the beer were that it was in the possession of the Appellant for the purposes of carrying on a controlled activity, namely selling controlled liquor wholesale, for which the Appellant did not hold the requisite approval from HMRC.

Subsequent events

12. The Appellant did not contest the validity of either seizure by requiring HMRC to commence condemnation proceedings.

13. By letter dated 3 April 2019, HMRC refused the Appellant’s request dated 26 March 2019 for restoration of the goods seized in March 2019. The Appellant’s solicitors requested a review of this decision by letter dated 30 April 2019, and by letter dated 13 June 2019, officer David Noble of HMRC confirmed the refusal. This is one of the two decisions under appeal in these proceedings.

14. There was some confusion about an appeal against HMRC’s refusal to restore the goods seized in September 2018. The Appellant considered that she had submitted a valid appeal, which ought to be dealt with, alongside her appeal in relation to the goods seized in March 2019, at the hearing of her appeal. This was only finally resolved at a hearing before the Tribunal on 4 August 2021, following which the Tribunal issued a decision dated 31 August 2021 (“the First FTT Decision”). The First FTT Decision noted that the Tribunal had no jurisdiction to consider the appeal against HMRC’s refusal to restore the goods which were the

subject of the September 2018 seizure, as no statutory review of that refusal had taken place (a right of appeal to the Tribunal only arising once such a review had been carried out).

15. Following the First FTT Decision, HMRC issued a letter dated 25 August 2021, in which they rejected the Appellant’s request for restoration in relation to the September 2018 seizure, and formally notified her of the right to obtain a review of that decision. By letter dated 22 September 2021 from her solicitors, the Appellant requested such a review, and by letter dated 5 November 2021, officer Linda Gordon of HMRC confirmed, following her statutory review, HMRC’s refusal to restore the goods (or pay compensation for their destruction). This is the second of the two decisions under appeal in these proceedings (though of course it relates to the first in time of the two seizures).

The First FTT Decision

16. It is also important to record that in the First FTT Decision, the Tribunal addressed as a preliminary issue an argument raised by Mr Avient on behalf of the Appellant in relation to the March 2019 seizure. His argument, as summarised by the Tribunal, was that “whilst the Appellant could not now challenge the *legality* of the seizure, the Tribunal could consider the facts relating to whether or not the Appellant was or was not wholesaling alcohol in determining whether HMRC’s decision was reasonable”.

17. This argument was addressed by the Tribunal at [59] to [92] under the heading “Can the Tribunal reconsider questions of fact surrounding the seizure/forfeiture?” In this section of the First FTT Decision, the Tribunal rejected the argument made by Mr Avient.

18. The Tribunal said this, at [88]:

It is clear that once goods have been deemed to be condemned as duly forfeited it is not open to this Tribunal to make any findings of fact which are inconsistent with the deemed facts which are the necessary corollary of “due” forfeiture. In the present case, that means that the Tribunal cannot consider whether or not Mrs Netufo was wholesaling alcohol. The deeming provisions in paragraph 5 schedule 3 CEMA mean a Tribunal considering the substantive appeal against HMRC’s restoration decision has to start from the propositions that Mrs Netufo was wholesaling alcohol without AWRS approval and that she was in possession of the alcohol for the purposes of wholesaling. The role of the Tribunal is then to consider whether HMRC’s decision not to restore was one which a reasonable officer could or could not have arrived at. In considering that issue, the Tribunal may make findings of primary fact, but not if they would undermine the facts deemed to exist by paragraph 5. The question whether Mrs Netufo was in fact wholesaling alcohol cannot be revisited.

19. However, it also went on to say this, at [91] to [92]:

91. At the end of the hearing, there was some discussion, based on *Gora* and *Behzad Fuels* as to whether the Tribunal could consider issues of “blameworthiness”. Mr Avient appeared to argue that Mrs Netufo could not be “blamed” for the seizure if she was not in fact wholesaling and the Tribunal was entitled to consider her “blameworthiness” by reference to a consideration of whether she was wholesaling or not as well as in relation to other matters such as whether she had provided assistance to HMRC or whether she had tried to conceal the alcohol.

92. We agree with HMRC that Mrs Netufo’s degree of culpability does not allow the Tribunal to go behind the deemed facts that she was wholesaling. That does not prevent the Appellant from arguing she was not “blameworthy”

in relation to other matters which go to the reasonableness of HRMC's non-restoration decision.

THE FACTS

20. The First FTT Decision contained certain findings of fact by the Tribunal, as follows:

BACKGROUND AND FACTS

2. Mrs Netufo ran a grocery shop which also sold alcohol including, in particular, a Nigerian brand of beer, and spirits. She held the appropriate licence to sell alcohol to retail customers.

3. She incorporated a company, Netufo Drinks Ltd ("NDL") to import alcoholic drinks from Nigeria and to sell them wholesale. A different type of permission is needed to sell alcoholic drinks wholesale and it is illegal for a UK trader to sell alcohol wholesale without approval from HMRC under the Alcohol Wholesaler Registration Scheme ("AWRS"). In July 2017¹, NDL applied for AWRS approval. HMRC requested certain information and records and following this, the Appellant indicated that she intended to withdraw the application². She did not do so and in order to dispose of the matter, HMRC formally refused the application on 14 June 2017. The Appellant says that NDL never traded as it did not have the necessary approval.

The first seizure

4. On 19 September 2018 HMRC officers made an unannounced visit to Mrs Netufo's premises. They returned the next day and seized a substantial quantity of beer and some alcoholic bitters which were stored in a lock up at the rear of the shop. As they could not remove all of it at once, they removed some of the items on 20 September, secured the rest and removed what was left on 21 September. The beer was seized on the grounds that excise duty should have been paid at the full rate, but small brewery relief had incorrectly been claimed and duty had been paid at a lower rate. The bitters were seized on the grounds that no duty had been paid at all. HMRC gave notice of their intention to issue a duty assessment in respect of the beer of £103,442.60 and an assessment in respect of the bitters for £3,306. It was alleged that the wrong rate of duty on the beer had been applied by Mrs Netufo's shipping agent and it seems there is an ongoing appeal in relation to the duty assessment which was raised on the basis of Mrs Netufo's joint and several liability with the shipping agent.

5. HMRC say they left Notice 12A in the lock up. Notice 12A informs a person whose goods have been seized as to their options for challenging the seizure, but it is not a legal requirement that it be provided. The Appellant denies receiving it.

6. Mrs Netufo did not challenge the legality of the seizure in the magistrates' court.

7. She took no further action until after the second seizure in 2019 referred to below.

8. On 18 March 2019, after the second seizure, HMRC were notified that the Appellant had engaged Chris Solicitors to represent her.

¹ This date appears to be an error. The application was lodged on 4 May 2017.

² In an email dated 1 June 2017, it was said that "because of the time it will take to obtain the information required from my suppliers, I would like to withdraw my AWRS and reapply when I commence trading." This appears to have been regarded as ineffective as a formal withdrawal by HMRC.

9. On 1 April 2019 Chris Solicitors wrote to HMRC requesting payment of an amount equal to the value of the goods seized in the first seizure, £25,793, as it was not possible to restore the goods as they had been destroyed by HMRC.

10. On 4 June 2019, Chris Solicitors wrote again to HMRC referring to their 1 April 2019 letter. The 4 June letter said “Please note further that this is a letter before the impending claim at the Tribunal should you fail to deal with this matter as requested under paragraphs 11 and 12 below”. Paragraph 11 requested a payment of the market value of the seized goods as they had been destroyed. Paragraph 12 said “...our client is hereby putting you on notice that a further failure to respond within 14 days...will leave her with no other option than to start an action at the tribunal to recover same”.

11. Mr Esponda of HMRC replied by email on the same day. He said that the goods would not be restored and Mrs Netufo would not receive compensation. The email ended “If you wish to go to request Tribunal (sic) you must write directly to the Tribunal Service within 30 days of this letter. However, even if you request a review or apply directly to the Tribunal Service the assessment must be paid, secured or an application made for hardship”. The reference to the “assessment” appears to be a reference to the duty underpaid or unpaid on the seized goods.

The second seizure

12. On 7 March 2019 HMRC officers made an unannounced visit to Mrs Netufo’s premises to return paperwork following the 2018 seizure. The officers had been carrying out an investigation into the Appellant’s alcohol sales since the 2018 seizure. They were aware that the Appellant was due to receive another delivery of alcohol in the fortnight before their visit. HMRC say that the Appellant told the officers that she had ceased to sell alcohol since the 2018 seizure and that there was no alcohol in the lock up where she had previously kept her stores. The Appellant denied making such statements. The officers made a search and discovered a large quantity of alcohol in the lock up.

13. The officers concluded, as a result of their investigations and the Appellant’s alleged attempts to conceal the alcohol from them that she was carrying out wholesale sales of alcohol without approval and that she had the alcohol in her possession for that purpose. HMRC seized the alcohol, uplifting part of it on 7 March, securing the rest and uplifting it on the following day.

14. The Appellant did not challenge the legality of the second seizure in the magistrates’ court.

15. On 26 March, Chris Solicitors requested restoration of the seized goods on the Appellant’s behalf. A decision not to restore the goods was sent in a letter dated 3 April 2019, which set out the right to a review and stated that if the Appellant did not agree with HMRC’s decision following a review, she could appeal to the Tribunal.

16. On 30 April Chris Solicitors requested a review and on 13 June 2019 HMRC issued a review conclusion letter upholding the original non-restoration decision.

21. Whilst it appears that the hearing bundle before us was largely the same as the documents before the Tribunal for the purposes of the First FTT Decision, it was not necessary for the Tribunal on that occasion to examine the material before it to the level of detail required for this decision; on its face, the First FTT Decision was limited to the “preliminary issues” which were considered by it.

22. We therefore make the following additional findings of fact.

Trading up to mid-2017

23. The Appellant started her retail grocery business in January 2003 under the trading name “Yokees Foods”. She began to import consignments of beer from Nigeria in October 2016 after obtaining a retail off licence in March 2016.

24. From 28 October 2016 up to 10 May 2017, HMRC records (the accuracy of which we accept) show five import entries of beer where the consignee was declared as “Omolade Netufo Foods Limited”, on 28 October and 19 December 2016, and on 1 March, 11 April and 10 May 2017. No company of that name existed (the Appellant only incorporated a company called “Netufo Drinks Limited” on 19 April 2017, through which her application for registration under the Alcohol Wholesaler Registration Scheme was made on 4 May 2017). In each case, the shipping agent making the declaration was Eagle Cargo Services Limited (“Eagle”). The code 473 was used on each declaration, appropriate for beer brewed in a large commercial brewery. The descriptions of goods given in these five declarations referred to various types of bottled beer. In passing, we observe that the quoted sale prices appear rather incredible, given that the imports were all of a similar product: the declared total invoice prices and weights of the five consignments were £685.28/7.805 tonnes (£87.80 per tonne), £1,215.23/9.9 tonnes (£122.75 per tonne), £459.25/4.98 tonnes (£92.21 per tonne), £301.84/21.22 tonnes (£14.22 per tonne) and £265.86/19.55 tonnes (£13.60 per tonne).

Changes from mid-2017 up to September 2018

25. After the Appellant’s application for registration under the Alcohol Wholesaler Registration Scheme was refused by HMRC on 14 June 2017 following her abandonment of it, she changed shipping agent, from Eagle to Canmi. She gave evidence that she had made the change not because Canmi had offered her a lower overall cost, but because she had been dissatisfied with the service provided to her by Eagle when the individual she had been dealing with had fallen ill and his role had been taken over by his son. We do not feel there is enough evidence before us to decide how the change of shipping agent came about and we do not consider it significant to our decision, therefore we do not take any reason for the change into account in our decision.

26. All subsequent import entries were declared in the Appellant’s name as consignee. Her next consignment was entered on 2 August 2017, and for that consignment and the following 13 consignments leading up to the seizure in September 2018, a “tax type” code of 443 was inserted by Canmi on the import declaration, denoting “imported beer, production of no more than 5,000 hectolitres per year”; this is the method of providing what is generally called “micro brewery” relief for imported beers produced on a very small scale. The relief is effectively 50% of the duty that would otherwise be charged. Consignments were declared for entry on 2 August, 6 September, 19 October, 21 November and 29 November 2017 and 13 February, 10 March, 9 April, 8 May, 29 May, 10 July, 1 August, 20 August and 10 September 2018.

27. Canmi made import declarations on behalf of the Appellant, spread over the 14 consignments, in respect of approximately 15,353 cases of beer (each case generally comprising either 12 bottles of 600ml or 24 bottles of 330ml).

28. We note that the invoices in our bundle from Canmi for these 14 consignments (which included freight costs, various other charges relating to the incidental costs of importation but also the VAT and duty charges on the import) were all for a total of around £8,000, of which just over half was accounted for by the duty; she cannot have failed to notice the change from her previous two invoices from Eagle (for her imports in April and May 2017), where the duty alone amounted to over £15,000 and over £10,000 respectively. As the invoices were itemised,

she could easily see that the reduction was due to the drop in duty, which should at the very least have put her on enquiry as to the reason for the reduction.

29. A further consignment was declared for entry by Canmi on 8 October 2018 (shortly after the September seizure referred to below), this time using the correct code 473.

30. The Appellant's evidence (which we accept) was that her usual order was around 1,000 cases of beer. There were in our bundle 11 commercial invoices for her purchases from Answer Nigeria Limited (her supplier in Nigeria) up to October 2018, which bear out this claim as the stated number of cases on each invoice was between 950 and 1,050. In addition, the eight copy bills of lading supplied by the Appellant all referred to quantities of between 964 and 1,050 cases. It appears that at one stage HMRC held invoices in respect of all 14 of the imports referred to above, but for whatever reason the other three did not appear in our bundle.

31. Elsewhere in our bundle was a further invoice for a consignment declared for entry on 6 February 2019, again for 974 cases of Guinness, Star and Trophy beer/lager, comprising 400 cases of large bottles of Guinness, 300 cases of small bottles of Guinness, 200 cases of Trophy and 74 cases of Star. The goods in question arrived on 11 February 2019 and were cleared for entry on 18 February 2019 at 10.30 am. The goods declared in this entry clearly made up the bulk of the goods subsequently seized from the Appellant's premises in March 2019.

32. It is not possible to match any of the other 11 supplier invoices in our bundle definitively to specific import entries, as they were not dated. However, the "invoice number" in each case appeared to give an indication of chronology (the number used on the first document supplied was "ANS/19/09/2017", which tends to suggest the order date, taking account of shipping time from Lagos, for the consignment entered on 19 October 2017; all the other 10 invoices appeared to predate an import entry by approximately one month). The invoice values gave no help in linking them to any particular import entry, as the invoice values were in the range 3.67 million Nigerian Niras ("NGN") to over 4.5 million NGN and the import entry values on all the Appellant's declarations up to 8 October 2018 ranged from 104,030 NGN to 475,000 NGN. It can readily be seen that the invoice values were approximately ten or more times the amounts declared as the commercial value on import. We consider the 19 October 2017 entry, for example, where the declared invoice value was 393,250 NGN, converted to £806.43 (an exchange rate of 487.64 NGN/£). This would work out to under 85p per case of beer. Applying the same exchange rate, we consider the invoice value of invoice ANS/19/09/2017 (3,670,000 NGN) gives a much more realistic value of £7,526 (or £7.92 per case). Even if we are wrong in considering this invoice to relate to this import declaration, it is clear that it is but a small fraction of the true value disclosed by any of the invoices in the bundle before us (and given the Appellant's statement that her typical order was around 1,000 cases of beer in order to make up a container, we infer that the values of the "missing" three invoices would not have been significantly different from the 11 in our bundle).

33. In short, it is clear that the import declarations systematically understated, by very large amounts, the true commercial value of the beer actually imported by the Appellant. We note also that the significant fluctuations in the declared net mass of the goods imported is inconsistent with both the available evidence (in terms of both the 11 invoices and the 8 bills of lading before us) and the Appellant's statement that her typical order was around 1,000 cases of beer. We therefore conclude that the content of the import declarations is unreliable, except to show that loads of beer were indeed declared for entry on the stated dates, roughly corresponding to the arrival of those loads at the UK port of entry (typically Tilbury). We emphasise that the duty with which this appeal is chiefly concerned is payable by reference to volume in litres, not commercial value, accordingly the inaccuracies in the commercial value declared are not significant, at least with regard to the underpaid duty.

34. All the beer imported by the Appellant from the import entry on 2 August 2017 onwards was declared as either Guinness (in big or small bottles, often referred to as “Big Stout” and “Small Stout”), Trophy or Star. The available invoices show the same.

The September 2018 visits and seizure

35. HMRC appear to have formed suspicions about the accuracy of the import declarations being made on behalf of the Appellant, as a result of which they visited her shop premises at Amhurst Road London N15 on 19 September 2018. They had clearly by that time already formed the view that there had been under-declarations of duty on the imports of beer she had made since August 2017.

36. The note of the 19 September visit in our bundle was very sketchy, it was unsigned and it did not clearly specify who was present on behalf of HMRC, referring only to “Officer Parr” (who we infer to be the officer Matt Parr referred to in a note of a further visit the following day) and “AE”. It was not signed or dated, nor was there any indication of when it was prepared or by whom, or whether it was based on manuscript notes which were not included in our bundle. Nonetheless, its content is not particularly contentious and we accept it at face value.

37. “AE” was, we infer, André Esponda (we infer this because officer Esponda took the lead in the actual seizure and subsequent correspondence). He asked the Appellant how she gave instructions to Canmi, and she replied that she ordered the beer from her suppliers in Nigeria, who then instructed Canmi. She was asked whether she had any storage apart from the shop, and she identified a lock-up “out the back”. She said she had left the key at home, so she locked up the shop (leaving the officers outside) while she went to get it. On her return, she opened the lock-up and showed its contents to the officers, who estimated there were approximately 1200-1500 cases of beer there (in fact, as can be seen from the table at [6] above, there were around 1,100 cases). It was agreed that “AE” would return the following day (after checking the status of the AWRS application the Appellant had referred to) and bring the import documents with him to discuss. The Appellant apparently volunteered that she “sells alcohol to people who have private parties”.

38. On the following day, 20 September 2018, it appears that officers Esponda and Parr returned as promised. Included in our bundle was a note of a visit taking place on that day, suffering from the same inadequacies as the note referred to above. On the basis of that note, however, we find as follows.

39. The Appellant once again informed the officers that she ordered the beer but Canmi arranged the duty declaration; she simply paid Canmi whatever they asked. She stated that she had over 1,000 cases of beer in her store, and she produced a notebook (referred to in the note as an “invoice book”) which seemed to be the only record of any of her sales, and included reference to a sale of 405 cases to someone simply called “Michael” (in fact, it appears the name may be “Machel” – discussed further below). The note records that when asked about this, the Appellant said she only had a name and phone number and he picked up the goods in his van. She did not know anything more about him. We comment further below on the Appellant’s dealings with this individual.

40. The officers took away with them the “invoice book” and it seems they attempted to compile some kind of record of the Appellant’s trading from it. Included in our bundle were some 279 pages of muddled handwritten material which were uplifted from (or provided by) the Appellant on one or more occasions, together with 19 pages of various spreadsheet printouts which appear to represent HMRC’s attempts to collate the handwritten material into some kind of intelligible record of sales. It was impossible to derive any clear overall picture from any of this material, none of which was explored or explained either in the other documentation or in

the hearing. All we can do with it is pick out some individually telling pieces of information from it (see below).

41. It was explained to the Appellant at the visit on 20 September 2018 that there was underpaid duty on all her imports using Canmi, amounting to approximately £100,000, and that the beer on her premises was being seized as liable to forfeiture because of the underpaid duty on it. She was told that a formal assessment for the underpaid duty would be issued, addressed jointly to her and Canmi. The Appellant held a telephone call with Canmi in a foreign language, and told the officers Canmi wanted the pre-assessment letter (which they had already given to her) forwarded to them.

42. The officers then proceeded to seize the goods in the lock-up. The goods were left secured overnight (using padlocks provided by HMRC), and the following day (21 September 2018) officers Esponda and Allen returned, along with two other HMRC officers, A Yasin and A Smyth, to remove the goods from the lock-up. The Appellant was not there. They removed all the beer from the lock-up. The Appellant's daughter arrived to ask what they were doing at one point, and was told they would be happy to discuss it further with the Appellant, if she arrived. The officers replaced the Appellant's padlocks and left. The note of this visit in our bundle (again unsigned, without any indication who had prepared it or when) records that various paperwork relating to the seizure was left in the lock-up, including HMRC notice 12A (notifying the Appellant of her rights in relation to the seizure). The Appellant denies seeing the notice 12A, affirming that the only documents she found in the lock-up after the seizure were three pages listing some of the goods seized. Whilst we do not consider a great deal turns on this point, on a balance of probabilities and in light of the somewhat slapdash attention to detail displayed by the HMRC officers in their approach to record keeping, and not having heard any further evidence from them on the point, we find Notice 12A was not in fact left by the officers as the note records, or at least not in a way which would ensure that it would come to the attention of the Appellant.

Correspondence following the September 2018 seizure

43. On 24 September 2018, Mr Shokunbi of the Appellant's accountants Paul Victoria emailed officer Esponda concerning the document which had been left with the Appellant during the seizure, notifying her of the duty assessment. He confirmed he had been instructed in relation to the matter, attached a form 64-8 and asked for confirmation of receipt, as he had not been able to get hold of officer Esponda by telephone.

44. Officer Esponda replied by email on 18 October 2018 (nearly a month later), informing Mr Shokunbi that "I will be posting the formal assessment out next week now", and confirming a copy would be sent to Mr Shokunbi. On 31 October 2018, Mr Shokunbi chased by email, to which officer Esponda replied on the same day saying he had still not sent out the assessment letter. Mr Shokunbi chased again by email on 9 November, to which officer Esponda replied on the same day, saying he had still not posted it out as he was "waiting for another department to get back to me". In reply (still on 9 November) Mr Shokunbi explained that "the client is anxious about the goods that was removed and to know if any decision has been made with regards to that since the duty issue is being dealt with." Officer Esponda replied on the same day, saying that the goods had all been destroyed. Mr Shokunbi asked by email on 11 November whether this was all of the goods or only part, and on 14 November officer Esponda confirmed that all the seized goods had been destroyed.

45. It was not until 1 April 2019 (shortly after the March 2019 seizure, when they appear to have been first instructed) that the Appellant's solicitors wrote to HMRC's Excise Appeals and Reviews section in Glasgow, formally requesting payment in lieu of restoration of the goods seized in September 2018 (which they acknowledged had already been destroyed).

46. Receiving no response, they sent a follow up letter by fax on 4 June 2019. This was forwarded to officer Esponda by the Appeals and Reviews section, and he emailed Mr Shokunbi on the same day. After setting out clarification on a few points of fact in Mr Shokunbi's letter that he disagreed with, he stated that "the seized goods will not be restored and Mrs Netufo will not receive compensation for the destruction of the goods as she had not paid the full duty on this import or the previous thirteen." He went on to say that "If you wish to go to request tribunal [*sic*] you must write directly to the Tribunal Service within 30 days of this letter. However, even if you request a review or apply directly to the Tribunal Service the assessment must be paid, secured or an application made for hardship."

47. It is therefore apparent that officer Esponda was himself mixing up the question of the duty assessment and the restoration application, and did not advise Mr Shokunbi of the correct procedure for pursuing the restoration issue, possibly not understanding it himself.

48. By this time, the appeals process in relation to the two seizures had become entangled. The formal review letter confirming refusal of restoration of the goods seized in March 2019 was issued on 13 June 2019 (see below) and when the Appellant's solicitors lodged her appeal with the Tribunal on 9 July 2019 (received at the Tribunal on 10 July), the notice of appeal form was clearly intended to address both seizures, giving as the Appellant's desired outcome "Payment of money equivalent of goods seized on 20 September 2018 and restoration of goods seized on 08 March 2019".

49. It was only after the First FTT Decision was issued that a proper statutory review was carried out (see [15] above).

Further imports

50. There were two further imports after the seizure in September 2018. One was a consignment which arrived at the entry port on 8 October 2018 (cleared on 9 October); this comprised 974 cases of beer, at a declared price of 249,800 Nigerian Naira (converted to £523.92), and it was imported using the correct code 473 by Canmi. There was then a delay until the second import, which arrived on 11 February 2019 (cleared on 18 February); this also comprised 974 cases, but this time at a declared price of 4,301,200 Nigerian Naira (converted to £9,096.52), imported using the correct code 473 by a company called Thunderbird Freight Limited.

Visits in February 2019

51. HMRC had clearly been concerned, from what they had discovered on their first visit, that the Appellant was wholesaling alcohol. They had taken away with them the Appellant's "invoice book" to examine it, and on 5 February 2019, officer Jane Matthews of HMRC telephoned the Appellant, informed her of their suspicions, and arranged a visit at the Appellant's premises for 18 February 2019 to discuss the matter. This was confirmed by letter dated 5 February, in which it was said that the Appellant would be given an opportunity to explain.

52. A note entitled "Visit Plan" was included in our bundle. It was clearly prepared in advance of the 18 February meeting by one of the officers attending. It includes the following items:

Get her to explain the details in the cash book, are the prices per case. How many bottles in a case.

Ask her opinion of what wholesaling involves.

Get her to explain the amounts sold as from these sales/amounts it looks like she has been wholesaling.

53. The visit took place as planned on 18 February 2019. Officers Jane Matthews and Farah Aslam attended, and as well as the Appellant, her accountant Larry Akande from Paul Victoria Accountants and her solicitor Shola Oyedirah of Chris Solicitors were present.

54. Two notes of this visit appeared in our bundle. Neither was signed, but we infer that the two notes were prepared separately by the two HMRC officers who attended on the visit. We accept them as broadly accurate accounts of the visit. Both notes record that the Appellant informed the officers she no longer sold any alcohol, having stopped after the seizure in September 2018. We accept that the Appellant said this to the officers, notwithstanding her subsequent denial that she had done so. She said she had previously imported from Nigeria and sold to the public and “approx. 10” organisers of “events”. She had taken orders 2-3 months in advance, making up a consignment from several orders. Her accountant said that her sales were “mainly to end users”. When asked about sales to an apparent business called “Walay’s Bar” which arose from the records previously uplifted, the Appellant did not reply. The arrangements for payment for the beer imported were discussed, involving the Appellant’s sister in Nigeria who placed the orders and paid the suppliers and was then paid by the Appellant using money transfer. Some further disorganised manuscript business records were uplifted (covering the period since the September 2018 seizure). The Appellant confirmed she did not keep any record of her takings, and had no till. The lock-up was inspected and found to be empty. When officer Matthews asked to see the current purchase and sales invoices, the accountant said that all the invoices relating to the alcohol had been sent to his office, accordingly the HMRC officers said they would visit his office to view the records there.

55. When the Appellant was challenged to identify the 10 event organisers that she had referred to earlier in her sales records, she did not do so. When it was pointed out to her that such activity would amount to acting as a wholesaler, she stated that all her supplies were made to end users.

56. Upon returning to their office, one of the officers carried out a search and established that a further import of beer by the Appellant had been cleared through customs that same day (see above).

57. Officers Matthews and Aslam visited the accountants’ office on 21 February 2019 and met Mr Ola Shokunbi. He was essentially unable to provide any further records, beyond 14 invoices from Canmi for the period 7 September 2017 to 11 September 2018 (which were uplifted, copied and returned the following day). He understood from the Appellant that she had been selling alcohol to people for parties. He also understood the Appellant had stopped trading in alcohol since the September 2018 seizure.

The March 2019 visits and seizure

58. Having become aware on 18 February that a further consignment of alcohol had been imported by the Appellant, officers Jane Matthews and Farah Aslam made a further unannounced visit to the Appellant’s shop on 7 March 2019, arriving at 11.30 am. There were two unsigned notes of this visit in our bundle, again we infer one was prepared by each officer. We accept them as broadly accurate.

59. There was nobody present at the premises (either the shop or the lock-up at the rear) when they arrived, though the lights were on in the shop. Officer Matthews telephoned the Appellant and got through on the third attempt at 11.50, to be told the Appellant was at her GP nearby; she confirmed she would be back at the shop later after seeing her solicitor. The officers waited. At 12.40 officer Matthews phoned her again, to be told she would be arriving shortly. At 12.50 she arrived and spoke to the officers by their car. They asked to enter the premises and she said she did not have the keys as her daughter had them. She said she was feeling very stressed, and her blood pressure was up. She left to get the keys. 25 minutes later

officer Matthews telephoned her again, to be told that she would be back around 1.40 after taking her medication. She arrived at 1.49 with the keys, accompanied by an unidentified male “family friend” and opened the shop. Officer Matthews returned to her the documents which had been taken away at the previous visit. She told the Appellant HMRC were considering a possible penalty for wholesaling alcohol without the requisite approval, and that any penalty could be reduced by co-operation from the Appellant.

60. Officer Matthews asked to check the lock-up storage at the rear of the shop. The Appellant said the landlord had taken it back and she did not have the keys; in any event she had no goods in it. Officer Matthews asked when the Appellant had last imported alcohol and she said she had not imported any since the September seizure. Officer Matthews challenged her, referring to the February 2019 import declaration. The Appellant then accepted that she had imported a consignment in February 2019, but asked why that mattered, as she was not wholesaling. Finally, she admitted that what was left of the imported alcohol (she thought about half) was indeed in the lock-up. She was challenged about the names of some of the customers to whom she had supplied alcohol which appeared on the documents uplifted previously, and maintained she did not supply any goods, the customers came and bought them.

61. Attempts were made to contact the landlord to obtain access to the lock-up keys. Ultimately the lock-up was opened by HMRC using bolt cutters (with police assistance). It was found to be approximately half full of beer. The Appellant and her daughter (who had now arrived) started questioning the legality of HMRC’s proposed seizure of the goods, and it was explained to them that the seizure was to be made because she was considered to be carrying on wholesaling without the correct approval. The Appellant’s friend asked if their emails would be ignored as had previously happened in relation to officer Esponda; it was confirmed that officer Matthews would acknowledge any correspondence received. Notice 12A was handed over, explaining that it currently contained estimated quantities (which would be updated the following day after a full count had been taken). In view of the time of day, it was too late to arrange for the goods to be removed and therefore the officers secured the lock-up with their own padlock and placed a seal on it. The Appellant was warned not to tamper with the padlock. She was told the officers would return the next day to remove the goods, about noon. Asked if she could be present, the Appellant said she could come in about 11.30. The last officers left around 6.35.

62. The following day (8 March 2019), at around 10.35 am officer Matthews rang the Appellant to ask for the current sales book to be made available to the officers who were attending. Her daughter answered the phone and said the Appellant was at the doctor’s that day, but intended to go to the shop at some point. If she did not go, she said she would get the documents scanned and sent by email. In fact an email was sent to officer Matthews by the Appellant’s daughter at 1.05 pm, saying that the Appellant had been referred to the hospital, so she would not be coming to the shop.

63. In the meantime, a number of other HMRC officers had arrived at the lock-up in the middle of the day to remove the goods. The Appellant obviously did not appear, though her daughter arrived shortly after 2pm, explaining that the Appellant was not around that day. Officer Mary Keen took a note of the events of the day, a copy of which was included in our bundle, stating that she had prepared the notes on the same day from her notebook and from memory. All the goods in the lock-up were removed, and the Appellant’s daughter was given a revised Notice 12A with full details of the goods removed.

64. Officer Matthews was not in the office when the Appellant’s daughter’s email arrived on 8 March, so did not see the email until the following Monday (11 March). She replied wishing the Appellant a quick recovery, and confirmed that she wanted to see the Appellant’s current

sales records, which were said to be kept at the Appellant's home. The Appellant's daughter replied the same morning, saying that the Appellant had another appointment that day, but should be back in the shop the following day (12 March), so officer Matthews could pick up the documents she wanted then.

65. On 12 March officer Matthews telephoned the Appellant around 12.30 to see when she would be available. The Appellant said she would be in the shop very shortly, and the officers could attend whenever they liked. Shortly before that time, officer Matthews had sent to the Appellant's daughter by email a letter setting out a large amount of information that HMRC wanted from the Appellant in relation to her activities. Officers Matthews and Aslam arrived at the shop around 1.50pm and met the Appellant. She gave them a book which purported to show her alcohol sales from 21 February 2019 to 6 March 2019. She called it her "alcohol book". It listed 20 sales, but gave just an abbreviated name of the purchaser and a list of the goods sold. Some entries were marked "paid", but with no indication how or when. Details are set out in Appendix 1 to this decision. These sales totalled 60 cases of "Big Stout", 172 cases of "Small Stout", 84 cases of "Trophy" and 70 cases of "Star", an overall total of 386 cases.

66. Broadly, therefore, the goods recorded by the Appellant as sold, together with the goods seized on 8 March 2019 (listed at [10] above), together made up the vast bulk of the goods shown on the invoice for the delivery to the Appellant which was cleared on 18 February 2019 (see [31] above). Just 4 cases of Small Stout and 4 cases of Star from the original delivery were unaccounted for, and the Appellant also had 10 unexplained cases of Orijin beer, 5 unexplained cases of 33 Export Beer and 2 cases and 11 bottles of "Guinness FES" beer, none of which she had imported herself.

67. Officer Matthews noted that 70 cases of Star Beer were included in the sales listed by the Appellant, but there had been no Star Beer seized, none having been found on the premises. She also noted that some of the customer names were the same as those on previous sales "lists" which had been uplifted (she quoted "Wumi", "Toyin", "Mr Gbenga" and "Denzil").

68. The only other records available were a copy of a "quotation" dated 15 February 2019 from Thunderbird Freight (whom the Appellant said she had found online). The details on this quotation match the entries on the import declaration made for the 19 February 2019 entry. Officer Matthews told the Appellant that she had emailed a detailed request for information to her daughter, and she should provide all that had been requested, or explain why any of it was not available.

69. Officer Matthews had also prepared a list of over 30 names which appeared as cash credits on the Appellant's bank statements that had been provided to HMRC, or to whom the Appellant appeared, from her rough manuscript notes previously supplied, to have provided larger amounts of alcohol. The Appellant provided some sketchy details about some of the names, but was unable to provide any information at all about approximately half of them.

70. In relation to "Brother Ameid", she said he had "told her that he organises parties". When asked about "Wumi", she said "she lives in Hackney and organised a baby christening".

Correspondence following the March 2019 seizure

71. On 18 March 2019, Chris Solicitors wrote to officer Matthews at HMRC, notifying her they had been instructed by the Appellant in relation to the March seizure, and expected to be writing further after taking instructions.

72. They followed this up with a letter dated 26 March 2019, in which they requested restoration of the goods seized on 7/8 March.

73. On 3 April 2019, HMRC (officer Nutting) replied to the restoration request. After recounting HMRC's version of events (including the September seizure), officer Nutting refused the restoration request on the basis that he did not believe that the purchases of beer were solely for retail purposes. He enclosed a copy of HMRC's restoration policy, and informed the solicitors of the right to request a review of his decision.

74. On 30 April 2019, Chris Solicitors responded in some detail, disagreeing with the reasons given for HMRC's decision and restating the Appellant's assertions as to the nature of her customers. They requested a formal review of the decision not to restore the goods.

75. Officer Matthews acknowledged the request by letter dated 10 May 2019, confirming that as no challenge to the legality of the seizure had been raised within the relevant timescale, the goods were now "deemed to have been duly condemned as forfeited."

76. A formal review letter was issued to the Appellant on 13 June 2019 by officer Noble, confirming that the decision not to restore was upheld.

77. The Appellant then notified her appeal to the Tribunal through her solicitors on 9 July 2019 (received on 10 July).

The nature of the Appellant's trading activities

78. The Appellant's records showed some dealings with "Wale" and "Walay's Bar" and she had received payments into her bank account from a company called Walay Enterprise Limited. A flyer for Walay's Bar (in Stratford, East London) was included with the documents uplifted from her shop by HMRC. In her witness statement, the Appellant referred to "Wale (Walay's bar)" as her "friend" and said she had sold him 11 cases of beer (in two transactions) in March and May 2016 for the purposes of social events he was holding. Payments received into her bank account from his company in August and September 2017 totalling £886 were, she said, loans which she repaid in cash. Included in our bundle was a witness statement of just over one page made by Mr Wale Olajo, referring to these transactions and supporting (almost word for word) what the Appellant had said in her witness statement. Mr Olajo did not attend the hearing to give evidence, and whilst we admitted his witness statement, we give it very little weight.

79. In addition, the records showed significant dealings with an individual variously described as "Michael", "Brother Michael", "Marchel" and "Brother Marchel". We are satisfied that these various entries relate to a single individual, not least because the Appellant herself, in her witness statement, specifically referred to a sale of 405 cases which was referred to in her own notes as being to "Brother Marchel," as relating to "a person named Michael". The note of the visit on 20 September 2018 records a statement (which we accept as broadly accurate) that when asked about the sale of 405 cases to "Michael", she said that she "only has phone and name and he picks goods up in his van." Dealings with this individual were shown on 2 May 2016 (30 cases), 17 May 2016 (15 cases), 19 May 2016 (10 cases), 14 February 2018 (80 cases), 10 May 2018 ("Marckel" – 80 cases), 3 August 2018 (405 cases) and 28 February 2019 ("Micheal" - 21 cases). We reject the Appellant's claim that she only dealt with this customer on one occasion.

80. Another name appearing frequently in the Appellant's manuscript records was "Gbenga" (sometimes spelt "Gbega") or "Mr Gbenga". Sales to this individual are shown of 13 cases (no date, but apparently some time in 2016), 20 cases (16 March 2016), 20 cases (24 March 2016), 19 cases (8 April 2016), 10 cases (20 April 2016), 10 cases (17 May 2016), 20 cases (25 May 2016), 10 cases (13 June 2016), 100 cases (14 February 2018) and 33 cases (1 March 2019).

81. "Amead" or "Brother Amead" also featured. Sales to him were recorded on 14 February 2018 (260 cases), 10 May 2018 (430 cases), 1 June 2018 (470 cases) and 3 August 2018 (50

cases). Another three orders (of 100 cases, 250 cases and 300 cases) are recorded, with no dates attached. This was the individual who had been described to HMRC at the meeting on 12 March 2019 as an organiser of parties.

82. Sales to “Wumi” were recorded on 10 May 2018 (20 cases), 3 August 2018 (25 cases) and 23 February 2019 (12 cases). This does not appear to be consistent with the Appellant’s statement at [70] above about Wumi having organised “a christening”.

83. A sale to “Denzil” of 550 cases was recorded on 1 June 2018 and a sale to “Denzil Bankole” of 75 cases was recorded on 3 August 2018. Even if the second sale was to a different Denzil, the first order (comprising over half a container load of beer, sold for £11,550) appears an unreasonable quantity for a private party, even a large one. This order comprised 150 cases of “big stout” and 400 cases of “small stout”, amounting to some 1,800 large (600ml) bottles and some 10,800 small (325 ml) bottles of beer – rather too much even for a party of 500 revellers to consume at one event.

84. A record (not dated, but included in the material obtained by HMRC in September 2018) shows cross-trading by the Appellant with “Siril”, selling 170 cases of beer for £3,910 and buying various bitters, beers and potentially other products (188 cases) for £4,058.

85. The above represent some of the more significant facts that have emerged from our examination of the evidence. There are others, but these give a clear picture. As an overarching comment, whilst it is clear that some of the recorded sales could be consistent with ordinary retail activity (including sales to individuals organising parties), there are many elements of the evidence which point more clearly towards a significant and ongoing wholesale operation, chiefly the extraordinary size of some of the sales, the ongoing relationships with established customers and the lack of any material third party evidence to support the Appellant’s assertions about her customers’ non-commercial use of the goods she sold to them.

86. As Mr Avient agreed, we are required to accept (as a result of the Appellant’s failure to challenge the lawfulness of the March 2019 seizure) that the Appellant was in fact holding the beer seized in March 2019 for the purpose of selling it wholesale without the requisite permission to do so. The finding Mr Avient effectively asks us to make is that the Appellant was doing so “innocently”, without believing that she was doing so, and that this should be taken into account when considering the question of restoration.

87. The only evidence in support of his case was the Appellant’s own uncorroborated oral testimony, the unsubstantiated and untested witness statement of one of her customers and the extremely poor trading records provided to HMRC and included in the bundle.

88. Having considered her evidence and examined her trading history, so far as it appears from the evidence before us, we are satisfied the Appellant was well aware of the statutory restriction on wholesaling alcoholic liquor, that the vast majority of her sales of beer were by way of wholesale, and she was well aware that she was operating in breach of the statutory wholesaling regime.

THE LAW AND HMRC’S POLICY

Jurisdiction of the Tribunal

89. It is common ground between the parties that:

- (1) dutiable alcohol is liable to forfeiture where it is in the possession, custody or control of a person for the purposes of carrying on a controlled activity, which includes wholesaling alcohol without approval under the AWRS (which approval the Appellant did not hold);
- (2) goods imported without payment of the correct duty are liable to forfeiture;

(3) where goods which are liable to forfeiture have been seized, HMRC have a discretion to restore the seized goods, subject to such conditions (if any) as they think proper;

(4) the jurisdiction of the Tribunal in an appeal against such a decision is set out in s 16(4) Finance Act 1994 (“FA94”), which provides as follows (the decision not to restore the Appellant’s goods amounting to an “ancillary matter” for these purposes):

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

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

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

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

(5) any claim that goods seized as liable to forfeiture are not so liable must be pursued through separate condemnation proceedings, and if that avenue is not pursued then the goods in question are deemed to have been duly condemned as forfeited;

(6) in exercising its jurisdiction, the Tribunal is permitted to consider facts and matters that were not before the relevant reviewing officer but may not find facts which are inconsistent with the facts that are deemed to exist by reason of the “statutory deeming” referred to at [(5)] above;

(7) in deciding whether the relevant decision of HMRC was one that they “could not reasonably have arrived at”, the Tribunal should consider whether HMRC took into account some irrelevant matter, disregarded a matter to which weight should have been given, or otherwise erred in law. The Tribunal should also consider whether HMRC’s decision was proportionate.

90. In the circumstances, we do not consider it necessary to set out a lengthy analysis of the authorities underpinning the above approach.

Wholesaling of controlled liquor

91. S. 88A Alcoholic Liquor Duties Act 1979 (“ALDA”) defines what amounts to wholesaling:

(3) Controlled liquor is sold “wholesale” if –

(a) the sale is of any quantity of the liquor,

(b) the seller is carrying on a trade or business and the sale is made in the course of that trade or business,

(c) the sale is to a buyer carrying on a trade or business, for sale or supply in the course of that trade or business, and

(d) the sale is not an incidental sale, a group sale or an excluded sale...

- (4) A sale is an “incidental sale” if –
 - (a) the seller makes authorised retail sales of alcoholic liquor of any description, and
 - (b) the sale is incidental to those sales.
- (6) A sale is a “group sale” if the seller and the buyer are both bodies corporate which are members of the same group....
- (7) A sale is an “excluded sale” if it is of a description prescribed by or under regulations made by the Commissioners.

HMRC’s policy

92. Included in the papers before us was a copy of HMRC’s “Restoration Policy for Disclosure” in relation to Alcohol, Tobacco and Oils. A copy is included at Appendix 2 of this decision

THE ARGUMENTS

For the Appellant

The September 2018 seizure

93. In relation to the September 2018 seizure, Mr Avient argued that HMRC’s review decision issued on 5 November 2021 was manifestly wrong and disproportionate because:

- (1) the Appellant had appointed and relied on a customs agent for the purposes of the import declarations and the reasonableness of this approach had not been considered;
- (2) the Appellant had paid the duty which had been notified to her by her customs agent;
- (3) HMRC had failed to take into account the prompt action taken by the Appellant to quantify the duty under-notified to her by her customs agent;
- (4) to the extent that the delay in seeking restoration was relevant, HMRC had given disproportionate weight to the length of the delay and had failed to give adequate weight to the reasons for that delay and
- (5) HMRC had given no consideration to the proportionality of refusing restoration, or making restoration with conditions.

94. As a result of the Tribunal’s questions to Ms Gordon during the hearing, it became apparent that she did not know the difference between the “small breweries” and normal beer duty rates, therefore she did not know the size of the Appellant’s under-declarations, In response to this revelation, Mr Avient argued that Ms Gordon could not possibly have even considered the question of proportionality in reaching a decision, meaning that it was necessarily flawed.

95. At the hearing, Mr Avient also argued that HMRC’s failure to leave the appropriate Notice 12A at the premises as required by HMRC’s internal policy (even though there was no statutory obligation to do so) upset the “delicate balance” between the interests of the state and the individual in such cases and resulted in the seizure being unreasonable and disproportionate because of the failure to make the Appellant properly aware of her rights in relation to it, especially where the goods were destroyed a short time later in the absence of any restoration request from the Appellant.

The March 2019 seizure

96. In relation to the March 2019 seizure, Mr Avient argued that HMRC’s review decision issued on 13 June 2019 was manifestly wrong and disproportionate because:

- (1) it failed to give any weight to the explanations as to the reasons for the volumes of sales unconnected to wholesaling;
- (2) it gave inappropriate weight to a historic failure to record to whom retail alcohol sales were made (no such records being required);
- (3) it failed to give appropriate weight to the explanations as to why the Appellant believed her sales were retail and not wholesale;
- (4) it failed to give weight to the Appellants medical condition at the time of the March 2019 seizure or the emotional and financial impact on her of the September 2018 seizure;
- (5) it failed to consider whether restoration could be made subject to the maintaining of sufficient records to demonstrate that only retail sales were made; and
- (6) it failed to consider the overall circumstances and that restoration could be made, subject to reasonable conditions to ensure compliance.

97. In his submissions at the hearing before us, Mr Avient argued, in relation to the March 2019 seizure, that whilst it must be accepted that the Appellant did hold the goods for the purpose of selling them wholesale, she was in fact unaware that she was doing so and had provided perfectly valid explanations as to the volume of alcohol required for the purpose of what she had considered to be a retail business, therefore she was reasonable in her belief that she was acting lawfully. In failing to address the Appellant's reasonable belief that she had acted lawfully, and in effectively assuming culpability on her part, HMRC's decision was necessarily fatally flawed.

For HMRC

The September 2018 seizure

98. Ms Brown submitted that the evidence showed officer Gordon had considered non-restoration to be in line with HMRC's policy where incorrect and/or no duty had been paid. Further, finding no humanitarian issues requiring an exceptional deviation from the normal approach, she had quite properly regarded non-restoration as appropriate.

The March 2019 seizure

99. Ms Brown submitted that officer Noble had undertaken a wider review than he was required to, deciding on the basis of the evidence before him that it was appropriate to conclude the Appellant had been involved in wholesale trading of alcohol. Again, on the basis of HMRC's policy he considered non-restoration to be appropriate and did not consider that there were any humanitarian issues that required a deviation from this standard approach. If anything, officer Noble had been over-generous in his review by exploring the background evidence on the Appellant's trading.

DISCUSSION AND DECISION

The September 2018 seizure

100. We consider that in failing to enquire into the amount of the underpaid duty, officer Gordon clearly failed to have regard to a factor which could have been very relevant to the question of proportionality of the refusal to restore. On this basis alone, we consider her decision to be one which could not reasonably have been arrived at. Having made this finding, we see no merit in further consideration of the other arguments advanced by the Appellant in reaching a decision on the reasonableness of officer Gordon's decision.

101. We were somewhat surprised that neither party was in a position to inform us at the hearing what the amount of underpaid duty was on the goods which were seized. We were made aware of an initial duty assessment of £100,000, which appears to have been

subsequently reduced by agreement to a little over £60,000. However, it is apparent that this assessment covers not just the goods imported by the Appellant immediately prior to the September 2018 seizure, but all the goods imported by her since August 2017.

102. From our subsequent legal research, we established that the “small breweries” relief applied at an effective rate of 50%. The duty originally declared on the consignment received by the Appellant shortly before the September 2018 seizure was just over £4,750. Given the 50% relief wrongly claimed, this means that the under-declaration on that consignment was the same amount. As HMRC seized over 1100 cases of beer, we infer that this comprised all or substantially all of the consignment which the Appellant had just received. The question therefore arises as to whether it was proportionate for HMRC to refuse to restore (or compensate the Appellant for) beer valued by the Appellant at £25,739 because of a duty under-declaration of some £4,750. In doing so, of course, it is appropriate to bear in mind that the commercial value declared on behalf of the Appellant for the whole shipment entered in February 2019 was NGN 4,30,200 (the equivalent of £9,096.52 at the relevant rate of exchange).

103. As part of that consideration, we are invited to consider the Appellant to have been innocent of any wrongdoing in relation to the under-declarations. Whilst we do not find her to have initiated or explicitly approved the under-declarations made on her behalf, we consider she did not show the requisite degree of care and attention to ensure that her agents complied properly with the relevant requirements. She had changed customs agents and immediately seen a very significant drop in the duty she was required to pay. She had made no enquiry as to how this had come about. In the circumstances, we consider she should have known of the under-declarations; she effectively turned a blind eye to them.

104. Even if this under-declaration had been an isolated event, we would have considered a refusal to restore goods valued at £25,739 on the basis of a duty under-declaration of £4,750 in such circumstances to be entirely proportionate, given the intended deterrent effect of seizure and the related restoration policy. We would further observe that since the aggregate under-declarations were ultimately settled at more than £60,000, the Appellant’s case in relation to proportionality is weakened still further.

105. We do not consider the failure to deliver Notice 12A to give rise to any unreasonableness so far as the decision not to restore is concerned. To the extent HMRC considered the delay in the Appellant’s restoration application to be a factor against granting it, we consider they were wrong; however the terms of the review letter are not particularly clear: whilst asserting that the Appellant had delayed in making enquiries about restoration of her goods and stating that a failure to seek restoration for some 8 months was not “a reasonable timeframe”, the text of the letter under “my conclusion” gives just one reason for refusing to restore the goods: “because the full excise duty was not paid on the beer...”.

106. As we have found that the review decision in relation to the September 2018 seizure was one which could not reasonably have been arrived at, we turn to the question of what we should do about it.

107. The Tribunal has power (see [89(4)] above) to;

- (1) 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, and
- (2) require HMRC to conduct, in accordance with our directions, a review or further review as appropriate of the decision.

108. It is important to note, however, that the Tribunal is not required by the statute to exercise either power.

109. This question was considered by the Tribunal in *NAS & Co Limited v HMRC* [2014] UKFTT 050 (TC), where the Tribunal was effectively in a similar position to this case: it had found that the decision in question had been unreasonably arrived at, but it was considering a submission to the effect that the decision should not be disturbed because even after taking account of all the defects in the decision making process, it could still have been reasonably arrived at in the light of all the circumstances. Referring to *John Dee Ltd v C&E Commissioners* [1995] STC 941 at 953, the Tribunal held at [146] that:

“It is only if the facts are such that the only decision which could possibly result from the exercise of the discretion – that is to say if the result were inevitable – that it would be permissible not to set aside the original decision.”

110. We respectfully agree. To say otherwise would effectively amount to arrogating to the Tribunal the discretion which the statute has conferred on HMRC.

111. In the present case, it is our view that if officer Gordon (a) had taken account of the amount of duty under-declared on the goods seized and (b) had not given any weight to the delay in the Appellant formally requesting restoration of the goods, we would certainly not have regarded a decision to refuse restoration to have been unreasonably arrived at. But even in the light of HMRC’s stated policy (see Appendix 2) we do not consider such a refusal to be “inevitable” (as referred to in *NAS* at [141]-[150] and *John Dee* at p.953) in the light of the facts as we have found them. Whilst we consider it to be unlikely, it may be that HMRC, after exercising their discretion properly, reach a different conclusion. We therefore consider the matter should be referred back to them for a further review on the appropriate basis, and our direction to that effect is set out below.

The March 2019 seizure

112. It is common ground that we are required to accept that the beer which was seized was being held by the Appellant for the purposes of wholesaling of alcoholic liquor without the requisite approval. The question before us is whether it remains permissible, following *Jones & Jones*, for the Appellant to argue that she was “innocent” of the fact that she was doing so, and should accordingly be allowed to have her goods restored to her.

113. By reference to the statutory definition of wholesaling (see [91] above), it is clear that the Appellant sold the beer in the course of carrying on her trade. In order for a sale by the Appellant to amount to wholesaling, however, it must be “to a buyer carrying on a trade or business, for sale or supply in the course of that trade or business” or be “incidental” to an authorised retail sale. The Appellant’s argument is that none of the persons to whom she sold her beer were “carrying on a trade or business”, or even if they were, the beer sold to them was not for sale by them in the course of their trade or business.”

114. In principle, we are prepared to accept that facts could arise where such an argument could be sustainable. But not here. Based on our assessment of the Appellant’s evidence and our examination of the sketchy records before us, we find that whilst a small part of the Appellant’s trade may have been to individuals throwing parties and the like, the bulk of her sales, as she well knew, were to persons carrying on their own trades or businesses for sale or supply in the course of their trades or businesses (see [78] to [88] above). We see no reason to believe that the goods which were seized from her in March 2019 were held for any other purpose. Given this finding, we can see no basis for attacking HMRC’s decision on any of the grounds advanced by Mr Avient. In our view the decision which HMRC came to was one which it was reasonable for them to come to. Accordingly, the appeal in relation to the March 2019 seizure must fail.

SUMMARY AND CONCLUSION

The September 2018 seizure

115. We consider that in failing to consider the proportionality of the refusal to restore the goods seized in September 2018 (by not enquiring into the amount of the under-declaration upon which the seizure was based), HMRC could not reasonably have arrived at the decision to confirm their refusal to restore the seized goods.

116. Even though we would ourselves have reached the same ultimate decision as officer Gordon on the facts as we have found them, it is not our decision to take. We have considered whether it is “inevitable” that HMRC will reach the same view on the basis of the facts as we have found them, and whilst we consider it extremely likely, we do not consider it inevitable.

117. We therefore **DIRECT**, pursuant to s.16(4)(a) and (b) FA94, that

- (1) officer Gordon’s decision dated 5 November 2021 shall cease to have effect,
- (2) HMRC shall conduct a further review of their original decision not to restore the goods seized in September 2018, on the basis of the fact that the amount of the under-declaration of duty in respect of the goods seized was approximately £4,750 whilst their claimed value was £25,739 (and their declared cost on import was approximately 60% of the total consignment import value declared of £9,096.52), and without giving weight to the period of delay before the Appellant notified her formal request for her goods to be restored (and otherwise on the basis of the facts found in this decision), and
- (3) the new review is to be carried out by a different officer.

118. To this extent, the appeal in relation to the September 2018 seizure is **ALLOWED**.

The March 2019 seizure

119. For the reasons given above, we consider that the decision of officer Noble to confirm HMRC’s refusal to restore the goods seized in March 2019 was a decision which it was reasonable to come to. Accordingly in relation to the that seizure, the appeal is **DISMISSED**.

Conclusion

120. To the above extent, the appeal is therefore **ALLOWED IN PART**.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

121. 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.

**KEVIN POOLE
TRIBUNAL JUDGE**

Release date: 10th FEBRUARY 2023

APPENDIX 1

SUMMARY OF SALES PROVIDED ON 12 MARCH 2019

Date	Customer	Goods	Price	Endorsed as Paid?
21 Feb 2019	Emanuel Sam	2 Big Stout 2 Small Stout	£64 £128	
21 Feb 2019	Sunday	4 Star 18 Small Stout 20 Big Stout	£80 £576 £640	
21 Feb 2019	Emma	1 Star 2 Small Stout	£20 £64	Yes
23 Feb 2019	Bidemi/Mr Bidemi	5 Star 30 Trophy 55 Small Stout	£100 £600 £1,760	Yes
23 Feb 2019	Ma Wale	1 Star 1 Trophy	£20 £20	Yes
23 Feb 2019	Wumi	2 Star 5 Trophy 5 Small Stout	£40 £100 £160	
25 Feb 2019	Mr Tony	10 Star 15 Trophy 20 Big Stout 30 Small Stout	£200 £300 £640 £960	
27 Feb 2019	Wemino Adegoke	1 Small Stout	£32	
28 Feb 2019	Micheal	3 Trophy 8 Big Stout 10 Small Stout	£60 £256 £320	
1 Mar 2019	Toyin	1 Star 1 Trophy 1 Small Stout 1 Big Stout	£20 £20 £32 £32	Yes
1 Mar 2019	Mr Gbenga	6 Star 9 Big Stout 18 Small Stout	£120 £288 £576	
2 Mar 2019	Denzil	2 Trophy	£40	Yes
2 Mar 2019	Jumji	3 Trophy	£60	Yes
2 Mar 2019	Shoja	10 Star 10 Small Stout 24 Trophy	£200 £320 £480	Yes
4 Mar 19	Chema (?)	1 Star	£20	

		2 Small Stout	£64	
4 Mar 19	Idowu	8 Small Stout	£256	Yes
4 Mar 2019	Abigail	3 Star	£60	Yes
4 Mar 2019	Dimond	1 Small Stout	£32	Yes
5 Mar 2019	Eugene	7 Small Stout	£224	Yes
6 Mar 2019	Taiwo (?)	2 Small Stout 26 Star	£64 £520	Yes

APPENDIX 2 – DISCLOSABLE RESTORATION POLICY

The policy for restoration of seized goods and vehicles

- is that alcohol, tobacco, vehicles and other things (such as cover loads) seized as liable to forfeiture must not generally be restored
- must be applied firmly but not rigidly
- allows for each case to be considered on its merits to determine whether restoration may be offered and under what terms
- offers restoration exceptionally but not as a matter of course
- does not allow for restoration where fiscal marking and/or duty stamp legal requirements would be breached
- recognises there will be occasions when overriding humanitarian or hardship issues warrant a departure from usual restoration criteria
- is aimed at those who are profiting from offences under customs and excise legislation
- does not intend to penalise innocent third-parties
- aims to address instances where innocent third-parties do not learn from mistakes and omissions that facilitate offences
- allows for goods that are found, mixed or packed with goods liable to forfeiture to be restored in certain circumstances. If the goods have been used to deliberately mislead officers or to conceal a fraud, they will only be restored in very exceptional circumstances
- allows for things to be restored shortly after they have been seized so it is not necessary to remove them to a Queen's Warehouse. (If seized things are in the QW, the processes for returning them to their owner are in the QW instructions).

Restoration policy, with its emphasis on non-restoration, is intentionally robust in order to

- give a proportionate and graduated response to the risk posed by tobacco and alcohol diversion and smuggling
- maximise the deterrent value of seizure
- protect the UK revenue by ensuring the correct amount of excise duty is paid

- protect legitimate trade from unfair competition created by the sale of cheap alcohol and tobacco goods that have not borne the proper amount of excise duty
- prevent illicit trade in excise goods
- ensure goods not normally available in the UK from legitimate outlets are not made commercially available in the UK
- emphasise the duty of every citizen to comply with the law
- demonstrate that offences involving excise goods are treated seriously and cannot become socially acceptable
- deter development of a ‘smuggling’ culture

The policy of non-restoration includes these objectives because

- fraudsters rely on a market for their goods, which could still be met with restored goods even though seizure of the goods and resulting penalties imposed would impact on the financial viability of their operation
- allowing restoration of smuggled goods, even on payment of duty and appropriate penalties, would do little to address the effect of such activities on legitimate UK trade
- eliminating the opportunity to deal in illicit goods reduces the potential market for them.
- illegally-marketed goods are easier to identify if goods not normally available in the UK from legitimate outlets are not otherwise commercially available in the UK
- seizure of vehicles used to transport diverted or smuggled goods has a significant deterrent effect
- people not directly involved with illicit goods but otherwise associated with them, such as those financing or profiting from the enterprise, also suffer by losing the goods
- the government’s health objectives are supported by ensuring tobacco products without UK health warnings do not reach the UK market.

In addition, the underlying principles of vehicle restoration policy are that

- there will be occasions when overriding humanitarian or hardship issues warrant a departure from usual restoration criteria
- vehicle restoration terms should provide a graduated response depending on
- the degree of blame that can be attributed to an individual • the potential harm caused by the evasion of excise duty
- vehicles specifically constructed or adapted for concealing goods must not be restored unless the place for concealing goods is removed before restoration.

In pursuing this policy, officers should

- remember their obligation to act in a proportionate and reasonable way consistent with human rights principles

- vary usual action where required to deal with humanitarian issues or to meet individual circumstances
- be aware it would be highly unusual for seized excise goods to be restored on humanitarian grounds.