TC04162

Appeal number: TC/2014/01275

EXCISE DUTY – importation of tobacco – notice of claim in respect of condemnation proceedings not served within 30 day time limit – tobacco and car seized- offer to restore car on payment of 100% of duty- review decision – terms of offer to restore upheld – appeal – whether review decision unreasonable – role of tribunal in finding the facts against which the reasonableness of decision is to be judged - Gora and Others v Customs and Excise Commissioners applied - irrelevant factor taken into account – would decision inevitably have been the same – yes - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

CLAIRE YVONNE NEWMAN **Appellant**

- and -

DIRECTOR OF UK BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE GUY BRANNAN
MR LESLIE HOWARD

Sitting in public at Norwich Crown Court Building on 23 October 2014

The Appellant represented herself

Ms N Carpenter for the Respondents

DECISION

Introduction

1. This is an appeal under section 16 Finance Act 1994 against a decision by UK Border Force ("Border Force") dated 12 February 2014 which upheld on review an earlier decision to offer restoration of a vehicle on payment of the excise duty that would have been payable on tobacco imported into the UK by the Appellant and her partner. The amount of excise duty concerned was £1,554.66.

The evidence

2. We heard evidence from Mr Graham Crouch, a Higher Officer of Border Force, who was the reviewing officer who wrote the decision letter of 12 February 2014. Mr Crouch submitted a witness statement and was cross-examined on his evidence. We also heard evidence from the Appellant who was also cross-examined on her evidence. Because the Appellant was representing herself we allowed the Appellant to give a statement on oath and gave her permission to give a further statement, in lieu of re-examination, after her cross-examination. In the event, the Appellant chose not to give a further statement in lieu of re-examination.

3. In addition, both the Appellant and Border Force submitted bundles of documents.

The legal framework

4. As we have explained, this is an appeal in relation to a decision by Border Force to impose a fee for the restoration of the Appellant's car.

5. By way of background, we should explain that any vehicle which has been used for the carriage of goods liable to forfeiture (e.g. the tobacco in this case) is also liable to forfeiture: section 141 CEMA.

6. Under section 16 (4) Finance Act 1994 an appeal against a decision in respect of restoration is confined to a consideration of the question whether the Border Force officer reviewing the original decision reached a decision that could not reasonably have been arrived at. In other words, our jurisdiction is supervisory and not appellate.

7. The jurisdiction of the Tribunal under section 16 Finance Act 1994 was helpfully described by Judge Hellier in *Harris v Director of Border Revenue* [2013] UKFTT 134 (TC) as follows :

> "4. We must explain at the outset that the role of this tribunal in an appeal of this nature is unusual and is limited. There are two aspects to this.
>
> 5. First, in relation to the question of whether or not a car should be returned, we are not given authority by Parliament to make a decision

that it should or should not be restored. The decision as to whether or not to restore the car is left in the hands of the UKBA: only they have the power or duty to restore it. Instead we are required to consider whether any decision they have made is reasonable. If it is not reasonable we can set the decision aside and require them to remake it; we can give some instructions in relation to the remaking of the decision, but we cannot take the decision ourselves. If we set aside a decision and UKBA make a new decision, then the taxpayer may appeal against that decision and the same process follows.

6. It is important to remember that a conclusion that a decision is not unreasonable is not the same as a conclusion that it is correct. There can be circumstances where different people could reasonably reach different conclusions. The mere fact that we might have reached a different conclusion is not enough for us to declare that a conclusion reached by UKBA should be set aside.

7. The second limitation in our role follows from the fact that Parliament has decreed that it is for the magistrate's court or the High Court to decide upon whether or not goods are legally forfeit. The Customs and Excise Management Act 1979 ("CEMA") sets out the required procedure: if the subject disputes the legality of the seizure he can require UKBA to bring proceedings (unhappily they are called condemnation proceedings) in the magistrate's court to determine the legality of the seizure. If the magistrate's court decides that the goods are properly forfeit then the tribunal cannot overturn that decision or take a different view. Further we must proceed on the basis that any finding of fact which was necessary for the magistrate's court to have come to this decision is to be taken as having been determined by the magistrates and, before us, is therefore to be treated as proved.

8. If the subject does not require condemnation proceedings to be taken in the magistrate's court, he can effectively concede the legality of the seizure. That is because Schedule 3 CEMA provides:

"5. If on the expiration of the [one month period for giving notice that something is asserted not to be liable to forfeiture] 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 forfeit."

9. The effect of this deeming is that any facts which would have been necessary to the conclusion that the goods are forfeit must also be assumed to have been proved. It would be an abuse of process to permit such conclusions to be reopened in this (see para [71(7)] *HMRC v Jones* [2011] EWCA Civ 824: "Deeming something to be the case carries with it any fact that forms part of that conclusion").

10. ...

11. There is one other oddity about this procedure. We are required to determine whether or not the UKBA's decision was "unreasonable"; normally such an exercise is performed by looking at the evidence before the decision maker and considering whether he took into account all relevant matters, included none that were irrelevant, made no mistake of law, and came to a decision to which a reasonable

> tribunal could have come. But we are a fact finding tribunal, and in *Gora and Others v Customs and Excise Commissioners* [2003] EWCA Civ 525 [at [39]] Pill LJ approved an approach under which the tribunal should decide the primary facts and then decide whether, in the light of the tribunal's findings, the decision on restoration was in that sense reasonable. Thus we may find that a decision is "unreasonable" even if the officer had been, by reference to what was before him, perfectly reasonable in all senses."

8. As we shall see, one question which arises is whether the Notice of Claim under paragraph 3 Schedule 3 to the Customs and Excise Management Act 1979 ("CEMA") was given in time. Paragraph 3 Schedule 3 provides as follows:

> "Any person claiming that anything seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of the 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."

9. On this point, we should also refer to section 7 Interpretation Act 1978. Section 7 provides:

> **References to service by post.**
>
> Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

10. The question whether the Notice of Claim was served in time is important. If it was served in time, the deeming provision (referred to by Judge Hellier) contained in paragraph 5 of Schedule 3 CEMA does not apply. If, however, the Notice of Claim was not given in time the deeming provision of paragraph 5 does apply.

The Facts

11. We find the following facts.

12. On 20 November 2013 the Appellant arrived at Portsmouth on a ferry from Bilbao. She was accompanied by her partner, Mr Michael Mansell. The Appellant was driving a make of car called a Smart Fortwo Passion ("the car"). The Appellant was stopped at Portsmouth docks by Border Force officers. We should mention that Mr Mansell was not present at the Hearing.

13. The Appellant was asked whether the vehicle was her car and she replied in the affirmative. It was not in dispute that the Appellant was the registered owner of the car.

14. The Appellant also told the Border Force officer that she lived in the UK rather than Spain but that she had spent the last eight months in Spain. Mr Mansell said that he had been in Spain for two months but had flown home recently to visit his parents who were ill. We shall discuss this visit of Mr Mansell later. The Appellant confirmed that, whilst in Spain, she had lived at one of their properties and that she and Mr Mansell also had businesses in Spain.

15. The Border Force officer's notebook recorded that the Appellant's car was intercepted at 10:25 AM on 20 November 2013. The notebook recorded the notes as "started" at 10:45 AM. There was, therefore, a 20 min gap between the car being "intercepted" and the commencement of the note-taking. Nonetheless, the notes seem to record the opening exchanges between the Border Force Officer and the Appellant and Mr Mansell. Thus, the notes begin:

> "KB: Morning, can I see your passports please."

16. The notes of the initial conversation between the officer and the Appellant and Mr Mansell comprise only three pages of a small notebook. This exchange can only have lasted a few minutes. We, therefore, infer that these notes were written up at 10:45 AM i.e. shortly after this initial exchange took place. The notes were signed by Mr Mansell but not by the Appellant.

17. The notes then recorded the following questions and answers:

> KB[the Border Force officer]: Does everything in the car belong to you?
>
> CYN [the Appellant]: Yes
>
> KB: Has anyone asked you to bring goods into the UK for them?
>
> CYN: No
>
> …
>
> KB: Have you bought anything for yourself?
>
> [Mr Mansell]: 12 packs of tobacco.

18. The notebook then records:

> "Following the search of the car and bags I found 15 packs of tobacco totalling 7 1/2 kg.
>
> KB: Who owns the tobacco?
>
> [Mr Mansell]: I do, paid for it on the credit card on the boat.

19. The exchange at paragraph 17 was later relied on by Border Force as indicating that the Appellant had claimed to own everything in the car. We do not think that this is the natural way to read her response. In the first place, the Appellant was travelling back to the UK from Spain with her partner. When asked whether everything in the car belonged "to you", the most natural understanding of the question, in our view, would be whether the contents of the car belonged to the Appellant and Mr Mansell. We do not understand the Appellant as claiming that the entire contents of the car

belonged solely to her. That would plainly not make sense. We assume that the car contained some luggage or effects belonging to Mr Mansell. We note in this regard that the ferry trip from Bilbao was an overnight trip and that Mr Mansell later in his interview indicated that he was visiting the UK for 2 to 3 weeks. Moreover, within a few seconds after this exchange Mr Mansell was stating that he had purchased a number of packs of tobacco. It seems plain to us that when first asked: "does everything in the car belong to you", the Appellant fairly understood the "you" to refer to both her and Mr Mansell.

20. The Appellant told us, and we accept, that when she and Mr Mansell were asked about the tobacco, she told the Border Force officer that she had the receipts available for his inspection.

21. Mr Mansell was then separately interviewed by Border Force officers. The Appellant was not involved in this interview. The interview lasted from 11:10 AM to 12:15 PM. Mr Mansell signed the interview notes. We shall refer to this interview as the "Mansell interview" and will return to it when we discuss the review letter of 12 February 2013.

22. At 12:35 PM Mr Mansell was asked questions about whether he had anything on him "that he was smoking now." Evidently, these questions were asked in the presence of the Appellant because the notebook records that when Mr Mansell replied: "no nothing now", the Appellant called over saying: "There are some cigarettes in the car. But you left your rizlas [a brand of tobacco rolling paper] at home."

23. At 12:46 PM the Border Force officer confirmed that he was seizing 7.5 kg of tobacco. He gave the following reasons for the seizure:

> "1. 7.5 kg is seven times over the guidance levels.
>
> 2. Regular traveller. Last trip 10/2013 as shown by our records and claims to travel six - seven times a year.
>
> 3. Previous offender in 12/2012 – 15 kg HRT [hand-rolling tobacco] seized when Pax stated 4/4.5 kg seized
>
> 4. Claimed to bring in 2/2.5 kg on last trip. Actually intercepted [with] 9.5 kg
>
> 5. When stopped on the last occasion did not claim any HRT as for personal use. No evidence of smoking.
>
> 6. Vague on consumption rates and how much do you get out of a packet."

24. These reasons were read to Mr Mansell by the Border Force officer at 12:55 PM. The notebook then records that the tobacco and the vehicle were seized, although according to the notebook the reasons for seizure only related to the tobacco. In response, Mr Mansell is recorded as saying: "I'm cold. I just want to go. I'll sign the forms."

25. At 13:20 PM the notebook records the vehicle as being offered for restoration for a sum of £1554.66 and that Mr Mansell agreed to pay by credit card. The notebook also records that the vehicle owner was shown as belonging to the Appellant. The notebook states that "BOR's 156, 162, Notice 1 & Notice 12 A issued [and explained] to Mr Mansell."

26. The Appellant and Mr Mansell departed at 13:45 PM.

27. The Appellant sent a Notice of Claim challenging the legality of the seizure to the Border Force. Although our copy of the Notice of Claim did not have a date, it was accepted by the Appellant that it had been posted as an "urgent letter" (according to a receipt from the Spanish Postal Service) from Spain on 16 December 2013. In his evidence, Mr Crouch produced the envelope in which the Notice of Claim had been posted. This bore date stamp indicating that it was received by the Border Force on 6 January 2014. The Notice of Claim also bore a receipt stamp indicating that it had been received on 6 January 2014.

28. Mr Crouch explained the Border Force's post-opening procedures to us. He explained that post received by the Border Force was taken to a secure room. Two officers were allocated on a rota basis to open the post. Every item of post was stamped with the date of receipt – both the envelope and the correspondence would be so stamped and then kept together.

29. The Appellant claimed that the Notice of Claim must have been received before 6 January 2014 and argued that it was likely to have been received before 20 December 2013. She had posted the letter in Spain as an urgent letter and that usually an urgent letter would reach the UK within two or three days.

30. We find that the Notice of Claim was received by the Border Force on 6 January 2014. We accept Mr Crouch's evidence of the date of receipt. Even though we accept the Appellant's evidence that the Notice of Claim was posted in Spain on 16 December as an "urgent letter", it seems most likely that it was delayed in the Christmas post and was not delivered in the usual two or three days which the Appellant said was the ordinary delivery period for an "urgent letter". In other words it was received after the 30 day period permitted by paragraph 3 Schedule 3 CEMA and, accordingly, by virtue of paragraph 5 of Schedule 3 both the tobacco and car were deemed to have been duly condemned as forfeited.

31. In our view, section 7 of the Interpretation Act 1978 does not apply to produce a different result. Section 7, in effect, deems a notice to have been given when sent by post on the date that it would have been delivered in the "ordinary course of post". Those words are, however, qualified by the words "unless the contrary is proved". In this case, we are satisfied by Mr Crouch's evidence that the contrary has been proved and that the Appellant's Notice of Claim was received by the Border Force on 6 January 2014.

32. Because the seizure of the car took place on 20 November 2013, the Appellant's Notice of Claim was received too late. There is no provision in Schedule 3 for an

extension of time beyond the 30 day period. Accordingly, as explained, by virtue of paragraph 5 Schedule 3 CEMA the car was deemed to have been duly condemned as forfeited.

33. Finally, as regards the date of receipt of the Notice of Claim, HMRC's Statement of Case referred to a letter "received on 20 December 2013, and that the Appellant wrote asking for a review of the decision dated 26 November 2013". Ms Carpenter explained that this paragraph had been included in error (it appeared to have been "cut and pasted" from another document relating to a different appeal) by the person preparing the Statement of Case (who was not Ms Carpenter). Ms Carpenter apologised for the error. We accept this explanation and do not consider it to be evidence that the Notice of Claim was received before 6 January 2014. We note, however, that the Statement of Case contained a large number of errors and fell well below the standard normally to be expected of a Statement of Case prepared by a government department. Nonetheless, the gist of the case against the Appellant was made clear and, indeed, was also made clear from the review letter of 12 February 2014. For these reasons, we did not consider that the errors contained in the Statement of Case prejudiced the Appellant.

34. The Border Force treated the late Notice of Claim as a request for a review of the decision to restore the Appellant's car for a fee and explained this to the Appellant in a letter dated 7 January 2014. That letter requested that the Appellant provide any further evidence and information that the Appellant wished to provide in support of her application.

35. The late Notice of Claim stated that, as well as the car, 3.75 kg of tobacco belonged the Appellant (the remainder belonged to Mr Mansell).

36. The Appellant and Mr Mansell sent a joint letter dated 18 January 2014 (which was date stamped as received by the Border Force on 28 January 2014) in respect of the seizure of the tobacco and the car. The Appellant explained that Mr Mansell dictated the letter and she wrote it down. We shall refer to this letter as "the 18 January 2014 letter".

37. We should explain at this stage that, because no restoration decision in respect of the tobacco was taken by the Border Force officer at Portsmouth on 20 November 2013, there was no restoration decision which could be reviewed by the reviewing officer. We were informed that a subsequent restoration decision was made but that that decision and its review was not the subject matter of this appeal. This appeal, therefore, relates only to the decision to restore the car for a fee.

38. The 18 January 2014 letter stated that the Appellant and Mr Mansell felt they had been treated unfairly. It noted that they were given Form BOR 162 ("Warning letter about seized goods") and Form BOR156 ("Seizure information notice").

39. The letter recorded that Mr Mansell and the Appellant had had a rough crossing from Bilbao to Portsmouth (19 November) with no sleep. The previous night (18 November) they had driven through the night from Malaga to catch the ferry. On 17

November they had no sleep because they had spent time with a friend who had been admitted to hospital with a heart attack.

40. The letter stated that the Appellant and Mr Mansell had each brought into the country 3.75 kg of tobacco which was for their own use and for the family for Christmas.

41. The letter noted that the Appellant and Mr Mansell travelled regularly from the UK to Spain and France in relation to their work. They were regularly stopped by Border Force officers and checked for tobacco/cigarettes and that usually they did not carry any. Usually, they brought some tobacco back to the UK once a year. The letter continued:

> "One [sic] recent journey I was again stopped, a lady customs officer at Birmingham Airport…. I had two packs of tobacco in our luggage checked in, it came round the carousel baggage reclaim belt last, very delayed. I was stopped by customs as we went through the only open EU channel, Blue EU. Flight from Islamabad landed at the same time. We were overwhelmed by the number of officers giving us their retention. Anything we had was not for us but [sic] gifts to say a huge thank you to people in the village and friends who have supported my parents. [The letter then gave details of the ill-health of Mr Mansell's parents]."

42. The letter continued by complaining that the Appellant and Mr Mansell had been interviewed separately although they had requested that they should be interviewed together. The request for a joint interview had been declined by Border Force officers who then only interviewed Mr Mansell. It appeared to us, from the interviewing officer's notebook, that the Appellant had not been interviewed separately.

43. The 18 January 2014 letter maintained that half of the tobacco (i.e. 3.75 kg) belonged to the Appellant and that Mr Mansell had paid for it on his credit card. The remaining 3.75 kg belonged to Mr Mansell.

44. The letter stated that the Appellant used tobacco and rolled "perhaps 20 cigarettes per day, about 30 – 40 from a pouch of 50 g, one pack of 500 g per month. I use a little less and cigarettes. All our goods were seized, 3 3/4 kg each."

45. The letter complained about the length of the interviews, that the Appellant had been unwell and was kept in cold conditions.

46. Towards the end of the letter it stated:

> "I want the return of our goods, return of the UK duty-paid similar to blackmail given the weather £1554 .66 (not restoration fee) equal to 15 tobacco packs."

47. The letter enclosed copies of the receipts for the tobacco showing that it had been purchased on board the ferry.

48. In response to the letter of 18 January 2014, the Border Force replied by letter dated 23 January 2014 to Mr Mansell noting that the legality of the seizure could not now be contested because the Letters of Claim had not been submitted by the expiry of the 30 day deadline on 20 December 2013.

49. In a letter dated 25 January 2013 (received by the Border Force on 6 February 2014) the Appellant stated that she rarely had any alcohol or tobacco on her person during her many journeys and flights to the UK, "perhaps one packet of rolling tobacco in use and nothing else." This letter also asked for a review.

50. On 12 February 2014, Mr Crouch completed his review of the decision taken by the Border Force officer on 20 November 2013 to restore the Appellant's car for a fee.

51. The documents relied on by Mr Crouch in concluding his review were the notes of the initial interception of the Appellant and Mr Mansell, the notes of the interview with Mr Mansell, the Seizure Information notice, the warning letter to Mr Mansell, the receipts for the tobacco, the Appellant's letters dated 6 [we assume that this was the Notice of Claims sent by the Appellant on 16 December 2013], 18 and 25 January 2014, and the Border Force's letters to the Appellant dated 7, 18 and 23 January 2014.

52. In short, Mr Crouch upheld the Border Force officer's decision of 20 November 2014 and confirmed this decision by a letter dated 12 February 2014 to the Appellant.

53. After stating the background, the review letter of 12 February 2014 summarised the Border Force Policy for the Restoration of Private Vehicles:

> "The general policy is that private vehicles used for the improper importation or transportation of excise goods should not normally be restored. The policy is intended to be robust so as to protect legitimate UK trade and revenue and prevent illicit trade in excise goods. However vehicles may be restored at the discretion of Border Force subject to such conditions (if any) as they think proper (e.g. for a fee) in circumstances such as the following:
>
> - if the excise goods were destined for supply on a "not for profit" basis, for example for reimbursement; see 'Not for Profit' below:
> - if the excise goods were destined for supply for profit, the quantity of excise goods is small, and this is a first occurrence.
> - …
>
> …
>
> 'Not for Profit'
>
> The policy for seized vehicles involved in smuggling excise goods which are not for own use, but are to be passed on to others on a "not for profit" reimbursement basis, is:
>
> In *non-aggravated* cases vehicles will not normally be seized (but a warning letter will be issued). The meaning of "aggravated" is explained below.

Aggravated cases depend on how many aggravated offences have occurred within the previous 12 months:

- For a first aggravated detection vehicles will normally be seized and restored for 100% of the revenue involved.
- For a second aggravated detection vehicles will normally be seized and restored for 200% of the revenue involved.
- For a third or subsequent aggravated detection vehicles will normally be seized and <u>not restored</u> unless there are *exceptional* circumstances.

The 100% and 200% restoration fees are subject to a maximum of the trade buying price of the vehicle in Glass' Guide.

In all cases any other relevant circumstances will be taken into account in deciding whether restoration as appropriate.

<u>The meaning of "Aggravated" in 'not for profit" cases</u>

Aggravating circumstances include:

- Any previous offence by the individual
- Large quantities, for example more than:
  - 5 kg of handrolling tobacco or
  - 6000 cigarettes or
  - 20 litres of spirits or 200 litres of wine or 225 litres of beer
- Any other circumstances that would result in restoration not being appropriate."

54. Mr Crouch's letter continued by stating that he was guided by the above restoration policy but not constrained by it in the sense that he considered every case on its individual merits. Mr Crouch made it clear that he had looked at all the circumstances surrounding the seizure but had not considered the legality or correctness of the seizure because that had not been challenged before the Magistrates Court. The review letter continued:

"My starting point is that **the seizure of the vehicle was legal and the excise goods involved were commercial** (not for own use). In deciding whether the vehicle should be restored, and if so what fee should be charged, if any, I am guided by the Border Force policy as summarised above. I have examined the circumstances of this case so as to determine how to apply the policy as set out above.

I have examined the circumstances of this case so as to determine:

1. If the excise goods were held for profit, or if they were passed on to others on a "not for profit" reimbursement basis.

2. If the excise goods were to be passed on to others on a "not for profit" reimbursement basis, whether there were aggravating circumstances.

In considering the above I have taken into account the following:

You were intercepted by a Border Force Officer and must have known that you were expected to answer questions truthfully and to disclose the full quantities of any excise goods carried with you.

Mr Mansell failed to disclose all the excise goods, thus misleading the Officer about the true quantity of them, he declared 12 packs of tobacco (6 kg), 15 packs (7 1/2 kg) were found in the vehicle. If there was nothing to hide there was no need to mislead the officer, and, on those grounds alone, I have good reason to doubt his credibility. Furthermore, as he was carrying receipts for the full quantity, he clearly knew that he was misleading the officer.

I note from his record of interview that he seems to have a propensity to understate the amount of tobacco imported. He told the Officer that he's had goods seized from him before about a year and a half to two years ago, Christmas 2011. It was a year, year and half's [sic] supply of Amber Leaf; he said it was 8 to 9 packs, 4 to 4 1/2 kg. Records show that you were both stopped at Birmingham airport on 24 December 2012, you were in fact importing 19 kg of tobacco, you were allowed to retain 4 kg and 15 kg were seized.

He also said that he been stopped by Customs at Birmingham Airport two months prior to this interception; he said that he was importing tobacco; he'd imported 4 × 500 g packs of tobacco (2 kg), it might have been less. Records show that you were both stopped on 9 October 2013 and that you were importing 9 kg of tobacco.

….

In less than 12 months you have been stopped by Border Force on three occasions and have been found to be importing tobacco, 15 kg, 9 kg including 800 Lambert & Butler cigarettes and 7 1/2 kg (this interception). Mr Mansell said that over the last 12 months he had come in and out of the UK about 6 to 7 times, possibly 2 to 3 in the car. Therefore it is reasonable to conclude, that on the balance of probabilities, similar quantities of tobacco were also imported on the other trips.

As the quantity of excise goods imported exceeded the guide levels specified in the Excise Goods (Holding, Movement and Duty Point) Regulations 2010, I do not view it as unreasonable for Border Force Officers to take account of the criteria – including the quantities – that are also specified in those regulations when considering any aggravating, mitigating or exceptional circumstances affecting restoration. This is especially so in this case as there has been a failure to declare all the excise goods. With 7 1/2 kg of tobacco you were importing over **seven times** the Guide Level of 1 kg.

Mr Mansell said that amount of tobacco would last you both a year and a half to two years.

He went on to say that he smoked 4 to 5 rollups a day and that you smoked 20 to 30 cigarettes a day.

He said that a pouch lasted him the week and a half to two weeks; he said he'd smoke any brand.

You stated in correspondence that you obtained 30 to 40 cigarettes from a 50g pouch of tobacco; you, Mr Mansell, stated [sic] that you smoked a little less and cigarettes. It is generally accepted that a 50g pouch of handrolling tobacco producers on average about 90 cigarettes, the fact that you state you obtain less than 50 cigarettes from a pouch of tobacco leaves me to doubt whether you smoke tobacco at all. Furthermore, your arithmetic doesn't add up, in correspondence you state that you get through a 50 g pack per month (10 pouches), on the declared consumption rate for you of about 20 cigarettes per day you would consume a pouch every two days (30 to 40 cigarettes from a pouch), therefore, in a month you alone would smoke 15 pouches, that's without taking into account Mr Mansell's consumption rate.

Taking that average the guideline quantity of 1 kg (20 pouches) should produce about 1800 cigarettes. The average smoker smokers 13.1 cigarettes a day so that of 3 kg (60 pouches) – three times the guideline quantity – should last the average smoker about 385 days, more than a year on that basis the 6 1/2 kg that you state you are keeping for yourselves (the 1 kg of Golden Virginia you were allegedly giving away) would last you approximately 18 months.

The average daily consumption by current adult smokers in England in 2007 was 13.1: Table 2.3 in "Statistics on Smoking: England 2009" published by the Information Centre for the National Health Service.

Guidance issued by the major tobacco manufacturers is that, when remaining sealed in its original packaging and stored under *ideal conditions*, tobacco remains fresh for *up* to *twelve months*: I would therefore expect tobacco to become stale when kept for more than about a year when held in ordinary domestic conditions. I also doubt that anyone would spend so much money on tobacco only for it to go stale.

…

Having considered the representations and evidence in this case I considered that it is highly likely that some, if not all the tobacco was held on a "not for profit" basis and not just given away. I have determined that this is an aggravated case and as it is the second aggravated offence within 12 months I conclude that the vehicle should have been restored for a fee equal to 200% of the revenue involved subject to a maximum of the *trade* buying price of the vehicle in Glass' Guide. However, the fee applied equates to 100% of the revenue and is fair, reasonable and proportionate in the circumstances.

Conclusion

I am of the opinion that the application of the policy in this case treats you no more harshly or leniently than anyone else in similar circumstances and have not found sufficient and compelling reasons to deviate from that policy.

I have decided to uphold the original decision in that:

- the vehicle should be restored for a fee of £1554.66.

> If you have *fresh* information that you would like me to consider then please write to me: however, please note that I will not enter into further correspondence about evidence that has *already* been provided."

55. Having set out the main parts of Mr Crouch's review letter, we should return to details of the Mansell interview.

56. In the Border Force officer's notebook in relation to the Mansell interview, Mr Mansell is recorded as saying that the tobacco was for the personal use of himself and the Appellant and that he had paid for it. He said he did not smoke a huge amount but he did smoke “roll ups”. He estimated that the 7 ½kg of tobacco would last him and the Appellant between 1 ½ - 2 years. He estimated that he smoked 4 -5 roll ups per day and that the Appellant smoked 20 to 30 roll ups per day. He estimated that a pouch would last him a 1- 2 weeks.

57. He also confirmed that, as regards the 7 ½kg of tobacco seized on 20 November 2013, the 1 kg of Golden Virginia was intended as gifts for friends of his parents who had been helpful during their illness.

58. Mr Mansell confirmed that he had previously been stopped by Customs at Birmingham airport two months ago and that he had been carrying tobacco products on that occasion: between 2 to 4 x 500 g packs. He said that the tobacco was to be given away as gifts. He confirmed that he was travelling with his partner. He was then asked how much was being carried between them. He replied: "4 – 5", by which we understood him to mean 4 – 5 kg. It should be noted, however, that on this occasion no goods were seized.

59. There was a dispute as regards whether the Appellant had accompanied Mr Mansell when he had been stopped at Birmingham airport. This occurred in October 2013. The officer's notebook records Mr Mansell as saying that his partner was present on this occasion. Also, in the joint letter of 18 January 2014 mentions this incident and in several places refers to "we". The Appellant, in her evidence, denied being present and said that she was recovering from an operation at the time and was unable to travel. On balance, on the evidence in front of us, we consider it more likely than not that the Appellant was present.

60. The Border Force officer at Portsmouth had asked Mr Mansell whether he had had any goods seized before. Mr Mansell replied that he had had goods seized about a year and a half or two years ago at Christmas 2011. He described it as 1-1 ½ years supply of tobacco. When asked to describe the quantity he said 8 – 9 packs i.e. 4 – 4.5 kg. He had kept 2 kg but the rest had been seized. In fact, as the review letter notes, Mr Mansell had 15 kg of tobacco seized but was allowed to retain 4 kg. Moreover, the incident took place on 24 December 2012 and not December 2011. The Appellant accepted that she was travelling with Mr Mansell on 24 December 2012 but denied that any of the tobacco belonged to her. The legality of this seizure was not challenged.

61. Finally, The Appellant wrote to this Tribunal on 20 February 2014, emphasising that she had jointly owned the tobacco with Mr Mansell. She noted that she had not been interviewed at Portsmouth. She had not had goods seized by customs before 20 November 2013. Her share of the tobacco was only 3.75 kg and not 5 kg was referred to in the Border Force's policy in relation to aggravated circumstances. She notes that the review letter of 12 February 2014 gave lengthy details in relation to Mr Mansell, detailing his travel history and "customs incidents". She noted, however, that the review was in relation to her application for restoration of her car and did not relate to Mr Mansell.

62. As noted, this letter was addressed to this Tribunal and not to the Border Force. In addition, the letter did not request a further review of Mr Crouch's review decision of 12 February.

Discussion

63. The only question before us is whether the review decision of 12 February 2013 could not reasonably have been arrived at (section 16 (4) and (8) Finance Act 1994) in the public law sense (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223).

64. The lawfulness of the seizure of the car is not a matter which is before us. Because the Notice of Claim filed by the Appellant was received by the Border Force outside the 30 day period provided for in paragraph 3 of Schedule 3 CEMA 1978, paragraph 5 Schedule 3 has the effect that the car was deemed to have been duly condemned as forfeited. Moreover, in restoration proceedings it is not open to the Tribunal to make findings which are inconsistent with the deeming provision contained in paragraph 5. Thus, the tobacco cannot be treated as having been for either Mr Mansell's or the Appellant's own use. As the Court of Appeal explained in *HMRC v Jones and another* [2011] EWCA Civ 824 the deeming provision paragraph 5 limits the scope of the issues that can be ventilated before this Tribunal. It is not for this Tribunal to make findings of fact which are inconsistent with the conclusion that the tobacco and the car have been duly condemned as forfeited.

65. Thus, Mr Crouch was correct in his review letter to assume that the tobacco was not for the personal use (which would include gifts by the Appellant and Mr Mansell) of either the Appellant or Mr Mansell.

66. Furthermore, Mr Crouch was correct when he noted that Mr Mansell, in the company of the Appellant, had illegally imported tobacco and 24 December 2012. This interception also occurred at Birmingham Airport. However, there was no evidence before us which indicated that this was an offence committed by the Appellant. The Appellant denied in cross-examination that any of the tobacco seized in December 2012 belonged to her. She said that the tobacco had belonged to Mr Mansell. The Appellant maintained that 20 November 2013 was the first occasion on which any of her goods had been seized. We are conscious of the fact that the Appellant has claimed, in relation to the interception on 20 November 2013, that she owned half the total quantity of tobacco, whereas on 24 December 2012 she says that

Mr Mansell owned the entire amount. The Appellant's evidence in relation to the ownership of the tobacco in relation to the interception on 24 December 2012 was not, however, challenged in cross-examination. Accordingly, we accept that the offence committed on 24 December 2012 was committed by Mr Mansell and not by the Appellant.

67. As Judge Hellier pointed out in *Harris v Director of Border Revenue* (above), it is for this Tribunal to find the facts and for the reasonableness of the review decision to be judged against those findings of fact. Judge Hellier based his views on the dicta of Pill LJ in *Gora and Others v Customs and Excise Commissioners* [2003] EWCA Civ 525 at [39]. In that case, the Court of Appeal invited the Commissioners to give written submissions on the jurisdiction of the tribunal in restoration cases. Paragraph 3 (e) of those submissions read as follows:

> "e. Strictly speaking, it appears that under s 16(4) of the 1994 Act, the Tribunal would be limited to considering whether there was sufficient evidence to support the Commissioners' finding of blameworthiness. However, in practice, given the power of the Tribunal to carry out a fact-finding exercise, the Tribunal could decide for itself this primary fact. The Tribunal should then go on to decide whether, in the light of its findings of fact, the decision on restoration was reasonable. The Commissioners would not challenge such an approach and would conduct a further review in accordance with the findings of the Tribunal."

68. Pill LJ commented on that paragraph as follows:

> "39. I would accept that view of the jurisdiction of the Tribunal subject to doubting whether, its fact-finding jurisdiction having been accepted, it should be limited even on the "strictly speaking" basis mentioned at the beginning of paragraph 3(e). That difference is not, however, of practical importance because of the concession and statement of practice made by the respondents later in the sub-paragraph."

69. We, therefore, agree with Judge Hellier that this Tribunal should decide the primary facts and then decide whether, in the light of our findings, the decision on restoration was in that sense reasonable.

70. Accordingly, we consider that Mr Crouch was wrong to take account of the December 2012 offence in relation to a restoration application by the Appellant. This offence was not committed by the Appellant. Border Force's guidance states that aggravating circumstances include: "Any previous offence by the individual." That clearly indicates that only offences committed by the person applying for restoration should be taken into account.

71. That does not, however, mean that we find the review decision unreasonable. In the review letter of 12 February 2014 Mr Crouch wrote:

> "I have determined that this is an aggravated case and as it is the second aggravated offence within 12 months I conclude that the vehicle should have been restored for of the equal to 200% of the

> revenue involved subject to a maximum of the trade buying price of the vehicle in Glass' Guide. However, the fee applied equates to 100% of the revenue and is fair, reasonable and proportionate to the circumstances."

72. In the light of our finding that this was the first offence committed by the Appellant, the conclusion that the restoration fee should be 200% of the revenue involved must be incorrect. However, Mr Crouch upheld the original decision of charging a 100% restoration fee, which was equivalent to treating the 20 November 2013 interception as constituting a first aggravated offence. Mr Crouch saw no reason to upset the original decision because the car had already been restored and he considered that the decision was proportionate in all the circumstances.

73. Mr Crouch also considered that the 20 November 2013 importation was an aggravated offence because of the large quantities of tobacco involved, viz 7.5 kg. Mr Crouch considered that the Border Force guidance in relation to aggravating circumstances required him to look at the total amount of tobacco contained in the Appellant's car and not just at the amount of tobacco which the Appellant claimed belonged to her.

74. The guidance stated :

> "Appendix I: Meaning of "Aggravated" in 'Not for Profit' Cases
>
> When considering the seizure of goods and vehicles and any restoration terms, officers should first give consideration to whether or not the case should be regarded as 'aggravated'.
>
> Aggravating circumstances are defined as
>
> - a previous recorded excise offence by the individual
> - large quantities of excise goods are involved, for example more than
>   - 5kg of hand rolling tobacco or
>   - 10,000 cigarettes or
>   - 20 litres of spirits or
>   - 200 litres of wine or
>   - 225 litres of beer"

75. We note that the guidance does not specifically state whether account should be taken of the total quantity of tobacco or only that belonging to the restoration applicant. However, in the context of the restoration of a vehicle used for illegal importation of excise goods it does not seem to us that Mr Crouch's interpretation of the Border Force's guidance or indeed the guidance itself could be said the be wrong or unreasonable.

76. In our view, therefore, Mr Crouch correctly applied Border Force's guidance in relation to the quantity of tobacco and we consider his decision in this respect to be reasonable. In particular, we consider that he was correct in applying the guidance to

the total amount of tobacco contained in the Appellant's car rather than to the Appellant's share.

77. In summary, therefore, we conclude that Mr Crouch was wrong to conclude that this had been the Appellant's second offence within 12 months and we find that it was the Appellant's first offence. Secondly, however, Mr Crouch was correct when he concluded that the quantity of the tobacco contained in the Appellant's car constituted an aggravating factor in relation to this offence.

78. Does the fact that Mr Crouch concluded incorrectly that this was the Appellant's the second offence within 12 months mean that we should allow this appeal and direct that Border Force should remake its decision on the basis that it was the Appellant's first offence?

79. In *John Dee Ltd v Commissioners of Customs and Excise* [1995] STC 941 the Court of Appeal held that in cases, such as the present, where the Tribunal had to consider whether Border Force's decision could not reasonably have been arrived at it, because it took account of some irrelevant factor, the Tribunal could, nevertheless, dismiss the appeal if the decision would *inevitably* have been the same had account been taken of the additional material. A finding that the same decision would *probably* have been reached would not, however, justify the Tribunal in dismissing an appeal.

80. Was it, therefore, inevitable that, if Mr Crouch had concluded that this was the Appellant's first offence, his decision would have been the same? In our view, we consider it inevitable that his decision would have been the same. The fact that Mr Crouch concluded that this was the Appellant's second offence within 12 months led him to consider that the correct restoration fee should have been 200% of the value of the vehicle. Because the vehicle had already been restored and he considered that the officer's decision had been reasonable and proportionate, he upheld the restoration fee of 100% which is exactly what it would have been had it been the Appellant's first offence.

81. Moreover, we have concluded that the amount of tobacco carried in the Appellant's vehicle constituted an aggravating factor in accordance with the Border Force's guidance. This would also have justified a decision to restore the vehicle for 100% of the revenue involved.

82. For both these reasons, therefore, we have come to the conclusion that even if Mr Crouch had concluded that this had been the Appellant's first offence, he would inevitably have come to the same conclusion i.e. that the appropriate restoration fee was 100% of the value of the vehicle, as described above.

83. Part of Mr Crouch's review letter concerned the amounts of tobacco which the Appellant and Mr Mansell claimed to smoke and compared these with published statistics on smoking. It seems to us, however, that this was more relevant to the question of whether the tobacco was for "own use". As we have already mentioned, the question of "own use" goes to the legality of the seizure of the tobacco and the car.

These are matters over which we have no jurisdiction. In our view, in circumstances where the deeming provision of paragraph 5 Schedule 3 CEMA applies and the only defence in relation to the legality of the seizure that could have been relevant was "own use", it is not appropriate to enter into a detailed analysis of the amount of tobacco which the parties would have consumed. The deeming provision of paragraph 5 effectively deems the goods not to have been "for own use" with the result that they were held for commercial purposes (which would include a supply on a "not-for-profit" basis).

84. We do not consider, however, Mr Crouch's analysis of the level of the Appellant's and Mr Mansell's tobacco consumption, although not strictly relevant, affected the outcome of his decision. Accordingly, on the basis of *John Dee*, we consider that even if this issue had been ignored by Mr Crouch his decision would inevitably have been the same.

85. Similarly, the evidence put forward by the Appellant in relation to her tobacco consumption does not seem to us to be relevant to the question whether the review decision was *Wednesbury* unreasonable (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223), on the basis that the tobacco could not be regarded as being for "own use".

86. Furthermore, the Appellant's complaints about the failure by the Border Force to give her a notice of seizure address to her (rather than Mr Mansell) and about the manner in which the interception at Portsmouth was conducted, all seemed to us to go to the legality of the seizure – a matter over which we have no jurisdiction – and not the reasonableness of HMRC's review decision.

87. In our view, therefore, the review decision of 12 February 2014 was not a decision which could not reasonably have been reached.

88. For the above reasons, we dismiss this appeal.

89. 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.

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 2 December 2014