[2015] UKFTT 0177 (TC)

TC04370

Appeal number: TC/2014/01493

Excise Duty - restoration - Customs Excise and Management Act 1979 sections 88 and 139 - adaptation of vehicle for purpose of concealment of goods - seizure and confiscation of vehicle - refusal of restoration - Romanian owner denied knowledge of adaptation - s 16 Finance Act 1994 - whether the review officer had taken into account irrelevant considerations and disregarded relevant considerations in reaching her decision - yes - whether refusal reasonable and proportionate in the circumstances - no - appeal allowed - further review directed under s 16(4)(b) FA 1994

FIRST-TIER TRIBUNAL

TAX CHAMBER

SC NICKTRANS SRL **Appellant**

- and -

THE DIRECTOR OF BORDER REVENUE **Respondent**

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER GILL HUNTER

Sitting in public at 45 Bedford Square, London WC1 on 11 November 2014

James Stansfeld, Counsel, instructed by Lewis Nadas Law Limited for the Appellant

David Sawtell, Counsel, instructed by the General Counsel and Solicitor to The Director of Border Revenue for the Respondent

DECISION

The Appeal

1. This is an appeal by SC Nicktrans SRL, a company based in Suceava, Romania, ("the Appellant") against the decision of the Respondent following a departmental review, under s 14(5) and Schedule 5 of the Finance Act 1994 ("FA 1994") not to restore the Appellant's vehicle, a Scania coach registration number SVO2 NCK ("the vehicle"). The vehicle was seized on 10 November 2013. A trailer had also been seized at the same time but the Respondent subsequently restored this free of charge on the basis that it was detachable and not an integral part of the vehicle.

2. It is not open to the Appellant to raise the liability to forfeiture or legality of seizure of the vehicle as a ground of appeal. As the legality of the seizure of the vehicle was not challenged by the Appellant or any other party at the Magistrates' Court, the vehicle was condemned as lawfully seized and liable to forfeiture under paragraph 5 of Schedule 3 to the Customs and Excise Management Act 1979 ("CEMA") (deemed condemnation). A Tribunal has no jurisdiction other than to find that the vehicle was lawfully seized.

3. The Appellant appeals pursuant to s 16 FA 1994 and contends that the Respondent erred in refusing to restore the vehicle. The Appellant also says that the financial impact upon the Company was considerable. In the circumstances the Appellant says that the decision of the Respondent was not reasonable.

4. The issue is therefore whether the decision to refuse restoration of the vehicle was a decision which the reviewing officer could not reasonably have arrived at. In order for the decision to have been reasonable the reviewing officer must have considered all relevant matters and must not have taken into consideration irrelevant matters.

Evidence

5. The Appellant is a Romanian Company and its proprietor, Mr Niculai Ghiata, speaks little English. At the hearing, an interpreter was provided. The hearing bundle included the witness statement by the reviewing officer, Ms Deborah Hodge, together with relevant exhibits, which included a copy of the notes made by the Border Force officer who made the initial interception and inspected the vehicle, a copy record of the interview of the driver and correspondence between the Appellant and the National Post Seizure Unit of the Border Force. The bundle also included the Appellant's witness statement together with copy documents relating to the vehicle, its drivers and Company policy relating to safeguards against illicit smuggling. Both Mr Ghiata and Ms Hodge gave oral evidence and were cross-examined under oath. Photographs of the seized vehicle were also included showing the 'adaptation' to the nearside rear of the vehicle above the wheel arch. The Appellant also provided an accountant's report to support his contention that the loss of the vehicle adversely affected the Company's profitability.

Background

6. On 10 November 2013 at Dover Eastern Docks, the vehicle and a trailer belonging to the Appellant were intercepted by an officer of the UK Border Force ("UKBF"). The vehicle was being driven by an employee of the Appellant Mr Daniel Berari, who was accompanied by relief drivers Mr Marius Rindasu and Mr Constantin Morosan. The passengers were asked to remove all of their luggage. Each of the drivers declared four cartons of cigarettes. The drivers said that the coach was travelling to London, Victoria Station, and would be returning to Romania within twenty-four hours.

7. On examination by a UKBF officer Mr Colin Whyte, a rectangular box-shaped opening was found in a void above the right hand side rear wheel arch, concealed by a welded/riveted panel. It was accessible by lifting the wheel arch trim by means of its hydraulic telescopic mounts, which revealed a panel held in place by a screw in the base. It was not particularly sophisticated and would not have been costly to install. It could have been discovered very easily following a cursory examination. It is estimated that the covering plate would have taken an hour or so to install and could have provided an easily accessible and convenient storage area for tools and other commercial vehicle equipment. The Respondent says that it was not designed for that purpose as was obvious from the fact that it was secured by a bolt which was not readily visible, rather than for example, by a handle or other easily operated opening mechanism.

8. The left hand wheel arch similarly contained an opening above the wheel arch, but it was clear from the photographs that there was no adaptation. There was, as with the right hand side of the vehicle, a void or space above the wheel arch and between the cab chassis, but other than the fact that the void was behind the wheel arch trim there was no evident attempt at adaptation designed to conceal goods. The void was there quite possibly because that was the way the vehicle was manufactured.

9. The driver said that the company had owned the coach for three to four months but that he had not seen and was not aware of the adaptation.

10. The coach was seized under s 88 of CEMA because it was adapted for the purpose of concealing goods. The drivers were unable to remove the trailer from the coach and therefore it was treated as an integral part of the vehicle and also seized.

11. The driver was given Form 156, "Seizure information notice" and Notice l2A, "What you can do if things are seized by H M Revenue & Customs". Notice 12A explained that one can challenge the legality of the seizure in a Magistrates' Court by sending a notice of claim to the UKBF within one month of the date of seizure.

12. In a letter received by the UKBF National Post Seizure Unit on 13 November 2013, Mr Ghiata wrote asking for the vehicle and trailer to be restored. He said that the Appellant Company had purchased the vehicle in December 2012 and that he was totally unaware of any adaptations. He said that the coach had been stopped on at least four or five previous occasions and the adaptation had never been brought to his

attention. He asked what action he needed to take for the return of the coach and the trailer. He later says in his witness statement that 'at the time of procurement although the bus was examined, no visible signs were found in terms of changes of any kind'.

13. In a letter sent 15 November 2013 but erroneously dated 15 September 2013, the UKBF acknowledged Mr Ghiata's letter and asked him to send proof of ownership of the vehicle. UKBF did not respond to the Appellant's request that they advise '…what action he needed to take for the return of the coach and the trailer…'.

14. On 27 November 2013, Mr Ghiata provided the documentation requested by UKBF.

15. The Appellant did not challenge the legality of the seizure within thirty days, that is, by 10 December 2013 and accordingly the vehicle was duly condemned as forfeit to the Crown by the passage of time under paragraph 5 of Schedule 3 of CEMA.

16. On 15 January 2014 an officer of UKBF (no name was given in the letter) replied to Mr Ghiata refusing to restore the vehicle and trailer because the vehicle was adapted to conceal smuggled goods and was therefore liable to forfeiture under s 88 CEMA. With regard to 'Policy' regarding restoration, the officer said:

> "Our policy is normally to refuse to restore unless we are satisfied the owner had no knowledge of the adaptation, in which case the vehicle may be restored on conditions, one of which would be the removal of the adaptation".

The officer said that it was open to the Appellant to request a review of the decision by an impartial review officer.

17. On 27 January 2014, the Appellant asked for a review of the decision on the grounds that:

> "1. The adaption in the vehicle was there prior to purchase by our company and we were completely unaware of its existence until the officers at Dover discovered it on that day. Our vehicle had been intercepted on various occasions since we started operating and this adaption had never been identified to us. We have provided translated documents proving when we purchased the vehicle as requested showing that the vehicle was bought in December 2012. Our company is willing to pay for any adaption to be removed in order for our vehicle to be returned as soon as possible.
>
> 2. It is was evident to the officers involved that the adaption had not been accessed for a considerable amount of time, proved by the fact that they took a long period of time to gain access themselves. Provision of CCTV evidence within the examination area will prove this fact, along with the details recorded in the statements provided by these officers.
>
> 3. Our company feel that we have provided all the evidence requested and find it frustrating that the original decision has upheld the seizure. We as a small company are suffering immensely and have had to rent a vehicle at considerable cost in order to maintain the service to our clients. Prior to this situation our company were never involved in smuggling goods into the United Kingdom".

18. On 3 February 2014 Ms Hodge acknowledged the request for a review and wrote explaining the review process. She invited any further information in support of the request.

19. Ms Hodge then contacted the inspecting officer Mr Whyte. In her email to Mr Whyte she passed on the Appellant's grounds of appeal and asked for his comments, a copy of his note book and photographs that had been taken.

20. Mr Whyte, responded saying:

> "…. That the concealment took some time to find was simply due to the fact that I was the only officer searching the coach. Wheel arch concealments have been used in the past and as such will always come under close scrutiny. In this case access was made easier as the wheel arch is not bolted as on other coaches but held in place by a shaft and pin method and assisted in lifting by hydraulic arms (standard factory fitting, similar to the boot supporting arms in hatch back vehicles). On lifting the wheel arch the concealment was apparent, there was a further delay in locating the access plate and establishing how it was held in place (found to be bolted). I would estimate that anyone familiar with the concealment could gain access within 1-2 minutes….
>
> The initial indication that there was something untoward was the newness of some pop rivets visible from under the wheel arch. It is difficult to estimate exactly how old a concealment is but given its sighting, open to all the water and detritus thrown up by the road wheels, I would expect its condition to deteriorate fairy rapidly. This had not happened. Interior paintwork seemed clean, even bare metal on the cuts showed little sign of rusting. Aging the concealment is difficult, but given my experience and its general appearance I would estimate its age in weeks or months, rather than a year or years. A full photographic/video exam was made by Barry McHugh. I would suggest contacting him for a comprehensive idea of the condition of the concealment and its access."

21. We were not provided with any evidence that Ms Hodge contacted Mr McHugh for further information regarding the adaptation. We also comment that the copy black and white photocopy photographs of the adaptation were of very poor quality and it was difficult to see detail such as the pop rivets and screw or bolt referred to by Mr Whyte. This made it difficult to gauge the 'newness' of the adaptation, or for example how obvious or unsophisticated the adaptation was.

22. During the hearing we were provided with a copy of the Respondent's restoration policy as follows:

'***Vehicle seizures and restoration policy'***

> ***Restoration Policy: Vehicles***
>
> *The general policy is that vehicles seized as liable to forfeiture should not be restored. This policy should be applied firmly but not rigidly. Each case should be considered on its merits to determine whether restoration may be offered exceptionally and under what terms. This is the same principle as restoration of seized goods.*
>
> *The underlying principles of vehicle restoration policy are that*

- *seizure of vehicles used to transport diverted or smuggled goods has a significant deterrent effect*

- *vehicle restoration terms should provide a graduated response depending on*

  the degree of blame that can be attributed to the individual

  and the potential harm caused by the evasion of excise duty

- *there will be occasions when overriding humanitarian or hardship issues warrant a departure from usual restoration criteria*

Vehicles Constructed or Adapted for Concealing Goods

The general policy is that a vehicle constructed, adapted, altered or fitted for the purpose of concealing goods will be seized and not restored. Such a vehicle is liable to forfeiture under section 88 of CEMA and may be seized under section 139 of the same Act, whether or not any goods are found in the vehicle. This applies to all types of vehicle, whether private or commercial, and irrespective of who owns them.

If, exceptionally, the vehicle is to be restored, the restoration amount, calculated in accordance with the usual policy for the type of vehicle and circumstances, should be increased by the cost of removing the place where goods could be concealed and the work must be carried out prior to releasing the vehicle. No vehicle constructed, adapted, altered or fitted for the purpose of concealing goods may be restored or otherwise disposed of unless the place for concealing goods is removed.

23. On 14 February 2014, Ms Hodge refused the Appellant's request for restoration. She explained that after conducting a review, the original decision would be confirmed and that the vehicle would not be restored. She referred to the UKBF's policy with regard to the restoration of commercial vehicles and said:

> "The policy for the restoration of commercial vehicles that have been used for smuggling excise goods is intended to tackle cross border smuggling and to disrupt the supply of excise goods to the illicit market. "Commercial vehicles" include not only 'Heavy Goods Vehicles' but any vehicle considered to be moving primarily for a commercial and business purpose. Each case is considered carefully on its individual merits so as to decide whether exceptions should be made. Any evidence of hardship is always considered.
>
> A vehicle adapted for the purposes of smuggling will not normally be restored, but in exceptional circumstances the vehicle may be restored for a fee to include the cost of removing the adaptation."

24. In giving reasons for refusing to restore the vehicle Ms Hodge said:

i. "The vehicle had two adaptations, one on each side capable of concealing illicit goods. Policy therefore dictates that it should not be restored. However, as I am not fettered by the policy, I shall further examine the evidence in order to decide whether there are exceptional circumstances in this case in order to deviate from the policy.

ii. The vehicle had made at least 18 trips to the UK since April 2013: each trip gave an opportunity to use the adaptation to transport illicit goods.

iii. The adaptations could accommodate significant quantities of illicit goods.

iv. You have claimed that the adaptation was part of the vehicle when you purchased it in December 2012 and that you were unaware of it. However, the officer has advised me that …..the concealment had only been there for weeks or a few months and not at least a year as you suggest.

v. You suggest that the adaptation had not been accessed for a long time because of the time it took the officers to access it. The officer has explained that he was the only person searching the vehicle at the time …..He considers that anyone familiar with the concealment could access it in 1-2 minutes.

vi. Although you have stated that the vehicle has been stopped on 4 or 5 previous occasions with the problem having not been brought to your attention I can assure you that, if the coach had been intercepted before and the adaptation found, it would have been brought to your attention. I cannot find any record of the vehicle having been stopped, but this does not necessarily mean that it wasn't.

vii. Although, on this occasion, it did not contain illicit goods, there has been plenty of opportunity to use it prior to this trip. I am not satisfied that there are exceptional circumstances in order to restore the vehicle to you.

viii. I have also paid particular attention to the degree of hardship caused by the loss of the vehicle. One must expect considerable inconvenience as a result of having a vehicle seized by the Border Force, and perhaps a large expense in making other transport arrangements or even in replacing the vehicle. Hardship is a natural consequence of having a vehicle seized and it would have to be exceptional hardship for me to restore the vehicle under this part of the policy. I do not regard either the inconvenience or expense caused by the loss of the vehicle in this case as exceptional hardship over and above what one should expect. Replacement of a seized vehicle with another does not necessarily require replacement with a vehicle of equal value if a cheaper vehicle will perform adequately. In the circumstances I do not consider that you have suffered exceptional hardship and I conclude that there is no reason to disapply the policy of refusing to restore the vehicle in all of the circumstances."

25. On 13 March 2014 the Appellant, through its representative, Messrs Lewis Nadas Law Limited appealed the decision. The stated grounds of appeal were:

> "The company purchased the seized vehicle in December 2012. The Scania coach and trailer SVO2 NCK was stopped and seized by Border Force on 10 November 2013 based on two adaptations considered to be capable of concealing goods.
>
> The company and the driver always stated that they were totally unaware of any adaptation which might have been made. The company is of the opinion that the adaptation was part of the vehicle when it was purchased and it should not be held responsible for it.

No goods were found in the adaptation of the vehicle which further proves that they were not aware of it. In the restoration request the company confirmed that they are willing to pay for the removal of the adaptations.

The company has provided transport services in the UK for many years and there have never been any problems. The company is a small family business. The loss of the coach and trailer has caused exceptional hardship in the running of the company.

The company should not be punished for matters which they were not aware of."

26. Documentary evidence produced by the Appellant following the seizure included copies of the employment contracts for each of the three drivers, together with copy references prior to their engagement. Each had a certificate to the effect that they had no criminal record. The employment contracts were very much of a standard nature including, as one might expect, obligations to observe international laws, rules and regulations, and also to be personally responsible for any infringements. The three drivers had been employed since 2013 but each had certificates to show that they had previously been employed as professional drivers for several years. The company had twelve drivers at the time of the seizure, each of whom were required to sign, on a monthly basis, an 'internal notice' to the effect that they would not carry within the vehicle anything illegal or of an illicit nature which might affect the Company's good standing.

27. The Company was formed in 2004. We were provided with a copy of the Company's registration documents, its European Union Road Licence and other regulatory documents, including numerous sample transport contracts which it had entered into to carry passengers, mainly to destinations in Romania but also to other countries, which it appeared to undertake on a regular basis. The Company used agents and internet marketing in order to advertise its business. On the whole the Company appeared to be a well-established, reputable, profitable and well-administered organisation.

28. The Company advertises its trips via various travel agencies, in local newspapers and on the radio. The Company's services are also advertised in UK newspapers.

29. We were also provided (by UKBF) with a 'record of travel', which showed that the vehicle had made eighteen return travel journeys between Romania and London between April and October 2013, carrying on average twenty-three passengers each way.

30. In his witness statement, Mr Ghiata states that, at the time of seizure, the Appellant Company had twenty-one employees. It had undertaken international passenger transportation since 2004, mainly to destinations such as Italy and Spain on a regular basis and to other European countries on a more occasional basis. Currently the company mainly operated routes between Romania - Spain and Romania - England. Because of a reduction in the number of passengers travelling to Spain and an increase in those travelling to the UK, it was decided to obtain a regular transport permit for the Suceava - London route. This was obtained in October 2013. The coach leaves Suceava Bus station each Friday at 12 noon and usually reaches London

Victoria on Sunday at approximately 1 pm. The trip back from London is on a Sunday at 2 pm and normally reaches Suceava on Tuesday at 8 am. Clients of the Company are mainly private individuals.

31. The vehicle, a Scania coach, was purchased on 21 December 2012 in Germany in part exchange for a Mercedes Benz coach. Mr Ghiata said that he had never dealt with the seller of the vehicle before and has not done so since. A technical and functional inspection was undertaken prior to purchase. He said that there were no visible signs in terms of changes of any kind. The coach was sold as seen and the seller gave no guarantees.

32. Mr Ghiata said that the Company's policy was to perform a technical check of all vehicles on a weekly basis when they returned from a trip. The vehicles were maintained on an ongoing basis and regularly checked for any possible changes. Unannounced controls during the trips were also made on a monthly basis in order to check driver's management, the general condition of the coach and to prevent any possible illegal activities.

33. Mr Ghiata said that he was not aware of the changes that had been made to the coach and believes that he took all reasonable measures to prevent such changes. He could not however eliminate the possibility that the changes may have been made prior to purchase of the vehicle and were simply not discovered until the seizure in November 2013. Equally he could not discount the possibility that changes had been made after the coach had been purchased without his knowledge. He said that from information provided by the drivers, the bus had been stopped and examined by customs authorities a number of times and no changes or illegal products had ever been found. The drivers however had not been able to provide him with any documentary evidence or specific dates as to when the examinations took place.

34. Mr Ghiata said that as a consequence of the coach being seized, the Company faced financial difficulties in continuing its activities. When the permit for trips to the UK was obtained, three coaches in the Company's fleet were used for the Romania - UK route, and the remaining two coaches alternately on a Romania - Spain or another occasional route. After the seizure, the coach which had been used for the Romania – Spain route was re-assigned to the Romania - UK route and after a period a back-up bus hired for the Romania – Spain route.

35. Following the seizure, established customers who had previously traded with the Company for many years and who wished to travel to countries other than Spain or the UK could not all be accommodated. In early 2014, because there was at that time no back-up bus, the Company's remaining vehicles were doing extra mileage to the UK and Spain and beginning to suffer damage, sometimes forcing the Company to hire in other vehicles in order to continue its activities. This, together with the cost of repairs and spare parts for the rented vehicles, affected both the Company's credibility and its resources financially. Mr Ghiata said that he had put a huge amount of effort into maintaining the regular route to London. To abandon it would have caused major financial imbalance and at least three drivers would have had to be dismissed.

36. Mrs Hodge in evidence agreed that a copy of the Respondent's policy current at the date of appeal had been requested by the Appellant's representatives but not supplied. She said that the Respondent's policy department was "not happy about releasing the policy". She was not sure whether it was "just guidance or public policy". This was apparently an issue which was under discussion. She agreed that the policy did not elaborate on what might constitute "exceptional circumstances". Mrs Hodge agreed that awareness or otherwise of an adaptation on the part of the owner of a vehicle was taken into account when deciding whether or not to restore, but that she was not aware until after her review decision of the steps that had been taken by the proprietors of the Company to avoid or guard against vehicles being adapted and illicit smuggling. Mrs Hodge also agreed that she did not revert to the inspecting officers to clarify the comment that "the makings of an adaptation" were present over the rear near side wheel arch.

Relevant legislation

37. Section 88 of CEMA provides as follows:

> "Forfeiture of ship, aircraft or vehicle constructed, etc. for concealing goods.
>
> Where—
>
> (a) a ship is or has been [in United Kingdom waters]; or
>
> (b) an aircraft is or has been at any place, whether on land or on water, in the United Kingdom; or
>
> (c) a vehicle is or has been within the limits of any port or at any aerodrome or, while in Northern Ireland, within the prescribed area,
>
> while constructed, adapted, altered or fitted in any manner for the purpose of concealing goods, that ship, aircraft or vehicle shall be liable to forfeiture."

38. Section 139(1) of CEMA provides that:

> "Any thing liable to forfeiture under the Customs and Excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard."

39. Section 141(1) of CEMA states that:

> "Where any thing has become liable to forfeiture under the Customs and Excise Acts-
>
> (a) any ship, aircraft, vehicle, animal, container (including any article of passengers' baggage) or other thing whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture; either at a time when it was so liable or for the purposes of the commission of the offence for which it later became so liable; and
>
> (b) any other thing mixed, packed or found with the things so liable, shall also be liable to forfeiture."

40. Section 152 of CEMA establishes that:

> "The Commissioners may, as they see fit-
>
> (b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under the Customs and Excise Acts."

41. Sections 14 and 15 of the Finance Act 1994 provide that:

> "Section 14 (2):
>
> (2) Any person who is—
>
> (a) a person whose liability to pay any relevant duty or penalty is determined by, results from or is or will be affected by any decision to which this section applies,
>
> (b) a person in relation to who, or on whose application, such a decision has been made, or
>
> (c) a person on or to whom the conditions, limitations, restrictions, prohibitions or other requirements to which such a decision relates are or are to be imposed or applied,
>
> may by notice in writing to the Commissioners require them to review that decision."
>
> "Section 15(1):
>
> Where the Commissioners are required in accordance with this Chapter to review any decision, it shall be their duty to do so and they may, on that review, either-
>
> (a) confirm the decision; or
>
> (b) withdraw or vary the decision and take such further steps (if any) in consequence of the withdrawal or variation as they may consider appropriate."

Jurisdiction of the Tribunal

42. As referred to in paragraph 40 above, the Respondent's power regarding restoration of goods or vehicles which have been forfeited or seized is set out under s 152(b) of the Customs and Excise Management Act 1979. Once the power is exercised, whether in the form of a positive decision to restore on terms or a refusal to restore, the individual affected has a right of appeal to the Tribunal. The powers of the Tribunal are limited in the terms set out in s 16(4) of Finance Act 1994 which provides that**:**

> "(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 further review of the original decision; and

(c) …."

43. The precondition to the Tribunal's exercise of its powers, namely, that the person making a decision could not reasonably have arrived at the decision, falls within the guidance given by Lord Lane in the decision in *Customs and Excise v JH Corbitt (Numismatists) Ltd* [1980] STC 231 at page 239:

> "…..if it were shown the Commissioners had acted in a way in which no reasonable panel of Commissioners could have acted; if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight. The tribunal might also have to consider whether the Commissioners had erred on a point of law."

44. We were referred to the Court of Appeal decision case of *Gora and others v Customs and Excise Commissioners* (CA) [2004] QB 93 which provided guidance on the jurisdiction of the Tribunal in relation to its powers under s 16 of the Finance Act 1994. Lord Justice Pill at paragraphs 37 –39 considered in detail the jurisdiction of the Tribunal. The Commissioners for Customs and Excise conceded in that case that it was proper for the Tribunal to examine the policy adopted by the Commissioners in restoration cases against the principles of proportionality. Further the Commissioners accepted that Appellants in restoration proceedings were entitled to raise the issue of blameworthiness. Counsel for the Commissioners then submitted that:

> "Strictly speaking it appears that under section 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 fact of the Tribunal."

Lord Justice Pill accepted the Commissioners' 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. That difference is not, however, of practical importance because of the concession and statement of practice made by the Commissioners later in the sub paragraph."

45. The test is whether the Commissioner making the decision could reasonably have arrived at that decision. At para 38 of *Gora* Pill LJ agreed with the following proposition put forward by Counsel for the Commissioners:

> "… For the purpose of deciding whether the policy was unreasonable, it is submitted that the Tribunal should not substitute its view for that of the Commissioners as to the appropriate policy in this area of administration. It should ask itself applying judicial review principles, whether the policy was one that could reasonably be adopted. In a context where Article 1 Protocol 1 of the ECHR was engaged, the principles of judicial review would include that of proportionality."

46. The Tribunal can therefore exercise its fact finding power to consider all the facts of this case, assessing whether the facts upon which the Respondent acted were correct and the reasonableness of the decision, on the basis of facts that may not have been before the Respondent at the time of the decision and whether the review decision meets the principles of proportionality.

47. For the purposes of s 16 FA 1994 the term "unreasonable" has a Wednesbury meaning, as defined by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, when he held:

> "A person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matter which he is bound to consider. He must exclude from the consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'."

48. Lord Lane in *Customs and Excise Commissioners v J H Corbitt* [1980] 2 WLR 653 further described the test of a review of a decision by the Tribunal:

> "It could only properly [review the discretion] if it were shown that the Commissioners had acted in a way in which no reasonable panel of Commissioners could have acted, if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight."

49. The issue of proportionality was considered in *Lindsay v Customs and Excise Commissioners* [2002] EWCA Civ 267. There, at para 55, it was stated that the aim of the Commissioners' policy is the prevention of the evasion of excise duty that is imposed in accordance with European Community law. That is a legitimate aim under art 1 of the First Protocol to the Convention. The issue is whether the policy is liable to result in the imposition of a penalty in the individual case that is disproportionate having regard to that legitimate aim, and in determining that issue a Tribunal may decide whether the reviewing officer when reaching a decision failed to have regard to all material considerations.

The Appellant's case

50. As the legality of the seizure of the vehicle was not challenged by the Appellant or any other party at the Magistrates' Court, the vehicle was condemned as lawfully seized and liable to forfeiture under paragraph 5 of Schedule 3 to CEMA (deemed condemnation). The Appellant therefore accepts that, following the decision of *Revenue and Customs Commissioners v Jones and Another* [2012] 2 WLR 544, the Tribunal does not have the jurisdiction to consider the lawfulness of the seizure of the vehicle.

51. The Appellant's case is that the review officer erred in refusing to restore the vehicle. Mrs Hodge failed to properly consider and apply the Respondent's policy to the Appellant's case, failed to reach a reasoned conclusion upon the Appellant's knowledge, or lack of knowledge of the adaptation and relied upon irrelevant and incorrect facts in her decision letter. For all, or any, of those reasons the decision taken was unreasonable. Further, upon a consideration of all the evidence, including the steps taken by the Appellant to guard against illegal acts by its employees and the financial impact on the Appellant, the decision of the Respondent was not reasonable.

The Respondent's Case

52. The Respondent contends that the review decision was one that could reasonably have been arrived at because the reviewing officer reasonably applied the policy of the Respondent as set out in 'Restoration Policy of Commercial Vehicles' (see paragraph 22 above). The review officer was guided by the restoration policy but not fettered by it in that she considers every case on its individual merits. She considered the decision afresh, including the circumstances of the events on the date of seizure and the related evidence, so as to decide if any mitigating or exceptional circumstances existed that should be taken into account. She examined all the representations and other material that was available to the UKBF both before and after the time of the decision. She considered all the Appellant's letters when applying the UKBF restoration policy. She examined photographs of the adaptations to the vehicle, which the Respondent says could have accommodated a significant quantity of illicit goods.

Analysis of the review decision and findings of fact

Whether the Decision Maker considered all factors within the policy

53. A copy of the Respondent's policy applicable to the seizure of commercial vehicles under s 88 CEMA was initially not disclosed to the Appellant but a copy was provided during the hearing. Clearly it is essential that the Respondent's policy current at the date of the decision is made available to an Appellant at the outset in order for him to assess the approach of a reviewing officer and to consider the reasonableness of the decision in the context of that policy. In *Nas and Co Ltd – HMRC* [2014] UKFTT 050 (TC) Judge Hellier said at paragraph 98:

> "In our judgment it cannot be right that a person whose goods have been seized and who seeks their restoration can be required to prove the unreasonableness of a decision whose full basis he does not know and cannot challenge.."

54. Ms Hodge does not appear to have considered all factors within the Respondent's policy. The only reference to the policy in the decision letter was to emphasise that the purpose of the Restoration Policy for Commercial Vehicles was to tackle cross border smuggling and to disrupt the supply of excise goods to the illicit market. The letter then emphasises the Respondent's policy that vehicles adapted for the purpose of smuggling will not normally be restored. There is no mention in the decision letter of that part of the policy which provides that vehicles seized under s 88 CEMA may be restored on conditions, one of which would be removal of the adaptation, if the

Respondent is satisfied that the owner had no knowledge of the adaptation. That part of the policy is set out in the original letter refusing restoration dated 15 January 2014 but do not appear to have been considered by Ms Hodge.

55. The Appellant's letter seeking a review of the decision made it clear that the Appellant was unaware of the existence of the adaptation to the vehicle and a specific offer to pay for the removal of the adaptation was made. Given that that was Appellant's reason for requesting the review, the failure to specifically address the Appellant's case and that part of the Respondent's policy meant that the Respondent failed to consider a material assertion by the Appellant and its applicability to the Respondent's policy. In that respect it was unreasonable.

56. Whilst the decision letter makes reference in the conclusions to the Respondent being of the view that the concealment had only been there for "weeks or a few months", Ms Hodge does not address the knowledge of the Appellant as the owner of the vehicle, or reach any reasoned conclusion on the Appellant's knowledge of the adaptation. Ms Hodge's conclusion only focuses on whether the Appellant is treated harshly in comparison to other cases by the seizure of the vehicle, which, in light of the basis for the request for review, is a clear indicator that she did not consider or reach a reasoned conclusion upon the innocence of the Appellant as the owner of the vehicle. As held in *Nas & Co Limited* §73, the failure to consider and reach a conclusion upon this critical factor makes this decision unreasonable.

57. Ms Hodge in her decision letter does not give any weight to the fact that no goods were found in the concealed space. She does not appear to have made any enquiry about the number of vehicles in the Appellant's fleet or take into account that the vehicle in this case was one of six, but that despite the vehicles having made eighteen trips to the UK, there was no evidence or suggestion of any smuggling activity nor any evidence of other vehicles in the Appellant's ownership having been found to have an adaptation. The Appellant's vehicles had never been stopped and found to be carrying illicit goods. In assessing the creditability of Mr Ghiata's request for restoration, she failed to take that into account.

UKBA considered and relied upon incorrect facts

58. Absent from Mr Whyte's e-mail or his notes is any reference to a second adaptation on the coach or that there were makings of another adaptation on the left-hand side of the coach. In contrast, the notes identify the adaptation on the right wheel arch and then conclude "search of coach completed finding no other illegal … [illegible]". Ms Hodge therefore appears to have considered and relied upon an incorrect fact when referring to "the makings of another adaptation being found above the left hand wheel arch", which then changes later in the review letter, to the vehicle having "two adaptations (one on either side of the coach)". It is therefore plain that Ms Hodge, in reaching her decision, relied upon an incorrect fact and as a consequence, reached an unreasonable decision.

59. It can also be inferred from the contradictions in facts asserted by the Respondent and the actual evidence in the case, that parts of Ms Hodge's letter were copied from a

standard pro-forma letter without proper consideration of the applicability of reasons given for non-restoration to the Appellant's case. This discloses a failure to properly consider the Appellant's case on its merits and for this reason the decision is also unreasonable.

Irrelevant consideration of facts

60. The clear issue in this matter was a consideration of the innocence, or otherwise, of the Appellant. The following facts were incorrectly relied upon by the Respondent, which as a consequence gave rise to an unreasonable decision:

a) That the vehicle had made eighteen trips to the UK since April 2013, giving the Company many opportunities to use the concealment. There is no evidence that the concealment had ever been used. The fact that eighteen trips had been made by the coach neither supports or undermines a finding of knowledge on the part of the Appellant, of the existence of the concealment, or its use by the Appellant. It is irrelevant to the issue.

b) The adaptation to the vehicle could accommodate a significant volume of goods. Whilst this may be relevant if the Appellant was aware of the adaptation, given that it was not being used, and there is no evidence that it had been used, the size of the adaptation is again irrelevant to the knowledge of the Appellant.

c) The cleanliness of the interior paintwork. This was relied upon to suggest that the adaptation was recent. Whilst that might be a conclusion which could be drawn from such observation, equally it could indicate that the adaptation, however old, had not been used. It could also mean that the adaptation was so recent that it had been made after the vehicle had last been inspected by the Appellant. Neither possibility appears to have been addressed by Ms Hodge. Further, and in any event, the condition of the paintwork inside the adaptation is again not a fact which provides assistance in determination of Mr Ghiata's knowledge.

61. In our view there is insufficient evidence of the 'newness' of the adaptation. The notes of Mr Whyte do not disclose such an observation, nor do the photographs. The email from Mr Whyte setting out those observations was written three months after the search and the basis for his later observations in February 2014, is not known. It would be remarkable for an officer who searches vehicles on a daily basis to be able to recall in detail the condition of an adaptation three months later without recourse to notes and his notes made no mention of the 'newness' of the adaptation.

62. The Appellant asserted when seeking a review that because the officer took time to find the adaptation this was an indication that it had not been accessed for some time. We do not see that this supports either the Appellant or the Respondent, but in any event the detecting officer was the only person searching the vehicle, hence the reason it took some time to search all aspects of the coach.

63. Mr Ghiata claimed that the adaptation was part of the vehicle when purchased in December 2012 and that he was unaware of it. The initial indication of the adaptation was the newness of 'pop rivets' visible from under the wheel arch. Because of the location of the adaptation, open to all the water and detritus thrown up by the wheels, one would have expected the condition of the rivets to deteriorate fairly quickly, but this had not happened. Also, the interior paintwork was clean and the bare metal on the cuts showed little signs of rusting. This all indicated that the concealment was relatively recent. However whilst that may be true, the officer stated that, on lifting the wheel arch trim, the concealment became immediately apparent. He considered that anyone familiar with the concealment could access it in one to two minutes. Whilst indicating that the adaptation may have been carried out before the Appellant purchased the vehicle, it equally supports the assertion that the adaptation was not particularly sophisticated and would have been easy to make, possibly after the vehicle was last inspected without the knowledge of Mr Ghiata. There was no similar adaptation above the off-side rear wheel arch. It would have made sense for someone attempting to conceal illicit goods to carry out an identical adaptation to each side of the vehicle, perhaps in the hope that the changes made to the vehicle would not have been so obvious. The point however is that given the Appellant's assertions that he was not aware of the adaptation, a conclusion that it could be accessed easily by anyone familiar with it, was not a conclusion that could reasonably have been used as a factor against the Appellant.

The Appellant did all reasonably expected of him to guard against smuggling and illegal acts

64. Mr Ghiata has adduced evidence in support of his assertion that reasonable steps were taken to ensure that the business was not used for smuggling goods or illicit purposes. Prior to the employment of the drivers, the Appellant Company obtains criminal records checks and satisfactory references. An internal notice was circulated and signed by all the drivers which stipulated that they were aware of their personal liability for any infringements of Romanian or other state laws. The importance of observing the laws of other countries was made clear at mandatory monthly meetings.

65. As a further check against illicit activity there were regular technical checks of the vehicles when they returned from journeys abroad. There were also unannounced in-transit inspections during trips in order to deter and detect any illicit transportation of goods or passengers. As a consequence of these checks it is fair to conclude that Mr Ghiata had no reason to believe there had been any adaptation to the vehicle. Further, if the vehicle had previously been stopped by the Respondent with nothing untoward being found (which the Respondent challenges but does not entirely refute) there was no reason for Mr Ghiata to suspect or know of an alteration to the vehicle.

66. The Appellant has in place proper checks when employing drivers and during their employment to guard against smuggling and other acts. Had all this information been before the Respondent at the time of the decision it seems to us that it would have been material information that could have been considered and may have led to a decision to restore the vehicle, on the condition that Appellant bore the cost of the alteration being removed. The Respondent could have questioned Mr Ghiata on the

issue to make a more informed assessment as to his knowledge, or lack of knowledge, of the adaptation. This would have been a reasonable step to have taken in the determination of the issue. In accordance with the Respondent's policy, the innocence of the owner is a critical factor in determining whether to restore a vehicle. This was clearly the issue to be determined in this matter, but the Respondent erred in not addressing that part of the policy or reaching a reasoned conclusion on the issue. To the extent that Ms Hodge assumed that the Appellant Company's proprietors were aware of the adaptation, the decision was made under a misapprehension of fact.

67. With regard to hardship, the financial cost to the Company of the seizure of the vehicle was examined in the Appellant's accountant's report. It is not clear however from the report what the extent of the effect of the loss of the vehicle was on the Appellant. A table prepared by the accountant shows the month immediately before seizure and the months immediately afterwards. The margin between total revenues and total expenses was already tight; it then appeared to drop marginally into the negative. The hardship consequentially caused and impact of the loss cannot therefore be described as 'exceptional'. There is no evidence of real financial hardship, such as recourse to unaffordable loans or redundancies. The proprietor of the Appellant Company adapted his utilisation of the fleet vehicles and was able to hire a replacement vehicle or vehicles.

68. The review officer paid particular attention to the degree of hardship caused by the loss of the vehicle, but considerable inconvenience as a result of having a vehicle seized by the UKBF has to be accepted. Hardship is a natural consequence of having a vehicle seized. The review officer did not regard either the inconvenience or expense caused by the loss of the vehicle in this case as exceptional hardship over and above what one would expect and in our view the review officer was reasonably able to conclude that the application of the UKBF policy in this case treated the Appellant no more harshly or leniently than anyone else in similar circumstances.

Conclusion

69. The function of the Tribunal is to determine whether the Respondent's decision not to restore the vehicle to the Appellant was a decision which could not have been reasonably arrived at. The burden of proof is on the Appellant. In order to succeed in his appeal the Appellant has to satisfy the Tribunal that the Respondent could not reasonably have arrived at the decision made by the review officer, Ms Hodge in her letter of 14 February 2014 within s 16(4) of the 1994 Act.

70. The Respondent's "general policy" with regard to "vehicles constructed or adapted for concealing goods is that they will not be restored, whether or not goods are found in the vehicle…irrespective of who owns them" and, "if exceptionally, the vehicle is to be restored, the restoration amount, calculated in accordance with the usual policy for the type of vehicle and circumstances should be increased by the cost of removing the place where goods could be concealed…".

71. It is recognised that there is a compelling need for a rigorous regime to prevent the loss of revenue to the Exchequer and that illicit smuggling has a substantial adverse effect on legitimate trade. Evasion of duty disadvantages legitimate traders and these

issues justify a robust policy which in the context of non-restoration of a vehicle may seem draconian. However, the use of the words "general policy" and "if exceptionally" make it clear that the policy is intended to be flexible. The policy is a starting point for the reviewing officer who must then go on to consider the case on its merits and after a full examination of the facts and circumstances ensure, that within the framework of the policy, and where appropriate the wide powers of unfettered discretion vested in the decision maker are exercised in order to ensure that a proportionate decision is reached.

72. We found Mr Ghiata to be a credible witness. He gave evidence via an interpreter which does not always assist in judging the credibility of a witness but his evidence was consistent with information provided in his witness statement. It did not vary on cross examination. There was no reason to regard his assertion that he was totally unaware of the adaptation as anything other than the truth. It is clear that he had put in place all reasonable checks against smuggling and other illicit acts. There was little else the Appellant could have done.

73. Although the reviewing officer was guided by established policy, as is clear from our analysis of her decision in paragraphs 53 - 68 above, she did not take into account all relevant matters and took into account some irrelevant matters when arriving at her decision to refuse restoration. There were a number of factors that militated towards disapplying the Respondent's general policy and restoring the vehicle.

74. Taking all the evidence into account, we conclude that the Respondent's review decision not to restore the Appellant's vehicle was one that could not have been reasonably arrived at and was not a proportionate response to the Appellant's infringement.

75. Given the conclusions we reach, we do not have to consider hardship. The reviewing officer's decision in this respect is not open to criticism. Ms Hodge in our view concluded correctly that the hardship suffered by the Appellant as the result of the seizure was not exceptional.

Order

76. We make the following orders pursuant to our decision to allow the appeal and in accordance with s 16(4) of the Finance Act 1994:

a. The decision not to restore the Appellant's vehicle shall cease to have effect from the date of release of this decision.

b. The Respondent shall conduct a further review of the decision and serve the same on both the Appellant and the Tribunal within 28 days of release of this decision and that such review shall be on the basis of the conclusions reached in this decision.

c. An officer not previously involved with the case shall conduct the further review.

d. The reviewing officer shall take account of any further material or representations made by the Appellant within 14 days from release of this decision. The

representations shall be made to The Review Team, Border Force, 3rd Floor, Westpoint, Ebrington Street, Plymouth PL4 9LT.

e. The Appellant will have a further right of appeal to the Tribunal if dissatisfied with the outcome of the further review.

77. 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.

MICHAEL CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 25 April 2015